Construction Law Newsletter

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CITY OF PORTLAND'S EQUAL BENEFITS PROGRAM

Jim Van Dyke
Portland City Attorney's Office

In April of 2006, the City of Portland adopted an Equal Benefits program with an effective date of January 1, 2007. The program requires certain city contractors to provide benefits to employees with domestic partners to the same extent as the employer provides benefits to employees with spouses. Similar programs have been adopted in both Seattle and San Francisco. The program applies to both opposite sex and same sex couples.

Contractors affected by the program are those who enter into contracts with the City where state or city regulations require formal advertisement of the contract. Currently that level is $100,000 for most construction projects, $50,000 for transportation projects, $150,000 for goods and services contracts and approximately $20,000 for professional services contracts. Contractors are not required to have coverage in place before submitting bids or proposals, but must have it before the contract is awarded by City Council or executed if City Council approval for that particular contract is not required.

The program originated with Commissioner Adams' office, who discussed the proposed program with insurance companies before the program was proposed. At present, the insurance landscape is increasingly favorable to such benefits. In Oregon, 8 insurers cover 99% of the small employer group market and 90% of the large employer group market. All of these 8 companies will offer domestic partner health insurance by July 1, 2007; 4 already do with no additional surcharge.

Contractors only have to provide domestic partner coverage to those employees who have registered as domestic partners, either under an employer program or with a local government that permits such registration. Multnomah County has a domestic partnership registry, but the program applies to those who were validly registered by another governmental unit.

The City's program encourages full compliance, but permits a contract to be awarded based on "delayed compliance" under appropriate circumstances. At a minimum, delayed compliance requires the employer to pay the employee the cash equivalent of the cost of providing benefits to spouses of employees. The program also permits waivers under limited circumstances.

There are a variety of questions that have arisen as a result of the program's implementation. Many of these questions are addressed on the City's Bureau of Purchases website, *http://www.portlandonline.com/omf/index.cfm?c=43774*. (Alternatively, go to *portlandonline.com*, look for the "agencies" menu on the left hand side of the page and find the listing for the Bureau of Purchases.) The Bureau's website provides links to the applicable portions of City Code, administrative rules and provides a number of other resources, including a list of Frequently Asked Questions (and answers).

"THE MATRIX" AN APPROACH TO CONSTRUCTION DAMAGE EVIDENCE

Dennis Rawlinson
Miller Nash LLP

As you may know, the recent movie and now a video game entitled The Matrix: Path of Neo are a futuristic action film and video featuring thrilling adventures, never-ending surprises, and unique weaponry.

In stark contrast, those of us who handle complex construction litigation like to keep never-ending surprises and thrilling adventures in our cases to a minimum, but admittedly are always looking for some "unique weaponry" to allow us to communicate the complexities of such cases in a clearer, easily understandable, and effective manner. This brings us back to the topic of The Matrix . . . but a matrix of a different kind, as discussed below.

1. A Challenging Case

Our office, over the last two years, has represented the Portland Art Museum in connection with the Museum's challenges relating to the renovation of the Masonic Temple into the new home of the Portland Art Museum, now known as the "Mark Building." The Mark Building, as you may know, is located on the west side of the downtown Park Blocks. Our representation of the Museum covered a number of issues, but at the heart of the work was a claim for incomplete and uncoordinated drawings against an architectural firm.

The parties entered into a guaranteed maximum price ("GMP") construction contract for $25 million, based on drawings that were supposed to be "complete 100% CDs [construction drawings]," in the words of the senior principal for the architectural firm. During the course of the project, however, more than 2,520 field requests were issued, mostly to clarify the design, including requests for information, items of change, and field directives. This led to a substantial number of change orders, which increased the cost of the project by greater than 40 percent.

The Museum's simple theory was that a substantial portion of the coordination and detail normally contained in construction drawings was not provided until well after construction was underway. As a result, the work was bid and accomplished largely under change orders, rather than under the GMP contract, with the resulting increased costs damaging the Museum.

One of the challenges facing the Museum was that each failure to coordinate and each omission of detail was unique, creating potentially more than a thousand unique failures and omissions. A second challenge was calculating recoverable damages for the myriad failures and omissions.

2. Unique Weaponry

Just as Neo uses unique weaponry in The Matrix, so the Museum employed unique weaponry to substantiate the damages that arose from the myriad omissions and failures . . . by using a matrix. For each omission and failure, the Museum had to calculate what portion of the increased costs arose from direct costs and betterment (which were not recoverable), as opposed to those costs arising from the late timing of the receipt of the design detail and coordination (which were recoverable), including:

a. The increased cost of materials, such as steel (the price of which rose sharply between the time of the GMP contract and later change orders);

b. The premium charged by subcontractors to perform work under change orders rather than under the base contract; and

c. Other costs arising from the failures and omissions, such as demolition and rework, which provided no benefit to the Museum.

The unique weaponry that solved these challenges was the preparation of a multipage matrix that described in detail each of the defects and omissions and disclosed and calculated to

what extent each failure and omission constituted direct costs and betterment (or owner-requested change orders and unforeseen conditions), which remained the Museum's responsibility, and those relating to increased costs of material, increased subcontractor costs, and rework and demolition, which arose from the failure of the architect to perform design work in a timely manner.

The matrix was developed by Everett Stitz of Hainline & Associates, Inc., a construction damage expert out of Seattle, Washington. The matrix, which had hundreds of entries, allowed the reader to, at a glance, determine what portion of the overall increase in cost should be and was being absorbed by the owner (direct costs and betterment) and what portion of the costs was being sought as damages against the architect. Moreover, the matrix allowed a reader to determine totals for the following categories, which led to the increased costs resulting from the change orders:

a. Unforeseen conditions;

b. Field conflicts;

c. Owner-requested changes;

d. Plan omissions;

e. Time and material charges;

f. City building bureau requirements; and

g. Costs related to value engineering.

At the same time, the reader was able to focus on any one of the hundreds of defects and determine the total change-order cost arising from that defect, to what extent the analysis disclosed owner responsibility to absorb the increased costs, to what extent damages were being sought against the architect for the increased costs, and why one or the other was being charged. In short, the matrix proved to be a unique weapon to use effectively in the presentation of evidence arising from complex facts.

A copy of an excerpt from the matrix is included as Exhibit No. 1 for your information and consideration. The matrix approach is adaptable to a number of complex claim applications in the construction field other than design claims. For instance, the same type of matrix analysis could be used to show contractor, subcontractor, or subconsultant negligence or breach of contract; the costs arising therefrom; and the allocation between nonrecoverable costs and recoverable damages.

3. Path of Neo

As adolescents across the country savor the unexpected surprises, thrilling adventures, and unique weaponry of The Matrix, you may want to consider using a construction version of the matrix to enhance the presentation of damage claims and minimize exposure to unexpected surprises and thrilling adventures.

See Exhibit 1 on the following pages:

Portland Art Museum Change Order Analysis (By Damage Matrix)

CO #	Prop. #	Source	Description	Paid Proposal Cost	Unforesee n	Field Conflict
1	002	CO 02	Increase the contract amount to cover structural steel surcharge increases from bid time to the notice to proceed	$37,460		
1	002.1	CO 02	Increase the contract amount to cover reinforcing steel surcharge increases between bid time and the notice to proceed	$16,660		
1	017	RFI 012	Increase the contract amount to close out the net affect of various sheet metal value engineering items. This change confirms revisions made by Streimer Sheet Metal to the exterior wall panels.	$8,754		
1	019	RFI 008.1	Change in glass in Type II windows specified in RFI 8.1	$1,896		
1	042	RFI 020	Revised detailing on full height glass walls	$1,587		
1	055	CO 09	Unforeseen subsurface conditions encountered on 5/3/04 while installing pin piles	$5,120	$5,120	
3	103	CO 14	The mechanical contractor was only to achieve a savings of $75,390 instead of the forecast V.E. Savings of $80,000 by switching to McQuay chillers	$4,698		
4A	008.1	IOC 001	Reduce the masonry scope of work per IOC No.1 R.3	($59,502)		
4A	033.3	IOC 006	Electrical revisions in IOC 6R including additions and increases in fixture costs due to the delays in closing ou the electrical V.E.	$7,512		
4A	58.2	IOC 035R	Confirming deletion of SST cladding and EI light fixtures from Value Engineering through IOC 035R	$9,468		
4A	062	IOC 012	Revisions to the original demolition plan at the east balcony as shown in IOC 12	$6,672		
4A	074	IOC 009	Revisions to shop drawings for windows including clarifications to changes in IOC 9	$1,661		
4A	91	IOC 017	Add Fire Sprinkler heads at glass doors. This involves V.E. 8.4 and IOC 017	($15,967)		
4A	110	RFI 180	Existing 8" storm drain and sewer lines were encountered at the North Basement as referenced in RFI 180	$4,184	$4,184	
4A	111	IOC 022	Closeout of waterproofing allowance with items described in IOC 022	$1,505		
4A	115	RFI 218	Revisions made at the M-Line wall footing in response to RFI 218	$5,476		
4A	160	RFI 326	Revise structural steel framing at floor 2 mezzanine on Grid Lines 7, N-P as directed in RFI 326	$1,661		
4A	174	RFI 334	Incorporate Added Structural Reinforcing per RFI Nos. 334 and 334.1 to Tie High Roof to Parapet After Discovering the Parapet was Unstable	$18,614	$18,614	
4A	186.2	IOC 060	Revise low roof parapet from sheet metal to elastomeric due to unforeseen waterproofing issues addressed in IOC 60	$21,617	$21,617	
4A	198	IOC 042	Revisions made to the interior elevator finishes by IOC 42	($2,648)		
4A	200	IOC 040	Savings realized by changing light traxks to lightoler through IOC 40R	($6,581)		
6	171.1	RFI 313	Modify Drag Struts on Upper Roof (4/S5.12) Due to Unforeseen Conditions	$17,458	$17,458	
8A	414	IOC 085	Floor Revisions From Submittal Review	$6,567		
9A	382	FD 013	Add Wall Reinforcing at HCT Walls @ Vest. 111, 1st Flr & 1M	$12,612		
10A	427	RFI 787	Additional angle iron was added on the rail of the parapet for east curtainwall support. This was in response to RFI 787 and was done on T&M.	$1,044		
13	498	IOC 077	Oregon Electric was requested to provide service to the stage area of the Grand Ballroom to accommodate the installation of Owners Stage Lighting and control being done by others. This was requested on IOC 77.1.	$95,257		
13	562	RFI 875	The door installer found credits that had not been issued after reviewing shop drawings	($3,078)		
13	598	RFI 946	The depth of the existing concrete floor was too shallow to anchor the SS handrail posts according to the plans. This is considered as an unforeseen situation.	$2,671	$2,671	
14A	450	RFI 789	At the exterior walls of the south galleries the plans had a furred wall inside of the shotcrete surface with a fire rating to protect the vapor barrier at the insulation. In RFI 789 the contractor proposed switching to a fire rated vapor barrier which allowed one layer of gypsum wallboard to be deleted.	($10,905)		
15B	410	RFI 714	Revise FTR's in Kitchen Rms 145 & 146. The specified heaters would not fit and needed to be replaced. The labor was estimated using MCA Manhours but they were not discounted by 50% which was the mechanical contractors bid discount.	$11,779		$5,085
16A	557	RFI 919	The existing concrete slabs at the overlook on 2M were not the thickness as anticipated. This required modified steel slab edge supports.	$3,361	$3,361	

Exhibit 1
nd Art Museum
aalysis (By Damage Matrix)

OWNER					IMPACTS				
Owner Request	Plan Omission	Time & Materials	Building Dept.	V.E. & Initial	Arch. Partial Respon.	Arch. Full Respon.	Schedule Recovery	Damage Matrix	Cost with Fee
				$37,460	$0			CC	
				$16,660	$0			CC	
				$8,754	$0			CC	
				$1,896	$0			CC	
				$1,587	$0			CC	
					$0			CC	
				$4,698	$0			CC	
				($59,502)	$0			CC	
				$7,512	$0			CC	
				$9,468	$0			CC	
				$6,672	$0			CC	
				$1,661	$0			CC	
				($15,967)	$0			CC	
					$0			CC	
				$1,505	$0			CC	
		$5,476			$0			CC	
		$1,661			$0			CC	
					$0			CC	
					$0			CC	
				($2,648)	$0			CC	
				($6,581)	$0			CC	
					$0			CC	
				$6,567	$0			CC	
	$9,942				$2,670			CC	
		$1,044			$0			CC	
$95,257					$0			CC	
				($3,078)	$0			CC	
					$0			CC	
				($10,905)	$0			CC	
					$6,694			CC	
					$0			CC	

NEW CLACKAMAS COUNTY CONSTRUCTION LITIGATION PROCEDURES

Jack Levy
Smith, Freed & Eberhard, PC

On March 2, 2007 Clackamas County Presiding Judge Steven Maurer announced that the Clackamas County Court will be adopting construction litigation procedures, effective immediately. The Clackamas County program is modeled after the Multnomah County referee program for construction disputes. The significant difference is that the Clackamas County process contemplates that the referee will hear ORCP Rule 21 motions, where Multnomah County's program does not. A copy of the court's notice is reprinted below.

Clackamas County Circuit Court Notice Regarding New Clackamas County Circuit Court Construction Litigation Procedures

NEW REFEREE PROCEDURE

Beginning immediately the Clackamas County Circuit Court will allow parties to opt out of the normal 12-month trial system in construction litigation cases by participating in a new Referee system based on ORCP 65. The Referee system is a procedure that was designed to deal with complex construction litigation (especially construction defect cases). If the parties do not choose to participate in this program, they will not be granted trial extensions beyond the 12-month period designated in UTCR 7.020(5) absent extenuating circumstances upon application. Cases in the Referee system will be designated complex cases under UTCR 7.030 for purpose of trial scheduling. The parties will be responsible for the Referee's fees.

REFEREE AUTHORITY

Under the Referee system, the Referee will have the authority to manage discovery and case scheduling, including submitting a recommended trial date all parties agree to which is within 18 months of initial filing date. Any request for trial extension beyond 18 months will require the Referee's recommendation to do so and approval by Presiding Court. In no event will a trial date setting be allowed beyond 24 months. The Referee will have the authority to rule on discovery motions. The Referee will also have the authority to hear and decide motions to join parties beyond the 90 days specified in ORCP 22, however, the Referee may only allow the joinder of additional parties during the one year period following the initial filing date. The Referee shall have authority to rule on Rule 21 motions as well as motions relating to discovery issues. The Referee shall also have authority to rule on summary judgment motions with the consent of the parties. All decisions rendered by, or orders issued by, the Referee may be reviewed by Presiding Court or its designee upon application under ORCP 65E(3).

REFEREE SELECTION

The parties can stipulate to being part of the new Referee system. Absent a stipulation, any party can file a Motion to Designate as Complex Litigation and Appoint Referee (motion) asking the Court to rule on whether the case will be allowed to go into the new system. The motion must be filed with the Presiding Court or Presiding's designee no later than 30 days after the date the party is served with Summons and Complaint. The plaintiff must file the motion no later than 30 days after the last party is joined or within 180 days of filing, whichever is sooner.

The parties have three options for selecting a Referee: 1) pick a Referee from a list provided by the Court; 2) stipulate to a Referee; or 3) the Presiding Court will select a Referee at a scheduling conference if the parties do not select one by a date certain.

The Court will maintain a list of pre-qualified Referees. Referees will be required to meet the qualifications established for court appointed arbitrators under UTCR 13.090, except that a Referee shall also have a minimum of 7 years experience handling construction matters or be a Senior Judge for the State of Oregon. The

rule is to be applied to the Referee system by substituting the term "Referee" for the term "arbitrator."

The rights, obligations, and procedures established for arbitrators and conciliators and parties under ORS 36.476 (Disclosure by Proposed Arbitrators and Conciliators; Waiver of Disclosure; Grounds for Challenge), ORS 36.478 (Procedure for Challenging Arbitrator), ORS 36.480 (Withdrawal of Arbitrator; Termination of Mandate) and ORS 36.482 (Substitute Arbitrator; Effect of Substitution) will apply equally to Referees and the parties under the Referee system, including without limitation, parties brought into the suit after the Referee is appointed. The statutes are to be applied to the Referee system by substituting the term "Referee" for the term "arbitrator." In addition, a party which anticipates bringing third party practice claims under ORCP Rule 22C will provide the Referee a list naming all the potential third/fourth/etc party defendants so that the Referee can make the disclosure required under ORS 36.476.

CRITERIA FOR REFERENCE

In addition to the criteria contained in UTCR 7.030(2) the Court will also consider: 1) the amount(s) in controversy; and 2) the involvement of insurance carriers and insurance coverage issues.

CONTENTS OF ORDER APPOINTING REFEREE; TWO TRACK SYSTEM

The Referee will operate on two simultaneous "tracks." The first track is the core case. As part of the core case, once a Referee has been agreed upon or appointed the parties will submit a recommended Order Confirming Appointment of Referee in Complex Construction Case (Order) to the Court for review, approval, and execution. A generic form of Order is attached for reference.

The second track will address any applicable insurance coverage issues.

The Order will contain mandatory provisions and optional (but encouraged) provisions. The mandatory provisions will include: 1) discovery deadlines; 2) dispositive motion deadlines; 3) alternative dispute resolution deadlines (including a deadline for selection of a mediator - who may be someone other than the Referee); 4) a presentation by the Plaintiff(s) of a defect list, a.k.a. Bill of Particulars; 5) a Defendant's statement of which of its third/fourth/etc. party defendants performed the work being complained of in the Third/Fourth/etc. Party Complaint; and 6) a trial date.

The optional provisions may include: 1) the response of each party to the claims against it; 2) the preparation of and a timeline for the scope of repair proposed by Plaintiff(s); 3) a demand by a Third/Fourth/etc. Party Plaintiff to those defendants it sued in the case; 4) a joint defense response to the statement of claims, defects and damages of Plaintiff(s); 5) a joint defense scope of repairs; 6) disclosure of experts; 7) exchange of expert reports; 8) depositions of experts; 9) depositions of other witnesses; and 10) any other collaborate effort to expedite and streamline the litigation.

On the second coverage track, the Referee may require each party to submit the following: 1) the names of all potential insurance carriers for each party; 2) copies of the Reservation of Rights letters from each carrier; 3) the name and contact information for the adjuster for each carrier; 4) copies of each carrier's policy for each party. The Referee will have the ability to advise the parties to retain coverage counsel. Regardless of whether or not the Referee chooses to provide this advice, the Referee shall not be deemed to be providing legal advice.

The Referee will have the ability to require the parties to engage in mediation on either or both of the two "tracks." For insurance-related mediation, the Referee may require insurance adjusters to physically attend the mediation and that the adjuster have complete authority to settle the claim. The mediator will be someone other than the Referee. However, the mediator will report any non-compliance to the Referee, who

will have the power to hear show cause motions for remedial contempt.

If mediation does not resolve the case, the Referee will prepare a report discussing the value of each of the claims (both monetarily and legally) and an allocation of responsibility among the parties. The Referee will submit a copy of this report under seal to the court to be used only after trial on the merits, and the trial judge may consider the Referee's report as a factor in considering the reasonableness of attorneys' fee awards, if attorneys' fees are at issue in the case.

If you have any questions regarding the new Referee system you may call Eva Marcotrigiano in the Presiding Court at 503-722-2732.

The Honorable Steven L. Maurer, Clackamas County Presiding Judge.

See Sample Order From Court reprinted at the end of this issue.

LEGISLATURE CONSIDERING TASK FORCE RECOMMENDATIONS

Eric Grasberger
Stoel Rives

On January 12, 2007 the Construction Claims Task Force signed its Final Report to the 74th Oregon Legislative. The report contains 11 primary recommendations, eight of which require formal legislative action. The House Committee on Consumer Protection, chaired by Representative Paul Holvey, is sponsoring the Task Force recommendations, and all eight have been included in draft bills. The recommendations are summarized below with a short comment on the status of each.

The Task Force was made up of nine state-appointed members: four members work in the construction industry; two work in the insurance industry; one works in the residential design field; one member is an employee of the Oregon Department of Energy; and one member (this author) represented commercial and residential consumers of construction and design services.

1. New Building Code Requirements

To help prevent moisture infiltration and improve ventilation, the Task Force recommends that framing components carry a moisture content of less than 19 percent when enclosed and that ventilation systems contain minimum flow rates, automatic on/off features, and be properly located. Also recommended is horizontal flashing of all building penetrations and joints between dissimilar siding materials. These recommendations will be addressed by the Building Codes Division in committee meetings and do not require legislative action. Other requirements were considered, such as "rainscreen" systems, but the Task Force was unable to conclude that rainscreen is necessary or would function well in all envelope types. Rainscreen was recognized, however, as a "best practice."

2. Enhancement of CCB Enforcement Powers

The Task Force recommends expedited license suspension powers for the CCB, along with greater ability to prevent problematic managers from serving as owners or managers of new entities. Also required would be disclosure of past financial malfeasance and past criminal activity, along with enhanced ability of the CCB to investigate a contractor's background in these areas. Although the Task Force recommended that the CCB be granted criminal citation authority, this recommendation was dropped by the House Committee and/or the CCB early in the process. The current bill is HB 2659.

3. Limited Consumer Assistance Fund

The Task Force recommends the creation of a limited consumer assistance pool that would be funded primarily from CCB fines and penalties and would supplement CCB bonds, which were

shown to be inadequate during testimony offered to the Task Force. The maximum benefit per claimant would be $20,000, and the minimum fund balance would be $250,000. The maximum payout for claims against any one contractor in a single year would be $100,000. The CCB would administer the fund and have subrogation rights against offending contractors. The fund concept has some opposition but is still progressing (HB 2658).

4. Improved Consumer Information Program

Under the Task Force recommendations, notice forms to consumers would have to be signed by the consumer to be effective, and the lack of a written contract would invalidate a construction lien. Failure to provide and execute the forms would also extend the CCB claim filing period from one year to two years. The draft bill (HB 2657) appears to be unopposed.

5. Residential Permit Application Changes

Another recommendation is that permit applicants must specify the owner of the project, the contractor, the CCB license number, and the certified envelope specialist (see No. 6 below). In addition, the Task Force suggests that a standard inspection checklist should be created, showing the municipality's minimum scope of responsibilities. This checklist would clearly communicate to consumers what is (and what is not) to be inspected by the municipality. These issues will be addressed at the Building Codes Division administrative level and not through legislation.

6. Building Envelope Training and Certification

The most important recommendation of the Task Force is that contractors working on any aspect of a building envelope (exterior walls, windows, doors, decks, roofs, etc.) be required to have a "certified envelope specialist" observe substantial portions of the envelope construction. Key to this new law would be a requirement that each individual worker installing elements of the envelope also be certified for his or her particular trade(s). Both the individual workers and the certified envelope specialist would be trained, obtain certification and carry a certification card. Because most construction defects involve moisture intrusion and envelope failure, this recommendation has the best chance of reducing construction claims in Oregon.

Unfortunately, there is significant opposition to the individual certification requirement. This opposition is based on the great number of contractors performing envelope work in Oregon and the magnitude of the effort it would take to get all workers certified. While the undertaking would be significant, the Task Force believed that the investment would pay off and would, more than any other measure, significantly reduce defects. During Task Force meetings, a plasterers union and some individual contractors testified that implementing such a program would not be as difficult as it may seem (the union had already done so for its members) and would yield enormous improvements in the quality of construction. The Task Force vote was unanimous in support of this measure, but its status before the legislature is uncertain. The current bill is HB 2656.

7. First Party Warranty

The Task Force recommends a three-tiered warranty program: a one-year warranty against all defects, a two-year warranty for major systems (such as HVAC) and the envelope, and a 10-year warranty against structural defects. Included in the recommendation and the draft bill was a prevailing party attorney fee provision and a clause disallowing any limitation or disclaimer of the minimum warranty. There is opposition to this bill, most of which is aimed at the attorney fee provision. The Task Force supported the attorney fee provision to create equity between a contractor's lien claim (which includes an attorney fee right) and a consumer's warranty claim. The current bill is HB 2655).

8. Completed Operations Coverage

Under the recommendations, the minimum insurance required to obtain a contractor's license would have to include completed operations coverage, which protects against claims for defects arising after a project is built. Most construction defects are covered, if at all, under the completed operations coverage of a general liability policy. Because the licensing statute currently does not require this coverage, the Task Force recommended a change. There is no opposition to this bill (HB 2654).

9. Owner–and Contractor–Controlled Insurance Programs

Owner and Contractor controlled insurance programs (known as "WRAPs") provide one insurance policy covering multiple contractors involved on a single project, particularly condominiums and other for-sale residential projects. Increasingly, condo and for-sale projects are excluded from prime and subcontractor general liability policies, making WRAPs the only insurance option for some projects. To reduce the cost of WRAPs and encourage their use, the Task Force recommends improving the ability of admitted (in-state) insurance companies to compete on the same level as surplus lines (out-of-state) insurance carriers in the WRAP market by dropping the $90 million dollar project value threshold applicable only to admitted carrier WRAPs. The draft bill dropping the threshold has no opposition of which the author is aware (HB 2751).

10. Loss-Control Discounts

The Task Force is encouraging insurance carriers to implement voluntary loss-control discounts for contractors who adopt the Task Force's recommendations or otherwise employ "best practices." The Oregon Insurance Division will implement regulations or policies supporting the discounts. No legislative action is required.

11. Insurance Data Reporting Requirements

The Task Force recommends that the Oregon Insurance Division develop a set of data points (such as dollars paid out for different types of defects) that each insurance company must maintain and provide to the Insurance Division upon request. In the future, when insurance problems or crises arise, the Insurance Division will be better able to understand and possibly solve the problems. The insurance industry is opposing this bill and the two Task Force members from the insurance industry voted against it during Task Force meetings; all other Task Force members supported the concept.

The Task Force work involved numerous meetings over a 16-month period, testimony from over 30 industry experts and leaders, significant public testimony, and over 400 submissions to its Web site. The Task Force expects that its extensive research and balanced industry analysis will lend significant credibility to its recommendations.

As stated during a recent meeting of the Construction Section of the Oregon State Bar, all members are encouraged to track the progress of these bills and offer testimony to ensure that the legislators have as much information as possible. Most legislators have little background in the issues and could use our input.

For more information, visit

http://egov.oregon.gov/DCBS/CCTF/.

NEWSLETTER POLICY UPDATE

Alan Mitchell
Mitchell Law Office, LLC

At its March 12, 2007 meeting, the Construction Law Section's Executive Committee voted to allow certain notices to be published in this newsletter.

Notices will be allowed if they meet the following criteria: (1) They are from or concerning a Section member; and (2) They are "newsworthy," which is defined as concerning recent moves, new firms, new services, etc. Notices will be published only a single time and whether a notice is accepted for publication is at the discretion of the newsletter editor.

If you have a notice you would like published, please email it to Alan Mitchell (Alan@Mitchell-LawOffice.com).

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FREE LUNCHTIME MINI-CLE SERIES

The OSB Construction Law Section is sponsoring a free lunch time CLE series for 2007. The series will give the new construction law practitioner a "nuts and bolts" background on the important, basic issues and concepts at work within the field.

Each session will be held at Schwabe Williamson & Wyatt, 1200 S.W. Fifth Ave Suites, Portland, Oregon. The sessions will start sharply at noon and is scheduled to last 50 minutes with 10 minutes for questions and answers. To reserve your seat for a particular session or the whole series, contact Diane Salt at 503-796-3744 or dsalt@schwabe.com. The Section will apply for CLE credit.

4/6/07 – CONSTRUCTION DELAY CLAIMS
(Steve Pinnell, Pinnell Busch, Inc.)

6/1/07 – MOLD AND INDOOR AIR QUALITY ISSUES IN CONSTRUCTION
(Greg Baker, AMEC Earth & Environmental, Inc.)

8/3/07 – CONSTRUCTION DEFECT CLAIMS
(Joe J. Johnson, President - Johnson Construction Consulting, Inc., Architect/AIA)

10/5/07 – PUBLIC CONTRACTING
(Jim Van Dyke, City of Portland, and Dana Anderson, Oregon Department of Justice)

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

_____, Plaintiff(s), vs. _____, Defendant(s).	Case No. _____ ORDER DESIGNATING CASE COMPLEX LITIGATION AND APPOINTING REFEREE REGARDING _____ (THE "PROJECT")

THIS MATTER coming before the Court on Motion of _____ [MOVING PARTY], _____[NAME], _____ _____ [ADDRESS], _____[PHONE], _____ [FAX], shall be appointed Referee pursuant to ORCP 65 on the above referenced matter, which is hereby designated a complex case under UTCR 7.030, on a showing that exceptional conditions require it, to hear and determine certain pre-trial matters including motions regarding pleadings, discovery, discovery motions, case management and settlement negotiations and to report findings and make recommendations to the Court, and good cause appearing.

Scope of Order. This Order Appointing Referee, as may be modified and supplemented by further orders of this Court, shall govern all further discovery, case management, and settlement matters in this action. All such matters shall be set for hearing and heard before the Referee. Before setting such matters, available dates must be verified with the Referee. Before setting such matters, available dates must be verified with the Referee. The Referee shall be

responsible for hearing ORCP 21 motions but shall not hear motions for summary judgment, or other substantive motions as addressed in the Hearings Review paragraph, unless by unanimous consent by all parties. The Referee may not rule upon the admissibility of evidence. Further, the Referee does not have the authority to put witnesses on oath nor may the Referee personally examine witnesses.

Scheduling Teleconference. Counsel for all parties shall conduct a telephone conference no later than 30 days after service of the Complaint, Third-Party Complaint or final "third-party practice" pleadings under ORCP 22, whichever occurs last, to establish a schedule for: 1) discovery deadlines; 2) dispositive motion deadlines; 3) alternative dispute resolution date; and 4) trial date. In the event this Scheduling Teleconference does not occur within the time prescribed in this Order or if the parties cannot agree on the required deadlines or dates, counsel for any party may request the Referee to conduct a Scheduling Teleconference with all counsel and the Referee shall do so on a schedule convenient to the Referee. The Referee shall be the final arbiter of the schedule subject to a party's opportunity to apply for *de novo* review pursuant to the Hearings Review paragraph. The Referee shall have the discretion to schedule additional teleconferences with the parties' counsel for case scheduling or other purposes and will notify counsel of the call-in number and the confirmation number for such teleconferences.

Service of this Order. A copy of this Order and all subsequent Orders regarding this reference shall be served with any third-party practice pleading under ORCP 22C bringing in a new party for any claims related to or arising from the Project. Failure to comply with this paragraph may result in a discovery sanction, at the discretion of the Referee, upon motion to the Referee.

Hearings: Review. All matters of any kind pertaining to pleadings, discovery, case management and settlement matters shall be noticed to be heard before the Referee. The time limitations applicable to serving the Referee with a motion to compel or to produce, and oppositions and replies thereto shall be as set forth in all court rules with respect to timely filings of similar motions with the Court, unless shortened by the Referee. Such motions may be heard

by the Referee, at the discretion of the Referee, for good cause shown, on a shortened time and on an informal basis. Matters involving substantive legal issues not related to discovery, case management, pleading issues or settlement matters, shall be submitted to the Court upon proper motion and notice, unless by unanimous consent of all parties to submit such matters to the Referee. Rulings of the Referee may be reviewed by applying to the Presiding Court or its designee. A party must file its motion for review within 10 days of service of the ruling from the Referee. If the request is not filed within that time period, the ruling of the Referee will become final and subject to enforcement by order of the Court confirming the ruling.

Investigation and/or Destructive Testing by Plaintiff(s). Absent a stipulation by all parties' counsel, Plaintiff(s) shall provide prior written notice of the dates of all "investigation and/or destructing testing" to all counsel. "Investigation and/or destructive testing" means the dismantling of any of the components or materials related to the Project for the purpose of analyzing, testing, inspection or other evaluation, the results or outcome of which are intended to be used at trial or any other legal proceeding (including but not limited to use in connection with summary judgment motions). Such notice must be sent by fax, overnight mail or hand delivered not less than fifteen (15) business days prior to the first date of any testing. Notice of the specific location(s) and time(s) for all inspections and testing shall be provided to all counsel not less than seven (7) working days prior to each inspection date, with subsequent updates of the location(s) and/or schedule(s) to be provided as these change. Counsel and experts for each party in the case may attend to observe. The Referee shall resolve any dispute arising out of the time, place and manner of investigation and/or destructive testing, upon motion of a party. If timely notice is not given, all evidence obtained by Plaintiff(s), including any and all findings, analyses and opinions of Plaintiff(s) and its consultant(s) and expert(s) based or derived from such investigation and/or testing will be barred from use in the trial of this action upon motion of the aggrieved party.

Repairs by Plaintiff(s). Plaintiff(s) shall provide seven (7) working days prior written notice to all counsel before performing any repairs involving the Project, except that Plaintiff(s)

may perform "emergency repairs", so long as written notice is given to all parties within twenty-four (24) hours after counsel for Plaintiff(s) has actual notice of such repairs. "Emergency repairs" are those repairs which, in accordance with recognized engineering or construction practices, are deemed immediately necessary to prevent imminent injury to persons or property. If timely notice is not given, all evidence obtained by Plaintiff(s), including any and all findings, analyses, and opinions of Plaintiff(s) and it consultant(s) and expert(s) based on or derived from such repairs may be barred in the Court's discretion from use at trial. In deciding whether such evidence is excluded on this basis, the Court may consider the prejudicial effect of the lack of notice to Defendants, and whether such actions were intentional, resulted from mistake, inadvertence, surprise or excusable neglect. However, the Court may also consider any other factors it may deem as relevant in deciding whether to exclude evidence that was procured by Plaintiff(s) without proper notice to Defendants as described in this paragraph. Plaintiff(s) will make all best efforts to save any removed materials, if practical and if requested by one of the Defendants. Defendants will have access to such materials upon request.

Investigation and/or Destructive Testing by Defendants. Absent a stipulation by all parties, all defense investigation and/or destructive testing will be completed 180 days from service of the last third-party practice pleading under ORCP 22C unless otherwise ordered by the Referee. Defendants shall give notice to all parties not less than 15 business days prior to the first date of any investigation and/or destructive testing. To the extent practicable, Defendants shall coordinate their respective investigation and/or destructive testing with other Defendants so as to minimize the impact to the Project and its occupants. All arrangements for investigation and/or destructive testing shall be made through counsel for Plaintiff(s). Notice of the specific location(s) and time(s) for all investigation and/or destructive testing shall be provided to all counsel not less than seven (7) working days prior to each inspection date, with subsequent updates of the location(s) and schedule(s) to be provided as these change. Counsel and experts for each party in the case may attend to observe. The Referee shall resolve any dispute arising out of the time, place and manner of investigation and/or destructive testing, upon motion of a

party. If timely notice is not given, all evidence obtained by the investigating/testing party, including any and all findings, analyses and opinions of its consultant(s) and expert(s) based or derived from such investigation and/or testing will be barred from use in the trial of this action upon motion of the aggrieved party.

Optional Provisions. Upon stipulation by all parties, the Referee may facilitate an expedited and streamlined discovery process that may include:

1. The response of each party to the claims against it;
2. The preparation of and a timeline for the scope of repairs proposed by Plaintiff(s);
3. A demand by a Third/Fourth/etc. Party Plaintiff to those defendants it sued in this case;
4. A joint defense response to the Plaintiff's(s') statement of claims, defects, and damages;
5. A joint defense scope of repairs;
6. Disclosure of experts;
7. Exchange of expert reports;
8. Depositions of experts; and/or
9. Depositions of other witnesses.

The parties may also stipulate to any other collaborate effort to expedite and streamline the litigation. At the request of any party's counsel, the Referee shall conduct a teleconference among all counsel, at the Referee's convenience, to inquire whether and to what extent all counsel are willing to agree to these optional activities. Conversations and documents produced and exchanged in the course of these optional expediting/streamlining activities shall be considered confidential settlement communications under Oregon Evidence Code Rule 408. They cannot be used for any purpose connected with the trial nor does the party's voluntary participation in these optional activities subject that party, its clients or expert to any discovery requirements beyond what is required in the ORCP, including, without limitation, that no party shall be required to produce its expert witness for deposition.

Insurance Issues. Where applicable, the Referee may require each party to submit within 45 days from the Referee's order, the following: 1) the names of all potential insurance carriers for each party; 2) copies of all reservations of rights letters from each carrier; 3) the name and contact information for the adjusters for each carrier; and 4) copies of each carrier's insurance policy for each party. The Referee may increase the time for production of insurance information upon the *ex parte* motion of a party. If these documents are ordered to be produced, they shall be provided to any other party that requests them at the requesting party's own copying expense.

The Referee has the ability to advise a party that, she or it may want to retain independent insurance coverage counsel, at that party's sole expense. Regardless of whether or not the Referee chooses to provide this advice, the Referee shall not be deemed to be providing legal advice.

Further Status Conferences. At such time as the Referee may find it necessary, all parties shall attend further status conferences before the Referee.

Settlement Discussions. On date(s) to be determined by the Referee, the Referee may order the parties to commence Mandatory Settlement Conferences with a separate mediator, which shall continue from time to time thereafter at the discretion of the Referee. If all parties agree the Referee may serve as the mediator for settlement conference purposes. All counsel and their principals and insurance representatives where applicable will be required to personally attend with full settlement authority. The parties' experts and/or consultants may be required to attend at the discretion of the Referee. The mediator will report any non-attendance at the Mandatory Settlement Conference to the Referee. The Referee is authorized to hear show cause motions for contempt brought by any party against another who failed to appear with counsel, principals and insurance representatives where applicable at the Mandatory Settlement Conferences. Said show cause motion shall be briefed under the timeline prescribed in UTCR 5.030. The Referee may excuse a party's attorney, principal, and/or insurance representative upon the *ex parte* request of the party's counsel. The cost of the mediator's services will be split in the same manner as prescribed in the paragraph below for the Referee Fees.

After the last Mandatory Settlement Conference, if the case does not settle, the Referee shall prepare a report discussing the value of each of the claims, counter-claims, cross-claims and third-party claims, both monetarily and legally, and shall prepare an allocation of responsibility among the parties. The Referee will submit a copy of this report to the parties' counsel prior to the trial of the case. Counsel shall deliver a copy of the Referee's report to their respective clients and insurance representatives. The Referee will also submit a copy of this report to the trial judge after trial on the merits if the Court is considering the issue of attorney fee awards. The Court may use the Referee's report to assist in its determination of reasonableness of attorneys' fees.

Ex Parte Orders. All applications to the Referee for *Ex Parte* Orders require twenty-four (24) hour telephone or fax notice to all parties affected by the motion.

Referee Fees. The Referee's fees and costs will be billed from time to time during the pendency of this action. Each party shall pay an equal share of the Referee's fees and costs, however, on a party's application to the Referee, the Referee, as justice requires in the Referee's sole discretion, may order a different allocation of fees and costs.

APPROVED and recommended:

Dated: _____

_____
Referee

IT IS SO ORDERED:

Dated: _____

_____
Presiding Judge

Oregon State Bar
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