Construction Law Newsletter

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

ISSUE No. 28 January, 2007

MESSAGE FROM THE CHAIR

Dana Anderson
Oregon Department of Justice

Greetings and Happy New Year to our Section's nearly 500 members! On behalf of the 2007 Executive Committee I would first like to thank outgoing Chair Jack Levy for a highly productive year in 2006. Under Jack's leadership, the Executive Committee conducted a variety of useful CLE programs and worked with Multnomah County Circuit Court Judges to institute a special procedure for complex construction litigation, including the use of referees with specified procedural authority.

Your Executive Committee meets every two months and has adopted a Preliminary 2007 Schedule that includes a series of six free lunch time mini-CLE programs to be held at various times throughout the year. These programs are designed to give newer practitioners practical information about the construction industry. The topics, dates and other details are outlined in this issue of our newsletter. If these mini-CLE programs prove to be useful, we will plan a similar series for 2008. As always, your suggestions for topics are welcome!

High on our list for 2007 are improvements to the OSB Construction Law Section's website, keeping that site current and making it more useful to the Section. The website will include legislative information during the 2007 session, announcement of upcoming CLE programs and links to useful resources.

We also intend to issue the Section newsletter with greater regularity, and perhaps in a more abbreviated form. Articles, opinions, updates and humorous submissions are welcome at any time from the entire Section membership.

We will wrap up the year with a CLE, to be held in conjunction with our Annual Section Meeting, highlighting construction related legislation from the 2007 session. Our newsletter will have written summaries of those measures sometime this fall (before most new laws, which take effect on January 1, 2008).

Thank you for the opportunity to serve as your 2007 Section Chair. I look forward to an industrious year that meets or exceeds our goals for useful legal education and communication. As always, feel free to share your suggestions with any member of our Executive Committee.

Finally, after the elections at our yearly meeting, the new board beginning January 2007 is as follows:

Dana Anderson – Chair

Alan Mitchell – Chair Elect

Angelo Otto – Secretary

Gary Christensen – Treasurer

Jack Levy – Past Chair

Members at large:

Darien Loiselle

James Van Dyke

Jason Alexander

John Berge

Timothy Dolan.

2006 CASE LAW UPDATE

D. Gary Christensen
Miller Nash, LLP

A. Arbitration: In a dispute within the scope of a valid arbitration agreement, the arbitrator determines whether the plaintiff met contractual and statutory preconditions to compelling arbitration.

Industra/Matrix Joint Venture v. Pope & Talbot, 341 Or 321, 142 P3d 1044 (2006). Industra/Matrix Joint Venture ("IMJV") contracted with Pope & Talbot, Inc. ("P&T"), to construct and install piping and mechanical equipment at a pulp mill. Because of various problems during construction, the project was not completed on time, and both parties incurred additional expenses. IMJV initiated a civil action for breach of contract and quantum meruit against P&T, and later petitioned the court to abate the action and compel arbitration. P&T opposed the petition and filed a motion for summary judgment, arguing that IMJV could not commence litigation or arbitration because it was not licensed with the Oregon Construction Contractors Board (the "CCB") and did not meet contractual preconditions to compel arbitration. The trial court denied IMJV's petition and granted P&T's motion for summary judgment. The court of appeals reversed and remanded, holding that the claims were arbitrable and that P&T's arguments must be ruled on by the arbitrator.

First, the Oregon Supreme Court determined that the claim was arbitrable. Although the parties' contract stated that the Arbitration Act of Oregon (the "OAA") would apply to "any arbitration hearings," the court interpreted the contract to mean that the OAA applied to a hearing itself, and not to prehearing issues. Instead, the Federal Arbitration Act (the "FAA") applied to the prehearing issues because this was a contract involving interstate commerce. The FAA requires that once a court has determined that the parties agreed to be bound by a valid arbitration agreement and that the particular dispute was within the scope of the agreement, the arbitrator determines "gateway" questions that bear on final disposition of the dispute, including procedural requirements, contractual preconditions, waiver, delay, and similar defenses to enforcement of an arbitration clause.

The parties stipulated that they had agreed to a valid arbitration agreement. But P&T argued that this dispute was not within the scope of the agreement because an exception in the agreement removed from arbitration disagreements concerning the "damages to which either [party] may be entitled at law on account of a breach of Contract." P&T also argued that the quantum meruit claim was not arbitrable because quantum meruit theory was based on the absence of an enforceable contract, and thus the contract could not be based on the parties' contractual obligation to arbitrate. The court rejected the first argument, reading the contract provision to exclude disputes over the amount of damages only, not disputes over the existence of a breach and the fact of resulting damage. The court rejected the second argument because, regardless of how it was labeled, the quantum meruit claim arose from matters the parties agreed to arbitrate, namely, the performance of the parties and the payment for that work. Thus, the dispute was appropriate for arbitration.

The court also stated that the arbitrator must decide whether IMJV met the procedural requirements to arbitration, including whether IMJV was appropriately licensed by the CCB and whether IMJV followed the contractual preconditions to arbitration.

B. Arbitration: Arbitration clauses are severable under the FAA. Challenges to the validity of a contract must go to the arbitrator.

Buckeye Check Cashing v. Cardegna, 546 US ___, 126 S Ct 1204, 163 L Ed 2d 1038 (2006). The Cardegnas entered various deferred-payment transactions with Buckeye Check Cashing ("BCC"), each time signing an agreement in which

the parties agreed that disputes would be decided through arbitration, including disputes over the validity of the arbitration clause or the agreement itself. The Cardegnas later sued BCC for charging usurious interest rates and other violations of Florida lending and consumer protection laws. BCC moved to compel arbitration.

The state trial court denied the motion, holding that a court should resolve a claim that a contract is illegal. The state court of appeals reversed, holding that because the Cardegnas challenged the entire agreement and not just the arbitration clause itself, the agreement to arbitrate was enforceable and the question of the contract's legality was for the arbitrator. The state supreme court reversed, holding that because state law did not permit severing the illegal or void parts of a contract from the remainder of the contract, enforcing an arbitration agreement in a potentially illegal or void contract would be unlawful.

The United States Supreme Court reversed. Federal arbitration law applies in federal and state courts. Southland Corp. v. Keating, 465 US 1, 12, 104 S Ct 852, 79 L Ed 2d 1 (1984). Under the FAA, an arbitration clause is severable from the remainder of the contract. Prima Paint Corp. v. Flood & Conklin, 388 US 395, 402-04, 87 S Ct 1801, 18 L Ed 2d 1270 (1967). Prima Paint also holds that unless a challenge is to the validity of the arbitration clause itself, questions of validity of the contract should be determined by the arbitrator. The state supreme court erred in not applying Prima Paint.

C. Civil Procedure: A plaintiff's failure to plead fraudulent concealment to avoid a statute-of-limitations defense prevented the plaintiff from relying on fraud at trial.

Permapost Products Co. v. Osmose, Inc., 200 Or App 699, 116 P3d 909 (2005). In 1995, Permapost Products Co. purchased a wood preservative from Osmose, Inc., to treat lumber it sold to consumers. In 2002, Permapost brought breach-of-warranty claims against Osmose to recover its expenses in defending and settling a 1999 suit arising out of injuries a homeowner suffered because of off-gassing of the wood preservative from lumber that Permapost had sold the homeowner. Osmose raised the UCC's four-year statute of limitations (ORS 72.7250) as an affirmative defense. Permapost did not reply.

Seven months later – and two days before a summary judgment hearing – Permapost sought leave to file a reply to allege that Osmose had fraudulently concealed the defect or that the statute of limitations did not begin to run until Permapost discovered the defect in 1999. The trial court failed to rule on the motion to allow Permapost's reply and granted Osmose summary judgment because Permapost's allegations with respect to the statute-of-limitations defense were beyond the scope of the pleadings.

The court of appeals affirmed because Permapost failed to timely plead fraudulent concealment. Although Oregon rules permit amendments to pleadings to conform to the evidence, no rule requires the trial court to allow a party to amend to include a substantially new theory simply because the party produced evidence at a summary judgment hearing that supports the theory.

The court also rejected Permapost's argument that the statute of limitations began to run only upon discovery of the breach because under the UCC, the breach of warranty occurs at the time of delivery, unless the warranty explicitly extends into the future. Nothing supported the argument that this particular warranty extended into the future.

D. Claim Preclusion: A plaintiff may bring a second claim based on facts in existence at the time of a prior claim if the plaintiff did not have actual or constructive knowledge of the second claim.

Hodges v. Blazer Homes, Inc., 204 Or App 86, 129 P3d 196 (2006). In 1994, an arbitrator awarded the Hodgeses damages on an action against Blazer Homes, Inc., for various claims arising out of Blazer's alleged failure to complete the home, failure to correct defective work, and unfair trade practices. In 2000, the Hodgeses brought another action for negligent construction of the same home. The trial court granted Blazer

summary judgment, holding that claim preclusion barred the claim because it was "common sense" that the damages alleged in the second action would result from the defects alleged in the prior action. The court disregarded evidence that the Hodgeses could not reasonably have discovered the defects at the time of the prior action.

The court of appeals held that claim preclusion does not bar a second claim based on facts in existence at the time of a prior action if the plaintiff did not have actual or constructive knowledge of the second claim. The evidence that the Hodgeses, in the exercise of care, could not have discovered the damages created an issue of material fact, requiring reversal of the trial court's summary judgment.

E. Design Professional Immunity (ORS 30.785): Whether an injured worker's employer complied with safety standards on a construction project is a question of fact.

Drey v. KPFF, Inc., 205 Or App 31, 132 P3d 663 (2006). A worker at a construction site suffered injuries when a column gave way and struck him. The employee sued the consulting engineer based on negligence and the Employer Liability Law. The consulting engineer claimed immunity under ORS 30.785, which provides that design professionals performing services on a construction project are immune from suit to the extent that a worker suffers injuries resulting from the failure of the worker's employer to comply with safety standards at the site.

Despite conflicting testimony about whether the employer complied with safety standards on the project, the trial court granted the consulting engineer summary judgment on the issue of immunity. The court of appeals reversed because the conflicting testimony created an issue of fact that could not be resolved by summary judgment.

F. Economic Loss Rule: Water damage to a building caused by negligent construction does not constitute the type of economic loss that triggers the economic loss rule.

Harris v. Suniga, 209 Or App 410 (2006). Defendants were general contractors of an apartment complex. Plaintiffs purchased the complex from the original owners and did not have a contractual relationship with defendants. Plaintiffs alleged that defendants had negligently built the complex by failing to install required flashing on the decks, concrete walkways, landings, gutters, laminates, and bellybands, and that defendants had failed to properly install certain wall caps, fasten trim to the outside of windows, and paint the siding. As a result of the alleged defects, plaintiffs claimed that the buildings in the complex suffered significant dry rot. Defendants moved for summary judgment, contending that the economic loss rule barred plaintiffs' claim because plaintiff did not have a special relationship with defendants. Plaintiffs countered that the economic loss rule applied only to intangible losses and not claims based on damage to physical structures. The trial court granted defendants summary judgment.

The court of appeals reversed. Although the court confirmed that the economic loss rule bars negligence claims for purely economic loss unless the defendant breached a special duty owed to the plaintiff, the issue in the present dispute was whether plaintiffs suffered the type of economic losses that trigger the economic loss rule. Prior Oregon Supreme Court decisions recognized that intangible financial losses trigger the rule, such as indebtedness incurred, return of money paid, loss of expected proceeds, attorney fees incurred to defend claims, and undervaluation of property. But the Supreme Court has never held that only intangible financial losses trigger the economic loss rule. In a case with facts analogous to the present dispute, however, the Supreme Court held that physical damage to a building from water damage was not economic loss. Newman v. Tualatin Development Co. Inc., 287 Or 47, 597 P2d 800 (1979). Plaintiffs' negligence claim was not barred by the economic loss rule because the claim was based on damage to physical property that was not the type of economic loss that triggers the economic loss rule.

The court of appeals rejected several arguments raised by defendants and amici. First, Newman had not been superseded by subsequent

decisions recognizing the economic loss rule in Oregon. Second, Jones v. Emerald Pacific Homes, Inc., 188 Or App 471, 71 P3d 574 (2003), did not apply because it neither discussed nor applied the economic loss rule. Jones stood only for the proposition that a breach of contract can give rise to tort liability only if the liability is based on a breach of a duty independent of the duty that forms the basis of the contract claim. Third, products liability cases holding that damage to a product itself constitutes economic loss barred by the economic loss rule were inapplicable because a building is not a product for products liability purposes. Fourth, extra-jurisdictional cases holding that the costs of construction defects constituted economic loss that could not be recovered in negligence were not persuasive. Finally, Oregon case law did not support the amici's argument that the court should not permit plaintiffs to recover damages in negligence because to do so would allow plaintiffs to obtain relief that not even the original owners of the complex could obtain.

G. Indemnification: A subcontractor's insurer must defend and indemnify a general contractor named as an "additional insured" under the subcontractor's liability insurance policy if the general contractor seeks coverage for vicarious liability or liability arising out of the fault of the subcontractor.

Hoffman Constr. Co. of Or. v. Travelers Indem. Ins. Co., No. 05-456-AA, 2005 US Dist LEXIS 39752 (D Or Nov. 28, 2005). Hoffman Construction Co. hired Advanced Technologies Group, Inc. ("ATG"), to raise flooring in a clean room. ATG controlled the clean-room construction and built and maintained temporary steps to a temporary raised floor. ATG's contract required it to designate Hoffman as an additional insured party to ATG's commercial general liability coverage.

An employee of another subcontractor injured himself falling down the temporary stairs and sued Hoffman and several unnamed defendants, but not ATG. Hoffman tendered its defense and indemnity to ATG's insurer. The insurer rejected the tender based on ORS 30.140(1), as interpreted in Walsh Construction Co. v. Mutual of Enumclaw, 338 Or 1, 104 P3d 1146 (2005), which held that an agreement requiring a subcontractor to procure additional insured insurance covering a general contractor for the general contractor's own fault is void. Unlike the situation in Walsh, however, evidence existed here that ATG caused the injury. Thus, Walsh was distinguishable because Hoffman could claim coverage to the extent of ATG's fault under ORS 30.140(2), and the agreement that ATG would name Hoffman as an additional insured was valid.

The insurer argued that the duty to indemnify did not arise because there was no express allegation in the injured worker's complaint that ATG had caused the injuries or that Hoffman was being sued for vicarious liability. The complaint was ambiguous about who was at fault because it stated that there might be other unknown defendants and the claim against Hoffman appeared to be based on vicarious liability. This ambiguity created the possibility that ATG was at fault, which triggered the insurer's obligation to defend Hoffman as an additional insured under ATG's policy.

H. Products Liability Law: The products liability statute of limitation/repose applies only when the operative facts underlying a claim are predominantly based on a product defect.

Weston v. Camp's Lumber & Building Supply, Inc., 205 Or App 347, 135 P3d 331, *adhered to as modified*, 206 Or App 761 (2006). In 1993, homeowners purchased from Camp's Lumber & Building Supply, Inc. ("Camp's), green lumber, instead of kiln-dried lumber, based on Camp's representation that the lumber would be of standard grade or better, and that it would be suitable for the life of the home. In 2002, the homeowners discovered that the wood was infested with golden buprestid beetle larvae, which were eating away at the wood and damaging the structural stability of the home. The homeowners sued the seller and manufacturers of the lumber for trespass, negligence, negligent misrepresentation, violation of the Uniform Trade Practices Act (the "UTPA"), and breach of

warranty. The trial court granted summary judgment in favor of the defendants, holding that the then-existing eight-year statute of repose for products liability claims (ORS 30.905) barred all of plaintiffs' claims.

On appeal, the court clarified that the products liability statute of limitations/repose would apply only if the predominant characteristics of the facts underlying plaintiffs' claims were based on a product defect. The court affirmed as to the trespass, negligence, and negligent misrepresentation claims because the predominant characteristic of those claims was that the defendants had negligently put a defective product in the stream of commerce. The limitations period began more than eight years before, when the damage occurred (when the lumber was introduced to the home), and thus the claims were time-barred.

The predominant characteristics of the facts underlying the UTPA claim were based on a willful misrepresentation that the lumber would be of standard grade or better and suitable for the home. Thus the claim was timely because it was filed within two-years from discovery of the misrepresentation.

The predominant characteristics of the warranty claim were the breach of the contractual promises that the seller made, and thus the six-year contracts statute of limitations applied. Any breach of the warranty that the product was of standard grade occurred at delivery and thus was time-barred. But the representation that the lumber would last for the life of the home extended into the future and was breached when the homeowners' discovered the damages, well within the statute of limitations. On reconsideration, the court considered whether the latter breach should have been discovered earlier based on testimony from the plaintiffs' expert that the lumber had obvious signs of infestation. The court held that the testimony did not address whether the signs would have been obvious to a consumer in the plaintiffs' position, and thus an issue of fact remained.

I. Real Party in Interest: An HOA required to fix damage caused by defective construction was not a real party in interest.

Quail Hollow West Owner's Assn. v. Brownstone Quail Hollow, LLC, 206 Or App 321, 136 P3d 1139 (2006). Quail Hollow West Owner's Association was a homeowner's association (HOA) of townhouse owners. Under the rules of the HOA, the HOA was responsible for repairs related to preventing water intrusion into the townhouses. The HOA initiated an action against the developer and builder of the townhouses for defective construction related to damages to the townhouses from water intrusion. The trial court dismissed the action because the HOA was not a real party in interest, reasoning that, although the HOA was required to fix the problem, the individual homeowners were required to pay to fix the problem (through association dues).

The court of appeals affirmed. A real party in interest is one who will be benefited or injured by the judgment in the case or one that is statutorily authorized to bring an action. The individual homeowners ultimately bore the responsible to pay for repairs, and thus would be benefited or injured by the judgment. Additionally, ORS 94.630, which statutorily authorizes an HOA to initiate litigation under certain circumstances, did not apply in this case.

J. Workers' Compensation: A subcontractor's employee was not the owner's subject worker under workers' compensation law, even though the owner provided workers' compensation coverage for all employees under an OCIP.

Schmidt v. Intel Corp., 199 Or App 618, 112 P3d 428 (2005). Intel hired contractors to construct a clean room and, under an owner-controlled insurance program (OCIP), opted to provide workers' compensation for employees of the contractor and its subcontractors. An employee of a subcontractor injured himself and sued Intel based on negligence, the Employer Liability Law, and loss of consortium. The trial

court granted Intel's motion for summary judgment, accepting Intel's argument that the subcontractor's employee was Intel's subject worker, and that thus workers' compensation was the employee's exclusive remedy. The court of appeals reversed. The employee did not qualify as Intel's subject worker because Intel had no right of control over the employee, nor was the nature of the work that the employee performed consistent with Intel's regular business.

K. Construction Liens: Update of *Ken Hood Construction*, as reported in Construction Law Newsletter, Issue No. 27, at 7 (OSB 2005).

Ken Hood Construction v. Pacific Coast Construction, 203 Or App 768, 126 P3d 1254 (2006). In the previously reported case, the court held that a construction lien was timely because removal of the contractor's equipment and debris benefited an owner, was within the scope of the contractor's work under the contract, and occurred less than 75 days before the lien was filed. Ken Hood Construction v. Pacific Coast Construction, 201 Or App 568, 120 P3d 6 (2005). On reconsideration, the contractor argued that remand was necessary for the trial court to enter a judgment foreclosing the lien and to award attorney fees on the lien claim. The court remanded, instructing the trial court to address the lien claim in light of the appellate court's holding that the lien had been timely filed.

The court also reconsidered its prior decision with respect to the breach-of-contract claim and quantum meruit claim. Originally, the trial court had held that the parties failed to enter into a valid contract, but awarded the contractor damages based on the contractor's alternative quantum meruit claim. In the 2005 decision, the court of appeals reversed, holding that there was a valid contract, but the court declined to address the owner's appeal of the quantum meruit claim.

On reconsideration, the court agreed with the contractor, who argued that remand of the contract claim was necessary so that the trial court could determine whether the contract was breached and the amount of any damages. Also, the court found that it had erred by not addressing the quantum meruit claim. Alternatively pleaded breach-of-contract claims and quantum meruit claims are mutually exclusive. Because the court held that there was a valid contract, the court had to reverse the award of damages based on the quantum meruit claim and remand for the trial court to consider the contract claim.

2007 CCB LEGISLATIVE CONCEPTS

Bill Boyd, Construction Contractors Board
Alan Mitchell, Scott Hookland LLP

The following are summaries of legislation that may be proposed by the CCB in the 2007 Legislature.

Consumer Protection: The Board proposed providing more protection to residential consumers. One concept increases the bond amount for residential contractors. A second concept creates a recovery fund for injured homeowners; however, the recovery fund concept proposed by the Construction Claims Taskforce may be substituted for the concept proposed by the Board.

Notices to Consumers: The Board is considering steps to persuade contractors to be more consistent in providing required notices to consumers (especially the Information Notice to Owner and the Consumer Notification). One concept allows consumers an additional year to assert CCB claims against a contractor who fails to provide the Consumer Notification form. This concept also requires that a contractor maintain written proof that the Consumer Notification form was delivered to a consumer and sets up a rebuttable presumption that the form was not delivered if the contractor can't produce that proof.

Information Notice to Owner: The Board proposed that contractors must maintain written proof that the contractor delivered the Information Notice to Owner about Construction Liens. This concept also sets up a rebuttable presumption that

the form was not delivered if the contractor can't produce that proof.

"Pay Twice" Lien Situation: The Board proposed changes to Oregon's lien laws that would allow payment by the homeowner to the contractor to be a complete defense to a lien claim. (Editorial Note: This would fundamentally change Oregon's lien law from a "direct" lien concept to a "derivative" lien concept. Since its conception, Oregon's lien law has followed the "direct" lien view.)

RMI Accountability: The Board is concerned that there are persons acting as "professional" Responsible Managing Individuals ("RMI") for Oregon contractors. The Board proposes that a RMI must exercise management or supervisory authority over a company's construction activities.

Insurance Coverage: The CCB's present laws do not require insurance companies to notify the CCB when a contractor's insurance has lapsed. The Board proposed a concept that would require insurance companies to give that notice to the CCB.

Notice of Court/Arbitration Awards: The Board proposed that residential contractors (not commercial ones) must notify the CCB whenever they receive an adverse court judgment or arbitration award against the contractor. However, a contractor does not have to report a judgment or award if the contractor pays it within 30 days or appeals it.

Notice of Bankruptcy: The Board proposed that all contractors must notify the CCB of any bankruptcies filed by the contractor or its owners or officers.

Contract Terms: The Board proposed that a construction contract with a residential owner must meet minimum standards adopted by the board. The Board must publish one or more model construction contracts that meet or exceed the minimum standards.

Business Ownership: The Board proposed that any CCB licensee must notify the CCB if its ownership or officers change. Previously only partners and corporations had to do this.

BANKRUPTCY COURT CURBS CCB'S POWER TO WITHHOLD OR SUSPEND LICENSE ON ACCOUNT OF CONSTRUCTION DEBT

Chuck Pruitt
Meyer & Wyse LLP

Under ORS 701.102, the CCB may suspend or refuse to issue a license to a business if any owner or officer of the business was an owner or officer of another business at the time the other business incurred a construction debt that is still unpaid. The policy or intent behind this statute is to prevent contractors from running up debt, going out of business without paying their creditors and then, under the banner of a new business entity, going back into the construction business.

The CCB has been aggressive in executing this policy. Take for example the case of an owner or officer of a construction company who has a falling out with the other owners. That individual may decide to leave the company at a time when it is not in debt in order to start or join a new construction company. If, after he has left, the individual's former company incurs a construction debt in connection with a project that was in progress while he was still associated with the company, the CCB may suspend or refuse to issue a license to his new company. Payment of that debt might prove to be impossible, such as where the individual was a minor officer in a national or international corporation and the debt is quite large. Nevertheless, if the construction debt of the former company is not paid, the former owner or officer may, in effect, be permanently barred from the construction business in Oregon.

The CCB has even taken the position that, if that individual is discharged in bankruptcy from any personal liability he may have had for his former company's debts, unless the former company is also discharged, the individual will still be barred from obtaining a license for his new company. However, the United States Bankruptcy

Court for the District of Oregon recently issued a ruling barring the CCB from denying a license to such a person. *In re Ray*, ___ B.R. ___, 2006 WL 3438569 (Bkrtcy.D.Or., November 29, 2006).

In that case, Mathew Ray was the sole shareholder of Valley Concrete, Inc. That company maintained a license with the CCB and operated in good standing until Mr. Ray filed articles of dissolution. At the time of its dissolution, the corporation had two outstanding debts totaling approximately $3,000. Both debts had been personally guaranteed by Mr. Ray. Subsequently, Mr. Ray and his wife filed for bankruptcy and were discharged from their personal obligation to pay the two corporate debts.

When Mr. Ray applied for a construction contractor license to operate as a sole proprietor, the CCB denied the application, citing ORS 701.102, because of the two unpaid corporate debts. Mr. Ray then filed an adversary proceeding against the CCB and the agency's key officials seeking relief on the ground that, in so acting, the defendants violated provisions of the Bankruptcy Code. On cross-motions for summary judgment, the Bankruptcy Court ruled in favor of Mr. Ray.

Section 525(a) of the Bankruptcy Code provides that a governmental unit may not deny, revoke, suspend or refuse to renew a license or other similar grant to a person who has gone through bankruptcy solely because such person has not paid a debt that is dischargeable under the Code. One of the primary purposes of the Code, as manifested in that section, is to give debtors a new start in life. The Bankruptcy Court held that ORS 701.102 was invalid to the extent it frustrated that purpose. Mr. Ray should not have been required to obtain a costly discharge of the corporation's debts as well as his own solely to satisfy the requirements of the state statute. Accordingly, the CCB was enjoined from denying a license to Mr. Ray on account of his former corporation's unpaid debts.

In addition, the court held that the CCB's actions constituted a willful violation of the automatic stay provisions of Bankruptcy Code section 362(a)(6) so as to warrant an award of damages. The court rejected the CCB's argument that its actions were exempt from the stay under Code section 362(b)(4), which authorizes the commencement of an action or proceeding by a governmental unit to enforce its police or regulatory power. The court found that the CCB's actions were not meant to protect the public's interests, but were meant to protect the private rights of certain creditors. Under those circumstances, Mr. Ray was entitled to the protection of the automatic stay. The issue of damages for violation of the automatic stay could not be determined on summary judgment and was reserved for trial.

CONSTRUCTION INDUSTRY UNIONS DON'T ALWAYS HAVE TO SHOW PROOF OF MAJORITY SUPPORT

John Hickey
Jordan Schrader

Before this past December, when a client asked a construction labor lawyer for advice because a union asked for voluntary recognition of Section 9(a) status, the lawyer could advise his or her client that it did not have to recognize the union as a Section 9(a) representative until the union presented actual proof of majority support. But, a new case confirms that construction lawyers need to be careful when giving such advice.

The construction industry holds a unique position under the National Labor Relations Act (the "Act"). In other industries, an employer is guilty of an unfair labor practice if it recognizes a union that has not demonstrated that it is supported by a majority of the employer's employees. In the construction industry, however, it is perfectly lawful for an employer to do just that. Such relationships are typically governed by "pre-hire" agreements – whereby an employer agrees not to hire employees who are not members of the union.

Even before Congress statutorily authorized pre-hire agreements under Section 8(f) of the Act, they were common in the construction industry. The industry established pre-hire agreements because, unlike companies in other industries, construction companies need to know their labor costs up front in order to generate accurate bids and need to draw on a pool of skilled workers on short notice. Additionally, construction employees frequently work for multiple companies over short periods because whether a particular trade is needed depends on the stage of a project. Thus, typical representation elections are often not feasible.

But, construction companies are not precluded from establishing a collective bargaining agreement by demonstrating majority support, and there are advantages to doing so. If a union demonstrates that it has majority support, Section 9(a) of the Act provides that subsequent elections are barred for the following twelve months, that the union is irrebuttably presumed to retain majority support for the term of any collective bargaining agreement (for up to three years), and that upon expiration of a collective bargaining agreement or three years, whichever comes first, the union retains a rebuttable presumption of majority support. Conversely, under Section 8(f), during the term of a pre-hire agreement, either party may repudiate the agreement and petition the Board for an election, and upon expiration of the agreement there is no presumption of majority support for the union. Thus, Section 9(a) agreements are considerably more secure.

A union may convert a Section 8(f) agreement to a Section 9(a) agreement by establishing that it is supported by a majority of the employer's bargaining unit employees. This past December, the D.C. Circuit decided a case that clarifies whether a union has sufficiently demonstrated majority support. In *M & M Backhoe Service, Inc. v. NLRB*, 469 F.3d 1047 (D.C. Cir. 2006), the owner of a small construction company signed a pre-hire agreement that permitted either party to terminate the agreement by notifying the other party at least sixty days before a certain date. A few months before that date, M & M's owner notified the union of his intent to terminate the agreement.

Before the agreement expired, the union collected signed authorization cards from all of M & M's employees and sent M & M a letter notifying it that the union had majority support and requesting "voluntary recognition from your firm and 9(a) status under the National Labor Relations Act." The union asked M & M's owner to sign a recognition agreement, which was attached to the letter, stating that M & M "acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees have authorized the Union to represent them in collective bargaining" and that M & M "hereby recognizes the Union as the exclusive bargaining agent under Section 9(a) of the National Labor Relations Act."

Without ever seeing the signed authorization cards, M & M's owner signed the recognition agreement and met with the union to negotiate a Section 9(a) agreement. The parties, however, did not reach an agreement and after the pre-hire agreement's expiration, M & M began operating with a nonunion workforce.

The union filed an unfair labor practice charge with the National Labor Relations Board (the "Board") alleging, among other things, that it was the employees' Section 9(a) representative and that M & M had violated the Act by withdrawing recognition of the union. M & M argued that under established Board precedent, an offer of proof cannot substitute for actual proof and that therefore the union had never obtained Section 9(a) status because it never gave M & M actual proof that a majority of M & M's employees supported the union.

In finding for the union, the Board distinguished the prior case law cited by M & M. It found that in the cases holding that an offer of proof could not substitute for actual proof, the unions never presented evidence that they conclusively established majority support, whereas, in the M & M situation, the record established that the union had obtained signed

authorization cards from all of M & M's employees. The D.C. Circuit upheld the Board's decision, reasoning that to hold otherwise would allow an employer to frustrate employees' rights under the Act by turning its back on a union's evidence.

Therefore, as long as a union actually has proof of majority support, an employer who recognizes a union's Section 9(a) status after the union offers to provide evidence of its majority support cannot revoke that recognition solely because the employer never took the union up on its offer. Notably, M & M never asked to see the union's proof. Thus, construction industry employers wishing to avoid Section 9(a) agreements may probably still successfully argue that actual proof is necessary as long as they demand to see the proof and the union fails to respond accordingly.

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.

2/2/07 – INTERPRETING BUILDING CODES
(Lori Graham, City of Portland, Code Services)

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)

Construction Law Section Executive Committee

Dana Anderson, chair:
dana.a.anderson@doj.state.or.us
Alan Mitchell, chair-elect:
alm@scott-hookland.com
Angela Otto, secretary: aotto@lawssg.com
Gary Christensen, treasurer:
gary.christensen@millernash.com
Jack Levy, past chair: jlevy@smithfreed.com

Members at Large:

Darien Loiselle: dloiselle@schwabe.com
James Van Dyke: jvd@ci.portland.or.us
Jason Alexander: Jason@sussmanshank.com
John Berge: berge@bljlawyers.com
Timothy Dolan:
timothymdolan@oregoncoast.com

Newsletter Editor: Alan Mitchell

Oregon State Bar
Construction Law Section
5200 SW Meadows Road
PO Box 1689
Lake Oswego, OR 97035