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Will A Surety Doing Business In Oregon Be Assessed Punitive Damages For Using Bad Faith Settlement Practices?

INTRODUCTION

In recent years, sureties doing business in Oregon have become concerned about the possibility of bond claimants bringing suits alleging bad faith settlement practices and seeking an award of punitive damages. This concern was touched off, at least in part, by the decision of the California Supreme Court in Royal Glohe *Ins. Co. v. Superior* **Court.** *infra.* With theoverruling ofthiscase a few months ago, thequestion arises whethersuretiesin Oregon need to be concerned about tort suits by bond claimants and the possibility of punitive damages awards. The following discussion focuses first on leading state court decisions from California. Attention is then directed to cases from other western states. The discussion concludes with a review of pertinent Oregon statutory and case law.

DISCUSSION

Leading Cases From **California**

In *Royal* Glohe *Ins. Co. v.* Superior *Court*, ***33*** Cal 3d 880, 592 **P2d** 329, 153 Cal Rptr 842 (1979) *("Royal* Glohe"), the California Supreme Court held that a private third party claimant could sue an insurer for violating the provisions of the Insurance Code prohibiting unfair claims settlement practices. Id., 153 Cal Rptr at 845. Royal Glohe involved a personal injury action against. among others, a food market and its liability insurer. *Id.* at 842-843. The reasoning of Royal *Globe* was subsequently extended to other types of insurance, e.g., an employee's action against the surety of **a** self-insured employer for bad faith refusal to pay worker's compensation benefits, see Hetance *v. Transport Ins.* Co.. 188 Cal App 3d 406, 232 Cal Rptr 803 (1986) and an obligee's claims against a surety for breach of the implied covenant of good faith and fair dealing and unfair claims settlement practices, see General *Ins.* Co. *v. Mammoth* Vista *Owners Ass'n*, 174 Cal App 3d 810, 220 Cal Rptr 291 (1985) (*"General Ins."*). Both *Royal Globe* and *General Ins.*, are discussed in greater detail, *infra.*

Earlier this year the California Supreme Court overruled Royal *Globe*, albeit prospectively. See *Moradi-Shalal v.* Fireman's Fund *Ins. Cos.*, ___Cal 3d___ 758 P2d 58, 250 Cal Rptr 116 (1988). What effect will *Moradi-Shalal* have on Royal *Globe's* progeny such as *General Ins.*? More paticularly, if and when the issue arises in this state, will Oregon courts hold sureties liable to obligees, and perhaps subcontractors, for bad faith claims settlement practices? Further, **would** such liability flow from the breach of the implied covenant of good faith and fair dealing or from a violation of ORS 746.230, Oregon's unfair claims practices statute?

As was previously stated, the opinion in General Ins. built upon the holding in Royal Glohe that private third party claimants have a right of action against liability insurers for bad faith claims settlement practices. Before discussing General Ins., however. it may be helpful to review the Royal Glohe decision itself.

Royal **Globe**

In Royal Glohe the California Supreme Court confronted the issue whether an individual who is injured by a negligent insured may sue the insured's insurer for allegedly violating provisions of California's Insurance Code. under the state's Unfair Practices Act. Id., 153 Cal Rptr at 844. The plaintiff in Royal *Globe* injured herself in a fall at a supermarket. Id. The complaint alleged that the insurer violated two provisions of the Insurance Code, §§ 790 et seq., Unfair Practices Act (hereinafter referrred to in its entirety as simply "the act"), by refusing to engage in good faith settlement, even though the insured's liability was reasonably clear, and by advising plaintiff not to seek the services of an attorney. *Id.* at 845.

The insurer demurred to the complaint, asserting that **a** third party claimant had no standing to bring a private cause of action under the act and moved for judgment on the pleadings on the grounds that the California Insurance Commissioner had the exclusive power to enforce the provisions of the act which plaintiff alleged were violated. *Id.* The trial court overruled the demurrer and denied the insurer's motion, whereupon the insurer sought a writ of mandate. *Id.*

On appeal, the California Supreme Court first determined that a private plaintiff does have a right of action under the act. *Id.* This determination was based on language proclaiming that "the act shall not absolve an insurer from civil liability or criminal penalty under the laws of this State arising out of the methods, acts **or** practices found unfair or deceptive." ***Id.*** While this language does not expressly provide for a private right of action, it also does not explicitly foreclose the possibility of such an action. Since the language quoted above does not expressly limit its reference to potential civil liability to acts violating the other laws of California, and since prior appellate court decisions had found that a private right of action existed under the act, the California Supreme Court concluded that "private litigants may rely upon the proscriptions set forth in the act as a basis for the imposition of civil liability upon an insurer." *Id.* at 846.

Further, the court thought that the legislative history seemed to suggest that the legislators realized that the act might be construed to create a private right of action in

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third party plaintiffs. *Id.* at 848. Therefore, since parts of the act referred to both claimants and insureds, the court insureds, had a right of action under the act. *Id.* at 847. concluded that private third party claimants, as well as

The California Supreme Court next determined that **a** single act, as opposed to a pattern of unfair claims settlement practices, would suffice to create a violation. *Id.* at 849. This determination flowed from the conclusion that private parties could bring civil actions for violations of the act:

> If, as we conclude, the act affords a private party, including **a** thrid party claimant. a right to sue an insurer for violating subdivision (h), it is inconceivable that the Legislature intended that such a litigant would be required to show that the insurer committed the acts prohibited by that provision "with such frequencey as to indicate **a** general business practice." There would be no rational reason why an insured or **a** third party claimant injured by an insurer's unfair conduct, knowingly performed, should be required to demonstrate that the insurer had frequently been guilty of the same type of misconduct involving other victims in the past.

Id. at 849.

Finally, after holding that a private right of action existed under the act, for both insureds and third party claimants, for single violations of the act, the court held that any such plaintiff could not sue both the insurer and the insured in the same lawsuit. ***Id.*** This prohibition was necessary "to prevent the prejudicial use of evidence of liability insurance in **an** action against an insured" and to avoid seriously hampering the defense of the insured "by discovery initiated by the injured claimant against the insurer." ***Id.*** at 849-850.

General Ins.

In 1985, some six years after the decision in ***Royal Globe,*** the California Court of Appeal, Third District, addressed the question of a surety's liability for compensatory and punitive damages for alleged unfair claims settlement practices in violation of the act and in violation of the implied covenant of good faith and fair dealing. ***General Ins., supra.*** The issue arose from the surety's appeal of a claimant's judgment for some $70,000 in compensatory damages and $150,000 in punitive damages. ***General Ins.,*** 220 Cal Rptr at 296-297. Punitive damages had been awarded upon the jury finding that the surety had tortiously failed to attempt **a** good faith settlement with the claimant. ***Id.*** The claimant homeowners association was obligee on **a** statutorily mandated completion bond given by the surety to insure its principal's performance of a construction cuntract for **a** commons recreational facility. *Id.* at 293. The claimant alleged two theories of liability: (1) breach of the implied convenant of good faith and fair dealing and (2) violation of the act. *Id.* at 292. *Id.* at 293-294. Despite repeated notice that its principal had failed to perform the construction contract, the surety steadfastly refused to pay the amount of the bond, offering instead to settle for **a** fraction of this amount. *Id.* Following trial, the surety finally paid over the full amount of the bond. ***Id.*** at 295.

On appeal, the surety contended first that it was not subject to liability in tort for breach of the implied convenant of good faith and fair dealing **or** for breach of the statutory duties under the act. *Id.* at 297. In disagreeing. the court stated:

> We note initially it is necessary for us to decide as to each theory whether the obligee under a surety bond may sustain a tort action against the surety. The actionable wrong contained in . . . [the act] . . . is merely **a** codification of the tort of breach of the implied duty of good faith and fair dealing as applied to insurence.
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> Under common law, every insurer has an implied-in-law duty to act fairly **and** in good faith in handling the claim of an insured. . . . Tortious violation of that duty may occur in several ways, including failure "without proper cause, to compensate its insured for **a** loss covered by the policy" . . . ; failure to properly investigate a claim, . . ; and failure to accept **a** reasonable settlement within policy limits . . . . In establishing "unfair claims settlement practices," . . . [the act] . . . sets forth standards of conduct substantially similar to those at common law. . . . Accordingly, we shall only consider the question of whether **an** action may be brought against a surety for violation of the Unfair Practices Act.

Id. at 297.

In considering **a** surety's liability under the act. the court first made the threshold determination that **a** suretyship was **a** class of insurance and therefore covered by the act. *Id.* at 298. Next the court considered the argument that a surety cannot be held liable beyond the express terms of its contract. *Id.* at 299. In rejecting this argument the court stated: "Under common law, an insurer who breaches the duty of good faith and fair dealing may be held liable in tort ***beyond*** the limits of the policy." *Id.* The surety also contended that obligees are limited to one remedy under the bond; where they sue to obtain their rights under the bond, they have "elected" a remedy amd have no right to an

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addtional tort remedy. Id. at 300. The court noted that here the obligee was suing for breach of the surety's common law and statutory duties to deal with the obligee fairly and in good faith, such breach occuring after the surety's contractual obligation had already become fixed and due. Id. at 301. Thus, in rejecting the surety's election of remedies argument, the court stated: "Mammoth's [the obligee] actions arose out of separate obligations and separate operative facts. Mammoth did not make an election of remedies but pursued two separate causes of action to successful completion." Id. Accordingly, the court affirmed the obligee's award of punitive damages. Id. at 302.

Apparently as a result of the holding in Royal Globe. the surety in General Ins. did not argue that, even if the act applied to sureties, it did not create a right of action for private plaintiffs. Nor did the surety, apparently because of the surety-obligee relationship, question the Royal Globe determination that third party claimants have a pnvate right of action under the act. The latter Royal Globe determination was simply never discussed by the court. And, even had the surety had subsequently sought to overturn the first Royal Globe determination. i.e., that a private right of action exists under the act, this would not necessarily have lead to the jury's award of punitive damages being overturned. After all, the *General Ins.* court noted that *the act* merely codified thecommon law implied covenant of good faith and fair dealing which applies to every insurer. Id. at 297. Presumably, then, the obligee's award of punitive damages could have been upheld solely on the basis of the surety's breach of the implied covenant of good faith and fair dealing.

Moradi-Shalal

Moradi-Shalal was decided just this past August. In this case a third party personal injury plaintiff brought a bad faith failure to settle action against the defendant's liability insurer. Id., 758 P2d at 60. Following a lengthy survey of sister-state opinions and a discussion of learned commentary. California legislative history and California developments subsequent to Royal Globe — all tending to show that the drafters of acts such as California's envisioned only administrative enforcement in order to avoid a multiplicity of private actions and escalating settlement demands, the California Supreme Court in *Moradi-Shalal* held that Royal Globe was wrongly decided in allowing *anyone* a private right of action under the act. Id. at 68. Thus, the California Supreme Court held that the provisions of the act were subject only to administrative enforcement by the California Insurance Commissioner. Id. Basically, the court in Moradi-Shalal found that *Royal Globe* created a private right of action which was never intended by the legislature and which had lead to a plic y of suits and coerced settlements. *Id.* at . As a result, the California Supreme Court held that *Royal Globe* was overruled i — as of the date th pinio became final. e e would no longer be a private right of ac or s seq ntly filed suites alleging violations of the act. *Id.* at 68.

Application of M ra Shalal To General Ins.

To the extent that the surety's liability in *General Ins.* v based upon a pri te righ of acti for riol tions of the act, *Moradi-Shalal* indicates that future obligees will no longer be able to b g pr ti s for ti of the act. l stead obligees will have to base their tort actions on the surety's c la i ip i d covenant f od faith and fai ling. As ted at this imp t was expressly pi d th t of Appeal in *General Ins. I* at 297.

Moradi-Shalal may ha greater impact. is will l in part upon o many s, i.e., t t or pp attempt t g l ith settlement actions against sureties. To the extent that such su e or s pli ie s are based upon a *R yal Globe* typ of third party private a i der the provisions of a state's *unfair claims* ttl t l isla io *Moradi-Shalal* y prove to be persuasive authority that no such third party private right of action exists. Clearly, as to priv t i h of i d C lif i's act, *Moradi-Shalal* is l authority.

D r will now turn to other l itl settlement cases brought against sureties in l er jurisdictions.

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In *Szarkowski v. Reliance Insurance Co.*, 404 N.W.2d 502 (ND , a t t brought it g t a construction contractor's surety, alleging that it had acted unreasonably l i bad fa itl in li c l the t co t tor s l i for npaid amou t for rock li g on tl t ti t cts. *Id.* t 505. The *complaint* asserted liability based on ol ti f the act and in tort. *Id.* pe i the al court's r sal of its ac the subcontractor disavowed its statutory claim and l that it w relying on North Dakota's Unfair Clair t ly l " d fi " th t's l ti s *Id* t l. Accordingly, the North k Supreme Court expressly did not decide whether a private right of ti existed under the North Dakota act. *Id.*

A p tly as id i t ii ing l th N th Dakota's act could be used to "refine and define" as surety's common law ties the c first sidered whether sureties were covere l the a t. *Id.* Citing *General Ins.*, and agreeing with tl nalysis therein, the court held that th N th D l t act did indeed apply t th t d before it. *Id.* t 505. Regarding pl i tiff's o

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action, the court held that the subcontractor was an intended claimant on the principal's bonds and that it thus stood in substantially the same relation **as** any insured to its insurer. Id. "We conclude, therefore, that Reliance owed Szarkowski **a** similar duty of good faith and fair dealing in handling its claim and that Szarkowski has a right to bring an independent tort action against Reliance for breach of that duty." Id. 505-506. Not surprisingly. the court found that the subcontractor had raised **a** valid claim in tort which required **a** trial on the merits. Id. Given the subcontractor's reliance solely on its tort claim, the North Dakota Supreme Court did not find it necessary to discuss the trial court's conclusion that even if North Dakota's Unfair Practices Act applied to defendant, no private right of action was conferred thereunder. Id. at 505. The court went no farther than to find that the subcontractor, as **a** third-party beneficiary and intended claimant on the bonds, stood in relationship with the surety analogous to the insurer-insured relationship and that both were governed by a similar duty of good faith and fair dealing in claims handling. Id.

The court's reasoning in *Szarkowski* did not rely upon, indeed did not even cite, the holding in Royal *Globe*. The California opinion which the court found persuasive **was** General Ins., and then primarily as authority for the proposition that sureties are to be treated like other insurers under the state's unfair practices act. Consequently, *Moradi-Shalal* should have no impact on subsequent decisions using a *Szarkowski*-type analysis.

Farmer's Union Central ***Exchange.*** Inc. *v. Reliance* Insurance Co., 675 F Supp 1534 (1987) was **a** second North Dakota case arising out of the actions of the same general contractor involved in the Szarkowski case, supra. In this case the federal district court, after noting that the North Dakota Supreme Court in *Szarkowski* had expressly declined to rule on the existence of **a** private right of action under the North Dakota Claims Practices Act, held that since North Dakota's act most resembled the acts in states where no private right of action had been found, North Dakota would similarly find no private right of action, if and when the issue should arise. *Id.* at 1537.1538.

The plaintiffs in Farmer's Union *Central Exchange, Inc.* also asserted a common law tort claim, much as did the plaintiff in *Szarkowski*. Id. at 1535. In this regard. the district court held that there were two elements necessary to be proved in order for plaintiffs to prevail: (1) an absence of a reasonable basis for denial of the policy benefits and ***(2)*** knowledge that the conduct is unreasonable, or reckless disregard for the fact that the conduct is unreasonable. Id. at 1538. Since the evidence demonstrated that the surety had **a** reasonable basis for refusing to pay plaintiffs claims, the court ordered judgment in favor of the defendant. Id. at 1542.

A Case From Montana

K-W Industries *v.* National Surety *Corp.*, 754 P2d 502 (Mont 1988) involved **a** subcontractor on **a** federal construction project suing the general contractor's surety for bad faith settlement practices. Id. at 503. The Montana Supreme Court's decision. while consistent with the California and Dakota cases. displayed less refined reasoning. Although the opinion is rather brief and not crystal clear, it appears that the Montana claims practices act "defines" what is actionable in a suit based upon the breach of the common law implied covenant of good faith and fair dealing. Certainly. the Montana court found that sureties were covered by Montana's claims practices act. Id. at 504-505. And the court also found that sureties were similar to other insurers in that they owed a common law duty of good faith to claimants as well as insureds. Id. What the court did not specify was whether a claimant had both an independent common law cause of action and a private cause of action under Montana's claims practices act.

However, the K-*W* case did cite to an earlier Montana decision wherein it was held that the Montana claims practices act *could* form the basis for **a** civil suit if an insurer violated the act's provisions. *Klaudt v. Flink*, 658 P2d 1065 (1983). The holding in *Klaudt* cited. but did not rely upon, *Royal Globe*. Accordingly, it would seem that neither *Klaudt* nor *K-W Industries* nor their progeny would necessarily be affected by the reasoning in *Moradi-Shalal*.

Oregon Law

ORS 746.230 is Oregon's version of the Unfair Claims Practices Act. It is similar in most respects to the uniform legislation from other states. However, civil penalties for violations of Oregon's act, provided for in ORS 731.988, specifically require payment of damages to the state treasury. Neither ORS 746.230 nor ORS 731.988 suggest that the legislature intended there to be **a** private right of action under the Oregon act.

In Farris *v. United States Fidelty & Guaranty Co.*, 284 Or 453, 587 P2d 1015 (1978), the Oregon Supreme Court was faced with **a** liability insurer's appeal from an award of emotional suffering damages and punitive damages to the appellant's insured. Id. at 455. The insurer had allegedly denied that its policy covered the insureds. Id. In its discussion of ORS 746.230, the Oregon Supreme Court found that violation of the act's provisions ***did*** *not* constitute the basis for a tort suit against the insurance company:

> There is nothing to indicate that the legislature intended, when it prohibited certain claims settlement practices in ORS 746.230, that actions for breach of insurance contracts would be transformed, in all of the covered instances. into

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> tort actions with a resulting change in the measure of damages. The statutes express no public policy which would promote damages for emotional distress. Concern about the insured's peace of mind does not appear to be the gravamen of the statutory policy.

Id. at **458.**

As to whether an insured could sue an insurer for the latter's alleged breach of the common law duty of good faith and fair dealing, *Farris* left this an open question in Oregon:

> This court never decided whether a cause of action for failure to settle within the policy limits is one in contract or one in tort. . . .
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> Assuming. but not deciding. that a cause of action for failure to settle within **the** policy limits is one in tort, it is **our** opinion that the rationale of such an action has no aplication to the present situation and that the present action is not one in tort.

Id. at 459-460.

In addition, the Oregon Supreme Court in Farris also found that punitive damages were not recoverable for violations of ORS 746, Id. at **467.** This conclusion was based upon the civil penalties imposed by the legislature under ORS **731.988:**

> In doing so, it did not provide for punitive damages. **We,** therefore, conclude that because it was writing on a clean slate, the legislature did not intend that punitive damages result bacause of the public service character of the relationship. It would, therefore, be inappropriate for this court to use further civil penalties for the accomplishments of the same purpose.

Id. at **467.**

The fact that *Farris* found no basis for a tort suit when the provisions of ORS **746.230** are violated, coupled with the civil penalties payable only to the state under ORS **731.988,** leads to the conclusion that there is no private right of action under ORS **746.230.** Thus, since Oregon never followed *Royal Globe*, the impact of *Moradi-Shalal* in Oregon would seem to be minimal, if not nonexistant. Even though it seems that Oregon courts will not allow an insured to bring an action against its insurer solely on the basis of the Oregon unfair practices act, and even more would not allow a third party to do so, this is not a complete answer.

Recall that General *Ins.* equated a private right of action under the California act to a common law action against the insurer for its violation of the implied covenant of good faith and fair dealing. *Moradi-Shalal* will affect General *Ins.* only to the extent that the latter opinion and its progeny rely upon a plaintiff's private right of action under the California act. *Moradi-Shalal* says nothing about the right of **an** insured or a third party **to** bring a common **law** action against an insurer. The availability of the latter action depends upon whether the jurisdiction in question extends the notion of an implied covenant of good faith and fair dealing to insurance contracts and, in particular, surety contracts.

In Oregon, **a** number of cases suggest that **an** insured might in certain actions be able to bring a tort action against its insurer, but not for the latter's breach of the implied covenant of good faith and fair dealing in claims settlement. For instance, in *Groce v.* Fidelity General Insurance, 252 Or **296, 448** P2d **554** (1969), the Oregon Supreme Court stated:

> The right to expect one's insurer to exercise good faith in the settlement of claims is a valuable contract right. The insurer reserves absolute control over negotiation and litigation. The insurer owes **a** duty to exercise this control in good faith to protect the insured. [citation to **40** ALR2d **168** (1955)] Even if the **insurer's** breach of its reciprocal obligation of good faith may be said for certain purposes to be tortious, the cause of action arising from such a breach is one that affects the insured in his property, **as** distinguished from his person, and so ought to be as capable of assignment and survival as any other contract right.

Id. at 302-303

Groce involved actions for wrongful death and personal injuries brought against the insured. *Id.* **at 300.** The suits were initiated after the insurer failed to **settle** for the policy limits. Id. at 301. Plaintiffs had previously informed the insurer they would bring an action for excess liability if the insurer failed to settle in good faith. Id.

The suits resulted in verdicts greater than the policy limits. Id. at **302.** Plaintiffs then got **an** assignment from the insured for his cause of action for failure to settle and then brought suit against the insurer. Id. at **302.** The resulting verdicts in favor of plaintiffs and against the insurer were affirmed on appeal. ***Id.*** **312.**

Groce does not establish that the insured's cause of action against the insurer is one in tort. It does establish, though, that Oregon recognizes an implied covenant of good faith and fair dealing in insurance contracts and, further, that a third party can **sue** for breach of its implied

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covenant when the third party has received an assignment of the insured's claim. *Id.* at 302-303.

In another Oregon case, the Oregon Supreme Court refused to decide one way or the other whether there exists in this state an action in tort for breach of the insurer's duty of good faith and fair dealing when dealing with its insured. *Santilli* **u.** *State Farm Insurance Co.*, 278-Or 53, 61-63, 562 P2d 965 (1977). In *Santilli* the insured's wife alleged that the insurer's actions amounted to bad faith in refusing to settle under a life insurance policy. The Oregon Supreme Court stated:

> In cases involving the insurer's duty to pay under policies for theft, fire, health. disability or life insurance. the unique relationship which gives rise to the special duty of liability insurers to attempt to settle within their policy limits does not arise. The insured, or his beneficiary, is not subject to the imposition of excess liability, and his rights and responsibilities are limited to those set forth in his contract.

Id. at 62.

Taken together, *Groce* and *Santilli* suggest that Oregon courts would recognize breach of an insurer's implied covenant of good faith and fair dealing as a *tort* only in those instances where the breach might lead to added liability for the insured. This conclusion finds some support in a recent case decided by the Oregon Court of Appeals, *Bollam v. Fireman's Fund Insurance* Co.. *76* Or App 267.709 P2d 1095 (1985). There the insureds were in an automobile accident clearly caused by their own negligence. *Id.* at 269. The insurer began making monthly payments to the injured driver of the other car but did not attempt to exact a settlement. *Id.* After paying out nearly half of the $100,000 benefits under the liability policy, the insurer finally attempted to get the injured driver to settle for **a** lump sum payment of the remaining policy benefits. *Id.* Following **a** trial court verdict for plaintiff, the insurer paid up to the policy limits, with the insureds contributing $35,000 of their own funds in order to meet the judgment. *Id.* Thereafter the insureds brought an action against the insurer for negligence. *Id.* On appeal, the verdict in favor of the insureds was affirmed. *Id.*

For purposes of this discussion, the pertinent portions of *Bollam* appear at 76 Or App 270. There the court discussed the insurer's argument that it could not be negligent under Oregon's claims practices act because it had attempted to comply on good faith with the requirements of ORS 746.230. In rejecting the argument that compliance with ORS 746.230 is a complete defense, the court noted that plaintiffs theory was that the insurer had handled the case negligently. *Id.* at 270-271. Regardless of whether the jury had based its award on the insurer's alleged bad faith or negligence, the Court of Appeals held that it was not erroneous for the trial court to have sent the case to the jury. *Id.*

Bollam, then is a case where the insureds. after incurring liability in excess of their policy limits, sued their insurer in tort. It is the type of case wherein *Groce* and *Santilli* suggested there might be tort liability for insurers.

A case which is of less recent vintage, but more direct in its language. is the Court of Appeals' opinion in *Employer's Fire Ins.* Co. **u.** *Love It Ice Cream Co.*, 64 Or App 784, 670 P2d 160 (1983). There the insured counterclaimed against its insurer for the latter's alleged bad faith practices when the insurer initiated litigation to determine the extent of its liability for coverage under the policy. *Id.* at 786. The insured based its bad-faith-refusal-to-settle counterclaim on an alleged violation of ORS 546.230. *Id.* at 790. The Court of Appeals stated:

> However. the violation of ORS 746.230(1)(f), which requires insurers to settle their claims promptly and in good faith where their liability is reasonably clear, does not give rise to a tort action. ... [citations omitted] ... Therefore, the question is whether Oregon has recognized the common law tort of bad faith for an insurer's refusal to settle a claim by its insured.
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> Three Oregon cases address this question. In *Santilli* **u.** *State Farm*, ... [t]he court discussed the difference between the type of bad faith alleged (first party) and the tort of bad faith refusal to settle with a third party within the limits of a liability policy (third party), *a* tort that **is** recognized in Oregon. The court did not decide whether the tort of first party bad faith was recognized in Oregon. because it held that there **was** no evidence that the insurer had acted in bad faith.
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> In *Farris* ..., the court held that an insurer's bad faith refusal to defend its insured under a liability policy gives rise only to a breach of contract claim, for which punitive and emotional distress damages cannot be recovered, rather than **a** tort claim. ... The court relied on the rationale it expressed in *Saritilli* that, although an insurer's breach of fiduciary duty to its insured, which is present in third-party claims but not in first-party claims, gives rise to tort liability, no liability results from an insurer's bad faith breach contract with its own insured.
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> In *Porter*. the trial court dismissed the plaintiffs claims for punitive damages based on the insurer's refusal to pay benefits under the policy. We noted

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> that, if an insurer engages in egregious conduct, that conduct could give rise to a tort action and punitive damages. ... Any language in *Porter* implying that the tort of first-party bad faith, absent egregious facts amounting to outrageous conduct, is actionable in Oregon was dictum. We hold that, under *Farris*, an insurer's bad faith refusal to pay policy benefits to its insured sounds in contract and is not an actionable tort in Oregon.

Id. at 790-791

SUMMARY

The foregoing can be summarized **as** follows:

1. Oregon is similar to California and many other states in that it has passed its own version of the Unfair Claims Practices Act.

2. Under the California version of the act, the California Supreme Court in Royal Globe held that a private right of action existed for both insureds and third parties, allowing them to sue in tort for violations of the act.

3. The recent opinion of the California Supreme Court in *Moradi-Shalal* overruled *Royal* Globe and held that there is no private right of action for anyone under the California 'versin of the unfair claims practices act.

4. Between the dates of the Royal Globe and *Moradi-Shalal* opinions, a lower California appellate court held that an obligee on a performance bond could sue a surety in tort in a private action based upon violations of the California claims practices act. This opinion, Gerieral Ins., noted that the action under the statute was essentially identical to a common law action for breach of the insurer's duty of good faith and fair dealing.

5. Without necessarily relying upon the opinion in ***Gerieral Iris.,*** courts in other states also have allowed suits against sureties for breach of the implied covenant of good faith and fair dealing. Although each opinion mentions the particular state's claims practices act, the opinions seem to be premised primarily on analogizing an obligee or subcontractor on a surety bond to an insured under a standard liability policy. Thus, if the state in question allows insureds to bring tort actions against insurers for breach of the implied covenant of good faith and fair dealing, the same right is extended to obligees and subcontractors suing a surety on a pricipal's bond.

6. Gerieral ***Iris.*** and the other state court surety cases would probably be similarly decided regardless of whether there was or was not a private right of action under the particular state's unfair claims practices act. Thus, *Moradi-Shalal* would seem to have essentially no impact on cases involving suits against sureties.

7. Further, Moradi-Shalal seems to have little relevance to Oregon. There are two reasons for this conclusion. First, Royal Globe has, apparently, never even been cited by an Oregon court, let alone relied upon. This is due no doubt to the fact that Oregon courts seem to have determined, prior to *Royal Globe*, that there is no private right of action under Oregon's unfair claims practices act. Second, Oregon courts have expressly held that violations of the Oregon act do *not* constitute a tort.

CONCLUSION

Whether bond claimants, i.e., obligees and subcontractors, will be able to sue a surety for bad faith settlement practices may depend upon whether they are analogized to insureds under a standard liability policy. If and when this issue arises in Oregon, one possible resolution would be a finding similar to that in Szarkocuski, i.e., that an obligee or a subcontractor vis-a-vis a surety stands in a relationship analogous to the insured-insurer relationship. In Oregon. such a finding would make the obligee's or subcontractor's claim one asserting the tort of first-party bad faith which, absent egregious facts amounting to outrageous conduct, is not actionable in this state. See Porter, ***supra.***

Alternatively, an obligee or a subcontractor could be analogized to a third party claimant under a standard liability policy. In that instance, it would seem that only the principal would have the option of bringing a tort action for third-party bad faith. Even here, though, a tort claim against the surety would seem to require that the principal show that the surety's breach of its fiduciary duty to the principal increased the latter's liability.

Thus, while a principal might be able to bring a tort action against a surety for alleged bad faith settlement practices, a tort action by an obligee or subcontractor would seem to require acts so egregious as to constitute outrageous conduct by the surety.

An obligee or subcontractor could also consider suing a surety in contract, based upon the former's status as a third party beneficiary and intended claimant on the bond. **In** this instance, though, punitive damages would almost certainly not be recoverable.

As of 1988, then sureties in the state of Oregon seem to be at minimal risk for suits by bond claimants alleging bad faith settlement practices and seeking punitive damages awards. This conclusion assumes that there are **no** facts demonstrating egregious or outrageous conduct by a surety. In addition, this conclusion is based upon the nonrecoverability of punitive damages under ORS **746.230** and the current limitation of tort actions against insurers in Oregon to instances involving third-party bad faith claims. **As** a result, while the California Supreme Court decisions in *Royal* Globe and Moradi-Shalal may hold some interest for sureties doing business in Oregon, the General *Ins.* case is of greater significance to sureties. If

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and when the issue arises in Oregon, it remains to be seen how much weight will be given to ***General** Ins.* and similarlydecided authority.

W. Douglas Marshall,
*Allen, **Kilmer, Schrader**, Yazbeck & Chenoweth, P.C.*

Multnomah County's MBE/WBE Program Declared Unconstitutional

On November 22, 1988. U.S. District Court Judge James Redden declared that Multnomali County's affirmative action program for public contracting violated tlie equal protection clause of the Fourteenth Amendment of tlie United States Constitution and enjoined the County from enforcing the program. The plaintiffs in the action were L.D. Mattson, Inc. and the Oregon-Columbia Chapter of the Associated General Contractors of America who brought suit pursuant to **42** USC 1983 alleging that tlie County's program was unconstitutional because it was not based on a finding of past discrimination by Multnomali County. Plaintiffs further contended that even if the program was supported by the requisite findingsit was not narrowly tailored to remedy only the discrimination from which the program drew its justification. Judge Redden agreed, stating:

> "Here, the defendant has not made findings upholding justification and the program cannot be narrowly tailored into survival. It is worth pointing out, however. that a justified program must be narrowly tailored, including a finding that lesser restrictive alternatives were inadequate. Also, tlie provision for compliance by good faith efforts must set objective standards to guide implementation. Finally, such a program requires a review date whereby the local government can determine whether or not necessity compels continuance of the ordained program."

Mattson's claim for damages is presently pending before the court.

Jurisdiction In Construction Cases: Where's The Beef?

Most construction cases are tiled in the jurisdiction where the construction project was located. However, tlie question of whether alternative jurisdiction and venue locations exist arise frequently — especially in cases involving specialty contractors who undertake projects around the country. **A** recent trilogy of Oregon Federal Court cases gives guidance to the construction law practitioner about how jurisdictional and venue issues will be resolved when a case is *not* filed in the state where the construction occurred.

The first case in the trilogy. *CWS **Corp**. v. **Munroe,*** Civil No. 86-1011FR (D Or May 28,1986), arose out **of** a dispute between a Pennsylvania primecontractor, Munroe, and an Oregon subcontractor, CWS, concerning tlie refurbishing of boilers at ***a*** New Mexican power plant owned by Arizona Public Service Company ("APS"). The renovation of tlie boilers required tlie application of a plasma spray metal coating to tlie boiler tubes. CWS was one of five subcontractors specializing in this process from which Munroe solicited a bid. Ultimately, APS awarded the renovation prime contract to Munroe, which, in turn, awarded tlie metallizing contract to CWS.

Munroe. whose headquarters were located in Pittsburgh. determined that it would fabricate the necessary boiler tubes at its Youngston. Ohio plant. Under the technical specifications, the tube metallizing had to occur in the vicinity of where the tubes were fabricated. As a result, CWS's subcontract performed its work in Ohio. However. tlie mobilization of its personnel. equipment and material to be transported to Ohio occured in Oregon, as did its contract administration for the project.

During tlie project. disputes arose between CWS and Munroe concerning, among other things, delays in providing tlie tubes to be coated. When CWS's work was completed. it made claim for delay damages and, predictably. Munroe claimed backcharges that negated tlie contract balance due to CWS. When the claims could not be resolved. CWS filed suit in tlie Oregon Federal District Court fur breach of contract and quantum meruit. Munroe responded by filing a motion to dismiss for lack of jurisdiction and an alternative motion for a change of venue to Pennsylvania. In addition. Munroe filed a separate action in Pennsylvania.

While CWS had at one time maintained an office in Pennsylvania. Munroe had a few signilicantcontiicts with the State of Oregon which would support a finding of general jurisdiction based upon "continuous and systematic" activities by Munroe within the state. ***Data***

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Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F2d 1280 (9th Cir 1972). **As a** result, the jurisdictional issue in the case was whether Munroe's Oregon-related activities in its transactions with CWS were sufficient to support specific or "single-act" jurisdiction. *Burger King* Corp. *v. Rudzewicz*, 471 US 462, 472-73, 105 S Ct 2174. 85 L Ed 2d 528 (1985).

After extensive briefing, Judge Helen Frye concluded that Oregon did not have jurisdiction over the dispute. **In** so doing. Judge Frye relied upon the three-prong jurisdictional tests for the exercise of jurisdiction stated in *State ex rel* **White** *Lbr. v. Sulmonetti*, 252 Or 121, 127, 41X P2d 571 (1968) (*"White Lumber"*):

> "*** Firstly. the defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. Second, the cause of action must arise from the consequences in the forum state of the defendant's activities. Finally. the activities of the defendant or the consequences of those activities must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable."

Specifically. Judge Frye concluded that the second prong of the *White Lumber* test had not been satisfied because the dispute between the parties did not arise from the consequences of Munroe's activities in Oregon, but instead arose from activities which occurred in Ohio or Pennsylvania. the location of the disputed contract work. Notwithstanding the contracts of both Munroe and the contract. itself, with Oregon, Judge Frye focused on the location of the events giving rise to the dispute.

CWS filed a motion to reconsider arguing that Judge Frye had too narrowly applied White *Lumber*'s relatedness requirement by focusing on the site of the disputed *work* rather than determining whether CWS's claims arose from a transaction which. taken as a whole, had the requisite contracts with Oregon. However, Judge Frye denied the motion and dismissed CWS's Oregon action.

The holding in *CWS* is quite instructive. It teaches that under the *White Lumber* relatedness test, if claims arise during a construction dispute in a foreign jurisdiction, Oregon has no "single-act" jurisdiction to consider the matter. One must remember that Munroe's contacts with Oregon were limited. However. the Court's emphasis on the locus of the dispute suggests that even if Munroe had more contacts with Oregon. jurisdiction would have been declined because the dispute did not arise here.

One of the first cases to test the CWS holding was *Blaesing* Granite ***u. Mellon*** *Stuart*, Civil no. 88-092JU (D Or April 14, 1987). This case arose out of **a** project, to build **a** high-rise building in Pittsburgh, Pennsylvania. Mellon Stuart, the Pennsylvania prime contractor, subcontracted with Blaesing Granite. an Oregon corporation, to supply and install the exterior granite for the building. During the course of the work, disputes arose that caused Blaesing Granite to file suit against Mellon Stuart in the Oregon Federal District Court for breach of contract. Among other claims, Blaesing Granite alleged that Mellon Stuart had interfered with its performance and failed to make timely payments for work performed. Mellon Stuart responded by filing a motion to dismiss for lack of personal jurisdiction and an alternate motion to change venue pursuant to 28 USC § 1404.

Judge Juba summarily concluded that Oregon did not enjoy general jurisdiction over Mellon Stuart. Applying the Ninth Circuit analogue to White Lumber, Decker Coal Co. *v. Commonwealth Edison* Co.. 805 F2d 834 (9th Cir 1986), he then analyzed whether Oregon had "single-act" jurisdiction over the parties' dispute.

Blaesing Granite admitted that its assembly and construction of the granite walls had occurred at the construction site in Pittsburgh. However, it contended that it performed the following activities in Oregon which would support jurisdiction in Oregon: system design. including drafting and engineering; posting and construction bond with an Oregon company; design and engineering of mode-up test; frame fabrication drawings; posting a letter of credit on **a** Portland bank and all management, scheduling and accounting.

Relying upon Judge Frye's analysis in the *CWS* case, Judge Juba found the second prong of the Decker Coal jurisdictional test had not been satisfied because the dispute had not arisen out of Mellon Stuart's forum-related activities. Specifically. he found that the disputed work occurred in Pennsylvania so that Blaesing Granite's claim did not arise from Mellon Stuart's activities in Oregon. Judge Juba also ruled that Mellon Stuart's bid solicitation from Blaesing Granite to perform work elsewhere did not constitute "purposeful injection" into Oregon, relying upon the holding in Hydrokinetics. *Inc. v.* Alaska Mechanical, *Inc.*, 700 F2d 1026 (5th Cir 1983). Thus, the dispute failed to qualify under the reasonableness prong of the White *Lumber* and Decker Coal tests. as well. Judge Juba's decision that Oregon had no jurisdiction was upheld by Judge Redden after objections to Magistrate Juba's Findings and Recommendations were filed by Blaesing Granite.

It is hazardous to read too much into any given jurisdictional case, since jurisdictional decisions are necessarily so fact-specific. However. the Courts' focus on the location of the disputed work in *CWS* and Blaesing *Granite* strongly indicates that establishing jurisdiction in a case relating to disputed work in **a** forum other than the construction location will be an uphill battle.

One method to establish jurisdiction outside the forum in

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which the construction occurred is the use of a forum selection clause. The recent case of *Lowell E. **Pauli & Associates.** Inc. v. **H.P.S. Industries.** Inc.*, Civil No. 88-994 RE (D Or October 24. 1988). the final in the trilogy. indicates that the use of such clauses may be very effective. Lowell E. Pauli & Associates is a small Oregon company which designs air systems for the wood products industry. In 1986, Pauli contracted to design and furnish an air system for a new Weyerhaeuser particleboard plant to he constructed in Moncure, North Carolina.

Since Pauli did not manufacture or install the type of equipment its systems required, it subcontracted with H.P.S. Industries, a Georgian company, to do so. **A.** representative of H.P.S. came to Oregon to negotiate and sign the contract. Due to Pauli's concern that it might be subjected to costly litigation in either North Carolina, the construction site, or Georgia, H.P.S.'s home state, it inserted into its subcontract this forum and law selection clause:

> "Applicable law will be the law of Oregon and the state and federal courts located in Oregon will have jurisdiction and venue of any controversy arising hereunder."

H.P.S. signed the contract without objection to this forum selection cause.

The project did not proceed smoothly, which led Pauli to file a suit against H.P.S. in Clackamas County Circuit Court 'for breach of contract. H.P.S. simultaneously removed the case to federal court and moved to change the venue to North Carolina pursuant to 28 USC § 1404(a). H.P.S. also counterclaimed, alleging that it was entitled to recover for additional costs resulting from changes during the course of the project.

Those who have not closely followed the recent case law relating to forum selection clauses might conclude that the existence of such a clause in the Pauli contract automatically assured that H.P.S.'s venue motion was doomed to failure. However, the United States Supreme Court recently held in *Stewart Organization, Inc. v. Ricoh Corp.*, ____US____, 108S Ct 2239,101 I. Ed 2d 22 (1988), that contractual forum selection clauses, while a strong factor to consider, are not alone dispositive of the venue issue in federal court cases. Rather. the trial court is to make an independent venue determination under federal law, using the standards of 28 USC § 1404(a). A concurring opinion opined that a valid forum selection causeshould be given controlling weight in all but the most exceptional cases.

Because of the forum selection clause in its contract, H.P.S. did not argue that Oregon courts did not have jurisdiction and venue over the dispute. however, H.P.S. argued that several key witnesses were in North Carolina so that venue should be moved for the convenience of the parties and to permit a jury view. Not surprisingly. Pauli responded by emphasizing the negotiated selection clause and unfair inconvenience to it if the case were transferred to North Carolina.

Judge Redden denied H.P.S.'s motion. While not expressly relying upon the forum selection clause. Judge Redden seemed to short-circuit the more involved analysis which would apply in the absence of such a clause. The clear import was that H.P.S. had failed todemonstrate the "exceptional" circumstances which might justify disregarding the parties' freely negotiated selection clause.

No one would dispute that it is usually most logical to litigate construction claims in the same jurisdiction where the project occurred. The CWS and *Blaesing Granite* cases indicate that courts will have an understandable inclination to deny a forum for construction disputes arising in other locations. However, there can belegitimate reasons for seeking to litigate in a forum that has contacts with the dispute, yet did not host the construction itself. In those cases. the existence of a forum selection clause. while not dispositive. will go a long way to convince the Court that it should accept jurisdiction and venue.

***Guy A.** Randles,*
*Stoel Rives **Holey Jones & Grey***

The Mini-Trial As A Tool For The Construction Lawyer

I recently had the good fortune and opportunity to serve as a "Neutral Advisor" in a Mini-Trial dispute resolution process in relation to a construction dispute involving a 21-story addition to an office building in Anchorage. Alaska. The dispute involved an owner, a general contractor, a sub-contractor, and a material supplier. The issues involved and the exposure to the various parties were substantial, for the reason that the dispute involved the furnishing and installation of all the acoustical tile and grid system in the entire building. The determinative issue was whether or not the substituted product was an "or equal." In this case the owner and general contractor had rejected the ceiling tile after delivery and an initial application of a portion of it. The dispute turned on the question of whether or not the ceiling tile conformed to the contract. The Mini-Trial took place at the Washington Athletic Club, and involved construction litigators from Alaska and Seattle, and house counsel from the various parties.

As a part of that experience, I concluded that lawyers

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should consider this form of alternative dispute resolution when confronted with a large and complex commercial construction case. In this matter, in my view, the business persons involved and the attorneys were able to reach a binding resolution of the issues, on a fast-track basis, at substantially less expense than they would have encountered had the matter continued in litigation in the Alaska courts. As you well know, many times construction disputes take on a life within themselves. and involve enormous expense and time which could otherwise be spent on productive matters. This article attempts to include my best observations based on 20 years of service as an arbitrator, mediator and fact finder, on this rather new departure in construction dispute resolution, to wit: the Mini-Trial procedure.

Many building contractors, engineers, and architects know from painful experience that building contracts sometimes erupt into expensive conflicts. Specified materials are not always available when needed. Can equal material be substituted for the specified product? Changes in plans often result in extra charges. What increased charge for the "extras" is payable? Contractors are sometimes subject to penalty clauses for delay. Who caused the delay? Estimates of constuction cost may prove unrealistic. Added costs are a frequent source of conflict. These are some of the very complex matters that are addressed better through alternative dispute procedures. than in submission to our court system. Too many trial judges lack experience in construction law, and in related Uniform Commercial Code statutes and case law, which are usually applicable. It is important that the lawyers involved review carefully the matter of the form and substance of their submission agreements. A carefully drafted submission agreement, with a knowledgeable Neutral Advisor or Arbitrator, or panel of the same. can **lead** to an expeditious and satisfactory final and binding resolution of the most difficult and complex construction controversy.

In its usual form, the Mini-Trial is a confidential, non-binding exchange of information, intended to facilitate settlement. The goal of the Mini-Trial is to encourage prompt, cost effective resolution ofcomplex litigation. The Mini-Trial seeks to narrow the areas of controversy, dispose of collateral issues, and encourage a fair and equitable settlement. Since 1986.the American Arbitration Association has had in place procedures to facilitate the use of the process. and has available to lawyers, forms of the Mini-Trial agreement which may be considered. It remains for the parties and their counsel. based on the nature of the dispute and the desired flexibility of the procedure, to adopt the Mini-Trial format to their needs. The AAA has procedures available for parties who want a more structured format for their Mini-Trial. Third-party assistance is available from a mutually chosen expert advisor, who might be asked to prepare a written opinion setting forth the strengths and weaknesses of the parties' positions and likely outcome in court. Ofcourse, the parties may elect to prepare their own submission agreement in a Mini-Trial procedure. without the benefit of **AAA** administration.

As I see it, the Mini-Trial is of advantage in that the senior executives of the parties involved in the legal dispute meet in the presence of a Neutral Advisor, and after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement. In the case in which I was involved, I chaired the panel as the Neutral Advisor, and the owner/general had as a member ofthe panel oneofitshousecounsel, andaseniorexecutive. The supplier in question also had as a member ofthe panel, its top executive. and housecounsel. Although I presided in terms of ruling on procedural matters, and in construing the submission agreement and applying applicable rules of law, the members of the panel were able to ask questions of the witnesses who were called, examine the documents provided and the product involved, and generally educate themselves in terms of their exposure, the issues, and their alternatives.

In its usual form, the Mini-Trial consists of an information exchange and settlement negotiation. Each party is represented throughout the Mini-Trial process by legal counsel, whose role is to prepare and present the parties' "best case," at the information exchange. Each party has in attendance throughout the information exchange and settlement negotiation a senior executive with settlement authority. The Neutral Advisor is present at the information exchange to decide questions of procedure and to render advice to the parties' representatives when requested. He should be knowledgeable in construction law and in commercial litigation. Discovery between the parties may take place prior to the information exchange, in accordance with the submission agreement of the parties. Prior to the information exchange, the parties prepare and exchange written statements summarizing theissues in the case, and copies of all documents they intend to present. Limitation on the scope of evidence offered at the information exchange shall be determined by the mutual agreement of the parties prior to the exchange. and shall be and are enforced by the Neutral Advisor,

After the information exchange, the senior executives meet and attempt in good faith, to formulate a voluntary settlement of the dispute. Again, the information exchange is a "best case" presentation, limited by the terms of the parties' submission agreement. If the senior executives are unable to settle the dispute. the Neutral Advisor then renders an advisory opinion as to the likely outcome of the case were it to proceed to conclusion in courts of law. It is best if the Neutral Advisor's opinion identifies the issues *of*

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law and fact which are critical to the disposition of the case. and give reasons for the opinion that is offered. In its usual form. this is an advisory opinion, which will enable the senior executives to meet for a second time in an attempt to resolve the dispute. If they are unable to reach a settlement, they then either abandon the proceeding or submit to the Neutral Advisor written offers of settlement. If that be the parties' desire, the Neutral Advisor then makes a recommendation for settlement based on those offers. This is akin to a mediation effort. If the parties reject the recommendations of the Neutral Advisor. either party may then declare the Mini-Trial terminated and resolve the dispute by other means. Mini-Trial proceedings are usually confidential, and no written or oral statement made by any participant in the proceeding may be used as evidence or in admission in any other proceeding.

In the matter which I resolved, the parties followed generally the Mini-Trial procedure above described, hut agreed that if their senior executives and/or house counsel were unable to resolve the matter through settlement, then I was to, and did, issue a written opinion and award arbitration, which was binding on the parties. In that matter, the parties had stipulated in their submission agreement to the entry of a final and non-appealable judgment in accordance with my opinion and award. The exposure to each side was substantial, and in order to limit their exposure somewhat, they had agreed in advance in their written submission agreement to limit award authority to the maximum sum of $400,000, on the claims or counterclaims. Because the ceiling tile either met the specifications or not, it was a case in which a decision based upon construction law and facts was required. It was not a case where one could "cut the baby in half."

In the trial in which I was invloved, the proceedings were by agreement to be totally concluded over a three day period. The Washington Athletic Club was a central location. and sufficed. At the outset we held a pretrial conference, to narrow issues and discuss any procedural problems which were not contemplated by the parties' submission agreement. The Mini-Trial began with the parties' lawyers making opening statements about their respective claims. Charts were used, and various contract documents, drawings, and specifications were introduced and described. **A** limited number of key witnesses were called, and testified. Cross examination was allowed. I kept strict time limitations which required the use of my watch to keep the parties within their self-imposed limitations. Respective counsel were allowed time for summation, wherein they set forth their theories of recovery or defense. My view is that the lawyers were indeed satisfied with the procedure. which they had developed and included in their submission agreement. Again. the issues involved whether or not the owner/general contractor was justified in rejecting the ceiling tile supplied, and whether or not the supplier had been given opportunity to cure the breach, together with the damages claimed in relation to that rejection. by each of the respective parties. The parties were not able to resolve the matter through their good faith settlement effort. in which I was involved at times as a Neutral Advisor. Therefore, I was required to issue a written opinion wherein findings and an award was entered. At the end of that process the parties had resolved a very substantial dispute. and could move on with their lives.

The Mini-Trial procedure offers an expedited and structured process for dispute resolution. Because of the involvement of lawyers in the preparation of the submission agreement. the parties are able to control to a reasonable extent the issues to he presented. discovery, and evidence to be offered and received. It does require lawyers and parties who are in good faith. desirous of resolving a matter. rather than conducting a war. It is a process which should be considered as an alternative by lawyers who specialize in construction law and litigation. Again, I have available review forms of the Mini-Trial submission agreement, which may be of interest to construction lawyers and senior executives, or house counsel. The form of agreement of the parties is included herewith for your review.

Norm Linstedt

Mini-Trial Agreement

Agreement made this _____ day of _____, 19____, between the Supplier, the Owner, the General Contractor, and the Installer Subcontractor (collectively referred to as "Purchaser"). Supplier and Purchaser are sometimes referred to as "Party" or jointly as "Parties."

WHEREAS, an action is now pending in Alaska Superior Court, wherein Supplier is plaintiff and Purchaser is defendant and cross-complainant; and

WHEREAS, Supplier and Purchaser wish to discontinuesaid action as between themselves, reserving **all** rights as against the Architects, and undertake a Mini-Trial in lieu thereof.

NOW THEREFORE, in order that said controversy as between Supplier and Purchaser be finally settled and determined and in consideration of the terms and conditions set forth below, the Parties agree as follows:

1. Mini-Trial

Supplier and Purchaser agree to discontinue the said litigation, and stay **all** proceedings thereunder, and further agree that all claims, demands and amounts in dispute in said action shall be referred and are hereby referred to resolution through a Mini-Trial conducted according to the procedures in this Agreement.

2. Binding Nature of Proceeding

Supplier and, Purchaser agree that the decision reached in the Mini-Trial shall be binding upon the each of them, Supplier and Purchaser agree that there shall be no right of appeal from the decision reached in the Mini-Trial, absent fraud or serious misconduct by the Neutral Advisor.

3. Limitation on Issues

Supplier and Purchaser agree to limit the issues considered in this Mini-Trial to the rejection of the ceiling tile and the damages associated therewith by both Parties. This Mini-Trial shall supercede **all** other issues raised in the Complaint and Counterclaims. The settlement or decision in this Mini-Trial shall be binding on both Parties as to **all** issues raised in the Complaint. Counterclaims and Affirmative Defenses in this action.

4. Panel Members

Supplioer and Purchaser shall each nominate two persons to serve as members of the Decision Panel. Each Party shall notify theotherofiisselections within ten (10) days of the effective date. Each Party agrees that the persons nominated shall be senior executives with settlement authority equivalent to the amount agreed to in paragraph *5* as the maximum award. The members of the Decision Panel shall elect a Neutral Advisor by mutual agreement within forty-five days (45) days of the effective date of this Agreement. If the Parties fail to mutually agree within that time, the Peryises shall request the American Arbitration Association to appoint a Neutral Advisor from the construction industry panel. The Parties agree to accept the appointment of the **AAA.** The Neutral Advisor **shall** decide points of procedure at the Information Exchange and render an opinion, if required, as set forth in paragraph 8 below. The Neutral Advisor shall also have the authority to delay the Information Exchange for good cause shown by either Party.

5. Brief Preceding Information Exchange

On or before the 12th day before the Information Exchange, each Party may file a brief with the Neutral Advisor and the opposing Party. The brief shall be limited to 15 double spaced legal size pages and may be accompanied by up to 35 pages of materials, including affidavits, exhibits and other supporting information. Sample materials may beoffered asexhibits at the Mini-Trial. At the request of the opposing Party, which shall be made in writing at least ten (10) days before the Information Exchange. an individual affiant shall appear at the Information Exchange for cross-examination. The time spent in such cross-examination shall be included within the four hours allowed therequesting Party. Should a Party request theappearance of an affiant and fail to examine him or her, the Party shall reimburse the Party producing the affiant **all** costs associated with production of the witness

6. Information Exchange

The Parties agree to conduct an Information Exchange before the Decision Panel and the Neutral Advisor ("Mini-Trial") on **a** date to be selected by mutual agreement of the Parties and the Neutral Advisor. The Information Exchange shall be conducted in Seattle, Washington. Each Party shall have a maximum time of four hours in which to make its presentation.

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Cross-examination of a witness by opposing counsel shall be limited to one-half of the time the witness narrates or is questioned by a Party's counsel. Time spent cross-examining a witness shall be counted against the four hour time allocated to the cross-examining Party. The Neutral Adivisur may question any witness either on his or her own motion or at the request of any member of the Decision Panel. The Neutral Advisor shall not be required to question a witness at the request of a member of the Decision Panel. Testimony shall be under oath or affirmed. The Parties agree no further discovery will be conducted before the Information Exchange. Federal or state rules of evidence do not apply to presentations made at the Information Exchange. The Neutral Advisor shall be responsible for the enforcement of the four hour time limit. The Parties agree to be bound by the decisions of the Neutral Advisor with respect to the time limit.

7. Limitation on Award

The Parties agree that the maximum amount which may be awarded to either Party in the settlement of this dispute is $400,000.00 which shall include any pre-award interest agreed to by the Parties or awarded by the Neutral Advisor.

8. Settlement Attempt

After the Information Exchange, the Decision Panel shall meet and attempt. in good faith, to formulate a voluntary settlement of the dispute. This meeting shall take place the day after the Information Exchange. The Neutral Advisor may participate in this meeting to facilitate a voluntary settlement, provided that both Parties are present while the Neutral Advisor is present. No other person may participate in this meeting. The Parties shall dismiss the pending action with prejudice upon reaching a settlement except as to the Architects against whom all rights are reserved.

9. Binding Opinion

If the Decision Panel is unable to settle the dispute on the day after the Information Exchange. the Neutral Advisor shall issue a written opinion within fifteen (15) days. This written opinion shall be binding on the Parties. The Parties shall stipulate to the entry of a final and non-appealable judgment in accordance with the opinion of the Neutral Advisor. Supplier and Purchaser have, however. each reserved **all** rights against the Architects and agree that the Party which obtains a judgment in its favor from the Neutral Advisor will assign **all** rights against the Architects to the losing Party.

10. Confidentiality

The proceedings conducted hereunder shall be considered confidential by the Parties and the Neutral Advisor. No written or oral statement made by any participant may be used as evidence or be admitted in any other proceeding.

11. Expenses

The fees and expenses if the Neutral Advisor and adminstrative expenses of the Information Exchange **shall** be borne equally by the Supplier and Purchaser. Supplier and Purchaser are each responsible for their own costs, including legal fees, incurred in the Mini-Trial.

12. Miscellaneous

a. The Parties shall not engage in ex parte communications with the Neutral Advisor.

b. This Mini-Trial shall not be conducted under the rules of the American Arbitration Association.

c. The laws of the State of Alaska apply to any dispute arising about this Agreement or enforcement of any award or settlement.

13. Counterparts

This document may be executed in counterparts, which together shall constitute an enforceable document.

14. Effectiveness

This Agreement shall not be binding on any Party until executed by **all** of the signatories set forth below. Once executed by all signatories, this Agreement shall be effective as of the date of the last signature.

IN WITNESS WHEREOF. the Parties have executed this Agreement on the date set forth below.

DATED_____ (COMPANY NAME)

_____

DATED:_____ (COMPANY NAME)

_____

Construction Law Upcoming Events Calendar

January 26,1989	International Association of Defense Counsel Fidelity and Surety Committee "Surety Trial Practice Mid-Winter Meeting" The Plaza, New York City, New York
February 3, 1989	Construction Law CLE Montgomery Park, Portland, Oregon
February 23, 1989	American Bar Association Satellite Seminar "Design and Construction Contracts" Oregon Law Institute, University of Oregon Portland Center
April 7, 1989	Construction Education Foundation Symposium Oregon State Bar Construction Law Section, Oregon State University

Construction Law Section Registration

(The Bar advises that you don't need to sign up again if you already registered with Bar dues payment)

Please enroll me in the Construction Law Section. My $10.00 annual dues are enclosed.

Send this cuupon and check to:

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Lake Oswego, OR 97035-0889

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I am not a member of the Oregon State Bar but would like to receive your newsletter. My $10.00 is enclosed (Place X on blank if applicable).

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