Oregon State Bar Construction Law Section

Construction Law Newsletter

Spring 2018, Issue No. 58

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ONGOING UNCERTAINTY ABOUT ONGOING OPERATIONS

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In *PIH Beaverton, LLC v. Red Shield*, 289 Or App 788 (2018), the Court of Appeals upheld the trial court's ruling that a subcontractor's insurer was obligated to provide a defense to the general contractor who qualified as an insured under an "Additional Insured" (or "AI") endorsement attached to the policy. This holding is completely in-line with the Oregon Supreme Court's prior 2016 decision in *West Hills Dev. Co. v. Chartis Claims, Inc.*, 360 Or 650 (2016).


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In both cases, the AI endorsement limited coverage for the additional insured (the general contractor) to liability arising out of the named insured's (the subcontractor's) "ongoing operations". Likewise, in both cases, the underlying complaint did not specifically allege when damages occurred, leaving it uncertain as to whether damages occurred during the subcontractor's "ongoing operations" or, instead, whether those damages occurred after all work had been completed. Nevertheless, both courts found that this lack of specificity was immaterial, opining that due to the broad duty to defend and the obligation to provide a defense if there was any possibility of coverage, there was a duty to defend.

Similarly, the courts in *PIH Beaverton* and *West Hills* rejected arguments that there was no duty to defend because the underlying complaints did not specifically name the involved subcontractor.


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Rather, the courts held that because the underlying complaints left open the possibility that the general contractor was being sued for damages arising out of the work of the named insured subcontractor, there was a duty to defend. *See West Hills,* 360 Or at 665 ("L&T may not have been identified by name in the complaint, but that is not the issue. The allegations of the complaint reasonably could be interpreted to result in West Hills being held liable for conduct covered by the policy: L&T's operations for West Hills.").

Thus, *PIH Beaverton* re-confirms, as stated in *West Hills*, that there is a broad duty to defend under additional insured endorsements, including those endorsements which limit coverage to liability arising out of the "ongoing operations" of the named insured. What is not decided, by either Court, however, is what the "ongoing operations" limitation really means. While the precise definition of "ongoing operations" liability may be irrelevant for most duty-to-defend analyses, it can make a significant difference for purposes of indemnity.

As reflected in the decisions just discussed, insurers interpret the "ongoing operations" limitation to mean that the additional insured qualifies for coverage only with respect to damages that occurred while the named insured's operations were ongoing (*e.g.*., the subcontractor accidentally drops a hammer on the owner's head during performance of its work). Insureds, on the other hand, have argued that "ongoing operations" liability includes liability for "faulty work done during the construction phase that is discovered at a later time" (*e.g.,* poor flashing work during construction led to water damage discovered two years after work was completed). *Sec. Nat'l Ins. Co. v. Sunset Presbyterian Church*, 289 Or App 193 (2017). Until Oregon's courts rule directly on the meaning of ongoing operations, insurance companies and their insureds (including additional insureds) are left to wonder about scope of coverage and limits of indemnity.

The cases discussed above help explain why it has become common practice for most carriers to insert "ongoing operations" limitations into their additional insured endorsements. However, *if* coverage under "ongoing operations" AI endorsements is limited to damages that occur while the named insured is performing operations, then there is *no* coverage for damages that arise after the insured has completed its work. Instead, such damages will be deemed to arise out of the named insured's "completed operations."

As required by ORS 701.073 (and because construction damages are so common) Oregon contractors are required to carry "completed operations" coverage. However, if this "completed operations" coverage is excluded under "ongoing operations" in AI endorsements, general contractors may find they have a significant gap in their additional insured coverage. A general contractor who is not prepared for this kind of coverage gap likely needs to review and, if necessary, amend their additional insured requirements to require subcontractors to acquire additional insured coverage that is *not* limited to ongoing operations. Given the current state of the industry – with most carriers including "ongoing operations" limitations – this coverage may be difficult to obtain. Nevertheless, if coverage for damages arising out of the completed work of subcontractors is a concern, a general contractor should require adequate additional insured coverage.

Further, contractors should require that any additional insurance procured be designated specifically as "primary and non-contributory." If this requirement is not included in the subcontract (and actually included in the additional insured endorsement) then it is likely the general contractor's insurance will also have to respond, at the primary level, to any loss that triggers the additional insured coverage. In Oregon, when multiple policies are triggered by a loss, the determination of which one is "primary" (and, therefore, must respond first) will generally depend on the relationship between the policies' "Other Insurance" clauses. The most likely result in this situation is to find that the "Other Insurance" clauses cannot be reconciled or, in the words of the Oregon Supreme Court, are "mutually repugnant." *Lamb-Weston, Inc. v. Or. Auto. Ins. Co.*, 219 Or 110, 129 (1959). In that event, both "Other Insurance" clauses will be rejected, and both policies will have to respond to the loss. On the other hand, if the additional insurance specifically provides that it is "primary and non-contributory", then that insurance will

very likely have to respond first, up to limits, before triggering the general contractor's own policy.

Finally, requiring a subcontractor to acquire additional insured coverage is one thing, but verifying that coverage was actually obtained is another. A promise to obtain coverage, if unfulfilled, can form the basis for a breach of contract action, but: (1) that claim will be worthless if the subcontractor is insolvent; and (2) the subcontractor will likely argue that the general contractor waived the additional insured requirement by allowing the subcontractor to commence work. Thus, it is critically important to follow through *after* the initial contract is signed and to obtain a copy of the Additional Insured certificate and endorsement for the project file.

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NEW OREGON PUBLIC CONTRACTING SEXUAL HARASSMENT POLICIES

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In the 2017 Legislative Session the Oregon Legislature passed and the governor signed into law House Bill 3060 which requires on public contracts exceeding $150,000 that all bidding subcontractors provide proof of policies design to prevent and address sexual harassment, sexual assault, and discrimination against protected classes. The law went into effect January 1, 2018.
This new law may have slipped by you and your contractor client's radars because there was little publicity surrounding it. Fortunately, the Legislature also authorized the Department of Administrative Services to develop sample policies for contractors. That means if you are in a hurry to meet the new requirements the DAS samples will help your clients meet this new requirement in short order until your client decides to develop its own policy or simply use the one offered by DAS.

The sample policies can be found on the DAS website here:

http://www.oregon.gov/das/Procurement/Pages/hb3060.aspx

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CALIFORNIA CLARIFIES RIGHT TO REPAIR ACT: ROADMAP FOR OREGON?

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Sixteen years is a long time. In 2002, John Ashcroft was US Attorney General, Enron was mired in bankruptcy, and Tom Brady was MVP of Super Bowl XXXVI. In the construction defect industry, California passed broad "Right to Repair" legislation addressing construction defect disputes. *See* CA Civil Code §895 et seq.

California, like many states, has faced a deluge of construction defect lawsuits which tend to be highly adversarial, complicated, and expensive. In response, many states, including Oregon, enacted prelitigation procedures that must be satisfied before a claimant may have access to the courts or to arbitration. Oregon's prelitigation procedure has been in effect since January 1, 2003 and can be found at ORS 701.560, *et seq*. (the "Notice of Defect Act"). This Act provides that contractors are entitled to notice of alleged construction defects and are afforded the right to inspect, investigate, and offer to repair alleged

construction defects before a lawsuit or arbitration may be commenced.

It is an open question whether Oregon's approach has served as an effective gatekeeper. California's Right to Repair Act sets another example, an ambitious piece of legislation significantly more broad and detailed than Oregon's Notice of Defect Act, addressing construction defects disputes both substantively and procedurally.

Substantively, California's Right to Repair Act created a new statutory cause of action by which a claimant may recover economic loss. The Act established 45 different "construction standards" and allows for recovery of strictly economic loss. For instance, the Right to Repair Act establishes that a deck or balcony "shall not allow water to pass into the adjacent structure." CA Civil Code §896(a)(5). If that standard is not met, then the Right to Repair Act allows for recovery regardless as to whether property damage has resulted. A claimant may bring an action without having to wait for a defect to cause property damage or personal injury.[1]

Procedurally, the Right to Repair Act provides for notice of a potential claim, an exchange of information, up to two inspections, mediation, and a right to repair. *See* Cal Civil Code §§910-933. There are several hoops to jump through, but a contractor has a right to repair, or have repaired by a third party, alleged defects. *See* Cal Civil Code §§918-921. While the homeowner retains the right to proceed with a lawsuit regardless of repairs, the right to repair provides contractors with a tool currently lacking in Oregon's Notice of Defect Act.

Over the years, however, this scheme resulted in competing interpretations about the type of claims to which the Act applies. Some homeowners argued they could ignore California's Right to Repair Act, taking the position that the Act only applies to claims seeking violation of a statutory construction standard seeking economic loss. In other words, a homeowner may avoid the prelitigation procedure by simply not alleging a statutory claim for economic loss. Contractors and their insurers, on the other hand, have argued the prelitigation procedure applies to all property repair claims arising from alleged construction defects.

On January 18, 2018, the California Supreme Court resolved this in *McMillin Albany LLC v. Superior Court of Kern County* (Case No. S229762, Cal. January 18, 2018). In a win for contractors, the California Supreme Court held that the prelitigation procedure is mandatory for all tort claims for economic loss and property damage arising out of construction defects. Moreover, the Court's review of the entire statutory scheme and legislative history led it to conclude that the Right to Repair Act reflects "a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." Therefore, as the statutory cause of action is the remedy for economic loss and property damage, the Right to Repair Act's prelitigation procedure applied to all such claims.

So, what can Oregon take from this? The short answer is its unclear. The full effect of California's Right to Repair Act has yet to be realized due to uncertainty as to the scope of its applicability. Contractors, and their insurers, scored a win at the California Supreme Court level. California's robust prelitigation procedure may have more of an impact than Oregon's Notice of Defect procedure if contractors and their insurers use the tools provided. On the other hand, ambitious legislation may undermine its purpose. It took sixteen years to determine the claims to which the Right to Repair Act applies. That seems to be scratching the surface of litigable issues under the Right to Repair Act. The Right to Repair Act may have the adverse impact of

[1] The Right to Repair Act is not applicable to claims for personal injury or breach of contract claims.

making construction defect disputes even more complicated. Maybe we will know in another sixteen years.

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NOT YOUR TYPICAL MEDIATION: DISPUTE RESOLUTION THROUGH CONSTRUCTION CONTRACTOR'S BOARD ONSITE MEETINGS.

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A major role of the Oregon Construction Contractors Board (CCB) is to provide a dispute resolution process for certain claims against Oregon licensed contractors. This article focuses upon some of the considerations that may arise in connection with the on-site meetings typically scheduled in the residential or small commercial structure complaint process against residential bonds.

Dispute Resolution Process Overview. ORS 701.145 provides a process for owners of residential and small commercial structures[2] to seek recovery from their contractor's residential license bond. An owner may assert claims for alleged negligent or improper work, breach of contract, or to recover funds to discharge a subcontractor or supplier construction lien. Upon the CCB's acceptance of a timely and properly completed complaint, and after receipt of the complainant's processing fee, the default procedure is the CCB sets an on-site meeting. The meeting is typically described as a "mediation" attended by the owner (complainant), the contractor (respondent) and the CCB onsite-representative (sometimes referred to as inspector or mediator). The CCB representative both inspects the structure in light of the issues raised by the complainant and engages the complainant and contractor, often separately, to try to bring about a resolution of the matter. If resolved, the parties enter in to a settlement agreement. If the matter is not resolved, the complainant must proceed to reduce the claims to judgment, a certified copy of which must be returned to the CCB within a certain period of time in order to potentially receive payment from the residential bond. [3]

The Mediation Is Usually Successful. The CCB's Annual Statistics for 2017, published on its website, states about 1,400 homeowner complaints were investigated by the CCB last year. Of the cases in which both parties participated in mediation, approximately 80% resulted in a settlement. The process that a complainant must follow after the onsite meeting provides a strong indicator why such a large percentage of cases settle. If the complaint does not settle at the onsite meeting, the complainant generally must timely provide proof of filing suit, arbitration or a properly served Notice of Defect pursuant to ORS 701.560 *et seq* and pursue such claim to judgment in order to receive payment from the contractor's bond. See OAR 812-004-1510 and 1520. Attorney fees awarded in an arbitrator award or judgment are not recoverable from a residential bond. See ORS 701.145(8). Therefore, the cost of future litigation is a significant factor weighing in favor of resolution.

The Mediation Is Not Confidential. What the CCB terms as a "mediation" does not square with

[2] See ORS 701.005(15) and (17) for specific definitions of residential and small commercial structures.

[3] CCB complaints have various time and jurisdictional requirements, including a prelitigation notice. For general information about the CCB dispute resolution process, the CCB's website provides links to forms and instructions. For additional information, see the latest edition of OREGON STATUTORY TIME LIMITATIONS published by the Oregon State Bar Legal Publications and Professional Liability Fund.

an important aspect of what most lawyers have come to know: Confidentiality. Simply put, the CCB mediation is not confidential (unless you obtain the CCB's agreement to make it so), although settlement negotiations may remain inadmissible if within the parameters of OEC 408. See OAR 812-001-0500(4) and (5)(f). Documents filed with the CCB in response to a complaint are generally public records that may be disclosed pursuant to a public records request (the CCB website has a form). Also, the CCB (as an agency), may not be perceived as impartial to the degree counsel may be accustomed to in other litigation matters: The CCB is authorized to recommend a resolution if "it appears the [contractor] has breached the contract or performed work negligently or improperly." OAR 812-004-1460. Similarly, the CCB representative's observation of the contractor's violations of the law during the course of the mediation may be referred to the appropriate authority for disciplinary action.

Scheduling the Onsite Meeting – Potentially Quick Turn Around. Once the CCB has accepted a complaint (and receives the complainant's processing fee), the agency may schedule one or more on-site meetings or telephone mediations. OAR 812-004-1530 (construction lien complaints); 812-004-1450 (all other complaints). Under current rules, the CCB will mail notices to the parties of an on-site meeting no less than fourteen (14) days before the date scheduled for the meeting. Presently, the CCB is considering the elimination of fourteen (14) day notice by regular mail in favor of email notice "before" the onsite meeting, predominately to promote flexibility in scheduling. See Notice of Public Meeting for CCB February 28, 2018. Regardless, the notice of the onsite meeting must be acted upon *promptly*. According to CCB's recent practice, a party who wishes to request a new date generally must provide a specific reason he or she cannot attend and provide "proof" of a scheduling conflict (such as airline tickets) in order to change the date. If both complainant and respondent are represented by counsel, cooperation in scheduling is recommended.

Preparing for the Onsite Meeting/Mediation. There is no discovery unless conducted voluntarily between complainant and respondent. While a complainant must provide notice of intent to file the complaint (generally by mailing the notice via certified mail to the contractor's last known address shown in the CCB records) not less than thirty (30) days prior to filing the complaint, the notice need not specify what the issues are. ORS 701.133. Accordingly, identifying the key issues in dispute may depend on how well the complainant articulates them in the CCB form complaint. A complainant is generally best served by obtaining assistance in evaluating and articulating construction issues, both in the complaint and at the mediation. A respondent is generally best served by arranging to have each subcontractor whose work may be implicated plan on attending. The respondent should consider having its construction file available and in an organized fashion so any relevant documents are quickly retrievable.

The contractor's workmanship generally will be evaluated by any applicable product or material installation instructions, the construction drawings or specifications (to the extent available), and the "Residential Construction Standards," dated March 20, 2009" as adopted by the National Association of State Contractors Licensing Agencies ("NASCLA"). OAR 812-004-1537(1). Counsel can purchase a copy of the Residential Construction Standards (a small spiral bound book) from the NASCLA website under the "Consumer Reference Library" tab, which may be useful in evaluation of a complaint. For example, the Residential Construction Standards provides a crack in a concrete garage slab that is not in excess of ¼" in width or vertical displacement does not require repair. If the parties' agreement adopts a different standard (such as the National Home Builders Association ("NHBA") publication "Residential Construction Performance Guidelines

for Professional Builders & Remodelers"), then the CCB will generally follow the standard adopted by the parties in the contract. Id. Counsel should purchase a copy from the National Association of Home Builders website and have the reference available if applicable.
If design or structural issues are potentially implicated, consider retaining an engineer or architect. Parties should be aware that such experts may be obligated to disclose any conditions that endanger the health, safety, and welfare of the public. See OAR 806-020-0020 (architects) and OAR 820-020-0015(1) (engineers).

Be sure to review the "Instructions for Parties Participating in a CCB Mediation" that accompanies the CCB's notice of site visit. In particular, counsel and the parties should familiarize themselves with the scope of the desired release and whether to enter into a "Substituted Contract" or "Not Substituted Contract." A complainant should take care not to offer too broad of a release from future claims or issues not bargained for during the onsite meeting. If the settlement does not result in the repair of the alleged defective work (such as a monetary settlement), the contractor should consider obtaining additional protection from potential future construction defect claims if the complainant transfers or sells the home to another without repairing the issues that are the subject of the complaint. The new home owner who did not release the contractor may be able to sue the contractor for property damage arising from the defective work, possibly even if the new owner has some knowledge of the defective construction. *See e.g. Bunnell v. Dalton Construction, Inc.*, 149 P.3d 1240, 210 Or. App. 138 (Or. App., 2006) (purchasers of home were aware of defective siding installation but not extent of resulting damage).

Should Respondent File a Written Response to the Complaint? A response by the contractor is not required, but the answer is usually yes, with several caveats. There will likely be facts or important documents the complainant omitted.[4] The goal of each party is to have the relevant facts and documents before the CCB's onsite representative before the start of the onsite meeting. The only practical way of accomplishing this goal is to file a response with the CCB. However, the caveats are several: First, the complainant will be provided a copy of the filing – so anything filed can be used against the contractor. Second, the CCB's onsite representative is unlikely to review (or at least digest) tens of pages of documents and argument. Any submission should be concise and stick to the construction issues in order to be effective. Third, respondent should be cautious about being overly argumentative in any response. For example, a contractor may minimize the poor quality of a certain aspect of the work (say, scratches on the countertop) while describing the issue in counsel's office. If the countertop looks completely unacceptable in person, the contractor will lose credibility with the mediator. Finally, any response is generally a public record available for anyone to request – including future customers or complainants.

***Can* the Parties Avoid the Onsite Visit?** In short, probably yes. If either the complainant or the respondent provides evidence of filing an arbitration or action involving the same facts, the Construction Contractors Board (CCB) may (and historically typically does) suspend processing the residential complaint. ORS 701.145(2)(a). If the respondent filed the action, the complainant must give the CCB evidence of filing its complaint as a countersuit, counterclaim, or other action within 30 days from the date that the CCB suspended

[4] In its February 8, 2018 newsletter, current CCB representatives generally attribute most disputes to poor documentation (whether in the original scope or change orders). Practically speaking, the burden generally falls upon the contractor to show decisions – or the owner's lack thereof – were documented.

processing the complaint unless the CCB determines that there is good cause to extend the deadline. OAR 812-004-1520(6). The CCB may also "determine" the nature or complexity of the dispute described in the complaint is more appropriately brought in another legal forum. ORS 701.145(2)(b).

If a residential bond complaint is filed based on a contract that contains a mediation or arbitration clause, certain rules apply. First, the CCB is deemed the mediator unless the contract requires mediation by a specific mediator other than the CCB. OAR 812-004-1440(2). If the contract specifies, the CCB must inform the respondent by written notice that if the respondent wants to mediate as provided by the contract terms, the respondent must provide proof of initiating contractual mediation within forty (40) days. OAR 812-004-1440(3). If the respondent complies, the CCB must suspend processing of the complaint pending mediation. OAR 812-004-1440(4).

The contractor must initiate mediation or arbitration within 30 days after notification by the CCB, or the contractor waives the right to mediation or arbitration in lieu of a CCB on-site or telephone mediation. ORS 701.180. If the parties do not resolve the dispute through CCB mediation, the complainant still must comply with any mediation or arbitration provision as a condition of obtaining judgment required for access to the bond. ORS 701.180.

Note, simply "skipping" a scheduled onsite visit is generally unwise. For a complainant, it means the likely loss of the ability to make the complaint against the contractor's bond (absent a very good reason why the complainant missed the meeting). See ORS 701.145(3); OAR 812-004-1260 (bases for closing a complaint); OAR 812-004-1320(7) (circumstances the CCB may refuse to process a refiled complaint based on the same facts as the earlier complaint). For a respondent, the meeting will continue without them and the contractor may find that the CCB inspector provides the parties a summary letter that includes the CCB representative's observations and conclusions about the contractor's responsibilities – which may prove harmful to the contractor in a subsequent proceeding (such as small claims court).

Should the Parties Avoid the Onsite Visit?

There may not be many reasons to avoid the on-site meeting. A major premise is the process is a quick and cost-effective way to dispense with disputes. The sooner the issue is resolved, the sooner the CCB dispute resolution page connected with the contractor's license is updated to reflect the matter has been "voluntarily resolved," which may influence the contractor's ability to obtain new customers. Even if the onsite meeting does not result in a settlement, it presents an opportunity for the contractor and counsel to see the project and disputed issues first hand (although if issues require additional investigation, that fact should be made known in writing to try to prevent the complainant from promptly "fixing" the work removing the ability to obtain further information for the contractor's defense). Therefore, even if the contractor views the dispute as a collection action rather than a legitimate dispute, the visit nonetheless affords the opportunity to engage in early, inexpensive discovery.

Also, if the contractor is subject to potential disciplinary issues (such as failing to provide Consumer Notices or use a written contract) and the contractor performs any resolution recommended by the CCB onsite representative, the CCB "shall" give that fact "due consideration in any subsequent disciplinary proceeding." ORS 701.145(4).

Nevertheless, there may be situations where a CCB onsite mediation may not be well-suited for a particular matter. For example, if significant property damage exists as a result of the contractor's work, there may be insurance coverage in the event the contractor is not able or qualified to perform the needed repairs. For

another example, if investigation beyond what is visually apparent is desirable, the CCB representative may not agree to another onsite meeting. The notice of defect process under ORS 701.575 provides for a visual examination and a follow up meeting that may include intrusive/destructive testing by the contractor, as well as subcontractors and suppliers. See OAR 812-004-1520(1)(b) (permitting an owner of a residential structure to suspend CCB processing in order to utilize the notice of defect statutes). Finally, sometimes there are interpersonal or legal issues beyond the construction work that make the "closeness" of meeting face-to-face at the complainant's home a difficult prospect. The CCB has the discretion to dismiss a complaint if the complainant does not make the home available or permit the respondent to come onsite. See ORS 701.145(3). If such issues exist, bring them to the attention of the CCB promptly in writing (keeping in mind, correspondence is generally shared with the other party and is usually a public record).

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LARISA'S HOME CARE, LLC: OREGON SUPREME COURT DECISION OPENS DOCTRINE OF UNJUST ENRICHMENT

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In October 2017, the Oregon Supreme Court decided *Larisa's Home Care, LLC v. Nichols-Shields*, 362 Or 115 (2017) and swept away a mechanistic reliance on the quasi-contractual notion of unjust enrichment articulated in *Jaqua v. Nike, Inc.*, 125 Or App 294 (1993). The details of the case flag several issues for practitioners in multi-party development, design, and construction scenarios.

In *Larisa's Home Care*, the plaintiff operated adult foster homes for the elderly. The defendant was the estate of a care recipient. That recipient's son, operating under a power of attorney, had both improperly transferred the recipient's assets away and fraudulently denied that in qualifying the recipient for Medicaid. As a result, the plaintiff was paid nearly $50,000 *less* to care for the recipient than the plaintiff should otherwise have been paid had the recipient *not* qualified for Medicaid but instead paid full freight. *Larisa's Home Care*, 362 Or 118-9.

Eventually, the recipient's estate reported the theft, and the recipient's son paid the estate back. Nonetheless, the plaintiff adult foster home brought a civil claim against the estate seeking the difference between what it did charge the recipient and what it should have, based on the fact the difference was wrongfully obtained. *Larisa's Home Care*, 362 Or at 119.

Below, the Court of Appeals had granted the defendant summary judgment, noting that the plaintiff had failed to produce evidence satisfying the elements in *Jaqua*, with which construction lawyers are by now very familiar: "(1) a benefit conferred, (2) awareness by the recipient that she has received the benefit, and (3) it would be unjust to allow the recipient to retain the benefit without requiring her to pay for it." *Larisa's Home Care*, 362 Or at 121.

On review, however, the Supreme Court took a step back and looked at the whole development of the law of restitution, harkening back to the publication of the *Restatement of Restitution* in 1937. What it found was that the law of restitution for unjust enrichment is not as narrow as it had become under *Jaqua*'s "quasi-contractual" elements. For example, the Court noted that, "[the law] is not limited to those circumstances in which a defendant must give

back something that had previously belonged to the plaintiff[.]" *Larisa's Home Care*, 362 Or at 126. The Supreme Court concluded "that the Court of Appeals should not have applied the formulation of unjust enrichment used in *Jaqua*, including its set of factors for determining when enrichment is unjust." *Id*. at 129.

So where should a plaintiff look? "In lieu of applying the formula in *Jaqua*, Oregon courts should examine the established legal categories of unjust enrichment as reflected in Oregon case law and other authorities to determine whether any particular enrichment is unjust." *Larisa's Home Care*, 362 Or at 132. This includes the current edition of the *Restatement of Restitution*, cited frequently in the opinion.

In so advising, the Oregon Supreme Court has opened the doctrine to unjust enrichment to creative application and extension of the caselaw and consensus authorities. Of particular interest to construction practitioners, the Court did away with the concepts that it should be required that a plaintiff should have expected to receive a benefit, or that the defendant should have expected to pay it. The Court instead walked through the law of agency to demonstrate that principals are bound by actions of their agents resulting in unjust enrichment even if several steps removed from a "quasi-contractual" posture. Construction practitioners will be on the lookout in upcoming cases for who is an agent, what constitutes a benefit or other ill-gotten or -retained improvement, and to whom may it have to be repaid.

Larisa's Home Care will provide the basis for expanded claims in equity among all participants in the web of construction relations, and practitioners will be wise to monitor that development in the years to come.

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