Construction Law Newsletter

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IN MEMORIAM: DANA ANDERSON

It is with sadness that we note that Dana Anderson, our Section Chair, recently passed away.

Dana was a Senior Assistant Attorney General in the Business Transaction Section, General Counsel Division and, before that, worked at Tri-Met as legal counsel. Dana was a knowledgeable and well-respected attorney whose expertise on public contracting issues caused him to be a frequent guest and speaker at CLEs on that topic. In addition, he frequently represented the Attorney General's office on a multiplicity of issues before the Oregon Legislature. Among other things, Dana was proud of his work on the interim legislative committee that revised and clarified Oregon's public contracting law and produced what is now known at the State's Public Contracting Code.

Dana had been a member of the Section Executive Committee since 1998, and had previously served as Secretary, Treasurer and Chair Elect. His hard work and dedication to the Section was much appreciated and he will be greatly missed by all.

TIPS FROM TILLAMOOK

Tim Dolan
Garibaldi, Oregon

The purpose of this article is to give you a brief summary of some of the unique construction issues from Tillamook County. These issues may not be identical to those in other coastal counties, but Tillamook should be indicative of the other coastal counties you have clients building in.

For starters, you need to be patient with the local planning authorities. As you'll see, there are more issues and more complexities to these issues than you will ordinarily encounter in a non-coastal environment. Combine that with the fact that there are fewer planning department staff at the rural local level, and it results in things taking more time than you may be used to.

You can speed things up by dealing with the following in the pre-application stage.

Seismic Issues

The entire coast is a seismic zone 4. Portland is a zone 3 in comparison. The difference between a 3 and a 4 is that a 4 is 100% greater magnitude quake than a 3. Coastal areas are subject to tsunami inundation not present in the rest of the state. As a result, in some situations, a geo-hazard report and soil analysis, requiring an engineer and a geologist, must be obtained prior to requesting a building permit. The G/H report will then contain requirements which will be incorporated into the permit issued.

Windshear Areas

A building windshear designation of D-2 is applicable to any area with 1,500 feet of the ocean or an open body of water. This requires different building standards than your clients may be used to regarding roofing, siding, comers, nailing patterns, and other construction techniques.

I'm told by local planning authorities than many builders from the valley are unaware of these requirements and fail inspections as a result. Winds at the coast may hit 130 mph on occasion. Make your clients aware. It rains sideways down here.

Wetlands, Estuaries and Coastal Zone Issues

Wetlands law is no different here then it is in the rest of the state. We just seem to have our share and then some. You can access these on the National Wetland Inventory (www.fwsgov/nwi). You need to watch out for local cities having their own wetland inventory. You'll have to contact them to get a copy. In coastal areas, there are coast zone management and estuary issues you will not see in the rest of the state. These need to be checked out, especially if building near a body of water.

Flood Plains

Tillamook County is a high flood hazard area, with estuary and ocean flooding issues besides conventional flood plain issues.

All buildings built within a flood plain are required to have a bottom floor 3' above the base flood elevation. There are areas in Tillamook County where the bottom floor is 15' off the ground, 3' above a 12' flood height. A map of the local designated flood plains can be located at the FEMA website (www.fema.gov). Local ordinance 3.060 determines when this is required and is available at the Tillamook County website (http://www.co.tillamook.or.us/gov/ComDev/planning/flood.htm). You can access the maps by visiting the local planning office also.

Mold

The venting requirements are the same statewide. However, clients should be aware that the humidity is higher on the coast than in the rest of the state. Also, they need to get the project closed to the outside before the rains begin in mid-October. Once the inside gets soaked, it is difficult to dry until the following season.

Summary

In closing, you should advise your clients to visit the site, to identify the unique issues pertaining to it, and identify the local building requirements that apply. Engage your own professionals and do your own research in the pre-application stage. Get your road approach, water, sanitation, and fire department approvals lined up, deal with the special districts, all before you submit the permit application. Don't assume that the local agency will guide you through this or do it for you. Make sure the application is complete.

Once the permit is issued, construction must proceed in a workmanlike fashion until construction is completed. Allow up to 180 days for land use applications and 30 days for building permits to get approved, if everything is in order. Building permits are only good for 180 days (renewed after each inspection) and extensions are not automatic. And remember to be patient; things are more relaxed down here.

2007 PRIVATE PROJECTS CONSTRUCTION LEGISLATION UPDATE

Alan Mitchell
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I. INTRODUCTION

The 2007 Legislature enacted a greater-than-normal number of laws in the area of construction law. Although many might remember the 2007 Legislature for the construction bills that did not pass (particularly those arising out of the Construction Claims Task Force), the bills that did pass will affect almost every construction-law attorney in one way or another. **Note: The Effective Date for all new legislation is January 1, 2008 unless the bill specifically states it is an emergency bill.**

II. CONSTRUCTION CONTRACTORS BOARD ("CCB")

A. Notifying CCB of Judgments: HB 2107 (Ch 540); ORS Ch 701

Contractors who have judgments entered against them must send the CCB a copy of those judgments within 45 days after the final judgment is recorded (unless the contractor paid the judgment within 30 days of recording or the contractor filed an appeal and any required undertaking). A judgment includes an arbitration award that has been confirmed by a court. This bill also applies to all existing judgments against licensed contractors – the contractor must deliver copies of the judgment to the CCB no later than February 15, 2008. The failure to send the judgment copy to the CCB may result in disciplinary sanction against the licensee.

B. Renumbering Existing Statutes: HB 2109 (Ch 114); ORS Ch 701

This bill divides the content of some portions of Chapter 701 into smaller statutes. It includes no major substantive changes.

C. Owner as RMI: HB 2111 (Ch 113); ORS 701.078

ORS 701.078 requires that construction contractors must have a "responsible managing individual" (RMI). Previously, an owner could be an RMI without exercising actual management or supervisory authority. This bill now requires that an owner who wants to be listed as the RMI must exercise actual management or supervisory authority.

D. Installing EIFS: HB 2112 (Ch 851); ORS Ch 701

This bill prohibits a CCB-licensed contractor from installing a "barrier-type exterior insulation and finish system" (commonly known as EIFS) on new buildings or, except for repairs, on existing buildings. This prohibition does not apply to so-called "drainage" EIFS systems or to architectural features or to installations over concrete or masonry walls.

E. Alternatives for Nonprofits: HB 2309 (Ch 203); ORS Chapter 701

A nonprofit organization that rehabilitates illegal drug manufacturing sites is now permitted to substitute a letter of credit or a cash deposit in lieu of the surety bond required for construction contractors.

F. Owner/Contractor Exemption: HB 2498 (Ch 639); ORS 701.010

This bill creates an exemption from contractor licensing for an owner of residential structures who hires licensed contractors for three or fewer projects in one year. If the work requires a building permit, the owner must hire a general contractor to stay within this exemption. This new exemption responds to complaints that the "licensed developer" category was too broad.

G. "Omnibus" Bill #1: HB 2654 (Ch 648); ORS Ch 701 & Ch 87

This bill sets forth a list of new requirements relating to construction contractors. Some of these requirements reflect various findings of the Construction Claims Task Force.

1. Construction contractors (except for licensed developers) will have to take continuing education each year. The CCB will determine the number of hours and the course content. Contractors licensed as of January 1, 2008 must comply with the new requirements by a date established by the CCB (no earlier than January 1, 2010 and no later than January 1, 2014). §§1-3.

2. Original contractors on residential projects (including condos) are barred from filing a construction lien claim if the work is for more than $2,000 and they do not have a written contract. If the work was originally for less than $2,000 but later exceeds that amount, the contractor must provide a written contract within five days after knowing the price would exceed $2,000. Failure to have a written contract does not void the contract. §§5, 7.

3. The CCB must adopt new rules that require contractors to use "standard contractual terms" in their written contracts. §7(2). The bill lists six terms that must be included (a non-exclusive list).

4. Homeowners who enter a written construction contract have the right to cancel the contract by delivering a written cancelation notice to the contractor prior to midnight of the next business day. The bill lists three exceptions to this cancelation right. §8. Note that this provision does not address the rights set out in ORS 83.710–83.750.

5. Contractors building new residences (including condos) must offer a written warranty

against defects in materials and workmanship to the initial purchaser or owner of the dwelling. If the owner refuses the offer and the parties have not yet signed a written contract, the contractor can withdraw the offer to construct the residence. This warranty obligation does not apply to manufactured dwellings. §§10-11.

6. Contractors building new residences (including condos) must provide a recommended maintenance schedule to the initial purchaser or owner of the dwelling. The CCB will adopt rules setting out the minimum information for the schedule, but the schedule must address water intrusion issues. §13.

7. The CCB must develop a new "consumer notice" form that informs property owners about actions to protect their rights during a residential project. §14. The bill sets out minimum content for this form, including that the form must have signature lines for the contractor and the owner. The CCB will adopt rules about when and how the contractor must deliver the form and whether the contractor must maintain evidence of that delivery.

8. The bill repeals ORS 701.590, which was a 2003 requirement for contractors to inform owners about certain rights. §18.

9. Contractors' insurance policies must include coverage for products and completed operations. This applies to policies issued or renewed after January 1, 2008. §§19-21 (amending ORS 701.105).

10. The bill increases the requirements for contractors' surety bonds by $5,000 for each type of contractor (for example, general contractors must now have a minimum $20,000 bond). §22 (amending ORS 701.085).

11. The bill creates a new definition of "*zero-lot-line dwelling*." §23 (amending ORS 701.005). For many people, this new definition will be consistent of their understanding of a "townhome."

12. Section 24 requires new disclosures about the "responsible managing individual" (RMI) for a license applicant. Previously, the CCB required only the owners to disclose whether they had been subject to any "construction debts" within the preceding five years. ORS 701.075(1)(b). Under the bill, applicants must also disclose this information about their RMI.

13. The CCB will have the ability to revoke or suspend a license if it determines that an owner, officer, or RMI "is not fit for licensure." §27 (amending ORS 701.102).

14. The CCB gains a new ability to issue an order directing a licensee to cease actions in violation of Chapter 701 or the CCB rules. If the licensee fails to request a hearing within 21 days after the CCB mails the order, then the order becomes final. §28b (amending ORS 701.135).

15. Finally, the bill includes a list of different dates for the applicability of various provisions set out in the bill. §30.

H. "Omnibus" Bill #2: HB 3242 (Ch 836); ORS Ch 701, Ch 279C, & others

HB 3242 is a second bill setting forth a list of new requirements relating to construction contractors. As with the other bill, some of these requirements also reflect various findings of the Construction Claims Task Force.

1. Perhaps the most significant aspect of this bill is the new division into "residential" and "commercial" categories (known as "endorsements"). The new commercial category has two divisions: "level 1" and "level 2." §2. Level 1 contractors must provide larger surety bonds ($75,000 for a general contractor and $50,000 for a specialty contractor). §4. All commercial contractors must have a certain number of key employees who have minimum levels of experience (Section 13 defines the term "key employee"). Contractors must work within their endorsement and make certain that those they contract with are also working within their respective endorsements. §16 (amending ORS 701.055).

2. Contractors who want to hold both a residential endorsement and a commercial endorsement must file a surety bond for each endorsement. §§3-4.

3. Commercial general contractors must provide two-year warranties of the building envelope and penetration components on new large commercial structures. Under this warranty, the contractor must annually inspect those elements during the warranty period. §12.

4. The bill makes a number of revisions to the procedures for complaints against licensed contractors. §§28-33. For example, complaints relating to construction liens will no longer be processed if the project is a large commercial structure.

5. The bill makes minor adjustments regarding how claims are paid out of the surety bond for a residential contractor. §10.

6. The bill makes significant changes regarding how claims are paid out of the surety bond for a commercial contractor. §10. Under the bill, labor or employee benefit claimants have first priority and can exhaust the entire bond. All other claimants fall into a single second-priority tier. §11.

7. The bill creates a significantly new definition of the term "small commercial structure," increasing the square footage and adding a monetary factor. On the other hand, the bill makes only minor adjustments to the definition of "residential structure," adding some new elements and listing ten exceptions to the definition (many of which already exist). §13 (amending ORS 701.005).

8. Another change concerning the new categories is that commercial contractors that are licensed "exempt" (from the workers' compensation requirements) must still carry workers' compensation insurance. §15 (amending ORS 701.035).

9. The bill also changes the licensing requirements for joint ventures. Previously, a joint venture that did not have its own CCB license could submit a bid if one joint venturer had a valid license. Under the bill, that exception no longer exists and a joint venture must have its own license in order to submit a bit (or engage in any further construction work). §16.

10. Finally, although this bill was declared an emergency and took effect July 1, 2007, the bill sets out specific effective dates for certain sections. §70.

I. Company Changes: SB 91 (Ch 478); ORS 701.055

Previously, only partnerships and corporations had to inform the CCB of changes in the partners or offices. Under this bill, all contractors must notify the CCB of any changes of owners, officers, or the RMI. Also, if a partnership or joint venture loses a partner, the contractor must obtain a new license.

J. Technical Changes: SB 94 (Ch 793); ORS Chapter 701

This bill makes numerous technical changes to ORS Chapter 701, none of which are substantive.

K. Chimney Services: SB 605 (Ch 511); ORS 701.005(3)

This bill requires that persons cleaning or servicing chimneys must have a CCB license. The CCB may not impose civil penalties for unlicensed work that occurs before January 1, 2009.

III. <u>LANDSCAPE CONTRACTORS BOARD ("LCB")</u>

A. License or Education Required: HB 2074 (Ch 249); ORS Ch. 671

Effective January 1, 2009, in order to obtain a license, landscape contractors must either have an owner or managing employee (both defined terms) who is a licensed landscape contractor under ORS 671.560 or prove that one of those persons has completed certain education requirements as set by the LCB. Landscape contractors obtaining a license after January 1, 2008 and before January 1, 2009 must comply with this requirement as part of renewing of their license. The bill does not mention whether the requirement applies to businesses that currently hold an LCB license.

B. Terminology: HB 2075 (Ch 399); ORS Ch. 671

This bill corrects some erroneous references and terminology in several sections of ORS Chapter 671.

C. Probationary Licenses: HB 2076 (Ch 111); ORS Ch. 671

This bill creates a new probationary landscape contractor license for persons who do not meet the regular training and experience qualifications. After two years in this program, a contractor can apply for a regular LCB license.

D. LCB Terminology & Fees: HB 2117 (Ch 541); various ORS Chapters

This bill notes some name changes concerning landscaping contracting. A "landscaping business" is now known as a "landscape contracting business"; a "landscape contractor" is now known as a "landscape construction professional." In addition, a company is no longer "registered" with the LCB but is "licensed" with the LCB.

Also, this bill notes a legislative intent to reduce the number of city business licenses that a landscape contracting business must obtain to do business in the Portland metropolitan area and sets limits on the number of license fees those businesses must pay within that area.

E. Continuing Education: HB 2538 (Ch 550); ORS Chapter 671

Landscape contractors will have to take up to 10 hours of continuing education each year. The LCB must develop a continuing education program no later than March 1, 2008. For existing licensees, this new requirement applies when they renew their licenses that expire on or after January 1, 2009. This bill was deemed an emergency and was effective June 22, 2007.

F. Claims: SB 62 (Ch 149); ORS Chapter 671

Previously, the LCB claims system was significantly different than that of the CCB. This bill makes the LCB claims system much more similar to the CCB complaint system, which should help reduce confusion among lawyers who are more used to the CCB system. These changes apply only to claims filed on or after January 1, 2008.

G. Unpaid Debts: SB 63 (Ch 151); ORS Chapter 671

This is another bill that makes the LCB system more similar to the CCB system. This bill requires LCB license applicants to inform the agency of any unpaid construction debts (final judgments, orders, etc.) against the applicant. This applies only to judgments entered and orders issued on or after January 1, 2008.

IV. DEPARTMENT OF CONSUMER AND BUSINESS SERVICES ("DCBS")

A. Electronic Code Information: HB2405 (Ch 69); ORS Ch 455

This bill instructs DCBS to develop and implement a program to allow electronic access to "building codes information" and permit and inspection services. Once established, the system would be available for use by code enforcement agencies. This bill was deemed an emergency and was effective May 2, 2007.

B. Electrical Apprenticeships: HB2473 (Ch 548); ORS Ch 479

This bill eases the apprenticeship requirements for certain limited electrical licenses from four years to two years. It also clarifies some of the limitations on a limited maintenance electrician's license.

C. Uniform State Codes: HB2478 (Ch 549); ORS 455.148 & 455.895

Under this bill DCBS has the authority to adopt rules to set uniform permit, inspection, and certificate of occupancy requirements under the state building code. The bill also requires public inspection agencies to enforce licensing requirements for permittees. This bill was deemed an emergency and was effective June 22, 2007.

D. Compliance Sanctions: SB 192 (Ch 306); ORS Chapter 455

This bill clarifies that licensing violations of the Electrical Code in Chapter 455 are licensing violations for purposes of ORS Chapter 701 and vice versa. The bill also expands the bases for which DCBS can suspend or revoke a license.

E. Boilers and Pressure Vessels: SB 193 (Ch 487); ORS Chapter 480

This bill allows instant hot water heaters and similar devices used in residences to be treated differently than large high-pressure boilers. This bill was deemed an emergency and was effective July 1, 2007.

V. Design Professionals

Indemnity Limitations: HB 2708 (Ch 413); ORS 30.140

This bill adds "planning" and "design" agreements to the definition of "construction agreements" that are subject to the limitations of ORS 30.140. This applies only to construction agreements entered on or after January 1, 2008.

VI. Miscellaneous

Construction Insurance: HB 2751 (Ch 210); ORS 737.600

This bill allows insurance carriers to issue liability at preferred rates or premiums to construction contractors without violating the restrictions against fictitious groupings. This applies to all insurance written, made available, or delivered on or after the effective date of the bill. This bill was deemed an emergency and was effective May 30, 2007.

2007 Public Works Construction Legislation Update

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A. Prevailing Wage Rates: HB 2021 (Ch 844); ORS Ch 279C

First, this bill makes public agencies liable for workers' prevailing wages and benefits if the agency fails to include certain information about the wage rates in the specifications (amending ORS 279C.855).

Second, under prior law, contractors awarded public works contracts had to pay a fee for the costs of surveys to determine prevailing wage rates and associated administrative costs. Now the public agencies are directly responsible for paying those fees. The bill sets limits for those fees.

Third, this bill also gives BOLI the authority to determine the "site" of a project for purposes of prevailing wage rates (amending ORS 279C.838). This includes the issue of workers transporting materials and supplies to and from a construction project, an issue that has been the subject of numerous appellate decisions.

Finally, the bill directs BOLI to develop and adopt a plan to increase diversity among workers on public projects. BOLI must report to the legislature on this issue, with the first report due by January 1, 2009.

B. "Technical Amendments": HB 2140 (Ch 764); ORS Ch 279A, B, & C

House Bill 2140 is another group of "technical amendments" to Oregon's public contracting laws. Although most of the changes are truly technical, there are some substantive changes. For example, Section 2 now lists specific agencies (including OHSU, OSB and the Oregon

Utility Notification Center) whose contracts *with other public agencies* are exempt from the Public Contracting Code.

Second, the bill gives agencies the ability to use a contractor selection process other than the traditional low bid process if the contracting agency has not previously used the alternative process before and if it identifies the project as a "pilot project" to determine whether it can achieve cost savings. Like other exemptions from the traditional low bid process, the agency must still make a finding that competition will not be substantially diminished as a result of the pilot project contracting method.

Third, the bill gives public agencies the ability to ask BOLI for a determination whether a project is subject to prevailing wages. If BOLI determines that a public agency has divided a project into more than one contract to avoid compliance with the prevailing wage requirements, BOLI can order compliance.

Fourth, the bill changes the prevailing wage law in at least one significant way. Previously, the term "public works" did not include the "reconstruction or renovation of privately owned property that is leased by a public agency." Former ORS 279C.800(5). Under HB 2140, the prevailing wage now applies to the construction, reconstruction, major renovation or painting of a *privately owned* road, highway, building, structure or improvement of any type that uses funds a private entity and $750,000 or more of funds of a public agency. ORS 279C.800(6)(a)(B).

In addition, prevailing wages are now applicable to similar projects that use funds of a private entity and in which "25 percent or more of the square footage of the completed project will be occupied or used by a public agency." ORS 279C.800(6)(a)(C). There also are additional provisions regarding the interaction of private property and public funding and/or use, so the statute should be checked carefully.

BOLI has adopted temporary rules to implement these new provisions, but at last glance the rules simply mirrored the statute and did not clarify how some of these provisions would be ultimately interpreted.

Fifth, the bill amends the prevailing wage law by defining, in more detail, the term "funds of a public agency." Under current law, if a project uses "funds of a public agency" it is more likely that the prevailing wage law will be triggered, although certain exceptions were made for affordable housing.

Finally, this bill was deemed an emergency and most provisions were effective July 1, 2007. With the retroactive implementation date, neither the Attorney General's office nor local contracting agencies had much chance to update their contracting rules to implement the changes.

C. Solar Technology: HB 2620 (Ch 310); ORS Ch 279A, B, & C

Before entering into public improvement contracts for new buildings or remodels with a value more than 50% of the building value, public bodies must make a written determination whether solar energy technology is appropriate for the project. If the agency determines that solar technology is not appropriate for a project, then the agency must spent certain amounts on solar technology on a future project. The bill applies to "public buildings," meaning buildings owned or controlled by a public body and used or occupied by public employees or used for public business. It also applies to intergovernmental entities. This bill applies only to public improvement contracts first advertised or entered into after January 1, 2008.

D. Public Works Bonds: HB 2776 (Ch 415); ORS 279C.836

Contractors can now elect not to provide the $30,000 public works surety bond for projects with a contract price less than $100,000. This applies to projects first advertised or entered into after January 1, 2008.

TOP-DOWN PLA RULED ILLEGAL

Charles Schrader and John Hickey
Jordan Schrader Ramis PC

On July 31, 2007, the NLRB released its long-awaited (and long-delayed) decision in *Glens Falls Building and Construction Trade Council*, 350 NLRB No. 42, in which it invalidated agreements between a union on one hand and a project owner and the owner's construction manager on the other, requiring all contractors on a project to abide by a project labor agreement (PLA). As a result of the decision, it will be more difficult for unions to organize construction projects by pressuring owners and construction managers into requiring all contractors on a project to become signatory to a PLA.

PLAs are agreements between owners (governments or private entities) and labor unions that establish rules for utilization of labor on specific projects. The typical PLA binds all contractors and subcontractors on the project (or site) to the terms and conditions of a common labor agreement. Union-only PLAs are controversial because non-union contractors contend that they inflate costs and exclude certain contractors from bidding. Unions, on the other hand, contend that PLAs lead to labor harmony, higher productivity and payment of area-standard wages and benefits.

In *Glens Falls*, a company called Indeck was constructing private power cogeneration plants in New York. The local union building trades council filed objections to Indeck's environmental impact statement for one of the projects and told Indeck that it would stop every Indeck project in New York unless the projects were built with union workers. Indeck agreed to use union labor on its New York projects, and in return the unions agreed to withdraw their environmental challenges. In accordance with the agreement, Indeck wrote a commitment letter to the unions for its Corinth, New York, project, agreeing to instruct its contractor to execute a PLA with the unions.

Indeck then contracted with a construction management company that negotiated an agreement with the unions requiring all contractors and subcontractors on the project to utilize union labor. Before construction began, a dispute arose between Indeck and its construction manager, and Indeck terminated the construction manager and hired a non-union replacement. Indeck did not require the new construction manager to agree to use union labor on the project. The unions then filed a breach-of-contract lawsuit against Indeck, and Indeck defended on the basis that its agreement with the unions was unenforceable and void under Section 8(e) of the National Labor Relations Act (NLRA). Indeck subsequently filed an unfair labor practice charge with the NLRB against the unions – which resulted in the decision at hand.

Section 8(e) of the NLRA provides that it is an unfair labor practice for a union and an employer to enter into a "hot cargo" agreement – where the employer agrees to cease or refrain from dealing with a company with which the union has a disagreement or dispute. But, the so-called construction industry proviso states that "nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." Thus, the proviso allows employers in the construction industry to agree to refrain from doing business with a non-union company under certain circumstances. In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), the Supreme Court explained that the proviso "extends only to agreements in the context of collective-bargaining relationships and . . . possibly to common situs relationships on particular jobsites as well."

In *Glens Falls*, the NLRB ruled that the Indeck commitment letter and its construction manager's agreement with the unions were not protected by the construction industry proviso and were, instead, prohibited by 8(e). The Board's rationale was that under *Connell*, the construction proviso extends only to agreements arising in the context of collective bargaining relationships, and the Indeck commitment letter and its construction manager's agreement with the unions were not part of a collective bargaining relationship – neither agreement related to the terms and conditions of employment for Indeck or its construction manager's employees. Furthermore, the Board noted that the unions had failed to prove that the agreements were executed to avoid tensions that might arise if union and nonunion workers of different employers were to work side by side – a purpose that might have saved the agreements under the *Connell* common situs *dicta*. Conversely, the record showed that the purpose was to remove the threat of union opposition to the project, provide a steady source of workers, and provide the unions with a labor monopoly on large construction projects.

The NLRB did not expressly rule on whether Indeck was an "employer in the construction industry." This has left open the issue of whether similar owners and construction managers fall within the category of employers that are not exempted from the "hot cargo" prohibition of Section 8(e) by the construction industry proviso. At the very least, *Glens Falls* reduces the ability of unions to monopolize a project by pressuring owners into agreements under which the owner agrees to require its contractors to sign PLAs.

DISREGARDING THE CORPORATE/LLC VEIL: THE MOST LITIGATED ISSUE IN CORPORATE LAW

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A 1991 study found that piercing the corporate veil was the most litigated issue in corporate law. Thompson, *Piercing the Corporate Veil: An Empirical Study,*76 Cornell L REV 1036 (1991).

Despite strong public policy favoring shareholder limited liability, creditors repeatedly try to collect corporate debts from corporate shareholders.

Generally, the law of the state of incorporation – not the state in which the shareholder or creditor resides – determines whether the corporate veil should be pierced. *Bartholomae Oil Corp. v. Booth*,146 Or 154, 28 P2d 1083 (1934); *Garetson-Hilton Lumber Co. v. Hinson*, 69 Or 605, 140 P 633 (1914). *But see* fn 2 in *Vuyksteke v. Broan*, 172 Or App 74, 17 P3d 1072 (2000). A state court does not have personal jurisdiction over a shareholder merely because the corporation did business in a foreign state. *Cannon Mfg. Co. v. Cudahy Packing Co.,* 267 US 333 (1925).

Oregon case law regarding corporate piercing also applies to LLCs. *BDL Products, LTC v. Technical Plastics of Oregon, LLC*, 2006 WL 3628062 (D Or).

***Amfac* test.** Oregon has one of the better articulated tests for determining when the corporate form can be disregarded to impose liability on individual shareholders, a test first set out in *Amfac Foods, Inc. v. Int'l Systems & Controls Corp.*, 294 Or 94, 654 P2d 1092 (1982). The *Amfac* criteria are:

> (1) The shareholder must have controlled the corporation.
>
> (2) The shareholder must have engaged in improper conduct in his exercise of control over the corporation; and
>
> (3) The shareholder's improper conduct must have caused plaintiff's inability to obtain an adequate remedy from the corporation. (footnotes omitted) *Rice v. Oriental Fireworks Co.*, 75 Or App 627, 633, 707 P2d 1250, 1255 (1985).

1. Improper conduct. Strong public policy favors the limited liability rights of shareholders, but courts will exercise their equitable powers and disregard the corporate form where fairness and justice so require. But this is an extraordinary power exercised only if there is clear evidence those who control the corporation have used the corporation to defeat justice by perpetuating fraud, improperly shielding themselves from contractual or tort responsibility or in other improper conduct.

Improper conduct can occur at formation, during operations or as creditors are beating on the door.

a. Disappearing assets. Sometimes when a corporation is failing, the shareholders transfer corporate assets to themselves (or to another corporation owned by themselves) for little (or often no) consideration. Such transfers are improper. *Allen v. Meinig*, 109 Or App 341, 819 P2d 744 (1991); *rev den*, 313 Or 209, 830 P2d 595 (1992); *Vermeer v. Dismantling Contractors, Inc.*, 90 Or 74, 751 P2d 796, *rev den*, 306 Or 156, 758 P2d 347 (1988); *Salem Tent & Awning Co. v. Schmidt*, 79 Or App 475, 719 P2d 899 (1986).

Closely related are the concepts of a *de facto* merger and fraudulent conveyances, both of which are discussed at the end of this article.

b. Milking. Milking involves paying excessive dividends or diverting corporate assets to owners – it goes well beyond the payment of normal dividends and salaries. "Piercing a corporate veil based on "milking" of "excessive dividends" makes sense in cases of corporate manipulation where corporate assets are systematically and extensively removed from the corporation." *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.,* 397 F3d 1217, 1231 (9th Cir 2005).

> Shareholders have been held liable for a corporation's debts because they have milked a corporation by the payment of excessive dividends, by the sale of products to the shareholders at a reduced price, or by exacting unreasonable management charges. *Amfac, supra*, 294 Or 94, 109, 654 P2d 1092 (1982).

In *Oregon Public Employees' Retirement Bd. v. Simat, Helliesen & Eichner;* 191 Or App 408, 83 P3d 350 (2004), the court upheld a trial court finding that by transferring $1 million to themselves, controlling shareholders had "milked" the corporation because the reduction in operating capital had reduced the chances the corporation could attract additional investors and, without these additional investors, the corporation failed.

c. Commingling & confusion. "In some number of cases, shareholders have been held liable for corporate debts because of misrepresentations by the shareholder to the creditor, confusion or commingling of assets, or because the respective enterprises were not held out to the public as separate enterprises." *Amfac Foods, supra*, 294 Or 94, 110, 654 P2d 1092, 1102 (1982).

If a corporation and its shareholder fail to act as if there is a difference between corporate property and shareholder property, courts are inclined to do the same. One court noted: "if the officer has demonstrated disregard of the corporate form, treating the corporation essentially as a conduit for personal business affairs, the court may likewise disregard the corporate entity to avoid injustice." *Weeks v. Kerr*, 486 NE2d 10, 12 (Ind App 1985).

An isolated act of commingling is not enough; there need be substantial confusion. *Aero Planning International, Inc. v. Air Associates, Inc.*, 94 Or App 143, 764 P2d 610 (1988).

> There must be such a commingling of property rights or interests as to render it apparent that they are intended to function as one, and, further, to regard them as separate would aid the consummation of a fraud or wrong upon others. *Norhawk Investments, Inc. v. Subway Sandwich Shops, Inc.*, 61 Wash App 395, 401, 811 P2d 221, 224 (1991).

See, also: *BDL Products, LTC v. Technical Plastics of Oregon, LLC*, 2006 WL 3628062 (D Or). *Salem Tent & Awning Co. v. Schmidt*, 79 Or App 475, 482, 719 P2d 899, 903 (1986).

d. Gross Undercapitalization. "[G]ross undercapitalization of the debtor corporation, by itself, may suffice to hold the shareholder liable to a creditor who is unable to collect against the corporation because it was inadequately capitalized." *Amfac Foods, supra.*, 294 Or 94, 109, 654 P2d 1092, 1102 (1982).

> Inadequate capitalization of a corporation is a form of improper conduct. Although there is no statutory minimum capitalization requirement in

> Oregon, a corporation must have sufficient capital to cover its reasonably anticipated liabilities, measured by the nature and magnitude of its undertaking, the risks attendant to the particular enterprise and normal operating costs associated with its business. Sufficiency of capital is measured at the time a corporation is formed and begins operations. *Gardner v. First Escrow Corp.*, 72 Or App 715, 723 696 P2d 1172, 1177-8, *rev den*, 299 Or 314, 702 P2d 1111 (1985).

See, also: *Stirling-Wanner v. Pocket Novels, Inc.*, 129 Or App 337, 341, 879 P2d 210, *rev den*, 320 Or 272, 882 P2d 1114 (1994).

"Capitalization" means the consideration paid for a corporation's shares. It includes cash and other physical property paid for the stock, and may include intangible assets, such as an employment contract with an experienced manager and potential contracts with customers. *Murphy Logging Co. v. U.S.*, 378 F2d 222 (9th Cir 1967). "A shareholder loan is deemed a capital contribution if it is made to an initially undercapitalized corporation." *Houston's Inc. v. Hill*, 111 Or App 502, 506, 826 P2d 644, 646, *rev den*, 313 Or 354, 833 P2d 1283 (1992). *See, also: Stumbo v. Paul B. Hult Lumber Co.*, 251 Or 20, 444 P2d 564 (1968).

Inadequate capitalization is measured at a corporation's formation or at the beginning of its operations. Vuyksteke v. Broan, 172 Or App 74, 17 P3d 1072 (2000); *Stirling-Wanner v. Pocket Novels, Inc.*, 129 Or App 337, 879 P2d 210, *rev den*, 320 Or 272, 882 P2d 1114 (1994); *Gardner v. First Escrow Corp.*, 72 Or App 715, 696 P2d 1172, *rev den*, 299 Or 314, 702 P2d 1111 (1985). *But see: DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F2d 681 (4th Cir 1976).

The US Supreme Court has indicated the adequacy of the capitalization should be "measured by the nature and magnitude of the corporate undertaking." *Anderson v. Abbott*, 321 US 349, 362, *rehearing den*, 321 US 804 (1944).

Adequate capitalization takes into account the assets placed at risk by the shareholders in relation to the corporation's anticipated business and liabilities. *Klokke Corp. v. Classis Exposition, Inc.*, 139 Or App 399, 405-6, 912 P2d 929, 929, *rev den*, 323 Or 690, 920 P2d 549 (1996).

In some states, undercapitalization is not grounds for piercing the corporate veil. *Norhawk Investments, Inc. v. Subway Sandwich Shops, Inc.*, 61 Wash App 395, 811 P2d 221, 223 (1991); *Marett v. Professional Insurance Careers, Inc.*, 201 Ga App 178, 410 SE2d 373, 375 (1991).

e. Corporate formalities. While failure to observe corporate formalities (minutes, director & shareholder meetings, etc.) is often mentioned as one of the wrongs committed by a corporation which has engaged in multiple wrongs, such a failure does not appear to be reason alone for piercing the corporate veil.

> Although it would have been more orderly and businesslike, if the directors of the corporation had evidenced the understandings between the different stockholders by formal resolutions, rather than to proceed in the informal manner which they chose, nevertheless in such an instance as this, wherein all the stock of the corporation is owned by a few, and all or most of the stockholders are actively engaged in the enterprise of the corporation, it is often the practice to transact ordinary business without formal resolutions. *Roles v. Roles Shingle Co.*, 147 Or 365, 371, 31 P2d 180, 182 (1934).

See, also: McMunn v. ML&H Lumber, Inc., 247 Or 319, 429 P2d 798 (1967); *Uni-Com Northwest, Ltd. v. Argus Publishing Co.*, 47 Wash App 787, 737 P2d 304, *rev den*, 108 Wash 2d 1032 (1987).

Particularly in close corporations, courts seldom rely on this ground alone.

> [A] failure of shareholders in a closely held corporation to strictly observe corporate formalities is not relevant to our decision of whether to pierce the corporate veil of a close corporation absent evidence indicative of and amounting to a true disregard of the corporate entity. *Consumer's Co-op of Walworth County*, 142 Wis 2d 165, 419 NW2d 211, 220 (1988).

The one corporate formality to which courts do attach particular attention, however, is the keeping of separate financial books and records. If shareholder and corporate assets are commingled, corporate creditors may be able to look to shareholder assets for repayment.

2. Actual control. If a corporation or its shareholders have engaged in improper conduct, a creditor may be able to pierce the corporate form and impose liability for corporate debts onto those who had "actual control" over the improper conduct.

> The shareholder's alleged control over the corporation must not be only potential but must actually have been exercised in a manner either causing the plaintiff to enter the transaction with the corporation or causing the corporation's default on the transaction or a resulting obligation. Likewise, the shareholder's conduct must have been improper either in relation to the plaintiff's entering the transaction or in presenting or interfering with the corporation's performance or ability to perform its obligations toward the plaintiff. *Amfac Foods, supra*, 294 Or 94, 108-9, 654 P2d 1092 (1982).

The test for "actual control" has two prongs: the person sought to be held liable must have actual control over the improper conduct itself and actual control over the corporation as a whole. *Or Public Employees' Retirement Bd. v. Simat, Helliesen & Eichner,* 191 Or App 408, 83 P3d 350 (2004).

It bears repeating: All three prongs of the Amfac test must be present for a shareholder to be liable for corporate debts. Simply owning 100% of the stock – without any improper conduct – alone is not enough to make the shareholder liable. *Levine v. Alpha Anesthesia, Inc.*, 145 Or App 549, 931 P2d 812, *rev den*, 325 Or 368, 939 P2d 45 (1997); *Wakeman v. Paulson*, 257 Or 542, 480 P2d 434 (1971); *Miller Lumber Corp. v. Miller*, 225 Or 427, 357 P2d 503 (1961).

3. Proximate cause. To be held liable on a theory of corporate disregard, there must be some link between a shareholder's misconduct and the creditor's harm. Proximate cause is the third element of the *Amfac* test.

> Given improper conduct by the shareholder exercising control over the corporation, the plaintiff must also demonstrate a relationship between the misconduct and the plaintiff's injury. If a shareholder's improper conduct causes no injury to a corporate creditor, there is no basis for a recovery from the shareholder. Consistent with the general policy of shareholder immunity, a shareholder's improper conduct does not give a hunting license to a corporate creditor to redress a general wrong. Surprisingly, this requirement has received little express attention in many of the appellate court opinions. *Amfac Foods, supra*, 294 Or 94, 111, 654 P2d 1092 (1982).

In *Oregon Public Employees' Retirement Bd. v. Simat, Helliesen & Eichner;* 191 Or App 408, 83 P3d 350 (2004), the court found causation between the shareholders' act of transferring $1 million to themselves (thus reducing operating capital and the probability of attracting outside investors) and the collapse of the corporation. *See, also: Gardner v. First Escrow Corp.*, 72 Or App 715, 696 P2d 1172 (1985).

In *J.C. Compton Co. v. Brewster,* 185 Or App 382, 59 P3d 1288 (2002), *affirmed,* 187 Or App 709 (2003), the court upheld jury findings that there had been improper conduct – but held that no damages resulted from that conduct.

Recovery may be limited to sum milked. In cases involving inadequate capitalization or milking, a shareholder's liability to the creditor may be limited to no more than the amount milked by that shareholder or to an amount no more than the difference between adequate capitalization and the amount actually contributed.

The damages which flow from milking or improper capitalization may or may not be limited to the shortage of capital or amount milked. In some cases, the causal relationship will be clear. Sometimes, the facts will create a question for the trier of fact. For example, if the sole effect of a shareholder milking $200,000 from a corporation is to reduce the amount available for creditors, the shareholder's liability to corporate creditors would be limited to $200,000. *Amfac, supra*, 294 Or 94, 111, n 18, 654 P2d 1092 (1982). *Klokke Corp. v. Classis Exposition, Inc.,* 139 Or App 399, 912 P2d 929, *rev den*, 323 Or 690, 920 P2d 549 (1996), involved undercapitalization and milking. After noting that damages flowing from improper conduct may involve "significant factual issues," the court upheld the trial court's decision to limit damages against one shareholder to the sum improperly transferred to that shareholder alone, not the amount milked by all shareholders.

4. Related theories. Other theories exist to allow creditors to obtain relief after a corporation fails.

If corporate assets have been transferred to insiders (or entities controlled by insiders), the transfer may constitute a fraudulent conveyance under ORS 95.200 *et seq; Allen v. Meinig,* 109 Or App 341, 819 P2d 744 (1991), *rev den*, 313 Or 209, 830 P2d 595 (1992).

Sometimes when the assets of an insolvent corporation are acquired by another corporation, the acquiring corporation can become liable at least for the value of the assets acquired – maybe more. There are 4 generally accepted exceptions to the general rule that a corporation purchasing all of the assets of another corporation acquires only these assets and not the liabilities:

> To this general rule there are four well recognized exceptions, under which the purchasing corporation becomes liable for the debts and liabilities of the selling corporation. (1) Where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts. *Erickson v. Grande Ronde Lumber Co.*, 162 Or 556, 568, 92 P2d 170, 174, 94 P2d 139 (1939).

See, also: Tyree Oil, Inc. v. BOLI, 168 Or App 278, 7 P3d 571 (2000); *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*, 728 F Supp 1506 (D Or 1990).

Distributions made to shareholders while the corporation is insolvent are void. *Enron Corp. v. Bear, Stearns Int'l Limited,* 323 BR 857 (SD NY 2005).; *Field v. Haupert,* 58 Or App 117, 647 P2d 952 (1982). Directors can be liable to the corporation for declaring illegal distributions. ORS 60.367(1); Rapid Displays Inc. v. Gorder, 155 Fed Appx 962, 2005 WL 3271355 (9th Cir 2005).

ORS 60.367 does ***not*** create an action at law by creditors against directors or shareholders for illegal distributions. *Wakeman v. Paulson*, 264 Or 524, 506 P2d 683 (1973). However, creditors may be able to impose liability upon "bad faith" shareholders and negligent directors through a bankruptcy trustee, a receiver or some other proceeding in equity. *Id.; In re Sheffield Steel Corp.,* 320 BR 405 (NE OK 2004); *Rosebud Corp. v. Boggio*, 39 Colo App 84, 561 P2d 367 (1977).

If a dissolved corporation's assets are distributed to shareholders before payment of corporation's debts, creditors may seek satisfaction from shareholders to the extent of the distributed assets. ORS 60.645(2); *Lonsdale v. Chesterfield*, 99 Wash 2d 353, 662 P2d 385 (1983); *Fountain v. Burke*, 160 Ga App 262, 287 SE2d 39 (1982).

FAILURE TO PROVIDE REST BREAKS IS NOW A COSTLY MISTAKE

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The Oregon Court of Appeals ruled on June 14, 2007 that Oregon nonexempt employees have a private right of action to sue employers for damages, penalty wages, and attorneys' fees based on an employer's failure to provide a paid 10-minute rest break for every four hours of work or the greater part thereof.

If this sounds like small potatoes, think again. A claim for failure to pay 10-minute rest periods can add up over time. Any nonexempt employee who misses breaks will be entitled to double payment (penalty wages), and to their attorneys' fees. A series of missed 10-minute rest breaks can set your company back thousands of dollars. Further, these claims will provide fertile ground for Plaintiff's attorneys to bring wage and hour class actions against your company.

The Ruling

In *Gafur v. Legacy Good Samaritan Hospital*, the court ruled that Oregon wage and hour statutes provide employees with a private right of action to sue their employer when the employer failed to provide *paid* rest breaks. The Court also held that employees do not have a private right of action to sue for missed meal breaks.

Although nothing in the Oregon statutes actually provides for paid rest breaks, the Court found that Oregon law allows the Bureau of Labor and Industries (BOLI) to promulgate rules regarding rest and meal breaks. The Court held that an Oregon statute that provides a private right of action to employees who are "paid less than the wages to which they are entitled" under other statutes worked in conjunction with a BOLI regulation that requires that employers give their employees paid rest breaks to provide a private right of action.

This decision represents a significant change in the law. Up to now, Oregon courts have routinely held that Oregon law did not provide a right for the employee to sue his or her employer over missed rest breaks.

This ruling marks the second major decision by the Oregon Court of Appeals that has given significant credence to a BOLI regulation. The other case was *Yeager v. Providence Health Systems*, issued by the Court in 2004. In that decision, the Court of Appeals held that the Plaintiff could sue her employer for retaliation based on the Oregon Family Medical Leave Act based on language in a BOLI regulation. In that case – as with the Court's recent ruling on rest breaks no such claim appears in the Oregon Statutes.

When Must You Give Breaks, And How Many Per Day?

You must provide a paid 10-minute break for every four hours or greater part thereof. One minute over two hours is the greater part of four hours. You should provide the rest break in the middle of each work segment. For easy reference, refer to the chart below that is provided by BOLI.

Length of work period	Number of rest breaks	Number of meal periods
2 hrs or less	0	0
2 hrs, 1 min to 5 hrs, 59 mins	1	0
6 hrs	1	1
6 hrs, 1 min to 10 hrs	2	1
10 hrs, 1 min to 13 hrs 59 mins	3	1
14 hrs	3	2
14 hrs-1 min to 18 hrs	4	2
18 hrs, 1 min to 21 hrs, 59 mins	5	2
22 hrs	5	3
22 hrs, 1 min to 24 hrs	6	3

What Should Employers Do To Protect Against Lawsuits?

- Require nonexempt employees to sign time cards, whether hard copy or electronic, with a statement on the time card that the employee's signature or electronic signature verifies that he or she has received the required number of paid 10-minute rest breaks and appropriate meal breaks, unless otherwise indicated.
- Require employees to clock in and out for breaks if you have a clocking system.
- Update your employment manual to include language in the time card section that the employee's signature or electronic signature on the time card verifies that the employee received his or her breaks.
- Make it clear in your handbook that breaks are mandatory for nonexempt employees.

- Work with your supervisors and managers to ensure that your nonexempt employees are taking his or her rest breaks. If you are a large employer with a workforce that must stay at their stations, consider hiring a person to act as a “breaker,” whose job it is to take over the employee’s duties while on break, and who documents all breaks provided.
- If, for extenuating circumstances, an employee was not able to take a break, then pay it as wages.
- Document your conversations with employees regarding the requirement that they take a break. Discipline employees who do not take breaks.
- Conduct exit interviews with all employees. Ask employees at their exit interview whether they received their 10-minute rest breaks twice daily. Have them sign a statement that they received their rest breaks before they leave your employment.
- If feasible, require that employees who use a computer to shut down or log out during their 10-minute break to obtain a computer record of the break time.

These suggestions may not work for every employer. You need to find the mechanism that works well for your workforce and culture. The reality is that BOLI and Oregon law makes the employer responsible for ensuring that its employees receive his or her breaks. Failure to provide rest breaks or to compensate employees who cannot take his or her breaks is now very risky business. Employers should examine how they handle rest breaks to make sure that they can establish that employees were provided the required breaks.

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