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MESSAGE FROM THE CHAIR

William G. Fig
Sussman Shank LLP

The further we advance down the path of life, the more difficult it can become to place an exact date on prior activities or accomplishments. I now find myself referring to decades, "I recall that! That was in the late 90's, right?" However, I can say with certainty that I will remember 2020 as the year I served as Chair of the Construction Group. What a crazy and challenging year old 2020 has turned out to be!!


Bill

Yet, with challenges come opportunities and "firsts." This year, the social distancing restrictions associated with COVID 19 resulted in our first "virtual" yearly meeting as well as our first all "virtual" CLE. Indeed, the challenges posed by COVID 19 gave us the opportunity to offer the yearly CLE to a wider audience and at a lower cost. The success of the CLE is a shining example of how our executive board and our members have risen to meet the challenges of the "new normal." I am honored to call many of them not only colleagues, but friends as well.

Next year, there will be both ongoing and new challenges as well as new opportunities. The recent devastating forest fires was another doozy of a challenge dealt by 2020 that will play out well into 2021. However, the fires also present an

opportunity for the construction industry to be a key player in rebuilding Oregon communities. Many clients will look to us to counsel them regarding their involvement in this effort. Likewise, as COVID 19 continues, clients will continue to look to us for advice on how to safely and effectively operate. As a result, the construction bar needs to continue to learn and adapt so we too can rise to meet new challenges.

Part of that adaptation is the group's continued and concerted effort to become more diverse. In 2021, over 1/3 of the executive committee (including the officers) will be women. New perspectives offer the opportunity for new solutions to new and old challenges alike. While much work on this issue needs to be done, I believe we are headed in the right direction.

Contact Bill at wfig@sussmanshank.com or (503) 227-1111.

THE CONTRACTOR'S BURDEN OF PROOF FOR AN AFFIRMATIVE DEFENSE BASED ON THE *SPEARIN* DOCTRINE: A RECENT CASE PROVIDES CLARIFICATION

Curtis A. Welch
Sussman Shank LLP

As construction lawyers and many others in the construction industry are aware, the *Spearin* doctrine provides that a project owner impliedly warrants to the contractor that the plans and specifications are accurate and suitable. *See United States v. Spearin*, 248 US 132, 137 (1918); *see also General Const. Co. v. Oregon State Fish Com.*, 26 Or App 577, 581 (1976) (*citing Barbour & Son v. Highway Com.*, 248 Or 247 (1967)).

The *Spearin* doctrine is a bedrock principle in construction law. It is expressly followed in thirty-seven states, and eleven other states have acknowledged the implied warranty of plans and specifications. *See* Buckner Hinkle, Jr., Robert J. MacPherson, James F. Nagle, *Still Spearin After All These Years?*, 12 No. 1 Journal of the American College of Construction Lawyers, n. 97-99 (January 2018).

A. *Lakehill Investments* case

In September 2020, the Washington Court of Appeals, in *Lakehill Investments LLC v. Rushforth Construction Company, Inc.*, 472 P3d 337 (Wash Ct App 2020), provided important clarification for contractors relying on the *Spearin* doctrine as an affirmative defense.


Curt

In *Lakehill*, the Court held that in order for a contractor to prevail on an affirmative defense based on the owner's defective plans and specifications, the contractor is required to prove that *all* of the construction defect damages established by the owner are attributable to the owner's defective plans and specifications. The Court reversed the judgment for the contractor because the jury had been instructed that the contractor could avoid all liability for an area of work if there was proof of a defect in the plans and specifications for that area, even if the owner proved that the contractor's deficient performance caused some of the damage in that area. *Id.* at 344-45.

The *Lakehill* case involved claims arising out of the construction of a project known as Lake Hills Village, which included a public library, two mixed-use residential/retail buildings, three commercial buildings and townhouses. The owner, Lake Hills Investments, Inc. ("Lake Hills") contracted with general contractor Rushforth Construction Company dba AP Rushforth ("AP").

AP was the contractor for four separate phases of the project. AP contracted to begin construction on February 16, 2013 and to be completed by January 31, 2015. Each of the four phases had its own substantial completion date and Lake Hills

could assess liquidated damages for delay days past those substantial completion dates.

Each of the four phases was delayed. In November 2014, Lake Hills notified AP that it was in breach of the contract schedule. Lake Hills also began identifying work that it considered defective. AP blamed the delays on Lake Hills arbitrarily cutting its pay applications, which made it difficult for AP to hire and retain subcontractors. Further, AP blamed construction defects on Lake Hills providing "a sketch" or "a concept", rather than buildable designs. *Id*. at 342.

Relations between Lake Hills and AP deteriorated and in late October 2015, Lake Hills filed suit against AP for breach of contract. AP stopped work a few weeks later and filed its own breach of contact claim, alleging underpayment.

The case proceeded to trial, which lasted almost two months. Two dozen witnesses testified before the jury. One witness, the owner's representative overseeing the project, testified for six-and-a-half days.

The Court noted the vast amount of pretrial discovery in the case—the parties produced more than 1,000,000 documents and took 59 depositions. The parties also participated in six days of mediation.

Using a special verdict form, the jury returned a mixed verdict, finding that construction defects by AP breached the contract, and awarded damages in six of the eight areas of claimed defects. The jury also found that each phase of the project was completed past its substantial completion date, but that Lake Hills was responsible for the vast majority of delay days. Additionally, the jury found that AP did not breach the contract by stopping work and that Lake Hills breached the contract by underpaying AP. The trial court awarded a net judgment to AP of $9,624,695.80, including attorney fees and costs. *Id.* at 343. Lake Hills appealed from the judgment and AP cross appealed.

The jury instruction at issue--Jury Instruction 9--stated:

> For its affirmative defense, AP has the burden to prove that Lake Hills provided the plans and specifications for an area of work at issue, that AP followed those plans and specifications, and that the [construction] defect resulted from defects in the plans and specifications.

Id. at 344. Lake Hills argued that the trial court erred by not stating AP's burden was to prove that the "construction defect results solely from the defective or insufficient plans or specifications." *Id*. (emphasis in original).

The Court held that the instruction misstated the law and it was reversible error to give that instruction to the jury. *Id*. The Court reasoned that under the instruction, proof of any defect in the plans and specifications for an area of work would let AP avoid all liability for that area even if Lake Hills proved AP's deficient performance caused some of the damage. *Id*. The Court held that the instruction incorrectly understated AP's burden of proof. *Id*.

In so holding, the Court stated:

> A defective plans affirmative defense can relieve a breaching general contractor of its liability in proving an alternate proximate cause. AP's affirmative defense theory was that a single cause, defective plans or specifications, injured Lake Hills. To be relieved of liability for its breaches, AP had to prove Lake Hills' defective designs "solely" caused the plaintiff's damages. This standard, expressly articulated in *Kenney*, is also acknowledged by commentators on construction law.

Id. at 346.

B. Discussion

The *Lakehill* court decided a narrow issue, albeit an important one. Contractors asserting an affirmative defense based on defective plans and specifications will need not only to present sufficient evidence and argument to convince a jury that the defective plans and specifications were the sole cause of the owner's damages, but also the jury must be appropriately instructed regarding this burden.

In the *Lakehill* case, it was merely a matter of one word--inserting the word "solely" after the word "resulted" in the subject jury instruction--that would have cured the error.

It appears, based on the *Lakehill* court's discussion of the case, that the contractor did present evidence for the jury to conclude that the defective plans and specifications were the sole cause of the owner's damages. For example, in relation to the owner's claim of excessive cracking in the concrete slab of the underground parking garage for the project, the contractor's expert testified that he saw no construction errors in the slab and that the plans and specifications caused the cracking by requiring the use of rebar as reinforcement throughout the slab. *Lakehill*, 472 P3d at 345.

The Court pointed out the well-settled principle that an owner's breach of the warranty that the plans are workable and sufficient could be the basis of a contractor's claim, a counterclaim, or an affirmative defense. In discussing the reason why the burden of proof is on a defendant contractor in relation to an affirmative defense, the Court noted that "[b]ecause the defendant asserting an affirmative defense presents an independent legal theory based on evidence extraneous to the plaintiff's case, it bears the burden of proof." *Id*. at 344.

The Court relied on four Washington appellate court cases in reaching its decision, but also made it clear that its decision was not unique to Washington construction law. The Court referred to writings by commentators in the construction law field--the national publications of Michael T. Callahan, *et al.*, *Construction Disputes: Representing the Contractor* § 20.02 (4th ed. Supp. 2020) and William Schwartzkopf, *Calculating Construction Damages* § 1.07 (3d ed. Supp. 2020). *Id*. at 346 n 42.

The *Lakehill* opinion is one that is important to study next time a construction practitioner has a case involving a defense based on defective plans and specifications, particularly when the case is going to be tried before a jury.

Contact Curt at 503-227-1111 or cwelch@sussmanshank.com

OREGON CONSTRUCTION CASE LAW UPDATE

D. Gary Christensen, Stacey A. Martinson, Vanessa Triplett, and Ryan C. Hall
Miller Nash Graham & Dunn LLP

CONTRACT TERMS

CONSEQUENTIAL DAMAGES: The Controlled Substances Act precludes a federal court sitting in diversity from awarding damages for lost profits derived from the cultivation and sale of marijuana. *J. Lilly, LLC v. Clearspan Fabric Structures, Int., Inc.*, No. 3:18-cv-01104-HZ, 2020 WL 1855190 (D Or Apr 13, 2020).

Owner entered into an agreement with Manufacturer for the purchase, construction, and installation of a commercial greenhouse for Owner's recreational marijuana business. Owner alleged that significant defects became apparent almost immediately and brought suit for breach of contract and breach of warranty after attempts to have Manufacturer repair them were unsuccessful. Owner sought recovery of $5,400,000 in lost profits resulting from its inability to grow a cannabis crop.

The agreement consisted of two contracts—the Construction Agreement and the Equipment

Capital Lease Agreement. The Construction Agreement provided for the delivery and installation of the greenhouse and contained a mutual waiver of the consequential damages provision. Under the provision, Owner waived any claims against Manufacturer for consequential damages arising out of the Construction Agreement, specifically including claims related to the loss of use of the property.


Gary

Manufacturer moved for partial summary judgment on Owner's claim for lost profits. The court granted Manufacturer's motion because (1) the mutual waiver of consequential damages was enforceable, and (2) Owner's evidence was insufficient to establish its lost profits with reasonable certainty.

At oral argument on Manufacturer's motion, the court raised the issue of whether a federal court sitting in diversity can award Owner damages for the loss of profits derived from the cultivation and sale of marijuana. After the parties provided supplemental briefing on the issue, the court found that awarding Owner damages for lost profits would require the court to compel Manufacturer to violate the Controlled Substances Act. Thus, as an independent basis for granting Manufacturer's motion, the court was precluded from awarding Owner's lost profits.

ARBITRATION CLAUSE: The court is the proper forum when the determination of unconscionability concerns an arbitration provision. However, if there are any challenges to the validity of the contract as a whole, or the validity of unrelated terms, the challenges must go to the arbitrator. *Gist v. ZoAn Mgmt., Inc.*, 305 Or App 708, 716 (2020).

Plaintiff was a delivery driver who filed a class action against the operators of a delivery service business. The driver signed a Driver Services Agreement (the "Agreement") which included a broad arbitration provision that stated: "[A]ny dispute, claim or controversy that arises out of or relates to this Agreement, the interpretation or breach thereof, the existence, scope or validity of this Agreement, or relates to the enforcement thereof, shall be resolved by binding arbitration."

Defendants successfully moved to compel arbitration. On appeal, Plaintiff argued that the trial court erred in compelling arbitration because the arbitration clause was part of an unconscionable contract. The court disagreed and held that any challenges to the contract, as a whole, must go to the arbitrator, but that the court could review whether the arbitration clause itself was unconscionable.

The court then summarized the case law in determining whether a clause is unconscionable, and held that such a determination is a question of law with the burden on the party asserting unconscionability. The test for unconscionability has both procedural and substantive components. "The 'procedural' unconscionability refers to the conditions of contract formation, and substantive unconscionability refers to the terms of the contract*." Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 614 (2007) (emphasis in original). In this case, the court ultimately held that the arbitration provision, based on the facts and circumstances, was not unconscionable.

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REGULATORY INTERPRETATION

PERSONAL LIABILITY: In a lawsuit against Roofing Company and Roofing Company's president for hiring Unlicensed Subcontractor in violation of the Oregon Contractor Registration Act, Company's president may not be personally liable where his actions were taken on behalf of the Company. *Gutierrez Negrete v. Commercial Roofing Sols. Inc.*, 3:18-CV-1999-SI, 2020 WL 1249887 (D Or Mar 16, 2020).

Roofing Company hired Unlicensed Subcontractor to perform labor at an apartment complex near Portland, Oregon. Unlicensed Subcontractor then hired Plaintiffs, a group of construction workers, to perform the work. When Plaintiffs did not get paid, they filed suit against Unlicensed Subcontractor, Roofing Company, and Roofing Company's president, Kenneth Burns. Among their claims, Plaintiffs alleged that Roofing Company and Mr. Burns had violated the Oregon's Contractor Registration Act ("OCRA") by using the services of an unlicensed labor contractor. Plaintiffs sought to hold Mr. Burns personally liable for the violation.

The OCRA provides, "any person who uses the services of a labor contractor who has failed to comply with any of the provisions of [the licensing] section * * * shall be personally and jointly and severally liable to any employee as far as the employee has not been paid wages in full for the work done for that person [and shall] be personally liable for all penalty wages due." ORS 658.415(8). A "person" may be an individual or a business entity. OAR 839-015-0004(23).

In interpreting the regulation, the parties disagreed about whether the use of the word "or" prevented liability from being imposed on *both* Mr. Burns as an individual *and* his Roofing Company. Viewing the question as a matter of first impression, the court found that Mr. Burns was not personally liable for his company's failure to inspect the labor contractor's license. In making that determination, the court explained that while OCRA is designed to protect workers, it should not be interpreted so broadly that it would impose personal liability for corporate officers acting on behalf of a corporation.

CIVIL PROCEDURE

CHOICE OF LAW: Oregon law, rather than Washington law, applied to Oregon Insured's contractual and non-contractual claims, despite Insured's executives and insurance broker being based in Washington. *Great American Alliance Insurance Co. v. SIR Columbia Knoll Associates Limited Partnership*, 416 F Supp 3d 1098 (D Or Sept 2019).

Insured, an Oregon limited partnership, owned adjacent apartment buildings in northeast Portland. Through its Washington-based broker, Insured obtained property insurance policies from its two Insurers, Great American and Philadelphia. After the alleged faulty workmanship of Insured's general contractor and subcontractors allowed water intrusion that caused extensive damage to Insured's buildings, Insured tendered claims under its separate policies with Insurers. Both Insurers denied Insured's claims.


Vanessa

Thereafter, Great American filed a complaint seeking declaratory relief under its policy with Insured. Insured asserted counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Washington Consumer Protection Act. Insured also filed a third-party complaint against Philadelphia asserting identical claims. The parties filed cross-motions for summary judgment as to whether Oregon or Washington law applied.

Applying the choice of law principles applicable to federal courts sitting in diversity, the court applied Oregon's choice of law rules to determine the controlling substantive law. Moreover, to determine whether the laws of the different states actually conflict, the court considered whether there is a material difference between Oregon and Washington law regarding the parties' claims. The court then separately addressed the choice of law issue for the parties' contractual and non-contractual claims.

On the parties' breach of contract claims, the court was unpersuaded by Insured's argument that Oregon law, unlike Washington law, prohibited the court from considering extrinsic evidence to interpret ambiguous insurance policy provisions. The court similarly dismissed Insured's arguments that (1) Washington has "more" law than Oregon on claims for breach of commercial property insurance policies, and (2) Washington courts have addressed issues that Oregon courts have yet to consider. Without a showing that the laws of Oregon and Washington were materially different, the court concluded that Oregon law applied to the parties' contractual claims.


Stacey

The court went further to hold that, even if a material difference between Oregon and Washington law existed, Oregon law would nonetheless apply. The court based this conclusion on an analysis of the factors listed in Oregon's choice of law statute applicable to contracts, ORS 15.360.

Turning to the non-contractual claims, the parties conceded that a material difference between Oregon and Washington law existed, and the court applied Oregon's statute governing choice of law for non-contractual claims, ORS 15.440. Finding that the factors favored the application of Oregon law, the court dismissed Insured's non-contractual claims, as they were not actionable under Oregon law.

ECONOMIC LOSS RULE: Buyer's claim that Contractor was negligent in replacing wet drywall without first identifying and repairing the source of a water leak is not barred by the economic loss doctrine because Buyer claimed property damage, not just financial loss. *Lansing v. John Does 1-5*, 300 Or App 803 (2019).

Contractor was hired by credit union to repair and replace water-damaged drywall in a foreclosed home. After Contractor completed the work, credit union sold the home to Buyer. During the pre-purchase inspection, Buyer inspected the new drywall and believed that any leaks in the home would have been fixed before the installation of new drywall. However, after moving into the home, Buyer discovered water damage to the ceiling and newly installed drywall.

Buyer sued Contractor for negligence, arguing that Contractor violated its duty of care to inspect and then repair the source of the water leak. Relying on the economic loss doctrine, the trial court dismissed Buyer's negligence claim for failure to state a claim. Under Oregon's "economic loss doctrine," a party that suffers purely economic damages may not bring a negligence action against the party that caused the loss absent a "special relationship" between the parties that gives rise to a duty of care. The court determined that because Buyer had no "special relationship" with Contractor that Buyer's negligence claim must fail.

The Oregon Court of Appeals reversed and remanded. The court ruled that the economic loss doctrine did not apply because the water damage to the new drywall constituted *property damage,* which was not a purely economic loss. Under the economic loss doctrine, "economic losses" means "financial losses," as distinguished from

"damages for injury to person or property." The appellate court held that "when a plaintiff alleges that a contractor's negligence resulted in physical damage to building components, including water damage, the plaintiff is alleging property damage, not a purely economic loss."
The *Lansing* decision began in the trial court as an economic loss rule issue, but was re-examined by the Court of Appeals as asking an entirely different question: whether a contractor has a duty under negligence law to prevent an owner from suffering foreseeable property damage. On remand, the court stated that Buyer must prove that Contractor's duty of care included an obligation to ascertain the source of the water leak and repair it before replacing the drywall.

INSURANCE

AMBIGUOUS POLICY LANGUAGE: When hidden property damage is discovered years after it arose, the insurance policy requirement that the claim be brought within two years after the date the damage occurred will not bar claim where the term "occurred" is ambiguous. *Housing Northwest Incorporated v. American Insurance Company*, 3:19-CV-00253-SB, 2019 WL 7040922 (D Or Dec 20, 2019).[1]

In 2017, Owner of a student housing property in Portland, Oregon hired a building envelope assessor to inspect the building. The assessor's report revealed hidden water damage that "likely happened very early on in the service life of the structure (in or around 1997) and continued until the discovery of hidden damage." Thereafter, Owner tendered insurance claims to two of its Insurers, who had issued policies covering the property from July 1, 2012 – July 1, 2018 and July 1, 2011 – July 1, 2012, respectively.

Both Insurers denied the claim, citing the "Legal Action Against Us" clause in the policies which required that *"[t]he action be brought within 2 years after the date on which the direct physical loss or damage occurred."* Insurers moved for summary judgment, asserting that Owner's claim was untimely because it was not brought within two years after the date the damage had begun—i.e., 1997. Owner responded that the two-year limitation provision was not triggered until the date the damage was discovered: i.e., 2017. The crux of the parties' dispute hinged on how the meaning of the word "occurred" was interpreted.


Ryan

The Court found in favor of Owner, and held that the claim was timely. In reaching its decision, the court applied the *Hoffman Construction* analysis, and concluded that the term "occurred" was ambiguous, that both parties' interpretations were plausible, and that under those circumstances the court must construe the policy in favor of the insured.

In its conclusion, the court made several key points on why the Insurers had lost. First, because any insurance provider in Oregon should know that progressive water damage is commonplace and should have clearer policy language to govern coverage for that damage. Second, insurance companies have litigated this exact policy language for years and the Insurers were on notice that their policy language was ambiguous, but chose not to update their policy language.

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[1] *Silver Ridge Homeowners' Ass'n, Inc. v. State Farm Fire & Cas. Co.*, 3:19-CV-01218-YY, 2020 WL 5893317 (D Or Oct 5, 2020) adopted the reasoning of *Housing Northwest Incorporated*. That case is summarized in detail in Stacey A. Martinson's article published with the Oregon State Bar titled, Suit-Limitation Clauses Held Ambiguous When Insurance Carriers Deviated from the Statutory Language.

STATUTE OF LIMITATIONS: In an action between Insured and its Insurers, the Court adopted reasoning from *Housing Northwest Inc.*, *supra*, to incorporate a "discovery rule" where the insurance policy required that claims be brought within two years after the date the damage "occurred." The Court also analyzed the definition of "collapse" in the context of expert testimony. *Great American Alliance Insurance Co. v. SIR Columbia Knoll Associates Limited Partnership*, No. 3:18-CV-00908-HZ, 2020 WL 5351035 (D Or Sept 4, 2020).

The background facts of this dispute are discussed in detail above and, for purposes of brevity, are not reproduced here. Subsequent to the opinion rendered on September 6, 2019, the Court considered Insurers' joint motion to exclude the testimony of Insured's engineering expert, as well as Insurers' respective motions for summary judgment. The pertinent aspects of the Court's opinion are addressed below.

Under their respective policies with Insured, Insurers Great American and Philadelphia provided coverage for direct physical loss or damage caused by the abrupt "collapse" of all or part of Insured's buildings. Insured's engineering expert opined that, based on evidence of damage to structural components of Insured's buildings, a policy-covered "collapse" had occurred. Insurers filed a motion to exclude the expert's testimony by arguing, in part, that he relied on an incorrect definition of "collapse," rendering his opinion irrelevant.

In his report, the expert defined a "structural collapse" as occurring "when a building's (or a building portion's) structural support system has, due to a loss of strength, or through excessive deflection or deformation, reached a state of structural instability and ceased to provide its intended structural support purpose." In contrast, the Insured's policies defined "collapse" as "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose."

To determine whether the expert based his opinion on the correct definition of "collapse," the Court relied on *Malbco Holdings, LLC v. AMCO Ins. Co.*, 629 F Supp 2d 1185, 1188 (D Or 2009). In *Malbco*, the court interpreted policy language identical to Insured's policy language and held that "the occupancy restriction stands as a proxy for a substantial impairment of integrity by adding a life and/or safety element to the definition."

The Court also invoked *Hennessy v. Mutual of Enumclaw Ins. Co.*, 228 Or App 186 (2009), in which the Oregon Court of Appeals interpreted the undefined term "collapse" to necessarily include a situation in which "an object, acting under the force of gravity, descends or drops" and requires "only that an object fall some distance."

Tying together the definitions in *Malbco* and *Hennessy*, the Court held that "a collapse occurs when parts of a building abruptly fall or cave in to any degree such that they cannot be occupied for their intended purposes." Thus, the Court excluded the expert's opinion to the extent that it relied on his inconsistent definition of "collapse."

Turning to the Insurers' respective motions for summary judgment, the Court analyzed Great American's argument that Insured's claims fell outside of the two-year limitations provision established under its policy.

Oregon law requires that all fire insurance policies contain statutory language that "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 24 months next after inception of the loss." ORS 742.240. Oregon courts have held that this statutory language does not provide for a "discovery rule," and actions must be brought within two years of the date that the damage actually occurred.

However, Insured's policy with Great American deviated from this statutory language, instead providing that legal action must be "*brought within 2 years after the date on which the direct physical loss or damage occurred*." Insured argued that the policy language invoked the discovery rule, under which the two-year limitations period would not be triggered until the Insured discovered the loss.

To determine whether Great American's policy language invoked the discovery rule, the Court looked to *Housing Northwest Inc.*, *supra*, in which the court found identical policy language to be ambiguous and construed it in favor of the insured. Adopting the reasoning from *Housing Northwest Inc.*, the Court held that, as a result of a meaningful difference between the statutory language and Great American's policy language, the two-year limitation provision was ambiguous, and, construing it in favor of Insured, was not triggered until Insured discovered the hidden water damage.

REAL PROPERTY

EASEMENTS: In a quiet title action concerning neighbors' dispute over existence of easement, land parcel partition made in accordance with ORS 92.075 does not provide exclusive means of creating easement. Implied easements may be established despite the lack of declaration in a partition plat. *Dayton v. Jordan*, 302 Or App 256 (2020), *rev den,* 366 Or 492 (2020).

Plaintiffs and Defendants owned adjacent properties on the Oregon coast that were once part of a larger common parcel. Before the common parcel was divided and sold, the original owner acquired an easement to a road that ensured access to the common parcel from Highway 101. After the common parcel was divided, Defendants' only *direct* access to their property was over the disputed road that crossed Plaintiffs' parcel.

Plaintiffs brought a quiet title action against Defendants to prohibit their use of the shared road. Specifically, Plaintiffs asserted that Defendants had no easement rights over the disputed road. Plaintiffs relied on ORS 92.075, which states that in order to partition a property, the owner must make a declaration that includes a statement about whether any public or private easement is created. Because the declaration governing Defendants' property did not reference any easement right to the disputed road, Plaintiffs argued that Defendants had no easement and none could be implied.

The trial court and Oregon Court of Appeals rejected Plaintiffs' argument. The court explained that just because ORS 92.075 sets forth the legal requirements for partitioning property, the statute does not foreclose the existence of an implied easement. The appellate court affirmed the trial court ruling that Defendants possessed an implied easement, and concluded that ORS 92.075 is not the exclusive means of creating an easement.

LAND USE PLANNING

JUDICIAL REVIEW OF LAND USE BOARD OF APPEALS (LUBA) DECISIONS: The Court of Appeals affirmed LUBA's decision to remand the City of Portland's Ordinance 189000, as the decision was not unlawful in substance or procedure. *Restore Oregon v. City of Portland*, 301 Or App 769 (2020).

As part of the City of Portland's Central City 2035 Plan, the City adopted Ordinance 189000, which established new building height limits within the City's New Chinatown/Japantown Historic District, and Ordinance 189002, which established new building height limits on the east side of the Willamette River between the Tilikum Crossing Bridge and the Ross Island Bridge (commonly referred to as the Southern Triangle).

After the ordinances were adopted, Restore Oregon appealed the City's decision to LUBA. At LUBA, Restore Oregon argued that the City

failed to make certain factual findings required by the Portland Comprehensive Plan (PCP) and further failed to comply with the PCP's citizen-involvement program goals. Owners of property within the Southern Triangle also challenged the City's decision, arguing that the City's economic, social, environmental, and energy (ESEE) analysis failed to comply with statewide planning goals.

Conversely, Guardian Real Estate Services, LLC, which owned property within the New Chinatown/Japantown Historic District, intervened in support of Ordinance 189000.

LUBA affirmed the City's decisions, with one noteworthy exception: it remanded Ordinance 189000 for the City to adopt findings that explained how the new height limits complied with the PCP. Specifically, LUBA held that the City's findings did not adequately explain how the maximum heights adopted in Ordinance 189000 complied with the PCP's goal of encouraging development "within the established urban fabric" of the district while "preserving and complementing historic resources."

Each of the parties appealed LUBA's order. Restore Oregon contended that LUBA erred in rejecting its argument that the City failed to comply with the PCP's citizen-involvement goals, whereas the Southern Triangle property owners argued that LUBA erred in approving the City's ESEE analysis. Guardian argued that LUBA erred in remanding Ordinance 189000 because it failed to give appropriate deference to the City's interpretation of the PCP.

Applying ORS 197.850(9)(1), the Court of Appeals reviewed LUBA's decision to determine if it was "unlawful in substance or procedure." The court held that LUBA neither failed to defer to the City's interpretation of the PCP nor misapplied the substantial evidence standard in reviewing the City's decision. Finding the parties' assignments of error unpersuasive, the Court of Appeals affirmed.

Contact Gary at
gary.christensen@millernash.com or
(503) 205-2435.

Contact Vanessa at
vanessa.triplett@millernash.com or
(503) 205-2328

Contact Stacey at
stacey.martinson@millernash.com or
(503) 224-5858

Contact Ryan at
ryan.hall@millernash.com or
(503) 224-5858

LAST MINUTE CONSTRUCTION LIENS

Doug Gallagher
Douglas Gallagher Law Office PC

Have you ever received a call from a client who needed to record a lien, only to find out the potential lien expiration date was only days (or hours) away? The purpose of this article is to identify some issues and strategies for those liens that need to be prepared and rushed off to the County recorder's office in haste.[2]

[2] This article does not include a complete explanation of *all* the steps necessary to properly perfect and maintain a valid construction lien (particularly those for employee benefit plans, architects, landscape architects, land surveyors or registered engineers). For more comprehensive materials, consult with *Chapter 16, Construction Liens, Construction Law in Oregon (2019 edition)* published by the Oregon State Bar and the materials and checklists published by the Professional Liability Fund ("PLF"), including *Construction Law, Chapter 17 of Oregon Statutory Time Limitations (OSB PLF & Legal Pubs 2018)*, *Appendix B – Summary of Steps Necessary to Perfect a Construction Lien in Oregon (Rev. 12/19)* and the *Oregon Construction Lien Checklist (Rev. 12/19)*.

Understanding the 75 Day Deadline to Record a Lien.

ORS 87.035(1) identifies two events, ***the earlier of which,*** triggers the 75-calendar day count down to the deadline to perfect a construction lien – "*the person has ceased to provide labor, rent equipment or furnish materials*" **OR** "*completion of construction*."[3]
"*Ceased to provide*" is defined by a significant body of case law. A general rule of thumb is "ceased to provide" means a last significant or "non-trifling" day of work, excluding warranty work or repairs of the claimant's work. *See e.g. Brown v. Farrell*, 258 Or 348, 352 (1971) (repairing washer and attending to minor matters did not extend time for recording a lien). Arguably minor work, however, may be deemed sufficient if the work is important to the completion of the project as a whole. *See e.g. Pro Excavating, Inc. v. Ziebart*, 148 Or App 436 (1997) (until performed, approximately $2,500 of work held up county approval of subdivision).
"*Completion of construction of an improvement*" is defined by ORS 87.045.[4] Claimants who provide labor, rent equipment or furnish materials, generally speaking, should focus upon the earlier of two[5] events.

First, "completion of construction," which means "*the improvement is substantially complete*" under ORS 87.045(1)(a) –may be an extremely fact-specific inquiry. An incomplete improvement – insofar as there are other contractors whose work is not substantially completed - does not qualify. *See e.g. Hood Constr. Co. v. Pac. Coast Constr., Inc.*, 201 Or App 568, 585 (2005) *modified on recons* 203 Or App 768, *rev den* 341 Or 366 (2006) (subcontractor excavator for cancelled restaurant project); *Emmert Indus. Corp. v. Sanders*, 131 Or App 113 (1995) (rental of steel girders for foundation repair never completed).

There is a closer, more fact-specific call to make when evaluating the last contractors' performance on an apparently completed improvement. *See e.g. Mercer Steel Co. v. Park Const. Co.*, 242 Or. 596 (1966) (construction not substantially completed before electrician hard-wired furnace and appliances previously operated by electrical cord); *Consolidated Elec. Distributors, Inc. v. Jepson Elec. Contracting, Inc.*, 272 Or 384 (1975) (suppliers supplying a project with non-standard electrical fixtures after the owner commenced occupancy did not defeat the suppliers' lien rights despite apparent substantial completion); and

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[3] For trustees of employee benefit plans, architects, landscape architects, land surveyors or registered engineers, the "completion of construction" is the sole event that triggers the commencement of the seventy-five (75) day deadline. See ORS 87.035(1)(referring to "every other person" claiming a lien under ORS 87.010, i.e. subsections (3-5)).

[4] Note the added word "improvement" to the statute may cause some confusion for some contractors, such excavators, who ostensibly construct no "improvement" but rather just push dirt or dig holes. A lien may be recorded for "preparation" of land or "improvement" of a street or road adjoining a lot or parcel under ORS 87.010(2)). However, that an "improvement" is defined broadly to include some dirt work, such as a "ditch, flume [water channel], reservoir, well, tunnel, fence, street, sidewalk, machinery, aqueduct or other structure or superstructure." *See also Abajian v. Hill*, 42 Or App 695, 700 (1979) (lien sustained for hauling away debris drop boxes under ORS 87.010(2) (preparation of land for construction) where a log dump was considered an "other structure" under the definition of an "improvement").

[5] A third "event" – the statutory definition of "abandonment" also marks "completion of construction." See ORS 87.045(5-7). Abandonment is probably only relevant for the employee benefit plans, architects, landscape architects, land surveyors or registered engineers. Abandonment occurs on either the proper posting and recording of a notice of abandonment or "on the 75th day after work on the construction of the improvement ceases." ORS 87.045(5).

Farrell v. Lacey/Basic Builders, Inc., 264 Or 505, 511–512, (1973) (Lien that would have been untimely if lien right accrued from substantial completion of the improvement. Lien deemed timely as homebuilder and owner entered a new work order to install sump pumps, which was not contemplated in the parties' original cost-plus agreement to build the home, when new home flooded shortly after owners moved into home).

Second, and less common, is the completion date established by a completion notice posted "in some conspicuous place" at the site and recorded within five days of posting by a person authorized per ORS 87.045(1)(b). A lien claimant may challenge a prematurely posted and recorded notice of completion. *See e.g. Dallas Lumber & Supply v. Phillips*, 249 Or 58, 60 (1968) (the "notice of completion permitted by ORS 87.045 is neither the exclusive nor conclusive test for deciding when completion of a structure has occurred").

Rooting Out Lien Deadlines During Initial Client Interview.

Obtaining as good of an understanding of the project – from the perspective of both the lien claimant and the owner – is critical to identifying situations where there is a risk an owner or other party may argue a lien was not timely recorded. Questions should fall into three basic categories:

1. *What is the last day of substantial, non-warranty work the lien claimant performed and can prove with records?* Are timecards kept? How can you prove the materials picked up at the supplier's will-call window were actually delivered to the site? Was the rental equipment called off-rent before it was picked up? If you did not perform that last work or supply the last materials, how seriously would your non-performance impact the owner or other contractors?

2. *What day could a hypothetical owner start using the improvement for its intended purpose?* Has temporary occupancy been granted? Is a "soft-opening" scheduled? Has the owner in fact assumed partial occupancy of the improvement? If the improvement is a retail shell, when is the shell available for the tenant improvement contractor to start? These questions can be important if the potential lien claimant is the general contractor or a trade that could potentially perform less essential work after the owner assumes occupancy, such as a paver (finishing the parking lot) or an alarm installation company.

3. *Did the lien claimant see any notices posted (whether completion or abandonment) and take a photo to show the date of posting?* Should the lien claimant go back and check as the only other way to discover such a notice is through a title report (at which point it may be too late)?

We Have a Potential Last-Minute Lien Situation – Now What?

Once the deadline has expired for recording a lien, the lien cannot be cured by a subsequent re-recording or amendment. *See Christman v. Salway*, 103 Or 666, 693–94 (1922). Accordingly, the decision to weigh speed vs. quality of information should not be taken lightly. If a lien must be recorded right away – discuss with the client (and confirm with the client in writing as soon as the circumstances permit) the potential prejudice caused by waiting until the last minute. Such risks include invalidity of the lien (meaning potentially paying litigation opponent's attorney fees as the non-prevailing party), loss of priority against a construction lender or other lien claimants and potential loss of the right to recovery attorney fees in litigation.

Review Pre-Lien Requirements, if Any.

Review the two potentially applicable pre-lien notice requirements (ORS 87.093 Information Notice to Owner and ORS 87.021 Notice of Right to a Lien) if no onsite labor is performed or the project concerns a "residential building" or "residential construction or improvement." Also check whether any other residential project restrictions or prohibitions apply. *See* ORS 87.021(1)(no lien for certain professional services provided to owner's agent for an owner-occupied residence); ORS 87.035 (certain subcontractor-supplier liens on owner-occupied residences); ORS 87.036 (ORS 701.305 requires a written contract). *See PLF Checklist Appendix B – Summary of Steps Necessary to Perfect a Construction Lien in Oregon* for a table summarizing various pre-claim notice requirements.

Get Good Title Information to Identify *All* the Owners and Mortgagees.[6]

Identifying the owner(s) or reputed owner(s) is a critical element of the lien. Getting the owners wrong could be fatal. *See e.g. HGC Limited v. Cascade Pension Trust*, 174 Or App 464 (2001) (lien foreclosure judgment failed to adjudicate correct owner due to error in original property deeds). Moreover, failing to name *all* the owners may result in a missed opportunity for a more effective lien. For example, ORS 87.005(8) defines "owner" to include lessees. If the lessee is whom contracted for the improvement, the lessee should be named as an owner (even if the interest is not recorded). Moreover, there may be circumstances in which the lessor's interest may also be subject to a lien if the lessor has knowledge of the improvement and fails to properly post a notice of non-responsibility. See ORS 87.030.

Generally, a lien claimant should strongly consider paying for a title report (often a litigation guaranty) for the lawyer to use to prepare a lien and required post-lien notices[7], both for reliable title information and potential insurance coverage depending on the title product purchased. The time-savings in lawyer time researching alternative sources can significantly offset the cost of the title report. Also, naming the wrong owner is likely to be readily discovered, whereas an argument about timeliness of the lien may be less obvious and subject to a good faith factual (and legal) dispute. Obtaining a title report, however, may take several business days.

If circumstances require moving ahead with the lien before receiving a title report, or the client declines (both events should be confirmed with the client in writing), many title companies will provide courtesy information, including the last deed and perhaps trust deed information. Many counties, including Multnomah, Lane and Deschutes also offer subscription or free online databases that may be useful to identify some owners and mortgagees. At least one title company provides access to a searchable database to customers (pre-approval is required). Most counties post county tax assessor owner and tax lot information online. These databases, however, may not be an adequate substitute for a formal title search and report from a title company, particularly if the property record contains defects or is particularly complex. Often "courtesy" or low-cost services can be incomplete or require an inordinate amount of time to parse through. Accordingly, a letter to the client explaining the potential impact of the client's decision (either to

[6] See ORS 87.005(6) and(8) for definitions of "mortgagee" and "owner."

[7] Once the lien is recorded, the lien claimant must deliver, by certified or registered mail or hand delivery, post-lien recording notices to owners and mortgagees to preserve the right to recover attorney fees in a lien foreclosure suit. See ORS 87.039 notice of recording the lien (with a copy of the lien) within 20 days of recording and ORS 87.057 notice of intent to foreclose more than 10 days of filing suit to foreclose). *See* ORS 87.018 (delivery of notices).

forego paying for title info or coming to their lawyer too late to obtain a formal title report) may prove valuable if the lien has defects associated with poor information.

Properly Identify Legal Names of Owners, Lien Claimant, and Person by Whom Claimant Was Employed.

All names should be checked against the title documents and contract documents. For any contractor or business entity, check the online registration and license records of the Oregon Secretary of State and Oregon Construction Contractor's Board (or other applicable state agency).

Address and Legal Description.

Although technically case law provides construction liens are exempt from the requirement of containing a legal description, *see Bell Hardware v. Ed Szoyka Woodworking Co.*, 129 Or App 332 (1994), a formal legal description should always be used, not solely an address or tax lot number as perhaps allowed by ORS 87.035(2), if for no other reason the county clerk will likely reject the filing notwithstanding the citation to case law. A last deed may provide a legal description; however, it may be more accurate to use the legal description from the owner's most current trust deed lender (or at least compare the two). Moreover, someone with actual knowledge of the site should verify the specific parcel to be subjected to the lien – mark an "X" on the map. A number of resources are available to identify tax lots, which in turn a title company can use to obtain the relevant last deed containing a legal description. Also, online building permit records contain project tax lot information.

Segregation of the Indebtedness Claimed.

Many times, a lien claimant may not know why its claim is not getting paid or what arguments will be made in litigation about why some or all of the debt is not owed. If, however, the lien claimant's lien seeks recovery of a greater sum than is awarded in litigation, the opponent may argue the lien is invalid because the lien did not state the "true statement of demand" required by ORS 87.035(2).

A hedge against such an argument is to segregate out the charges making up the total amount claimed in the lien. For an example of the rule of segregation, see *A-C Construction, Inc. v. Bakke Corp.,* 153 Or App 41, 47–49 (1998) (improper charges that were segregated on the face of the lien in a manner that permitted owner to question and dispute charges did not invalidate lien). A simple solution is to attach a copy of the claimant's invoices or last payment application as an exhibit to the lien form. If the owner is known to dispute a particular change order or amount, a list of change orders that segregates out the charge for each change order claimed may prove invaluable later in litigation. In attaching exhibits, however, be *especially* observant of potential reasons the recording clerk may reject the filing. Invoices attached as an exhibit may not meet the County recording standards for document margins, font size, readability, etc.

Also, in some situations a lien may be valid, but there is a risk the lien may lose priority to a mortgagee given priority rules that treat "materials" differently than labor and equipment. *See* ORS 87.025(3), *Benj. Franklin S&L v. Hallmark*, 257 Or 436, 442 (1971) (failure to segregate labor and materials resulted in loss of priority of entire lien to mortgagee). The loss of priority of the entire lien to the mortgagee may, practically speaking, defeat the lien claimant's ability to get paid. Most construction lien forms provide the segregation of the true statement of demand claimed between labor, materials and equipment.

Verification and Mechanics of Recording.

Be sure the lien's form of verification (requiring execution under penalty of perjury before a notary) conforms to ORS 87.035(4) – it is not an acknowledgment as is the case with many other recorded documents. While an attorney can sign

the lien after a reasonable investigation of the facts as an "other person," *see e.g. Teeny v. Haertl Constructors, Inc.,* 111 Or App 543, 548, *rev'd in part,* 314 Or 688 (1992), it is not generally advisable as the attorney would presumably become a fact witness and subject to cross-examination about the nature and scope of the attorney's reasonable investigation. Some other potential lien recording issues to consider:

E-Recording. Lawyers can utilize e-recording services, which is a real convenience for same-day recording of documents in faraway counties during the particular county's hours of operation. One such service is Simplifile.com. The filer must certify possession of the original notarized signature.

Common reasons clerks may refuse to record documents. Check the county recording standards (typically posted on the County's website) for margin, font size and document requirements, including room for the recording "sticker." Confirm all pages comply, particularly any invoices or other documents attached as exhibits. A clerk may reject a document with an unreadable (smeared) notary stamp or a document that is not readable when printed, scanned or copied. If the client is going to record the lien, be sure to advise the client about avoiding these common errors and require the client to send a scanned copy to you for review for these issues before recording.

Hours of recording. Check ahead of time to confirm the hours the recorder's office is accepting documents; it may vary from county to county. During a past budgetary crisis, smaller counties furloughed employees closing the recorder's office hours early, sometimes for the day.

Post Lien Issues.

Once recorded, timely performance of post-lien notification requirements and calendaring important dates, including the foreclosure deadline and any applicable contractual pre-litigation requirements, are important not to forget. See the *Oregon Construction Lien Checklist* available on the Oregon PLF's website.

Final Note on Timeliness of Liens.

Oregon case law interpreting Oregon's Construction Lien law and its preceding statutes is robust. Careful research and analysis (taking care to account differences between the current statutes and the statutes interpreted by the case law) may reveal some novel applications of the lien law related to timeliness. For example, a particularly interesting recent case that addresses lien rights when there has been more than 75 day gap in days of performance (as can be typical with some trades like electricians and plumbers) is *Bethlehem Constr., Inc. v. Portland Gen. Elec. Co.,* 298 Or App 348 (2019) (lien rights essentially revived for work that had earlier expired through use of a change order to add additional work during construction of improvement).

Finally, consider the opposite situation of filing too late – a lien can be filed too early. For example, if the contractor has failed to substantially complete its performance without excuse, the lien filed before substantial completion may fail. *See Devlin v. Milwaukie Covenant Church*, 269 Or 596, 603-05 (1974), 276 Or 1207, 1210 (1976) (Owner's justified withholding of payments did not excuse claimant from substantially completing the contract, resulting the court denying foreclosure of the lien). Moreover, if the lien claimant does not hold a proper license and endorsement for the work performed, the issue *may* need to be addressed *prior to* recording the lien. *See* ORS 701.131(2)(a) (compare with (2)(b)).

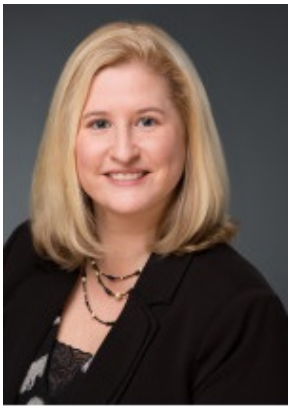
Contact Doug at doug@dglawoffice.com or (541) 357-4021

THE OREGON WORKPLACE FAIRNESS ACT IS NOW IN EFFECT – WHAT ARE THE IMPLICATIONS FOR CONTRACTORS?

Tara Johnson, Alliant Systems LLC and Sandra Fraser, Fraser Law

As construction lawyers, we aren't regularly focused on the employment law aspect of the practice. However, one recent piece of legislation merits our attention for the benefit of our full-service construction clients as it requires employers to implement expanded anti-discrimination policies by October 1, 2020.

In 2019, the Oregon Legislature enacted the Oregon Workplace Fairness Act (OWFA) via Senate Bill 726. The OWFA modified ORS Chapter 659A and made significant changes to the state's law governing sexual assault, discrimination, and harassment claims related to race, color, religion, gender, sexual orientation, national origin, marital status, or age (ORS 659A.030); disability (ORS 659A.112); and military service (ORS 659A.082). The OWFA applies to all businesses with at least one employee in Oregon. Although some of OWFA's provisions took effect in September 2019, most of the provisions requiring employer action became effective as of October 1, 2020. The following are the key changes and takeaways:



Tara

1. **Written Anti-Discrimination Policy Required**

ORS 659A.375 requires every employer to adopt written anti-discrimination policies no later than October 1, 2020, which at a *minimum* must include the following provisions:

- A description of the process to report suspected discrimination, sexual assault, or harassment ("prohibited conduct");
- Identification by the employer of an individual, and an alternate, to whom reports of prohibited conduct can be made;
- Notice that employees have five years to bring administrative or civil claims based on an alleged incident of prohibited conduct occurring on or after September 29, 2019;
- A statement that an employer may not require or coerce an employee to enter into a nondisclosure or nondisparagement agreement, but that an *employee* may request such provisions in an agreement and has at least seven (7) days to revoke the agreement; and
- Advice to employees and employers to document any alleged incidents involving prohibited conduct.

The anti-discrimination policy *must* be: (1) provided to all new hires, (2) made available at the workplace, and (3) given to anyone who reports suspected discrimination or harassment.

Most employers already had a policy in place, and this was always best practice, but now it is a requirement. To assist with policy adoption, including all of the statutory requirements, the Oregon Bureau of Labor and Industries (BOLI) offers a template policy on its website at: https://www.oregon.gov/boli/workers/Pages/sexual-harassment.aspx

Numerous employers are using this as time to globally update their handbooks and bring all of their policies current. For example, public bidding contractors will need to make sure that their discrimination and harassment policies are also aligned with the provisions of ORS 279A.112 (anti-discrimination policies required to bid on public contracts). Once updated, the policies can be distributed by various methods, including email, physical or electronic posting, website link included in check stubs, and jobsite meetings.

In addition to updating policies and handbooks, several employers are also taking this opportunity to refresh their training efforts on these issues. Such training includes complaint/grievance investigation workshops for: (1) those persons designated to receive such reports as described in ORS 659A.375(2)(b) (generally human resources administrators) and (2) managers or supervisors. Given the penalties, damages, and attorney fees that an employer may face if found to be at fault, it is critical that an employer handles any allegations of prohibited conduct promptly and with the proper mindset.

2. Broad Prohibition on Confidentiality, Nondisparagement, and No-Rehire Provisions

Pursuant to ORS 659A.370, employers may not enter into employment, separation, severance, settlement, or confidentiality and nondisclosure agreements that:

- Contain nondisclosure/nondisparagement provisions preventing the employee from discussing conduct that constitutes prohibited conduct and which occurred in the workplace, off employment premises at a work-related event, or between an employer and employee off the employment premises;
- Prevent disclosure of factual information relating to a discrimination or sexual assault claim; or
- Contain a no-rehire provision that prohibits the employee from seeking re-employment with the employer as a term or condition of the agreement;

unless the employee claiming to be aggrieved requests the same. Even if the employee requests such provision(s), the agreement must also provide that the employee has at least seven (7) days after execution to revoke the agreement. By law, the agreement may not then become effective until after the revocation period has expired. Unfortunately, OWFA provides no guidance on what an employee's "request" must look like, nor does BOLI's website provide additional resources or insight into this issue.

The limitations in ORS 659A.370 do have some boundaries however; they do not apply to nondisclosure provisions relating to matters other than the discriminatory conduct. For example, employers are not prohibited from requiring employees to keep the amount of a severance or settlement payment confidential. Additionally, OWFA provides an exemption to the nondisclosure prohibitions in those circumstances under which an employer "makes a good faith determination" that an employee with whom it is entering an agreement engaged in conduct prohibited under the statue. ORS 659A.370(4).

Finally, OWFA specifically exempts from these limitations those employees who are "tasked by law" to receive reports of discrimination, harassment, or sexual assault, presumably to ensure confidentiality for the employee making the report. ORS 659A.370(6). Although OWFA does not define which employees would be "tasked by law" to receive reports, one could safely assume the individual and alternate employees identified in the policy mandated by ORS 659A.375 would fall under this category.

Sandra

Employers would be wise to consult with employment counsel in the event they find themselves in a situation that requires them to memorialize such a request and review any current employment or non-disclosure agreement forms to insure they conform with the law. Employers failing to conform to ORS 659A.370 are subject to administrative or civil actions for damages and attorneys' fees and costs, which can be brought up to five years after occurrence.

3. Statute of Limitation Increases From 1 Year to 5 Years

OWFA significantly expands the statute of limitations from one year to five years for filing an administrative complaint with BOLI or a civil lawsuit alleging prohibited conduct occurring on or after September 29, 2019. OWFA's five-year statute of limitations is one of the longest in the nation for similar claims; our neighbor Washington's statute of limitations for this type of claim is three years. As noted in Section 2 *supra*, as of October 1, 2020, the five-year statute of limitations also applies to claims brought under ORS 659A.375, OWFA's prohibition on confidentiality provisions. Employers should review their document retention policies against this expanded timeline.

4. Golden Parachutes Can Be Voided

The OWFA includes a provision that benefits employers seeking to terminate the employment of "bad actor" executives. Pursuant to ORS 659A.380, employers will no longer be forced to pay generous severance to an executive as they walk out the door amid allegations of prohibited conduct. If, after a good-faith investigation into reports of prohibited conduct by a supervisor (defined as a person having authority to hire and fire employees or discretion to exercise control over employees), an employer determines the supervisor engaged in unlawful conduct under OWFA, the employer may void any severance or separation agreement with the supervisor so long as the violations were a "substantial contributing factor" in causing the separation from employment. Neither the OWFA nor BOLI provide any guidance as to what constitutes a "good faith investigation" or a "substantial contributing factor" so employers seeking to void a golden parachute provision per the statute should seek guidance from employment counsel. This provision may make negotiations with incoming executives more difficult, but it will also protect companies from public backlash in the now likely event such claims become public knowledge.

5. Claims under OWFA

In addition to regulating the workplace, the OWFA also extends employer liability for prohibited conduct to situations outside of the workplace: conduct occurring at work-related events organized by the employer; conduct between employer and employee occurring off employment premises; and conduct by a non-employee if the employer knew or should have known of the conduct, and failed to take immediate and appropriate corrective action. For our contractor clients, this last item may be most concerning as it expands the nexus of liability to job sites, resulting in claims related to prohibited conduct by other contractors, vendors, or third parties. *See* OAR 839-005-0030(7). For this reason, it makes sense to ensure jobsite supervisors receive adequate training for handling complaints from their crews of discriminatory or harassing behavior.

Chapter 800 of ORS 659A provides the framework under which aggrieved employees may file complaints alleging sexual assault, discrimination, harassment or other unlawful conduct under the OWFA with BOLI (ORS 659A.800 – 659A.865) or file a civil lawsuit (ORS 659A.870- 659A.890). As with other discrimination-based claims, an employee is not required to exhaust intra-company remedies before filing a complaint or a lawsuit. An employee who has filed a civil lawsuit based on prohibited conduct under OWFA will be precluded from filing a complaint with BOLI for the same matter. Often, aggrieved employees who seek counsel are encouraged to initiate claims through BOLI first, as an inexpensive way to obtain discovery for the civil suit which will inevitably follow, but a BOLI claim and administrative adjudication is not a condition precedent to filing a civil suit.

Employers subject to a complaint filed with BOLI will receive notice of the complaint within 30 days after the complaint is filed, which will include the date, place and a description of the alleged prohibited practice. ORS 659A.820(6). The

employer may file an answer and must participate with any investigative efforts performed by BOLI.

bAfter BOLI completes the investigation, it will either dismiss the complaint or issue a finding of substantial evidence. ORS 659A.835. At any time upon receipt of the notice of complaint, an employer may seek to settle the issue with BOLI and the claimant; after BOLI issues a finding of substantial evidence BOLI also has the option to initiate the settlement process. ORS 659A.840. If settlement fails, the employer will be subject to formal charges and a hearing, after which the commissioner will issue findings of facts and conclusions of law; dismiss any respondents not found to have engaged in prohibited conduct; and issue cease and desist orders. The cease and desist orders will require the employer to take specific ctions "reasonably calculated to eliminate the unlawful practice" including paying damages, complying with injunctive or other equitable relief, submitting reports to BOLI confirming adherence to the order, and refraining from any conduct that would jeopardize the rights of the employee. ORS 659A.850. The employer will also be subject to civil penalties up to $1,000 per violation.

Employers named in civil suits for claims alleging prohibited conduct under ORS 659A may be subject to prevailing party costs and attorney fees, compensatory and punitive damages, and orders for injunctive and any other equitable relief that may be appropriate, including reinstatement or the hiring of the aggrieved employee with back pay. ORS 659A.885. Litigation of these types of claims in Oregon is an expensive and risky proposition; a discussion of the hurdles employers face in this circumstance can be found in the November 2019 issue of the Construction Law Newsletter, *Avoiding Employee Retaliation Claims*. As with retaliation claims, the best defense against a discrimination or harassment claim for an employer is to simply avoid them. Be proactive and educate managers and human resources personnel; identify claim reporting procedures and follow them without exception; deal with claims swiftly; and document everything.

Contact Tara at tara.johnson@alliant-systems.com or (503) 619-4000

Contact Sandra at sandra@fraserlawllc.com or (503) 776-6621

Construction Section Executive Committee

William Fig, Chair, *billf@sussmanshank.com*
Curtis Welch, Chair-Elect
cwelch@sussmanshank.com
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stacey.martinson@millernash.com
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Molly Washington, *mwashington@schwabe.com*
Van White III, *vmw@samuelslaw.com*
Jacob Zahniser, *jacob.zahniser@millernash.com*
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jalexander@sussmanshank.com
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gary.christensen@millernash.com
Tom Ped, *tped@williamskastner.com*
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Jeremy Vermilyea, *jeremy@vermilyealaw.com*
Tara Johnson, *tara.johnson@alliant-systems.com*
Alix Town, *town@oles.com*
Alex Naito, *alex.naito@tnslaw.net*

Newsletter Editors
Justin Monahan, *justin.monahan@otak.com*
Alex Naito, *alex.naito@tnslaw.net*