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OREGON SAYS "YES" TO CONSENT JUDGMENTS

Allen Eraut
Rizzo Mattingly Bosworth PC

Many jurisdictions allow for consent judgments. Typically, a defendant will allow entry of judgment against it, and assign the defendant's rights against its insurance carriers to the plaintiff. In exchange, the plaintiff will agree to release the defendant from liability, and promise not to pursue the defendant's assets to satisfy the judgment. The plaintiff then tries to collect the judgment from the defendant's insurers, through garnishment or other means.

For more than 40 years, Oregon frowned on this arrangement. Oregon instead followed "the *Stubblefield* rule" (from *Stubblefield v. St. Paul Fire & Marine*, 267 Or 397 (1973)), which required that a judgment be entered before a party (typically a defendant) could assign rights against that party's insurer. The *Stubblefield* rule was designed to limit these assignments to situations where a defendant's insurer refused to defend, and a judgment was entered against the defendant after a decision on the merits. *Id.* at 398. In that situation, the defendant was permitted to assign its rights against its insurer to the plaintiff in exchange for a release and a covenant not to execute the judgment against the defendant. *Id.* at 400, *citing Groce v. Fidelity General Insurance*, 252 Or 296, 302-03(1969).

If the defendant tried to make the assignment before judgment was entered – as part of a settlement, for example – the *Stubblefield* rule prevented the plaintiff from collecting against the insurer. The *Stubblefield* court reasoned that, under the terms of the liability insurance policy at issue, the insurer was only obligated to indemnify its insured for damages the insured was "legally obligated to pay." *Stubblefield*, 267 Or at 400. If the insured was released from liability as part of the settlement with the plaintiff, the insured was no longer "legally obligated to pay" any damages. If the insured was not "legally obligated to pay" damages, the insurer did not have a duty to indemnify, and had no obligation to satisfy the judgment. *Id*. Essentially, the insurer was released along with the insured, leaving the plaintiff with an uncollectable judgment.

In *Brownstone Homes Condo Assn. v. Brownstone Forest Hts.*, 358 Or 223 (2015), the Oregon Supreme Court changed course, overruling *Stubblefield*, and opening the door for parties to settle and assign claims before a judgment is entered.

The Brownstone Homes Condominium Association sued a contractor, A&T Siding, Inc., claiming that A&T negligently caused damage to the condominiums. *Id.* at 226. The contractor's insurer, Capitol Specialty Insurance Co., eventually refused to defend A&T. *Id.* Brownstone settled with A&T in exchange for the right to pursue A&T's claims against Capitol. *Id.* The deal included a covenant not to execute in which Brownstone agreed not to collect the judgment from A&T. *Id.*

Brownstone then filed a garnishment action against Capitol. *Id*. *Citing Stubblefield*, the trial court dismissed the action. *Id.* at 228, *citing Stubblefield*, 267 Or at 400-01. The trial court reasoned that the covenant not to execute had released A&T from any obligation to pay

Brownstone, which meant that A&T– and by extension its insurer Capitol – were no longer "legally obligated to pay" any damages to Brownstone. *Id*. Brownstone appealed, arguing that *Stubblefield* either was distinguishable on its facts or was superseded by statute. *Brownstone*, 358 Or at 228. In the alternative, Brownstone argued that *Stubblefield* was wrongly decided and should be overruled. *Id*. at 228-29.

The Court of Appeals affirmed, but the Oregon Supreme Court reversed. *Id*. at 228. The Supreme Court rejected Brownstone's first two arguments, finding that *Stubblefield* was not distinguishable, and was not superseded by statute. *Id*. at 231-36. But the court agreed that Stubblefield was wrongly decided, and overruled it. *Id*. at 246. The court found *Stubblefield*'s analysis "sparse" and contrary to precedent on the issue of whether the phrase "legally obligated to pay" allows an insurer to deny coverage when the insured enters into a consent judgment. *Id*. at 236. Instead, the *Brownstone* court found the phrase "legally obligated to pay" ambiguous, triggering the rule that ambiguous terms must be construed against the insurer. *Id*. at 245. The court also noted that the vast majority of other jurisdictions considering this issue have ruled that consent judgments do not extinguish claims so as to preclude recovery from an insurer. *Id*.

Although Oregon has now joined the other jurisdictions that allow consent judgments before judgment, some questions remain on how these agreements will work.

Can the defendant's insurer contest the consent judgment?

In Washington, the defendant's insurer would have the opportunity to request an RCW 4.22.060 reasonableness hearing to evaluate whether a consent judgment was proper. The statute requires a claimant who intends to enter into a release or covenant not to execute to give five days' written notice to other parties and the court. The court "shall" hold a hearing "with all parties afforded an opportunity to present evidence." RCW 4.22.060(1). The court must determine at that hearing whether the "amount to be paid is reasonable."

Oregon does not have a similar statute, but ORCP 71 C (relief from judgment by other means) states that a court has "inherent power" to "relieve a party from judgment," or "to set aside a judgment for fraud upon the court." This may provide a vehicle for an insurer to contest a consent judgment.

Litigants should also be aware of ORCP 73, which governs Judgment by Confession. ORCP 73 requires that a defendant who confesses to a judgment file a signed and verified statement that:

- authorizes the entry of judgment for a specified sum;
- states concisely the facts out of which it arose, and shows that the sum confessed therefore is justly and presently due;
- contains a statement that the person or persons signing the judgment understands that it authorizes entry of judgment without further proceedings which would authorize execution to enforce payment of the judgment; and
- must have been executed after the date or dates when the sums described in the statement were due.

Most judgments, however, will likely be entered by stipulation under ORCP 67 F, which do not have the same requirements as ORCP 73.

Just because you can does not mean you should.

The door to consent judgment may be open, but should you walk through it? After taking the assignment, a plaintiff still needs to face the insurer's coverage defenses before collecting on the judgment. Under *Brownstone*, an insurer would not be able to argue (as the insurer in *Stubblefield* did) that the insured is no longer "legally obligated to pay" any damages after a consent judgment is reached. But many more coverage defenses could exist. *See New England Ins. Co. v. Barnett*, 465 F App'x 302, 306-09 (5th Cir. 2012) (Louisiana law) (holding consent

judgment breached policy's voluntary payments provision); *Hinkle v. Crum & Forster Holding, Inc.*, 747 F Supp 2d 1132, 1137 (D. Alaska 2010) (holding insurer not liable for consent judgment because insured breached its duty to defend). A plaintiff should carefully evaluate the underlying coverage issues before pursuing this approach.

What can the defense lawyer tell the insurer?

An Oregon lawyer hired by the insurer to represent the defendant owes ethical duties to both the insurer and the defendant. *See* OSB Formal Ethics Op No 2005-30; OSB Formal Ethics Op No 2005-77; OSB Formal Ethics Op No 2005-121. Most liability insurance policies give the insurer the right to control the defense, and require the insured's cooperation in that defense. If the insured defendant is considering a consent judgment, the insurer likely will want to know.

Oregon Rule of Professional Conduct 1.4 states that "a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." The status of settlement negotiations, including the potential of the insured entering into a consent judgment, would appear to fall within this rule. A defense lawyer's primary duty of loyalty is to the insured. Would telling the insurer about the insured's plans to enter into a consent judgment harm the insured's relationship with its insurer, and jeopardize coverage based on lack of co-operation or a "no action" clause? This question does not have a clear answer.

In *Brownstone*, the insurer was not providing a defense, so an argument can be made that the insured cannot enter into a consent judgment while the insurer is providing a defense, even under a reservation of rights. But other states allow consent judgments even while the insurer is defending under a reservation. In that situation, an insurance defense lawyer should look closely at the insurance policy at issue to determine whether any communications with the insurer would place coverage at risk. It also is an open question whether insurance defense counsel, under the tripartite relationship, can inform the carrier of the insured's plans to enter into a consent judgment over the insured's objections.

Oregon Supreme Court Applies ORS 12.115 Statute of Repose to "Spec" Home Purchases

Paul Sheely
Jakob Lutkavage-Dvorscak
Smith Freed & Eberhard, P.C.

The Oregon Supreme Court recently ruled, *Shell v. The Schollander Companies, Inc.*, 358 Or 552 (2016), in regards to a "spec" home that the 10-year period of repose runs from "the act or omission complained of" as directed by ORS 12.115, rather than the "date of substantial completion" provided for in ORS 12.135. The *Schollander* opinion continues the Court's recent string of decisions ruling on various legal issues affecting construction litigation for the past several years. This decision, while clearly delineating the applicable statute of repose for a "spec" home, will also create some uncertainty in the "spec" home context because when the repose period expires for individual trades will vary since their respective acts/omissions will occur at different times.

Before discussing *Schollander* further, we must provide full disclosure. We represented The Schollander Companies, Inc. in the circuit court and through the entire appeals process.

Schollander Companies built "spec" homes. On May 30, 2000, Schollander Companies and Ms. Shell entered into a purchase and sale agreement for a home. Although most of the construction was complete, the agreement required Schollander Companies to make interior changes to the home. After completing the interior changes, the sale closed on July 12, 2000.

Plaintiff sent her ORS 701.560 *et seq.* Notice of Defect in July 2010 and filed suit for construction defects arising from allegedly defective window, roof and siding installation, resulting in water intrusion damages. The lawsuit was filed more than 10 years after the windows, roof and siding were installed (the "date of the act

or omission complained of"), but less than 10 years after the sale closing. She alleged defendant was negligent based on certain defective exterior elements of the home, namely the windows, siding and roof. At summary judgment, Schollander Companies prevailed on the argument that plaintiff's negligence claims were barred by the 10-year period set out in the general negligence statute of repose, ORS 12.115(1).

The Supreme Court affirmed the Court of Appeals and the trial court holding that ORS 12.115 applied to the sale of the "spec" home.

The Court reached this conclusion after a searching review of the statutory language and legislative history of ORS 12.135. The Court first determined that ORS 12.135 only runs from "substantial completion," which is defined in the statute as the date the contractee accepts construction as complete. The Court then concluded that in the context of ORS 12.135 "contractee" refers to a "party to a contract to construct, alter, or repair an improvement to real property" and that the statute only applies to "claims that derive from contracts to construct, alter, or repair an improvement to real property" where a contractee could accept the construction. Because Ms. Shell's contract was only for the purchase of real property, not the construction of the building, ORS 12.115 controlled, and her negligence claims were barred due to the acts or omissions complained of having occurred more than 10-years prior to filing of the lawsuit. She was not a contractee for the purposes of ORS 12.135.

Schollander is important in that it creates certainty as to the statute of repose "spec" homes. In its analysis, the court indicated that the legislature may have deliberately differentiated between "spec" homes as opposed to homes built pursuant to construction contracts, as they present different issues for purposes of statutes of repose. For instance, "spec" homes could go unsold for years. If the statute of repose for construction applied to "spec" homes, it would create uncertainty as to when the buyer accepted the construction as substantially completed.

However, attorneys representing plaintiff homeowners will need to be more diligent in investigating potential claims on "spec" homes that are getting close to ten years old because ten years from the date of purchase will not be determinative as to the viability of the claims. Counsel will need to do its due diligence in determining, if possible, when specific trades completed their work.

Prospectively, one of the more interesting portions of the decision will be how the courts will interpret what it means for a claim to "derive from contracts to construct, alter, or repair an improvement to real property." The use of "derive" in the opinion does not track ORS 12.135's use of "arising from" when discussing what actions the statute applies to and the Court's reason is not immediately apparent but is something to keep an eye on.

BUILDER'S RISK: WHAT IS IT AND WHY SHOULD PROJECT PARTICIPANTS CARE?

Dan Gragg
Seifer, Yeats, Zwierzynski & Gragg, LLP

As construction activity has picked up, projects are experiencing a corresponding increase in losses that occur during the course of construction. Course of construction losses are frequently covered by a project specific Builder's Risk policy, but many project participants are unfamiliar with, and unaware that they may be covered by, such policies. As the industry continues to expand, it is critical to educate incoming project participants about the existence of Builder's Risk policies, including the coverage afforded by such policies, the effect of making a claim and issues to spot when reviewing contract insurance provisions.

Builder's Risk, sometimes referred to as 'all risk' or 'course of construction' insurance, is intended to protect the owner, the prime contractor and subcontractors of all tiers from physical loss or damage to the project resulting from a covered peril such as fire or theft during the course of

construction. Depending on the form purchased (named perils versus all-risk) Builder's Risk generally covers all non-excluded fortuitous losses. Excluded perils typically include earthquake and flood; although, in the Northwest we often purchase these excluded perils as an optional rider. The Builder's Risk policy limits increase in lock-step with the value of the work-in-place up to the full replacement value of the project, subject to the typical "per occurrence" deductible. When the project is completed, the owner brings the project into its portfolio of covered assets with a property policy.

In addition to the typical waiver of subrogation found in most construction agreements, by including themselves as insureds under the Builder's Risk policy, project participants are provided an added level of comfort that potential subrogation efforts against them will be barred. This furthers the intent of the Builder's Risk policy, which is to minimize cost and disputes among the project participants by purchasing a single insurance policy that will cover the interests of all parties in the event of covered damage to the project during construction.

More and more projects are using OCIP and CCIP policies as the sole means of insurance. These policies bundle typical insurance policies such as general liability, worker's compensation, employer's liability, Builder's Risk, installation floater, etc. into one policy on behalf of all project participants. In practice some of these policies have had the unintended consequence of creating a pecuniary interest in denying claims for covered losses and fostering contractual disputes between the parties.

By far the most heavily litigated exclusion in the Builder's Risk context is the "defective or faulty workmanship" exclusion. Under this exclusion, the costs of repairing or correcting faulty work are not covered losses under the policy. There is a wide variation amongst courts on what constitutes defective workmanship for purposes of coverage. However, with some exception, faulty workmanship exclusions come in two varieties. The first category consists of those exclusions that do not also include an "ensuing loss" provision. If the faulty workmanship exclusion does not have a corresponding ensuing loss provision and faulty work results in physical loss or damage to other property in the project, both the cost of repairing the faulty work and the resulting damage to other property are excluded from coverage. The second category consists of those exclusions that do include an ensuing loss provision. Typically, if the faulty workmanship exclusion has a corresponding ensuing loss provision and faulty work results in physical loss or damage to other property, the cost of repairing the faulty work is excluded, but the resulting damage to other property is covered by the policy. It is increasingly important to recognize the difference between such exclusions and be able to educate project participants about the same.

Things to consider when reviewing Builder's Risk policy provisions in construction agreements:

- What is the deductible on the Builder's Risk policy?
    - Confirm that the deductible is stated in the subject contract;
    - Negotiate for an acceptable deductible at the outset; and
    - Make sure the subject contract speaks to who is responsible for payment of the deductible (i.e. owner, prime or subcontractor)
- Who are the named insureds on the policy?
    - Make sure that all of the project participants are named on the policy to bolster the construction agreements' waiver of subrogation provisions
- Builder's Risk Claims v. At-Fault Policy Claims
    - Remember, if you're the contractor it is advantageous that claims be made under the Builder's Risk policy rather than the at-fault contractor's Commercial General Liability policy, because when purchased correctly Builder's Risk claims have no impact

on a contractor's loss ratio or future premiums.

Craft Your Next Arbitration Provision to Address the Common Pitfalls in Arbitration

Jacob A. Zahniser
Jordan Ramis PC

Arbitration provisions are tucked into nearly every construction contract. Many perceive arbitration as a cost effective and quicker means to resolve disputes compared to a court action. Arbitration is also private, not open for public consumption, like court proceedings. However, arbitration may not be for every construction dispute. Before you draft or sign-off on another arbitration provision, you should be aware of the pitfalls associated with arbitration and address those pitfalls in the arbitration clause itself.

Arbitration can be more expensive. Contrary to popular belief, arbitration can be just as expensive as court, possibly even more so. Arbitration fees are steep: the standard fee schedule of the American Arbitration Association ("AAA"), the default arbitration service provider in most construction contracts, currently calls for an upfront administrative fee of $5,000 where the construction claim is between $500,000 and $1,000,000. There is another fee of $6,200 payable in advance of the first hearing. These fees do not include the arbitrator's compensation, who is typically an experienced lawyer who will be paid by the hour or by the day for his or her services, including preparation time and travel expenses. Depending on the arbitration clause or administrative rules, there may be three arbitrators involved, tripling the expense of arbitration.

By contrast, the filing fee in Oregon Circuit Court for similar claim between $500,000 and $1,000,000 is $531. The filing fee includes the services of the Judge and other courthouse personnel plus the use of courthouse facilities.

Arbitration includes expensive discovery. Many believe arbitration avoids the expense of protracted discovery. This is also not necessarily true. The AAA rules for the construction industry were revised in 2015 to provide arbitrators greater control over the exchange of documents and other information, including electronic information, and to give the arbitrator enforcement power. [1] AAA new rule 23 provides that at the discretion of the arbitrator, a preliminary hearing is to be scheduled as soon as practicable following the appointment of the arbitrator. Rule 23 includes a checklist of 20 items to be addressed during this preliminary hearing. The arbitrator then issues a written order memorializing decisions made during this preliminary hearing. This is remarkably similar to the case management conferences under federal rule 16.

Then, AAA's new rule 24 gives the arbitrator greater control over the prehearing exchange of information. Under this rule, the arbitrator is supposed to balance the costs and burdens of responding to requests for information with each party's right to develop and present its case. The arbitrator may require production of electronically stored information (ESI) in the manner most convenient and economical for the producing party, and may impose search criteria or parameters setting the boundaries for searches of electronically stored documents or information. This is similar to ESI discovery under the federal rules.

Finally, AAA's new rule 25 enables the arbitrator to issue orders and sanctions to parties that refuse to comply with the Rules or other standing orders. The arbitrator now has specific enforcement authority and power to enforce compliance with the rules and the arbitrator's own orders. The arbitrator may place restrictions on the scope of discovery, issue protective orders, and sanction parties for non-compliance, including payment of fees and costs, limitations on evidence, and other procedural sanctions (but not default, which is the only expressly prohibited sanction).

[1] AAA's new rules for construction arbitration may be found at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004219&revision=latestreleased (last accessed on 2/29/2016)

Arbitration can include expensive motion practice. Another common belief is that arbitration immunizes dispute resolution from expensive motion practice. Again, this is not necessarily true. As noted above, AAA rule 24 and 25 empower the arbitrator with enhanced authority to control the exchange of documents and sanction parties for failing to comply with the arbitrator's orders. This will likely be a ripe area for expensive motion practice in high-stakes construction arbitration.

In addition, AAA new rule 34 allows arbitrators to dispose of all or part of a claim, or to narrow the issues in a claim, prior to hearing through "dispositive motions." While AAA rule 60 allows the arbitrator to sanction a party for filing a motion that had no reasonable chance of success, it is unknown how and whether arbitrators will actually use this power to stifle unreasonable or frivolous motions.

Conflicted arbitrators are not always disqualified. In court, judges are obligated to recuse themselves from hearing a case when a conflict arises that would appear to a reasonable person to question the judge's impartiality. This is not necessarily the case in arbitration. Under AAA rule 19 a parties' failure to disclose a conflict they may have with an arbitrator potentially waives the right to disqualify arbitrator later. While an arbitrator's failure to disclose a conflict may be grounds for vacating an award[2] that is cold comfort to a client that has gone through the entire expense of arbitration and now faces the prospect of continued litigation because the arbitrator refused to disqualify his or her self after a late-discovered conflict arose.

Arbitration is generally not appealable. Unlike a judge's decision, there is generally no right to appeal an arbitrator's award. Under Oregon's Uniform Arbitration Act, the grounds for vacating an arbitration award are narrow, generally limited to procedural irregularities and are difficult to prove, except in the most obvious of cases.[3] There is no requirement under Oregon's Uniform Arbitration Act that an arbitrator actually follow Oregon law when resolving an Oregon dispute. In short, a client will probably be stuck with the results of arbitration even if the arbitrator's opinion is plainly wrong and against Oregon law.

In the end, some situations are suitable for arbitration, but others are not. Even in the suitable situations, it is advisable to address certain issues noted above in the arbitration provision, rather than wait for the actual arbitration when the parties' interests are adverse. Issues such as administered versus non-administered arbitration, the number of arbitrators, the applicable procedural rules, any limitations on discovery, and whether the arbitrator's award is reviewable for errors of law are all issues that should be addressed in the arbitration provision.

[2] ORS 36.650.

[3] ORS 36.705.

Design Professional Firms Selling Prefabricated Accessory Dwelling Units, Building Substructures, or Microhomes May Be Liable for Breach of Implied Warranty, or Strict Product Liability

Justin Monahan
Ball Janik LLP

A recent Illinois state court of appeals decision has highlighted the distinction between providing a product for sale to the public on the one hand, and providing a service under a contract on the other. Many design firms are branching out now to market and deliver their own products, satisfying a growing market for prefabricated structures, substructures, and building systems while taking advantage of developments in manufacturing coordination. Historically, architects involved solely with design have enjoyed immunity from expanding breach of warranty doctrines. But, as designers enter the stream of commerce to deliver fully manufactured products, that protection may disappear. Instead, design firms may subject themselves to liability for implied warranties and strict liability, concerns typically reserved for manufacturers and builder-sellers. Design firms need to make sure their

products are priced to account for this risk, and that they are insured for it. Sophisticated customers ordering prefabricated structures, substructures, and building systems from design firms or their subsidiaries should seek proof of the same.

In *Bd. of Managers of Park Point at Wheeling Condo. Ass'n v. Park Point at Wheeling, LLC*, 2015 IL App (1st) No. 123452, ___N.E.3d___, 2015 WL 9589615 (December 31, 2015), a condominium homeowners association sued an architecture firm for defective design leading to water and air filtration. The architecture firm had designed the 128-unit complex in 2000, and construction had commenced from 2001 to 2004. The architecture firm did not take part in the construction or sale of the units.

In reviewing the Association's argument that the architecture firm should be liable for breach of implied warranty, the Illinois court reviewed state and national caselaw. It noted that even the sale of pre-drawn plans and shell materials as a package to a builder-seller would not subject an architect to liability for breach of implied warranty in Illinois, so long as the architect did not have a role in the construction, discussing *Paukovitz v. Imperial Homes, Inc.*, 271 Ill App 3d 1037, 659 NE2d 473 (1995). In reviewing the national caselaw, the Court noted the general consensus that the concept of a "warranty" applies to goods, not services, and that architects are no different from other professions in being held only to the standard of care of a reasonable practitioner in the same time and place. Regardless, the Association argued that the law should be extended. An Illinois appeals court had previously extended liability for implied warranty to a painting subcontractor who was not the direct builder-vendor, in *Minton v. The Richards Group of Chicago*, 116 Ill App 3d 852, 452 N E 2d 835 (1983), on the basis that the responsible contractor should have liability.

Refusing to apply this to design professionals, the Court focused on construction and manufacture as the distinguishing feature. The Court ruled that absent involvement in the construction itself, the architecture firm would not be liable for implied warranty, in accord with the national consensus. *See, e.g., 797 Broadway Group, LLC v. Stracher Roth Gilmore Architects*, 123 A D 3d 1250 (2014); *Huang v. Garner*, 157 Cal App 3d 404 (1984)

The flip side of this discussion is if a design firm is involved in the manufacture of structures, that firm may very well find itself liable for implied warranty and strict product liability, as would any other manufacturer or builder-seller.

A minority of courts have already begun to use the terminology of "implied warranty" in application to design professionals. For example, in Arizona, the court used the phrase to hold that the implied warranty given by design professionals is "that they have exercised their skills with care and diligence and in a reasonable, non-negligent manner." *N. Peak Const., LLC v. Architecture Plus, Ltd.*, 227 Ariz. 165, 168, 254 P.3d 404, 407 (Ct. App. 2011). In response, however, this sounds like the traditional professional negligence standard applicable generally.

In Oregon, no court has yet extended the implied warranties of workmanlike construction and habitability of *Yepsen v. Burgess*, 269 Or 635 (1974) to design professionals providing design services. Given the history of law differentiating professional services from the delivery of goods, design firms may not be keyed in on the liability they may be taking on if they market and sell manufactured dwellings, Accessory Dwelling Units, and seismic substructures. As entrepreneurial design professional firms continue to branch out and offer prefabricated structures, they should have a look at whether they are crossing the line from providing professional services for a fee to providing a product for a cost. When they do, design firms should make sure that they take the same precautions that manufacturers do, obtaining proper insurance and sales agreements which identify and limit warranties and liabilities. Customers and sophisticated consumers of architectural products should make sure that the company with whom they are dealing

is equipped to handle any problems with its products down the road.

Construction Law Section
Executive Committee

Tara Johnson, Chair:
taraj@seifer-yeats.com
Dan Gragg, Past Chair:
gragg@seifer-yeats.com
Doug Gallagher, Chair-Elect:
doug@dglawoffice.com
Dan Duyck, Secretary:
dduyck@whippleduyck.com
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tstorti@lawssl.com

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C. Andrew Gibson: *agibson@stoel.com*
Ryan Hunt: *rhunt@ghrlawyers.com*
Stacey Martinson:
stacey.martinson@millernash.com
Justin Monahan: *jmonahan@balljanik.com*
Tom Ped: *tped@williamskastner.com*
Michael Peterkin: *mwp@peterkinpc.com*
Jeremy Vermilyea; *jvermilyea@schwabe.com*
Curtis Welch: *cwelch@dsw-law.com*
Jacob Zahniser: *jacob.zahniser@jordanramis.com*

Advisory Members:
Jason Alexander, *jalexander@sussmanshank.com*
Gary Christensen:
gary.christensen@millernash.com
Darien Loiselle: *dloiselle@schwabe.com*
Jakob Lutkavage-Dvorscak, *jld@smithfreed.com*
Chuck Schrader, *chucks@nspor.com*
Pete Viteznik: *pviteznik@kilmerlaw.com*

Newsletter Editor:
Justin Monahan: *jmonahan@balljanik.com*

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