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WORKER'S COMPENSATION: WHEN DOES EXCLUSIVE LIABILITY APPLY?

Tara Johnson
Seifer, Yeats, Zwierzynski & Gragg

Every few months, our firm receives a call from a client regarding worker's compensation contract clauses. Typically, they call regarding a provision in the subcontract requiring that the subcontractor procure liability insurance protecting the prime contractor from claims from all persons, including the subcontractor's workers. Inevitably, the subcontractor's legal counsel has struck this provision as being statutorily void. However, that response only accounts for one piece of the story.

The statute at issue is ORS 656.018(1), and it states in pertinent part:

> (1)(a) The liability of every employer who satisfies the duty required by ORS 656.017 (1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom, specifically **including claims for contribution or indemnity asserted by third persons** from whom damages are sought on account of such conditions, except as specifically provided otherwise in this chapter.
>
> …
>
> (c) Except as provided in paragraph (b) of this subsection, **all agreements or warranties contrary to the provisions of paragraph (a) of this subsection entered into after July 19, 1977, are void**. (**emphasis added**).

In subsection (a), the statute provides that the provision of worker's compensation insurance by the subcontractor for its workers is the exclusive liability the subcontractor will assume as a result of injuries sustained by its workers. This statutory limitation goes so far as to include claims for contribution or indemnity by third-parties (such as the prime contractor and owner). In turn, subsection (c) makes third-party indemnity provisions of this nature void as a matter of law.

Attorneys frequently interpret this statute to mean that contractual clauses that require that the subcontractor name the prime contractor as an additional insured on its liability policy, including coverage for injuries to its workers, are also void. The rationale is that requiring procurement of insurance of this nature is tantamount to requiring an indemnity agreement, and therefore is also void. However, this argument is invalid in light of the ruling by the Oregon Court of Appeals on this issue, *Montgomery Elevator Co. v. Tuality Community Hospital, Inc.*, 101 Or.App. 299, 790 P.2d 1148 (1990).

In *Montgomery Elevator Co.*, Tuality Community Hospital, Inc. had a provision in its prime contract with Montgomery Elevator Company requiring Montgomery to procure liability insurance protecting Tuality against personal injury and property damage claims from

all persons, *including Montgomery's workers*. Montgomery failed to purchase the contractually-mandated insurance. Ultimately, one of Montgomery's employees was injured while using the elevator and sued Tuality. Tuality settled the worker's claim and demanded that Montgomery reimburse it. Montgomery refused, and Tuality sued Montgomery for breach of their contract (i.e. failure to procure the mandated insurance).

Montgomery's counsel argued "that the exclusivity of ORS 656.018(1) is comprehensive, and thus precludes any other liability, and that agreements to purchase insurance are identical to indemnity agreements..." Alternatively, Tuality asserted that the purchase of insurance is an independent contractual obligation and therefore not subject to the exclusive liability provision of ORS 656.018(1).

The Court held in favor of Tuality's position, and found that insurance clause was not equivalent to a prohibited indemnity agreement because "[t]he genesis of plaintiff's claim lies in defendant's failure to keep its part of the bargain by purchasing insurance, not in the infortuitous occurrence of an injury to defendant's employee." Furthermore, the Court pointed to a critical distinction between indemnity agreements and insurance contracts – "under an indemnity contract, payment by the insured is a prerequisite to the insurer's duty of reimbursement; under an insurance contract, the insurer's obligation attaches as soon as liability is established." Based on this rationale, the Court found that although there was coincidence in the measure of damages, the requirement to procure liability insurance covering potential injury claims by the subcontractor's workers was not statutorily void.

Therefore, although on its face a subcontract clause requiring that the prime contractor be named as an additional insured on the subcontractor's liability policy (including claims for injuries to the subcontractor's workers) may appear void at first glance, it is permissible and encouraged. The Court has held that a critical distinction exists between additional insured endorsements of this nature and indemnity provisions for subcontractor's work. Though the distinction may be slight (as noted by the split, en banc decision of the Court of Appeals in *Montgomery Elevator Co.*), it is sufficient to permit the use of such clauses in the future.

ORS 87.059 FORECLOSURE STAY

Tim Dolan

ORS 87.059, which takes effect on July 1, 2017 for complaints filed after that date, allows a property owner who is a defendant in a lien foreclosure to suspend the lawsuit by filing an ORS 701.145 CCB complaint. This statute applies if the case involves a lien foreclosure by a sub-contractor where the property owner paid the general contractor who never paid the sub. This replaces ORS 87.058, which was repealed by 2011 SB 939.

ORS 87.059 (2) States in relevant part:

> (2) If a person files a suit to enforce a lien perfected under ORS 87.035 and the owner of the structure subject to that lien files a complaint that is being processed by the board under ORS 701.145 against a contractor who performed work on the structure, the owner may obtain a stay of the proceedings on the suit to enforce the lien if:
>
> (a) The owner already has paid the contractor for that contractor's work that is subject to this chapter on the structure;
>
> (b) The person suing to enforce the lien perfected under ORS 87.035:
>
> (A) Performed work that is subject to ORS chapter 701 on the structure for the contractor who has been paid by the owner;
>
> (B) Furnished labor, services or materials or rented or supplied equipment used on the structure to the contractor who has been paid by the owner; or

(C) Otherwise acquired the lien as a result of a contribution toward completion of the structure for which the contractor has been paid by the owner; and

(D) The continued existence of the lien on which the suit is pending is attributable to the failure of the contractor who has been paid by the owner to pay the person suing for that person's contribution toward completion of the structure.

Under ORS 87.059 (3), a property owner may petition for a stay of lien foreclosure proceedings by demonstrating to the court there is a CCB claim pending. ORS 87.059 (4) says the court "shall" stay the foreclosure suit on showing a CCB claim is pending.

But, as everyone is aware, the CCB has stopped issuing administrative orders on ORS 701.145 residential structure complaints since 7/1/2011.

So how would you reconcile the fact the ORS 701.145 CCB claims are handled by the court and ORS 87.059 lets a property owner stay a foreclosure proceeding by filing an ORS 701.145 CCB claim?

According to the CCB, when a property owner receives an ORS 87.035 lien foreclosure suit filed after 7/1/2017 from a subcontractor for a claim where the owner already paid the general contractor, the owner should:

1. File a complaint with the CCB under ORS 701.145 (don't forget the 30 day pre-claim notice requirement under ORS 701.133);
2. Attend an on-site mediation and hope the general contractor agrees to pay the foreclosing subcontractor;
3. If claim doesn't settle the matter, then file an ORCP 22B cross claim against the general contractor/co-defendant or an ORCP 22C third party claim against the general contractor if they are not already co-defendant;
4. Forward copies of the cross claim/third party claim to the CCB;
5. Once the property owner obtains a favorable judgment against the general contractor, the owner must submit a certified copy of the judgment to the CCB in order to resume the claim processing. That will hopefully result in access to the general contractor's CCB surety bond. This judgment can include the property owner/s attorney fees and court costs and the bond can be used to reimburse these expenses.

Thanks to Pam Tobeck for her assistance with this article.

CASE LAW UPDATE

Gary Christensen
Jeff Sagalewicz
Alexander Naito
Miller Nash

I. INTRODUCTION

The past year saw an abundance of case law relating to the field of construction law issued by courts at both the state and federal levels. Despite the recession in the construction market, there was no shortage of construction-related claims being brought and decided in Oregon courts. The majority of these cases tended to implicate one of four main areas of construction law: (1) claims and settlement; (2) construction liens; (3) insurance; and (4) statutes of limitations and repose.

II. CLAIMS AND SETTLEMENT

NEGLIGENCE/PREMISES LIABILITY/EMPLOYER LIABILITY LAW: Summary judgment is inappropriate when a specialty subcontractor's risk of falling at a home construction project may or may not be "inextricably intertwined" with the plumbing task he was performing.

***Spain v. Jones*, No. A148635 (Or App Aug. 7, 2013).** Plaintiff was injured as the result of a nine-foot fall during the construction of a home in Medford. Plaintiff brought claims for negligence, premises liability, and violation of the Employer Liability Law (the "ELL") against Jones, who owned the property and was overseeing the construction project, and Rossetto and Brown, who were framing subcontractors on the project. Plaintiff claimed that defendants should have provided fall protection on the first floor of the home where plaintiff fell. Defendants filed motions for summary judgment, which were granted by the trial court. Plaintiff appealed and the court of appeals reversed, concluding that there was a genuine issue of material fact regarding plaintiff's employer's specialized task during the construction project.

The court found that the trial court had not properly granted summary judgment with respect to the negligence and premises-liability claims. Prior case law established that a defendant with no special expertise in an area should not have a duty to protect a plaintiff from risks that are inherent in the plaintiff's work. The court established that "(1) when a risk is obvious and 'inextricably intertwined with [the plaintiff's employer's] performance of a specialized task'; (2) the defendant lacks expertise regarding and control over the specialized task and, consequently, the risk; and (3) the defendant hired the plaintiff's employer because of its expertise in that work, the defendant cannot be liable for an injury to the plaintiff resulting from the risk." The court found that a genuine issue of material fact existed as to whether plaintiff's risk of falling from the second floor of the house was "inextricably intertwined" with "the specialized task for which Jones hired plaintiff's employer." Specifically, the court stated that an unresolved question of fact remained about the scope of plaintiff's employer's specialized task in this project.

MARY CARTER SETTLEMENT &INDEMNITY: A contractor that settles with homeowner for defect claims is barred from seeking indemnity or contribution from third-party subcontractor because the settlement does not discharge all of subcontractor's liability to owner.

***Marton v. Ater Constr. Co., LLC*, 256 Or App 554, 302 P3d 1198 (2013).** Homeowners brought defective-construction claims against Ater Construction for damage caused to their home. Ater filed a third-party complaint against Marvin Windows, Inc., manufacturer of the windows used in the home, and Medallion Industries, Inc., distributor of the windows. Ater and the homeowners settled the homeowners' claims under a "Mary Carter" agreement, whereby Ater would remain in the litigation but its exposure to the homeowners would be capped at $100,000. After the Mary Carter agreement was entered into, Marvin and Medallion filed for summary judgment against Ater's claims for indemnification and negligence. The trial court granted the motion, and the court of appeals affirmed.

The court of appeals held that Ater's statutory claim for contribution under ORS 31.800 failed because the Mary Carter agreement did not extinguish the liability of Marvin and Medallion. Under ORS 31.800(3), a party that settles with a claimant is not entitled to recover contribution from a third party whose liability is not extinguished by the settlement. Similarly, Ater's common-law claim for indemnity also failed because when an indemnity claim arises out of a settlement, the claiming party must demonstrate that "it discharged the obligation owed to [the principal claimant] so as to extinguish both its own and [the third party's] liability." Because Ater's settlement with the homeowners did not extinguish Marvin's or Medallion's liability, Ater could not seek contribution or indemnification.

ASSIGNMENT OF CLAIM AGAINST INSURER: A plaintiff who covenants not to execute on a stipulated judgment entered against an insured defendant as part of a settlement may not garnish defendant's insurer under ORS 18.352 or ORS 31.825 because defendant is no longer legally liable to pay plaintiff.

***Brownstone Homes Condo. Ass'n v. Brownstone Forest Heights, LLC*, 255 Or App 390, 298 P3d 1228 (2013).** Plaintiff, a condominium association, sued a siding contractor for certain construction defects. Plaintiff settled with the siding contractor and one of its two insurers. The settlement required the siding contractor to stipulate to a judgment in the amount of $2 million, of which the settling insurer paid $900,000. In exchange, plaintiff covenanted not to execute the judgment against the siding contractor or the settling insurer. Plaintiff then attempted to garnish the nonsettling insurer's policy. The nonsettling insurer contested the garnishment, arguing under *Stubblefield v. St. Paul Fire & Marine*, 267 Or 397, 400-01, 517 P2d 262 (1973), that its potential liability was extinguished because the siding contractor was not legally obligated to pay the remaining unsatisfied portion of the judgment (the "Stubblefield Rule"). The trial court agreed.

On appeal, the court of appeals rejected plaintiff's argument that the Stubblefield Rule did not apply in a garnishment proceeding under ORS 18.352. Under *State Farm Fire & Cas. v. Reuter*, 299 Or 155, 700 P2d 236 (1985), a judgment creditor such as plaintiff has no greater rights than the siding contractor has against the insurer. Here, the siding contractor had no rights because it was not legally liable to pay the judgment. The court of appeals also rejected plaintiff's argument that ORS 31.825 abrogates the Stubblefield Rule because it allows an insured judgment-debtor to assign a claim against the judgment-debtor's insurer without extinguishing the cause of action against the insurer. But ORS 31.825 applies only if the assignment is made *after* the judgment has been entered. Here, the assignment was made and the claim extinguished before judgment was entered.

RIGHT TO CURE: General contractor that terminated subcontractor for convenience could not offset cost to repair subcontractor's work in suit by subcontractor to recover for unpaid invoices because contractor had not provided subcontractor with the opportunity to cure the defective work.

***Shelter Prods., Inc. v. Steelwood Constr., Inc.*, 257 Or App 382, 307 P3d 449 (2013).** Court of appeals upheld a trial court decision granting the plaintiff subcontractor's summary judgment motion on claims to collect unpaid invoices and foreclose its construction lien. Catamount Constructors, Inc., hired Steelwood Construction to install the roof on the project building. Catamount terminated Steelwood partway through the project for Catamount's convenience and failed to pay Steelwood for the materials or work that it had already received. Steelwood's suppliers filed liens on the project, causing Catamount to pay off the suppliers directly. Steelwood then brought an action for its materials and work supplied on the project. Catamount argued that Steelwood's claim should be offset by costs incurred to repair its defective work and to cure its failure to pay its suppliers, resulting in liens.

The parties' subcontract allowed for termination for convenience and "without cause and without prejudice to any other right or remedy." Midway through the project, Catamount exercised that provision. Catamount subsequently hired another subcontractor to complete the work, at which time it identified defects in the original work. Catamount never gave Steelwood the opportunity to fix the work. According to the court, because Catamount terminated the agreement for convenience and did not provide an opportunity to cure, it could not seek reimbursement for the repair costs. The court held that "at least in the absence of an opportunity to correct allegedly defective work, * * * where a party has terminated a contract for convenience, that party may not then counterclaim for the cost of curing any alleged default." Therefore, because the general contractor had failed to provide the subcontractor with the opportunity to cure the defective work, and because the supplier liens were caused by the general contractor's failure to timely pay the subcontractor, the general contractor was not entitled to offset the amount owed to the subcontractor.

FRAUD: The statute of limitations on a fraud claim does not begin to run until after plaintiff learns sufficient facts to create a duty to investigate further, and the time needed for a reasonable investigation to provide plaintiff with sufficient facts of the injury. In determining reliance, the court considers the pressure on plaintiff by defendant to rely on defendant's representations.

***Murphy v. Allstate Ins. Co.*, 251 Or App 316, 284 P3d 524 (2012).** Plaintiff owned a home that was insured by defendant. Plaintiff's home suffered extensive water damage, and plaintiff subsequently filed a claim with defendant. One of defendant's claims adjusters, Gould, inspected the property with Stewart, a local contractor used by defendant for home repair and restoration. Both Gould and Stewart told plaintiff that the repairs would not require building permits. They also told plaintiff that the repairs needed to be performed immediately in order to avoid further damage to the property. After the work was completed, the city inspected the property and determined that the repair work violated the building code because it had been performed without permits. As a result, the home could not be occupied until all permits were acquired. Plaintiff brought suit against defendant for fraud.

The court held that the statute of limitations on a fraud claim does not begin to run until plaintiff learns sufficient facts to create a duty to investigate further, and then only when a reasonable amount of time has passed for that investigation. Here, the court determined that it was a factual question when the statute of limitations began to run. Second, the court held that even though plaintiff had the means and the sophistication to determine the truth of Gould and Stewart's statement, the fact that they had exerted pressure on him to sign the work contract immediately eliminated plaintiff's ability to conduct an independent investigation into the truth of the representation.

III. CONSTRUCTION LIENS

CONSTRUCTION LIEN LAW: Under ORS 87.025(7), the attachment of a construction lien occurs when site preparation begins, even if the improvement is not ultimately constructed.

***SERA Architects, Inc. v. Klahowya Condo., LLC*, 253 Or App 348, 290 P3d 881 (2012), *rev denied*, 353 Or 533 (2013).** SERA Architects, Inc., appealed a trial court judgment that SERA's construction lien did not relate back under ORS 87.025(7) to a time before lender Shorebank Pacific Corporation recorded its trust deed. Beginning in March 2006, SERA performed design services related to a condominium development. Site preparation for the development began in July 2006, but the planned improvement was never built. Shorebank recorded a trust deed in November 2006 after providing a loan to refinance the original purchase loan and to finance construction. SERA recorded a claim of construction lien in 2007, after the developer stopped paying SERA.

The court of appeals found that ORS 87.025(7) was dispositive. The legislative history shows that the purpose of ORS 87.025(7) is to clarify that a construction lien that attaches before a party files a bankruptcy petition has priority over the bankruptcy trustee notwithstanding that the construction claim of lien is recorded after the bankruptcy filing. Further, the legislative history states that ORS 87.025(7) is not intended to alter existing lien law as to priorities. In the century before ORS 87.025(7) was passed, Oregon courts had consistently held that construction liens encumber the property on the date on which site work begins, regardless of when the claim of lien is recorded. Accordingly, SERA's lien related back to the date when site preparation began, which was before Shorebank recorded its trust deed. Additionally, under the facts, Shorebank could not benefit from equitable subrogation because it was not sufficiently "ignorant" of SERA's lien at the time it provided the refinance loan.

CONSTRUCTION LIENS AND DEFECTS: So long as a contractor substantially performs its construction contract, it may establish claims for breach of contract and lien foreclosure, even though the contractor's work contains defects.

***Fostveit v. Poplin*, 255 Or App 751, 301 P3d 915 (2013).** Defendants, owners of a self-storage unit, had hired plaintiff to partially construct additional storage units. To save costs, defendants retained responsibility to install metal roofing, siding, insulation, and wall partitions, as well as to pave the area around the building. After the certificate of occupancy was issued, defendants discovered water intrusion in the units, so defendants instructed plaintiff to stop work and refused to pay plaintiff's final invoice. Plaintiff recorded a lien and filed an action for breach of contract and lien foreclosure. At trial, the court found evidence that plaintiff's work contained defects that contributed to the water intrusion, but that the defects could easily be remedied and paid for by deductions in the contract price. The court also concluded that defendants' installation of the paving, roof, and siding also contributed to additional water intrusion. The evidence was unclear whether plaintiff's work also contributed to the water intrusion attributable to defendants.

Defendants appealed, asserting that the trial court had erred by effectively shifting to defendants plaintiff's burden of proof on plaintiff's performance under the contract. Under defendants' view, the trial court had improperly assumed that all the additional water intrusion was caused by defendants. But to prove substantial performance of the contract, defendants argued, it was plaintiff who was required to prove that his work was not the cause of additional leakage. In affirming the trial court, the court of appeals rejected defendants' view of the record. Reviewing the court's findings and conclusions, the court of appeals found that the trial court had not assumed that defendants caused the additional water intrusion. Instead, the trial court weighed the evidence and concluded that defendants' work was the cause of the additional water intrusion. Ultimately, plaintiff's obligation was to set forth evidence that he had performed the contract, and plaintiff met the burden.

IV. <u>INSURANCE</u>

INSURANCE DUTY TO DEFEND: In determining whether an insurer has a duty to defend the insured, the court must look only at the complaint and the insurance policy. If the facts as alleged in the complaint provide any basis for potential coverage, the insurer has a duty to defend.

***Bresee Homes, Inc. v. Farmers Ins. Exch.*, 353 Or 112, 293 P3d 1036 (2012).** Plaintiff contractor Bresee appealed the grant of summary judgment in favor of its insurer, Farmers, on claims that Farmers had breached its duties under a commercial general liability policy to defend and indemnify Bresee. Bresee had been sued by a homeowner for negligent construction of certain flashing and the Exterior Insulated Finish System, allegedly causing water to leak into the interior of the home.

The policy provided a specific exclusion from coverage for property damage arising after all work in the contract had been completed. The allegations in the complaint, however, did not state "whether the claimed damages from the alleged breach of contract and negligence occurred before or after the completion of Bresee's work." In its motion for summary judgment, Farmers provided extrinsic evidence indicating that Bresee had completed its contract before the damage occurred, thereby preventing coverage. Bresee presented no contradictory evidence. As a result, the trial court and the court of appeals concluded that there was no issue of material fact because Bresee "had a specific burden to produce evidence that an exception (i.e., damage arising out of uncompleted work) to the exclusion * * * applied."

The Oregon Supreme Court reversed, holding that the court of appeals had incorrectly relied on facts that were not alleged in the original complaint. Accordingly, "[w]hen Bresee tendered the [homeowner's] claims, only the facts alleged by the [homeowner] and the terms of the Farmers

policy governed Farmers's duty to provide a defense." Because the complaint did not identify when the damage occurred, either before or after completion of the work, it was possible, based solely on the allegations in the complaint, that the policy would require coverage. Therefore, Farmers had a duty to defend Bresee.

INSURANCE/ATTORNEY FEES: ORS 742.061 does not entitle an insured to recover attorney fees for work related to coverage issues. It does, however, entitle the insured to recover all attorney fees (excluding coverage issues) from a single insurer, even if there were other insurers that settled with the insured before litigation, so long as the amount is reasonable.

***ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 255 Or App 524, 300 P3d 1224 (2013).** Plaintiff was a group of related companies (collectively, "Zidell") that acquired and dismantled decommissioned navy and merchant marine ships after World War II. Over the years, Zidell purchased a variety of different insurance policies, including several from two related insurance companies (collectively, "London"). In 1994, the Oregon Department of Environmental Quality ("DEQ") informed Zidell that it was potentially responsible for contamination resulting from its business. Zidell accepted a voluntary cleanup program offered by DEQ and tendered the cost of the cleanup, as well as any defense costs, to its insurers. All other insurers settled with Zidell. London, however, denied coverage.

On appeal, London argued that the trial court had erred in granting Zidell attorney fees incurred in establishing London's duty to defend under the insurance policies ("coverage issues"). Zidell contended that ORS 742.061 should be read broadly to include coverage issues. ORS 742.061 permits an insured to recover a "reasonable amount" of attorney fees if the plaintiff's recovery against the insured is greater than the tender made by the insured to the insurer. The court sided with London, holding that "Zidell has not established an independent right to recover attorney fees related to the duty to indemnify, which, at this stage of the litigation, precludes recovery under ORS 742.061."

V. <u>STATUTES OF LIMITATIONS AND REPOSE</u>

STATUTE OF LIMITATIONS/ ACCRUAL CLAUSE: For the purpose of the accrual clause, the date of substantial completion is determined by the contract, not the date that the facility can be used for its intended purpose. Substantial completion under ORS 12.135 is the date on which the owner accepts the facility.

***Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App 24, 295 P3d 62 (2012).** Sunset Presbyterian Church brought an action against its general contractor, Brockamp & Jaeger, Inc., and subcontractors for negligence and negligence per se resulting from the construction of a new church facility. Sunset appealed the trial court's order granting summary judgment to Brockamp and the subcontractors based on the statute of limitations. On appeal, the court reversed the trial court's finding that the "date of substantial completion" for the purposes of the parties' accrual clause occurred when Sunset occupied and began using the facility for its intended purpose. The court also found that Sunset had to accept its new facility in writing or by assuming the maintenance, alteration, and repair responsibilities of the facility in order for the ten-year repose period of ORS 12.135 to begin.

The court rejected the contractor's claim that the two-year statute of limitations under ORS 12.110(1) began to run at the time the facility was occupied and began to be used for its intended purpose. Sunset began to hold services at the new facility starting in February 1999, although construction work continued to be performed. The court determined that the "date of substantial completion," as defined by the contract, was the date when the architect certified the project as substantially complete and not the date that the "improvement was substantially complete" for use. The contractor failed to provide evidence establishing the certification date and therefore

failed to establish when the statute of limitations for Sunset's claim began to run.

ORS 12.135 establishes a ten-year repose period for all claims arising from the construction, alteration, or repair of an improvement to real property. An action subject to ORS 12.135 must commence within ten years of substantial completion of the project or other period established by law. The court rejected the subcontractors' claims that the date of substantial completion occurred when the general contractor accepted the work of the subcontractors. Rather, the court held that the repose period runs from the date that the general contractor transfers control of a completed project to the person who contracted for its construction. The subcontractors submitted no evidence to establish when Sunset accepted the facility.

STATUTE OF REPOSE AND INDEMNITY: Notice of completion filed by owner is not a written acceptance of substantial completion for purposes of starting the statute of repose.

***PIH Beaverton, LLC v. Super One, Inc.*, 254 Or App 486, 294 P3d 536 (2012).** Plaintiff PIH Beaverton purchased a hotel from VIP'S in 2006. PIH discovered construction defects. PIH sued Super One, the general contractor, and various subcontractors. PIH filed suit more than ten years after VIP'S filed a notice of completion under ORS 87.045 but less than ten years after Washington County issued its final notice of completion. Super One filed a third-party complaint against its subcontractors, seeking indemnification. Super One moved for summary judgment, arguing that the statute of repose barred the claim.

The parties disputed whether the project had reached "substantial completion" under ORS 12.135(3) when VIP'S filed a notice of completion. The court held that VIP'S filing was not an acceptance in writing of an improvement to real property. Filing a notice under ORS 87.045 "does not necessarily equal substantial completion for purposes of starting the statute of [ultimate repose] for bringing a construction defect suit." Because the notice did not amount to acceptance in writing under ORS 12.135, there was a question of fact as to when substantial completion occurred.

STATUTE OF LIMITATIONS/ ACCRUAL CLAUSE: A remedy-reservation clause will not act to limit an accrual clause with no limiting language.

***Wood Park Terrace Apartments Ltd. P'ship v. Tri-Vest, LLC*, 254 Or App 690, 297 P3d 494 (2013).** Wood Park Terrace Apartments Limited Partnership brought an action against Tri-Vest, LLC, a general contractor, for negligence and negligence per se resulting from the construction of an apartment complex. Wood Park appealed the trial court's order granting summary judgment to Tri-Vest. On appeal, the court affirmed, holding that the accrual clause in the parties' contract barred Wood Park's claims under the six-year statute of limitations set forth in ORS 12.080(3).

The accrual clause provided that "any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of [s]ubstantial [c]ompletion," a date that both parties agreed was in April 2000. Sometime in 2008, Wood Park found "systemic catastrophic building envelope deficiencies," allegedly due to the contractor's defective construction. Wood Park filed suit in 2010. The court rejected Wood Park's argument that the remedy-reservation clause in the contract limited the accrual clause solely to contract claims. Rather, the court held that both provisions worked "in harmony to preserve the parties' rights to bring tort claims," subject to the accrual clause.

2013 LEGISLATIVE UPDATE

Alan Mitchell
Mitchell Law Office

The 2013 Legislature took up a broad spectrum of construction law related topics. Aside from the major CM/GC public works bill (SB

254), the legislature changed the statute of ultimate repose for claims against design professionals (SB 46), changed the retainage requirement on private projects (SB 405), and made a number of revisions with the state building code enforcement programs (HB 2698, HB 2978, and SB 582). As to the Construction Contractors Board, most of the bills were not substantively significant.

Unless otherwise noted, all bills take effect on January 1, 2014.

PUBLIC WORKS

A. HB 2212 (Ch 66) Small Procurements Threshold

This bill changes the threshold for "small procurements" under the Public Contracting Code from $5,000 to $10,000. This change applies to procurements that are conducted after January 1, 2014.

B. HB 2545 (Ch 239) Debarments

This bill makes adjustments to the ability of the Commissioner of Bureau of Labor and Industries to debar contractors (or subcontractors) from public works contracts. Aside from adding limited liability companies to the list of entities that can be debarred, the bill also clarifies that it is the Commissioner who makes this determination. While this bill was deemed an emergency that became effective May 28, 2013, that was done to allow BOLI to adopt administrative rules prior to the bill's true effective date. The bill will apply to contracts entered on or after January 1, 2014.

C. HB 2646 (Ch 203) Prevailing Wage Rates

This bill requires prevailing wage rates to be paid on Oregon University System construction projects. While this bill was deemed an emergency that became effective May 22, 2013, that was done in order to allow the Oregon University System to adopt administrative rules prior to the bill's true effective date. The bill will apply to contracts that are offered to bid or are entered on or after January 1, 2014.

D. HB 2800 (Ch 4) Interstate 5 Bridge Replacement Project

This bill declares that it is in Oregon's interest to undertake the Interstate 5 bridge replacement project. First, the bill states that the Department of Transportation and the State Treasurer may not request or issue any financing bonds unless various conditions are met by certain deadlines. Second, the bill authorizes the Oregon Transportation Commission to enter into agreements for collecting tolls for this project. Third, the bill authorizes the appropriate state departments to address funding efforts for this project. Fourth, the bill requires that steel, iron, and related material associated with this project must be produced in the United States (with certain qualifications to that mandate). Fifth, the bill states that public contracts associated with this project must, as much as possible, focus on nondiscrimination, address disadvantaged business enterprises, and generally implement the policies in ORS 279A.100, 279A.105, and 279A.110. These same issues must also be "flowed down" into subcontracts. Sixth, the bill requires the Oregon Transportation Commission to conduct various studies about impacts of this project. Finally, the bill requires ODOT to submit reports to the legislature every calendar quarter. This bill was deemed an emergency and took effect on March 12, 2013.

E. SB 254 (Ch 522) CM/GC Regulations on Public Works

This bill addresses the construction manager/general contractor method of performing public works projects. The bill defines this construction method and sets out parameters for how this method should work. It also lists out projects and services that are not included within the CM/GC method. The bill mandates that the Attorney General will adopt model rules to set out the parameters for how CM/GC projects will be advertised and procured – and sets out criteria that the AG must meet in adopting those rules. Agencies are not permitted to adopt their own CM/GC rules.

The bill also sets out certain provisions that must be included in any contract where this method is used, as well as certain provisions that must be included

in any subcontract (including that those subcontracts must be awarded competitively).

Next, the bill revises the ORS 279C.335 exemptions from the competitive bidding requirements to add a significant number of criteria that must be met by an agency seeking such an exemption.

This bill was deemed an emergency and became effective June 26, 2013. However, that was mainly for the purpose of allowing the Attorney General to adopt the required rules. Otherwise, these changes become operative on June 1, 2014. Rulemaking for the changes in the CM/GC bill had not begun as of October 10, 2013.

F. SB 831 (Ch 673) Highway Construction Workforce Development

This bill revises the existing provisions of ORS 184.866, which sets out requirements for ODOT to spend federal funds to increase diversity in the highway construction workforce. The bill changes the limit of funds that ODOT can spend from $1.5 million to $2.1 million. This bill was deemed an emergency and became effective July 25, 2013. It applies to funds received on or after July 1, 2013.

CONSTRUCTION CONTRACTORS BOARD

A. HB 2524 (Ch 378) Contractor Licensing Exemptions

This bill amends ORS 701.010, which lists out parties who are exempt from obtaining a license from the Construction Contractors Board. First, one existing exemption is for persons doing "casual, minor or inconsequential" work. Previously, there was a $500 monetary threshold concerning such work; now, the threshold is $1,000.

Second, the existing exemption for banks and surety companies now lists out more similar companies that are exempt from licensing. The changes also clarify that this exemption only applies to properties where the lender or surety holds a security or legal interest. Third, the bill clarifies that the exemption for worker leasing companies only applies to those companies that fit the definition in ORS 656.850.

This bill only applies to construction work that is arranged for after January 1, 2014 or work performed after that date.

B. HB 2540 (Ch 251) Enforcement Actions Against Contractors

This bill expands the Construction Contractors Board's ability to revoke, suspend, or refuse to issue a contractor's license. Now, the Board can take any of those actions if it finds that a person has provided false financial information to a long list of governmental entities if doing so would result in the person receiving a monetary benefit.

The bill also makes a change in the definition of the term "construction debt," which is an important term under CCB laws and rules. Previously, that term only applied if there was a final judgment, a final arbitration award, or a final agency order. Now, this term also applies if the contractor owes money to its employees for unpaid wages. While the CCB has indicated that it will not take enforcement action against a contractor unless there has first been a BOLI determination on the underlying issues, that limitation is not set out the bill.

C. SB 205 (Ch 168) Residential Construction Contracts

This bill deletes the portions of ORS 701.305 that required specific language to be included in residential construction contracts. Because the CCB already has an administrative rule requiring that same language in those contracts (OAR 812-012-0110), this change merely makes it easier for the CCB to make future changes in mandatory contract language.

D. SB 207 (Ch 300) CCB License Requirements

Currently, ORS 701.046 lists the specific information that applicants must provide in order to apply for a license with the Construction Contractors Board. The existing version did not address limited partnerships; this bill corrects that omission.

Next, this bill makes clarifications and revisions to the CCB license requirements for residential locksmiths, home inspection services, and home services contractors. The bill also makes a number of changes regarding worker leasing companies and how they interact with licensed contractors.

E. SB 783 (Ch 718) Residential Continuing Education

This bill creates new provisions for the existing continuing education requirements for residential-endorsed contractors. It does not address the continuing education requirements for commercial-endorsed contractors.

First, the bill deletes the existing requirements of ORS 701.123 (education and training program approval), ORS 701.126 (continuing education rules and fees), and ORS 701.127 (continuing education for residential contractors). Second, the bill instructs the CCB to create a continuing education system for residential contractors. That system must meet certain minimum standards.

Third, the bill sets out specific minimum education criteria that residential contractors must satisfy; however, it also gives the CCB authority to exempt contractors from the criteria, either on a general or case-by-case basis. Fourth, the bill maintains the existing exemption from continuing education for contractors holding only the residential developer endorsement.

Fifth, the bill gives the CCB the ability to enter agreements with approved continuing education providers and sets criteria that the CCB must measure with those providers. Since, the bill allows the CCB to satisfy its continuing education requirements by taking a specialized education program as established by ORS 701.120.

The bill was deemed an emergency and took effect on August 1, 2013. However, this is mainly to allow the CCB to prepare rules in compliance with these new directives. The substantive portions of the bill will not take effect until January 1, 2014.

DESIGN PROFESSIONALS

A. HB 2268 (Ch 196) Architecture Firms

The majority of this bill consists of minor clarification of the existing statutes. Section 1 adds the words “consulting architect” and “foreign architect” to the definition of “architect.” In several places, the bill changes the term of holding an architect “license” to holding an architect “registration.” Section 14 makes minor revisions to the “plead and prove” requirement – those who draft these types of pleadings should read this section carefully.

B. SB 46 (Ch 469) Statute of Ultimate Repose

This bill revises the statute of ultimate repose against design professionals found in ORS 12.135(3). Previously, the limitation was ten years after substantial completion or abandonment of the project. Now, the limitation is six years for most large commercial structures (as defined by ORS 701.005) and ten years for all other structures. This bill applies to causes of action arising on or after January 1, 2014.

C. SB 208 (Ch 86) Engineering and Land Surveying Admissions

This bill allows the State Board of Examiners for Engineering and Land Surveying to waive the educational requirement for admission if the applicant furnishes sufficient evidence being in the senior year of a board-approved curriculum and then provides evidence of successful completion of that curriculum. This bill applies to applications that are pending or filed on or after January 1, 2014.

D. HB 209 (Ch 169) Suspension of Engineers or Land Surveyors

This bill revises ORS 672.200, which sets out grounds for suspension or revocation of a certificate issued by the Board of Examiners for Engineering and Land Surveying. Those grounds now include the failure to pay civil penalties or fees or to meet any other term in a final order of the Board. This bill applies to final orders issued on or after January 1, 2014.

MISCELLANEOUS

A. HB 2005 (Ch 255) Energy Board Changes

This bill revises the Construction Industry Energy Board by adding four new members, two from the State Plumbing Board and two from the Mechanical Board. The bill also expands the Mechanical Board to include a tradesperson with experience in heat and frost insulation. The bill was deemed an emergency and took effect on June 4, 2013.

B. HB 2048 (Ch 677) Revisions to Paint Stewardship Program

The 2009 Oregon Legislature adopted a bill that required Oregon to establish a Paint Stewardship Program designed to address the issue of recycling leftover paint. Those provisions were placed into ORS Chapter 459A. This new bill makes a number of revisions that are designed to improve the success of that program, which is administered through the Department of Environmental Quality and operated by various stewardship organizations. The bill was deemed an emergency and took effect on July 29, 2013.

C. HB 2698 (Ch 110) Building Code Inspectors

This bill gives new authority to the Director of the Department of Consumer and Business Services to certify inspectors to perform inspections throughout a building code administrative region, whether within or without a municipality (although this does not require a municipality to allow such inspections unless the inspector is employed by the municipality). This bill was designed to remove the sunset of the specialized inspector laws that was created by the 2009 Legislature.

The bill sets out factors for the Director to consider in making these decisions, including experience, training, and similar qualifications. Also, the bill revises the definition of "inspector" under ORS 455.715 to address both these new changes and the 2009 changes.

D. HB 2977 (Ch 584) Construction Labor Contractors

This bill revises the farm labor statutes and creates a new classification of "construction labor contractor." This new label includes anyone who pays, supplies, or employs labor workers for construction projects. The label does not apply to anyone who has a construction contract with the property owner, an owner who hires persons to work on the owner's own property, labor unions, and a number of other situations. The bill was deemed an emergency and took effect on July 1, 2013 – however, many of the provisions do not take effect until July 1, 2015.

E. HB 2978 (Ch 324) Building Inspections and Permits

This bill makes a number of changes to the building code regulations of the Department of Consumer and Business Services. In general, this legislation was designed to make the Building Code Division's enforcement tools more consistent across the various licensing disciplines.

First, the bill caps the authority of DCBS (or a municipality) to issue an "investigation fee" against a person who commences work before a permit is issued (these are sometimes known as "double permit" fees). Now, these fees cannot exceed the average or actual additional cost of the additional inspections required. This does not apply to emergencies or projects that are exempt. Second, the bill allows DCBS to seek injunctive relief against a party that is doing work in violation of the state building code and its associated provisions. Third, the bill expands the limitations on persons working without a license or without the proper license. It also sets out a new violation of performing inspections or plan review on structures where the inspector or a relative has a financial interest.

F. HB 3169 (Ch 612) Green Technology in Public Buildings

This bill revises and expands the current statutes addressing the use of "green technology" in public buildings, ORS 279C.527 & 279C.528. It expands the obligation for contracting agencies to keep

records of these issues and to report those records to the State Department of Energy, who will then report them to the Legislature.

This bill was deemed an emergency and took effect on July 2, 2013. Its provisions apply to any project that either was first advertised after that date or, if not advertised, was entered after that date.

G. HB 3245 (Ch 328) Inmate Labor

This bill prohibits the Department of Corrections from using inmate labor for electrical or plumbing work unless performed under the direct supervision of a regular DOC employee who is a licensed electrician or plumber. It also directs that such work may only be performed on buildings owned or leased by the DOC. This bill was deemed an emergency and took effect on June 6, 2013.

H. SB 405 (Ch 410) Retainage

This bill revises the retainage provisions for private construction contracts. Now, no more than five percent may be withheld as retainage (which is currently the restriction for public contracts). This bill applies to contracts entered into on or after January 1, 2014.

I. SB 465 (Ch 303) Flood Damage Records

This bill allows local governments with land use jurisdiction to record a "notice of designation of substantial damage" caused by flooding. When the affected structures are brought into compliance with applicable regulations, the local government shall record a "notice of remedy" that declares void the previous notice. This bill was deemed an emergency and took effect on June 4, 2013. The bill's provisions apply to any structure that was substantially damaged before, on, or after that effective date.

J. SB 582 (Ch 528) State Building Code

This bill makes a number of revisions to the State Building Code, which is administered by the Director of the Department of Consumer and Business Services. First, the bill sets out broad policies in support of various aspects of the state building code regulations.

Second, the bill requires the Director to give special consideration to the unique needs of construction in rural or remote areas of the state. Third, the bill allows for coordination between building officials and fire code officials in plan review and inspections of structures.

Fourth, the bill allows building officials to provide typical plans and specifications for various specific types of structures. Fifth, the bill allows municipalities to request that the Director enter into an agreement to administer and enforce all or a portion of a building inspection program within a specified area. The bill limits the ability to challenge such agreements and also addresses the fees associated with these agreements.

Sixth, the bill allows the Director to take actions to ensure there are sufficient staff and resources to enforce the state building code. The bill lists a number of powers and limitations on the Director in taking these actions. It also addresses the fees the department may charge when a code program has been surrendered or abandoned by a municipality.

Finally, the bill creates a new appeal right under ORS 455.475 where a building permit applicant may appeal the decision of a local building official directly to the Director. The Director's decisions on these appeals is subject to judicial review as provided in ORS 183.484.

This bill was deemed an emergency and took effect on June 26, 2013.

K. SB 782 (Ch 606) Apprenticeship Task Force

This bill creates a State Task Force on Apprenticeship in State Contracting to make recommendations about apprenticeship utilization standards for state contracting agencies. The bill details the nature of the 14 members of the Task Force as well as its goals and issues to be considered. The Task Force must submit its final report no later than November 1, 2014. This bill was deemed an emergency and took effect on July 1, 2013.

L. OAR 731-005-0780 ODOT Rules and Standard Specifications

In the summer of 2013, the Oregon Department of Transportation amended its rules to change the types of records that must be kept by contractors, subcontractors and suppliers on ODOT projects. The amended rule does essentially three things. First, the rule expands the types of records that must be kept by so-called "Record Keepers" from direct project documents to more general company financial and other records. Second, the rule obligates lower-tier parties to the record-keeping requirements. Finally, the rule requires the records to be kept, and be available for inspection by ODOT, for a period of three years, or longer if there is a claim or litigation pending.

Subsequently, ODOT has proposed an amendment to its Standard Specifications for Construction that expands on the record-keeping requirements. The amendments to the Standard Specifications do the following, among other things: make the prime contractor responsible to ensure compliance by all lower-tier subcontractors; make the failure to keep records in compliance with the rule a material default of the prime contract; provide access to the records by any employee or representative of ODOT; provide that a failure to adhere to the recordkeeping requirements, as determined by ODOT's Contract Administration Engineer, can result in the waiver of a claim by the prime contractor.

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Construction Law Section
Executive Committee

Pete Viteznik, Chair:
pviteznik@kilmerlaw.com
Jason Alexander, Chair-Elect:
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gragg@seifer-yeats.com
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timothymdolan@oregoncoast.com
Dan Duyck: *dduyck@whippleduyck.com*
Katie Jo Johnson: *katiejoj@mcewengisvold.com*
Darien Loiselle: *dloiselle@schwabe.com*
Heather McNamee:
hmcnamee@gibsonpeabody.com
Tom Ped: *tped@williamskastner.com*
Tyler Storti: *tstorti@lawssg.com*
Jeremy Vermilyea; *jvermilyea@schwabe.com*
Curtis Welch: *cwelch@dsw-law.com*

Newsletter Editor:
Alan Mitchell: *alan@mitchell-lawoffice.com*

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