Construction Law Newsletter

From the Construction Section of the Oregon State Bar
Fall 2022, Issue No. 71

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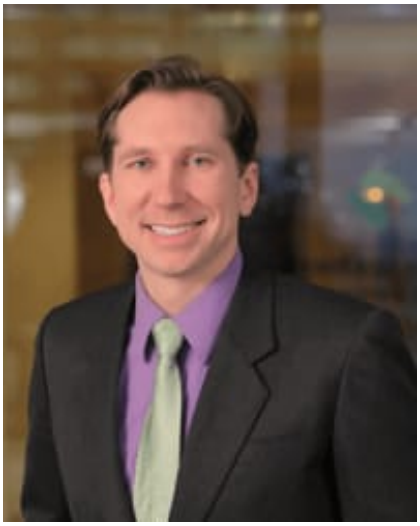
MESSAGE FROM THE CHAIR

Jakob Lutkavage-Dvorscak
The Partners Group

Another successful year is in the books for the Oregon State Bar Construction Section. As my term as Section Chair comes to its end, I look back at the last year fondly for the accomplishments of the Section. I have spent the last four years as an officer of the Section—a time marked by significant personal milestones and worldwide changes that affected us all—and am incredibly grateful my colleagues allowed me to serve and all the volunteer hours the Executive Committee has contributed to making this a successful year. I want to highlight three things the Section did in the last year—the Section social, the Section CLE, and the Section charitable giving.



Jakob

After two years of pandemic caused disruption, the Section started to return to semblance of normalcy with the return of in-person meetings and events, including the first social event since 2019. In August Section members gathered at

Xport Loung in Portland reconnecting with old acquaintances and meeting a number of new members. Seeing the new members reminded me how important it is for the section to connect with new lawyers and or lawyers news to the practice area because it is these members that will continue to develop this section.

I would like to thank Jeremy Vermilyea and the Emeritus Committee for organizing the social. Jeremy negotiated an incredible deal for the section on the event space and catering. I look forward to more future social events where members can once again connect with each other. These connections are what make the Section strong and will help continue its growth.
The section had a stellar return to in-person CLEs this year. As many of you know the annual CLE is the main event for the Section each year. The CLE planning committee (Laurie Hager, Katie Jo Johnson, Stacey Martinson, and Justin Monahan) did a fantastic job with new topics and a modified format. It is difficult to find ways to freshen up the CLE format and provide great content, but the planning committee did it remarkably well. Thank you to the committee for all the hard work and planning that went into this year's CLE.

Finally, last year the Section was able to donate a total of $7,500 to six charities—Campaign for Equal Justice, Classroom Law Project, Oregon Minority Lawyers Association, St. Andrews Legal Clinic, SMART Reading, and The Commons Law Center. The Section will again be able to donate to charities this year, which is an important benefit the Section has been able to provide thanks to smart stewardship of our events over the years.

I would like to thank my fellow Executive Committee members for all their work this year. I look forward to your leadership next year and the years following.

It has been an honor to have served as the Section Chair this year.

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CONSTRUCTION COLLECTION ACTIONS & THE "NEW" FAIR DEBT COLLECTION PRACTICES ACT

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Most of you know the Fair Debt Collection Practices Act (FDCPA) exists and applies to the collection of consumer debts. 15 USC §1692 et. seq. Most of you also likely know that Oregon has a sister statute, the Oregon Unlawful Debt Collection Practices Act (OUDCPA), ORS 646.639–646.656 (collectively "the Acts"). What many of us tend to forget is that the Acts are not limited to a collection agency attempting to collect credit card debt. Indeed, the Acts apply to a much broader swath of collection activity, including collection of amounts owed by a homeowner to a construction contractor or supplier! This includes counsel asserting lien rights against a homeowner on a contractor client's behalf.


Bill

Generally speaking, the FDCPA applies to communications by a third-party collecting a consumer debt. The Oregon act is broader in scope because it applies to a commercial creditor attempting to collect its own debt. A "commercial

creditor" is "a person who in the ordinary course of business engages in consumer transactions." ORS 646.636(1)(c). Debt is broadly defined as, "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 USC § 1692a(5). The intended use of the proceeds of the transaction determines whether a transaction is primarily for personal, family, or household purposes. *See Bloom v. I.C. Sys., Inc.*, 972 F2d 1067, 1068–1069 (9th Cir 1992). "Communication" is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 USC § 1692a(2). A lawyer can be a debt collector. *See Garrett v. Derbes*, 110 F3d 317, 318 (5th Cir 1997). Whether conduct violates the Acts is based on a "least sophisticated" consumer standard.

An attorney representing a contractor or supplier attempting to collect amounts owed by a homeowner most likely falls under the Acts. A contractor or supplier who regularly "engages in consumer transactions" likely falls under the OUDCPA. The FDCPA, §§ 1692c, d & e, and the OUDCPA, ORS 646.636(2)-(3), set forth a laundry list of acts that are prohibited under each act. Among other things, the Acts define how and when the debt collector may communicate with the debtor and what can and cannot be said to the debtor (and third parties). Thus, a residential contractor/supplier and their counsel would be well served by carefully reviewing these statutes to ensure they are following their requirements. Counsel should also make sure to advise the client that the client can be liable for violating the OUDCPA!

The FDCPA requires the debt collector to make certain mandatory disclosures to the consumer debtor. The FDCPA requires two types of disclosures: the debt validation notice under §1692g and the "mini Miranda" notice under §1692e. Historically (and generally speaking), the debt validation notice had to be made once, in the first written communication with the debtor. The "mini Miranda" notice had to be made in every communication with the debtor. These requirements certainly apply to demand letters sent by an attorney to a homeowner and most likely apply to lien notices as well. Giving the FDCPA notice cannot "boot strap" you into the FDCPA; however, the failure to give the required notice is a violation of the FDCPA, which allows for up to $1,000 statutory damages (or actual damages) and attorney fees.

Effective November 30, 2021, the FDCPA was amended to address more current forms of communications (*e.g.* texts and social media; 12 CFR §§1006.18 & .22), to set call frequency requirements (12 CFR §1006.14(b)), explicitly bar the collection of time-barred debts (12 CFR §1006.26(b)), and expand the information required in the §1692g debt validation notice (12 CFR §1006.34). The "standard" §1692g language was expanded to include, among other things, the contact information of the debt collector and an itemization of the debt. A creditor may now also give the new debt validation notice orally, if the oral communication is the creditor's first communication with the debtor (not recommended). Fortunately, the CFPB has provided a "safe harbor" form of written notice that complies with the amended debt validation notice requirements. The safe harbor notice may be found at https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_model-validation-notice_english.pdf.

If you collect consumer debts on behalf of your clients, a thorough review of 12 CFR §1006.34 is a must. Indeed, a review of all the "recent" amendments to the FDCPA is advisable. It is also a good time to refresh yourself (and your client) on the requirements under the OUDCPA.

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OREGON'S CONTEMPT PROCEDURE FOR FAILURE TO TRUTHFULLY ANSWER JUDGMENT DEBTOR INTERROGATORIES

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Construction lawyers are often faced with having to collect a judgment for a client. However, many of us have learned that sometimes the effort in obtaining the judgment pales in comparison to the effort needed to collect the judgment.

Fortunately, a lawyer has many tools for collecting a judgment. One of the more important tools is the use of judgment debtor interrogatories under ORS 18.270. Under ORS 18.270(1), "[a]t any time after a judgment is entered, a judgment creditor may serve written interrogatories relating to the judgment debtor's property and financial affairs on a judgment debtor."


Curt

Many of us have also learned that a judgment debtor may choose to be untruthful in their responses to judgment debtor interrogatories. This article discusses the enforcement process when a judgment debtor is untruthful in their answers to judgment debtor interrogatories.

I. Judgment Debtor's Statutory Duty to Truthfully Answer Judgment Debtor Interrogatories

Under ORS 18.270(2), a judgment debtor "must answer all questions under oath." Under ORS 18.270(1), a "judgment debtor's failure to answer the interrogatories truthfully shall subject the judgment debtor to penalties for false swearing as provided in ORS 162.075 (False Swearing) and for contempt of court as provided in ORS 33.015." Further, ORS 18.270(3) provides that a judgment debtor's failure to comply with the provisions of ORS 18.270 "is contempt of court and the judgment creditor may commence proceedings under the provisions of ORS 33.015".

Pursuant to ORS 33.015(2), contempt of court "means the following acts, done willfully: . . . (e) violation of a statutory provision that specifically subjects the person to the contempt power of the court." Thus, under ORS 18.270(3) and ORS 33.015(2), the willful failure to truthfully answer judgment debtor interrogatories is contempt of court.

The term "willfully" as used in ORS 33.015(2) was discussed in *State v. Mohammed*, 301 Or. App. 367, 370 (2019), where the court held: "'[w]illfully' for the purposes of ORS 33.015(2) meant, and means, intentionally and with knowledge that the act or omission was forbidden conduct." (*citing State v. Nicholson*, 282 Or. App. 51, 62 (2016)).

The willful mental state can be inferred. *Elizabeth Lofts Condo. Owners' v. Victaulic Co.*, 293 Or. App. 572, 580 (2018). In the *Elizabeth Lofts* case, the court referenced the following principle: "A trier of fact can infer a willful mental state from facts showing a knowing violation. The Oregon courts have often stated that intent is rarely susceptible to proof by direct evidence." *Id*.

II. Procedure/Order to Show Cause

The judgment creditor's initial step in seeking an order of contempt due to a judgment debtor's failure to truthfully answer judgment debtor interrogatories is for the judgment debtor to obtain an order requiring the judgment debtor to appear before the court and show cause why the debtor should not be held in contempt of court for such conduct. The motion must be supported by a declaration setting out the facts supporting the judgment creditor's contention that the judgment debtor failed to truthfully answer the interrogatories.

As a side note, there is no obligation to confer before filing the motion for order to show cause. A judgment debtor's counsel advanced such an argument in a recent Oregon circuit court case, which argument was expressly rejected by the assigned judge, who held that a motion for order to show cause for contempt is not subject to the conferral requirement under UTCR 5.010.

Even though the order to show cause is commonly issued through an *ex parte* appearance, such as is done in Multnomah County (*See* Multnomah County Supplemental Local Rule 2.501(1)(d)), the motion and declaration should be as sufficiently detailed and supported as though it is a contested pretrial motion set on the civil motion docket. Certification that the judgment debtor interrogatories were properly served on the debtor should be attached as an exhibit, as should the judgment debtor interrogatories, and the debtor's answers to those interrogatories.

Additional exhibits that may be attached include documents obtained from third party sources or other investigation that demonstrate the falsity of the debtor's interrogatory answers. For example, a debtor may have stated in their interrogatory answers that they have no income or a very limited income. The debtor's bank records produced by the debtor's bank, sometimes obtained by the judgment creditor's subpoena served on the bank, can clearly refute such an answer by the debtor.

In connection with the motion, the judgment creditor must follow the provisions of UTCR Chapter 19, including the requirement under UTCR 19.020(1)(a) that the initiating instrument, i.e. the motion for order to show cause, must include in the caption either the word "remedial" or the word "punitive".

UTCR 19.020(1)(b) requires that the judgment creditor state in the motion the following: "The maximum sanction(s) that the party seeks"; "[w]hether the party seeks a sanction of confinement"; and "[a]s to each sanction sought, whether the party seeking the sanction considers the sanction remedial or punitive."

III. Remedial or Punitive Sanctions

Under ORS 33.045(3)(b), a fine is remedial "if it is for continuing contempt and the fine accumulates until the defendant complies with the court's judgment or order or if the fine may be partially or entirely forgiven when the defendant complies with the court's judgment or order."

Under ORS 33.045(3)(a), a fine is punitive "if it is for a past contempt." Only a city attorney, a district attorney or the state attorney general may initiate a proceeding seeking a punitive sanction. ORS 33.065(2). In contrast, under ORS 33.055(2)(a), "a person aggrieved by an alleged contempt of court" may initiate a proceeding to impose remedial sanctions. Thus, a judgment creditor is authorized to seek a remedial sanction related to a debtor's contempt.

It should be noted that although confinement is one of the authorized remedial sanctions under ORS 33.105(1), the burden of proof for imposition of a remedial sanction of confinement is proof "beyond a reasonable doubt." ORS 33.055(11).

Other remedial sanctions authorized under ORS 33.105(1) are "[p]ayment of a sum of money to compensate a party for loss, injury, or costs suffered by the party as the result of a contempt of court"; "[a]n amount not to exceed $500 or one percent of the defendant's annual gross income, whichever is greater, for each day the contempt of court continues"; "[a]n order designed to insure compliance with a prior order of the court, including probation"; "[p]ayment of all or part of any attorney fees incurred by a party as the result of contempt of court"; and a sanction other than those listed under ORS 33.105(1)(a) through (e) "if the court determines that the sanction would be an effective remedy for the contempt."

Under ORS 33.055(11), the burden of proof for the imposition of a remedial sanction other than confinement "shall be by clear and convincing evidence."

In regards to service of the order to show cause, the court may authorize that it may be served by a method other than personal service, if the court finds that the defendant cannot be personally served. ORS 33.055(5)(a). Language authorizing service by means other than personal service should be set forth in the order itself.

IV. Evidentiary Hearing

Assuming the court grants the creditor's motion for order to show cause, and the order is served personally on the debtor, or otherwise in accordance with the court's order, a hearing is then held for the purpose of determining if the debtor should be held in contempt.

The hearing is tried to the court (ORS 33.055(6)); the debtor ordinarily has no right to a jury trial in the matter. ORS 33.055(7). The one exception to that rule is "when a statute or constitution provides a specific right to a jury trial in a contempt proceeding and a party claims that right." UTCR 19.050(3). The debtor is entitled to be represented by counsel at the hearing. ORS 33.055(8).

The hearing often takes the form of an evidentiary hearing, with the judgment creditor presenting testimony and evidence demonstrating that the debtor was untruthful in their answers to the interrogatories. Should the debtor testify, the judgment creditor is given the right to cross examine the debtor. Similarly, the debtor may cross examine the creditor's witnesses.

The court may allow opening statements and closing arguments. The judgment creditor, depending on the size of the judgment at issue, may also submit a trial or hearing brief. Likewise, so may the judgment debtor.

To establish that the debtor acted willfully, and to do so by clear and convincing evidence, information from third party sources is often helpful. For example, a creditor may introduce into evidence bank records showing the existence of bank accounts that the debtor denied existed. Such records are particularly useful when it is shown that sums of money had been deposited by the debtor in those allegedly non-existent accounts. Another type of evidence is tax returns subpoenaed from an accountant or bookkeeper for the debtor, which contradict a debtor's interrogatory answer that the debtor has limited income.

A commonly used judgment debtor interrogatory requires the debtor to identify persons and entities who owe monies to the debtor. Bank records that show payments to the debtor from third parties, occurring after the date of the debtor's answers to the interrogatories, are clearly helpful in establishing the willful requirement for contempt where the debtor claims in their interrogatory answer that they are not owed money by anyone.

Unlike responses given in a judgment debtor's examination, a debtor has time to review and reflect on their answers to judgment debtor interrogatories. The court is likely to take that practical factor into account when deciding

whether the debtor willfully provided false answers to interrogatories.

Should the court find the debtor in contempt, the court technically has discretion whether to impose sanctions, but often will impose sanctions. As noted above, the sanction sought by the creditor is set forth in the motion for order to show cause.

Should the court impose the sanction under ORS 33.105(1)(e) of requiring the debtor to make payment of all or part of the creditor's attorney fees incurred as a result of the debtor's contempt, the creditor's attorney will need to submit a statement of attorney fees under ORCP 68, and the debtor will have the opportunity to respond. *See In re Marriage of Young,* 172 Or. App. 108, 112 (2001).

V. Conclusion

As is apparent from the above discussion, it is a time-intensive process for a creditor to enforce their right to receive truthful answers to judgment debtor interrogatories. Before initiating that process, the judgment creditor's attorney should consider the size of the judgment at issue, as well as analyzing information as to whether the judgment debtor may have significant assets that the judgment debtor is trying not to disclose.

There is also the issue of accountability to factor into a decision by the creditor. A judgment debtor should not be permitted to treat responses to judgment debtor interrogatories as an exercise in how to hide assets and income by providing false or incomplete information. Doing so not only undermines the legal process, but it also increases the expense to the creditor, which expense should ultimately be borne by the judgment debtor.

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CONSTRUCTION LIENS FOR DUMP TRUCK COMPANIES

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Over the years, I have prepared a number of construction liens. Most of them are for material suppliers, subcontractors, or general contractors involved in the construction or remodeling of a building or structure. I have also drafted liens for persons involved in making land ready for construction, but not nearly as often—perhaps because there are less cash flow issues at the beginning of a project when the land is being prepared for construction of a building or structure. Or it may be because those involved in making land ready for construction aren't as aware of construction liens as a collection device in the event of non-payment. I think it's a bit of both.

In my experience, one of the trades involved in making land ready for construction that aren't always aware of their construction lien rights are dump truck companies. Dump truck companies typically haul dirt, sand, gravel, rock, asphalt, and spoils to and from construction projects. In some instances, they deliver materials to a project site and then drive to another area of the site to haul away materials. By doing so, their efforts contribute to the process of making land ready for construction.

The first time I was approached by the provider of dump truck services to assist with the collection of past due amounts, I was somewhat surprised by how much it costs to haul materials to and from a project site being prepared for construction. Since then, I've also been surprised by the number of dump truck companies in Oregon that didn't realize they had construction lien rights and/or that were not taking the correct steps in a timely manner to secure and/or file construction liens.

This article analyzes the rights of dump truck companies in Oregon who haul materials to/from a construction site to file a construction lien in the event of non-payment. Construction liens for dump truck companies can be an effective way for them to collect payment and causes them to be a secured creditor.

When asked to draft a lien for a party who provides a particular type of labor, materials, equipment or services for which I haven't previously prepared a construction lien, I will usually refer to ORS 87.010 to refresh my memory with respect to the parties granted construction lien rights in Oregon. ORS 87.010 (Construction Liens—Who is Entitled to Lien) is the Oregon statute that specifies the parties entitled a construction lien in Oregon.


Van

ORS 87.010 includes a fairly broad scope of persons entitled to a claim of construction lien in Oregon. With respect to dump truck companies, ORS 87.010 expressly recognizes the transporting of materials used in the construction of any improvement. ORS 87.010(1) holds that any person performing labor upon, **transporting** or furnishing any material to be used in, or renting equipment used in the construction of any improvement shall have a lien upon the improvement for the labor, transportation, material furnished or equipment rented at the instance of the owner of the improvement or the construction agent. Per ORS 87.005(5), "Improvement" means a building, wharf, bridge, flume, reservoir, well, tunnel, fence, street, sidewalk, machinery, aqueduct, or other structure or superstructure.

There are no restrictions in ORS 87.010, like there are in some public works payment bond statutes, on the right of lower tier providers (including dump truck companies) to file a construction lien.

Granting construction lien rights to those who transport materials to be used in the construction of an improvement is consistent with the purpose of the construction lien laws—that is, when work or material is devoted to the improvement of real property, the value of the property is likely to be enhanced, and the cost of that work or material is appropriately treated as a charge on the real property. The court in *Lemire v. McCollum*, 246 Or. 418 (1967) stated that Oregon's lien law statutes are designed to protect laborers and materialmen who expend their labor upon the buildings of others.

In *Abajian v. Hill*, 42 Or App 695,699 (1979), when determining that providing and hauling drop boxes filled with debris was a lienable item, the court stated that the purpose of the mechanics' lien law is best served by treating all of the component undertakings in the construction of the finished building as lienable work (citing *Robinson v. Thatcher*, 252 Or. 603, 605 (1969)). The court in *Abajian* held that the drop boxes used to help clear the land in preparation for construction shouldn't be analyzed as an isolated function and must be analyzed as one part of the larger function in the development to which it contributed. The providing and hauling of the drop boxes was a necessary part of the land clearing process. Because the providing and hauling of drop boxes filled with debris from the project site was a necessary part of clearing the land for construction, said efforts were deemed to be lienable by the court.

The holding in *Abajian* also appears to fill what might be a hole in ORS 87.010 regarding the

services often provided by dump truck companies. That is, ORS 87.010(1) states that all persons who transport material to be used or incorporated in the construction are entitled to a lien for the cost of transport—but doesn't expressly refer to transporting materials away from the site. Since the *Abajian* court granted lien rights to a drop box hauler who provided and hauled away drop boxes containing debris from the construction site, the hauling away of materials or debris by dump truck companies should also be lienable. This is also consistent with Oregon courts treating all component undertakings in the construction of an improvement as being lienable.

While there are many dump truck companies in Oregon who are aware that their efforts may be lienable, it appears to me that there are also a fair number of them who fail to take the correct steps to secure and file a lien in the event of non-payment. Unless a dump truck company is hired directly by the owner of the subject property, they generally must provide a Notice of Right to a Lien, as required by ORS 87.021 (Notice to Owners), to the owner of the property to secure their right to file a lien in the event of non-payment. ORS 87.021 holds that when labor, materials, equipment or services described in ORS 87.010(1) are furnished at the request of someone other than the owner that the providers of such items shall give a Notice of Right to a Lien to the owner of the site. In my experience, too many dump truck companies fail to provide a Notice of Right to a Lien to the site owner to secure the right to file a lien if they are not paid. Or, if they do provide the notice, they do so only after they haven't been paid for their services—which is usually too late.

I often refer to the providing of a Notice of Right to a Lien as a mini-insurance policy which helps ensure a that a provider of labor, materials, equipment, or services has the right to file a construction lien in the event of non-payment. I believe that those who do not contract directly with the owner of the site should make it company policy to provide a Notice of Right to a Lien on every project where required in order to secure their right a file a lien in the event of non-payment. No one knows at the beginning of a project whether there will be payment issues. By making such a policy, and sticking to it, they don't have to worry about the details of Oregon's lien laws or who owns the property. They should just engage the services of lien notice service at the beginning of every new project. The notices sent by the local lien notice services are inexpensive and a small price to pay in order to become a secured creditor if not paid in full for their services or materials.

The laws regarding the filing and foreclosure of construction liens for dump truck companies are the same as for others who provide labor, materials, equipment or services used in the construction of an improvement or preparation of a lot or parcel of land. Dump truck companies generally must file their liens not later than 75 days after they ceased to furnish (or haul away) materials (ORS 87.035). They should also send the post lien filing notices required by ORS 87.039 and 87.057 to secure their right to attorney's fees if they successfully foreclose their construction lien. The deadline for a dump truck company to file suit to foreclose a construction lien is, per ORS 87.055, generally 120 days from the date the lien was recorded.

SUMMARY

Dump truck companies that transport materials to be used in the construction of any improvement are expressly granted construction liens rights by Oregon law. Oregon case law also appears to provide lien rights for dump truck companies that haul away materials from a construction site. Transporting materials to and from a construction site is a component undertaking in the construction of a finished improvement. Granting lien rights to dump truck companies who transport and/or haul away materials from a construction site is consistent with the purpose of the lien law to allow those whose work or material is devoted to the improvement of property to treat their work or material as a charge on the property that

benefitted from their efforts. In order to make sure they take advantage of their lien rights, dump truck companies need to follow the procedures required by Oregon law to secure and file a construction lien the event of non-payment. If they do so, having lien rights will make their claims for payment more certain and more secure.

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ADDRESSING INFLATION AND PRICE VOLATILITY IN CONSTRUCTION CONTRACTS AND DISPUTES

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The impact of inflation and related price volatility issues on construction projects needs no introduction. This article identifies some of the issues parties on all sides of a construction project should consider when evaluating current projects or negotiating future contracts.

What Contract Provisions or Legal Theories Address Inflation?

Odds are likely that your construction contract does not directly address inflation. But that does not mean that the impact of inflation is not embedded in your contract (or should be embedded in contracts you sign in the future). Review of the following contract provisions and legal theories with an inflation lens is recommended:

Escalation/Price Adjustment Clause: As discussed in Alex Naito's recent article "Material Escalation Clauses – Different Ways to Allocate Risk" in the spring/summer 2022 issue of this Construction Law Newsletter, price escalation issues are often addressed in material escalation clauses. Mr. Naito provides several key metrics for drafting material escalation clauses that should be reviewed when drafting your next contract. Some additional considerations for these clauses include the following: (i) consider including a pre-defined index in the clause to create a baseline when evaluating whether and by how much the relevant material price has fluctuated; (ii) consider making the provision mutual to increase the equity of the provision by not only providing an upside to contractors for price increases, but a discount to owners if the price drops (for example, the recent rollercoaster ride of lumber prices resulted in some owners signing contracts when framing costs were at their peak, only to see those costs plummet months later); (iii) build in flexibility to the clause by requiring the parties to confer on potential material changes or substitutions, revised phasing of the work, or other potential creative solutions before materials are purchased at increased cost.


Mario

Force Majeure Clause: A force majeure clause might address inflation or price volatility, but more often than not these clauses do not expressly address these issues. Many jurisdictions also do not consider inflation an "act of God," which could limit any potential recovery under this clause (for example, an Oregon court recently interpreted a force majeure clause as follows: "[a] force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed price contract is that the

market price will change. . . . The whole purpose of a fixed price contract is to allocate risks in this way." (*Shelter Forest Int'l Acquisition, Inc. v. COSCO Shipping (USA) Inc.*, 2020 (citation omitted))). Nonetheless, a force majeure clause, which clause may be in your contract even without use of the phrase "force majeure," should be carefully reviewed in case the express wording of the clause captures the impact of inflation. Other considerations include whether the price volatility at issue was "foreseeable" at the time the contract was drafted, and whether the force majeure clause entitles the contractor only to additional time to perform its work, or both additional time and compensation.

Delay/Extension of Time Clause: Similar to a force majeure clause, a delay or extension to time clause may provide some relief for the impact of inflation or price volatility, but the relief provided is most often additional time for the contractor to perform its work. These contract clauses should be carefully reviewed, however, because parties can customize these provisions to provide additional compensation under certain scenarios, such as in the event of supply chain disruptions.

Impossibility of Performance: Depending on applicable law, this doctrine may provide a defense to a claim of breach of contract where the impact of inflation made it impossible to perform the duties of the contract. Whether performance is "impossible" will vary depending on the circumstances, and many jurisdictions will require objective impossibility—meaning that it must be impossible for any similarly situated owner, contractor or design professional to perform. This legal doctrine may also apply even if the contract does not have a specific provision addressing this issue.

Impracticability of Performance: A cousin to the preceding provision, this doctrine states that if performance is impracticable but not impossible, there may still be a defense (or at least a mitigating effect) of a failure to perform. These provisions and theories are the tip of the iceberg but a good starting point. Other relevant touchpoints include constructive change or change in legislation provisions, as well arguments regarding commercial frustration/frustration of purpose, mutual mistake and failure of an implied condition precedent. Creative parties may even draft a provision specifically addressing the risk of inflation.

Can I Recover Damages Specifically for Inflation?

Decisions analyzing whether courts or arbitrators should take inflation into account when awarding damages are limited. In specific circumstances, such as bad-faith claims against insurers, there is precedent in some courts for taking into account the effects of inflation. For example, in this specific context the Court of Appeals for the Ninth Circuit (analyzing California law) upheld the use of inflation as an element of damages where, among other factors, "there was a steady rate of inflation during the compensable period." (*Leslie Salt Co. v. St. Paul Mercury Ins. Co.*, 1981.) Several years later the Ninth Circuit (this time analyzing Arizona law) held that "the factfinder may take inflation into account in measuring damages for breach of contract where doing so will put the damaged party in as good a position as if the contract had been fully performed and will avoid an otherwise unjust result." (*Safeco Ins. Co. of Am. v. Duckett*, 1988.)

How these decisions or related opinions will impact a non-insurer dispute under Oregon law appears to be an open question. Oregon courts appear to have acknowledged the relevance of inflation calculators (specifically, the CPI Inflation Calculator from the Bureau of Labor Statistics, found at https://www.bls.gov/data/inflation_calculator.htm) in some contexts, such as attorney fee disputes. There is also dictum from a recent Oregon Supreme Court decision that appears to acknowledge the relevance of inflation when evaluating certain types of damages (*see Busch v. McInnis Waste Sys., Inc.*, 2020). Whether an

Oregon court will expressly take inflation into account in a commercial construction dispute remains to be seen.

Does Prejudgment Interest Compensate for Inflation?

The objective of compensatory damages is to put a plaintiff in a position the plaintiff would have occupied if no wrongful conduct had occurred. As many disputes are resolved years after the fact, prejudgment interest is one way to compensate a party for the time value of money. But whether prejudgment interest will also account for the effects of inflation will depend on the time period at issue.

In times of high inflation, prejudgment interest may be insufficient to fully compensate a party as most prejudgment interest statutes are not indexed to account for inflation. Parties to construction disputes, in particular, are cautioned not to assume the award of prejudgment interest is a foregone conclusion—even putting inflation aside. Construction disputes often involve damages for additional work, delayed work or changed work that are heavily contested in quantum, and often are subject to expert disputes. Depending on the jurisdiction of a dispute, even successful claims may not generate an award of prejudgment interest (or may only produce a limited award of prejudgment interest), which during times of inflation can be particularly damaging to a company's bottom line.

In summary, all construction project parties are mindful to keep inflation and price volatility issues top of mind when evaluating their next dispute or negotiating their next contract.

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PAY ONCE, PAY TWICE, PAY THREE TIMES A WINNER? THE IMPACT OF FACTORING COMPANIES ON THE CONSTRUCTION PAYMENT PROCESS

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Construction projects are expensive undertakings that place substantial risks on General Contractors and Subcontractors to advance monies to perform the work for the promise of being paid later. In the ordinary course of business, the Owner pays the General Contractor who pays the Subcontractor who pays the Sub-Tiers. However, what happens if there is another party with an interest in the funds?


Alix

In the world of commercial lending, a company can use its Accounts Receivable as security for a loan from a factoring company in exchange for a percentage of the Accounts Receivable's worth in cash immediately. In construction, this presents a substantial problem for Owners and General Contractors. If a company with Sub-Tiers sells its Accounts Receivable, usually the discounted cash that the company receives does not cover the hard costs on the project, which means the Sub-Tiers, and potentially the company's laborers, cannot be wholly paid with the funds received. If the

company does not pay the factoring company in full, the factoring company can issue a UCC-1 lien, which requires the entity holding the money for the company, usually the Owner or the General Contractor, to pay the factoring company rather than the company or its Sub-Tiers. However, if the Sub-Tiers are not paid, the Sub-Tiers still have lien rights secured by the real property on private projects or bond rights on public projects. This means that the Owner or the General Contractor can be forced to pay twice for the same work.

So how do Owners and General Contractors protect themselves? First, many contracts make it a breach of contract to assign an interest in the contract to another entity without the permission of the other party. This is more of a preventative measure as once the accounts receivable have been sold it is unlikely that the company has the funds to proceed with reimbursing the Owner or General Contractor for the breach. Second, if there are indicators that the company is in trouble, require a payment bond. This transfers risk of non-payment on behalf of the company to a surety rather than requiring the Owner or General Contractor to hold that risk. Third, if a UCC-1 lien is recorded, the entity holding the money can interplead the money into the court. This puts the parties with interests in the money on notice that there are competing claims and allows the entity holding the money to step out of the fight. Fourth, ask the factoring company, the company, and its Sub-Tiers to meet and attempt to broker a resolution with a settlement agreement that releases all lien or bond rights.

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RIGHT-OF-WAY: YOU DRIVE ON IT AND YOU WORK ON IT, BUT WHAT IS IT?

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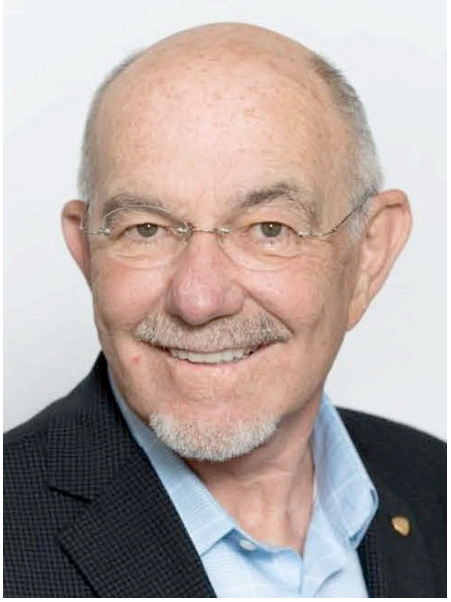
Civil construction projects such as roads, bridges, and sewers are carried out almost exclusively within public rights of way, usually on behalf of the public agency with jurisdiction over that section of right of way. In addition, most construction projects are bounded by at least one public right of way and involve work being carried out within it. While it is generally understood that a right of way represents a kind of property interest held by the public, the nature of that interest is often not well understood, as it differs from more common property interests. The purpose of this article is to provide an introduction into the nature of right of way, which can be important to those planning or executing construction projects within or adjacent to public rights of way.

I. Background.

Since earliest times, humans have, through usage, established commonly-used routes for walking and transportation. In the United Kingdom, as elsewhere, many of these antedated the earliest notions of private property ownership (construction of one such way in Somerset, England is firmly dated to 3806-3807 BCE). The public retained its right to travel on such established ways even after ownership of the underlying property was later assumed by the nobility and by their successors in interest. The central notion of the nature of right of way that developed in English common law is continued in American law to this day, as a "right of passage held by the public in general to travel on roads, freeways, and other thoroughfares." Black's Law Dictionary, 9th Ed. (West Publishing Co., 2004), p. 1440.

Starting in the 17th century, Europeans settlers established claims to land across what is now the United States. These areas lacked established rights of way, in the sense recognized by the common law, and a more formalized method of setting aside land for public travel and transportation was developed. Those methods included both developments in the common law

and statutory schemes. See Sheldon W. Parks, "The Law of Dedication in Oregon," 20 Or. L. Rev. 111, 163 (1941). In Oregon, the first statutory provision for rights of way was through an act of June 27, 1844 by Oregon's provisional legislative assembly, which was superseded in 1851 by a system for adoption and dedication of "county roads" enacted by the Territorial Legislature. See Oregon Laws, 1843-1849, 88-90, Oregon General Laws, 1850-1851, 11-25.


James

II. Right of Way Issues.

The hybrid mix of regular changes to statute, combined with ongoing case law development over the past 175 years, creates a variety of issues related to rights of way. Depending in particular on the statutes in effect when a right of way was established, as well as the method used in its establishment and its documentation, the nature of a right of way can vary considerably from one small segment to the next. The balance of this article will address some of the significant factors that can cause legal issues for those working with rights of way.

A. Dedication and Establishment.

"Dedications are of two general kinds: statutory and common law." *Nodine v. City of Union et al*, 42 Or. 613 at 616 (1903).In Oregon, most rights of way exist because someone provided them by dedication, either through county action to create a road, or by the property owner executing a written grant or filing a plat with the county surveyor that contains a dedication. Roads and the County: A Manual for County Road Officials (Association of Oregon Counties, 2020). p. 148. A much smaller group of rights of way were created by usage under the common law or by prescription. See *Huggett v. Moran*, 201 Or 105, 266 P2d 692 (1954) (public road created by adverse use for prescriptive period).

With the exception of certain early long-distance roads established by the Legislature, the four most common methods used to create road rights of way were: (1) action by a county court, either upon petition of property owners (or, after 1917, upon the initiative of the county), (2) dedication by deed, (3) dedication by subdivision or partition plat, or (4) purchase by a public agency. In each case the language or description contained in the county's order or the conveyance document that established the right of way—the deed or the plat—determines the location and nature of the interest granted.

<u>Rights of way created by county court</u>. Most county road rights of way were established and surveyed following a route described as a single line, and the order adopting the road may or may not have stated the width of the right of way being established. In the event that no width was given, a series of Oregon laws beginning in 1854 set forth the standard default width for county roads, which has since varied over the years from 30 feet to 60 feet wide (ORS 368.036 sets it currently at 50 feet). Consequently, for many rights of way established by county order up through the middle of the 20th century, it is necessary to examine both the original county order and the then-current statutory width in order to determine with certainty the width of the right of way that was created.

Rights of way created by deed. A dedication made in a conveyance document, similar to other property interests, relies upon the language and description contained in the written document, must clearly demonstrate the intent to dedicate and the proposed use, and be accepted by the agency. *See McCoy v. Thompson*, 84 Or. 141, 164 P. 589 (1917), and *Sec. & Inv. Co. of Oregon City v. Oregon City*, 161 Or. 421, 90 P2d 467 (1939). Prior to 1955, the agency acceptance did not need to be formal. *McCoy v. Thompson*, supra, at 149 ("neither a formal acceptance by the county nor the immediate opening and improvement of a street are essential to complete an irrevocable dedication.") However, since 1955 "an instrument dedicating land to public use may not be accepted for recording in this state unless the instrument bears the approval of the city or county authorized by law to accept the dedication." ORS 92.014(2). For such rights of way, examination of the deed itself is necessary in order to determine the location and nature of the right of way granted, and also, for dedications prior to 1955, evidence of acceptance by the agency, whether formal or otherwise.

Rights of way created by plat. A dedication made in a recorded plat must also have been accepted by the agency having jurisdiction. Rights of way created by dedication made in a plat are similarly subject to interpretation of the dedicator's intent contained in the plat. Security & Inv. Co. of Oregon City v. Oregon City, 161 Or. 421 (1939), 90 P.2d 467 ("Plats by which dedications are made are to be interpreted by the court as any other writing would be, and are to be construed as a whole in order that the intention of the dedicator may be ascertained, and every part of the instrument given effect"). Thus, for rights of way established by plat, it is necessary to examine not only the recorded conveyance, along with the evidence of acceptance necessary before 1955.

Purchased rights of way. Typically, when a public agency requires additional right of way, usually for a road improvement, the agency purchases the additional right of way width. Depending upon the circumstances of the purchase, the resulting interest may be that of a dedicated right of way or it may be a fee interest: in some cases, the public may prefer to acquire a fee interest in order to limit future access from the adjacent property. Perhaps more commonly than that, the agency may be required to purchase property in fee when the amount of right of way to be acquired would reduce the remaining property to an "uneconomic remnant*." City of Lake Oswego v. Babson*, 97 Or.App. 408, 776 P.2d 870 at 872 (1989), (interpreting ORS 281.060, since renumbered ORS 35.510). For such rights of way, as for those established otherwise by deed, it is necessary to examine the recorded conveyance.

B. Nature of the Interest in Dedicated Right of Way.

Right of way held by the public differs from ownership of the property, and is in the nature of an easement, where the beneficiary is the public, or any member thereof. Cappelli v. Justice, 498 P.2d 209 at 213 ("In common parlance the term 'right of way' signifies an easement"). "Easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement: they are not land; they merely burden land that continues to be owned by another." U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S.Ct. 1837 (2020) at 1840 (grant of right of way does not include authority to allow installation of a pipe 600 feet below the roadway). Like an easement, the right of way held by the public consists of only that which is necessary for the exercise of the right of way use, and the remainder of the property rights remain with the owner of the underlying property.

The easement acquired in public right of way in Oregon is much broader than a simple right of the public to pass across the property, as it includes not only the right of the public to construct improvements upon the easement that practically preclude any remaining private use, but also allow its use by utilities for the location of their lines.

See, e.g., ORS 758.010(1) ("Except within cities, any person has a right and privilege to construct, maintain and operate its water, gas, electric or communication service lines, fixtures and other facilities along the public roads in this state"). And, as the trend continues toward an increasing number of buried utilities (e.g., power, water, gas, storm and sanitary sewers), the boundary between where the easement ends and the fee ownership begins is somewhat blurry.

However, blurry as the boundary may be, the soil at least that remains under the right of way remains the property of the owner of the underlying fee, who may claim it for the owner's use if it is excavated from the right of way. *John P. Sharkey Co. v. City of Portland*, 58 Or. 353, 114 P. 933 (1911) ("the abutting owner on a street in Portland owns the soil to the center of the street; . . . he still owns it when it is excavated, unless needed for the improvement of the same street; . . . he has a right to take it away.")

C. Jurisdiction.

Jurisdiction over public rights of way is by default assigned to counties pursuant to ORS 368.016: "Except as provided in this section or as otherwise specifically provided by law, the exercise of governmental powers relating to a road within a county is a matter of county concern." Pursuant to ORS chapter 366, however, the Oregon Department of Transportation may both acquire jurisdiction over existing county roads and other public roads for use as state highways, or remove state highways from the highway system and pass jurisdiction to local agencies, with the consent of the counties involved. Within incorporated cities, upon annexation the city takes jurisdiction over public roads generally, with the exception of state highways and county roads within the city limits. ORS 368.031(1). As a consequence, jurisdiction over the rights of way abutting a property within a city that is located at the intersection of a state highway and a county road may fall to three different agencies, each of which has powers to regulate improvements in its right of way.

D. Vacation and Abandonment.

Since the underlying fee is retained by the dedicator (except when the right of way was acquired in fee by a public agency), the right of way can be vacated by the agency having jurisdiction over it. For cities and counties, ORS chapters 271 and 275 set forth procedures for such vacations, which may be initiated either by the adjacent property owners or by the agency having jurisdiction. The costs of such vacations vary considerably, as many cities and counties have ordinances requiring that the property owners pay the agency for the market value of the property, or a proportion thereof, while others do not. *See, e.g.*, Eugene Code (City of Eugene), Sec. 9.8710(5).

Vacation is generally the only method by which the public's interest in a right of way can be terminated. Unlike easements, failure to develop or use dedicated right of way generally does not terminate the public's rights. *See Martin v. Klamath County*, 39 Or. App. 455, 592 P.2d 1037 (1979). In addition, public rights in streets and highways cannot be extinguished by adverse possession. ORS 221.750, ORS 257.027. However, an agency's acquiescence or implied consent to adverse use of right of way, and reliance upon that acquiescence or consent by a property owner, may be used in certain circumstances to estop the agency from requiring removal of the adverse use. *See, e.g., City of Mollala v. Coover*, 192 Or. 233, 235 P.2d 142. (this opinion contains a useful summary of the holdings in the Court's prior decisions relating to adverse use of property dedicated to public use.)

E. Road Relocation.

Interesting problems often arise when roads are straightened or realigned. Unused portions of the existing right of way not needed are also vacated as part of the adoption of the new right of way location. *See, e.g.*, ORS 368.126. In such cases, a realignment that eliminates a curve in a road may

result in isolated slices of property being returned to full private ownership that are on the opposite side of the road from the main parcel. Such road realignments can also result in clouds on title when descriptions of property contained in deeds have used as a boundary an existing road right of way, and future conveyances rely upon the same boundary language even though the road is no longer in the same place. Such subtleties are often not reflected in title reports or county assessors' records, as the vacation order is not commonly recorded on the property.

III. Conclusion.

This article gives a brief description of some of the most significant differences in how rights of way are dedicated or acquired, differences between the various jurisdictions with authority over rights of way, and complexities introduced by statutory schemes, including the rights granted to utilities. Given the way rights of way are realigned or enlarged over time, and the cost and difficulty of terminating right of way interests, it is shown to be important when planning development of any property to understand the particularities of the rights of way serving the property.

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RECENT DEVELOPMENTS IN OREGON'S RENEWABLE ENERGY EFFORTS

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A few months ago, Oregon commissioned the first-ever renewable energy facility in the United States that combines solar, wind, and battery power.[1] The project represents a continued shift in Oregon, and at the national level, of the movement away from fossil fuels to cleaner energy. Accordingly, it is no surprise that the preservation of the state's natural resources and climate change mitigation have become key issues in recent legislative efforts in the United States and Oregon's renewable energy laws.

Recent legal developments in Oregon's renewable energy efforts include:

Oregon's Clean Energy Bill

In June 2021, the Oregon legislature passed House Bill 2021, a clean energy target bill.[2] HB 2021 is an expansive clean electricity bill that requires Oregon's two largest electrical suppliers—PacifiCorp and Portland General Electric—to radically reduce greenhouse gas ("GHG") emissions associated with electricity sold to Oregonians in the following three stages:

Stage 1: Reduce GHG to 80 percent below baseline emissions levels by 2030;
Stage 2: Reduce GHG by 90 percent below baseline emissions levels by 2035; and
Stage 3: Reduce GHG to 100 percent below baseline emissions levels by 2040.

Oregon's progress toward meeting HB 2021's emissions goals is being monitored by the Department of Environmental Quality ("DEQ"), who is responsible for collecting and reviewing the state's emissions data. The state's move toward renewable energy is already showing positive results: in May 2022, DEQ issued an order finding that the electrical suppliers were on target toward meeting the emissions reduction milestones.[3]


Stacey

In setting HB 2021's emissions goals, the legislature invited and encouraged the development of clean energy sources like wind and solar power. A quick look into Oregon's wind power industry makes it clear why the state is well suited for further development. With 3,415 megawatts of wind generation, Oregon is the ninth state nationally for overall wind capacity. In fact, wind power makes up 11.6 percent of Oregon's electricity generation and 4.69 percent of Oregon's energy consumption. Second only to hydropower, onshore wind is the largest zero carbon-emitting electricity resource in Oregon.[4]

Responsible Labor Standards and HB 4059

HB 2021 also established "Responsible Labor Standards" for developers, contractors, and subcontractors for certain renewable projects of ten megawatts or greater in Oregon. Specifically, the bill developed stronger labor standards for such projects and includes, in part:

- Participation in an apprenticeship program, requiring contractors to hire apprentices to make up at least 15% of their workforce;
- Establishing a plan to recruit and retain women, minority individuals, veterans, and persons with disabilities;
- Having policies in place to limit workplace harassment and discrimination;
- Paying the area wage standard for the same trade and occupation in the locality where the labor is performed, and providing health and retirement benefits; and
- Complying with several other standards, including providing a quarterly report and demonstrating a history of compliance with state and federal laws.

HB 4059 was signed into law on March 23, 2022, and provides updated standards outlined in HB 2021 and amends ORS 757.306.[5] The bill amends definitions such as "large-scale project" and other terms for the purpose of implementing the Responsible Labor Standards.

Greenhouse Gas Emissions

HB 4139 was passed in February 2022, and requires the Oregon Department of Transportation to reduce greenhouse gas emissions.[6] The bill requires replacing or substituting certain materials used to construct and maintain Oregon's transportation system.

Focus on Offshore Wind Power in Oregon

Notably, Oregon's untapped offshore wind-power generation potential has recently caught the eye of the federal government. In September 2022, the Biden administration announced plans to develop offshore wind farms off the Oregon coast that will eventually be sufficient to generate enough power for five million homes.[7]


Vanessa

The Bureau of Ocean Energy Management ("BOEM"), an agency within the United States Department of the Interior, is focusing on the offshore areas from Coos Bay and Brookings.[8] BOEM is proposing these "call areas" to be a massive 1,811 square miles. The Coos Bay Call Area is proposed to begin 13.8 miles offshore from Charleston, Oregon, and extend about 65 miles offshore, while the Brookings Call Area would begin 13.8 miles offshore from Gold Beach and Brookings, Oregon, and extend about 46 miles offshore. These call areas would potentially accommodate 17 gigawatts of offshore wind capacity, but according to BOEM, they are planning to reduce the size. To be clear, not all Oregonians are on board with this plan. Many in the fishing industry are concerned about the significant impacts on the fishing industry and the off-coast marine ecosystems, and it is too early to predict exactly how BOEM will respond.

In sum, Oregonians' interest in combating the reliance on, and the effects of, using fossil fuels has resulted in Oregon's legislature to pass aggressive clean energy goals. No matter your position, it is clear that we will see new laws in the coming years.

Citations:

[1] Oregon's Wheatridge renewable energy plant goes live with wind, solar, batteries | Fortune
[2] HB2021 (oregonlegislature.gov)
[3] https://www.oregon.gov/deq/ghgp/Documents/HB2021Order.pdf
[4] https://www.oregon.gov/energy/energy-oregon/Pages/Wind.aspx
[5] HB4059 (oregonlegislature.gov)
[6] HB4139 (oregonlegislature.gov)
[7] https://www.msn.com/en-us/money/markets/biden-administration-targets-oregon-coast-for-wind-power-generation/ar-AA11Vglh
[8] Oregon Activities | Bureau of Ocean Energy Management (boem.gov)

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CONSTRUCTION SCHEDULE DELAY CLAIMS PRIMER

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Although ubiquitous in the realm of construction litigation, delay claims are inherently complex, and often insufficiently developed or supported by those asserting them. This article provides a framework for identifying types of delay, the required elements of a viable delay claim, the judicially preferred method for proving those elements, and discusses common pitfalls and logical fallacies that are likely all too familiar to construction law practitioners.

TYPES OF DELAYS

There are generally three categories of delays: excusable/compensable; excusable/non-compensable; and inexcusable/non-compensable.

Whether a delay is compensable depends on the nature of the delay, and the controlling language of the parties' contract. Although beyond the scope of this article, another important consideration regarding delay compensability for attorneys practicing in the Northwest is the legality of no-damages-for-delay clauses. In Oregon, no-damages-for-delay provisions are void and unenforceable as against public policy on public improvement contracts (ORS 279C.315), and in Washington, they are void and unenforceable on public and private construction contracts (RCW 4.24.360).

In order to be considered excusable/compensable a public entity or owner must be the sole proximate cause of the contractor's loss, and the contractor must not have been delayed for any other reason during that period. *Triax-Pacific v. Stone*, 958 F.2d 351, 354, 37 Cont. Cas. Fed. (CCH) ¶ 76275 (Fed. Cir. 1992). Further, there must have been no concurrent delay attributable to the contractor. *George Sollitt Const. Co. v. U.S.*, 64 Fed. Cl. 229, 238 (2005). Essentially, the primary rule when it comes to compensability is that the claimant must have clean hands, and must not have created or contributed to the delay.
Excusable/non-compensable delays require much of the same proof as compensable delays, and would otherwise also qualify as compensable. However, due to contractual terms or other risk allocation functions, they are deemed simply excusable. Delays falling into this category are characterized by being beyond the control of both the owner and contractor, and include common events typically found under a force majeure clause, e.g., acts of God, fires, floods, strikes, embargoes, etc. When events fall into this category, the contractor will be entitled to additional time, and the owner may not assess liquidated damages. In effect, both parties share the burden: the owner's project will be delayed, and the contractor assumes increased costs related to that delay.


Nick

Inexcusable/non-compensable delays result from the acts, omissions, and negligence of the contractor, or its subcontractors and suppliers, or fall under the risk allocation provisions of the contract. Inexcusable delays are always non-compensable, and can result in an assessment of liquidated and actual damages by the owner.
The assessment of delay excusability and compensability generally requires consultation with a professional experienced in delay analysis and critical path method schedules, as discussed in detail in the following sections. Presentation of that analysis requires offering the consultant as an expert, subject to evidentiary gatekeeping functions.

A BRIEF HISTORY OF CRITICAL PATH METHOD (CPM)

In the much cited case *Haney v. United States*, the Court of Claims provided an apt description of the critical path method:
Essentially, the critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. (E.g., one could not carpet an area until the flooring is down and the flooring cannot be completed until the underlying electrical and telephone conduits are installed.) . . . Many subprojects may be performed at any time within a given period without any effect on the

completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These latter items of work are on the "critical path." A delay, or acceleration, of work along the critical path will affect the entire project. 230 Ct. Cl. 148, 676 F.2d 584, 595, 30 Cont. Cas. Fed. (CCH) ¶ 70189 (1982).

CPM scheduling was developed in late 1956 by a team of Du Pont and Remington Rand engineers for use in manufacturing projects to minimize the turnaround time for servicing machinery on production lines. See W. Stephen Dale & Robert M. D'Onofrio, Construction Schedule Delays § 2.2 (Thompson Reuters, 2022)[hereinafter Construction Schedule Delays]. A few years later, those same engineers left their respective firms, formed a new company, and began teaching CPM to clients for a variety of applications, including, specifically, construction projects. Id.

Integrating CPM into day-to-day construction practices proved to be relatively seamless. For example, although progress bar charts had long been an industry requirement for construction contracts, they did not contain logic ties or precedence of relationships for different categories of work. Id. The ease of adding CPM logic ties, and relationships to existing progress bar charts, expedited the use and application of CPM in the construction industry. See, e.g., Appeal of S. Patti Const. Co., A.S.B.C.A. No. 3423, 1964 B.C.A. (CCH) ¶ 4225, 1964 WL 856 (Armed Serv. B.C.A. 1964)("The progress bar chart does not list the sequence of construction for various specific items of the work. Appellants prepared, as exhibits for the hearing on this appeal, planned flow diagrams for each building based upon the so-called critical path method. The critical path method was developed after the performance of this contract and is now in regular use in the construction industry. This process depicts in some detail the inter-relation between the various particular items of work, giving approximate and necessary performance dates for each and specifying those items critical to either other work or completion dates.").

The first published decision involving CPM occurred in 1963 before the Atomic Energy Commission Board of Contract Appeals, which summarized CPM as follows: "At danger of oversimplification, the basic theory involves a determination by analysis of the work on which all other work depends, e.g., in the instant case, nothing could start until the excavation was completed; steel could not go up before the basin was completed, etc. The essential work is called the "critical path." The time required to traverse the critical path sets the time limit for the whole undertaking." In the Matter of S & E Contractors, Inc, A.E.C.B.C.A. No. CA-161, A.E.C.B.C.A. No. CA-162, 2 A.E.C. 631, 666–67, 1963 WL 1313, *35 (A.E.C.B.C.A. 1963).


Andrew

The use of CPM in the construction industry steadily increased during the 70's and 80's, and by 1990, virtually all of the Top 400 Engineering News Record large firm contractors were using CPM schedules and schedules updates, and 90 percent of medium and small contractors were using CPM as well. Construction Schedule Delays § 2.2. The widespread use of the CPM method in the construction industry was also reflected in the

number of CPM cases addressed by courts and boards over the same period of time. Id.

DELAY CLAIM ELEMENTS & BURDEN OF PROOF

A contractor seeking to prove liability for delay must establish: the extent of the delay; the contractor's harm resulting from the delay; and the causal link between the owner's wrongful acts and the delay. *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000); *see also Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1582, 40 Cont. Cas. Fed. (CCH) ¶ 76803 (Fed. Cir. 1995). "It is incumbent upon the plaintiffs to show the nature and extent of the various delays for which damages are claimed and to connect them to some act of commission or omission on defendant's part." *Wunderlich Contracting Co. v. U.S.*, 173 Ct. Cl. 180, 351 F.2d 956, 969 (1965).

In order to satisfy the first prong, extent of delay, the claimant must prove that there was a delay to the overall completion of the work, rather than delay to some mere element of the work. *See, e.g., R.P. Wallace, Inc. v. U.S.*, 63 Fed. Cl. 402, 409 (2004) (burden on contractor to "prove that the excusable event proximately caused a delay to the overall completion of the contract, i.e., that the delay affected activities on the critical path. … And it must also establish the extent to which completion of the work was delayed-it 'is entitled to only so much time extension as the excusable cause actually delayed performance.'"); *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000) ("the contractor must show that the government's actions affected activities on the critical path of the contractor's performance of the contract.").

With regard to causation, the claimant must prove "with reasonable certainty" the extent of unreasonable delay that resulted from defendant's actions. *Wunderlich Contracting Co.*, 351 F.2d at 968 (Indeed, "Broad generalities and inferences to the effect that defendant must have caused some delay and damage because the contract took … longer to complete than anticipated are not sufficient."); *see also Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1060, 39 Cont. Cas. Fed. (CCH) ¶ 76599 (Fed. Cir. 1993) (conclusory statements such as "if it had not been for this delay … we would have finished it six months earlier" is "legally insufficient to prove causation"); *R.P. Wallace, Inc.*, 63 Fed. Cl. at 409.

As a method for proving delay to overall project completion "with reasonable certainty" courts and boards have expressed a clear preference for critical path schedule analyses. *E.g., G.M. Shupe, Inc. v. U.S.*, 5 Cl. Ct. 662, 728, 32 Cont. Cas. Fed. (CCH) ¶ 72712 (1984) ("The reason that the determination of the critical path is crucial to the calculation of delay damages is that only construction work on the critical path had an impact upon the time in which the project was completed."); *U.S. ex rel. CMC Steel Fabricators, Inc. v. Harrop Const. Co., Inc.*, 131 F. Supp. 2d 882, 886 (S.D. Tex. 2000), aff'd, 61 Fed. Appx. 120 (5th Cir. 2003) (noting "[t]his method of analysis is the formal approach by courts and experts alike in determining the cause and extent of construction delays."). The reasoning behind the preference is that an interruption in one phase of the work does not always result in an increase in time necessary for total performance. In other words, some delays merely absorb available float in the project schedule, and do not result in delay to project completion. The CPM methodology simplifies the process of identifying delays that impact project completion: only construction work on the critical path has an impact upon the time necessary to complete the project. If work on the critical path is delayed, the eventual completion date of the project may be delayed. Conversely, delay involving work not on the critical path generally has no impact on the eventual completion date of the project.

Although some decisions of federal and state courts appear to accept proof of delay by other methods, at least one federal case held that even where not contractually required, anything less

than a CPM analysis fails to meet the required burden of proof. In Mega Construction Co. v. U.S., the contractor entered into a fixed-price construction contract with the United States Postal Service for the construction of a Post Office in Canoga Park, California. 29 Fed. Cl. 396, 405, 39 Cont. Cas. Fed. (CCH) ¶ 76564 (1993). The contractor was terminated, and filed suit seeking to convert its default termination into one for convenience, and alleging entitlement to compensation for 272 days of delay. Id. at 423. In its assessment of contractor's claim, the court noted the minimum evidence required to meet the contractor's burden as claimant: "In order for the court to be able to award damages to plaintiff for government-caused project delay along the critical path, the court must have before it evidence that establishes the critical path of plaintiff's project." Id. at 425-26. Although the court expressed its preference for a CPM analysis, it acknowledged that the contract did not require the parties to maintain or to rely on CPM schedules. Id. Despite the absence of a contractual obligation requiring the parties to maintain and prepare a CPM schedule for the project, or for proof of delay, the court essentially imposed that obligation, finding: "plaintiff failed to provide the court with any credible coherent analysis of critical path delay, leaving to the court the well-nigh impossible task of identifying, quantifying, and assigning responsibility for critical path delay." *Id.* The court held that the contractor was not entitled to an equitable adjustment for delay to any work item or project delay, concluding:
Without a critical path analysis the court cannot exclude the possibility that the contractor caused concurrent delay on the project. Plaintiff's charts are not sufficient to prove allocation between the parties or attribution to defendant. The court cannot rely on assertions of a contractor, not supported by a critical path analysis of the project, to award critical path delay costs. *Id.* at 435, 39.

TOTAL TIME THEORY CLAIMS; SPECIFITY OF EVIDENCE REQUIRED

Courts have repeatedly held that showing that the original schedule was not met, or that a delay occurred, is insufficient without an analysis showing causation and relation to the cause of the delay. "To show how the critical path of contract performance evolved over the life of the contract and how excusable delays impacted that path, a contractor, at a minimum, needs a reasonable 'as planned' schedule and an 'as built' schedule, which it can incorporate into an analysis to show 'the interdependence of any one or more of the work items with any other work items' as the project progressed." 1-A Construction & Fire, LLP, 15-1 BCA at 175, 557 (citing *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 428 (1993)).

A method that has routinely been found to be inadequate is the total time theory. "Under the 'total time theory,' the contractor 'simply takes the original and extended completion dates, computes therefrom the intervening time or overrun, points to a host of individual delay incidents for which defendant was allegedly responsible and which "contributed" to the overall extended time, and then leaps to the conclusion that the entire overrun time was attributable to defendant." D' 1-A Construction & Fire, LLP, 15-1 BCA at 175,556 (citing *Law v. United States*, 195 Ct. Cl. 370, 382 (1971)). The "[total time] theory of proving delay is insufficient to meet the contractor's burden to prove that government-caused delay actually delayed the overall completion of the project." *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110, 134 (2001), *aff'd*, 36 F. App'x 452 (Fed. Cir. 2002) (quoting *Mel Williamson, Inc. v. United States*, 229 Ct. Cl. 846, 852 (1982)).

A recent Board of Contract Appeals case, *French Construction, LLC v. Dept. of Veteran Affairs* 2022 WL 3134507, CBCA 6490 (CBCA 2022), again rejected the total time claim method, and highlighted the level of specificity required in proving damages for delay. Using their project manager, Mr. Ballew, as their expert in a claim for constructing a hospital corridor, French sought

over 400 days of delay. French discovered details that weren't on the design documents and had to wait for updated documents and a notice to proceed. The court agreed that this likely caused delay, but Ballew failed to show with specificity the "nature and extent" of the delay this caused – when French was able to start, the interaction of various activities, and whether related work which was delayed was on the critical path. Further, there were predecessor activities to this work, and Ballew failed to show how they overlapped with the discovered condition. The Court held that "[w]ithout this information, we have no way to quantify the delay attributable to the electrical wiring relocation and ensure that there were no concurrent delays caused by French Construction."

There was extensive testimony about other issues which delayed French at the beginning of the project, but no explanation of the duration of these issues and how they affected the critical path. Ballew alleged numerous design issues with the concrete foundation that had to be completed before the structural steel work could proceed, but didn't testify to details about the duration of such delays, or the specifics of why this delay was actually justified. The Court held that Ballew had failed to isolate delay attributable to the various issues and government errors noted, he had simply submitted a total time claim, and such "broad generalities and inferences" were "insufficient to carry French Construction's burden to prove compensable delay." *Id.*

LESSONS

The line of caselaw above leads to some clear lines that proving delay claims require:

- A critical path analysis may not be technically required if not specified in the contract, but is clearly the preferred method by courts;
- Regardless of method, courts uniformly require a detailed analysis of how the delaying issue actually impacted the critical path;
- Any such analysis has to identify with specificity the nature of any delay, the amount of such delay, and address contributing factors and concurrent delays, and start times and any predecessor activities in order for a court to award delay;
- The total time theory claim is not acceptable, and;
- Contractors should strongly consider using an outside expert in place of a project manager for the presentation of any such claim.

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LAWYER WELL-BEING WORKGROUPS ARE DETERMINED TO MAKE A DIFFERENCE

Katie Jo Johnson
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The importance of considering, and managing, one's own well-being is something that has gained more attention and focus since the recent global pandemic. But it has always been a prevalent issue with the legal community.

In 2016, the American Bar Association Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published their study of almost 13,000 practicing lawyers, which identified widespread issues with depression, stress and anxiety within the legal profession, along with a high incidence of problem drinking.[1] That same year, a Survey of Law Student Well-Being was released, which surveyed 15 law schools and over 3,300 law students, and made similar findings.[2] Taking these results together, it is undeniable that the legal profession carries an elevated risk for mental health and substance use

disorders. But the issue is actually broader than that; even though the majority of lawyers and law students do not have a mental health or substance use disorder, many still struggle with job satisfaction and well-being.

In response to these findings, a national task force was created to consider and report on the issue of lawyer well-being. The National Task Force on Lawyer Well-Being published their report in 2017: *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*.[3] The report identified three reasons to take action on the issue of lawyer well-being: (1) lawyer well-being contributes to organizational success, (2) lawyer well-being influences ethics and professionalism, and (3) promoting well-being is humanitarian. The report also made five recommendations of actions to take: (1) identify stakeholders and the role each of them can play in reducing the level of toxicity in the legal profession, (2) end the stigma associated with help-seeking behaviors, (3) emphasize that well-being is an indispensable part of a lawyer's duty of competence, (4) expand educational outreach and programming on well-being issues, and (5) change the tone of the profession through small steps.


Katie Jo

In October 2021, the Oregon House of Delegates passed a Resolution acknowledging that "the well-being of the legal profession is of integral importance to the OSB, the PLF, the OJD, Oregon Law Schools, Affinity Bars, Legal Employers, and the OAAP. These stakeholders have been working toward improving the well-being of the Oregon legal community and collaboration is necessary to achieve the goal of improving well-being." The Resolution recommended that all stakeholders convene a Conference of Stakeholders to explore the following areas: (1) informing well-being efforts using diversity, equity, and inclusion principles and values, (2) reducing stigma/shame and increasing help-seeking behaviors, (3) vicarious trauma within our profession, (4) lawyer education and law school practices, (5) regulatory and disciplinary practices that affect well-being, (6) well-being in the workplace and evolving legal culture, (7) law practice management, and (8) structural impediments to well-being including UTCRs, court timelines, and trial court administration.

The initial Conference of Well-Being Stakeholders took place in June 2022, and there are now three separate workgroups underway to cover the topics identified in the Oregon HOD Resolution: (1) Legal Culture/Law Practice Management Workgroup, (2) Regulatory/Structural Workgroup, and (3) Stigma and Vicarious Trauma Workgroup. Each of these workgroups is answering the call of the National Task Force on Lawyer Well-Being, as well as the Oregon State Bar, to make the changes necessary to improve the well-being of the legal profession.

This is an issue that impacts each of us, and we should all be interested in exploring how to get involved in this important work. If you are interested in participating in any of these workgroups, please contact Kyra Hazilla (https://www.osbplf.org/about-plf/staff/kyra-hazilla/) or Bryan Welch (https://www.osbplf.org/about-plf/staff/bryan-r-welch/).

Citations:

[1] P.R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10

J. ADDICTION MED. 46 (2016).
[2] J.M. Organ, D. Jaffe, & K. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).
[3] You can read the report in full here: https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf

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OREGON CONSTRUCTION LAW UPDATE 2022

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PERSONAL LIABILITY

LIABILITY OF PARTNER FOR ANOTHER'S USE OF CCB LICENSE: Defendant whose partnership held an Oregon Construction Contractors Board (CCB) license was not jointly and severally liable for breach of contract committed by distinct entity that used the partnership's CCB license. *Little v. Branch 9 Design & Contracting, LLC*, 317 Or App 639 (2022).


Gary

Defendant-Partner formed a general partnership with Co-Defendant in 2010, with the Partnership obtaining a CCB license that listed Defendant-Partner as the responsible managing individual (RMI). Following the Partnership's licensure, Co-Defendant began to complete construction projects through a separate entity (the LLC) in which Defendant-Partner had no ownership interest or participation level. The LLC, however, used the Partnership's CCB license, and Defendant-Partner knew of and approved of the Co-Defendant's performance of separate construction jobs through the LLC.

In March 2017, the LLC entered into a contract with Plaintiffs to perform residential construction work on Plaintiffs' property (the Project). Defendant-Partner worked on the Project for a week during the demolition phase, but he otherwise had no involvement with the Project. The following month, Plaintiffs terminated their contract with the LLC and thereafter sued Defendant-Partner, Co-Defendant, the Partnership, and the LLC for breach of contract and recovery of the advance payments that Plaintiff had made to the LLC.

While entering a judgment in Plaintiffs' favor, the trial court held that Defendant-Partner, as a general partner in the Partnership, was jointly and

severally liable for the damages caused by the LLC's breach of contract.

On appeal, Defendant-Partner argued that the LLC was a separate and distinct business entity from the Partnership, that Defendant-Partner was not an owner or employee of the LLC, and that Defendant-Partner neither participated in the formation of the contract with Plaintiffs nor received any payments in connection with the Project.

The Court of Appeals agreed with Defendant-Partner, holding that although OAR 812-003-0100(1) specifically prohibits an entity from performing work through the use of another's CCB license, Defendant-Partner's liability was determined by partnership law. Because there was no evidence that Defendant-Partner knew what was happening on the Project and did not authorize any of the actions of the LLC, he could not be jointly and severally liable for the LLC's breach, even though the LLC used the Partnership's CCB license to do Plaintiffs' work.

CONTRACT TERMS

CONTRIBUTION FOR HAZARDOUS MATERIALS REMEDIATION: Sellers of residential property were strictly liable for remediation costs associated with a prior release of hazardous materials, even though the sales contract stated that Buyers took title "AS IS" and with a release of all contingencies. *Rudder v. Hosack*, 317 Or App 473 (2022).

Sellers owned Property in Coos Bay, Oregon, from 1975 to 2013. Before converting to the use of natural gas in 2006, Sellers used an underground heating oil tank. Following the conversion to natural gas, Sellers decommissioned and drained the oil tank using a professional fuel pump.

Buyers purchased the Property from Sellers in 2013, and Sellers disclosed the existence of the oil tank before closing. In the sales contract, Buyers agreed that they were "purchasing the Property 'AS-IS,' in its present condition and with all defects apparent or not apparent." The sales contract further provided that Buyers "release[d] all contingencies . . . including the inspections in general and specifically the presence of an underground oil tank."

In 2016, a release of heating oil was discovered, and the Oregon Department of Environmental Quality (DEQ) sent both Sellers and Buyers letters informing them of their clean-up responsibilities with respect to the oil release. In particular, DEQ asserted that Buyers and Sellers were liable under ORS 465.255(1)(a)-(b), which states that an owner or operator of property at the time of the release of hazardous materials is strictly liable for the remediation and clean-up costs associated therewith.

Buyers then sued Sellers seeking a declaratory judgment that Sellers were solely responsible for the clean-up costs because the release occurred only during Sellers' ownership of the Property. In return, Sellers asserted claims for contribution and breach of contract against Buyers, arguing that Buyers breached the sales contract by suing Sellers for environmental liabilities it waived against Sellers in their contract.

The jury found that the release of heating oil occurred during Sellers' ownership period alone. As a result, the trial court held that the Sellers were strictly liable for the clean-up costs, despite the contradictory language in the sales contract.


Ryan

On appeal, the Court of Appeals analyzed the plain language of the sales contract. With respect to the contract's "AS-IS" clause, the court found the clause to be merely a warranty disclaimer that applied to Sellers' representations as to the condition of the Property. Thus, while the clause precluded a breach of warranty action, it did not prohibit Buyers' declaratory judgment action. Similarly, the court found that the release language operated only to waive Buyers' right to conduct an inspection of the oil tank.

Given that the language in the sales contract did not support Sellers' argument that Buyers had a duty to indemnify Sellers for any environmental liabilities, the Court of Appeals affirmed the judgment against Sellers.

INSURANCE

CAUSATION OF PROPERTY DAMAGE: Construction defects can serve as the efficient proximate cause of building damage for purposes of determining coverage under an insurance contract. *Silver Ridge Homeowners' Association, Inc. v. State Farm Fire and Casualty Company*, 2022 WL 787937 (D Or Mar 15, 2022).

Homeowners' Association maintained Property in Portland, Oregon, comprised of twenty-two buildings containing sixty-four residential units. Insurer issued an all-risks property insurance Policy to Homeowners' Association insuring the Property from covered perils.

The Property was originally constructed in the mid-1990's. Between 1997 and 2012, Homeowners' Association discovered frequent property damage in the form of water intrusion and dry rot at the Property's windows, roof, and siding. After Homeowners' Association obtained a building envelope condition assessment in 2012 identifying construction defects related to the Property's exterior wall assemblies, windows, and roofs, it hired Contractor to repair the Property's envelope system.

In 2018, following Contractor's completion of the repair work, Homeowners' Association obtained a second building envelope condition assessment for the Property, which concluded that Contractor defectively performed its repair work in 2012. It was at this time that Homeowners' Association realized the full extent of the pervasive damage to the Property, some of which originated from the original construction, and it tendered a claim under the Policy.

After Insurer failed to pay Homeowners' Association's claim, Homeowners' Association filed a breach of contract action against Insurer. Insurer then moved for summary judgment, arguing that the Policy did not cover Homeowners' Association's claim.

In determining whether the Policy covered Homeowners' Association's claim for property damage, the magistrate judge identified two threshold issues: (1) whether Homeowners' Association's claim was barred by the Policy's two-year suit limitations provision, and (2) whether the property damage was caused by a covered loss under the Policy.

To resolve the first issue, the magistrate judge applied the "discovery rule," which tolled the limitations period until Homeowners' Association, in exercising reasonable care, discovered or should have discovered the injury or loss covered by the Policy. Pointing to the widespread damage and Homeowners' Association's historical repair efforts, the court concluded that genuine issues of material fact existed to preclude summary judgment on this issue.

On the second issue, Homeowners' Association argued that the Property's damage was caused by a covered peril in the form of weather conditions, including wind-driven rain, whereas Insurer argued that defective construction work, an uncovered peril, caused the damage.
With multiple causes arguably contributing to the damage, the court explained that the relevant cause for determining coverage under the Policy was the "efficient proximate cause," or the "active and efficient cause that sets in motion a train of events which bring about a result without the intervention of any force, starting and working actively and efficiently from a new and independent source." If the efficient proximate cause was a covered peril, the resulting damage was covered under the Policy, even if another cause of the damage was specifically excluded. If the efficient proximate cause was an excluded peril, there would be no coverage.

The magistrate judge held that, under either cause, the Policy did not cover Homeowners' Association's claim. The Policy's "seepage or leakage" exclusion applied to the extent that the damage was caused by water-related weather conditions, and the construction defects exclusion applied to any damage caused by defective workmanship. The court granted Insurer's motion as a result.

To reach this holding, the court explicitly rejected Homeowners' Association's arguments that construction defects could not serve as the efficient proximate cause of the building damage, namely (1) that construction defects did not "set in motion" rain, (2) that construction defects did not independently damage the Property, and (3) that construction defects could not cause damage without rain. Accordingly, defective construction work can serve as the efficient proximate cause of property damage under an insurance contract.

STATUTORY INTERPRETATION/LAND USE

ADMINISTRATIVE STANDARDS: A municipal ordinance regulating housing development does not violate the statutory requirement for a clear and objective standard just because it contains terms that, in isolation, may be ambiguous. *Roberts v. City of Cannon Beach*, et al., 316 Or App 305 (2021).

Petitioners owned a 5,394-square-foot lot (the Property) in Cannon Beach, Oregon, and submitted an application to the City to construct a 2,712-square-foot residence on the Property. In reviewing Petitioners' application, the City applied its "oceanfront setback" regulation, which determines the minimum distance from the oceanfront that a building may be constructed on oceanfront property. Finding that the application did not satisfy the City's oceanfront setback standard, the City denied Petitioners' application. The Land Use Board of Appeals (LUBA) affirmed the City's decision.

Petitioners appealed to the Oregon Court of Appeals, arguing that the City's oceanfront setback regulation violated ORS 197.307(4), which requires municipalities to "adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing." To Petitioners, the oceanfront setback regulation did not meet the requirement for a "clear and objective" standard because some of the regulation's terms were capable of multiple meanings.

The Court of Appeals disagreed with Petitioners' view that, to satisfy the requirement for a "clear and objective" standard, none of the terms in a

regulation may be ambiguous when considered absent their context or the underlying purpose of the regulation. Instead, the court adopted LUBA's position that a regulation may provide for a "clear and objective" standard, even if it contains imprecise or ambiguous terms, so long as the standard is clear and objective within its appropriate context.

Petitioners also assigned error to LUBA's affirming opinion on the grounds that ORS 227.175(4) prohibits the application of the City's oceanfront setback regulation where its application has the effect of reducing the maximum density of development that is otherwise permissible by law. The Court of Appeals analyzed the plain language of the statute and determined that it "did not intend to preempt the ability of local governments to apply clear and objective standards, like setbacks, that have purpose other than reducing density but nevertheless have the effect of reducing the floor area" below the maximum otherwise allowed by law.

Perhaps most importantly, the Court of Appeals agreed with the City and its amicus curiae that, where the Oregon legislature "has enacted an ambiguous provision that, under one construction, would have the effect of divesting local governments of their ability to regulate an area that has long been within local control," home-rule principles overcome the argument that the legislature intended the statute to have broad or preemptive meaning. Accordingly, the Court of Appeals affirmed.

JUDICIAL DEFERENCE/ISSUE PRECLUSION: A municipality was not precluded from denying a permit application that provided for construction within an oceanfront setback, even though the municipality had approved such construction ten years earlier. The municipality's previous approval was also not entitled to deference, as no plausible interpretation of the oceanfront setback ordinance supported its prior approval. *Griffin Oak Property Investments, LLC v. City of Rockaway Beach*, 318 Or App 777 (2022).

Homeowners owned oceanfront Property in Rockaway Beach, Oregon, and applied for a building permit to construct a new home on the Property in 2008. The City Planner reviewed the permit application and applied the City's oceanfront setback ordinance, which required a minimum oceanfront setback that would be calculated by taking the average depth of "all existing yards abutting the oceanshore for a distance of 200 feet in either direction from the parcel's property lines." The City Planner determined that an oceanfront setback of 30.3 feet from the Oregon Coordinate Line, which is established by statute, applied to Homeowners' Property.

Homeowners, however, submitted a site plan showing only a 20-foot oceanfront setback, and the City nonetheless approved permit application. As built, the most oceanward point of the newly constructed house was its deck, which measured 25.4 feet from the Oregon Coordinate Line.

After a winter storm destabilized Homeowners' deck in 2018, requiring it to be rebuilt, they applied for another building permit from the City. When the City failed to issue a final decision on the permit application within the 120-day statutory period, Homeowners filed mandamus proceedings seeking approval of their application.

In the trial court, the City argued against approval of the Homeowner's application on the grounds that (1) the 30.3-foot oceanfront setback calculated by the City Planner in 2008 was incorrect and should have been 60.6 feet, and (2) even if the 30.3-foot oceanfront setback was correct, Homeowners now were seeking to rebuild a deck closer to the ocean than allowed. Conversely, Homeowners argued that the City was precluded from deviating from its 2008 approval. The trial court sided with Homeowners and ordered approval of the application without any conditions, and the City appealed.

The Court of Appeals, after initially confirming the 30.3-foot oceanfront setback calculation, held that no deference was owed to the City Planner's 2008 interpretation of the oceanfront setback ordinance because no plausible interpretation of the ordinance would have allowed the house and deck to be built where they were.

The court then analyzed whether the City was precluded from withholding approval of Homeowners' application because it had previously approved construction with the 30.3-foot setback. There, the Court of Appeals focused on the fact that the 2018 permit application was completely distinct from the 2008 permit application and did not qualify as a continuation of the original permit review. Thus, the City was not precluded from denying the application on those grounds. Moreover, neither Homeowners' house nor deck qualified as a lawful prior nonconforming use, as the location of the deck was unlawful when it was constructed in 2008. For those reasons, the Court of Appeals reversed and remanded.

NEW ADMINISTRATIVE REGULATIONS

Rules to Address Employee and Labor Housing Occupant Exposure to High Ambient Temperatures, OAR 437-002-0156 (Oregon OSHA Administrative Order 3-2022).

On May 9, 2022, Oregon Occupational Safety and Health Division (OSHA) revised OAR 437-002-0156 to adopt new, permanent rules aimed at protecting workers from excessive heat on the job. The new rules apply to outdoor workers and, where there is no climate control, indoor workers. The new rules, which took effect on June 15, 2022, and do not apply to employees working from home, require Oregon employers to:

- Provide access to shaded areas and cool, potable drinking water for employees when temperatures equal or exceed 80 degrees;
- In the event of high heat, implement one or more of the following practices, and communicate such practices in a language readily understood by the employee: (a) regular communication with an employee working alone, (b) a mandatory "buddy system," or (c) other equally effective means of observation or communication;
- Increase rest breaks to include at least one ten-minute break every two hours when temperatures equal or exceed 90 degrees; and
- Provide annual training to supervisors and employees, and create and implement acclimatization plans, a heat illness prevention plan, and an emergency medical plan.

Rules to Address Employee Exposure to Wildfire Smoke, OAR 437-002-1081 (Oregon OSHA Administrative Order 4-2022).

On May 10, 2022, Oregon OSHA revised OAR 437-002-1081 to adopt new, permanent rules aimed at protecting workers from exposure to wildfire smoke while on the job. The new rules, which took effect on July 1, 2022, and do not apply to employees working from home, require Oregon employers to:

- Provide filtering respirators for workers to voluntarily use once the air-quality index (AQI) reaches 101;
- Provide administrative or engineering controls to reduce smoke exposure, such as using an HVAC system to filter smoke;
- Require the use of respirators once the AQI reaches 251 and ensure that all employees use respirators at 500 AQI;
- Monitor employees' exposure to wildfire smoke when employees are, or are likely to be, exposed to an AQI of 101; and

- Provide information and training before employees are exposed.

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CHALLENGES PRESENTED BY "NEW" 2020 RETENTION LAWS AND HOPE FOR FUTURE CLARITY

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Anyone familiar with the construction industry knows that retainage – or, money held back from payment until a later time – is a tool project owners and general contractors have long used to protect against contractor non-performance or other project risks. By contractually agreeing to hold back a portion of the money due to a contractor (typically from a progress payment) until final completion, a project owner or general contractor can provide incentive for a downstream contractor to perform its contractual obligations throughout the project until the very end, when the money is then released. Until January 2020, whether and how to withhold retainage could largely be determined by the parties to a construction contract.

As most Oregon construction lawyers know, that all changed in January 2020 when new laws went into effect impacting the treatment of retainage on private and public construction projects over $500,000. For all construction projects in Oregon – private and public – entered into on or after January 1, 2020 with a price of more than $500,000, ORS 279C.570(2) and ORS 701.420(2)(b) *require* an owner, general contractor or subcontractor to hold the amounts deducted as retainage into an interest-bearing escrow account. The interest on the retainage accrues from the date the payment request is made until the date the retainage is paid to the contractor or subcontractor to which it is due.


Stephanie

Regardless of what you think about the initial intent behind these laws, most attorneys and members of the construction industry can agree that their implementation has created some confusion. For example, neither laws expressly say for which party the retention is being held. Most people in the construction industry and most attorneys agree that – based on the laws' purpose and intent – it only makes sense that the retention is payable to the party that has already earned it through performing the work that is the subject of the progress payment. But again, that detail is not clear.

As another example, the requirement to keep the retention in an interest-bearing *escrow* account can be difficult to implement. Escrow accounts are not easy to establish or administer for retention being withheld on a construction project; neither the parties using the account nor the financial institution serving as the account holder like this requirement. Finding a banking institution to provide this type of service is challenging as it is atypical and not a service banks usually provide. In addition, requiring an escrow process triggers specific duties of an escrow agent and triggers administration processes that may not be appropriate (or needed) for all construction projects, especially those of smaller scope and scale.

For public projects, one way some public agencies are adjusting to these "new" laws is to simply ask the

contractor whether they want retention funds to go into an interest-bearing account under ORS 279C.560(5), or an escrow account under ORS 279C.570(2). Specifically, ORS 279C.560(2) authorizes a "contracting agency that holds moneys as retainage under ORS 279C.570(7) [to either]:

(a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS 279C.570; or

(b) At the election of the contractor, pay the moneys to the contractor in accordance with subsection (4) or (5) of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services."

ORS 279C.560(5) states that, "If the contractor elects, the contracting agency shall deposit the retainage as accumulated in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency." So, agencies are giving the contractor a choice, and it has been reported that in many cases contractors opt for the former, which means the specific escrow requirement can be ignored.

On the private side, owners and contractors of all tiers have worked together to find creative solutions to these issues. For example, we have seen parties agree to structure progress and final payments in a way that makes withholding "retention" unnecessary. We are also aware of parties entering into contractual addenda that change the legal requirements for withholding retention or at least modify the administration details (of course whether those addenda are actually legally enforceable is a topic for another article!). As Jeremy Vermilyea – an experienced construction attorney and arbitrator – has recently observed, more often than not, the way parties are getting around these "new" laws' requirements is simply by choosing not to comply with them – even after receiving legal advice to the contrary.

In an effort to make implementation of these laws easier and more palatable to both owners and contractors, several seasoned Oregon construction attorneys have come together and formed a working group to discuss these issues and make recommendations for future legislative action to clean up the requirements and drafting of these new laws. The working group is comprised of local construction attorneys, representatives from trade organizations, and industry service providers who all want to see this issue managed in a more pragmatic way.

This group's current plan is to propose new legislation during the next legislative session, and specific draft language is now being considered by legislative counsel. At its root, the proposed new system would abandon retention requirements and instead substitute a retention bond program, much like the program used in Washington State. So far, there appears to be good consensus from all stakeholders on this new framework, which is promising. At the end of the day, the goal is to come up with laws that work for everyone at all levels of the contracting chain so that projects are built in a way that is fair and cost effective across the board.

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Thanks to our authors!

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