Construction Law Newsletter

Published by the Section on Construction Law of the Oregon State Bar

ISSUE No. 25 July, 2004

MODEL RULES BEING DEVELOPED TO IMPLEMENT NEW CODE

Dana Anderson
Oregon Department of Justice

It's out with the old and in with the new. As we look forward to the new Public Contracting Code (ORS Chapters 279A, 279B and 279C) taking effect on March 1, 2005, we should be aware that a great deal of state and local government rule making activity is already under way. In fact, the underlying legislation requires it. Pursuant to HB 2341 (2003 Or Laws, Ch 794, Sec 334), all of the rules and exemptions adopted under the public contracting statutes to be repealed in current ORS Ch 279 are repealed as of the effective date of the new Code, although that will not invalidate or terminate any existing public contract.

Most state and local public contracting agencies will be subject to the Attorney General's Model Public Contract Rules (Model Rules) that implement the new Code, unless they opt out in whole or in part as described in ORS 279A.065. Recognizing that those agencies would need to have an early look at the Model Rules in order to make that determination in time for their own rulemaking schedules, the Code sets an early date for promulgation of the Model Rules.

Section 335(2) of HB 2341 requires that the Attorney General adopt Model Rules implementing the new Code by September 1, 2004, with an effective date six months later on March 1, 2005. In order to meet that requirement under Oregon's Administrative Procedures Act, a formal rulemaking hearing will be held on August 23 of this year, preceded by a required distribution of the proposed rules on July 23. Public notice of the rulemaking action will appear in the August 1 Oregon Bulletin.

Not far behind, state and local governments are already gearing up by reviewing early drafts of the Model Rules and making preliminary decisions about what their own rules will look like, or whether they will accept the default to the Model Rules. Oregon's Department of Administrative Services, State Procurement Office (DAS-SPO), for example, has held a series of educational sessions on the new Code and agency rulemaking requirements, along with public brainstorming sessions for development of their own contracting rules.

DAS-SPO is the state's central procurement authority, and state agencies without independent contracting authority either have DAS-SPO make their procurements for them, or operate under DAS-SPO rules when proceeding under delegated authority from that agency. And because DAS-SPO traditionally adopts the Model Rules with minimal changes, the Model Rules continue to be the keystone.

Consistent with the organization of the new Code, the implementing Model Rules will be organized into corresponding divisions under OAR Chapter 137. Division 46 (based on ORS Ch 279A) will contain overarching rules that affect all public contracting activities, including definitions, policies, affirmative action, contract preferences and cooperative procurement.

Division 47 (based on ORS Ch 279B) will address public procurements for goods and services, including source selection, types of procurements, the procurement process, specifications and legal remedies.

Division 48 (based on ORS Ch 279C) regulates the consultant selection process, including public contracts for architectural, engineering, land surveying and related personal services.

Division 49 (also based on ORS Ch 279C) addresses public improvements and other public construction contracts, including procurement rules, alternative contracting methods and construction contract provisions.

State agencies and local governments that have not already begun considering the development of their own public contracting rules under the new Code should get started on that effort without delay. Information on Model Rules development, as well as DAS-SPO rules, is available on line (for Model Rules click on "DOJ Model Public Contract Rules") at http://www.oregon.gov/DAS/PFSS/SPO/ors279-menu.shtml

Included on that site is information regarding DOJ contacts for each division of the proposed Model Rules, as well as the rule making schedule, tables of contents and drafts of the rules themselves. The site also lists the membership of the Rules Advisory Committees that were established to assist DOJ in developing Model Rules. For Division 49 construction contracting rules the Oregon Public Contracting Coalition and the Oregon Project Directors Association are also involved in review.

Further information on the Code and Model Rules will be presented at several educational programs in the Portland area:

- 7/9 - Lorman Education Services "*Construction Contracting for Public Entities*"
- 10/15 - Oregon Law Institute "*Public Contracts*" (featuring the Model Rules)
- 12/15-12/17 - DAS/DOJ Public Conference "*Partners in Public Purchasing*"

The new Code and implementing Model Rules will apply to public contracts first advertised, or if not advertised then entered into, on or after March 1, 2005. (HB 2341, Section 336). The Attorney General's Model Public Contract Rules Manual, including all four divisions of Model Rules with official commentary, public contracting statutes, constitutional provisions, selected case law summaries and references to related administrative rules, will be available for sale to the public in mid-October. Call 503.378.2992 (ext. 325) to reserve copies in advance.

THE DEATH OF PAY-IF-PAID CLAUSES?

Jason Alexander
Sussman Shank LLP

Depending on who you are, "pay-when-paid" clauses and "pay-if-paid" clauses can be the savior or the death of your company. While such clauses are dependent on the exact language used in the contract, generally "pay-if-paid" and "pay-when-paid" clauses state that a subcontractor or supplier is not entitled to payment until its customer (usually the general contractor) has received payment (usually from the owner or developer) for the subcontractor's or supplier's work.

A true "pay-if-paid" clause is one that makes prior payment by a third party a condition precedent to the payor's obligation to pay. "Pay-when-paid" clauses, on the other hand, affect the timing of payment and provide the payor a reasonable amount of time to obtain payment from a third party before the payor is obligated to make payment. What is a reasonable amount of time depends on the circumstances of the project, but can be as short as a couple of months or as long as a year or two.

Over the years, these clauses have become more and more prevalent in construction contracts in Oregon. They also have become a source of great frustration for subcontractors and suppliers. Depending on the exact language of the clause and contract overall, arguments do exist that can allow a party on the wrong end of the clause to claim the provision is satisfied or

inapplicable. However, pursuing such arguments is risky, time-consuming, and expensive. The contracts in which these clauses are found also usually include a clause requiring the subcontractor or supplier to continue performing under the contract even though it had not been paid. For many companies, this can effectively put them out of business.

Fortunately, the 2003 Oregon legislature recognized this problem and enacted a series of statutes commonly referred to as the "Construction Contract Payments" requirements. These provisions are found in ORS 701.620-701.645 and arguably do away with pay-when-paid and pay-if-paid clauses (or at least there drastic effect), as well as clauses requiring continued performance in the absence of payment for the performance.

Generally, these statutes apply to private construction projects other than projects that are subject to the Low-Rise Residential Dwelling Code or low-income housing. They also only apply for projects for which plans and specifications are first published on or after January 1, 2004. Other prompt pay statutes apply to public projects, but they are not the focus of this article. (See ORS Chapter 274.)

Specifically, ORS 701.625 requires the owner, on all projects that will last more than 60 days, to make progress payments to the prime contractor. Unless the owner and prime contractor agree on an alternative billing cycle, progress payments must be made on the basis of a certified (as defined in the statute) billing or estimate for the work performed and the materials or products supplied during the preceding 30-day billing cycle.

With limited exceptions, the owner must issue a progress payment to the prime contractor within 14 days after the date the billing is submitted to the prime contractor. The owner may make progress payments later than 14 days after the date the billing or estimate is submitted if (1) the owner is responsible for providing plans and specifications that expressly allow, in a clear and conspicuous manner, an extended payment, defined by a specific number of days after the billing or estimate is submitted, and (2) the owner provides, for each page of plans and specifications, a statement substantially in the following form:

> Notice of Extended Payment Provision – The contract will allow the owner to make payment within ___ days after the date a billing or estimate is submitted.

The statute does not allow a construction contract to alter the right of any original contractor, subcontractor, or material supplier to receive prompt and timely progress payments. If progress payments are not timely made by the owner, the prime contractor is entitled to interest on the unpaid balance at the rate of 1-1/2 percent per month or at a higher rate as the parties agree to in the construction contract.

The statute also allows a subcontractor to give a written request to the owner which requires the owner to notify the subcontractor within five (5) days of the issuance of a progress payment or final payment to the prime contractor. Finally, the statute provides a right for an aggrieved original contractor to recover its incurred attorney fees and costs to collect any payments or interest due pursuant to the statute.

ORS 701.630 contains virtually the same provisions as ORS 701.625, but applies to payments due subcontractors and material suppliers rather than original contractors. However, instead of 14 days to make payment (as the owner has under ORS 701.625), a prime contractor must pay its subcontractors and suppliers within 7 days of receipt of payment by the prime contractor.

ORS 701.635 allows a prime contractor or a subcontractor to suspend performance under a construction contract or terminate a construction contract if performance is suspended for longer than 30 days for failure by the owner to make timely payment of the amount certified under ORS 701.625 or the subcontractor fails to receive payment for the certified work from the prime contractor under ORS 701.630.

The statute also requires that certain notices be given before suspension or termination occurs. Assuming the notices are properly given, ORS 701.635 states that a prime contractor or subcontractor, as the case may be, may not be deemed in breach of a construction contract for suspending performance or terminating a contract pursuant to the statute.

Finally, ORS 701.640 does not allow a construction contract to include any provision, covenant, or clause that makes the contract subject to the laws of another state or states that a party to the contract cannot suspend performance or terminate the contract if the other party fails to make prompt payments as required.

These new statutes are powerful tools and when used correctly can greatly ensure a party's ability to obtain payment and reduce its risk. Subcontractors and suppliers rejoice! The legislature has helped level the playing field, at least when it comes to payment rights.

WHO SHOULD ATTEND MEDIATION OF THE MULTI-PARTY CONSTRUCTION DEFECT CASE?

Richard G. Spier
Arbitrator and Mediator

Here are some points to think about when proposing mediation, considering a proposal to mediate, or preparing for mediation in a multi-party construction defect case: (1) Who should attend on behalf of one's own client?; (2) Should counsel condition participation on commitment to personal attendance by appropriate persons for the other parties?; and (3) Who should stay home?

Who Should Attend?

The homeowner (in a residential case) or owner or corporate representative with authority (in a commercial case) always seems to appear in person on contraction defect mediations, and properly so.

In case of joint owners (particularly married couples or domestic partners), I think it is important that both attend, even if one would grant authority to the other. It seems that the more "aggressive" of the partners often seems to show up alone. It is not uncommon that joint owners have different levels of commitment to the litigation, and the mediation provides an opportunity for discussion, guided by counsel and the mediator, leading to consensus between the owners. Indeed, I have found it necessary in several cases to convene a delayed, second mediation session with both owners attending in order to achieve settlement, if only one appeared at the first session.

On the general contractor and sub/supplier side, there is a list of potential attendees that might be appropriate to attend, depending on the circumstances. Let's say we have a corporate general contractor or sub that is still in business, and that there are insurance coverage issues. For most effective mediations (by which I mean maximizing the chances that a settlement can be achieved on terms acceptable to both the contractor and its insurer or insurers), the attendees might well include:

(1) Corporate representative with unlimited authority for a small company (typically the majority or sole shareholder), or a corporate representative with some authority and the ability to call for more authority for a larger company;

(2) Insurance defense counsel;

(3) Business or coverage counsel, or in-house counsel, for the contractor;

(4) Coverage counsel, if already appointed, for the insurer or insurers, or separate claims representative, if any, handling coverage (versus defense) aspects of the claim; and,

(5) Defense claims representatives for each insurer on the risk (or a single claims representative, if the insurers have already agreed on allocation and have granted authority to the attendee). This may not always be possible, but savings in trial costs and control of

exposure resulting from a settlement most often make the costs of personal attendance an excellent investment.

I cannot overemphasize how important it is that an insurance claims representative attend in person, if at all possible, particularly on behalf of the general contractor and subs with the most exposure (such as siding applicators, in water intrusion cases). There are several reasons for this.

First, the mediator can do a more effective job in communicating face-to-face with the person who has the authority (or who can call to get it).

Second, the roles of insurance defense counsel and claims representative are different (though overlap). For one thing, the mediator wants to discuss coverage (when that is an issue) with the insurer, and cannot do so with insurance defense counsel.

Third, and this is a key point, claimants in these cases often feel aggrieved and ignored after months or years of perceived disrespect and delay. I believe it can make a difference (certainly in increasing the probability of settlement and maybe even compromising on a few more dollars, though I am less certain on this point) if the claims person attends, in person.

This is a significant emotional point for many claimants. This tells the claimant that someone with a checkbook is at least listening, but conversely makes the aggressive assertion of defense arguments more effective. People will indeed listen to adverse arguments, if they feel respected and listened to. From talking with many claimants, I know that this makes a big difference to them.

This point also applies to the owner or representative of a defendant. Even if there is no coverage issue (and thus no need to even consider the possibility of contribution by the contractor to the authority the insurer is willing to grant), I think it does make a difference in the attitude of claimants when they know that the other side—particularly the general contractor with whom the claimant dealt directly—took the time and trouble to attend.

Who Should Not Attend?

While it is very effective for a full defense team (client and insurer) to attend on behalf of at least target defendants, this can be overdone in two ways.

First, I generally recommend that expert witnesses not attend. It doesn't hurt for experts to attend, but is usually not necessary. The right expert has great technical skills and judgment, high integrity, and is a good witness before a jury or arbitrator. Expert witnesses are not and should not be chosen for their negotiating skills and ability to analyze mixed legal and factual issues—this is counsel's job. If counsel is properly briefed and prepared, he or she can in turn brief the mediator with efficiency and speed on the expert's opinions. Remember, the mediator has no authority to decide the case, and is more interested in the "big picture" than in the details. Experts should be available by telephone, so that counsel can get a quick answer in case an unanticipated question arises.

On the other hand, cooperation and disclosure among counsel and experts prior to mediation can be very helpful. Joint site visits can be useful in understanding different points of view. One approach, in a larger case, is to convene a joint session of experts (with a predetermined time for adjournment) for a "pre-mediation." The mediator presides in order to facilitate the exchange of facts and opinions (though the session itself is part of the mediation process, and thus off the record). Counsel and clients may attend to listen, but are required to remain silent!

An exception: In case of early mediation before much discovery, parties can agree to presentations by the experts for key parties, or for just the claimant. Have a maximum time per presentation (short) and short question and answer (not argument) period. This can be helpful when the parties truly do not understand the contentions of a claim or defense. Then, send the experts home, and begin the mediation.

Second, do not send large "committees" of client representatives. Some contractor parties attend mediations with multiple in-house representatives. These can include job superintendent, job supervisor, project engineer, trade craftspeople, and others. This is generally not an efficient way to proceed. Counsel should have obtained the input of these people early in the workup of the case.

This is not an arbitration, and it is not good use of valuable mediation time (when multiple other parties may be waiting) for the mediator to hear "testimony" from jobsite personnel. Attendance of multiple persons is sometimes a sign of lack of sufficient prior investigation, analysis and briefing of counsel. The mediation session itself is not the time for a defense team to review deal contracts, plans, claims and numbers for the first time. For effective mediation, these steps need to be completed well before the mediation session, so that a party comes in already knowing its strategy for the negotiations.

Rules are Made to be Broken

Every case is different. There are few hard and fast rules about how to represent a client in mediation, including issues of whom to bring or whom to insist that the other parties bring. Compromise will often be necessary, if the mediation will take place at all.

As always, the keys to effective mediation practice by counsel are prior preparation of the case, prior preparation of the client, succinct and balanced briefing of the mediator, personal attendance by persons with authority, and a coherent yet flexible negotiation strategy.

MUCH ADO ABOUT NOTHING NEW: DESPITE ALL THE COMMOTION, JONES V. EMERALD PACIFIC ADDS LITTLE TO OREGON LAW ON CONSTRUCTION DEFECT CLAIMS

Dennis Rawlinson & Kevin Koliner
Miller Nash LLP

Much has been written, both in publications and in pleadings, about the recent decision in Jones v. Emerald Pacific Homes, Inc., 188 Or App 471, 71 P3d 574 (2003), rev denied, 336 Or 125 (2003). And if Jones actually said what people are claiming it says, there would be ample reason for all the interest. For instance, if Jones really held that there is no longer tort liability for contractors, the decision would be monumental for insurance companies and devastating to owners.

But despite all the noise, very little about Jones – if anything – breaks new ground. It is nothing new, of course, for the Oregon Court of Appeals to hold that a special relationship is required to maintain a negligence claim when the parties have a contractual relationship. And Jones expressly reserves the possibility that a contractor/owner relationship can be such a "special relationship," even though the court rejected that classification for the parties at issue based on a fact-specific inquiry into the nature of their relationship.

A. What does Jones say?

The homeowners alleged that Emerald Pacific Homes, Inc., a custom home builder, created construction defects and failed to meet its schedule. The homeowners sued Emerald and its owners for breach of contract and negligence. 188 Or App at 473. The trial court dismissed the negligence claim, and plaintiffs appealed.

The decision details the lengthy history of Oregon courts that have recognized that a breach of contract can give rise to tort liability (such as a negligence claim), so long as there is a special relationship between the parties. 188 Or App at 476. A special relationship is present when "the

plaintiff's damages result from breach of an obligation that is independent of the terms of the contract, that is, an obligation that the law imposes on the defendant because of his or her relationship to the plaintiff, regardless of the terms of the contract between them." 188 Or App at 476 (numerous citations omitted).

What, then, are the criteria for a special relationship? In answering that question, Jones relies heavily on the Oregon Supreme Court's discussion in Conway v. Pacific University, 324 Or 231, 924 P2d 818 (1996), and summarizes the standard as follows:

> "[P]arties to a contract are in a 'special relationship' imposing a heightened duty of care and thereby creating potential tort liability when one party delegates to the other the authority to make important decisions with the understanding that the authority is to be exercised on behalf of and for the benefit of the authorizer." Jones, 188 Or App at 478.

Jones explicitly states that it is possible for a special relationship to be shown using only the express or implied terms of a contract, "so long as the obligation would exist even if it were not in the contract." 188 Or App at 476 (citing Georgetown Realty v. The Home Ins. Co., 313 Or 97, 106, 831 P2d 7 (1992)). In addition, certain professions give rise to a presumptive special relationship (and potential tort liability), including lawyers, physicians, architects, engineers, brokers, trustees, and—sometimes—insurers. 188 Or App at 477 (citing Conway, 324 Or at 239-40).

Finally, the court describes the essence of a special relationship as a relationship in which "one party has relinquished control over the subject matter of the relationship to the other party and has placed its potential monetary liability in the other's hands." 188 Or App at 477 (quoting Conway, 324 Or at 240-41, relying on Georgetown Realty).

Judging from recent articles about Jones and even more-recently filed pleadings that cite Jones, an important point has been lost in the shuffle: Jones makes it clear that in every case, "the inquiry is fact-specific." 188 Or App at 478. Consequently, Jones is explicitly limited in its holding: The evidence presented regarding the particular relationship between the homeowners and Emerald was insufficient to show that the requisite special relationship existed. In fact, the court states the following:

> "Although it is conceivable that the facts in some situations might demonstrate that a building contractor and its client are in a contractual relationship from which tort liability might arise, in the present case plaintiffs rely on the contract itself and no other evidence." Id. (citation omitted).

There is no escaping that Jones stops short of holding that there is no longer tort liability for general contractors in Oregon. Rather, its analysis is quite explicitly limited to the facts at hand, in which the only offered evidence of a special relationship was the contract itself, which merely stated that work would be done according to standard practices and in a workmanlike manner. 188 Or App at 479. One could imagine a much different result in a complex commercial setting in which the contract provides for fiduciary duties, or if evidence had been offered about the parties' representations or pattern of conduct.

B. Recent Decisions Citing Jones

Since Jones was decided in July 2003, a few local federal and state court judges have cited it when granting summary judgment motions on behalf of subcontractors defending against subrogation and contribution claims. See, e.g., Currier v. Halton Dev., Ltd., No. C0206-06288 (Multnomah County Cir Ct July 24, 2003); Int'l Paper Co. v. TCR Northwest 1993, Inc, Civ. No. 02-496-JE (D Or May 25, 2004).

To be liable for subrogation and contribution, a third-party defendant must bear independent liability to the plaintiff, but subcontractors rarely have contractual relationships with owner/plaintiffs. Therefore, the only theory of liability for such parties is negligence, and in both Currier and Int'l Paper Co., the courts held that the relationships with the subcontractors were too attenuated to amount to the requisite special relationship.

These decisions should come with some surprise because, above all else, Jones holds that determining whether a special relationship exists is a fact-specific inquiry, which would not appear to be appropriate for summary judgment. In fact, Jones itself was based on the entire record established during the plaintiffs' case in chief, not on a summary determination of the evidence.

Despite this apparent inconsistency, the recent decisions are consistent with Jones to the extent that they depend on analyses of the particular relationships and determinations that the evidence did not support the existence of the required "special relationships."

C. Jones and the Economic-Loss Doctrine

Some commentators paint Jones inaccurately as a decision that somehow solidifies the economic-loss doctrine in Oregon, despite the fact that Jones never mentions the doctrine. The economic-loss doctrine is a foreseeability rule borrowed from products-liability law that is most succinctly stated in Hale v. Groce, 304 Or 281, 284, 744 P2d 1289 (1987): "[O]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property."

Some have deduced that Jones implicitly adopts the economic-loss doctrine because, if there were property damage or personal-injury damages in Jones, there would have been no need to analyze whether a special relationship existed to establish the liability of Emerald. That is because Emerald would have been held to the common-law duty merely to exercise reasonable care to prevent foreseeable harm. But it is problematic to infer a holding when the case fails to address the issue. In fact, a review of the appellate briefs filed in Jones shows that the issue was never raised on appeal. Jones simply offers no support (or criticism) for the economic-loss doctrine.

If the economic-loss doctrine were applied wholesale to construction-defect cases, it would create dangerous, perverse incentives for owners. For instance, it is well established that the doctrine is applied only when losses are "purely" economic, meaning that it does not apply if there is any property damage or personal injury in addition to the economic losses.

This distinction was made clear by the Oregon Court of Appeals in Gladhart v. Oregon Vineyard Supply Co., 164 Or App 438, 446, 994 P2d 124 (1999), rev'd on other grounds, 332 Or 226 (2001), in which a vineyard owner claimed damages in negligence from a nursery that was alleged to have sold to the vineyard grape plants infected with aphids. 164 Or App at 440. In rejecting application of the economic-loss doctrine, the court noted that "plaintiffs have alleged that the infected grape plants caused damage to the other plants in their vineyard. Thus, this case involves allegations of property damage." 164 Or App at 446. In other words, the economic-loss doctrine did not apply to limit liability for any of the claimed damages because the plaintiff demonstrated property damage in addition to economic losses.

Now consider, as an example, a hotel owner who discovers that construction defects have caused balconies to become unstable. If he fixes the balconies before they fall, no property damage or personal injuries will have occurred—at least according to the proponents of the economic-loss doctrine[1]—and he will be left with little hope of recovering his losses, including repair costs and loss of his use of the hotel during repairs.[2] But if he waits until the balcony falls and

[1] Any distinction between "property damage" and "economic loss" is blurry at best. The notion is apparently that, although defects may have caused damage to property, those losses are actually "economic losses" because the result is a diminution in the value between what was purchased and what was received. That distinction is awkward because, after all, what are damages attributed to "property damage" if not the cost to repair or the diminution in the overall value? Further, the classification of damages as either economic or noneconomic also cannot come down to the relative ease of placing a dollar amount on a loss. Judges and juries place dollar amounts on noneconomic damages all the time without thereby transforming them into "purely economic damages."

[2] A cause of action for breach of contract/breach of

causes property damage, he retains his cause of action not only for the property damage, but also for the cost of repairing the defects. There is no question that insurers champion the economic-loss doctrine as applied to construction-defect cases because it allows them to avoid liability, but the incentives that it creates for owners should make courts apprehensive about its full-scale application.[3]

D. Where Do We Go From Here?

Jones changes little if anything about Oregon law. It does take construction contractors out of the list of professions for which Oregon courts presume special relationships. At the same time, the court quite explicitly abstained from holding that contractors are categorically released from tort liability. It is surprising that some courts have cited Jones as authority when granting summary judgment releasing contractors from tort liability. Also, despite what some have assumed is implicit in the opinion, the Jones court was not asked to address–and did not address–the economic-loss doctrine because it was not at issue on appeal.

Further, courts should consider the dangerous incentives created by holding that construction defect damages are somehow barred by the economic-loss doctrine. In any event, there can be no question that owners and construction professionals considering insurance options need more direction on these significant issues, which appears to make it a ripe subject for the Oregon Supreme Court's clarification.

warranty might remain, but without a tort claim, there may be no insurance coverage. And without insurance coverage, some defendants would be judgment-proof, especially for defects in construction of larger, more expensive projects.

[3] This article does not address the related ethical issues insurance defense counsel should consider before moving for summary judgment against a tort claim that, if successful, would leave clients exposed to claims for which insurance coverage may not exist.

CCB QUICK TIPS

Alan Mitchell
Scott ◆ Hookland LLP

Asserting and defending claims through the Oregon Construction Contractors Board can sometimes be a confusing proposition–especially for attorneys who don't do it very often. Here are a few quick tips that may be helpful.

Pre-Claim Notice: Remember that sending the new 30-day certified mail notice is a jurisdictional prerequisite. ORS 701.147(9); OAR 812-004-0320(7). Also, be sure that your notice tracks the statute with words to the effect of "my client intends to file a CCB claim." Using words like "reserves the right to file a claim" may be inadequate. Be sure to send the notice to the contractor's address as listed in the CCB records.

Exempt Status of Claimant: If the claimant has not complied with the "exempt" license requirements (ORS 701.035; OAR 812-003-0002), then the potential claimant is barred from filing a CCB claim against another contractor for unpaid contract amounts. OAR 812-004-0320(4).

Filing Fees: Don't send the $50 filing fee at the same time you send your claim to the CCB. After making the decision it has jurisdiction over the claim, the CCB will ask you to submit the filing fee. OAR 812-004-0400(1)(d).

Time for Filing: If you file a court claim and want to have the option of accessing the contractor's surety bond, watch carefully the deadlines set out in ORS 701.146(2). For example, if you file and serve the court action and then send the 30-day preclaim notice, you will have to wait for the 30-day period to expire before you file the CCB claim and then you will have to wait until 30 days after that before you can seek a default.

The most current CCB administrative rules can be found through the agency's web site at www.ccb.state.or.us.

RECENT CASE LAW DEVELOPMENTS

D. Gary Christensen and
Sherilyn Holcombe Waxler
Miller Nash LLP

A. CCB Licensing and Contractor Suits

L.H. Morris Elec. v. Hyundai,
187 Or App 32, 66 P3d 509 (2003)

FACT-FINDER MUST DECIDE WHETHER CLEANROOM INSTALLER FITS STATUTORY DEFINITION OF CONTRACTOR.

The court of appeals reversed the circuit court's dismissal of a breach of a contract claim made by the installer of cleanroom walls and wall panels at a semiconductor manufacturing plant. The court remanded the question whether the installer fit the statutory definition of a contractor under ORS chapter 701. The trial court had reasoned that the complaint sought damages under a construction contract and that the installer was barred from recovery by ORS 701.065, which limits those who can claim remedies under construction contracts to licensed contractors.

The court of appeals held that a factual inquiry was necessary to determine whether the cleanroom walls and wall panels were attached to real property. The court explained that "[a]lthough walls are commonly attached to a structure, there is nothing inherent in the definitions of the terms 'clean room' and 'wall' that is inconsistent with or would preclude proof that the clean room walls * * * were not attached to the real property." 187 Or App at 39.

Splinters, Inc. v. Anderson/Weitz,
192 Or App 632, 87 P3d 689 (2004)

CCB LICENSING STATUTE'S RELIANCE ON CONTRACTOR'S ACTUAL KNOWLEDGE PRECLUDES SUMMARY JUDGMENT FOR FAILING TO BE PROPERLY LICENSED.

Plaintiff subcontractor and defendant general contractor, a joint venture, each filed for summary judgment arguing that the other was precluded from seeking redress on breach-of-contract claims because of the other's failure to comply with the licensing requirements of the Construction Contractors Board ("CCB") under ORS 701.065. The court of appeals held that the CCB's file on plaintiff's license was not inadmissible hearsay because no objection to its admissibility had been properly raised. Further, the file created a genuine issue of material fact about whether the CCB had actually suspended plaintiff's license.

The court also held that a genuine issue of material fact existed regarding whether defendants had complied with ORS 701.055(1), which requires that one member of a joint venture must possess a license at the time of bid or contract and that the joint venture itself must be licensed when work is performed. Although the court found that defendant had not complied with the second condition, defendant had presented evidence that a CCB representative had assured it that the joint venture itself did not need a license as long as its members had licenses.

Because the legislature created an exception to the licensing requirement that is triggered by the actual knowledge of the contractor and not the constructive knowledge imputed by the statute, the court concluded that an issue of fact existed about whether defendant was in fact aware of the joint-venture licensing requirement.

B. Construction Liens

Valencich v. TMT Homes of Oregon, Inc.,
193 Or App 47, 88 P3d 300 (2004)

SURETY MAY BE LIABLE IN FORECLOSURE ACTION, EVEN IF IT WAS NOT A PARTY.

Construction lien foreclosure action. TMT Homes employed Valencich to landscape property. When TMT did not pay, Valencich perfected construction liens against the property. then filed actions to foreclose the liens. TMT obtained release of lien bonds from Cumberland Casualty and Surety Company pursuant to ORS

87.076. Valencich then sought to foreclose the liens against the bonds rather than against the property. TMT was named as the defendant in the lien foreclosure action; Cumberland was neither named as a party nor served. The amended complaint did, however, identify Cumberland as the surety on the bonds, asserted that the construction liens had attached to the bonds, and sought payment from the bonds and foreclosure against them.

The trial court entered a default judgment against TMT, and Valencich submitted the default judgment to Cumberland for payment. Cumberland, citing ORS 87.060(7), refused payment, arguing that because it had not been joined as a party in the foreclosure action, it had had no opportunity to contest the validity of the underlying liens and was not bound by the judgment. Valencich argued that a surety on a release of lien bond is not an indispensable party in an action to foreclose the underlying lien.

The court affirmed judgment for Valencich, finding that he could collect from the bonds without obtaining a judgment against Cumberland directly. The liability of a surety arises from its own assurances that it will pay whatever the defendant is adjudged to owe if defendant fails to do so, not from a judgment against the surety itself.

Further, ORS 87.083 does not contemplate joinder of parties as a result of filing the bond. Rather, it contemplates a summary process for payment of the amount of money secured by the bond. Also, ORCP 82, which outlines a summary procedure for recovery against a bond, also suggests that a surety on a litigation bond need not be named as a party to the litigation in order for it to be liable on the bond.

C. Defect and Indemnity Claims

***Association of Unit Owners v. Dunning*,**
187 Or App 595, 69 P3d 788 (2003)

CONDOMINIUM ASSOCIATION MAY ASSERT WARRANTY CLAIMS ON BEHALF OF MEMBER-OWNERS; CONDOS ARE NOT "PRODUCTS" UNDER OREGON'S PRODUCT LIABILITY LAW.

A condominium association brought a design and construction defect action, in its own capacity and on behalf of owner-members, against developers and builders, a general contractor, engineers, and former members of its own board. The trial court concluded that the association was not the real party in interest authorized to sue under ORCP 26 A and dismissed the breach of express and implied warranty claims.

The court of appeals reversed, finding that the Oregon Condominium Act authorizes condo associations to sue on behalf of individual unit owners if "the claim[s] asserted * * * concern 'matters affecting the condominium.'" 187 Or App at 612 (quoting ORS 100.405(4)(d)). The court reasoned that breach of warranty affects the condominium "in the sense that it results in multiple defects in the design and construction of the land, building, and structures that make up the condominium." Id. at 611. The court also declined to expand the definition of "product" to apply to condominiums under Oregon's product liability law, ORS 30.920, affirming the trial court's dismissal of a strict product liability claim. Id. at 617.

***Jones v. Emerald Pacific Homes*,**
188 Or App 471, 71 P3d 574 (2003)

CONTRACTING PARTIES HAVE A "SPECIAL RELATIONSHIP" CREATING POTENTIAL TORT LIABILITY WHEN ONE PARTY DELEGATES TO THE OTHER THE AUTHORITY TO MAKE IMPORTANT DECISIONS ON BEHALF OF AND FOR THE BENEFIT OF THE AUTHORIZER.

Homeowners brought action against contractor and its owner regarding the quality of and delays in construction, alleging breach-of-contract and negligence claims. The court of appeals upheld dismissal of the negligence claim, while recognizing earlier Oregon decisions recognizing tort actions between parties to a contract in certain circumstances in which a "plaintiff's damages result from breach of an obligation that is independent of the terms of the

contract, that is, an obligation that the law imposes on the defendant because of his or her relationship to the plaintiff, regardless of the terms of the contract between them." 188 Or App at 476.

Here, plaintiff relied solely on a contract term requiring defendant contractor to give "workmanlike" performance. But the court found that this term, by itself, did not "impose obligations 'beyond the common law duty to exercise reasonable care to prevent foreseeable harm.'" Id. at 477 (quoting Onita Pacific Corp. v. Trustees of Bronson, 315 Or 149, 159, 843 P2d 890 (1992)). Plaintiff offered no other evidence that any special obligations had been imposed on defendants that would give rise to a negligence claim. The court allowed, however, that "it is conceivable that the facts in some situations might demonstrate that a building contractor and its client are in a contractual relationship from which tort liability might arise." Id. at 478.

Moore Excavating v. Consol. Supply Co.,
186 Or App 324, 63 P3d 592 (2003)

INDEMNITY CLAIMANT MUST PROVE THAT THIRD PARTY IS LEGALLY PREVENTED FROM BRINGING SUIT AGAINST DEFENDANT; SALES AGREEMENT IN WHICH SUPPLIER SELECTS PRODUCT DOES NOT CREATE REQUISITE SPECIAL RELATIONSHIP TO ALLOW NEGLIGENCE ACTION.

The court of appeals affirmed summary judgment rulings in favor of defendant supplier on both indemnity and negligence claims. The supplier had provided materials to a utility installation contractor, who later settled with a residential developer ("Aspen") after leaks were discovered in the contractor's water system. The contractor brought this indemnity action against the supplier.

The court rejected the indemnity claim, finding that the settlement agreement and certain affidavits indicating Aspen's satisfaction with the settlement did not preclude Aspen from seeking damages from the supplier. 186 Or App at 329 ("Nowhere did the settlement agreement indicate that Aspen released its claims against defendant [supplier].").

The court held that a plaintiff seeking indemnity "must show that it has 'bought peace' for the alleged indemnitor-defendant in a way that is legally binding on the third party [Aspen]." Id. at 330. The court also affirmed dismissal of the negligence claim against the supplier on summary judgment, holding that the plaintiff contractor had no right to rely on the supplier's representations, despite the fact that the supplier had selected the pipe cement that supposedly had failed. Because the contract was for the sale of goods, "defendant did not assume an obligation to pursue plaintiff's economic interests" in a way that permitted a negligence action. Id. at 334.

Vtech Comm. v. Robert Half, Inc.,
190 Or App 81, 77 P3d 1154 (2003)

CONTRACTING PARTIES ARE IN A "SPECIAL RELATIONSHIP" CREATING POTENTIAL TORT LIABILITY WHEN ONE PARTY DELEGATES TO THE OTHER THE AUTHORITY TO MAKE IMPORTANT DECISIONS ON BEHALF OF AND FOR THE BENEFIT OF THE AUTHORIZER.

Company filed breach of contract and negligence claims against temporary employment agency that provided a "temporary-to-permanent" payroll clerk who allegedly embezzled more than $1 million from the plaintiff company.

In a holding similar to Jones v. Emerald Pacific Homes, 188 Or App 471, 71 P3d 574 (2003), the court of appeals affirmed summary judgment for the defendant agency because it found that (1) no contractual obligation was breached, and (2) the agency did not owe the plaintiff a duty independent from the terms of the parties' contract and, therefore, there was no basis for a negligence claim under Oregon law. As in Jones, the court cited Oregon precedent that in a contractual relationship, a plaintiff may allege negligence only if defendant bears a duty of care independent of the terms of the contract.

Thus, the court considered "whether the terms of the contract create the *type of relationship*

that gives rise to such a tort duty." 190 Or App at 89 (quotations omitted). Dismissal of the negligence claim was appropriate because "there [was] no evidence that defendant furnished [the employee's] services to plaintiff in order to further the plaintiff's economic interests. Rather, the record shows that the parties entered into an arm's-length transaction in which defendant sought to profit from plaintiff's employment of [the employee]." Id. at 90.

D. Defenses: Releases

Western Surety v. FDS Diving Const. and Salvage,
193 Or App 1, 88 P3d 293 (2004)

RELEASE OF CLAIMS AMBIGUOUS UNLESS MEANING SO CLEAR AS TO PRECLUDE DOUBT BY REASONABLE PERSON.

Suit for breach of contract and quantum meruit, in which defendant raised the execution of a release as a defense. General Construction subcontracted with FDS. At the end of the project, FDS claimed $229,000 from General Construction for work pursuant to a number of change orders.

The parties executed a release, under which FDS released General Construction "'from any and all liens and claims whatsoever arising out of or during the performance of' [the subcontract]," other than any "'claims specifically expected [*sic*] from this release with the consent of the Contractor.'" 193 Or App at 6. If no claims were excepted from the release, the parties were to write "none" in the space provided on the release. The parties did not specifically except any claims, but they also left blank the space indicating that there were no specifically excepted claims. General Construction asserted that FDS' change-order claims were barred by the release, but FDS argued that the release was not intended to cover the work performed outside the scope of the subcontract.

The court of appeals reversed summary judgment for General Construction, finding that the exception clause of the release was ambiguous and summary judgment was therefore inappropriate. Only if a release is "so clear as to preclude doubt by reasonable persons" is it unambiguous and an appropriate basis for disposition by summary judgment. Id. at 8. Because the blank exception clause had more than one plausible meaning, it was ambiguous, thus precluding disposition by summary judgment.

E. Defenses: Statutes of Limitation and Repose

Lozano v. Schlesinger,
191 Or App 400, 84 P3d 816 (2004)

STATUTE OF ULTIMATE REPOSE DOES NOT APPLY TO OWNER-BUILT RESIDENCES.

Action for negligent construction of a residence, resulting in major water-intrusion defects. Defendant built the home and lived there with his family for three years before selling to a second owner, who later sold to plaintiffs. Defendant claimed that ORS 12.135, requiring commencement of actions within 10 years of substantial completion, barred plaintiffs' claim.

The court of appeals reversed judgment for defendant, holding that ORS 12.135 does not apply when a residence is owner-built. The definition of "substantial completion" in ORS 12.135(3) is the date when the contractee accepts the construction. When a residence is owner-built, the contractor and contractee are the same person, so substantial completion does not occur. But the 10-year statute of ultimate repose for negligent injury to the property of another, ORS 12.115, protects contractors who build their own homes.

Employer Liability

Woodbury v. CH2M Hill, Inc.,
335 Or 154, 61 P3d 918 (2003)

GENERAL CONTRACTOR LIABLE FOR INJURIES OF SUBCONTRACTOR'S EMPLOYEE FOR FAILURE TO TAKE SAFETY PRECAUTIONS.

Plaintiff, a subcontractor's employee, claimed recovery from the general contractor, CH2M Hill, for injuries he suffered in a fall from a

construction platform. Plaintiff fell while dismantling the platform. The subcontractor was responsible for the details of constructing and dismantling the platform, and after the decision was made to build the platform, no employee of CH2M Hill assisted, provided instructions, offered advice, or provided oversight of that work.

The supreme court reinstated judgment against CH2M Hill, finding sufficient evidence to support the jury's findings that the general contractor (1) exercised actual control of "work involving a risk or danger" (working at height) and was therefore liable under the Employer Liability Law, and (2) was negligent in failing to provide any fall-protection training or supervision. Actual control over the project was found based on the facts that plaintiff's supervisor expected and received detailed CH2M Hill instructions from CH2M Hill's personnel, had an onsite safety coordinator, and a CH2M Hill employee was involved in the decision to build a platform and advised plaintiff to make the platform "sturdy."

Indemnity and Insurance

***Walsh Const. Co. v. Mutual of Enumclaw*, 189 Or App 400, 76 P3d 164 (2003), *rev allowed*, 336 Or 657 (2004)**

SUBCONTRACT TERM REQUIRING GENERAL TO BE COVERED AS ADDITIONAL INSURED IS VOID UNDER "ANTI-INDEMNIFICATION" STATUTE, ORS 30.140.

Subcontractor's employee was injured at the work site and sued the general contractor, who tendered the claim to subcontractor's liability insurance carrier under an additional insured endorsement. The insurer declined to investigate the claims and the general settled with the injured worker, then brought this breach-of-contract action against the insurer. Subcontractor's policy contained a blanket additional insurance endorsement that added as insureds "any * * * organization * * * whom you are required to add as an additional insured on this policy under a written contract or agreement." 189 Or App at 402.

The trial court, on cross-motions for summary judgment, allowed judgment to the insurer, holding that ORS 30.140(1) voids contractual requirements to provide additional insured endorsements for another party. The court of appeals affirmed, reasoning that the statute applied not only to bar indemnity provisions in which one party is protected against its own negligence, but also to insurance that could have the same result.

Because the policy naming general as an additional insured was void, general was not a legally cognizable additional insured, and thus insurer had no duty to defend or indemnify. The holding voided the additional insurance clause (and thus the insurance) entirely, not just to the extent to which it violated the statute. (Note that the supreme court has accepted review of this case, which is set to be heard in November 2004. Pending review, no appellate judgment has been entered in this case.)

F. International Contracts

***Rotec Indus. v. Mitsubishi Corp.*, 348 F3d 1116 (9th Cir 2003)**

UNDER THE ROBINSON-PATMAN ACT, FEDERAL COURTS HAVE NO JURISDICTION OVER ACTS OF FOREIGN CORPORATIONS THAT ARE NOT WITHIN THE FLOW OF COMMERCE; UNDER OREGON LAW, PLAINTIFF MUST SHOW CAUSATION BETWEEN INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS AND HARM TO MAKE CLAIM.

Plaintiff-contractor, Rotec Industries, Inc. ("Rotec"), sued Mitsubishi Corp. et al ("Mitsubishi") when Mitsubishi was awarded a portion of the work associated with constructing a dam on the Yangtze River in China. Rotec had secured a contract from a Chinese corporation owned by the Chinese government ("Owner") to supply three pieces of concrete placement equipment. As part of that contract, there was an option for Owner to purchase two more pieces of equipment from Rotec. A 60-person bid evaluation committee recommended that the Owner purchase the two additional pieces of

equipment from either Rotec or Mitsubishi, and the Owner awarded the contract to Mitsubishi. In its suit, Rotec claimed that Mitsubishi paid the Owner a kickback and awarded a bid evaluation committee member with a quality-control job.

The Ninth Circuit found that the Robinson-Patman Act, which prohibits making unlawful payments to obtain a contract, does not apply to activity that has not occurred within the flow of commerce among the several states or with foreign nations. Because any unlawful payment was made by a Japanese corporation to a Chinese corporation, the Ninth Circuit held that the U.S. courts did not have subject-matter jurisdiction and dismissed the case.

The Ninth Circuit also dismissed Rotec's claim for intentional interference with economic relations, finding that Rotec had not proved that Mitsubishi's actions caused Rotec damages, since the bid evaluation committee recommended Rotec as well as Mitsubishi, and there was insufficient evidence relating to a kickback to the Owner.

G. Piercing the Veil

Gemignani v. Pete,
187 Or App 584, 71 P3d 87 (2003)

SOLE SHAREHOLDER OF DEVELOPER MAY BE PERSONALLY LIABLE FOR OBLIGATING DEVELOPER TO LOANS IT COULD NOT REPAY BECAUSE OF UNDER-CAPITALIZATION OR INSOLVENCY.

Defendant T.M. Pete Enterprises, Inc. ("Pete"), developed commercial and residential real estate. Pete sold lots in a subdivision to plaintiffs, pledged the lots owned by plaintiffs as security for bank loans, and then delivered plaintiffs a warranty deed, representing that plaintiffs owned the lots free and clear and that no liens existed. The corporation later filed bankruptcy and the bank sought to foreclose its liens. Plaintiffs sued Pete and its sole shareholder for violation of the Unlawful Trade Practices Act (UTPA) and breach of contract.

The court of appeals affirmed judgment for plaintiffs, finding that plaintiffs could pierce Pete's corporate veil and extend liability for breach of contract to its sole shareholder because he engaged in improper conduct by obligating the corporation to loans that it could not possibly repay because of its under-capitalization or insolvency. But the court found that the only ascertainable loss arising because of defendants' UTPA violation was plaintiffs' payment of property taxes after delivery of the warranty deeds. Any other harm suffered was not attributable to the misrepresentations in the warranty deeds but to Pete's pledge of the property as security to the bank.

Oregon PERB v. Simat, Helliesen & Eichner,
191 Or App 408, 83 P3d 350 (2004)

DUE DILIGENCE TO VERIFY CONSTRUCTION COSTS A PREREQUISITE FOR JUSTIFIABLE RELIANCE ON A MISREPRESENTATION IN A CONSTRUCTION CONTRACT; TO PIERCE THE CORPORATE VEIL, SHOWING THAT SHAREHOLDER-DEFENDANT POSSESSED "ACTUAL CONTROL" OVER CORPORATION REQUIRED, NOT SIMPLY CONTROL OVER THE IMPROPER ACTS AT ISSUE; "MILKING" OF CORPORATE ASSETS MAY ALLOW PIERCING.

The court of appeals reversed a trial court's judgment for plaintiffs on a fraud claim against two developers, holding that justifiable reliance was lacking because due diligence was not performed by the plaintiffs' representatives with respect to a project's construction costs. Reasonable reliance "is measured in the totality of the parties' circumstances and conduct." 191 Or App at 428. The court of appeals also affirmed judgment denying plaintiffs' attempt to pierce the corporate veil against one defendant, rejecting plaintiffs' attempts to conflate the "improper conduct" and "actual control" elements of a piercing claim. Id. at 430-31. Defendant never held a significant interest in either corporation at issue, nor was he ultimately responsible for financial decision-making.

Finally, the court affirmed judgment for plaintiffs against a second defendant, finding that the corporate veil was properly pierced because

defendant "milked" corporate assets. The court reasoned that the presence of the missing $2 million on the corporate balance sheet would have materially improved the likelihood of the corporation's attracting an additional $10 million in investments—which would, in turn, have materially affected the likelihood of the corporation's survival and its ability to meet its obligations.

H. Public Contracts

Coats-Sellers v. ODOT,
192 Or App 432, 85 P3d 881 (2004)

PUBLIC CONTRACT'S INCORPORATION BY REFERENCE OF PARTICULAR OAR VERSION PRECLUDES LATER "UPDATING" WITH NEWER VERSION.

In a breach-of-contract counterclaim in a highway construction contract, defendant ODOT argued that plaintiff contractor was required under the parties' contract to pay applicable prevailing wage rates to its employees working in a nearby quarry and had failed to do so. The parties' contract incorporated by reference a 1995 version of an Oregon Administrative Rule that referred to the federal "site of work" definition found in 29 CFR Part 5.2(L), the federal standard requiring payment of a prevailing wage. ODOT argued that the Oregon Bureau of Labor and Industries' definition of "site of work" incorporated by reference in the 1997 version of the administrative rule should be applied.

The court noted that while it normally defers to plausible interpretations of administrative rules by the agency that promulgates them, that principle does not extend to an agency's interpretation of rules not promulgated by that agency. The court found it impossible to imagine that parties who incorporated by reference a specific version of a definition found in 29 CFR Part 5.2(L) meant to incorporate a state agency's subsequent interpretation of the federal definition rather than the federal definition itself. Because ODOT did not persuade the court of appeals that the trial court had interpreted the federal rule incorrectly, it affirmed the trial court's grant of summary judgment to plaintiff.

JAL Construction, Inc. v. Friedman,
191 Or App 492, 83 P3d 332 (2004)

MISDELIVERED BIDS SATISFACTORY IF THEY REACH THE DESIGNATED PUBLIC OFFICIAL BEFORE CLOSING.

Award of a public contract for street improvements in the City of Bend. Hap Taylor and Sons ("Hap Taylor") submitted the low bid and was awarded the contract. JAL Construction, Inc. ("JAL"), the next low bidder, sued to challenge the award because Hap Taylor delivered its bid to an address different from the one specified in the bid solicitation documents.

The court of appeals reversed judgment for JAL, finding that neither ORS 279 nor the Attorney General's Model Public Contract Rules require delivery of bids to a particular site or physical location. Rather, the bid must be filed with the *person* designated by the public contracting agency to receive bids before closing.

Reasoning that ORS 279 requires only substantial compliance with bidding procedures and that the objectives of the public bidding process are openness, impartiality, and competition in public contracting, the court held that the essential elements of the delivery process are that the bids be "received in a timely manner by the designated public official in such a way that they can be accurately identified, secured, and opened at the time and place designated for the public opening." 191 Or App at 499. Hap Taylor's delivery satisfied those requirements; to hold otherwise would "place an excessive formality in the way of healthy competition." Id. at 500.

U.S. ex rel Ali v. Daniel, Mann, Johnson & Mendenhall,
355 F3d 1140 (9th Cir 2004)

CONSTRUCTION MANAGEMENT FIRM ACTING ON BEHALF OF STATE AGENCY MAY BE LIABLE FOR FALSE CLAIMS SUBMITTED TO THE FEDERAL GOVERNMENT.

Architect brought a *qui tam* action against construction management firm Daniel, Mann, Johnson & Mendenhall ("DMJM") under the False

Claims Act for making false claims to the Federal Emergency Management Agency ("FEMA") on behalf of California State University at Northridge ("CSUN").

Plaintiff claimed that DMJM employees had made misrepresentations to FEMA regarding CSUN's eligibility for funding with respect to an unoccupied building that had been damaged by an earthquake. Those communications understated the amount of time the building had been unoccupied and suggested that there was a clear intention to reoccupy the building, despite the fact that it had not been occupied for two years and CSUN was not in the process of obtaining funding to repair the building.

The Ninth Circuit reversed the district court's judgment for DMJM, finding that the applicable test for sovereign immunity was the "arm of the state" test and, under that test, DMJM was not entitled to immunity for false claims submitted to FEMA.

STATUS OF ADDITIONAL INSURED ENDORSEMENTS PENDING FINAL RESOLUTION OF WALSH V. MUTUAL OF ENUMCLAW

D. Gary Christensen
Miller Nash LLP

The skirmish over how Oregon's "anti-indemnification" statute, ORS 30.140, relates (if at all) to additional insured endorsements became a battle royale last year in Walsh Construction Company v. Mutual of Enumclaw, 189 Or App 400, 76 P3d 164 (2003), rev allowed, 336 Or 657 (2004), that will culminate before the Oregon Supreme Court in November 2004.

Oregon has long held to the policy, with respect to indemnification provisions in construction contracts, of "to each his own": You can require another in the chain of contracting to indemnify you for that party's negligence or fault, but you cannot make them indemnify you for your own negligence or fault. The statute, ORS 30.140, by its terms applies to indemnification duties in construction contracts, but contractors and insurers have questioned whether it also applies to liability insurance endorsements known as "additional insured endorsements," through which an upstream party becomes a directly-insured party under the downstream party's liability policy. These endorsements became common several years ago and now are virtually ubiquitous risk-allocation features on most complex residential and commercial construction projects.

In Walsh, the Oregon Court of Appeals determined that ORS 30.140 applies to contract provisions requiring additional insured endorsements. In that case, the endorsement was of the "blanket" variety, automatically covering any party which the subcontractor was bound by contract to include as an additional insured on the policy, without the necessity of naming each additional insured expressly in a separate endorsement.

A subcontractor's employee was injured and made a claim against the general contractor for damages. The general contractor tendered the claim under its additional insured endorsement to the subcontractor's liability carrier, which refused to investigate or defend the claim. The general contractor settled with the injured worker (without any action being filed by the worker) and then filed this action against the subcontractor's recalcitrant carrier, alleging breach of contract for failing to investigate and defend the claim and failing to provide insurance to satisfy the claim. (Because of this unique posture, there was never any allegation, determination, or judgment about who was actually responsible, and to what extent, for the worker's injuries.)

The court of appeals found that recent amendments to ORS 30.140 prohibit an upstream party from doing indirectly (through requirements for additional insured endorsements) what the statute forbids it to do directly (through indemnification clauses). Consequently, it held that ORS 30.140 bars contract clauses in which one party requires the other to provide insurance protecting the first party against its own negligence or fault.

In framing its holding, however, the court of appeals held that the clause requiring the additional insured endorsement was void entirely, not merely to the extent that the insurance was procured or applied to reach the prohibited result. (There is no indication in the record that the general contractor was, in fact, seeking insurance coverage or indemnification against its own fault. Indeed, no evidence about the relative fault of the general contractor and subcontractor for the worker's injury was before the circuit court, which ruled on cross-motions for summary judgment on the legal issue alone.) The court simply held that ORS 30.140 applied to invalidate the contractual requirement to provide the endorsement and, under the terms of the blanket endorsement, there was therefore no requirement to insure the general contractor as an additional insured.

Traditionally—and by its own terms—ORS 30.140 has been applied only "to the extent that" an indemnification clause violates the statute's policy and seeks to protect one from his own negligence. Consequently, in addition to the general contractor's appeal to the supreme court that ORS 30.140 should not apply to contractual terms requiring additional insured endorsements, several amici curiae have jointly appeared to ask the supreme court to apply its final ruling only "to the extent" that the statute has been violated, keeping in place the valuable device of the additional insured endorsement as a risk-allocation tool on construction projects if the statute does not apply or, if it does, to the extent that the endorsement is not applied to violate the statute. (The author represents these amici in the supreme court.)

The supreme court has set November 4, 2004, to hear the appeal of the general contractor, and has agreed to hear from amici at that time, as well. At the time this article was submitted, briefs had been filed by the general contractor and amici, and response was shortly due from the insurer. In the meantime, it is important to note that the court of appeals withheld filing an appellate judgment based on its opinion in the case, thus leaving the matter open pending resolution by the supreme court.

OREGON AND WASHINGTON CONSTRUCTION LIEN CLAIMS: THE BASICS

Aaron Blankenship
Buckley LeChevallier PC

The prosecution of construction lien and bond claims requires an in depth understanding of complex statutes. For most practitioners, it takes time to learn and understand the intricacies of just one state's construction lien and bond claim statutes. Many of us have added to this burden by becoming licensed in both Oregon and Washington.

The following tables summarize the construction lien and bond claim statutes of Oregon and Washington. The tables are organized chronologically with respect to the assertion of claims. Thus, preclaim notice requirements are addressed first, claim assertion requirements are addressed second, and post claim notice requirements are addressed last.

1. Preclaim Construction Lien Notices

Both Oregon and Washington require construction lien claimants to provide preclaim notices in certain situations. Generally, Oregon requires the provision of an Information Notice to Owner, Consumer Notification, and/or a Notice of Right to Lien. Washington requires the provision of a Notice to Customer and/or a Preclaim Notice of Right to Lien. **See Chart #1 (Private Works Lien Claims).**

2. Construction Lien Claims

Oregon and Washington both require construction lien claims to be recorded. The content requirements for construction lien claims in Oregon and Washington are similar. However, Oregon and Washington differ greatly as to when a construction lien must be recorded. In Oregon, lien claimants have 75 days to record their liens, and in Washington, lien claimants have 90 days to record their liens. Given the fact that an untimely construction lien is essentially useless,

the differences between the lien recording deadlines in Oregon and Washington are very important. **See Chart #2 (Private Works Lien Claims).**

3. Post Claim Construction Lien Notices and Foreclosure

After recording, Oregon and Washington both require that construction lien claimants provide copies of their lien claims to specified parties. Washington lien claimants must provide copies of their lien claims to all owners of the subject real property within 14 days of recording. Oregon requires lien claimants to provide copies of their liens to all owners of the subject property and mortgagees within 20 days of recording.

In both Oregon and Washington, foreclosing a construction lien claim is accomplished by filing a lawsuit in the county where the subject property in located. However, construction lien claimants in Washington have 8 months from the lien recording date to foreclose, and construction lien claimants in Oregon only have 120 days from the lien recording date to foreclose. **See Chart #3 (Private Works Lien Claims).**

4. Pre-Claim Bond Notices

Oregon and Washington have both enacted their own "Little Miller Acts" to protect those who provide professional services, labor, materials, and equipment to public works projects. In Oregon, there are no preclaim requirements for the assertion of a public works bond claim. This is not true in Washington. **See Chart #4 (Public Works Bond Claims).**

5. Assertion and Foreclosure of Bond Claims

Generally, the calculation of bond claim deadlines in Washington is based on acceptance of the subject project by the public body. However, Oregon bond claim deadlines are based on the claimant's last day of work on the subject project. Furthermore, there is no hard and fast deadline for foreclosing a public works bond claim in Washington. Generally, the bond itself will set out when a lawsuit must be filed. A bond claimant in Oregon, however, must commence a lawsuit to foreclose its claim no later than two years after its last day of work on the project. **See Chart #5 (Public Works Bond Claims).**

6. Retainage Lien Claims

Washington has enacted a detailed set of statutes governing the assertion of retainage lien claims. Washington's statutes set out notice and claim requirements similar to its public works bond claim requirements. Oregon has no specific statutes governing the procedure for retainage lien claims. Oregon allows claims against retention; however, there are no specific claim presentation and notice requirements. **See Chart #6 (Public Works Retainage Lien Claims).**

7. Conclusion

The similarities and differences between the construction lien and bond claim statutes of Oregon and Washington can be a source of confusion. The tables on the following pages should serve to alleviate some of this confusion and bring a measure of clarity to complex areas of law.

Table #1 (Private Works Lien Claims)

WASHINGTON			OREGON		
Who	**What**	**When**	**Who**	**What**	**When**
Contractors working directly for an owner on 4 residential units or less if the contract is $1,000 or more, and commercial projects when the contract is between $1,000 & $60,000.	A **Notice to Customer** must be provided. No particular delivery method is required, but the notice should be sent by certified mail or personally delivered with a receipt. Lien rights depend on giving the notice. RCW 18.27.114	Before the contractor commences construction work.	Contractors working on residential construction that exceeds $1,000. If the contract originally does not exceed $1,000, but is subsequently amended and does exceed $1,000, the notice must be sent.	**Information Notice to Owner** must be provided to all owners. ORS 87.093	On the date the contract is signed, or within 5 days of agreement if there is no written contract.
N/A			All contractors who bid on residential repair, remodel or construction projects.	**Consumer Notification** must be provided to the owner. ORS 701.055	At the time of submitting a bid or proposal for work.
Material and equipment suppliers who do not have a contract with the owner, and subcontractors who repair, alter, or remodel an existing owner occupied single family residence and do not have a contract with the owner.	**Preclaim Notice of Right to Lien** must be provided to all owners and the prime contractor by certified or registered mail, or by personal service with a receipt or acknowledgement. RCW 60.04.031	<u>New single family</u>: within 10 days of first work or delivery. <u>Commercial:</u> within 60 days of first work or delivery. <u>Owner occupied residences:</u> first day of work or delivery.	All original contractors, subcontractors, and materials suppliers who are required to give this notice under ORS 87.021. The statute should be thoroughly reviewed. When in doubt, send the notice.	**Notice of Right to Lien** must be provided to all owners & mortgagees by personal delivery or by registered or certified mail. ORS 87.021 & 87.025	Within 8 business days of first delivery of material or performance of labor.
Potential Lien Claimants on projects that don't have a payment bond equal to at least 50% of the amount of construction financing.	**Notice to Real Property Lender**. If provided, it must be given to the lender, owner and prime contractor by certified or registered mail, or by personal service with a receipt or acknowledgement. RCW 60.04.221	Between 6 and 35 days after payment is due the claimant.	N/A		
N/A			All original contractors, subcontractors, and material suppliers who receive demand.	**List of material, labor, etc.** with a statement of charges and unpaid balance must be provided to the demanding party. ORS 87.025 & 87.027	Within 15 business days after receipt of written demand. (prior to lien recording)

Table #2 (Private Works Lien Claims)

WASHINGTON			OREGON		
Who	**What**	**When**	**Who**	**What**	**When**
All lien claimants.	**Record a Construction Lien Claim** in the county where the real property is located. RCW 60.04.091	Within **90 days** of the claimant's last day of substantial original performance.	All lien claimants.	**Record a Construction Lien Claim** in the county where the real property is located. ORS 87.035	The earlier of **75 days** after the claimant's last day of substantial original performance, or 75 days after project completion.

Table #3 (Private Works Lien Claims)

WASHINGTON			OREGON		
Who	**What**	**When**	**Who**	**What**	**When**
All lien claimants who recorded a lien.	Provide a copy of the lien to all of the project's owners by certified or registered mail or by personal service. RCW 60.04.091	Within 14 days after recording the lien claim.	All lien claimants who recorded a lien.	**Provide a copy of the lien** to all owners & mortgagees by hand delivery or certified or registered mail. ORS 87.039	Within 20 days after the lien is recorded.
N/A			All lien claimants who recorded a lien.	**List of materials, labor, etc.** with a statement of charges and unpaid balance. ORS 87.057	Within 5 days after receipt of written demand received after the lien is recorded.
N/A			All lien claimants who recorded a lien.	**Notice of Intent to Foreclose** must be provided to all owners & mortgages by hand delivery, certified or registered mail. ORS 87.057	Not less than 10 days before filing suit to foreclose the construction lien claim.
All lien claimants who recorded a lien.	**Foreclosure lawsuit** must be filed. RCW 60.04.141	Within 8 months of recording the claim of lien.	All lien claimants who recorded a lien.	**Foreclosure lawsuit** must be filed. ORS 87.055	Within in 120 days after recording the claim of lien.

Table #4 (Public Works Bond Claims)

WASHINGTON			OREGON		
Who	**What**	**When**	**Who**	**What**	**When**
All subcontractors and suppliers that do not have a contract directly with the prime contractor on the project at issue.	Provide **Preclaim Notice of Payment Bond Claim** to the prime contractor by certified mail. RCW 39.08.065	Within 10 days of first supplying materials or equipment. Generally no relation back, but there is a possible exception for open accounts. Do not rely on this exception.	N/A		

Table #5 (Public Works Bond Claims)

Washington Bond Claims			Oregon Bond Claims		
Who	**What**	**When**	**Who**	**What**	**When**
Prime contractors, subcontractors and suppliers. Material and equipment suppliers may not have a claim against the bond depending on whom they supplied to. This is a gray area.	Provide a **Notice of Payment Bond Claim** by certified mail on the public body that let the contract. RCW 39.08.030	Within 30 days of acceptance of the work or improvement by the public body.	All contractors, subcontractors, and suppliers on public works projects.	**Claim Notice** must be given by registered or certified mail or hand delivered to the contractor that provided the bond, the clerk or auditor of the public entity, and/or the state agency. ORS 279.528	Within 120 days after last substantial performance of labor, delivery of materials, or rental of equipment.
All claimants.	**File suit** to foreclose the payment bond claim.	Deadline is usually stated in the bond, but foreclose the claim at the same time as a companion retainage lien.	All claimants.	**File suit** to foreclose the payment bond claim. ORS 279.536	No later than 2 years after the last day on the project. Not based on the date of the claim.

Table #6 (Public Works Bond Claims)

Washington Retainage Lien Claim Summary			Oregon Retainage Claims (ORS 279.314)
Who	**What**	**When**	
All subcontractors and suppliers that do not have a contract directly with the prime contractor on the project.	**Preclaim notice** to the prime contractor by certified mail or personal service. RCW 60.28.015	Within 60 days of first supplying materials or equipment. There is a relation back period.	There is no retainage lien process in Oregon comparable to that of Washington. Nonetheless, ORS 279.314 provides that: Every public contract shall contain a clause or condition that, if the contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public contract as such claim becomes due, the proper officer or officers representing the state, county, school district, municipality, municipal corporation or subdivision thereof, as the case may be, may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of such contract. ORS 279.314(1) The inclusion of a brief paragraph in a public works bond claim notice regarding ORS 279.314 is a very good idea. If the claimant's bond claim fails, ORS 279.314 provides an alternative avenue of collection.
The prime contractor and all subcontractors and suppliers. A supplier to a supplier may not have retainage lien rights in Washington.	Serve Notice of Claim of retainage lien on public body letting the contract by certified mail. RCW 60.28.011	Within 45 days after completion of the contract between the public body and the prime contractor.	
The retainage lien claimant.	File **suit to foreclose** the retainage lien claim. Generally, a retainage lien claimant will also have a claim against the payment bond. Foreclose both claims together. RCW 60.28.030	Within 4 months after serving the claim, or serve the claim again within 4 months of serving the first claim. However, the lawsuit must be filed no later than 4 months and 45 days after project completion.	

UPCOMING CLES

December 3, 2004: "2004 Practitioner's Guide to the CCB"

This CLE will be an update on the bi-annual "Practicing before the CCB" series. Topics include recent legislative and administrative rule changes, CCB enforcement issues and bankruptcy issues. Speakers include Bill Boyd of the CCB, Alan Mitchell and others.

This CLE will be a half-day (morning) seminar (lunch included) and will be held on December 3 at the Sweetbriar Inn in Tualatin. The section's annual meeting will be held after the CLE. For details, contact Alan Mitchell at (503) 620-4540.

Construction Law Section Executive Committee

Roger Lenneberg, current chair:
roger.lenneberg@pcg.com
Janelle Chorzempa, chair-elect:
chorzempa@mca-law.com
Jack Levy, secretary: jlevy@smithfreed.com
Dana Anderson, treasurer:
dana.a.anderson@doj.state.or.us
David Douthwaite, past chair:
ddouthwaite@jedunn.com

Members at Large:

Nancy Cary: ncary@hershnerhunter.com
Gary Christensen:
gary.christensen@millernash.com
Alan Mitchell: alm@scott-hookland.com
Angela Otto: aotto@lawssg.com
Darien Loiselle: dloiselle@schwabe.com
James Van Dyke: jvd@ci.portland.or.us
Newsletter Editor: Alan Mitchell

OREGON STATE BAR
Construction Law Section
5200 S.W. Meadows Road
P.O. Box 1689
Lake Oswego, OR 97035-0889