# Construction Law Newsletter

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## NEW STATUTE OF ULTIMATE REPOSE FOR LARGE COMMERCIAL STRUCTURES

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The 2009 Oregon Legislature passed House Bill 2434, which affects the statute of ultimate repose under ORS 12.135. The bill, which goes into effect on January 1, 2010, decreases the ten-year ultimate repose period for large commercial structures to six-years.

However, the change will not apply to such structures when owned or maintained by homeowners' associations or associations of unit owners. Nor will the six-year period apply to public bodies acting as plaintiffs. Construction defect litigation in the context of condominiums should be unaffected.

The beneficiaries of the new bill will be commercial builders and practitioners who will now enjoy some added consistency when it comes to the statutory limitations period for purposes of both negligence and contract claims.

## 2009 LEGISLATION

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The following are a few of the construction-related bills that passed the 2009 Oregon Legislature. For a more complete discussion, see the OSB's "Legislation Highlights" book.

### A. HB 2349 (Ch 513) Lien Release Deposits

This bill revises the procedures used to release a property from a construction lien claim by using a cash deposit.

First, a person submitting a cash deposit to the county treasurer previously needed a court order in order to receive any investment income from that cash deposit. Under HB 2349 the treasurer must pay the investment income to the depositor when the treasurer otherwise distributes the money from the deposit. The bill expressly states that the depositor bears the risk of loss resulting from the investment.

Second, when cash deposits were made, many lien claimants formerly named the county treasurer as a defendant in the lien foreclosure lawsuit. HB 2349 specifically prohibits naming the treasurer or the county as defendants.

Third, the bill creates a new provision that allows the treasurer to notify the parties how the treasurer intends to distribute the money. (Normally, distribution is pursuant to a court order). If either party objects within ten days, the

treasurer will either hold the money pending a court order or commence an interpleader action.

Fourth, if the lien claimant fails to foreclose its lien, under HB 2349 the person depositing the funds has the ability to notify the lien claimant and the treasurer that the suit was not timely commenced. The notice must give the lien claimant 15 calendar days to object to release of the lien and return of the money.

Finally, the bill provides that these statutes do not create a cause of action and may not be used to assert a negligence per se action.

**B. SB 203 (Ch 408) Information Notice to Owner**

Under current law an original contractor must provide the Information Notice to Owner to a residential owner when the contract price exceeds $1,000. SB 203 raises this threshold to $2,000. This is consistent with the requirement for a written contract noted in ORS 701.305 and the requirements for other residential notices.

The bill also changes the definition of "residential property" for these notices. Although these changes do not look to be substantive, it may be up to the courts to decide whether these changes affect a given project.

**C. SB 204 (Ch 225) CCB Complaint Procedures**

SB 204 clarifies the procedures for asserting complaints against a contractor's CCB surety bond. If the contractor is licensed as a "residential contractor" and is working on a residential or small commercial project, the complaint process follows ORS 701.145., ORS 701.146 governs the complaint process if the contractor is licensed as a "commercial contractor" and is working on a large commercial project . By the process of elimination, complaints against contractors working outside the limits of their license will not reach the surety bond.

**D. SB 205 (Ch 409) Consumer Notices**

SB 205 revises the statutes dealing with notices for residential projects to clarify that the notices must be provided not only to owner-occupants but to original purchasers (if there were no prior owner-occupants). Thus, the statute now covers homes built on speculation (spec homes). The affected notices include the offer of warranty (ORS 701.320), the consumer notice (ORS 701.330), and the recommended maintenance schedule (ORS 701.335). The maintenance schedule no longer needs to be acknowledged in the written contract; however, contractors must now provide a schedule when they make the written offer of warranty. In addition to custom projects, contractors must now give a written offer of warranty on spec houses.

The bill also revises the "one-day cancellation" right to clarify that it does not apply to spec homes.

**E. HB 2264 (Ch 292) False Claims Act**

Oregon along with 22 other states has now adopted legislation similar to the federal False Claims Act, 31 USC 3729-3733. HB 2264 empowers the Attorney General to investigate false claims made to public agencies and to bring actions for violations. One difference from the federal act is that Oregon's law does not include qui tam provisions.

The bill first defines "false claims" to include not only false information but also the omission of material information from a claim. The bill prohibits anyone from knowingly making a false claim, and defines "knowingly" to include actual knowledge, deliberate ignorance, or reckless disregard of the facts. The prohibition applies to a person who fails to disclose discovery of the false nature of a claim within a reasonable period after the claim is filed. The Attorney General has no obligation to prove specific intent to defraud the public agency.

The bill allows the Attorney General to recover actual damages as well as a penalty of the greater of $10,000 or twice the actual damages for each violation. The lack of injury to the public body is not a defense to a false claims action, nor is intent to repay any amounts.

The court may also allow attorney fees to the prevailing plaintiff. Attorney fees are available to a prevailing defendant only if the court determines that the Attorney General had no objectively reasonable basis for bring the claim or appeal. The Attorney General has broad investigative powers to obtain information about potential false claims.

The Attorney General must bring its claims within three years after the public agency discovers or should have discovered the violation. However, there is a ten-year statute of ultimate repose.

**F. SB 50 (Ch 160) "Little Miller Act" Claims**

Previously, a claim against a public works payment bond had to be given within 120 days of the claimant's last day of work. SB 50 extends the period to make a claim against a public works payment bond from 120 days from the claimant's last day of work to 180 days. The deadline for claims for contributions to employee benefit plans is also extended, from 150 days to 200 days after the employee's last day of work.

Although the bill took effect on May 26, 2009, it only applies to public contracts first advertised or entered after that date.

**G. HB 2436 (Ch 18) Recording Fees**

HB 2436 adds an additional $15 fee to record most documents in Oregon. The fee does not apply to recording certified copies of judgments or lien record abstracts, or satisfactions of judgment. These additional fees will be sent to a County Assessment and Taxation Fund created under new ORS 294.187 and are ultimately intended for use in developing affordable housing.

HB 2436 took effect on September 28, 2009.

**H. SB 306 (Ch 487) Attorney Fees**

ORS 20.080 allows for the recovery of attorney fees under certain circumstances in tort actions seeking damages of $5,500 or less. SB 306 increases the damage limit for recovery of attorney fees from $5,500 to $7,500; effective January 1, 2012, the limit increases to $10,000. The bill requires that a demand letter include specific information to support a claim for attorney fees under the statute.

For claims under ORS 20.082 (contracts lacking an attorney fee clause), the damage limit increases from $5,500 to $10,000. A demand letter under this section must be given at least 20 days before filing an action; under current law the limit is 10 days).

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## *ABRAHAM* MAY LEAD TO TROUBLE

Tom Ped
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In holding that the Oregon Building Code can provide a basis for a negligence *per se* claim against a builder, the Court of Appeals in *Abraham v. T. Henry Construction, Inc. et al.*, Case No. A136228 (September 2, 2009), may have gotten it half right. It was not a leap of logic or departure from common sense to rule that an owner who had contracted with a builder could sue in negligence for construction defects. Tying potential tort liability to the code, however, may lead to unneeded motion practice and require further involvement by the courts in construction defect lawsuits.

In *Abraham*, the plaintiffs were homeowners who brought a lawsuit for construction defects against the builder with whom they had contracted to build a home. Suit was brought some eight years after the work was completed. As such, their breach of contract claims were subject to dismissal based on the six-year statute of limitations. Establishing tort liability was therefore critical. In attempting to establish that they had been in a "special relationship" with the builder, which is a requisite to proving the existence of a noncontractual standard of care, the plaintiffs averred that they

had "delegated responsibility" to the defendant "to ma[k]e decisions regarding the construction budget, construction means and methods, Building Code compliance and construction cost savings."

The court, however, declined as a matter of law to find that such facts could establish a "special relationship" akin to that which exists between lawyers, physicians, architects and engineers and their clients, where such a special relationships are found. The court thereby adhered to its decision in *Jones v. Emerald Pacific Homes, Inc.*, 188 Or App 471, 71 P3d 574, *rev den* 336 Or 125 (2003), in which nearly identical allegations brought by an owner in contractual privity with a builder had been rejected.

Nevertheless, in the court's view, negligence *per se* claims based on alleged violations of the Building Code could be legally supported. To prove such claims in general, a plaintiff must show that: (1) the defendant violated a statute or rule; (4) the plaintiff was injured as a result of that violation; (3) plaintiff was a member of the class of person meant to be protected by the statute or rule, and (4) that the injury plaintiff suffered was of the type that the statute or rule was enacted to prevent. *McAlpine v. Multonomah County*, 131 Or App 136, 144, 883 P2d 869 (1994), *rev den* 320 Or 507 (1995).

With respect to the Building Code, it was enough for the *Abraham* court that ORS 455.020 states that the code establishes "uniform performance standards providing reasonable safeguards for health, safety, welfare, comfort and security of the residents of this state *who are occupants and users of buildings.*" [Emphasis included in opinion.] Accordingly, plaintiffs with construction defect claims were meant to be protected by the code and have suffered the type of harm that was meant to be prevented.

The court's reasoning is questionable. First and foremost, the weight of cases from other jurisdictions seems to be against it. A substantial majority of courts from other jurisdictions reject the notion that a building code can establish an independent basis for a tort claim, where repair costs alone are sought. Courts variously hold that plaintiffs bringing claims for defective construction do not allege the type of injury that the code is designed to protect, or are not within the class of persons that were intended to be protected. *See, e.g., Iverson v. Solsberry*, 641 P2d 314 (Colo App 1982) (costs expended in bringing building into compliance was not the type of injury the code was designed to prevent); *Morris v. Horton*, 22 Cal App 968, 27 Cal Rptr2d 585 (1994) (same); *Lassiter v. Cecil*, 551 SE2d 220 (NC App 2001) (plaintiffs did not fall within class of persons intended to be protected).

Rather, courts hold that the building code is designed to regulate the practice of a profession, rather than the imposition of civil liability to private individuals. *Dorman v. Aiken Communications, Inc.*, 398 SE2d 687 (1990). Other courts have held that that building codes are regulations for safety, *Board of Directors of Lesner Point Condominium on Chesapeake Bay Ass'n, Inc. v. Harbour Point Building Corp.*, 2002 WL: 32072394 (Va Cir Ct 2002), with the implication being that construction defect claim do not implicate building occupant safety concerns. Construction defect cases in which alleged building code violations have been allowed to be considered have involved defect claims coupled with personal injury claims. *See, e.g., Davis v. Fischer Single Family Homes, Ltd.*, 231 SW3d 767 (Ky App 2007) (plaintiffs alleged personal injuries due to mold exposure).

Perhaps a more troubling aspect of invoking the building code to support negligence *per se* claims is that applicable code provisions simply are not specific enough to appropriately establish any clear standard of care, as is required by Oregon law. In *Shatout v. Emco Garbage Co.*, 298 Or 598, 601, 695 P2d 897 (1985), the court held that when a plaintiff invokes a government rule to support a negligence *per se* claim, the question is whether the rule "so fixes the legal standard of conduct that there is no question of due care left for a factfinder." In *McAlpine* (cite above), the court held that ORS 144.331(1), which provides that a parole may be suspended where it is suspected that parole has been violated, could

not be used to support a negligence *per se* claim that was asserted by a plaintiff who had been injured in a traffic altercation with a parolee. The court held that the statute did not clearly and sufficiently define the limited class of persons to be protected or the harm to be prevented.

Likewise, building code provisions applicable to building envelope construction tend to be vague. Many provisions require, for example, that flashing for exterior windows and vent utility penetrations shall be installed in such a manner as to be "leakproof" and so as "to prevent entry of water into the wall cavity." Specific methods of construction tend not to be prescribed. It is submitted that few, if any, building code provisions typically invoked in construction defect cases "so fix[] the legal standard [so] that there is no question of due care left for a factfinder." As a result of *Abraham*, builders will be required to defend themselves against claims for alleged building code violations, which carry powerful influence over jurors, when in reality such claims do not seem to meet the requirements of specificity as required by Oregon law.

In sum, the decision in *Abraham* will likely lead to extensive motion practice at the trial court level. Defendants in construction defect cases will seek to have stricken most claims for negligence *per se* based on alleged building code violations, for all of the above reasons. Given the lack of specificity of most code provisions, it seems likely that few such provisions should sufficiently support negligence *per se* claims within the parameters of Oregon law. The motion practice will end only after a modification of the law.

The court in *Abraham* was not completely out of bounds in searching for and finding a reason to permit a homeowner to assert claims in negligence against a builder. Given that the Court of Appeals previously held in *Harris v. Suniga*, 344 Or 301, 180 P3d 12 (2008), that plaintiffs with construction defect claims who were not in privity with the original contractor alleged claims for "property damage" within the meaning of Oregon tort law, it was not a stretch to conclude plaintiffs who *were* in contractual privity with the original builder should be able to properly allege tort claims, too. But in basing such claims on violations of the building code, the court was off the mark.

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## *ABRAHAM* CLARIFIES OREGON LAW

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In its recent holding in *Abraham v. T. Henry Construction, Inc.*, Case No. A136228 (September 2, 2009), the Oregon Court of Appeals clarified Oregon law and provided an answer to a longstanding problem in the area of construction defect litigation.

Under the prior holdings of *Harris v. Suniga*, 344 Or. 301, 181 P3d 12 (2008) and *Jones v. Emerald Pacific*, 188 Or. App. 471, 71 P3d 574, Review Denied, 336 Or. 125 (2003), Oregon law could have been interpreted to allow second, third or even fifteenth purchasers of homes and buildings in Oregon to sue the original contractor and subcontractors in negligence. However, the holdings of *Harris* and *Jones* could also be interpreted to prohibit an identical claim by a first purchaser or anyone in contractual privity with the original contractor.

Further, the recent case of *Waxman v. Waxman*, 224 Or. 499, 198 P3d 445 (2008) (which the author briefed and argued at the Court of Appeals) held that the statute of limitations for breach of contract claims in the construction defect context was six years from the date of the contract, with no discovery rule. Thus, prior to the Court of Appeals decision in the *Abraham* case, the holdings of *Waxman*, *Jones*, and *Harris* could be construed to allow second purchasers not only a greater right to sue in negligence, but also a longer period of time to bring a construction defect claim than first purchasers. This is because the statute of limitations under Oregon law for negligent property damage is six years, with a discovery rule. See, ORS 12.080(3) and *Sutter v. Bingham*,

81 Or. App. 16, 724 P2d 829 (1986) (construction defect claim involving a leaky roof that predated the 1991 amendments to ORS 12.080 applied discovery rule to ORS 12.080(3)).

In its recent decision, the Court of Appeals in *Abraham* has clarified and corrected this problem. First, it is important to note that in *Abraham*, the homeowners were "in privity" with the defendants against whom they brought suit. Further, suit was brought some eight years after work was completed, but less than a year after the defects were discovered. As such, the homeowners in Abraham had no viable breach of contract claims under the holding of *Waxman*. Thus, establishing tort liability was critical.

As the attorney who argued the case on behalf of the plaintiffs in *Abraham*, it seems reasonable to infer that the Court of Appeals was troubled by the inherent inconsistency raised by the *Waxman*, *Jones*, and *Harris* decisions. Further, while *Harris* specifically declined to answer the question of whether or not first purchasers have the right to sue in negligence in Oregon, the Court of Appeals' prior decision in *Jones* appeared to answer that question with a definite "no."

Interestingly, the *Jones* decision was written by Judge Shuman, as was the *Abraham* decision. However, the issue of the building code was never raised in Jones. Thus, the Court of Appeals was presented with a different factual and legal scenario in *Abraham* than it faced in *Jones*. Consequently, the *Abraham* court held that negligence per se claims based on alleged violations of the Building Code could be legally supported. (See the prior article for more detail about the court's analysis.)

While some may find this decision troubling, it is the author's opinion that far more troubling would be a result whereby first purchasers somehow had less rights than second, third, or even fifteenth purchasers. Significantly, a motion for reconsideration had been filed with the Court of Appeals as of the time of this article. A petition for review may well be filed with the Oregon Supreme Court. If that happens, an update to this article will be forthcoming.

## HB 2366 UPDATE

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Many practitioners are aware of House Bill 2366 that was raised in the 2009 Oregon Legislature. In brief, the bill would have made major changes to Oregon's construction lien laws.

Late in the session, the bill was pulled. However, its concepts remain alive and its sponsor, Representative Holvey, has indicated an intention to re-introduce a related bill.

The Construction Law Section has been working with Rep. Holvey on changes to the potential bill. Jeremy Vermilyea has agreed to assist in those efforts and is acting as point person for the Section.

At a recent meeting, the following concepts were discussed. There would be a "Lien Assistance Fund" that would aid when a homeowner was in the situation of paying twice for the same work. The fund would be available only for owner-occupied residential projects and would be administered through the Construction Contractors Board (CCB).

There were two issues that remained open after the meeting. The first was a funding source; a proposed concept was to use civil penalties recovered by the CCB. In other words, the funding would come from other "bad" contractors. The second issue was who would have to pursue the claim against the fund, the homeowner or the unpaid lien claimant. For various reasons, many attendees argued that the homeowner should be the one to pursue the claim.

Another issue discussed at the meeting was deleting the "waiver" option under the

Homebuyer's Protection Act; that option is found at ORS 87.007(2)(f).

If you have any questions or comments about any of these issues, please email Jeremy Vermilyea at *jeremy@vermilyealaw.com*.

## NEW COURT FILING FEES

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As you know, the State Court Administrator's office recently notified all courts of significant fee increases. If you do not have a copy of that notice and the associated fee charts, contact your local court administrator.

Some practitioners have raised concerns about the fees for multi-party construction lawsuits, such as lien foreclosures or construction defect actions. For example, if your client has a lien claim of $10,000 and there are 2 owners, 2 lenders, and 11other lien claimants, then your filing fee would be $2,955. Further, it appears the rules would require each defendant to pay a $2,758 filing fee in that scenario.

The Executive Committee is considering approaching either local presiding court judges or possibly the Chief Justice to request fee adjustments in these kinds of multi-party cases. If you have any thoughts or input on these issues, please contact Alan Mitchell (*alan@mitchell-lawoffice.com*).

Finally, please note that at least some courts are not accepting complaints unless you also provide a printout of the fee calculation (based on the spreadsheet calculator).

## DEADLINE FOR LEGISLATION PROPOSALS

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If the Construction Section wishes to propose any legislative changes for the 2011 term, the deadline to submit those changes is April 1, 2010. Darien Loiselle is coordinating this for the Executive Committee. If you have any questions or proposals, please send them to Darien as soon as possible (*dloiselle@schwabe.com*).

## CONSTRUCTION DEFECT REFEREE PROGRAM UPDATE

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The Construction Law Section is continuing to work with Multnomah County Judge Maurer concerning the Construction Defect Referee Program. Roger Lenneberg and Pete Viteznik are heading up discussions with Judge Maurer. If you have any questions or input, please contact Pete at *pviteznik@kilmerlaw.com*.

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