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NEGLIGENT MISREPRESENTATION

By Arnold L. Gray
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During 1991 the Oregon Court of Appeals ruled in *Onita Pacific Gorp. v. Trustees of Bronson,* 104 Or. App. 696, 803 P2d 756, *rev. allowed* 311 Or. 349 (1991) *("Onita Pacific")* that under certain circumstances a cause of action for economic loss based on negligent misrepresentation will lie in Oregon. In general, the court ruled that the nexus between the parties determines whether or not such a claim will lie. *Onita Pacific* involved a claim of negligent misrepresentation made by one party and its lawyer to the other party in an arm's length commercial transaction (but supposedly after negotiations had ended and the deal was made). The Court of Appeals upheld the jury's verdict finding negligent misrepresentation.

On December 31, 1992, the Oregon Supreme Court *reuersed* this result. *Onita Pacific Corp. u. Trustees of Bronson,* 315 Or. 149, 843 P2d 890 (1992). The Court held that "in arm's length [business] negotiations, economic losses arising from a negligent misrepresentation are not actionable." However, the majority opinion and both of the separate opinions from Court expressly recognized the tort of negligent misrepresentation in Oregon, and ruled that the scope of the duty not to make negligent misrepresentations will be developed on a case-by case basis.

The facts of the real estate transactions in *Onita Pacific* were complex, but are critical to an understanding of the case. Interestingly, the claim in *Onita Pacific* was essentially against one with whom the claimant was in privity of contract. In essence, the plaintiffs acquired a "Buyer's" interest under a land sale contract in which the defendant joint venture partners were the "Seller." Thus, plaintiffs' acquisition put them "in-contract" with the defendants, even though defendants' original sale was to a buyer other than plaintiffs. In determining whether to go forward with the purchase, plaintiff-Buyers asked one of the defendant joint venturers, and also asked the joint venture's attorney, how they as "Sellers" interpreted certain language of the land sale contract which plaintiffs were acquiring. Defendant-Seller's misrepresentation to plaintiffs on this contract interpretation issue formed the basis of the complaint.

The plaintiffs had acquired the "Buyer's" interest under an agreement to purchase parcels of undeveloped land which were to be subdivided into lots. Plaintiffs borrowed the $200,000 down payment, but in so doing required defendants' assurances that 16 of the lots would be released upon the down payment through escrow so that plaintiffs could pledge those lots as security for financing to complete the subdivision. Although the agreements did not expressly reference either the $200,000 down payment or the release of 16 lots, plaintiffs were assured by the defendant's lawyer "that the agreement did not need to make express reference to the $200,000 payment, because it would be processed through the existing escrow account and would automatically result in a release of the deeds." 104 Or. App. at 703. However, once the money was paid and plaintiffs identified the lots to be released, defendants refused to release any lots on the basis that the contract did not require releases absent sales to third parties. Without the deeds to the lots, plaintiffs were unable to go forward and their security was foreclosed upon.

The *Onita* majority stated the tort of negligent misrepresentation will be sustainable only where there is "some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm." The Court said that some professional relationship or a contractual relationship "might give rise to a tort duty to exercise reasonable care on behalf of another's interests."

In the Restatement of Torts (Second), § 552, to which the several opinions all refer, the extensive comments and illustrations tend to deal with those acting in a professional capacity or those with some special expertise upon which the recipient of the information is specially relying. ***See,*** *Western Energy, Inc. u. Georgia Pacific Gorp.,* 55 Or App 138, 637 P2d 223 at 227, n.6 (1981).

Of significance to Construction Law Section members, the majority added: **"Engineers and**

architects are among those who may be subject to liability to those who employ (or are the intended beneficiaries of) their services and who suffer losses caused by professional negligence." (Emphasis added)

Based on this latter *dictum,* some parties who are intended beneficiaries of a design contract (even if they are not in privity?) and who suffer economic loss arising out of a construction project now have a stronger basis for stating a negligent misrepresentation claim directly against the design professional. The obvious question, not clearly addressed in the opinions, is whether contractors and subcontractors are likely to be viewed either as (i) intended beneficiaries of design contracts, or (ii) within the class of persons to be protected from negligent misrepresentations due to designers' professional relationship to the owner, contractors or the project.

The decision itself is long and directs that both the tort of negligent misrepresentation and the scope of recoverable damages therefor will be developed only on a 'case-by-case'basis. Practical application of the opinion is further clouded by the concurring and dissenting opinions. Nevertheless, the tort of negligent misrepresentation is here to stay, at least where the Court finds that some special relationship between the parties gives rise to a higher duty of accuracy or care in one's conduct.

COMMENTS FROM THE CHAIR

By Kevin Kiely
Schwabe Williamson & Wyatt

The Construction Law Section Executive Committee has held four meetings so far this year. In keeping with a practice started a few years ago, "mini-CLE" programs were conducted in conjunction with two of the meetings.

Our first meeting of the year was held on January 23, 1993, in Portland. By tradition, this first meeting of the year is also a long-range planning session for the balance of the year and beyond. In addition to developing a list of CLE topics that will probably last the Section at least two years, we set a schedule for the remaining meetings of our current term, which concludes with the OSB Annual Meeting in October.

The highlight of our second meeting (March 11) in Tigard was a status report from the always-colorful Mike Scott on the work of the Section's affirmative action committee. The committee is currently planning a class or seminar on construction law to be held at Northwestern School of Law. The affirmative action committee also held a "get acquainted session for interested students at Northwestern School of Law on March 18, as a follow-up to last year's presentation at the school.

As previously mentioned, for the last few years, the Section Executive Committee has scheduled "mini-CLE programs to be held in conjunction with one or two meetings per year. We have attempted to scatter these programs to representative locations around the State. In the past, however, a lack of publicity has resulted in very limited attendance.

We seemed to have solved that problem this year. In conjunction with our April 22 meeting in Portland, an excellent program on "Insurance Issues for Construction Law Practitioners" was presented by Mr. Wade Coykendall, CPCU, the President of Pettit-Morry Co. of Oregon. Section member workhorses Arne Gray and Jeff Wilkinson made all of the luncheon and program arrangements. Close to 40 Section members attended, an all-time high for us.

In keeping with the chair's desire to play golf in Central Oregon in June, our fourth meeting of the year was held on June 25 at the Riverhouse Convention Center in Bend. Another excellent mini-CLE program on Residential Construction Law was presented by Bend-area Section members Brian J. MacRitchie and Carl W. "Bill" Hopp, Jr. Their program received 1.5 MCLE credits from the bar. The program was well-attended (about **30** people) and well-received. Chuck Pruitt and Jeff Wilkinson (both **of** whom are also Executive Committee members) selected the speakers and made program arrangements.

Section members are invited and encouraged to attend the Section's annual business meeting at the Oregon Bar Convention, October 10, 1993, 12:00 - 2:00 p.m. at the Eugene Hilton Conference Center. In conjunction with the latter meeting, there will be a CLE on new legislation affecting the construction industry and a short mini-CLE for the construction lawyer. A further notice of the annual business meeting will be mailed to each Section member later this year.

"SUBSTANTIAL COMPLETION" DEFINED – FEDERAL STATE AND ADMINISTRATIVE RULES

Jeffrey B. Wilkinson
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[The following information was originally presented as part of the hand-out material for a

mini-CLE program on August 20, 1992, held in conjunction with a meeting *of the* Construction Law Section Executive *Committe.]*

I. Substantial Completion — Sources of Law

The "punch list that will not die" is one of the most vexing problems facing contractors and their professional advisors. It usually follows on the heels of a project where the relationship between the contractor and the owner, or its design professional, has lost the rosy glow of profits hoped for and is instead mired in the murky bog called "substantial completion." The uncertainty of what constitutes substantial completion, which normally triggers the final punch list work, is often caused by vague definitions provided by the courts and the legislatures and as frequently poor drafting. In this brief review, the case law, legislation, and common contractual sources of the definition of substantial completion will be reviewed with an eye toward giving the practitioner insight into the pitfalls of relying on existing definitions of substantial completion and perhaps suggest some bench marks, to determine when substantial completion occurs.

A. Federal Law *Definition(s)* of Substantial Completion.

The analysis of what state of progress constitutes substantial completion often arises in cases where the owner attempts to impose liquidated damages but, under the prevailing rule, cannot do so if the project is substantially complete. However, these cases are still generally useful because substantial completion is typically the event which gives rise to the right of the owner to issue a punch list and begin the process of project close out.

One Federal Court described substantial completion as something less than strict compliance with the contract but not much more than a minor deviation which will not substantially defeat the object of the parties. See Wells *Benz,* Inc *v.* United States, *ex rel.* Mercury Electric Corp., 333 P2d 89 (9th Cir. 1964). The Board of Contract Appeals follows the rule that substantial completion exists when the deficiencies complained of do not render the facility unsuitable for its intended purpose. Abrey Construction Co., Inc., ASBCA No. 26 358, 83-1 BCA ¶16, 246.

Regrettably, courts attempting to define substantial completion wind up offering definitions that do little more than add layers of additional words, but never refine the meaning. In Aetna Casualty & Surety Co. *v.* Butte-Meade Sanitary Water District, 500 F Supp 193 (D.S.D. 1980), the court held

> There is substantial performance of such a contract where all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed are performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract.

Id. at 198.

These general descriptions of substantial completion add little to the analysis. There are, however, some general characteristics that develop.

1. Examples of Substantial Completion.

The following are summaries of the characteristics of jobs which were found to be substantially complete under federal contracts.

(1) 92% of construction complete; minor importation of top soil and seeding remained. Appeal of *Teegarden*, IBCA 419, 65-2 BCA 5011 (1965);

(2) only stucco work remained on building entry way. Appeal *of Brooks* Lumber Co., ASBCA 40743, 91-2 BCA 23984 (1991);

(3) beneficial occupancy may often indicate substantial completion, so long as only minor punch list items remain. Appeal of *U.C.* Edwards Contracting and Engineering, *Inc.*, VABCA 1947, 85-2 BCA 18068 (1985);

(4) substantial completion where 99% of work completed. Continental *Ill.* Nat. Bank *v. U.S.*, 121 Ct. C1.203 (1952).

But quantitative measures of substantial completion or mere occupancy alone will not be determinative in most jurisdictions. See *e.g.* Urban Plumbing & Heating Co., IBCA No. 43, 56-2 BCA ¶1102 (1956); Continental Ill. *Nat.* Bank *v. U.S.,* supra. For example:

(1) No substantial completion where Post Office occupied building, but half the work area was still unusable. Appeal *of* Jolly Co., GSBCA 2270, 67-2 BCA 6424 (1967); and

(2) No substantial completion where roadway contract called for 11/2 inch overlay and contractor had installed only 1/2 inch overlay. Appeal *of Norair* Engineering Corp., GSBCA 2728, 70-1 BCA 8350 (1970).

B. State Law Sources *of* the Definition of Substantial Completion

Oregon decisions concerning substantial completion are as vague about the meaning of substantial completion as federal decisions referred to above. Some factors that have been

considered include the removal of the contractor's tools *(DallasLumber & Supply v. Phillips,* 249 Or 58,436 P2d 739 (1968)) and final payment by the owner *(Schade v. Alton,* 61 Or 187, 121 P2d 898 (1912)).

Oregon has no comprehensive statutory definition of substantial completion or specific provisions defining the parties' rights upon reaching substantial completion.

ORS 87.045 provides a somewhat circular definition.

> (1) The completion of construction of an improvement shall occur when:
>
> (a) The improvement is substantially complete.

The administrative rules governing the Construction Contractors Board are only a little more helpful. OAR 812-02-000(14) defines substantial completion as follows:

> (14) "Substantial Completion" may occur at the time of but not limited to the following events: final inspection is completed, certificate of occupancy is issued, the structure or portion of structure is in a habitable or usable condition, most or all payment is made.
>
> ***OAR*** 812-02-000(14).

The Oregon State Highway Division Standard specifications do not specifically define substantial completion, However, the Standard Specifications implicitly require that "all construction" be completed before the process of close out and the final punch list may issue.' *See Oregon State Highway Dept. Standard Specification* ¶00150.90 (b), p. 38. The Attorney General's Model Public Contract Rules define "contract completion" as the time when "all work" under contract is performed. OAR 137-40-035.

1. Substantial Completion Under Public Contracts.

Both state and municipal governments routinely include AIA Standard General Conditions or National Society of Engineers Standard Conditions. Both define substantial completion similarly:

> Substantial Completion - The Work (or a specified part thereof) has progressed to the point where, in the opinion of ENGINEER as evidenced by his definitive certificate of Substantial Completion, it is sufficiently complete, in accordance with the Contract Documents, so that the Work (or specified part) can be utilized for the purposes for which it was intended; or if there be no such certificate issued, when final payment is due in accordance with paragraph 14.13. The terms "substantially complete" and "substantially completed" as applied to any Work refer to Substantial Completion thereof.

These clauses create broad, unilateral discretion in the engineer to determine whether substantial completion exists. They do little to address the problem of "the punch list that won't die."

11. Conclusion

Achieving the state of substantial completion is a significant event for both contractors and owners. It is that event, or more often the recognition of that event, which gives rise to a host of contract rights and defenses. The creation of a punch list, which describes for the contractor the final work to be performed, is only one of those rights. Unfortunately, the uncertainty about what state of affairs constitutes "substantial completion" may give rise to the "punch list that won't die."

Often, there is no real opportunity to negotiate a more sensible, predictable term defining substantial completion in public contracts. In private contracts, however, practitioners should negotiate for language in the contract which provides both a quantitative measure of "substantial completion" and a more subjective approach. The following should be considered as items that should be addressed:

(1) Define substantial completion (possibly 95-97%) as a percentage of the total contract price, including changes agreed upon, or as a percentage of unit quantities provided in the contract;

(2) Upon certification by the contractor that the agreed upon level has been reached, the owner (or its representative) must issue a punch list containing all items remaining to be performed which are known or which can be discovered through a reasonable inspection; and

(3) The owner or its representative may issue only two punch lists following the certification of substantial completion.

ENDNOTE

1. The process is commonly referred to as the three notice process. The first and second notices may include punch list items and deficiencies which must be corrected. The final notice by ODOT certifies that all work has been completed.

EFFECT OF "SUBSTANTIAL COMPLETION" and "FINAL COMPLETION" UNDER AMERICAN INSTITUTE OF ARCHITECTS OWNER-CONTRACTOR AGREEMENT (A101) and GENERAL CONDITIONS (A201)

By *Thomas J.* Murphy
***Furrer** & Scott*

[The following outline and checklist were originally presented as hand-out materials at a mini-CLE program on August 20, 1992, *held in* conjunction with *a* meeting of the Construction Law *Section* Executive Committee.]

The concluding phases of a complex construction project can be a difficult and frustrating experience for all concerned. The owner is impatient to assume occupancy, yet continues to expect quality in the completed product. The general contractor is keeping a weather eye on the deadline for completion, only too aware of the financial consequences of unexcused delay. The design professional's observation of the work in place intensifies, as the date for her/his client to take possession of the completed project draws near. The subcontractors complain about trade-stacking and acceleration, all the time wondering if it is time to make good on their threats to suspend work if their long-pending change order requests are not approved.

It is not a time when the parties need more surprises from their contract documents. Ideally, their contract should accurately reflect the participants' mutual expectations and shared goals, and should provide a mechanism for dealing with the inevitable unforeseen conditions. Too often, however, no one reads the specific provisions of the contract (other than the price and the completion date) until a problem has arisen and impasse has been reached; then both would-be combatants are likely to tell their legal counsel, "But no one does it that way!"

The contract documents propagated by the American Institute of Architects are probably more widely and frequently used than any others, especially for substantial building projects. Yet, despite their prevalence, neither the owner, the general contractor nor even the design professional on a typical job is necessarily familiar with their terms. *[Pop* Quiz: Under *the* A.I.A. contract forms, who is responsible in the first instance for preparing the *"punchlist"?*] The purpose of this presentation is to identify some of the most significant effects under the A.I.A. A101 (the "Standard Form of Agreement Between Owner and Contractor") and the **A.I.A.** A201 (the "General Conditions of the Contract for Construction") of those points in the construction process identified as "substantial completion" and "final completion."

According to A201 ¶9.8.1, "Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use."

"Final completion" is not separately defined as a term of art by A101 or A201. A201 ¶9.10.1 provides that the architect is to issue the final certificate for payment when she/he finds the contractor's work is fully performed and is "acceptable" under the contract documents.

I. Substantial Completion.

1. The contractor is required to achieve substantial completion of the project within the period of time designated in A101 ¶3.2. This obligation is confirmed by A201 ¶8.2.3. Thus, the date on which a project is substantially complete will determine the contractor's liability for liquidated damages (if provided for in the contract), will affect the contractor's liability for other delay damages, and may determine the contractor's entitlement to any premium for early completion (if the parties have so agreed).

2. Upon substantial completion, the contractor is entitled to payment of the percentage of the contract sum called for by A101 ¶5.7.1, less the amount determined by the architect to be necessary to ensure final completion and to resolve outstanding claims. To the same effect is A201 ¶9.8.3. The owner continues to hold some amount of retainage.

3. According to A201 ¶9.8.2, it is the contractor who in the first instance proposes that a project is "substantially complete." The contractor then prepares a "comprehensive list of items to be completed or corrected (the so-called "punchlist") and submits it to the architect. The architect is then required to undertake an "inspection" (more intensive than the duty of "observation" during the course of construction) of the status and condition of the work; meanwhile, the contractor is required to proceed promptly to complete and correct all punch list items. When the work is substantially complete, the architect is to prepare a certificate of substantial completion which fixes the date substantial completion was realized. According to A201 ¶8.1.3, "The date of Substantial Completion is the date certified by the Architect ..."

4. A201 q19.8.2 also provides: "If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not in

accordance with the requirements of the Contract Documents, the Contractor shall, *before issuance of the Certificate of Substantial Completion,* complete or correct such item upon notification by the Architect." (Emphasis added) If the architect has given such notification, the contractor can request another inspection after the specified items have been completed.

5. The certificate of substantial completion fixes the relative responsibilities of the owner and the contractor for security, maintenance, heat, utilities, risk of damage to the work in place, and insurance, and also sets the time for punch list items to be completed. The certificate is to be submitted to the owner and the contractor for their written acceptance of such responsibilities. A201 ¶9.8.2.

6. Warranties required by the contract documents commence on the date of substantial completion, unless otherwise provided *in the certificate.* A201 ¶9.8.2.

7. The date of substantial completion initiates the one-year period prescribed by A201 ¶12.2.2 for the contractor to correct work found to be not in accordance with the requirements of the contract documents. *[Note:* **A** *special warranty provided by the contract documents can establish a different date of accrual and a different duration.]*

8. Disputes over substantial completion and the respective rights and obligations of the parties are to be resolved in accordance with A201 '34.3, unless the parties agree upon a different mechanism.

9. As to *acts or failures to act* occurring prior to the date of substantial completion, "any applicable statute of limitations shall commence to run and *any alleged cause of action shall be deemed to have accrued*" not later than the date of substantial completion. A201 ¶13.7.1.1.

11. Final Completion.

1. Again, the contractor "triggers" the sequence for acknowledgement of final completion of the project, by giving notice to the architect that the work is ready for final inspection and acceptance *and* by submitting a final application for payment. A201 ¶9.10.1. Upon receipt thereof, the architect is required to "inspect" the work.

2. If the architect finds the work to be fully performed and acceptable under the contract documents, the architect is to issue a final certificate for payment. A201 ¶9.10.1.

3. A201 ¶9.10.2 imposes several conditions upon the contractor's entitlement to final payment. Issuance of the architect's final certificate for payment constitutes "a further representation" that such conditions have been fulfilled.

4. Upon final completion, the contractor is entitled to release of all previously- undisbursed retainage and any other amounts earned under the contract.

[Since final acceptance by the owner is a condition to the contractor's right to receive retainage and other sums outstanding under the contract, the owner cannot "unreasonably withhold acceptance." Contractors, Inc. v. Tri-Met, 94 Or App 392, 399 (1988).]

5. The making of final payment by the owner constitutes a waiver of claims by the owner *except* those arising from:

(a) Unresolved liens, claims (as defined by A201 ¶4.3.1), security interests or encumbrances arising out of the work of the project;

(b) Non-compliance of the work with the contract documents; or

(c) The terms of any special warranties required by the contract documents. A201 ¶4.3.5.

6. Acceptance of final payment by the contractor *or a subcontractor or material supplier* constitutes a waiver of claims by that payee *except* those previously made in writing *and* identified by that payee as "unsettled" at the time of final application for payment. A201 ¶9.10.4.

[One commentator suggests that it may be "unconscionable" for an owner to insist that a contractor waive delay damage claims as a condition to release of retainage. In North Harris County Junior College District v. Fleetwood Construction Co., 604 **S.W.** *2d 247 (Tex Ciu App 1980), the court held that such conduct by the owner estopped the owner to rely upon the contractor's failure to fulfill certain express contractual conditions (such as releases from subcontractors, as-built drawings, and a roof warranty) as defenses. Sweet on Construction Industry Contracts (1987) $16.15, p. 314.1*

7. Disputes over final completion are to be resolved in accordance with A201 ¶4.3, unless the parties agree upon an alternative approach.

8. As to acts or failures to act occurring after the date of substantial completion but prior to issuance of the final certificate for payment, any applicable statute of limitations commences to run and any alleged cause of action is deemed to accrue not later than the date of issuance of the final certificate for payment. A201 ¶13.7.1.2.

SUGGESTED CHECKLIST FOR PROJECT CLOSE-OUT

- ☐ Affidavit from general contractor identifying all subcontractors and suppliers (including equipment rental) on any tier
- ☐ lien releases and/or waivers of claims from all subcontractors and suppliers
- ☐ Post completion notice (ORS 87.045)
- ☐ satisfactory completion of any testing required by contract, including necessary approvals (i.e., Underwriters Laboratories)
- ☐ operating manuals and maintenance instructions for all equipment and other applicable components
- ☐ manufacturers' and/or installers' warranties for equipment, roof and other applicable components (including registration forms and warrantors' confirmation where applicable)
- ☐ transfer of responsibility (by date and/or dollar amount, where applicable) for:
  utilities
  maintenance (including internal temperature and humidity)
  security
  fire and casualty insurance
  risk of loss
- ☐ as-built drawings
- ☐ keys and other means of access
- ☐ issuance and receipt of occupancy permit
- ☐ issuance and receipt of other requisite governmental approvals for intended use
- ☐ consent of surety
- ☐ consent/approval of construction lender
- ☐ final accounting on cost-plus and not-to-exceed-with-incentive projects
- ☐ sign-off on punch list by owner, architect and contractor
- ☐ issuance of final certification of payment by architect
- ☐ mutual release between owner and contractor (?)
  [scope? exclusions?]
- ☐ release of retainage and other sums previously earned and undisbursed under the contract
- ☐ other: [may be specific to unique characteristics of project]

CASE NOTES

OFF-SITE FABRICATION IS NOT "LABOR" FOR PURPOSES OF EXCEPTION TO CONSTRUCTION LIEN NOTICE REQUIREMENT

*Thomas J. **Murphy***
Teeny v. Haertl Constructors, Inc.
***314** Or 688, 842 P2d 788 (1992)*

In *Teeny v. Haertl Constructors, Inc.*, 314 Or 688, 842 P2d 788 (1992), the Oregon Supreme Court reversed the holding of the Oregon Court of Appeals that two material suppliers which had performed custom fabrication work away from the construction site were not required to give the property owner the notice of right to a lien pursuant to ORS 87.021(1). The Court of Appeals had concluded that such off-site work fit within the exception to the notice requirement afforded by ORS 87.021(3)(b) for one who "provides labor and material for a commercial improvement." The Supreme Court did not address the other significant aspect of the Court of Appeals' decision — that verification of a construction lien by the claimant's attorney was sufficient, so long as the attorney had made a reasonable investigation of the facts provided by his/her client and believed in good faith that the facts stated in the claim of lien were true.

Haertl Constructors, Inc. ("Haertl") was the general contractor for the renovation of a multi-story retail and office building in downtown Portland during 1987 and 1988. Haertl contracted with Enterprise Fabricators Co., Inc. ("Enterprise") for custom steel fabrication and with Microflect, Inc. ("Microflect") for aluminum grating.

> Almost all of Enterprise's work occurred off-site at its shop, where Enterprise fabricated various items. Enterprise then delivered those items to the construction site for others to install. In addition to approximately 22 delivery trips, Enterprise's president, Mel Haldors, made approximately 19 other trips to the construction site, where he took measurements and met with various people to work out problems related to Enterprise's fabrication tasks.
> *** John Robertson, a general manager at Microflect, spent four hours at the construction site taking measurements for the grating. The grating was then cut to size at Microflect's shop in Salem and delivered to the construction site by an independent trucking company.

314 Or at 691-92.

In August 1988, another subcontractor commenced an action in Multnomah County Circuit Court seeking foreclosure of its construction lien upon the subject property. All

other lien claimants, as well as Haertl, the property owner and his lessee, were joined as defendants. Enterprise and Microflect filed counterclaims and cross-claims for foreclosure of their liens. Both conceded that they had not provided the property owner with notices of right to a lien pursuant to ORS 87.021(1). The trial court concluded that neither Enterprise nor Microflect fell within the exception of ORS 87.021(3)(b) for a person who "performs labor upon a commercial improvement or provides labor and material for a commercial improvement," and disallowed both liens. The trial court also held that the liens were not properly executed, since they had been verified by the attorneys for Enterprise and Microflect.

The Court of Appeals reversed, ruling that both Enterprise's and Microflect's liens were valid. *Teeny* v. *Haertl* Constructors, Inc., 111 Or App 543, 826 P2d 1029 (1992). On the notice issue, the Court held that, as utilized in ORS 87.021(3)(b), "provides labor .... for a commercial improvement" means something different than "performs labor upon a commercial improvement." 111 Or App at 547-48 (emphasis in opinion). The owner and the lessee had contended that the exception provided by that section would apply only if the labor was performed on-site, whether or not materials were also furnished.

> To agree with that conclusion, we would have to ignore the plain language of the statute. * * * We conclude that, if a person provides labor *and* material ***for*** a commercial improvement, notice of a right to claim a lien is not required, regardless of whether the labor is performed on-site or off-site. Microflect provided labor to create material for the project. Accordingly, as a person who provided labor and material for a commercial improvement, Microflect was not required to give notice of its right to a lien.

111 Or App at 548 (emphasis in opinion).

Next, the Court of Appeals considered the owner's and lessee's argument that verification of the liens by the claimants' attorneys did not comply with ORS 87.035(4), which requires that "(t)he claim of lien shall be verified by the oath of the person filing or some other person having knowledge of the facts...." The Court held that the statute does not require that the signatory on a lien have actual knowledge of the underlying facts.

> Microflect's attorney was given information by the general manager of Microflect. The information included invoices, a bill of lading showing delivery of the materials and other facts. The attorney had worked with the manager for eight years and considered him a reliable source.
>
> * * *
>
> The claim (of lien of Enterprise) was verified by its attorney, who had been informed of the pertinent facts by its president and chief operating officer.

111 Or App at 548-549.

The Court of Appeals held that both lien claims had been lawfully verified.

The Oregon Supreme Court reversed on the notice issue only. Justice Gillette, writing for a unanimous Court, found the distinction in the language of ORS 87.021(3)(b) upon which the Court of Appeals' opinion hinged to be less than convincing. Thus, he turned to the legislative history of that provision, beginning with a 1915 amendment to Lord's Oregon Laws § 7416 and culminating in testimony before the House Judiciary Committee during the 1981 session.

> The foregoing legislative history of ORS 87.021(3)(b) shows that the legislature did not intend the phrase 'provides labor and material for a commercial improvement' to have a different meaning than 'performs lahor upon a commercial improvement' with regard to where the labor is performed. * * * Consequently, we hold that '[a] person who performs labor upon a commercial improvement or provides labor and material for a commercial improvement,' within the meaning of ORS 87.021(3)(b), is a person who labors at the site of the commercial improvement.

314 Or at 698.

The Supreme Court then turned to the contention of Enterprise and Microflect (which the Court of Appeals had not addressed) that they had in fact provided on-site labor by taking measurements at the project. The Court held that the notice requirement exception afforded by ORS 87.021(3)(b) was intended to apply only to subcontractors (such as painters) who, as a part of their work at a construction site, supply material that is incorporated into the improvement. Visits by an employee or agent of a material supplier solely to take measurements or to attend meetings were labelled "incidental contacts with the job site" which do not constitute "labor" for purposes of ORS 87.021. 314 Or at 688.

The Supreme Court did acknowledge that it is not possible to delineate exactly where the line between "incidental contact" and "on-site labor" is drawn. The writer suggests that the definition of labor for purposes of the Construction Lien Law (ORS 87.001 to 87.060 and 87.075 to 87.093) should be co-extensive with those on-site activities which would require a person or business to register with the Oregon Construction Contractors Board under ORS 701.055 or with the Landscape Contractors Board pursuant to 671.530. In any event, the cautious practitioner will counsel her/his client whose predominant role in a construction project is furnishing materials (including sophisticated

equipment for permanent installation, such as the computer controls and monitors for heating/ventilating/air conditioning or communications systems) to deliver the notice of right to a lien to all owners (including lessors and land sale contract vendors and vendees), all mortgagees and all trust deed beneficiaries. Even if the claimant is found to have provided labor as well as materials in furtherance of a commercial construction project, and is hence entitled to the exemption from the notice requirement provided by ORS 87.021(3)(b), the portion of its lien attributable to materials can be deprived *of priority* over a recorded mortgage or trust deed unless the notice of right to a lien is given to the mortgagee or beneficiary. ORS 87.025(3); *Benj. Franklin Federal Savings & Loan Ass'n. v. Hallmark, Inc.*, 257 Or 436, 479 P2d 740 (1971). In the aftermath of a troubled project, priority *uis-a-uis* a secured lender may well prove the difference between being paid (sooner or later) rather than having a valid but economically-worthless lien. The safest course is to give the notice of right to a lien to all owners and all holders of mortgages or trust deeds on a commercial project, if the potential claimant is providing any materials and wishes to preserve lien rights.

The Supreme Court's opinion in *Teeny v. Haertl* raises another warning flag. In the first footnote, Justice Gillette points out that none of the parties sought review of the Court of Appeals' holding that the contested liens had been properly verified, and "... this court does not express any opinion on that issue." 314 Or 688, n. 1. It is suggested that the reversal of the Court of Appeals' ruling on other grounds, coupled with this express reservation, casts serious doubt on the sufficiency of an attorney's verification of a client's construction lien. Even the Court of Appeals' decision could be narrowly construed; the attorney for Microflect had a long relationship with the claimant's personnel and apparently conducted a "due diligence" investigation of the factual basis of the lien. The attorney who signs and acknowledges a claim of construction lien on behalf of a client puts the rights of the client at risk — normally for no reason other than convenience. At the least, an attorney who executes a lien should expect to be deposed on the issue of his/her "knowledge of the facts," and may well be a material witness at trial.

IN THE FOURTH CIRCUIT (AT LEAST), NOTICE OF A CLAIM UNDER THE MILLER ACT MUST BE RECEIVED WITHIN NINETY DAYS. DEPOSIT IN THE MAIL ALONE IS NOT SUFFICIENT.

Thomas J. Murphy
Pepper Burns Insulation, Incorporated v. Artco Corporation, et al.
970 F2d ***1340 (4th*** *Cir 1992)*

In *Pepper Burns Insulation, Incorporated v. Artco Corporation*, 970 F2d 1340 (4th Cir 1992), *cert den* ___ US ___, 113 S Ct 976, 122 L Ed 2d 130 (1993), the Fourth Circuit Court of Appeals held that written notice by a second-tier subcontractor or material supplier under the Federal "Miller Act," 40 U.S.C. §§ 270a-270d, must be *received* by the general contractor within ninety days after the claimant last performed labor or furnished materials in furtherance of a federal construction project. Mere deposit in the mail, even by registered mail as required by 40 U.S.C. § 270b(a), within the ninety-day period is not sufficient to preserve the subcontractor's or material supplier's right to pursue a claim against the general contractor's surety bond.

Artco was the general contractor for a project at Fort Bragg, North Carolina for the U.S. Army Corps of Engineers. Artco subcontracted a portion of the work to Pyramid Contracting, Ltd. which in turn retained Pepper Burns Insulation ("Burns") as a second-tier subcontractor. Burns completed its work upon the Fort Bragg project on July 27, 1989. When Pyramid failed to pay Burns in full, Burns mailed a written notice of its claim to Artco on October 20, 1989. The notice was received by Artco on October 31, 1989 — more than ninety days after Burns' last day on the project.

Burns filed suit against Pyramid, Artco and Artco's surety on July 27, 1990. On cross-motions for summary judgment, the U.S. District Court held that Burns' notice was "given" within ninety days after its last involvement in the project, even though Artco did not receive it within that period.

The Fourth Circuit Court of Appeals reversed, holding that the rule of liberal construction of the Miller Act was not applicable to the requirement of 40 U.S.C. § 270b that written notice be given to the general contractor within the ninety-day time period. The Court of Appeals held that "the language 'giving written notice to said contractor' requires receipt of the notice by the contractor." 970 F2d at 1343. The Court reasoned that a prime contractor on a project which is subject to the Miller Act should be able to make final payment to its subcontractors ninety days after their work is completed, without fear that claims from

second-tier subcontractors or material suppliers will subsequently appear.

> [O]ur ruling here provides contractors with a date certain after which they are no longer at risk of liability to second-tier subcontractors. Certainty facilitates payments to first-tier subcontractors and closure of the project finances. Any alternative ruling, it seems, could potentially extend liability for an indefinite period of time and thus defeat the purpose of the ninety-day requirement.

970 F2d at 1343-44.

Though the question was not specifically addressed by the ruling in the *Pepper Burns u. Artco* case, The Court's reasoning indicates that the Miller Act claimant rather than the contractor bears the risk of non-delivery. In other words, a notice which is properly registered and mailed in accordance with 40 U.S.C. § 270b(a) and is lost or delayed in transit will be ineffective to preserve the claimant's right to pursue payment from the prime contractor's surety.

The decision in *Pepper Burns v. Artco* is directly contrary to the holdings in the two reported cases which previously addressed the issue. *United States ex rel Crowe u. Continental Casualty Co.*, 245 F Supp 871 (E.D. La. 1965); *United States ex rel Lincoln Electrical Products Co. u. Greene Electrical Service*, 252 F Supp 324 (E.D. N.Y. 1966). The Fourth Circuit Court of Appeals dismissed the reasoning in those decisions as "unpersuasive." 970 F2d 1343, n. 5.

The effectiveness of a Miller Act notice of claim which is mailed prior to the lapse of the ninety-day period but delivered after that deadline has not been confronted in any reported Ninth Circuit case. The cautious practitioner will ensure that notice pursuant to the Miller Act on behalf of an unpaid second-tier subcontractor or material supplier is dispatched by registered mail sufficiently in advance of the ninety-day deadline that the postal return receipt will be in hand prior to the ninetieth day. If it is not, a duplicate original of the notice should be served upon the general contractor in the manner permitted for service by the U.S. Marshal for the judicial district in which the public improvement is located. If time is short, the notice should be personally served upon the contractor if at all possible.

THE COUNT SEZ: GET THAT LIEN RECORDED ON FRIDAY ... MONDAY MAY BE TOO LATE! ORCP CALCULATIONS OF TIME MAY NOT APPLY TO STATUTORY NOTICES

By *Thomas J.* Murphy
Tyree *v.* ***Tyree*** *and Klaniath County*
116 Or App 317, 840 P2d 1378 (1992)

ORCP 10A and ORS 174.120 specify how time is to be computed for purposes of certain legal rights and remedies. Both provide that a period of time is to be calculated by excluding the first day and including the last day, unless the last day falls upon a Saturday or any legal holiday (which includes Sunday), in which case the period is extended through the next day which is neither a Saturday nor a legal holiday. Many attorneys have assumed that this method of computation would apply to determining the deadlines for recordation of a construction lien pursuant to ORS 87.035 and for foreclosure of a construction lien pursuant to ORS 87.055. Under this view, if the 75th day after the claimant's last substantial work on a project happened to fall on a Saturday, Sunday or holiday, the deadline to record a lien would extend through the next full business day. Likewise, if the 120th day after a lien was recorded happened to be a Saturday, Sunday or holiday, a foreclosure action could be commenced on the next business day.

A recent decision by the Oregon Court of Appeals casts serious doubt upon this assumption. In *Tyree v. Tyree and Klamath County*, 116 Or App 317, 840 P2d 1378 (1992) *rev. den.* 315 Or 644 (1993), plaintiffs decedent was killed in a motor vehicle accident on September 9, 1988. Pursuant to the Oregon Tort Claim Act, plaintiff mailed a notice of claim to defendant on Friday, September 8, 1989. Defendant received the notice on Monday, September 11, 1989. The trial court dismissed the action on the basis that the notice of claim was untimely. On appeal, plaintiff argued that ORCP 10A and ORS 174.120 applied to the computation of the one-year notice period prescribed by ORS 30.275(2)(a). The Court of Appeals held:

> In general, those rules exclude weekends and holidays from any time calculation. Plaintiff contends that her notice was timely if those rules are applied, because Monday, September 11, 1989, would have been the last day of the one-year period. ORCP procedural rules about when service is complete do not apply to a statutory requirement that notice of a claim be received by the public body before the commencement of an action. (citation omitted). Similarly, ORS 174.120 concerns the computation of time for the purpose of procedural statutes. ORS 30.275 is not a procedural statute. The requirement that notice be given timely is a substantive condition precedent to

recovery under the Oregon Tort Claims Act, that, if not satisfied, deprives a plaintiff of a right to make a claim.

The Court of Appeals affirmed the trial court's dismissal of plaintiffs claim, and the Oregon Supreme Court denied review.

The Court of Appeals' analysis seems equally applicable to the requirement of ORS 87.035 that a claim of construction lien be recorded within 75 days after the claimant's last work on a project and the further requirement of ORS 87.055 that a foreclosure action be commenced within 120 days after the claim of lien is recorded. Those requirements are "substantive condition(s) precedent" to recovery under the Oregon Construction Lien Law. If they are not satisfied, the claimant is deprived of the right to assert a lien.

It is the writer's belief that the *Tyree* case was wrongly decided. Also, it may be confined to cases arising under the Oregon Tort Claims Act. However, caution dictates that construction lien rights be perfected via recordation on or before the 75th calendar day following the claimant's last substantial day on a project, and that a foreclosure complaint be filed within 120 days after the claim of lien is recorded, without regard for Saturdays, Sundays or legal holidays.

SECTION NEWS

NOMINATING COMMITTEE REPORT

At the meeting of the Section Executive Committee held on June 25, 1993 in Bend, the following members were appointed to the 1993 nominating committee: G. Kevin Kiely; Charles J. Pruitt; and Michael J. Scott. Pursuant to Article VI, § 7 of the Section's bylaws, the nominating committee was instructed to propose one candidate for each position on the Executive Committee (including officers) which is to be filled by election at the Section's 1993 annual business meeting. The following are the positions for which candidates are needed:

Chair-Elect (one year term);

Secretary (one year term);

Treasurer (one year term); and

Four Executive Committee Members-at-Large (two year term).

At the Executive Committee meeting held August 27, 1993, the nominating committee proposed the following section members for those posts:

Chair-Elect . . . Thomas J. Murphy, Tigard
Secretary . . . Susan G. Whitney, Portland
Treasurer . . . . . Dale Hormann, Salem

Executive Committee Members-at-Large
Milton C. Lankton, Portland (second term)
Stephen Eichelberger, Salem (first term)
Carl W. Hopp, Jr., Bend (first term)
David F. Bartz, Jr., Portland (first term)

This slate of nominees was accepted by the Executive Committee, and will stand for election at the Section's annual business meeting on October 10, 1993 (see insert.)

SECTION VIDEOTAPE LIBRARY

"From Tiny Oaks Do Mighty Acorns Grow" (Or Something Like That)

The Construction Law Section has a small but high-quality collection of videotapes of CLE programs, which are available for loan to all Section members without charge (except for the cost of mailing), on a "first-come, first-served" basis. At this point, the shelves are occupied by:

- "Ethics for the Construction Lawyer," a panel presentation at the 1992 annual meeting which was approved for 1.5 "Ethics" MCLE credits by the Oregon State Bar; and
- "Labor Law for the Construction Lawyer," a half-day program originally offered on October 16, 1992 which was approved for 4.0 "General" Oregon MCLE credits.

Copies of the written hand-out materials can also be made available to Section members for the cost of duplication and mailing.

If you are interested in borrowing either of the above videotapes, please contact:

Tom Murphy
P. O. Box 23414
Tigard, OR 97281
Telephone: (503) 620-4540
Facsimile: (503) 620-4315

Also, any suggestions concerning the use of Section videotapes or possible additions to the library are most welcome.

SOME GENERAL COMMENTS ABOUT MONEY

Susan Whitney, Treasurer

In 1992, we began the year with approximately $6,500 in our account, and we ended the year with approximately $6,600, despite absorbing quite a loss on our "Labor Law for the Construction Lawyer" CLE in October.

The Bar wants the sections to spend their money and not carry over very much in reserve from one year to the next, although most sections feel that they need a fairly substantial cushion to cover contingencies. Apparently some of the very large sections have huge reserves. Our Executive Committee's informal policy is to try to maintain a reserve of approximately $5,000. Some expenses which the Section actually incurred in 1992 for affirmative action programs at the three Oregon law schools were not billed or paid until 1993. This is only one example of why we need reserves.

As of July 31, 1993, we had 337 members; in 1992 we had 338 members. Since we usually pick up only a few new members during the year, we are a little behind, having budgeted based on 350 members. We are hopeful that this Newsletter and our plan for more frequent mini-CLEs combined with food will attract more new members to the Section.

On July 31, we had approximately $8,500 in our account, and very few outstanding unpaid bills. Our 1993 Budget projects an end-of-year balance of $6,136. We are probably right on track, as many of our major expenses are incurred at the Annual Meeting in the fall.

Feel free to call Susan Whitney at any time at 221-0699 if you have any concerns or suggestions about how *your* Executive Committee is spending *your* money. Our records are always open for your inspection.

SCHEDULE OF UPCOMING EVENTS

Mark These Dates on Your Calendar

The Section's annual business meeting has been scheduled for Sunday, October 10, 1993 from 12:00 noon until 2:00 p.m., during the bar convention. The site will be the Scott Joplin Room in the Eugene Hilton Conference Center (adjacent to the Hilton Hotel), 66 East Sixth Avenue in downtown Eugene. The primary purpose of the annual meeting is the election of officers and at-large members of the Executive Committee for the upcoming year. In keeping with tradition, all members of the Construction Law Section who preregister and sit through the relatively painless business meeting will be served a complimentary meal. A panel of presenters will offer a mini-CLE on new legislation of particular interest to the construction practitioner, recent developments in caselaw, and emerging rules governing independent contractor status and selection of design professionals for public projects. It is anticipated that the program will qualify for 1.5 MCLE credits. By September 20, 1993, all Section members will receive registration information along with the nominating committee's report and a summary of Section activities and expenditures for the current year.

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