Construction Law Newsletter

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SECTION NEWS

At the annual meeting of the Section in September, 1997, the following officers and Executive Committee Members were elected: **Chair** Chris Carson, Portland, **Chair Elect** Milt Lankton, Portland, **Past Chair** Dale Hormann, Salem, **Secretary** Chuck Pruitt, Portland, **Treasurer** Dave Bartz, Portland.

Executive Members at-Large: Ken Jones, Eugene; Bob O'Halloran, Portland; David Douthwaite, Wilsonville; Cindy Forbes, Salem; Rod Mills, Portland; Mike Peterkin, Bend; Madelyn Wessel, Portland; Eric Grasberger, Portland; Richard Cecchetti (Oregon State Bar Staff Liaison), Lake Oswego; Joyce Cohen, Portland.

SCHEDULE OF UPCOMING EVENTS

- February 5, 1997: Executive Board Meeting at Lane, Powell at noon.
- June 19, 1998: CLE in Bend regarding residential construction issues. Time and location to be announced.

RECENT OREGON CONSTRUCTION LAW CASES

By: Rodney R. Mills
Seifer, Yeats & Mills, LLP

Public Contracting

***Anderson's Erosion Control, Znc. v. ODOT,* 141 Or App 221,917 P.2d 537, *rev. denied,* 324 Or 305 (1996).**

ODOT's Standard Specifications require acceptance of bids within 30 days of opening and provide that no proposal is valid for a longer period unless a written agreement provides otherwise. ODOT accepted a bid more than 30 days after the opening of bids. ODOT and the low bidder had entered into a written agreement, after the 30 days had expired, which provided that the low bidder's proposal was still available for acceptance by ODOT. An unsuccessful bidder filed suit for an injunction under ORS 279.067(1) against an award of the contract to the low bidder, contending that ODOT Standard Specifications required that the written extension be made within 30 days of the bid opening. ODOT argued that the Standard Specifications could be interpreted as allowing the written extension to be made after the expiration of the 30-day period.

The Court of Appeals affirmed the trial court's dismissal of the action, holding that the Standard Specifications were ambiguous as to when the written extension could be made, that the Standard Specifications have the status of an agency rule and, therefore, ODOT's interpretation of the Specification was entitled to deference.

***State v. Triad Mechanical, Inc.,* 144 Or App 106,925 P.2d 918, *rev. denied,* 324 Or 488 (1996).**

A contractor to the Oregon Department of Fish & Wildlife (ODFW) brought suit for delay and impact costs incurred as a result of performing additional rock excavation work on a fish hatchery project. The contractor and ODFW had executed two change orders regarding the rock excavation which provided for payment on a per cubic yard basis. The change orders further provided that "the completion time [for the project] will not increase and [will] remain at 335 days as a result of this change order." The contractor contended that ODFW had agreed, prior to the execution of the change orders, to consider the contractor's claim delay and impact costs, which were to be determined after completion of the excavation work. The contractor contended that the change orders were consistent with this agreement because the change orders only addressed the direct cost of the rock excavation. At trial, ODFW successfully argued that the Parol Evidence Rule barred the contractor from introducing evidence that ODFW had orally agreed to consider the delay and impact costs. The Court of Appeals affirmed, holding that the change or-

ders were complete on their face and precluded any claim for delay and impact costs. Judge Armstrong, in dissent, argued that the change orders were in fact consistent with the contractor's understanding of its agreement with ODFW.

Coats v. ODOT, 144 Or App 449,927 P.2d 108 (1996)

The Court of Appeals reversed an award of attorneys fees to a contractor who had prevailed on the claim against ODOT for an unpaid contract balance and interest. The court held that ORS 279.435(5) allows an award of attorneys fees when contractor's claim is solely for unpaid interest, but not when the claim is for both an unpaid contract balance and interest.

Schlumberger Technologies, Znc. v. Tri-Met, 145 Or App 12,929 P.2d 331 (1996), *rev. denied*, 325 Or *80* 1997).

An unsuccessful bidder on a Tri-Met procurement for a fare collection system brought an action to prevent an award to the low bidder, contending that (1) the low bidder was not registered with the Construction Contractors Board and (2) the low bidder's proposed equipment was incapable of satisfying the technical requirements of Tri-Met's IFB.

Tri-Met's IFB indicated that bidders had to be registered as required by law, but, prior to receiving bids, Tri-Met sent all bidders a letter indicating that bidders need not be registered if the company actually installing the collection system was itself registered before it signed a subcontract with the successful bidder.

The trial court granted summary judgment for Tri-Met and the Court of Appeals affirmed, holding that the registration requirements were substantially complied with if the installer was registered. The Court also held that in deciding whether the bid was technically adequate, that is, if the bid was "responsive" to the IFB, the Court would defer to Tri-Met's discretion in areas requiring technical expertise, and would determine whether the agency "properly exercised its discretion, not whether we agree with its decision." The Court went on to find that Tri-Met did not abuse its discretion in deciding that the low bidder's equipment complied with the IFB's technical requirements.

Both the trial court and the Court of Appeals refused to award attorneys fees to Tri-Met under ORS 279.067.

Blue Fox, Inc. v. Small Business Administration and the United States Army, 9th Cir. Case No. 96-35648 (filed August 25, 1997).

A construction subcontractor under a contract awarded pursuant to the Small Business Administration's Section 8(a) program filed suit in U.S. District Court for the District of Oregon against the United States Army and the SBA to impose an equitable lien on retained funds. The Army had failed to require that the prime contractor provide a Miller Act payment bond. When the prime contractor failed to fully pay its subcontractor, the subcontractor filed suit. The District Court dismissed the suit, holding that the subcontractor's claims against the Army were barred by sovereign immunity, and that an equitable lien could not issue against the SBA which, having delegated contract administration to the Army, never possessed the contract funds. The Ninth Circuit reversed, and holding that the subcontractor's claim for an equitable lien against the Army sought relief "other than money damages" and was therefore within the sovereign immunity waiver of 5 USC § 702. The court did, however, affirm the District Court's dismissal of the equitable lien claim against the SBA because the SBA never possessed the contract funds.

Construction Liens

Miller v. Ogden, 325 Or 248,935 P.2d 1205 (1997)

The Supreme Court affirmed an earlier Court of Appeals decision (134 Or App 589, 896 P2d 596 (1995)) that the claimant's construction lien was invalid because the property owner neither asked for nor authorized claimant's work nor was the work done with the property owner's knowledge. Had the owner been aware of the work, he may have been required to post a notice of nonresponsibility pursuant to ORS 87.030.

Forsythe v. Homestead Development Corp., 142 Or App 45,919 P.2d 537 (1996)

An employee of a contractor filed a construction lien against the property on which he had worked for the contractor. The property owner tendered defense of the lien and subsequent foreclosure action to the contractor pursuant to ORS 87.070. The contractor indicated that it would accept the tender only if the owner would allow the contractor to pursue unrelated claims against the owner and if the owner would pay a portion of those claims as well as the cost of defending against the lien action. The owner refused these conditions and instead defended itself and cross-claimed against the contractor for its cost of defense. The employee failed to recover anything on his lien and the trial court awarded the owner its costs of defense against the contractor. The Court of Appeals affirmed, holding that the property owner was entitled to attorneys fees from the contractor because the contractor had an obligation under ORS 87.070 to defend the property owner.

Knez Building Materials Co. v. Bell-Air Estates, 144 Or App 392,927 P.2d 608 (1996).

A drywall supplier filed a construction lien and foreclosure action regarding materials supplied to a subcontractor. The trial court determined that part of the material was covered by a lien waiver provided by the supplier during the project and consequently declared that the entire lien was therefore invalid because the lien, on its face, did not segregate the costs of the material covered by the lien waiver from other material. The Court of Appeals reversed, holding that failure to segregate lienable from nonlienable material costs does not invalidate a lien where the property owner could have "by a simple question" obtained from the lien claimant information necessary to determine the material costs incurred after the lien waiver.

Morse Bros., Inc. v. Kemp Construction, Inc., 147 Or App 217,935 P.2d 464 (1997).

The Court of Appeals affirmed a trial court decision that a construction lien was valid even though the claimant's ORS 87.021 notice of its right to lien to the property owner was incorrectly addressed. The Court held that evidence demonstrated that the notice was actually delivered by the postal carrier to the owner's correct address and was accepted by a person with apparent authority to receive notice on the owner's behalf.

Rotarius v. *Edwards*, 147 Or App 484,936 P.2d 401 (1997).

A lien claimant delivered shale and crushed rock that was used at a construction site but which was later removed when the owner changed prime contractors. The Court of Appeals held that the supplier of the material was entitled to a construction lien because ORS 87.010(1) requires only that the material "be used in" the construction of the improvement, not that it become "part in parcel of the improvement." The Court determined that the material was in fact used, even though it was subsequently removed at the owner's request.

Pro Excavating, Inc. v. *Zibbart*, 148 Or App 436,939 P.2d 1187 (1997).

The Court of Appeals reversed the trial court's summary judgment in favor of a property owner on a paving contractor's construction lien. The parties disputed the date on which the project was "substantially completed" for purposes of the commencement of the 75-day filing period set forth in ORS 87.035(1). The Court of Appeals held that because the erection of signs and barricades by the contractor was considered by the owner's engineer to be critical to the project performance of that work, even though a minimal part of the project, would extend the commencement of the 75-day period.

Tigard Sand and Gravel v. *LBH Construction*, 149 Or App 131,941 P.2d 1075 (1997).

The claimant supplied rock for what it believed was one project but which the property owner contended was two separate projects on two separate pieces of property. The property owner contended that the lien failed to clearly indicate that it pertained to both properties and therefore did not comply with the requirement of ORS 87.035(3)(d) that a lien contain a property description that is sufficient for identification. The trial court granted summary judgment but the Court of Appeals reversed, holding that there were issues of fact as to whether the lien substantially complied with the statute because there was evidence from which it could be concluded that the supplier's noncompliance was minimal and that the property owner had not been prejudiced by the property description in the lien.

Contractor Registration

J.L. Ward Co. v. Landscape Contractors Board, 141 Or App 181,916 P.2d 887 (1996) . . . modified 142 Or App 438,921 P.2d 416 (1996).

The Court of Appeals reversed an Order from the Landscape Contractors Board which had imposed a civil penalty on a homebuilder for operating a landscape business without a landscaping business license. The builder sold subdivision homes complete with sprinklers, lawns, trees, and shrubs. The Court of Appeals held that because the landscaping was installed on the lots before those lots were sold to homeowners, the builder was not offering the services of a landscape contractor.

Architect/Engineers

Estey v. MacKenzie Engineering, Inc., 324 Or 372,927 P.2d 86 (1996).

A homeowner hired an engineering firm to perform a "limited visual review" of a house which the homeowner intended to purchase. The review was intended to identify any major structural deterioration, including settlement of the structure. The contract entered into between the homeowner and the engineers included an estimated contract sum of $200 and provided that the 'liability of [the engineering firm] and the liability of its employees are limited to the Contract Sum." The engineers reviewed the house and issued a two-page written report to the homeowner. The homeowner subsequently purchased the house and discovered problems which he felt should have been discovered and disclosed by the engineers. The homeowner sued the engineers for negli-

gence, negligent misrepresentation, and breach of contract. The Circuit Court granted the engineer's Motion for Summary Judgment on the basis that the contract's limitation of liability applied to all of the homeowner's claims. The Court of Appeals affirmed. 137 Or App 1, 902 P2d 1220 (1995).

The Supreme Court reversed the Court of Appeals and held that the contract's limitation of liability clause did not "clearly and unequivocally express an intent to limit defendant's liability for the consequences of their own negligence to the Contract Sum" because the homeowner reasonably might have interpreted "liability" in the clause to refer only to liability arising from breach of contract. The Court remanded the case to the Circuit Court for further proceedings.

Safety/Employment Issues

German u. Murphy, 146 Or App 349,932 P.2d 580 (1997).

An injured employee of a contractor brought a claim under the Employer's Liability Act (ELA) [ORS 654.305 et seq] against another contractor working at the same site even though there was no contractual relationship between the two contractors. The trial court granted summary judgment for the defendant contractor but the Court of Appeals reversed, holding that the injured employee could establish liability of the defendant contractor under the ELA by showing that the defendant contractor had responsibility for work involving risk or danger and that the two contractors were engaged in a "common enterprise." A "common enterprise" would exist if:

(1) The defendant contractor's operations were an integral or component part of the project;

(2) The work involved a risk or danger to employees or the public;

(3) Injured employee was an adopted or intermingled employee of the defendant contractor; and

(4) The defendant contractor had charge of, or responsibility for, the activity or instrumentality that caused the employee's injury.

The Court found that there was evidence that defendant contractor's foreman was supervising the entire project, including the injured employee's work, and that the two contractors had a common schedule and conducted joint safety meetings.

OR-OSHA u. Tom O'Brien Construction Co., Inc., 148 Or App 453 941 P.2d 550 (1997).

The Court of Appeals reversed an Order of an administrative law judge dismissing a citation charging an employer with violating a fall protection standard. The employer had successfully argued that it had exercised reasonable diligence to assure compliance with safety standards and to discover employer noncompliance but that any violation was due solely to the unauthorized acts of its supervisor. The Court of Appeals held that while OR-OSHA had the burden of disproving the employer's defense, the administrative law judge had erred in excluding evidence regarding a previous similar citation received by the employer, thus prejudicing OR-OSHA's rights. The Court remanded the matter for reconsideration.

1997 LEGISLATIVE SUMMARY

By: Michael J. Scott
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Unless otherwise noted, these changes to the Oregon Revised Statutes ("ORS") go into effect 90 days after adjournment of the 1997 Oregon legislative session - in other words, on October 4, 1997. *See* §28, Article IV, Oregon Constitution.

Design Professionals

Topic: State Contracts
ORS ORS 279.015 & others
1997 OR. Laws: Chapter 802
Legislation: Senate Bill 139

This legislation will put, subject to some limited exceptions, the Oregon Department of Administrative Services in control of public contracts with design professionals. §3. It also requires the Attorney General to review and approve all such contracts that require the payment of more than $75,000. This review and approval must occur prior to the effective date of the contract. A contract that requires approval and is not approved is not binding on the state. *Id.*

One of the other elements of this legislation is its mandate that state agencies provide a "statement of justification" if they pay more in a calendar year under a personal services contract for services historically performed by state employees than they would have "paid to its employees for performing the same task." *Id.* Thus, one commentator on this legislation has suggested that there may never be a justification if the state is allowed to compare its raw labor rate (without any associated overhead costs) against the total cost of an outside design professional's contract. James Marvin, *Oregon Law for Design Professionals*, Lorman Education Services, p. 17-19, (July 18, 1997) (hereinafter "Marvin").

Topic: QBS
ORS ORS 279.067
1997 OR. Laws: Chapter 861
Legislation: Senate Bill 390

This bill introduces the Qualification Based Selection ("QBS") process to state contracts with engineers, architects and land surveyors. Similar legislation had been discussed for almost 20 years and one version passed. the legislature only to be vetoed by then Governor Neil Goldschmidt. Marvin at 19.

The QBS process may consider, among other things, an applicant's specialized experience, resources available, record of past performance, ownership status and employment practices with women, minority and emerging small businesses.

The bill applies only to contracts issued by state agencies. **$2.**

Contractors and Construction Contracts

Topic: Liability of Public Agency for Prevailing Wages
ORS: ORS 279.356
1997 OR. Laws: Chapter 255
Legislation: Senate Bill 39

Under existing law, a public agency that failed to include the provision required by ORS 279.352 was exclusively liable for unpaid minimum wages. Under this legislation, the public agency is ***jointly and severally*** liable with the contractor or subcontractor who had notice of the requirements to comply with ORS 279.350.

The bill governs all ORS 279.356 claims regardless of whether or not the claim arose before or after the effect date of the bill. **$2.** The bill does not, however, affect claims on which there is a final trial court judgment or a final order from Bureau of Labor and Industries. *Id.*

Topic: Four Tens and Notice of Hours
ORS 279.316 & 279.334
1997 OR. Laws: Chapter 265
Legislation: Senate Bill 234

Contractors who are not signatories to collective bargaining agreements should be able to work four, ten hour days on public works construction projects during the traditional Monday-Friday work week without having to pay overtime wages. Previously, overtime wages were due in this circumstance if the employee worked over 40 hours per week or eight hours in any given day.

Employers must give employees written notice "of the number of hours per day and days per week that employees may be required to work" at the time the employee is hired or before work is commenced on the project or by posting a notice in a location frequented by employees. $1& 2. The law is effective June 9,1997 and applies to all contracts entered into on or after the effective date. **$3** & **4.**

Topic: Determining the Prevailing Wage
ORS: ORS 279.348 & 279.359
1997 OR. Laws: Chapter 810
Legislation: Senate Bill 719

The Commissioner of the Bureau of Labor and Industries may rely on annual independent wage surveys when determining the prevailing wage rate. If, however, it appears to the Commissioner that the "data derived from the survey alone are insufficient," then the Commissioner can consider additional information including collective bargaining agreements and federal prevailing wage rates when setting the prevailing wage rates.

Topic: Competitive Bidding
ORS 279.011 & 279.015
1997 OR. Laws: Chapter 685
Legislation: House Bill 2910

This legislation permits a public agency to negotiate with the lowest responsive and responsible bidder prior to awarding the contract **if all the responsive bids exceed the public agency's cost estimate.** The negotiations are limited to "[soliciting] value engineering and other options to attempt to bring the project within the agency's cost estimate." §2. The intent of this legislation according to David Douthwaite, Associated General Contractors ("AGC") government relations manager, is also to permit the public body to award the contract to the bidder with whom the public agency engages in negotiations with.

An award to the lowest bidder that engaged in these negotiations is prohibited "if the scope of the project is significantly changed from the original bid proposal." *Id.*

This bill also requires that a public hearing be held before the adoption of final "findings," which is defined term under $1 of the bill, that exempt a contract from competitive bidding. The bill also outlines the requirements for notices of the hearing and the way in which the hearing is to be conducted. Finally, the bill requires that public agencies that did not use the competitive process on a project in excess of $100,000 must prepare and deliver to the Director of the Oregon Department of Administrative Services a detailed evaluation of the project within 30 days of the public agency's acceptance of the project. §4.

Topic: 'Voided" Public Contracts
ORS: 279.310 & 279.320
1997 OR. Laws: Chapter 828
Legislation: House Bill 2909

1997 Oregon Laws Chapter 828 permits contractors to get paid even if a court determines that the public works contract is void because of the public agency's failure to comply with applicable bidding requirements.

Subject to an equitable exception, if the court determines that the contract is void, and the work is substantially complete "the public agency shall ratify the contract." In turn, if the work is not substantially complete, "then the public agency shall ratify the contract and the contract shall be deemed terminated." **$2.** The contractor is then generally entitled to payment in accordance with ORS 279.330.

David Douthwaite, AGC government relations manager, notes that this legislation was designed, in part, to address the Oregon Youth Authority juvenile detention facilities under construction by Emerick-Shea and which are presently being challenged. The law is effective August 11, 1997 and applies "to all public improvement contracts for which work has not been finally accepted prior" to that date. §§3&4.

Topic: Indemnity Provisions
ORS: 0.140
1997 OR. Laws: Chapter 858
Legislation: House Bill 2259

This legislation addressed what is and what is not a construction contract subject to ORS 30.140's limitation on indemnity provisions.

The testimony on the bill varied: Either this bill will change existing law or it will simply codify it.

Without limiting the agreements that are not considered construction agreements in Oregon for the indemnification purposes, the bill specifically excludes most real property leases and rental agreements and all personal property leases and rental agreements from ORS 30.140's definition of "construction agreements."

The result may well be different in other states. In *Aetna Casualty & Surety Co. v. Marion Equipment*, 894 P.2d 664 (Alaska 1995), the Alaska Supreme Court held that its statute barred an electrical subcontractor's surety from recovering its litigation costs from the rental company that had supplied the hoist involved in causing injury to an employee of the electrical subcontractor. The Alaska court cited similar holdings in Indiana, Illinois, and Washington in finding that these statutes include rental equipment contracts.

Yet, remember it may be possible to contract around the anti-indemnification statute. This possibility arises because Oregon courts have characterized the obligations to indemnify from the obligation to carry insurance as *two separate obligations.* In *Montgomery Elevator Co. v. Tuality Community Hospital,* 101 Or App 299 (1990), the Oregon Court of Appeals held that an anti-indemnification provision in the Oregon Workers' Compensation statute did not void an agreement to purchase liability insurance. The case involved an injury involving an elevator accident. The plaintiff hospital incurred defense costs and sought reimbursement in accordance with a contract provision that required the defendant elevator company to procure comprehensive liability insurance to protect the hospital from this type of claims. The elevator company had failed to purchase the insurance.

The defendant argued that the insurance provision was ineffective because it permitted the plaintiff to contract around the anti-indemnification statute. The court disagreed, saying that the provisions were independent contractual obligations. It held that the plaintiffs claim for reimbursement did not arise out of the accident but out of a breach of the contract. The court noted similar findings by courts in Illinois and Utah.

Construction Contractors Board

Topic: CCB Registration of Home Inspectors
ORS: ORS 701.005, 701.010, 701.205 & 701.280
1997 OR. Laws: Chapter 814
Legislation: Senate Bill 974

This bill **was signed by the governor on** August **11, 1997** but **contains a provision that portions of it are effective on July 1, 1997.** §10. It requires that home inspectors be registered with the CCB. A "Home Inspector" is defined as:

> "[A] person who, for a fee, inspects and provides written reports on the overall physical condition of a residential structure and the appurtenances thereto." §1.

Business entities that are certified home inspectors are prohibited from undertaking or bidding any repair work at the inspected property for a period of 12 months following an inspection. $7

Section 3 of the bill is effective July 1, 1998. §10. Section 3 requires the CCB to adopt education, training and examination requirements leading to home inspector certification and also prohibits un-certified persons from undertaking or bidding home inspection work.

Topic: Claims Limitations for Non-Registered and Lapsed Contractors
O R S ORS 701.065
1997 OR. Laws: Chapter 818
Legislation: Senate Bill 2041

In adopting House Bill 2041, the 1997 Oregon Legislature substantially modified ORS 701.065, which limits contractors' claims if they are not properlyregistered with the CCB.

When this bill becomes effective, the statute will specifically apply to arbitrations as well as liens and litigation. The bill applies "to liens perfected and claims commenced on or after January 1, 1998. Id. at $4.

The hill uses the word "perfection" as the prohibited act relating to construction liens. This term is used in 87.035 and means that, absent compliance with ORS 701.065, a claim of lien of construction lien cannot be recorded. The bill also uses the word "commence" as the prohibited act for other claims. Previously, ORS 701.065 prohibited commencing or maintaining a suit or action. The elimination of the word maintain was not intended to have any impact on existing case law, as it was understood that you cannot maintain an action that could not and cannot be commenced.

The bill recognizes four situations in which contractors may find themselves. Two of these situations have the same outcome. The four situations are:

(1) Properly registered when the work is bid, the contract is formed and all of the work is performed.

These contractors' rights are not limited by House Bill 2041 B-Engrossed.

(2). Never registered **and** (3). First registered during the required time period.

These contractors' rights are limited as they must timely apply to become registered and also actually become registered before they proceed with either perfection of a lien or action. The CCB can set the time period within which to submit a completed CCB registration by administrative rule. The time period, however, cannot exceed 90 days. The registration is not expected to be back dated to cover the entire time period. Again, this is a change in the law. And, before an unregistered contractor can proceed, it must actually become registered.

(4). Registration lapsed and was timely and properly renewed.

Unlike the prior law, which treated these contractors in the same manner as contractors who were never registered, these contractors can now undertake efforts to correct a lapse in registration. These contractors' rights are still limited, as they must timely apply to renew their registration and actually get their registration renewed to cover the entire time period. There is a special rule for construction liens and the lawsuits *to* foreclose the lien. This rule permits the lapsed contractor to proceed with the exercise of these rights even before its registration has been renewed. Again, this construction lien exception does *not* apply to contractors who were never registered or were first registered during the required time period. The construction lien exception was adopted because of the limited time periods within which to perfect and foreclose construction lien claims.

Topic: Construction Contractors Board Claims
O R S ORS 701.080, 701.085, 701.140 and 701.145
1997 OR. Laws: Chapter 301
Legislation: House Bill 2039

First, contractors should make sure that their addresses on file with the CCB are correct. Section 1 of this bill provides that "Initial notice of a contested case or arbitration," like other communication from the CCB, **shall be considered delivered when deposited in the United States Mail.**

Under ORS 701.085, to be entitled to payment from a contractor's CCB bond, claimants are required to give notice to both the contractor's surety and the CCB that a claim related to non-residential structure has been commenced. This modification requires that sureties who receive notice that a claim has been commenced against a contractor and who contend that they are not that contractor's surety, to respond to the claimant and the CCB within 30 days of the surety's receipt of the notice. **$4.** If the claimant disputes the surety's response, it can now join the surety in the action. This legislation also hinds the surety to all issues of fact and law determined by the court if the surety is a party to the action. The legislation also expressly limits a surety who did not intervene in the action to the following issues:

a). Whether the claim was timely filed;

b). Whether the surety received timely notice of the complaint and judgment;

c). Whether the claim is for construction work in the State of Oregon; and

d). The extent of the surety's liability to the claimant.

Also, in response to the holding In re Jeffrey *Christensen*, 167 BR 213 (D Or 1994), which reversed In ***re*** Apache Construction, Inc., 34 BR 415 (Bankr D Or 1981), and In re *Fintel*, 10 BR 50 (Bankr D Or 1981), $4 of the bill endeavors to avoid the need for a claimant on a non-residential CCB claim to obtain relief from the bankruptcy code's automatic stay once a judgment has been obtained against the contractor. It does so by fully and finally concluding the contractor's involvement in the process with the entry of the final judgment.

This bill also permits the CCB to refuse to process claims $250 and under, **$4,** and requires that claims of

less than $1,000 be subject to mediation or resolved through binding arbitration.

Topic: Collection of Final Orders
ORS 205.125
1997 OR. Laws: Chapter 387
Legislation: Senate Bill 272

This bill addresses how to undertake post-final order collection activity on a CCB final order. This act is effective January 15, 1998. But, claimants with existing CCB final orders should note that the bill provides as follows:

> "Section 2 of this Act [which is discussed below] applies to all orders and warrants whether entered before, or after the operative date of this Act. If an order or warrant recorded before the operative date of this of this Act was also renewed before the operative date of this Act, the date of renewal must be reflected in the affidavit required by section 2 of this Act." (*emphasis* added).

Previously, ORS 701.150 said that an order could be recorded in the County Clerk Lien Record and that "[a]fter recording, the order is equivalent to a judgment." Now, ORS 701.150 expressly directs claimants to §2 of this bill, which provides a method of filing the order with the court in which the final order is recorded and then proceeding with enforcement efforts "in the same manner as provided for the enforcement of judgments issued by a court." A final order can also be renewed "at any time within 10 years after" its recording. Id.

Debtor/Creditor

Topic: Dishonored Checks
ORS: 30.700
1997 OR. Laws: Chapter 182
Legislation: House Bill 2419

House Bill 2419, 1997 Oregon Laws Chapter 182, repealed ORS 30.700.

In its place, this law now expressly provides that the payee on a dishonored check is entitled to $100 or triple the amount of the check, but not more than $500 more than the amount of amount of the check, in addition to the amount of the check. For example, on a $200 dishonored check, the payee could claim:

$600 (Triple the amount of the check); and
$200 (The amount of the check)

While, on a $3000 dishonored check, the payee could claim:

$3500 ($500 more than the amount of the check. Because triple the amount of the check is more than $500 above the amount of the check); and
$3000 (The amount of the check).

The prevailing party in an action on a dishonored or stop payment check is also entitled to its attorney fees. To be entitled statutory damages under this bill, the payee must make a demand for payment not less than 30 days prior to commencing the action and the maker of the check must have failed to pay the amount of the check and applicable statutory interest of 9% per annum together with a handling fee not to exceed $25. The payee cannot, however, collect both the statutory triple damages and the handling fee. If a handling fee has been paid or the payee has sought and recovered a judgment for such amount, then only the amount of the handling fee paid or for which a judgment has been entered must be reduced from the judgment.

Note that this legislation repeals ORS 20.090, which previously permitted recovery of attorney fees in an action on a dishonored or stop payment check. It also repeals ORS 82.300, which provided the total $25 fee on a dishonored check.

Other statutes relating to dishonored checks include:

Topic: Payment in Full Checks
ORS 73.0311
1997 OR. Laws: Chapter 437
Legislation: House Bill 2418

ORS 73.1230 was repealed by the 1993 legislature, which made ORS 73.0311 the relevant statute concerning payment in full checks.

The 1997 legislature, however, adopted House Bill 2418 and repealed the 1993 legislature's language, which had generally provided that the negotiations of a "Payment in Full" check by a creditor would satisfy a disputed debt. Under the 1997 legislation, the negotiation of a check marked "payment in full" or in other similar fashions does not create an accord and satisfaction, "unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation."

The bill applies to "instruments tendered or negotiated for the purposes of an accord or satisfaction" on or after October 4, 1997.

Topic: Small Claims
ORS: 46.405, 46.425 & 46.461
1997 OR. Laws: Chapter 378
Legislation: House Bill 2350

Effective January 15, 1998, the small claims limit is increased to $3500. On January 1, 2002, the amount increases to $4,000.

Topic: Judgment Liens
ORS: 18.350
1997 OR. Laws: Chapter 801(§66)
Legislation: House Bill 3737

Actions commenced on or after January 15, 1998 will not result in judgment liens — even if the judgment arises out of circuit court — unless the judgment creditor complies with this law which mandates the **filing of a lien certificate with the court and filing the same** with **county recorder.** The bill outlines the information required in a valid lien certificate. When a judgment creditor wishes to record a lien record abstract pursuant to ORS 18.320, the judgment creditor must also file a lien certificate.

Landscape Contractors

The 1997 Oregon Legislature passed House Bill 2347, 1997 Or Law Chap. 785, which was introduced at the request of Oregon Landscape Contractors Association in response to the *J.L. Ward v. Landscape Contractors Bd.* decisions. Under this bill, a general contractor can perform up to $2500 in landscaping work related to the construction of a new residence without a separate LCB registration. The $2500 amount is subject to adjustment every five years based upon the Consumer Price Index. *See* 671.540(9). An owner who, in pursuit of an independent business, installs or has installed landscaping work on property it owns but which it intends to sell is not exempt from the LCB registration requirements. 52.

Topic: Landscape Contractors and Independent Contractors
ORS: ORS 656.027, 671.525 & 671.610
1997 OR. Laws: Chapter 337
Legislation: House Bill 2038

This bill is designed to make the workers compensation statutes application to landscape contractors analogous to those applicable to construction contractors. §1.

In general terms, all landscape contractors are required to have workers' compensation insurance (or, in other words, are "non-exempt") except business: (1) Without employees and (2) Without more than two principals or, if there are more than two principals, the principals are related. §2.

Finally, this legislation limits the number of landscape contractors that can work together on the same task to two sole proprietorships or one business entity. A violation of this mandate will expose the parties to possible civil penalties by the LCB.

Topic: Backflow Prevention Device Inspectors
ORS ORS 448.279 & 670.600
1997 OR. Laws: Chapter 398
Legislation: House Bill 2478

Except for employees of water suppliers defined by ORS 448.115, backflow prevention device inspectors certified by the Health Department are required to be either registered with the CCB or licensed with the LCB.

Topic: Landscape Contractors Fees
ORS: ORS 671.570 & 671.650
1997 OR. Laws: Chapter 327
Legislation: House Bill 2132

The non-refundable examination fee for Landscape Contractors Board licensure can be increased to a maximum of $50, up from the previous $25. In turn, the annual license fee now cannot exceed $50 and the annual landscaping business fee cannot exceed $125. Previously, the amounts were $25 and **$75** respectively.

[This article is a summary of the author's presentation at the section's annual meeting on September 26, 1997.]

PRACTICE TIPS

Business Dealings With Indian Tribes

By: Elizabeth Yeats
Seifer, Yeats & Mills, LLP

There is a proliferation of construction related to Native American gaming facilities. Contractors should be advised that it is not "business as usual" when non-Native Americans do business with Indian tribes or entities. The peculiar treatment of Native Americans under federal law translates into risks and issues unique to business dealings between non-Native Americans and Indian tribes or their business entities. Of particular importance are:

1. The applicability of 25 U.S.C. $81, which requires certain agreements with any tribe of Indians to have the approval of the Secretary of the Interior or otherwise be null and void;
2. The sovereign immunity of Indian tribes and the need of the non-Indian to obtain an effective waiver of immunity in order to have recourse in later disputes; and
3. Jurisdictional questions of where disputes will be litigated, if necessary, which should be resolved in the original contract documents.

Under certain circumstances, the agreement may not even be valid if it is entered into without the approval of the U.S. Secretary of the Interior. *See*, 25 U.S.C. § 81. This might be important, for example, where a contractor has performed work for a Native American tribe and then seeks to enforce the contract, only to find it is "null and void" due to the absence of Secretarial approval. This can even be a problem where the Secretary or the Bureau of Indian Affairs opines that Secretarial approval is not required under the circumstances. As stated by William V. Vetter, "Doing Business With Indians and The Three "S"s: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction," 36 Ariz. L.R. 169,172 (1994), "[A]n administrative opinion that no approval is necessary is, of course, subject to administrative "revision" and the risk of a differing court decision," citing *Barona Group of Capitan Grande Band of Mission Indians v. American Management and Amusement, Inc.* 840 F2d 1394 (9th Cir., 1987), *cert. dismissed*, 487 U.S. 1247 (1988). *See also, Stockwest Corp v. Taylor*, 964 F2d 912 (9th Cir., 1992).

In order to determine whether 25 U.S.C. § 81 applies, one must consider the identities of the contracting parties and whether the contract is "relative to Indian lands." For example, although there is a difference between contracting with a tribe and an entity owned by the tribe, the court may treat a contract with a tribal corporation or entity as being with an Indian tribe, making § 81 applicable. *See, Altheimer and Gray v. Sioux Manufacturing Corp.*, 983 F2d 803 (Seventh Circuit, 1993); *Vetter*, 36 *Ariz.* L.R. at 171.

Persons doing business with Indian tribes or entities should also be aware of the risks presented by tribal sovereign immunity. The sovereignty of Indian tribes is well established. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L Ed2d 303 (1978). The sovereign immunity of the Indian tribes has been equated with that of the United States. *United States v. U.S.F.& G.*, 309 U.S. 506 (1940). Not only are tribal governments and tribal officials acting within the scope of their authority not subject to non-consensual suit in tribal, state, or federal court, but tribal immunity is not implicitly waived when a tribe engages in commercial or proprietary activities. *See, In Re Greene*, 980 F2d 590 (9th Cir., 1992). Consent to waive immunity will not be implied. To be effective, a waiver of tribal sovereign immunity from suit must be an *official act* of the *tribe* that *unequivocally expresses consent to suit*.

Sovereign immunity issues are too complex to be dealt with comprehensibly in this article. Suffice it to say that persons doing business with Indian tribes should be aware of and consider the need to obtain a general or at least a single-contract waiver. The language of the waiver can be critical. For instance, the waiver may be of little use if the tribe consents to suit but does not consent to execution or levy of any judgment.

Persons contemplating doing business with an Indian tribe or entity should also consider where, if necessary, they will litigate their disputes and what law will apply. Possible jurisdictional candidates include tribal court, state court, and federal court. Absent a specific provision regarding jurisdiction, it may be difficult to establish state or federal court jurisdiction. Without an express agreement to the contrary, the rules tend to favor tribal court jurisdiction, which may not be the non-Native American business' first choice. To deal with jurisdiction questions, Vetter suggests the written contract contain express provisions or consent to the jurisdiction of specific courts or jurisdiction (example, specified state or federal court) and an agreement that the law of a specified state law will be applied in interpretation and enforcement of the contract. *Letter*, 36 Ariz. L.R. at 194. Be sure the designated court is capable of having subject-matter jurisdiction.

It is not the purpose of this article to discourage persons from doing business with Indian tribes or their entities. However, given the peculiar status and treatment of Indian tribes under the law, it is essential that persons and businesses entering into business transactions with Indian tribes or their entities be aware of these differences so they do not take unnecessary or uninformed risks in these relationships.

ARBITRATOR/MEDIATOR LIST

In our last newsletter we announced our intention to compile a list of individuals interested in serving as arbitrators and/or mediators regarding construction disputes. We received several responses and maintain a list of such individuals. If you would like to be included on the list, please complete and submit the "Construction Section Arbitrator/Mediator List@ form included in this newsletter. The Section is not undertaking a selection process. Anyone who signs up will be on the list. The list is provided simply as a service to our membership and is up to those choosing arbitrators and mediators to determine if they are qualified. Anyone with questions regarding arbitrator/mediator list or anyone desiring a copy of the list should contact Chris Carson at (503)224-0055.

CONSTRUCTION SECTION ARBITRATOR/MEDIATOR LIST

Name _____

Firm _____

Address _____

Telephone _____ Fax _____

E-mail Address _____ Bar Number _____

Bar Memberships _____

Areas of Concentration _____

Hourly and daily rates _____

☐ **Available to Serve as an Arbitrator**

☐ **Available to Serve as a Mediator**

■ Arbitration/Mediation Experience:

_____

_____

_____

■ Arbitration/Mediation Training:

_____

_____

_____

■ Service on any other arbitration/mediation panels:

_____

_____

_____

■ Other related experience, education, or expertise:

_____

_____

_____

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