Construction Law Newsletter

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MESSAGE FROM THE CHAIR

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The recession and the continuing financial crisis have affected most construction industry businesses in some substantial way, and this of course telegraphs to those who service the industry. Foremost, the impact has resulted in fewer opportunities, tighter margins, and more competition. Business is more difficult these days. Attorneys are feeling the pinch.

The Construction Section is doing its part to keep everyone informed, provide access to learning, and help practitioners efficiently respond to these ever-pressing needs. We have an active Section with many opportunities to learn and participate. We hope to see you (frequently) during the course of the year.

This year our focus will be outreach. Our "Brown Bag" lunch series is designed to touch on topical issues. We will host a CLE on April 22 covering legal issues on both the Washington and Oregon side of the river for those practitioners working in both jurisdictions. We will again host a Section CLE in either southern Oregon or the coast. And of course, our articles in our newsletters, with the helpful guide of Alan Mitchell, our Section editor, will keep us abreast of the changing legal environment. We also will promote outreach by socializing with other Sections of the Bar (stay tuned). Now that the industry is waking up once again, we want to be sure that all Section members have access to the resources they need to succeed.

The legislature is in session this year, and your Section will be monitoring and counseling legislation important to the construction industry. Our efforts will be on a neutral, non-partisan basis to achieve consistency and certainty in how statues are applied. Your Section currently has proposals to make corrective amendments to the Oregon Prompt Pay Act, the Oregon Construction Lien law, the residential defect Notice Statute, and some miscellaneous sections of ORS Chapter 701. Your Section also is actively participating in new legislation governing filing fees in Circuit Courts to address concerns you have raised. Please regularly check in with our website for updates as the legislature proceeds through session.

Remember, your Section is a resource. We have a diverse Board, a large membership, and ambitious goals. We hope you have enjoyed our efforts in recent years, and are thankful for the past leadership of our Committee and Chair, including Gary Christensen and his predecessors, who have left a legacy of durability in the Construction Bar. We are excited about this year; we hope you are, too.

ARE STATUTORY "NOTICE OF CONSTRUCTION DEFECT" REQUIREMENTS UNCONSTITUTIONAL UNDER WASHINGTON AND OREGON LAW?

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Recently, the Washington Supreme Court issued an opinion holding unconstitutional a statute that requires a plaintiff to provide notice to a would-be defendant before the plaintiff can bring a medical malpractice action. *Waples v. Yi*, 169 Wash 2d 152 (2010). Specifically, the Court in *Waples* held that RCWA 7.70.100 violated the separation of powers inherent to Washington's system of government.

RCWA 7.70.100 states that "No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given

at least ninety days' notice of the intention to commence the action." The Court reasoned that this statute usurped the judiciary's power to dictate how cases would be handled, procedurally, and that it conflicted with CR 3(a) which establishes the procedure for commencing any civil action in Washington, through the filing of a complaint and service of a summons.

In both Oregon and Washington, similar statutes exist in the context of construction defect cases. For example, in Oregon, ORS 701.565 states that "An owner may not compel arbitration or commence a court action against a contractor . . . unless the owner has sent that contractor . . . a notice of defect as provided in this section and has complied with ORS 701.575." This restrictive language is similar in substance and effect to the language in RCWA 7.70.100 that the Washington Supreme Court held unconstitutional.

Although it is unknown whether the Oregon courts would adhere to the same "separation of powers" rationale that the Washington Supreme Court did, we believe it is possible that ORS 701.565 would be held unconstitutional.

The Oregon Supreme Court has stated that "[t]he limits of legislative authority are reached . . . when legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions." *Ramstead v. Morgan*, 219 Or 383, 399 (1959). Over the years, that test became articulated in terms of two questions:

> (1) whether one department of government has "unduly burdened" the actions of another department where the constitution has committed the responsibility for the governmental activity in question to that latter department; and (2) whether one department has performed functions that the constitution commits to another department.

MacPherson v. Dept. of Administrative Services, 340 Or 117, 134 (2006).

In *State ex rel. Emerald People's Utility Dist. v. Joseph*, 292 Or 357 (1982), the Court was asked to look at whether a statute that required the Court of Appeals to hear and decide certain types of cases within three months violated Oregon's separation of powers doctrine. The majority held that because it was *possible* for the Court of Appeals to hear and decide cases within three months, the legislature had not unduly burdened the judiciary. They did not, however, force the Court of Appeals to adhere to the 3-month deadline in that case because of the time it took for the case to get heard by the Supreme Court.

Justice Peterson, however, specially concurred. He wrote much more strongly that the legislature *had* overstepped its function. He wrote that:

> I am persuaded that, even though the Court of Appeals could possibly hear and determine the appeal in this case within the statutorily prescribed time, the intrusion by the legislative branch into affairs which are peculiarly the responsibility of the judicial department violates the separation of powers clauses of the Oregon Constitution. The Court of Appeals has had outstanding success in its handling of one of the heaviest caseloads-per-judge of any intermediate appellate court in the United States. It controls the time the cases shall be set for hearing, the manner of hearing, and the manner of disposition of cases coming to it. I believe that legislative intrusion into this uniquely judicial function is prohibited by the Oregon Constitution.

Id. at 366-367.

Oregon's Notice of Construction Defect statute, ORS 701.565, does not simply provide limitations on the Court's power to hear certain cases under certain circumstances, but rather, it wholly precludes the Court from hearing cases arising out of construction defect unless the proper notice is given. There are no exceptions. It requires would-be plaintiffs to do more than is required by ORCP 7 (e.g. filing and serving a complaint and summons on the opposing party) to commence a lawsuit.

Thus, it is possible that ORS 701.565 would be deemed unconstitutional because it unduly burdens, limits, and/or interferes, with the Court's ability to exercise at least two uniquely judicial functions: establishing procedures for what is required to "commence" a lawsuit, and hearing and deciding disputes.

MAKING USE OF L&I WEBSITE HELPS CONTRACTORS AVOID INDUSTRIAL INSURANCE ASSESSMENTS

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If you represent a contractor or subcontractor doing business in the State of Washington, you may already be familiar with the recent assessments imposed by the Department of Labor & Industries ("L&I") against prime contractors for unpaid industrial insurance premiums owed by their subcontractors. This concept is known as prime contractor liability ("PCL").

PCL is a misnomer because, under the rules, liability attaches to (and stops with) the entity next up in the contracting chain, which in most circumstances has turned out to be between a second and third-tier subcontractor. Recent decisions from the State of Washington Board of Industrial Insurance Appeals (the "Board") have held that L&I can be estopped from assessing PCL for premiums owed by subcontractors when its website indicates the subcontractors are current.

L&I's system for collecting worker's compensation premiums requires contractors to regularly report the type and volume of work both they and their subcontractors perform, and then tender payment for their work. When work is performed by a subcontractor and that subcontractor fails to tender its premiums, RCW 51.12.070 imposes primary and direct liability on the prime contractor unless the contractor falls within a narrow statutory exemption. The exemption involves an exceedingly difficult five-part test, for which very few contractors qualify. In light of the difficulty associated with the five-part test, contractors have explored other avenues of relief, including equitable estoppel. Several recent decisions indicate the Board's receptiveness to this line of approach.

In re: Universal Drywall, Inc. et al, Dckt. No. 08 21769 (September 1, 2010) was a consolidated appeal in which seven subcontractors appealed L&I's assessments of PCL for premiums owed by their second-tier subcontractors. The subcontractors argued that they met the requirements of the exemption, or in the alternative, that L&I should be estopped from imposing PCL because the L&I's website indicated the second-tier subcontractors were current in all premiums that were owing to L&I. As expected, the Board found that the subcontractors did not meet all five requirements for the exemption. However, while the Board affirmed some of the assessments on those grounds, the Board found L&I was estopped from imposing PCL against four of the subcontractors because of the information contained on the website.

The subcontractors offered evidence that they had visited L&I's website for the purpose of confirming the premium status of the second-tier subcontractors prior to issuing payment. When the website indicated the second-tier subcontractors' premiums were current, payment was made. The subcontractors' evidence included testimony and copies of dated screen prints from L&I's website indicating the current premium status. The Board, citing *In re West Coast Drywall, Inc.*, Dckt. No. 05 20471 (September 5, 2007), held that L&I was estopped from assessing interest and penalties resulting from the incorrect information supplied by L&I on its website.

The Board subsequently applied the holding of *In re: Universal Drywall, Inc. et al* to absolve GT Drywall of PCL for its second-tier subcontractor Angel Jiminez Drywall. *In re GT Drywall, Inc*., Dckt. No. 10 11537 (September 29, 2010). The circumstances were almost identical to those found in the *Universal Drywall* case.

Again, GT Drywall failed to show the exemption applied, but the Board applied the principles of equitable estoppel and reversed the L&I assessment against GT Drywall. The Board cited testimony from a GT Drywall representative that she received communication from L&I certifying that the second-tier subcontractor's premiums were current; that she relied on communications from L&I prior to issuing payment to subcontractors; and that GT Drywall's reliance was reasonable. Under these circumstances, the Board found L&I was estopped from asserting GT Drywall was responsible for the unpaid premiums.

These recent decisions indicate that a prime contractor can avoid PCL for unpaid subcontractor premiums if: 1) the prime contractor checks a subcontractor's premium status on L&I's website prior to payment; 2) confirms the premiums are current; and 3) reasonably relies on L&I's statement to its

detriment. Contractors who print and keep the website information together with the check stubs will likely find success in defending against these types of assessments.

PRESERVING AND MAINTAINING OREGON CONSTRUCTION LIEN CLAIMS WHEN A BANKRUPTCY IS FILED

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The ability to record a construction lien is a powerful, yet complicated and time sensitive payment remedy for those who supply labor, materials, rental equipment and/or certain professional services for the construction of private projects in Oregon. A bankruptcy petition filing by a party involved in a construction dispute potentially adds another treacherous layer of issues that a practitioner must navigate or risk losing a powerful remedy.

This article focuses on some of the impacts that may arise for an Oregon construction lien claimant when a party to the dispute files a bankruptcy petition.

Effect of Bankruptcy Petition.

When a debtor files a bankruptcy petition, two immediate changes occur. First, any and all property interests of the Debtor become part of a bankruptcy estate. 11 USC §541. Second, an "automatic stay" arises that, with limited exceptions, prevents creditors from asserting claims or taking other adverse actions against the Debtor and any "estate" property. 11 USC §363.

Any actions taken that violate the automatic stay are not only subject to penalties and sanctions by the bankruptcy Court but are also void as a matter of law – even actions taken without knowledge of the bankruptcy filing. See e.g. In re Schwartz, 954 F.2d 569 (9th Cir. 1992).

Threshold Issue–Who Filed Bankruptcy?

The threshold issue always should be who is the bankruptcy debtor? Generally, so long as the debtor has no interest in the real property or improvements that are or will be the subject of the construction lien, a claimant's ability to perfect and maintain a construction lien usually should not be materially affected (although care must still be taken to avoid violating the automatic stay).

For example, if a subcontractor who has no ownership or other interest in the project, files bankruptcy, the subcontractor's suppliers may record construction liens, serve post claim notices and proceed with foreclose of the lien – with the caveat that the suppliers should omit the subcontractor in the lien foreclosure action. *See e.g. Osborn v. Logus*, 28 Or 302, 308 (1895) (contractor who owed debt and was also owner's statutory agent was not indispensable party). Obviously, any party omitted from the foreclosure action is not bound by its outcome. ORS 87.060(7); *See HGC Limited v. Cascade Pension Trust*, 174 Or App 464, 468 (2001).

Yet what if the subcontractor recorded its own construction lien against the property prior to filing bankruptcy? Assuming the lien has not yet expired, other lien claimants who wish to name the subcontractor as a party to determine its interest may violate the automatic stay by doing so because the subcontractor's lien claim is an asset of the subcontractor's estate.

When evaluating the debtor's relationship with the project, practitioners should review the expansive definition of "owner" and "mortgagee" under the Oregon Lien Law. For example, the term "owner" generally includes lessees, contractor vendees and any person "who is or claims to be the owner in fee or a lesser estate of the land." ORS 87.005(8) As discussed more below, a bankruptcy filing by one, but not all of the owners of the project, may result in some difficult and time sensitive situations for the prospective lien claimant.

Effect on Oregon Construction Lien Rights.

Once a bankruptcy is filed, prompt action may be required to properly perfect and maintain a construction lien during the pendency of the bankruptcy. Three critical periods for perfecting and maintaining construction lien rights are:

The deadline to record the lien;

The deadline to serve post-lien notices; and

The deadline to foreclose the lien.

The impact of bankruptcy on each of these time periods is discussed below.

Recording the Construction Lien.

An Oregon construction lien must be recorded within the 75 calendar day period described in ORS 87.035(1). This deadline is not extended by any party filing bankruptcy.

Fortunately, recording a construction lien against estate property does not violate the automatic stay. Bankruptcy Code Sections 362(b)(3) and 546(b)(2) generally provide that if a law creates a lien whereby the claimant acquires rights in the subject property before the date of perfection (i.e. recording the lien), then recording the lien post-bankruptcy does not violate the automatic stay.

In 1987, the Oregon legislature amended the Oregon Lien Law to clarify that Oregon construction lien rights fit within the Section 362(b)(3) exception to the automatic stay. Under ORS 87.010, liens are "created" upon delivery of materials, rental of equipment or performance of labor (see ORS 87.025(1-2) and 87.035(1-2)) and recording the lien constitutes the act of perfection (see ORS 87.025(1), 87.035(1), and 87.060(1)).

Service of Post-Lien Notices.

In order to recover attorney fees in a foreclosure under ORS 87.060(5), a lien claimant must give two types of notices after the lien is recorded. Within twenty days of recording the lien, the claimant must provide a notice to the owners and mortgagees that the lien has been recorded. ORS 87.039. More than ten days prior to commencing a lien foreclosure, a lien claimant must also give a ten day notice of intent to foreclose to the same parties. ORS 87.057. Both notices must be timely given (with a copy of the lien) by certified mail or hand-delivery.

In a bankruptcy context, the question is whether service of post-claim lien notices upon the debtor violates the automatic stay, potentially rendering the notice void and subjecting the creditor and attorney to sanctions. If time permits, relief from the automatic stay may be available, although due to the time constraints of the twenty day lien notice period, perhaps it would be necessary to move for relief to serve the notices prior to even recording the lien. A more practical alternative may be to serve the post-lien notices together with a copy of the construction lien as part of the creditor's Section 546(b)(2) notice, which is discussed further below. Important to note, however, is that ordinary service of the 546(b)(2) notice through the Electronic Case File System ("ECF") system does not strictly comply with the service requirements of ORS 87.018 (which requires personal service or service by certified or registered mail).

What about the scenario where a lien claimant timely served the lien notices, but after the twenty day notice of recording period expires, learns the notices are void due to an owner having filed bankruptcy a few days before the notices were served? The solution is to file a motion seeking an "annulment" of the automatic stay in order to "validate" the notices. *See In re National Environmental Waste Corp.*, 129 F3d 1052 (9th Cir. 1997) (The Court balances the equities among the parties in order to determine whether retroactive annulment of the stay is justified on a case by case basis). Note, however, that even a relatively harmless but "knowing" violation of the stay may be difficult to validate under the test set forth in the *National Environmental* case, not to mention the additional risk of sanctions from a potentially unsympathetic bankruptcy judge.

Preserving the Lien Beyond the 120 Day Foreclosure Deadline.

A construction lien claimant must file an action to foreclose the lien within 120 days of recording or the lien will expire. ORS 87.055. If the owner of the property subject to the lien files bankruptcy, however, the claimant may no longer simply file a state court action due to the automatic stay.

Instead, the Code creates an additional requirement the construction lien claimant must satisfy within the 120 day foreclosure deadline. Section 546(b)(2) provides that the lien claimant must file a notice in the bankruptcy court within 120 days of recording the lien. The notice should identify the lien, the subject real property and improvements, and recite that the lien claimant intends to continue perfection of the lien by foreclosing the lien. Case law provides that filing a proof of claim or seeking relief from stay to foreclose the lien is not sufficient notice under §546(b)(2). *In re Baldwin Builders*, 232 B.R. 406, 413-414 (9th Cir. B.A.P 1999) (discussing a California construction lien).

A copy of the notice should be served upon the bankruptcy trustee or debtor in possession. Filing by use of the ECF system ordinarily would accomplish such service. Practitioners who are not ECF filers should beware that ECF registration may be required

ahead of time, particularly if the practitioner is an occasional filer. See LBR 5005-4(b)(1) (12/10) (Any creditor filing more than 10 documents in one calendar year must thereafter file using the ECF system only). Computer malfunctions do not extend any time periods. LBR 5005-4(f).

Note that the Section 546(b)(2) notice is not the equivalent of filing a lien foreclosure action. Once the automatic stay terminates, a lien claimant may only have thirty (30) days to file the state court action pursuant to Section 108(c). *See In re Hunters Run, Ltd. Partnership*, 875 F2d 1425 (9th Cir 1989) (holding Section 108(c) tolled the deadline to foreclose a Washington mechanic's lien). Also note that *In re Hunters Run* was decided prior to amendments that now require the filing of the 546(b)(2) notice.

Filing a Section 546(b)(2) notice may not be the only step for all lien claimants. For example, if other owners exist who have not filed for bankruptcy protection, obtaining relief from stay to file and serve the lien foreclosure action may be necessary to preserve the lien against the non-bankruptcy party's interest. Similarly, to the extent a debtor and a non-debtor's property interests are intertwined (such as ownership by tenancy in the entireties), relief from the stay (or retroactive annulment of the stay) may be necessary. Similarly, in complex bankruptcies that involve large sums for the lien claimant, it may be wise to obtain limited relief to file and serve the state court lawsuit in order to avoid some of the pitfalls described below.

Finally, some practitioners insist that a lien creditor should always attempt to obtain limited relief from stay to file and serve an action within the original 120 day foreclosure period. Some reasons include that a lien claimant may have difficulty convincing a state court judge, a title company or another interested third party that Section 108(c) indeed extends a claimant's right to file a lien foreclosure action beyond the 120 day deadline. This author is unaware of any case that applies Section 108(c) to extend Oregon's construction lien rights (although a lien claimant could argue that there is no applicable practical differences between Oregon's statutory scheme and the Washington mechanics lien foreclosure rights extended in *In re Hunters Run).*

Some Other Bankruptcy Hazards for Lien Claimants.

Generally, unless a lien is "dealt with" in some fashion in the bankruptcy process, the lien will not be extinguished and will survive the conclusion of the bankruptcy. *See e.g. In re Work,* 58 B.R. 868, 869 (Bankr. D. Or 1986) (discussing a real property tax lien). While a complete discussion of the various hazards that might arise for a creditor with a perfected construction lien in bankruptcy is beyond the scope of this article, a few issues to keep mind may include:

Whether to file a proof of claim.

A lien creditor should carefully consider whether to file a proof of claim. With few exceptions, a proof of claim is the only method by which a creditor may recover unsecured pre-petition debt. Accordingly, a careful analysis of priorities and potential equity in the property should be evaluated in light of the various pros and cons that impact a creditor who files a proof of claim. A lien creditor should also consider whether it may be able to obtain relief from stay to foreclose the lien (for example, in circumstances where the debtor has no equity in the property and the property is not otherwise needed for a successful reorganization). Finally, a lien creditor should consider the various effects that filing a proof of claim has.

First, consider that when any creditor files a proof of claim, the creditor becomes subject to the jurisdiction of the bankruptcy court and generally waives the right to a jury trial. Second, a proof of claim many be disposed of in a summary manner unless the creditor requests a hearing. A denial of the proof of claim sometimes can come unexpectedly after long periods of inactivity and if a hearing is not requested, is binding on the creditor.

Finally, a lien claimant should carefully consider whether filing a proof of claim would disclose any potential preference issues under Section 547 (generally involving payments or transfers made within 90 days of a bankruptcy filing while the debtor is insolvent that enable the creditor to recover more than it would in a hypothetical bankruptcy liquidation). Absent any defenses, a trustee or debtor in possession may sue a creditor to recover debtor's payments that discharge unperfected lien rights (that is, the debtor's payments made before the lien is filed) or payments on an invalid or valueless lien on the basis of such payments being a preferential transfer.

Section 363(f) Motion to Sell Property Free and Clear of Liens.

Practitioners should carefully review such motions to be sure that the validity, amount and priority of the lien are accounted for, as well as to confirm that the property sale will yield an acceptable price under the circumstances. *See e.g. In re Wilde Horse*, 136 B.R. 830, 841 (Cal. Bk. D. 1991) (discussing the standards for evaluating such motions).

Motions to Abandon or For Relief from Stay.

Under Section 108(c), discussed in the *In re Hunters Run* case cited above, once the automatic stay terminates, a lien claimant may only have 30 days to file the foreclosure action or the lien expires. Ways that the automatic stay can terminate include termination of the bankruptcy case, confirmation of a Chapter 11 plan, an order granting a trustee or debtor in possession's motion to abandon the property, or an order granting another creditor relief from the stay to foreclose. In a complex bankruptcy involving multiple properties, it may be difficult to identify "what" property is being abandoned or is subject to relief because not all creditors may identify the same property in the same way.

Chapter 11 Bankruptcy Plan Language.

If the foreclosure lawsuit is not already filed and served, a lien claimant in a debtor's Chapter 11 bankruptcy must carefully consider the language of any bankruptcy plan that may impact the lien claimant's ability to timely file a lien foreclosure action after a plan is confirmed. Generally, confirmation of a bankruptcy plan ends the automatic stay, triggering the 30 day period to commence the foreclosure action under Section 108(c). Yet most bankruptcy plans generally provide for an injunction that prevents the filing of new lawsuits for pre-petition matters.

Even if a state court lien foreclosure has been filed and served, if the Chapter 11 plan provides payment terms that extend beyond the time in which a lien claimant can procedurally keep the state court action "alive," a lien claimant may have its lien foreclosure action dismissed before it knows whether it will receive payment under the confirmed Chapter 11 plan. Accordingly, lien claimants may need to object and negotiate plan language that would permit filing and serving (or continuing) a lien foreclosure action, as well as account for practical issues, such as how long the particular state court will permit the foreclosure action to be abated pending payment.

PRACTICE TIP: EXEMPTING LIEN FORECLOSURE ACTIONS FROM EXCESSIVE FILING FEES

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Many construction law practitioners have been aware of the expensive filing fees that now accompany construction lien foreclosure actions since September of 2009. Fortunately, Chief Justice De Muniz issued Chief Justice Order No. 09-052 (2)(c) allowing for exemptions from those fees in certain situations.

In conducting a seminar recently, I was interested to learn that some practitioners were unaware of these exemptions. In addition, one county in which I recently filed a motion to exempt the filing fee was unaware of Order No. 09-052(2)(c) and had no procedure in place to entertain the motion. This article is intended to provide practical tips that have successfully resulted in the reduction of filing fees in lien foreclosure actions that exceed $10,000.00.

Order No. 09-052 (2)(c) allows a Court to exempt an action from the required filing fee for more than five parties named in a pleading. The factors the court must consider are:

1. The severity of the hardship the fees impose on the requesting party; and,
2. Whether the number of parties named in the pleading will require additional judicial resources to process the case.

The severity of the hardship imposed by the filing fees can be illustrated to the court by attaching a fee calculator showing the amount of the required fee. The filing fee to foreclose a $500,000.00 lien claim against ten defendants will cost a plaintiff $4,207.00. If there are twenty defendants, the fees increase to $8,367.00. The hardship of the fees is not necessarily difficult to establish. Even if you represent a large or perceived wealthy client, you can point out to the court that the filing fees are being incurred to recover a large sum of unpaid compensation that has been unavailable for payroll, overhead and investment.

The court will be concerned about judicial resources; and, the court must consider the issue under Order No. 09-052(2)(c). The motion should state that the number of parties is only the result of a requirement that all interest holders be named in the foreclosure action. A summary of the equal priority of lien claimants, the tendency for lower tier claimants to join in motions filed by upper tier claimants and an attempt to identify the basic issues and how the case will likely be processed can all be persuasive.

A motion pursuant to Order No. 09-052 (2)(c) will be presented at ex parte before the complaint is filed. Many counties outside of larger urban or suburban areas do not have scheduled times for ex parte appearances. You will need to contact the presiding judge's staff and schedule a special ex parte appearance with the judge.

You should not assume that the judge, the court staff or the trial court administrator has previously entertained a motion under Order No. 09-052 (2)(c). In presenting the motion, it is helpful to the court and the clerk to attach copies of Order No. 09-052 (2)(c) and a filing fee calculator showing the calculation of the reduced filing fee. Once the presiding judge approves the amount, include the reduced filing fee in the order itself so the clerk knows the exact fee to impose.

The more information a practitioner can provide the presiding judge, the court staff, and the trial court administrators, the better chance one has of obtaining a favorable result.

NEW WASHINGTON CASE LAW

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The Washington Court of Appeals recently issued a ruling of interest for construction law practitioners licensed in that state.

In *Ahten v Barnes* (Div 1 Docket #64345-2, Nov. 1, 2010), the plaintiff homeowner served the defendant contractor via substituted service through the Department of Labor & Industries under RCW 18.27.040(3). The homeowner then took a $250,000 default judgment against the contractor.

The contractor sought and obtained an order vacating the bulk of the default judgment due to lack of service. (The surety paid its $12,000 to the homeowner and was not involved in the appeal. The portion of the default judgment associated with that $12,000 was not vacated.)

The court held that the substituted service provisions of RCW 18.27.040 were solely for purposes of actions against contractors and their sureties. Those service provisions were not sufficient to include any other claims against the contractor. The homeowner plaintiff argued that the statutory words "and confer personal jurisdiction" was sufficient to allow substituted service for all of her claims. The court rejected that argument.

For practitioners, this case points out the need to carefully follow all necessary service rules.

Construction Law Section Executive Committee