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INSURANCE COVERAGE FOR CONSTRUCTION DEFECTS: AN OREGON BREAKTHROUGH

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For most people the purchase of a brand new home, or a substantial remodeling project, is the largest consumer purchase they will ever make. Yet obtaining redress for defective work can be one of the most frustrating experiences consumers or their lawyer ever face. Some of the major obstacles are:

- the highly fragmented nature of the construction industry,

- the traditional undercapitalization of the industry, and

- insurance policy exclusions.

As to this last point, through the ISO ("Insurance Services Office"), insurers have drafted integrated and overlapping exclusions with the goal/effect of denying insurance coverage for breach of contract and tortiously-caused property damage claims for defective construction work.

This problem has been magnified by the current spate of synthetic stucco (EIFS) cases, where water leakage causes structural wood framing of expensive houses to rot away in the course of only a few years, with damage claims in excess of $100,000 becoming routine.[1] The problems with EIFS are exemplified by the facts that there already have been cents on the dollar class action settlements against the EIFS manufacturers,[2] and the Zurich insurance group. Zurich, which was writing coverage for residential construction contractors, has crafted an "EIFS exclusion" which is so all encompassing that no measure of interpretation will avoid its application.

It is as if auto insurers could craft and enforce a "whiplash exclusion." As we all know, under the Financial Responsibility Law ("FRL", ORS chapter 806, mandatory auto insurance) such exclusions cannot be enforced. Fortunately, a Multnomah County judge recently held the EIFS exclusion invalid on the basis of the insurance requirements of the construction contractor licensing legislation. [3]

Spoljaric v. Northridge and **Gerritsen v. Maryland Casualty** The Facts

The facts were simple. Northridge is a construction contractor, licensed with the CCB, specializing in the construction of custom homes. Brent Gerritsen is the owner of Northridge. Northridge was hired by the Spoljarics to build a custom home in 1995. The home had EIFS siding, which was installed by a now-bankrupt EIFS installation subcontractor. In 2000, Spoljarics sued

[1] In this writer's opinion, claims of property damage caused by defective synthetic building construction products will only increase.

[2] Ruff et al. v. Parex et al., New Hanover County, North Carolina, Superior Court, Case 96 CVS 0059. Partial information may be found at www.kinsella.com/stucco/.

[3] Gerritsen and Northridge Remodeling Company v. Maryland Casualty Company, Assurance Company of America and North Pacific Insurance Company, Multnomah County Circuit Court Case No. 0004-04298. The insurers did not appeal.

Gerritsen, Northridge and the subcontractor for damages for negligence construction, negligent misrepresentation, and violation of the Unfair Trade Practices Act (but not breach of contract).[4]

The three insurers had issued CGL policies covering the five insurance years between the construction of the house and the Spoljarics' filing of their lawsuit. Northridge had provided the CCB with certificates of insurance, prepared by the insurers, in order to obtain its annual licenses. All the insurers refused to defend, collectively alleging twenty different defenses[5] including the absolute "EIFS exclusion." The absolute EIFS exclusion is bullet-proof, if it is applicable, so Northridge had to undertake a frontal assault on it—arguing that the exclusion was unenforceable because it violated Oregon statutes.

Discussion: The CCB Statutory Framework

Under ORS chapter 701, all construction contractors must be licensed annually. It is a condition of licensure that contractors annually obtain bonds and insurance and provide evidence of them to the Construction Contractors Board.[6] ORS 701.105(1)(a) provides that the insurance must be "personal injury, public liability and property damage insurance covering the work of the contractor that is subject to this chapter" with minimum aggregate limits of $500,000.

There are no administrative requirements for the insurance, except that the CCB has enacted an administrative rule that the insurance cannot exclude coverage for liabilities that the contractor is likely to anticipate. OAR 812-002-0380. This regulation was not in effect when four of Northridge's policies were submitted and, in any event, the regulation cannot impose standards that are not authorized by the statute.

Parallel Enforcement Mechanisms for Mandatory Coverage under the Insurance Code

The minimum standards of the FRL, relating to auto insurance, are enforceable under ORS 742.038(2) and ORS 742.450. ORS 742.038(2) also is the basis of the recent Fleming v. USAA[7] decision, enforcing ORS 742.246(2) to deny the enforceability of certain inartfully drafted "exclusions" in the widely used ISO drafted HO-3 form of homeowner's insurance policy.

Enforcement of Mandatory Coverage Under ORS chapter 701

ORS 701.105 is outside the Insurance Code, and the ORS 742.038(2) rule has its parallel in the common law of insurance. The Oregon Supreme Court has said:

> The parties to a contract of insurance are presumed to have knowledge of valid city ordinances or local laws, and they become an integral part of policies upon property within the limits to which they apply,[8]

and:

> Frequently the legislature requires that persons carry a specific type of insurance, requires that insurance covering certain risks shall contain certain provisions, or prohibits the inclusion of certain provisions in certain kinds of insurance; life and health and accident insurance are examples of the latter two kinds of legislative action. Insurance policy provisions imposing a lesser obligation

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[4] Multnomah County Circuit Court Case No. 0002-01045. This case was later settled.

[5] The more notable ones included the known loss doctrine, loss in progress doctrine, no coverage for damages caused by breach of contract, the absolute EIFS exclusion, the more traditional j(5) and j(6) contractor's work exclusions, the intended or expected exclusion, plus others which did not have a prayer of success.

[6] The names of the insurers and the policy numbers can be found on the CCB's web-site, www.ccb.state.or.us.

[7] 329 Or 449, 988 P2d 378 (1999), on reconsideration, 330 Or 62, 996 P2d 501 (2000).

[8] NW Amusement Co. v. Aetna Co., 165 Or 284, 288, 107 P2d 110 (1940).

on the insurer than that required by statute are unenforceable.[9]

Northridge's declaratory judgment action

Northridge successfully brought a declaratory judgment action, defeating all of the defenses on summary judgment. Simply, Northridge contended that the Spoljaric complaint alleged "property damage" caused by the "work of the contractor that is subject to this chapter," thus triggering the mandatory coverage required by ORS 701.105(1)(a), and the duty to defend.

Northridge did not litigate the duty to defend, because it was premature, and the insurers later paid to settle the case, so that issue was not litigated. However, it is Northridge's position that because the basis of the duty to defend was the statutory coverage requirement, the same principles would apply to the duty to indemnify.

What Northridge did not argue

Northridge acknowledged the following: (1) its claim for statutory coverage did not extend to its employees (including its owner) who are not required to be licensed; (2) it did not provide coverage for the work actually performed by independent subcontractors (who have their own statutory coverage); and (3) it did not preclude application of the contractual exclusions to claims in excess of the $500,000 statutory minimum limits.

How did Northridge get around Oak Crest v. Austin Mutual?

As mentioned above, the insurers asserted about twenty different defenses. One of the important ones was that a prior Oregon Supreme Court case, Oak Crest v. Austin Mutual,[10] precludes insurance coverage for breach of contract claims. Northridge recognized that Oak Crest was squarely on point, if it was applicable.

Northridge's successful position was that Oak Crest was not dispositive because the Supreme Court had not considered Northridge's mandatory statutory coverage argument.

Conclusion

Even as limited, the case is an important victory, not just for Northridge and not just for construction contractor defendants, but also for homeowner plaintiffs. The case provides a much needed economic resource for resolution of defective construction claims that is consistent with the consumer protection aspect of the construction contractor licensing legislation.

But many questions remain to be decided:

Does this rule apply to the numerous other statutorily mandated insurance requirements outside the Insurance Code?[11]

How will this rule apply to defective construction claims brought for breach of contract? Notwithstanding vociferous objections actually and likely to be made, Northridge's statutory coverage theory is not dependent upon the underlying claim being brought in tort.

What will be the contours of the duty to settle within coverage when there are claims against the licensed contractor's unlicensed individual owners? In the underlying Spoljaric v. Northridge litigation, the uninsured individual owner made a nuisance value contribution to the ultimate settlement with the homeowner.

Nor is the outcome a panacea. At least one of the insurance defendants threatened that a result favorable to Northridge would result in insurers withdrawing from the contractor market en masse

[9] Peterson v. State Farm Ins. Co., 238 Or 106, 110-11, 393 P2d 651 (1964).

[10] 329 Or 620, 998 P2d 1254 (2000).

[11] ORS 634.115 - pesticide operators; ORS 671.565 - landscape contractors; ORS 682-105. and .107 - ambulance services; ORS 693.025 - utility companies, energy service providers and water suppliers whose employees install low flow showerheads and faucet aereators; ORS 704.020 - outfitters and guides; ORS 460.320 - amusement ride or device operators; ORS 462.110 - race meetings.

(not their only Chicken Little argument either). The author recently heard from the principals of a major insurance broker in Portland that underwriters at the Zurich companies are specifically pointing to this decision as a reason for avoiding the Oregon market.

More in the realm of reality, even $500,000 aggregate limits may quickly be eroded with six-figure damage claims so typical in EIFS litigation.

INTERVENTION PARTNERING

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Projects in Trouble

When a project gets into trouble, partnering often goes out the door. Yet, projects in trouble are now turning to partnering to get back on track to a successful completion without litigation.

Projects and partnering typically start with the best of intentions. Soon after the notice to proceed is issued, the partnering workshop starts the team-building process with great goals and lots of talk about "communication." However, on many projects, partnering does not go beyond the workshop. There is no partnering follow-through on the project, and teams are not actually formed. It's business as usual, and then something goes wrong—perhaps an unforeseen subsurface condition, or construction documents that are incomplete. Out come the claims notices, the tough sounding letters, and the tense meetings in the job trailer. The job is headed in the wrong direction, and people complain that partnering did not work.

In fact, partnering never had a chance to work in most cases of troubled projects. Partnering is a team-building process that provides a framework for communication, problem solving, risk and opportunity assessment, and dispute avoidance and resolution. Teams are not built in a workshop. They may be started there, but they are built by constant practice, day in and day out, and this is true whether on the basketball court or on a project site. When partnering is applied on a project in a disciplined, routine basis, it becomes an effective tool for saving troubled projects. When partnering begins and ends with the workshop, it isn't given the chance to work.

Partnering as the Solution—Intervention Partnering

Re-establishing trust and communication is often the key to resolving the tough issues that can lead to a project's failure. Partnering, when practiced successfully, has proven to be the method for project participants to make difficult decisions over cost, time, and necessary personnel changes in the face of unexpected delays, design issues, and unforeseen conditions. Army Corp of Engineer projects, such as the Wyoming Valley Levee Raising Program, credit partnering for guiding the project through crisis.

A new partnering process has evolved to help projects that are in trouble. Intervention partnering combines an intensive version of partnering with dispute resolution processes to re-direct a project in trouble toward a successful completion. Originally developed by Team Technologies, construction partnering facilitators in Olympia, Washington (contact Tom Brascher at 360-754-8326), it has been used on projects from Seattle to the San Francisco Bay. Project size has ranged from small ($2 Million) to large ($73 Million), and from parking garages to port projects. Through word of mouth, its use is slowly spreading in the construction industry.

Partnering is traditionally instituted at the beginning of a project, typically through a workshop. Intervention partnering, by its nature, is introduced later into a project. While early intervention may increase the likelihood of success, it has been successfully used on projects as late as the 70% completion stage.

Intervention partnering proceeds on twin tracks—on-the-job partnering, and dispute resolution. The partnering does not use the conventional workshop or team building exercises, but is put in place directly on the job through

concrete, project oriented planning and problem solving methods. The dispute resolution effort uses various processes to achieve prompt and fair claims resolutions.

Intervention partnering has five phases, or steps:

1) The executive session;

2) The project managers' meeting;

3) Initiating partnering for the project's "fresh start";

4) Dispute resolution; and

5) Partnering through project completion.

1. The Executive Session

Intervention partnering starts with a two-day session with project executives and project managers. The first day is an executive session, although project managers may attend to assist their executives. It is attended by all of the key project participants—owner, designer, general contractor, construction manager, and significant subcontractors. The goal is to fashion an inclusive process.

During the executive session, the facilitator leads the participants in evaluating the current status of the project. What is working, and what is not? This wide-ranging discussion identifies those elements of the project that are working, and more importantly, those that are not and are leading the project toward a bad end.

Next, the executives are asked to look to the future, and answer this question: if nothing changes on the project, where will the project, your organization, and even you personally end up? How bad can it get? What risks do you and your organization face, including litigation risks and costs?

After evaluating the risks, the executives are asked to describe their desired outcome for the project, despite its current problems. They will often have the familiar discussion about quality, safety, budget, and schedule.

At this point, the facilitator asks the executives for a decision on proceeding with the effort to turn the project around. The executives will understand that the effort requires a commitment of time and money, and will involve tough decisions. If the risks of taking no action are great enough, the executives make the commitment to proceed with intervention partnering.

2. The Project Managers' Meeting

Following the executive session, the project managers meet for one day to identify what must immediately change on the project to give it a "fresh start." They will look at a variety of issues, including systems (RFI's, change order processing), technical and engineering support, changes in quality control, and personnel changes. They will also typically consider the necessity of implementing an effective dispute avoidance and dispute resolution process. Action plans will emerge from this meeting, intended to make immediate changes on the project and create the platform for a change in the project's direction.

Intervention partnering now proceeds on twin tracks. The partnering process is one track, in which teams are formed at the field, project manager, and executive levels, at a minimum. No workshop is held. Instead, the facilitator meets with the teams in short, regularly scheduled meetings on the project site, and often in the job trailer.

3. The Project's "Fresh Start"

The project manager team will be the partnering champions, and in addition will implement the "fresh start" action plans. The field team will begin performing regularly scheduled goal setting, risk and opportunity evaluation techniques, in an effort to get ahead of the job, plan better, and solve problems. The executive team will also begin regularly scheduled meetings, often once a month. All teams will participate in a dispute resolution matrix, or elevation process, to resolve problems and disputes quickly.

Real partnering begins to take hold when people on the job see problems being solved. As they participate in the team meetings, and have the opportunity to be heard and contribute, they begin to see themselves as team members, and the project's outcome again becomes their main focus.

4. Dispute Resolution

This partnering effort is short-lived unless the second track, dispute resolution, proceeds quickly. Its goal is to wipe the slate clean of all outstanding and unresolved claims and disputes. Intervention partnering will not work if claims go unresolved. Trust and open communication cannot be established as long as claims linger.

The claims resolution track is guided by three key words—quick, fair, and cost-effective. The executives, project managers, and facilitators select a dispute resolution process, or a combination of them, that will resolve all claims and disputes in accordance with these three criteria. The dispute resolution effort begins immediately after the initial executive and project manager sessions and proceeds simultaneously with the partnering track.

In implementing a dispute resolution process, the parties are not evading or circumventing the terms of their contracts. A variety of public and private owners have found that the change order sections of the contract, general conditions, or specifications often give them the flexibility to adopt innovate dispute resolution procedures, without running afoul of the claims provisions or of the more formal dispute resolution sections of the contract.

Claims are resolved in a matter of days, or weeks, not months. In seeking quick, fair, and cost-effective resolutions, project executives must be prepared to control outside legal counsel and consultants. The executives maintain control over the disputes and claims with the goal of making the best possible business decisions in the shortest possible time period.

Projects have used a variety of dispute resolution procedures to achieve fast and fair claims resolutions. Projects have often used an independent project neutral, or expert, in combination with mediation or facilitated negotiations. The participating organizations will together select an expert, or team of experts, to independently investigate the claims and disputes. The experts and the participants enter into a confidentiality agreement that prevents any party from using the expert's work and opinions against another party in litigation or arbitration.

The participants will tell the experts how much time they will have to investigate the claims and produce a confidential report. Time is critical, since claims need to be resolved quickly and turned into change orders in part to address the cash flow needs of subcontractors. More importantly, resolved claims are proof to the people in the field that things are really changing on the project.

5. Partnering Through Completion

By the time that the "fresh start" action plans have been implemented, and the claims have been resolved, the project will be headed in a new direction—toward a successful completion. Partnering will continue to be practiced on a regularly scheduled basis by the field, project manager, and executive teams, until final completion.

CCB "PROMPT PAY" CLAIMS

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As many of you know, the 1999 Oregon Legislature passed House Bill 2895, which set forth certain "enforcement" procedures for claims under Oregon's Prompt Pay Act, see ORS 279.445.

The outline of the procedure is that an unpaid subcontractor or supplier can file a claim with the CCB that the prime contractor did not make payment to the subcontractor or supplier for more than sixty (60) days after the prime contractor actually received payment from the public body. ORS 701.227. If the CCB determines these allegations are valid, then the CCB must place the prime contractor on a "not qualified" list. Id.

The "enforcement arm" of this statute is that contractors placed on the "not qualified" list

are automatically deemed nonresponsive for public works bids. ORS 279.029(2)(a) & (6)(a).

Subcontractors or suppliers want to be careful about making these claims. If the CCB determines that the claim was false or made in bad faith, it places the claimant itself on the "not qualified" list. ORS 701.227(3). Perhaps it is this last feature that has resulted in the current situation where the CCB's web site shows zero contractors placed on its "not qualified" list.

Attorneys wanting to pursue one of these claims may want to consider the following process. First, make a public records request to the public body. You should ask not only for the pay applications and payment records but also for copies of letters from the prime contractor to the public body concerning your client.

These letters to the public body can be particularly important. If the prime contractor does not give these notices to the public body, the prime contractor's defense to a prompt pay claim may be impacted. See ORS 279.445(7) & (9).

Once you have the public records, it is pretty easy to determine whether any prompt pay violations have occurred. You can then either send in the CCB claim or send a demand letter to the prime contractor. The latter course may be more conducive to your client actually receiving payment.

You can obtain copies of the CCB claim form at the CCB's web site (www.ccb.state.or.us). Since this form requires the signing person to certify the claim, you may want to consider having your client sign the form.

2001 PUBLIC CONTRACTING MEASURES

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This article provides a brief summary of the primary 2001 Oregon Laws affecting design and construction contracts in the public sector. All of the new laws take effect on January 1, 2002, unless otherwise noted. ORS 171.022. More detailed information on the new statutes and related administrative rules will be available at the September 19 Construction Law Section CLE, as well as in the fall edition of this newsletter.

First Tier Subcontractor Disclosure requirements have been clarified in HB 2052 (Or Laws 2001, Ch 507). First, the requirements no longer apply to subcontracts that are solely for materials. Disclosure is limited to the subcontractor name and category of work, while the amount of the subcontract is no longer required. The public agency role is only to require the disclosure rather than determining its accuracy or completeness.

The new law expands the grounds for substituting undisclosed subcontractors and gives the Construction Contractors Board authority to define substitution for "good cause" by rule. It also empowers the CCB to investigate subcontractor complaints of unlawful substitution and to impose civil penalties. Finally, HB 3424 (Or Laws 2001, Ch 746) requires that the contracting agency send the disclosure information to the Bureau of Labor and Industries.

Disqualification of Public Improvement Contractors may become easier for contracting agencies under HB 2617 (Or Laws 2001, Ch 546). In lieu of that agency's own disqualification process, the agency may petition the Construction Contractors Board to disqualify persons from consideration for award of that agency's public improvement contracts (after notice and an opportunity to be heard) based upon statutory criteria.

Prevailing Wage Exemptions were introduced in various measures during the last session, but only HB 3350 (Or Laws 2001, Ch 628) emerged victorious. That new law exempts projects for which no funds of a public agency are used, with certain exclusions. The Bureau of Labor and Industries is charged with adopting rules to implement this provision, and the measure takes immediate effect with an emergency clause.

Design-Build Contracts were recognized as lawful, although not by name, under HB 2936 (Or Laws 2001, Ch 362). This bill amends the professional architect and engineering statutes to allow contractors to offer "appurtenant" design services within construction contracts. However, the services must still be performed by a design professional and the offer must (1) disclose that the contractor is not a design professional, and (2) identify the registered professional that will perform those services.

Qualifications Based Selection of Design Consultants would be expanded to political subdivisions of the state under HB 2014 (not yet signed by the Governor as of submission of this article) when a specified amount of state funding is involved. This new law also provides for agency consideration of the proportion of a candidate's staff time proposed to be spent on a project, recognizing that "staff loading charts" are proper under a qualifications based selection process.

A Two-Tiered Selection Process is mandated under HB 3804 (Or Laws 2001, Ch 712) for state agencies awarding design consultant contracts when a public improvement is owned or maintained by a local government and the state serves as the lead contracting agency. Affected state agencies must adopt rules establishing a process that allows local governments to select consultants from among finalists identified by the state. Provisions are also made in qualifications-based selection statutes for choosing between equally qualified candidates, and for keeping records of the locations of personal service contracts.

Public Contracting Law Revision was given a boost by the passage of HR 1 in the House, which formally recognizes the work of the *Public Contracting Law Revision Work Group* and encourages continued efforts through a 2001-2002 interim House committee. HR 1 encourages cooperation among affected interest groups seeking a comprehensive revision of the public contracting laws in ORS Chapter 279 during the 2003 session.

Since most 2001 session laws become effective on January 1, 2002, state and local public contracting rules, including the *Attorney General's Model Public Contract Rules*, will need to be amended effective as of that date. Further information on the *Model Rules* amendment process may be obtained from Nick Betsacon at the Oregon Department of Justice (503-378-6060).

OREGON'S EMPLOYERS LIABILITY ACT

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Overview

The Oregon Employers Liability Act ("ELA"), ORS 654.305-654.335, first appeared in Oregon law as an initiative proposal in 1910. It was designed to address perceived inadequacies in the common law by requiring employers to use a higher standard of care in work involving risk or danger to employees. The current version requires employers to "use every device, care and precaution that is practicable to use." ORS 654.305. The cost of the precaution is irrelevant. *Id.*

Oregon's first Worker's Compensation Act, passed in 1913, altered the remedies available to injured workers. Between 1913 and 1965, an employer who chose to be covered under the Worker's Compensation Act effectively opted out of liability under the ELA. After 1965, employers were required to provide worker's compensation. However, this did not render the ELA irrelevant. Instead, the ELA became a vehicle for injured workers to make recoveries from "indirect employers." Not only does it allow recovery against additional defendants; it is a particularly attractive vehicle to plaintiffs because it allows recovery under a pure comparative fault analysis. *See* ORS 654.335. Thus, there is no comparative fault bar if plaintiff is more than 50% at fault for his or her own injury.

The ELA is applicable to "all owners, contractors or sub-contractors and other person having charge of, or responsibility for, any work

involving a risk or danger to the employees or the public." ORS 654.305. The Oregon Supreme Court has decided that the "risk or danger to ... the public" language "applies to employees of a person other than the defendant, if their work requires them to come within the risk of injury from the defendant's instrumentalities." *Blaine v. Ross Lbr. Co., Inc.*, 224 Or 227, 235 (1960).

Thus, an entity that is an "indirect" employer may be held liable for injuries to another's employee. This "indirect" employer's liability will be triggered if any one of three conditions is met: (1) the "common enterprise" test, (2) the retained control test, or (3) the actual control test. *See Miller v. Georgia-Pacific Co.*, 294 Or 750, 754 (1983).

The Oregon Supreme Court established a four element test for "common enterprise" in *Sacher v. Bohemia*, 302 Or 477 (1987). Under the "common enterprise" test, the plaintiff must prove that: (1) the defendant employer is an integral or component part of a common project with the plaintiff's actual employer; (2) the work involves a risk or danger to the employees or the public; (3) the plaintiff is an adopted or intermingled employee; and (4) "the defendant employer must have charge of or responsibility for the activity or instrumentality that causes the plaintiff's injury." *Id.* at 486-87. The first requirement is not met by mere "common interest in an economic benefit that might accrue from the accomplishment of the enterprise." *Id.* at 486.

A party can also be an indirect employer if it has retained a right to control via a contract or other means. However, "[t]he fact that defendant retained some control over some aspects of plaintiff's work will not suffice." *Woodbury v. CH2M Hill, Inc.*, 173 Or App 171, 178 (2001). Instead, in order for the retained right to qualify the party as an "indirect employer," it must have retained the "right to control . . . the manner or method in which the risk-producing activity [was] performed." *Miller*, 294 Or at 754.

Actual control is self-explanatory. A party is an indirect employer if it has exercised actual control over the "the manner or method in which the risk-producing activity [was] performed." *Id.*

Recent Trends in Case Law Concerning the ELA

Although plaintiffs can still establish their claims via the "common enterprise" or by exerting actual control over the risk producing activity, the Oregon Courts have begun to limit the application of the retained control test. Recent cases have focused on narrowing the scope of what constitutes retained control. Unlike in earlier cases, the fact that the indirect employer defendant had control over some aspect of plaintiff's work is not enough; instead, the retained right of control must focus on the manner or method in which the specific risk producing activity was performed.

Three recent cases illustrate what appears to be the Oregon Court's more narrow construction of the retained control test (which, if established, can trigger an indirect employer's liability).

In *George v. Myers*, 169 Or App 472 (2000), a plaintiff was injured after falling while attempting to move a pile of lumber at a house construction site. The defendants were the general contractor and the property owner on whose property the house was being built. The plaintiff was employed by the subcontractor hired to do framing for the house. The general contractor provided blueprints and checked in daily to evaluate progress. The plaintiff's direct employer (the framing subcontractor), rather than the defendant, decided the pile of lumber needed to be moved. Plaintiff himself decided how to move the lumber.

Under a previous analysis, the court may have looked to the entire project to determine the "risk-producing activity," thus giving a plaintiff extensive latitude to establish the retained control element for liability. Instead, the *George* court determined that the "risk-producing activity" was only "moving the bundle of lumber" not the broader project of the house framing itself. Thereby, the activity producing the injury was limited and so was the indirect employer homeowner's liability. The ELA claim was dismissed on summary judgment.

Similarly, in *Brown v. Boise-Cascade Co.*, 150 Or App 391 (1997), the Oregon Court of Appeals agreed that plaintiff failed to prove the requisites of the ELA. Although the court discussed plaintiff's failure to meet any of the tests for liability as an indirect employer, this case was the earliest limitation on the scope of the "retained control" test.

Defendant's employees were doing a general clean up of its mills. Plaintiff's employer was contracted to do painting throughout the mill as part of the general clean-up project. Plaintiff fell while painting a specific site at the mill. Plaintiff asserted an ELA claim against defendant Boise Cascade alleging that the company had failed to provide guardrails or other necessary fall-protection to the painters. Plaintiff's theory (among others) was that Boise Cascade was plaintiff's indirect employer because his work order had language stating that the work needed to be completed with the direction of a Boise Cascade representative. *Id*. at 399.

The Court of Appeals held that the work order was insufficient to create liability. Moreover, it held that the work order "pertained solely to the scope" of the plaintiff's work, not the "manner or method" of his performance. *Id* at 150. Thus, because Boise Cascade only retained the right to tell the plaintiff where to paint and not how to paint, there was no liability. *Id.*

Finally, in *Woodbury v. CH2M Hill, Inc*, 173 Or App 171 (2001), the court again stated that, if the indirect employer does not retain the right to control the manner of the actual activity which produces the risk, there is no ELA liability under the retained control test.

In *Woodbury*, CH2M hired the plaintiff's employer (a subcontractor) to lay pipe from a vehicle decontamination pad to a clarifier tank. The CH2M contract with the subcontractor specified that the subcontractor would be responsible for the means and methods of completing the work. CH2M told the sub-contractor where to locate the pipe, what materials to use, and requested that the pipe cross a sunken stairway. The plaintiff built a platform over the stairway to assemble that section of pipe and was injured while dismantling the platform. One of defendant's employees was involved in the decision to build the platform.

The Court of Appeals applied its previous holdings in *George* and *Brown* and held that the contract addressed only the scope of the work, not the "manner or method" of the performance. Hence, there was no retained control. The court followed its earlier trend of narrowly construing the instrumentality of the injury. It interpreted "risk producing activity" in this case to mean the "disassembling of the platform" rather than "fitting pipe above ground," or even "work over the stairwell." Either of the alternative definitions would probably have presented at least a jury question about whether the defendant maintained some actual control over the activity.

Conclusion

Recent case law indicates a trend toward more detailed analysis of the risk producing activity coupled with a more precise defining of what the indirect employer actually retained the right to control. If an indirect employer has the right to control the project in general but not the actual activity that caused plaintiff's injury, then summary judgment may be appropriate to defeat a plaintiff's claim relying on the retained control test.

The author thanks Andrew Lee for assistance with this article.

UPCOMING CLES

September 19, 2001: "2001 Legislative and Case Law Update"

This CLE will present an overview of 2001 legislative changes and recent cases that will most impact construction law practitioners. Dana Anderson will address public contract issues and David Douthwaite will address private contract issues.

The CLE will be held at the Downtown Greek Deli in Portland from noon until 1:30, followed by the annual Executive Committee meeting. For details, contact Rod Mills at (503) 223-6740.

December 7, 2001: "Lessons from Oregon Troubled Projects"

This CLE will look at several recent troubled projects in Oregon and attempt to extract some lessons to help avoid future troubled projects. The presenters plan to discuss The Round at Beaverton Central, the Pamco project and the Sundance Cinema.

The CLE is scheduled to be held at the Greek Deli in downtown Portland from noon until 2:00, with a cost of approximately $15.00. For details, contact Reg Perry at (503) 691-2949.

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