# Construction Law Newsletter

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## QUALIFIED BASED SELECTION FOR PUBLIC AGENCIES: AN OVERVIEW OF ORS 279C.100-.125

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### I. Background

Qualification Based Selection (QBS) is a consultant selection process that requires consideration of the consultant's experience and qualifications prior to the consideration of price or cost. Under a QBS process, price will not be considered until after the most qualified consultant has been selected by an evaluation committee. The QBS process was developed to give public owners procurement tools selection of creative-type services for which low cost is a poor criterion. "An apt analogy from outside of the construction arena often cited is in the area of medical care: Nobody willingly chooses a surgeon based upon a doctor's willingness to perform an operation most cheaply." Arthur Schwartz, *QBS*, (found at http://www.acec-co.org/qbs/resources/).

Prior to 2011, Oregon law imposed QBS primarily on state agencies, although local agencies were required to use QBS in limited situations.[2] In 2011, the Oregon legislature expanded the application of QBS to local contracting agencies when it adopted HB 3316 (now codified at ORS 279C.100–.125). Under the QBS statute, the contracting agency has "sole discretion" to create rules and procedures to select the consultants. However, if the agency does not adopt procedures, the Attorney General's model rules (OAR 137-048-0100) will apply.

### II. Contracts to which QBS applies.

QBS is not applicable to the selection of all consultants. Instead it is limited to the following professions: Architects, Engineers, Land surveyors, Photogrammetrists; and Transportation Planners (the latter for projects that require compliance with NEPA, the National Environmental Policy Act).[3] ORS 279C.110.

In addition, QBS selection processes may also apply to some professional service contracts known as "related services" contracts. ORS 279C.120(1)(b). A "related service" is a "personal" (i.e., professional) service *other than* QBS services, which are "related to" the activities performed in regard to a public improvement project. The category of "related services" is open-ended.[4] ORS 279C.100(8). The selection

[1] The opinions expressed in this article are solely those of the authors and do not represent any official or unofficial policy of the City of Portland.

[2] Previously it applies only if the local contracting agency received money from the state highway fund or a grant or loan from the state used to pay for design and construction and the total amount of money from the state exceeded 10% of the value of the project, which had to exceed $900,000. *Former* ORS 279C.110(2).

[3] OAR 137-048-0010(5) further defines "transportation planning services."

[4] ORS 279C.100(8) provides a non-exhaustive list of "related services."

process for "related service" contracts is discussed below.

ORS 279C.120 does not require the use of QBS procedures to hire consultants for "related services." Agencies may adopt their own rules for "related services" consultants, follow QBS procedures, or use price competition. ORS 279C.120(1)(a) – (c). However, if an agency follows the AG Model rules, then QBS may apply, as discussed in more detail below.

ORS 279C.110(1) provides that QBS applies to all QBS consultant contracts. However, there are exceptions to that requirement for (1) contracts that do not exceed $100,000, (2) emergencies, and (3) continuation of existing contracts. ORS 279C.110.

## III. Selection Procedure

ORS 279C.110(2) gives the contracting agency "sole discretion" to create procedures for screening and selecting QBW consultants. However, the contracting agency may not ask for pricing policies, pricing information, the number of hours proposed, or hourly rates and overhead until after the most qualified candidate has been selected. ORS 279C.110(1). Price may be discussed *only after* consultants are ranked and only with the highest ranked consultant.

ORS 279C.110(3) lists criteria agencies *may, but are not required*, to use in order to select and screen candidates, such as "specialized experience." If the selection process ends up in a tie, then the agency may use any process *other than price* to break the tie.

Once the highest ranking candidate is selected for a QBS contract, the agency can negotiate contract conditions, including payment. The agency has complete discretion to determine whether the compensation level to be paid to the consultant is "reasonable and fair." ORS 279C.110(5). If no agreement is reached, the agency shall "orally or in writing, formally terminate negotiations with the selected candidate." ORS 279C.110(6).

It is not clear what "formally" terminate negotiations means. Presumably, it requires the agency to expressly say that it is terminating negotiations so the agency cannot "play games" with the selection process, such as pitting one consultant against another on price.

## IV. Selection Process under the Model Rules

As previously mentioned, if the contracting agency does not create its own rules or procedures to screen and select candidates, the Attorney General's Model Rules will apply. Those rules have three different tiers of selection: direct appointment, informal selection, and formal selection.

### A. Direct Appointment: OAR 137-048-200

Contracting agencies may hire QBS consultants without following QBS procedures if the contract prices does not exceed $100,000, is an emergency, or is a continuation of an existing project.

For continuation contacts that do not exceed $250,000, the prior contract must have used either the formal selection process pursuant to OAR 137-048-0220 or the formal procedure application to selection of the consultant at the time of original selection to select the consultant for the earlier contract. Therefore, if a QBS consultant was hired before the statute went into effect, then the contact is permitted, provided that a "formal" selection process was used. For continuation contracts where the estimated fee is expected to exceed $250,000, the contracting agency is required to make written findings that (1) the contract will support the efficient use of public funds and resources and resulting substantial cost savings, and (2) the contract will "protect the integrity" of the contracting process by not encouraging favoritism or substantially diminishing competition.

In utilizing the direct appointment method, the contracting agency may select the consultant from a) its list of consultants, b) another agency's list of consultants *with that agency's written consent*, or c) from all consultants that the agency can reasonably identify. OAR 137-048-200(2).

After selection, the agency may negotiate price with the consultant, along with performance obligations and performance schedule. OAR 137-048-200(3)(b).

### B. Informal Selection: OAR 137-048-210

If the estimated fee is not expected to exceed $250,000, contracting agencies may select QBS consultants from an "informal" process. OAR 137-048-210(1).

Under the informal process, the contracting agency prepares and distributes an RFP to a minimum of 5 prospective consultants from (a) its list of consultants, (b) another agency's list of consultants (*but without a requirement that the other agency give written consent*), or (c) from all consultants that the agency can reasonably identify. It is important to note that public advertising is not required. The contracting agency then reviews and ranks proposals and select the 3 highest ranked proposers. OAR 137-048-210.

The contracting agency may then negotiate with the highest ranked proposer on performance obligations, payment methodology and the maximum amount payable and other provisions. OAR 137-048-210(3). If negotiations with any of the top ranked consultants do not result in a contract the contracting agency may proceed with a new informal solicitation or a formal solicitation. *Id.*, 210(5).

### C. Formal Selection: OAR 130-048-220

Formal selection process shall be used at the contracting agency's discretion or if consultants cannot be directly or informally appointed. OAR 130-048-220(1).

Formal selection requires either an RFQ followed by an RFP, or simply an RFP selection process. *Id.*, 220(2). The process for formal selection is as follows:

*(1) Advertisement*: Formal selection requires advertisement in a newspaper or electronically pursuant to one of the methods found in OAR 137-046-0110(14). *Id.*, 220(2)(a) and (b). In addition, the RFP or RFQ *may* be sent to consultants on the Agency's list of consultants. *Id.*, 220(2)(c).

*(2) Request for Qualifications/Short List*: If the agency decides to use a Request for Qualifications (RFQ) process, the rule provides a list of items that must be included in the RFQ. OAR 130-048-220(3)(a). An evaluation committee (comprised of at least two individuals) will screen the responses to the RFQ and create a "short list" of at least three qualified consultants.[5] However, if four or fewer consultants responded to the RFQ or if fewer than 3 consultants fail to meet minimum requirements, then a short of list of fewer than three may be established. OAR 130-048-220(3)(e).

*(3) Request for Proposals*: An RFP must be provided to each consultant on the short list. OAR 130-048-220(4)(a)(A) lists the required contents of an RFP, which includes selection criteria, while 220(4)(a)(B) includes criteria that are discretionary and lists examples of criteria that agencies may want to consider. A sample form of contract must be provided with the RFP. *Id*., at 220(4)(a)(N).

*(4) Ranking by Evaluation Committee*: RFP responses are evaluated and ranked by a committee of at least 3 individuals, one of whom must be an employee of the contracting agency. Persons who screened the proposals pursuant to an RFQ process, if utilized, may also serve on the RFP evaluation committee. OAR 130-048-220(4)(b). Any reasonable screening or evaluation method is acceptable. The committee then provides results of scoring and ranking for each proposer. If two proposers are tied, the contracting agency can break the tie with any process other than price. After the tie is broken,

[5] The Rule permits the contracting agency to place a "pre-determined number * * * on a short list" but in a different subsection states the contracting agency "shall establish a short list of at least three qualified Consultants, if feasible." 220(3)(d)(B) and (e). (Emphasis added.) Reading the rules together, it appears the agency has discretion to establish a "pre-determined number" on a short list, provided that number is three or more.

the agency may proceed with negotiations. OAR 137-048-0230 (1).

*(5) Negotiation*: The contracting agency may cancel the RFP after it receives the committee's results for the scoring and ranking. If it does not cancel the RFP, the agency may begin negotiations with the highest ranked proposer. OAR 130-048-220(4)(c). If no agreement is reached, the agency must "formally terminate" negotiations with the highest ranked proposer before moving on to the second highest ranked proposer.

## V. Summary

QBS is a new selection procedure for certain types of consultants that mandates consideration of price only after the "most qualified" consultants have been selected. As a result, it will likely take a longer period of time to acquire such consultants. Whether it will accomplish the goals of the legislation's authors remains to be seen.

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## TRUST ME: ENHANCING CONSTRUCTION CREDITOR RIGHTS IN BANKRUPTCY THROUGH TRUST LAW

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The beneficiary of a trust enjoys a number of special benefits and rights as a creditor in a bankruptcy filed by the trustee (the custodian of the trust as the debtor in bankruptcy, not the trustee appointed to administrate or oversee the bankruptcy process). This article suggests that a construction creditor may also be able to enhance its collection rights in bankruptcy by contractually creating a trustee-beneficiary relationship with the contractors the creditor supplies for construction projects.

### Statutory Trusts in Other States.

The use of trust law concepts to enhance construction creditor's rights in bankruptcy is not new. For example, in Arizona, funds paid by certain types of owners to a contractor for work by a subcontractor are deemed to be held "in trust" by the contractor for the benefit of the subcontractor:

> *A.R.S. 33-1005. Payments made in trust*
>
> Monies paid by or for an owner-occupant * * * to a contractor * * * as payment for labor, professional services, materials, machinery, fixtures or tools for which a lien is not provided in this article shall be deemed for all purposes to be paid in trust and shall be held by the contractor for the benefit of the person or persons furnishing such labor, professional services, materials, machinery, fixtures or tools. Such monies shall neither be diverted nor used for any purpose other than to satisfy the claims of those for whom the trust is created and shall be paid when due to the person or persons entitled thereto. The provisions of this section shall not affect other remedies available at law or in equity.

In the *In re Baird*, 114 B.R. 198 (B.A.P. 9th Cir. 1990) case, the Bankruptcy Appellate Panel concluded that the misuse of funds in violation of the Arizona "trust fund" statute stated a claim that the "debt" owed to the creditor is a non-dischargeable debt in bankruptcy. *Baird*, 114 B.R. at 206. In other words, the debtor who filed bankruptcy in *Baird* had substantial incentive to resolve the subcontractor's claim because the debt may remain collectable by the subcontractor despite the bankruptcy filing (which is generally the exception, not the rule, for most debtors who fully complete the bankruptcy process).

### Creating New Potential Rights by Creating a Trust by Contract.

Absent an action by the Oregon Legislature to pass a "trust fund" statute similar to the Arizona statute, construction creditors may be able to create new potential bankruptcy rights by creating a trust by agreement.

A trust is nothing more than a special relationship where a trustee holds legal title to a "res," or property, for the benefit of the trust beneficiary. The Uniform Trust Code ("UTC"),

adopted in Oregon, provides the following minimum requirements for creating a trust:

(a) The settlor has capacity to create a trust.

(b) The settlor indicates an intention to create the trust.

(c) The trust has a definite beneficiary * * *

(d) The trustee has duties to perform.

(e) The same person is not the sole trustee and sole beneficiary. See ORS 130.155(1).

Absent language to the contrary in the terms of the trust, the UTC provides the default rules for trusts, subject only to certain non-waivable rules. See ORS 130.020(1) and (2). Note that a "settlor" means "a person * * * *who creates a trust or* contributes property to a trust" – so the settlor need not be the person who contributes the property to be held in trust. ORS 130.010(16).

One important default rule under the UTC is that a trustee must hold trust property separate and apart from the trustee's own property. ORS 130.695(2). Therefore, any agreement attempting to create a trust established over "funds" should provide that the trustee (i.e. the person who owes the money for the purposes of this article) may commingle the trust beneficiary's funds with its own funds. See ORS 130.020 generally and 130.720(1) (permitting the trust agreement to vary the trustee's duties). Using the example of a contractor holding funds in trust for its subcontractor, the failure to modify this default rule under the UTC would require the contractor to deposit the subcontractor's funds in a separate account, which is not practicable, and may cast doubt on whether the arrangement truly is a trust.

**Construction Law Relationships Potentially May Include a Trustee and Beneficiary.**

A joint check agreement creates a three party relationship for the express purpose of benefiting a remote payee – typically a contractor who makes payment on a subcontract jointly with the subcontractor and the subcontractor's supplier. Using the above-example, it may not be a significant additional step for a material supplier with sufficient negotiating power to include language in the joint check agreement creating an express trust whereby the contractor (as the "settlor") requires the subcontractor (as the "trustee") to hold funds intended to be paid to the supplier (the beneficiary) in trust. Language to use as a starting point might be:

> *All parties agree that all funds owed to Customer, to the extent those funds result from materials or equipment supplied by Supplier, shall be and are held in trust for the sole benefit of Supplier for the express purpose of insuring Supplier realizes payment for past and future materials and equipment supplied to the Project (hereinafter "Trust Funds"). Customer may commingle Trust Funds, but agree they have no interest in Trust Funds held by anyone, that Customer has no interest in the joint checks to be issued pursuant to this Agreement, and to promptly account for and pay to Supplier all such Trust Funds.*

Similarly, a construction contract that requires retention is analogous to a trust relationship insofar as there is a "res" – the retained percentage of the contract funds earned – held by the contractor (or owner) to secure completion of performance by the ultimate intended beneficiary of the retainage. Or for that matter, all funds earned under the construction agreement. For example, the following case excerpt recites contract language used by a general contractor to insure the subcontractor paid its suppliers:

> Each subcontract provided that all money received by the subcontractor from Raiser [the general contractor] immediately became and constituted a trust fund for the benefit of "persons and firms supplying labor and materials . . . for the benefit of said persons and firms, and shall not in any instance be diverted by Subcontractor to any other purpose until all obligations arising hereunder have been fully discharged and all claims arising therefrom have been fully paid."

*In re Gonzales*, 22 B.R. 58, 59 (B.A.P. 9th Cir. 1982). Note, however, that due to the adoption of the UTC since this case decision, a drafter must include language expressly permitting the trustee to commingle funds with the trustee's own funds.

**Using Trust Concepts in Bankruptcy to Protect Construction Creditors.**

If parties to construction contracts can be elevated to the level of a trustee and beneficiary in relation to the sums to be paid, a creditor can potentially enjoy additional rights and remedies in bankruptcy court.

**1. Misuse of Trust Funds May Be a Non-Dischargeable Debt of a Contractor *or* a Responsible Corporate Officer of Contractor.** Most bankruptcy debtors file bankruptcy to discharge debts and to obtain a financial "fresh start" – meaning most debts arising before the bankruptcy filing are no longer collectable against the debtor. However, a bankruptcy debtor may not discharge certain types of debts determined by the bankruptcy court to be "non-dischargeable." Case law provides that even a potentially innocent misuse of funds by a fiduciary can give rise to a claim the debt is non-dischargeable under 11 USC §523(a)(4). *In re Gonzales*, 22 B.R. at 59 ("defalcation" under Section 523(a)(4) does not require proof of an intentional wrong by a debtor with respect to funds held in trust).

Potentially, this theory could apply to both a subcontractor seeking to recover payment affirmatively from the upstream contractor (as is the case in *Baird*), or a general contractor seeking to recover damages caused by a downstream subcontractor's non-payment of "trust funds" to his supplier who filed mechanics liens (as is the case in *Gonzales*).

Furthermore, it seems possible to create liability on the part of the "trustee" that may even attach to officers of the debtor corporation. For example, the debtor in the *Baird* case was a *corporate officer* of what presumably was an insolvent corporate entity that owed the debt for the work performed. While *Baird* is obviously of only limited utility as it is based upon a "statutory" trust, perhaps the same result could be obtained contractually if the "trust" provision of the contract identified the contractor's specific corporate officers as trustees over the funds and recited their specific fiduciary duties in relation to the funds.

**2. Trust Funds May not be Part of Debtor's Bankruptcy Estate (and Should be Paid to Creditor).** A voluntary bankruptcy filing immediately creates a bankruptcy "estate" in all legal and equitable interests of the debtor in any property, wherever located. The concept of an estate is critical to bankruptcy law. Generally, the purpose of most bankruptcies is to either liquidate the debtor's non-exempt assets to pay creditors or to use the debtor's assets as part of a plan to reorganize. The bankruptcy "estate" generally describes all of the debtor's property to be protected from unauthorized creditor collection action and unauthorized transfers by the debtor, both of which disrupt or render impossible an orderly administration of the bankruptcy.

Under the statute creating the bankruptcy estate, however, the trustee (i.e. the debtor who is the custodian of a trust) owns only "legal title" to trust assets - equitable title is held by the beneficiary for whom the assets are held in trust. 11 U.S.C. §541(d). Therefore, if the trustee files bankruptcy as a debtor, the trust assets never become part of the debtor's bankruptcy "estate" and the debtor should not be able to "use" or liquidate those trust assets in a bankruptcy. *See In re LAN Tamers, Inc.*, 329 F.3d 204 (1st Cir.2003) (Holding that the debtor did not have any property rights in funds that the court declared to be held in a resulting or constructive trust); and *In re Edison Bros., Inc.*, 243 B.R. 231 (Bankr.D.Del.2000) (Same result regarding a constructive trust). Accordingly, a creditor who is a beneficiary of trust funds traceable to trust funds held by the debtor may file an adversary proceeding for the return of those funds. Similarly, the creditor can and often should object to any motion to use cash collateral in the context of a Chapter 11 bankruptcy to the extent the trust funds are

traceable to the cash collateral that the debtor proposes to use.

**3. Trust Funds Used to Pay Debts May Not be Subject to Preferential Transfer Claims In Bankruptcy.** Many trade creditors are familiar with preferential transfer claims under 11 U.S.C. §547. A common scenario is a trade creditor receives a payment from a customer on a pre-existing debt only after threatening collection. The customer then files bankruptcy less than ninety (90) days after the check clears the bank. Sometime later, the creditor receives a letter from the bankruptcy trustee demanding the creditor return the payment to the bankruptcy court as a "preferential payment."

If the trade creditor can claim the funds paid were "trust funds" (such as the scenario with a trade creditor who uses a joint check agreement that creates a trust), the trade creditor may have a potential defense to disgorging the funds. A central element of a preferential transfer claim under Section 547 is that there was a transfer of "*an interest of the debtor in property*" – in other words, the debtor "owned" the property or funds transferred. As noted in the discussion above, a trustee (again, custodian of a trust as a bankruptcy debtor) only holds legal title, not equitable title, to the trust property. Accordingly, case law provides that a transfer of "trust property" may not be subject to a preference claim. *Begier v. Internal Revenue Service*, 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) (Debtor's payments of employee FICA taxes and certain excise taxes deemed by statute to be held in trust by the Internal Revenue Service were not preferential transfers of an interest held by the debtor in the funds to the IRS).

**Summary.** Given the fragile condition of the construction industry, bankruptcy is a potential risk for virtually any given project. While none of the above-strategies may be fool proof, use of these techniques by creditors may provide significant value should a bankruptcy occur. Trust me.

## EXPEDITED JURY TRIALS: AN UPDATE

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The Expedited Civil Jury Trial Program was adopted by Multnomah County Circuit Court just over a year ago. To date, seven trials have gone to verdict in the program. This article will revisit the basic rules for the program and provide some background. Later, a second article will discuss the results of a study currently being conducted by the National Center for State Courts with respect to the program.

The basic rules for the program were the subject of a two-part "Tips from the Bench" article written by Judge Marilyn Litzenberger and published in the *Multnomah Lawyer* in November and December 2010. The full text of the articles is available from the archives on the MBA website at http://mbabar.org/Resources/Publications.html. Additional information and forms can be found at http://courts.oregon.gov/Multnomah/General_Info/Civil/Civil.page?

Program highlights are as follows:

1. All parties must agree to participate in the program and file a joint motion.
2. A case management conference will be scheduled in front of one of the following Judges: Henry Kantor, Marilyn Litzenberger, Judy Matarazzo, Adrienne Nelson, or Janice Wilson. At the conference, a trial date for a six juror trial will be set within four months of the designation. A corresponding discovery cut-off date will be set not later than 21 days before the trial date.
3. Unless stipulated otherwise, within four weeks of designation, each party must do the following: 1) exchange certain witness contact information; 2) exchange certain non-privileged documents; and 3) exchange insurance policies per ORCP 36B(2).

4. Unless stipulated otherwise, the parties may do the following: 1) take two depositions; 2) serve one set of requests for production to be served 60 days before the trial date; and 3) serve one set of requests for admission to be served 60 days before the trial date.

5. Once designated, the case is no longer part of the mandatory arbitration program, is exempt from the alternative dispute resolution requirements and pretrial motions are disallowed without prior leave of the court.

In addition to the above, the parties are allowed to enter stipulations about the conduct of the trial. For example, the parties may desire to stipulate to the admissibility of documents per UTCR 13.190 of the mandatory arbitration program. Another example is to stipulate to a precautionary jury instruction informing the jury that they are participating in an expedited civil jury trial. This stipulation could be used to explain an unusual number of stipulated exhibits, a limited number of fact witnesses testifying in person, or the use of documentary expert witness testimony rather than live testimony.

Judge Wilson was on the statewide committee that developed the program and drafted UTCR 5.150. She also chaired the local Civil Case Management Committee, which worked to implement the program in Multnomah County. In preparation for this article, she took time to discuss her thoughts on the program. Judge Wilson points out that historically the court was divided into circuit and district courts. It was in the district court, with lower dollar value cases, that many young attorneys learned the ropes of the civil jury trial. The elimination of the district court and the introduction of mandatory arbitration necessarily meant the loss of this training ground and corresponding loss of experienced civil trial attorneys. The expedited program gives newer attorneys the opportunity to gain civil jury trial experience. The program is not limited to newer lawyers, however.

Judge Wilson encourages civil attorneys to broaden their perspective and consider the program for any case. There is a perception that the program is only for "that special case" - such as a low dollar case. Instead, the program can be used for a wide variety of cases. For example, the program can be used to determine liability only where damages are agreed to (and vice versa) or to reduce the cost of litigation by limiting the number of depositions and through the use of stipulations regarding the admissibility of evidence. Under the new Supplementary Local Rules for civil case management, all cases will have an initial case management conference with a judge at which time they will be asked for the appropriate track for the case, i.e., regular course with mandatory arbitration, regular course, expedited jury trial or complex case. Prior to the conference, attorneys are encouraged to discuss the option of an expedited jury trial before the conference with both their clients and opposing counsel.

Multnomah County Circuit Court is currently participating in a research study developing information on various state court programs around the country. The expedited civil jury program is being analyzed as part of the study. In a future article, the results of the study will be shared with local lawyers.

Note: This article was previously published in the Multnomah County Bar Association magazine, *Multnomah Lawyer*.

## BEWARE OF BANKRUPTCY IN CCB DISPUTE RESOLUTION COMPLAINTS

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Last summer the legislature had to make significant changes to the CCB Dispute Resolution Services (DRS) complaint process to fill a budget hole caused by a 25 percent drop in

the number of licensed contractors since 2008. Part of this budget hole was filled by eliminating the cost of hearings before the Office of Administrative Hearings on DRS complaints involving residential structures. For complaints filed on or after July 1, 2011, the complainant must file the complaint in court if the complainant and respondent fail to settle the dispute at the onsite meeting held by the CCB.

This change may have the unintended consequence of barring a complaint against a respondent who receives an order from a United States Bankruptcy Court discharging his or her debt to the complainant. This issue arose in a complaint being reviewed by the DRS. For various reasons, the complainant did not file in court and now the Bankruptcy order prevents the suit. We are still trying to find a way to allow the complaint against the bond, but so far we have been unsuccessful.

It is possible to file against a tortfeasor who has filed for bankruptcy if the relief sought is limited to recovery from the defendant's liability insurance. The insurance company has a duty to defend so there will be someone to contest the suit. That may not be possible in a case involving access to a CCB surety bond. The disappointed complainant can't sue the bond company directly because the procedure set out in ORS 701.145 provides that the bonding company is only obliged to pay after the complainant presents a court judgment against the respondent to the CCB.

If you represent a CCB complainant in a CCB DRS complaint and the respondent files bankruptcy, it may be advisable to immediately seek relief from the bankruptcy stay so that the complainant can file a suit that is limited to determining the amount of the respondent owes on the complaint solely for the purpose of establishing access to the CCB bond. This must be done before the Bankruptcy Court discharges the respondent's debts. Otherwise there will be no court able to issue relief from the stay.

Care must be taken if the claim is larger than the available bond and this strategy is adopted. If the bankruptcy case is dismissed, your client may be limited to recovery from the bond, when it might have been possible to get a judgment against the respondent for the whole amount of the complaint after all.

The CCB may consider filing a bill in the next legislature to close this loophole in its DRS procedure, but in the meantime complainants will have to be careful that a bankruptcy filing does not eliminate their access to respondent's bond.

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## MULTNOMAH COUNTY CIRCUIT COURT NEW CASE MANAGEMENT SYSTEM

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On February 1, 2012, Multnomah County Circuit Court's new civil case management system took effect through a series of new Supplementary Local Rules, marking a significant change in how civil cases will be administered in the Fourth Judicial District.

The new case management rules apply only to cases filed on or after February 1, 2012. Cases filed before that date are not subject to the new rules. In addition, the rules apply only to those civil cases that are not small claims, FED, family law, juvenile, protective proceedings or probate cases.

The new civil case management system is comprised of three mandatory procedures:

1. Civil Case Management Cover Sheet (SLR 2.011)

Each complaint or petition initiating an action must be filed with a cover sheet in a form proscribed by Multnomah County Circuit Court. The form provides introductory information about the parties and the type of case involved.

The form may also act as a notice of a change of address pursuant to UTCR 2.010(14) (which requires an attorney or unrepresented party to immediately notify the trial court administrator

and parties of any change in address or telephone number).

The form is number 05-95 and is available from Presiding Court, Room 210 of the Multnomah County Courthouse, or online at http://courts.oregon.gov/Multnomah.

2. Initial Civil Case Management Conference (SLR 7.011)

SLR 7.011 has been substantially rewritten from its former notice that the Presiding Judge "may" enter a pretrial scheduling order to a new mandate that parties must conference with the Court and will be managed by specific guidelines and orders.

Under the new SLR 7.011, the parties are required to participate in an initial case management conference, unless the case has been dismissed or transferred to arbitration, the Expedited Civil Jury Trial Program or to a special assignment, or unless otherwise directed by the Presiding Judge.

The court sets the initial case management conference and sends notice to any counsel or pro se litigants that have appeared, announcing the date of the conference and listing any information required from the parties for that conference.

It is the plaintiff's responsibility to forward a copy of the notice to any non-appearing parties who have been served. Counsel for a party that has not yet appeared is "expected to participate" in the conference, but does so "without waiving any rights of the party, including the right to challenge personal jurisdiction."

The conference takes place by phone, unless otherwise indicated by the court. At the conference, the court and parties "select an appropriate track for the case," and the court executes an Initial Case Management Order reflecting that information. The court may also set the date of the SLR 7.015 Trial Readiness Case Management Conference at that time.

A form of the Initial Case Management Order is available from Presiding Court, Room 210 of the Multnomah County Courthouse (Form 05-96), or online at: http://courts.oregon.gov/Multnomah.

3. Trial Readiness Conference (SLR 7.015)

SLR 7.015 requires the parties to participate in a trial readiness case management conference, unless the case has been dismissed or transferred to arbitration, the Expedited Civil Jury Trial Program or to a special assignment, unless otherwise directed by the Presiding Judge. The purpose of the trial readiness conference is "to facilitate the selection of a firm trial date and to assess readiness for trial."

No trial date will be set without a trial readiness conference.

The court sends notice of the trial readiness conference thirty-five days prior to the conference to any counsel or pro se litigants that have appeared, announcing the date of the conference and instructing the parties to come prepared with three agreed upon trial dates within the "time to trial" guidelines set by the court. The conference takes place by phone, unless otherwise indicated by the court.

Any request for postponement of the trial date set at the conference must be presented as provided in SLR 7.035(2)(f) and will not be granted without a showing of good cause. Trial postponements will no longer be set in the "regular course."

**SAVE THE DATE:**
**SUNDAY, SEPTEMBER 30, 2012**

*Arne Gray, with daughters Tori & Lindsay, son Andrew, wife Fran, & mom Babs – at the 2011 Portland Walk to Defeat ALS.*

Arne Gray is one of the pillars of our Section, including being the seventh person to sit as Chair of the OSB Construction Law Section's Executive Committee. In 2010, Arne was stricken with ALS (known as Lou Gehrig's Disease). Its onset was sudden, and it progressed rapidly to the point where Arne is now paralyzed.

Throughout his illness, the ALS Association of Oregon and Southwest Washington has been there for Arne. In his words: "Throughout my illness, the ALS Association of Oregon and Southwest Washington has provided for my family and me in countless ways. These include social work, counseling, support groups, and a wealth of practical information about how to live with ALS. ALS is extremely difficult for both the patient and the patient's family, but it receives neither the publicity nor the fundraising support it deserves. For this reason, I am asking you or your firm to make a donation in my honor for the ALS Association's most significant annual fundraiser, the Walk to Defeat ALS."

Arne plans to "roll" in the 2012 Portland-Metro Walk to Defeat ALS on September 30th. Please walk with him. More information is available at:
http://web.alsa.org/goto/ArnesWarriors

To contribute to Arne's Warriors, please go to the following link:
http://webor.alsa.org/goto/Arne.Gray

Thank you.

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**NOTE**: Prior newsletters are available (in a searchable format) at the Section's website: *www.osbarconstruction.com*.