Construction Law Newsletter

Published by the Section on Construction Law of the Oregon State Bar

ISSUE No. 32 May, 2008

Electronic Pleadings

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A pending multi-party lawsuit got me thinking about electronic pleadings. We all know that eventually this will be required by Oregon courts. Until that time, there is nothing stopping us from making each others' lives a bit easier.

Although this issue is particularly relevant for multi-party cases, the principles can be used in any matter. Currently, ORCP 7G not only expressly allows for email service but sets out some basic parameters.

Aside from the basic requirements of ORCP 7G, the parties can also agree to other parameters. For example, you might require that all emails involving service have specific language in the "re" line. In our recent situation, the parties agreed that each such email's caption had to say "SMITH v JONES – SERVICE OF PLEADINGS" in order for the email to be effective service.

In addition, one or more of the main parties should prepare an email matrix, listing all of the parties, their counsel, each counsel's additional designees, and the email addresses for the latter two categories. Referring again to my recent experience, an Excel spreadsheet worked very well for this purpose. Whenever someone later requested a revision to the list, it was easy to mark our respective spreadsheets.

Here are some further thoughts for your consideration:

- Do not leave your pleading with the number generated by your scanner. Name the pleading appropriately.
- Reach agreement on a naming nomenclature: My preference is to use the following structure: Client Name–Pleading Name. For example, if you are filing a summary judgment motion on behalf of Hoffman Construction, you should name your document as follows: Hoffman-Summary Judgment.pdf. That way, they group by party in your electronic directory.
- Learn to use Adobe Acrobat. You can combine documents to create a single file for attaching to the email. Thus, you do not need to send separate documents for your motion, your affidavit, and your memorandum.
- Attach your PDF document directly to your email. Do not send emails that include other emails as an attachment.

Sending pleadings electronically also reduces the amount of paper that we use. That not only saves money for our businesses, but also saves trees for our planet. In today's "greener" world, that is a good thing for all of us.

In that vein, I also question the practice of sending documents via both fax and regular mail. To me, that is just a waste. Unless there is some statutory requirement, I urge all of us to be diligent in reducing the flood of paper that flows across our desks.

ONE AND DONE
THE TRUE FINALITY OF ARBITRATION

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Over the past 40 years or more, mandatory and binding arbitration clauses have populated legal agreements in every facet of the law, including construction contracts. In addition to the numerous standardized contracts, there a host of home grown construction contracts with a variety of arbitration provisions. In direct proportion to the use of these clauses is the ever increasing number of attorneys who have transitioned their practice to arbitrator. Just a quick glance at the recent Oregon State Bar Bulletin identifies no less than 11 attorneys offering their services as an arbitrator.

The reality of the arbitration practice is that our brethren who are offering their services have become judge, jury, appellate judge and ultimately Supreme Court Justice. In short, when you embark on the arbitration road, you have one shot at making your client's case. Although ORS 36.705 and 36.710 (see below) provide a few extreme grounds to vacate an arbitration award, you no longer have the luxury of advising your client to include contractual review triggers in arbitration clauses. As such, if the arbitrator's view of the law and/or the facts or even the procedural conduct of the hearing differs from your advice to your client, you need to advise your clients that appellate review of those decisions is virtually non-existent. In short, arbitration's are a "one and done" legal process.

For those creative attorneys seeking to protect their clients from this single avenue of dispute resolution, many try to fashion an appellate review procedure in their contracts. Surely, the contracting parties can alter the harsh restrictions of arbitration review by mutually agreed upon contract provisions. Alas, no matter how sharp your pencil is, this may not be the case.

The United States Supreme Court has recently further cemented the single avenue of legal redress by way of arbitration. In *Hall Street Associates, LLC v. Mattel, Inc*, 128 S.Ct. 1396, 76 USLW 4168 (March 25, 2008), the Supreme Court took an Oregon lease dispute and further imprinted the "one and done" effect of agreed upon arbitration clauses. In *Hall Street*, Hall Street Associates leased a manufacturing site to Mattel. During the tenancy, it was discovered the property's well water had certain environmental contaminants. Mattel gave notice of intent to terminate the lease and Hall Street filed suit in the US District Court of Oregon. Following a bench trial, Mattel prevailed on its termination issue. A remaining issue of indemnification for the cleanup costs was subsequently resolved via agreed-upon arbitration.

The parties' lawyers drafted a very specific arbitration agreement wherein the parties agreed: "[t]he United States District Court of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." As such, the parties' lawyers sought to retain independent review of the arbitrator's decision by the District Court. The parties truly wanted to avoid the potential "one and done" effect of binding arbitration. However, all was to no avail as the Supreme Court struck the parties mutually agreed upon contractual rights to independent review of the arbitrator's award.

During the arbitration of the environmental indemnification issue, the arbitrator concluded Mattel had no duty to indemnify under the lease. The arbitrator found the Oregon Drinking Water Quality Act was not an environmental law as defined under the lease agreement and as such Mattel did not owe a contractual duty of indemnification. Hall Street obviously disagreed with the arbitrator's decision, claiming the decision was clearly erroneous.

Using the independent appellate review clause, Hall Street asked the District Court to vacate the conclusion. The District Court found the arbitrator's decision was erroneous and remanded the decision back to the arbitrator. The arbitrator complied as directed by the Court. Each party subsequently sought review of the amended award. The District Court, following the parties' contractual standard of review, made a correction as to the interest calculation, but otherwise upheld the amended award. Both parties then appealed the award to the Ninth Circuit.

Once on appeal, Mattel switched its argument as to the enforcement of the contractual standard of review. Mattel based its new position on the Ninth Circuit's *en banc* opinion in *Kyocera Corp. v. Prudential-Bache Trade Servs.*, Inc, 341 F.3d 987, 1000 (2003). The Ninth Circuit, based on its ruling in *Kyocera*, concluded "the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable."

The Supreme Court after granting certiorari concurred with the Ninth Circuit finding the provisions to vacate and modify an arbitration award under sections 10 and 11 of the Federal Arbitration Act ("FAA") are exclusive and not subject to modification, alteration or extension by agreement. Hall Street and certain *amici* argued that by thwarting a party's contractual ability to impose a modicum of independent review, "parties will flee from arbitration if expanded review is not open to them." One of Mattel's *amici* prophesized that parties will flee from the courts if independent review is allowed. The Court wrote "We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds."

Where does this leave parties to a construction contract who wish to use arbitration as a dispute resolution, but would like the right to at least ask for a second opinion as to the arbitrator's ruling? In short, why should a party be required to allow an arbitrator unfettered decision making, if they have a contractual option? Why should a single arbitrator or even a panel be empowered as judge, jury and appellate judge, when the parties desire independent review? Should we advise our clients to strike all arbitration clauses?

While the United States Supreme Court is steadfast in its ruling that sections 10 and 11 of the FAA are the sole and exclusive grounds for vacating and/or modifying an arbitration award; the Court did leave open a small crack in the door. The Court wrote that while its ruling was based on the FAA, "we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."

The Court's commentary may be hollow after reviewing the Oregon standards of review. Under ORS 36.705, a party may seek vacation of an arbitration award only if: 1) the award was procured by fraud or undue means; 2) there was evident partiality, corruption or misconduct by the arbitrator prejudicing the rights of a party; 3) the arbitrator refused to postpone the hearing upon a showing of sufficient cause, refused to consider evidence material to the dispute or conducted the hearing so as to substantially prejudice a party; 4) the award exceed the arbitrator's powers; 5) there was no agreement to arbitrate; or 6) the arbitration was conducted without proper notice so as to substantially prejudice a parties rights.

If you compare the Oregon statutory basis to vacate an award to those recited in the FAA, there is very little difference. Therefore, the Oregon legislature has not afforded litigants a statutory right to expand their rights for review of an arbitration award. Maybe it is time to expand the statutory rights of parties to bargain for independent review. Until that time, absent some very narrow basis, litigants in an arbitration should be forewarned the arbitration proceeding is their one and only avenue to resolve their dispute. This "one and done" process greatly empowers the arbitrators. When there are such divergent opinions as to the law and the application of the law to a particular set of facts, it is unsettling to this author how little a party may contractually protect itself from erroneous arbitration awards.

The question then becomes will you advise your construction clients to flee the arbitration process completely and at least afford your client the potentiality for review or, as suggested by the *amici* for Mattel, run from the courthouse doors?

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OREGON'S PRIVATE PROJECT PROMPT PAYMENT ACT

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Oregon's recent addition of a private project prompt payment act may be the most important and overlooked statutory development of the 21st century for prime contractors and subcontractors.

Applicable to most private projects, ORS 701.620-.640 establish timely payment requirements that might at first reading seem familiar to those acquainted with prompt-payment statutes applicable to public projects. However, these newer private project requirements differ from and go far beyond the public project statutory scheme to give prime contractors and subcontractors real remedies when payment does not flow.

For any construction practitioner not already familiar with this "private-project prompt payment act" from 2003, read on to discover how its terms are designed to bring order, calm and certainty to the chaos inherent in private construction project payment terms and practices at both prime and subcontract levels.

ORS 701.620-.640 apply to any private project other than low-rise residential and certain low income housing. They do not apply to public contracts, (which are subject to their own statutory scheme in ORS 279C.570 and .580), or to projects subject to the Low-Rise Residential Dwelling Code or "[h]ousing in which all or part of the dwelling units are reserved for rental to persons having an income equal to or less than 80 percent of the median household income for the area as determined by the Housing and Community Services Department." ORS 701.645.

As to an owner's payments to its prime contractor, the owner must use a monthly progress payment cycle, and must pay, <u>within fourteen days of receipt of each progress payment request</u>, any amount the owner has not objected to in writing within ten days of receipt of the request. (An owner may only adopt a different progress payment cycle and/or extend the ten-day review and fourteen-day payment times if each page of the plans and specifications bears a conspicuous legend giving notice of a different payment cycle and/or extended time lines.) The prime contractor may suspend or terminate performance due to the owner's failure to timely and fully pay. In addition, the statutes govern the time for the owner's final payment. The owner's failure to pay progress payments or final payment timely or in full brings the right to recover 18% interest and prevailing-party attorneys' fees.

As between the prime contractor and its subcontractors and material suppliers (and between subcontractors and their lower-tiers), the statutes also include requirements as to both progress and final payments. In general, prime contractors and their subcontractors must make progress and final payments to their respective subcontractors and suppliers <u>within seven days of receipt of funds</u> (subject to the right to withhold for specified failures of performance). In addition, subcontractors at all tiers have the right to suspend and terminate performance for unjustified payment failures and have the right to recover 18% interest and prevailing party attorneys' fees.

Those already familiar with ORS 701.620-.640 may nod your heads in agreement with the unassailable principle that this often-overlooked bundle of rights and obligations at its core was intended to and does provide a powerful tool for prime contractors and subcontractors in the seemingly never-ending struggle to obtain timely and full payment for work performed at the relatively small cost of requiring diligence and attention to the calendar by all parties.

As of this writing there are no appellate decisions interpreting or applying these provisions, so at present we have only the text to guide our clients and the lower courts or arbitrators when faced with these issues. So, let us parse the text of each provision, which require and provide:

1) on a project expected to last over 60 days, the owner must use a monthly progress payment cycle, [ORS 701.625(1)];

2) the owner (or its representative, if any, designated to receive and review progress payment requests) has only **ten** days from the owner's (or its representative's) receipt of an individual progress payment request to object in writing to any or all of the items/amounts requested [ORS 701.625(4)];

3) ten days after the owner's (or its representative's) receipt of the progress payment request it is deemed "certified" as to all amounts not objected to in writing [ORS 701.625(4)];

4) the owner must pay the "certified" progress payment amount to the prime contractor within **fourteen** days of the owner's (or its representative's) receipt of the particular progress payment request [ORS 701.625(1)]. To the detriment of owners, lenders on private projects are still generally unaware of this statutory requirement, and even when informed lenders often refuse to alter their standard 30-day (or more) cycle for approving and funding draw requests, thus putting their borrower/owner in jeopardy beginning from the initial progress payment;

5) the grounds for the owner's potential objections in that initial ten-day period generally include the contractor's failure to properly or timely perform, or failure to pay lower tiers, or because of defective work not remedied, plus other specific grounds the parties may negotiate [ORS 701.625(4)], and the owner may also withhold sufficient amounts to correct defects or to cover its costs [ORS 701.625(5)]. Prime contractors and subcontractors may omit from their bills or estimates any amounts withheld from payment to a subcontractor, lower-tier subcontractor or supplier for similar reasons [ORS 701.630(4)];

6) amounts representing retainage (as provided under ORS 701.410) may still be withheld and are not subject to the prime contract progress payment objection, certification and payment time lines [ORS 701.625(5)], and may be withheld by the prime contractor from subcontractors [ORS 701.630(4)(i)];

7) the prime contractor and its subcontractors or suppliers at every tier must pay their respective lower-tiers both progress payments **and** final payment within **seven** days of receipt of corresponding funds, provided the lower-tier party has provided an appropriate billing and executed lien waiver [ORS 701.630(2)]. The term "subcontractor" includes subcontractors at all lower tiers; ORS 701.620(7) defines "subcontractor" as having the meaning given that term under ORS 87.005 which, in turn, defines "subcontractor" as "a contractor who has no direct contractual relationship with the owner." Failure by the prime contractor or a subcontractor to pay their respective lower tier subcontractors or suppliers within seven days of receipt of a progress payment or final payment triggers an interest penalty of 1.5% per month commencing on the eighth day unless payment is withheld for the lower-tier's performance failures [ORS 701.630(5)];

8) the owner must make the final payment within seven days after the prime contractor completes and the owner approves all work under a construction contract, subject to the obligation to make payment for individual items that may be completed prior to completion of the entire work if the contract prices for those individual items are separately stated, [ORS 701.625(8)], and further subject to the owner's right to withhold for defective work, damage or other reasons for which the owner could object to a progress payment;

9) the prime contractor, on seven days' notice, (or less if provided in the contract), may suspend performance for the owner's failure to timely and fully pay, and may similarly terminate the contract on written notice if the suspension

lasts more than 30 days [ORS 701.635(1)]. Notice may be given by hand or by any means giving written, third-party verification of delivery. If the prime contractor suspends, it is not required to resume until the owner has paid the certified amount plus reasonable costs of de-mobilization and re-mobilization [ORS 701.635(6)];

10) a subcontractor at any tier, after giving three days' written notice to the owner and prime contractor, may suspend performance for failure by the owner to make timely payment of amounts certified under ORS 701.625 or if the subcontractor fails to receive payment for the certified work under ORS 701.630 (2), or on seven days' written notice if the owner pays the prime contractor who fails to pay the subcontractor; the subcontractor may on written notice terminate if the suspension lasts more than 30 days [ORS 701.635(2) and (3)]. In addition, the subcontractor may on appropriate notice suspend or terminate if the owner fails to approve portions of the progress payment attributable to the subcontractor's work for reasons unrelated to the subcontractor's performance, [ORS 701.635(4)]. The subcontractor need not resume until it has been paid the amount "certified", plus reasonable de-mobilization and re-mobilization costs [ORS 701.635(6)]. Note that there is a lack of clarity here as subcontractor payment requests do not become "certified". Presumably, the phrase was intended to mean the amount in the prime contractor's "certified" request attributable to that subcontractor's performance;

11) the owner's failure to pay the prime contractor timely or in full triggers an interest penalty of 1.5% per month, [ORS 701.625.(11)]; and

12) claims in any lawsuit **or** arbitration involving alleged failure of an owner or prime contractor to make timely and full payment are subject to a prevailing-party right to attorneys' fees, ORS 701.625(13), as are claims in lawsuit or arbitration involving a prime contractor's or subcontractor's suspension or termination for failure of timely and full payment (thus making the decision whether to suspend or terminate for alleged payment failure one not to be made lightly or risked unnecessarily) [ORS 701.635(7)].

Other portions of these statutes prevent parties from avoiding their requirements by use of contract terms, allow subcontractors to require the owner to provide them with information as to prime contract payments, and expose licensed parties to CCB discipline for failure to properly apply or use payments:

13) ORS 701.625(10) prohibits parties from using prime contract or subcontract terms to modify the statutory progress payment requirements and time lines; the only way to effectively extend any of the times is for the owner to include the appropriate legend(s) on every page of the plans and specifications giving notice that the prime contract provides for a different progress payment cycle, [ORS 701.625(2)], or an extended time for the owner to review the progress payment request and make objection, [ORS 701.625(6)], or an extended time for the owner to make payment of the certified progress payment amounts [ORS 701.625(3)]. Note that ORS 701.625(10) does not by its terms prohibit prime contract terms from extending the prime contract final payment time line set out in ORS 701.625(8);

14) ORS 701.640(1)(b) prohibits enforcement of any contract clause that would purport to limit or bar a party's right to suspend or terminate its performance for the other party's failure to comply with the statutory payment requirements and time lines;

15). ORS 701.635(1), (2), (3) and (4) each prohibit contract terms from extending the times for a prime contractor or subcontractor to give notice of its intent to suspend or terminate;

16) So as to avoid subversion of these requirements in a roundabout way, ORS 701.640(1)(a) prohibits enforcement of any clause that "[m]akes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state." Practitioners faced with issues involving clauses purporting to apply another

state's laws or specify a different venue/hearing locale should review evolving federal case law on the enforceability of such clauses, especially as they relate to the location of arbitrations;

17) ORS 701.625(12) requires the owner, upon written request of a subcontractor, to give notice within five days after the owner issues a progress payment or the final payment to the prime contractor. This is a significant right, and one which will and should make subcontractors less vulnerable to mis-information or lack of information, and thus allow them to exercise the rights provided for in other sections; and

18). Under ORS 701.630(3), a licensed party may be subject to disciplinary action by the Construction Contractors Board for "[a]ny failure to reasonably account for the application or use of payments, as proven in a legal proceeding authorized under the terms of the construction contract" although the statutes do not define the phrases "reasonably account" or "application or use", or clarify the concept, and of this writing the CCB has yet to enact a rule to specify what types of purported misconduct in the application or use of payments may put a licensee at risk. Presumably, this section would be construed in light of ORS 701.630(1), which provides "Performance by an original contractor, subcontractor or material supplier in accordance with the provisions of a construction contract entitles the original contractor, subcontractor or material supplier to payment from the party with whom the original contractor, subcontractor or material supplier contracts."

Whether or not this statutory scheme is already part of your construction-law vocabulary, it is certain to become part of the everyday lexicon of Oregon practitioners, making essential a thorough familiarity with its concepts to help provide educated judgment as to their likely application.

LIMITATIONS OF OREGON'S PROMPT PAYMENT ACT

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The provisions of the Oregon Private Prompt Pay Act, ORS 701.620-.640 (the "Act"), appear to give parties to a construction contract the substantive right to prompt progress payments. Nevertheless, a detailed reading of some of the Act's key provisions demonstrates that the Act has limited practical importance in many routine situations. Parties to a construction contract have the ability to contract around many of the key provisions, which, in essence, renders many of them moot. In some cases, the Act has no real meaning at all.

I. Short-Term Projects – Owner and Prime Contractor.

The Act begins with a loophole that removes shorter term construction projects from automatic coverage: "By ***mutual agreement*** with an original contractor, an owner ***may*** make progress payments to the original contractor on a construction contract that is anticipated to last less than 60 days." ORS 701.625(1). This provision is couched in permissive "may" terms, rather than mandatory "shall" terms, which is a general indicator that the parties may choose not to follow the rule. Even though most large-scale construction projects will generally be anticipated to last more than 60 days, those projects that are 60 days in length or less are removed from the Act's provisions unless the parties clearly choose to opt in. This provision could create ambiguity of coverage for any project that might last anywhere up to 90 days, as either of the parties might later say that they reasonably anticipated that the project would not last more than 60 days.

II. Longer-Term Projects – Owner and Prime Contractor.

As the Act makes clear, an owner "shall" make progress payments on all other construction projects. ORS 701.625(1). Even though the Act purports to require 30-day billing cycles, the Act permits the parties to agree to an alternate billing cycle, if the alternate cycle is "stated in the construction contract" in a clear and conspicuous manner. Indeed, ORS 701.625(2) provides the "Notice of Alternate Billing Cycle" text that is relatively simple in form. Conceivably, a large construction contract could specify a much longer billing cycle than the Act's default 30-day period if the parties agree (or if the parties agree to use a standard industry form contract as discussed in more detail in Section V., below).

III. Date for Progress Payments – Owner and Prime Contractor.

ORS 701.625(1) provides that in general an owner "shall" make progress payments within 14 days after a billing is submitted. Nevertheless, the Act allows an owner to make progress payments later than 14 days if the owner is responsible for providing plans and specifications that expressly allow for an extended payment that is defined by a specified number of days, and the owner provides such notice in a form roughly correspondent to ORS 701.625(3)(b).[1] This exception will obviously not cover every construction contract; however, it clearly permits an owner to set a payment schedule out longer than the Act's basic provisions contemplate.

III. Owner-Approved Billing Estimates – Owner and Prime Contractor.

The prompt payment provisions as between the owner and prime contractor are predicated largely on the owner's certification of a billing or estimate, which is deemed complete after 10 days if an owner does not formally object in the form of a written statement. ORS 701.625(4). Even still, an owner has a large number of grounds on which to decline approval of a billing or estimate.

In two provisions that are likely to arise frequently, an owner can decline approval if 1) there is reasonable evidence that a third-party claim will be filed, or, 2) the original contractor or a subcontractor fails to make timely payments for labor, equipment, materials, or products to its subcontractors and/or suppliers. *See* ORS 701.625(4)(e-f).

Importantly, a third provision, ORS 701.625(4)(i), allows an owner to decline approval on the basis of "[o]ther items as allowed under the contract terms and conditions." This broad exception appears to drive a hole into the provisions of the Act in general. It is easy to wonder whether this exception would permit the construction contract to except itself from the Act's requirements altogether or curtail its protections in some other global fashion.

Even though ORS 701.625(10) later states that a construction contract "may not alter the rights of any original contractor, subcontractor or material supplier to receive prompt and timely progress payments as provided under this section," this provision appears to be in direct conflict with ORS 701.625(4)(i), since subsection (4)(i) grants the parties substantial latitude to draft around the Act.

IV. Payments as Between Contractor and Subcontractor.

As between a contractor and its subcontractors, the provisions are generally the same as before. Performance under a subcontract entitles the subcontractor to payment. ORS 701.630(1). Nevertheless, the contractor has further options as to when it must pay a subcontractor that would be covered under a "pay-if-paid" clause in the subcontract.

ORS 701.620(2) states that when a subcontractor has performed under a construction contract, the "contractor shall pay...the full amount received for such subcontractor's work...within seven days of receipt by the original

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[1] Specifically, ORS 701.625(3)(b) permits owners to extend the payment cycle by including the following statement on <u>each page of the plans and specifications</u>:

> Notice of Extended Payment Provision
>
> The contract will allow the owner to make payment within ____ days after the date a billing or estimate is submitted.

contractor or subcontractor of a progress payment or final payment." The contractor's obligation to pay its subcontractors is triggered by actual receipt of a progress payment or final payment. As such, if the subcontract contains a standard "pay-if-paid" clause, whereby the contractor is not obligated to pay the subcontractor until the contractor is paid by the owner, the Act appears in full agreement that the subcontractor does not get paid until the contractor gets paid. Moreover, a contractor is also allowed to withhold payment on the basis of reasonable retainage, as defined in ORS 701.410, or "[o]ther items as allowed under the subcontract or purchase order terms and conditions." ORS 701.630(4)(i). As before, the specific terms of a contract or subcontract – as agreed upon by the parties – appear to trump the provisions of the Act.

From the subcontractor's position, the right to "prompt" payment in this instance offers no real protection. Indeed, to the extent the subcontract includes a "pay-if-paid" or "pay-when-paid" clause, "promptness" becomes a relative term that is triggered only after the contractor is paid by the owner for that subcontractor's work. Little, if any, new substantive rights are put into play if the owner fails or refuses to pay the prime contractor.

V. Conflict with Standard Industry Form Contracts.

Moreover, it is not clear if the Act even applies where the parties have elected to utilize a standard industry form contract such as the standard AIA contract forms (which generally operates on a calendar month basis rather than a 30 day basis). With provisions like ORS 701.625(4)(i) (permitting an owner to decline payment approval for "[o]ther items as allowed under the contract terms and conditions") and ORS 701.630(4)(i) (allowing payment to be withheld for "other items" under a subcontract), there is an argument to be made that to the extent that the parties agree to use a standard industry form contract, the payment provisions of that contract trump any at least some of the Act's provisions.

Ultimately, the Act seems to raise more questions than answers, and provides for prompt payment only in limited circumstances that are not contracted around by the parties.

SOME THOUGHTS ON CCB RULE CHANGES

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The 2007 legislature made more changes in the Construction Contractors Board statutes than I have seen since I started working for the agency in 1997. Most of these came in two bills, one sponsored by the Associated General Contractors and the other from the Taskforce on Construction Defects created by the 2005 legislature. The CCB has spent the last 10 months sorting out the meaning and implications of these bills and adopting rules required to implement them. I now have a much better idea of what these changes will mean for contractors. The following lists some of the changes that every construction attorney should know.

Changes in structure type definitions

Many CCB regulations depend on the type of structure a contractor works on: residential, small commercial or large commercial. The definitions of residential and small commercial structures have dramatically expanded. For instance, residential structures are not limited to the number of units in a building. The only limit is that they must be four stories or less. There is no limit to the number of units.

Small commercial structures used to be 4,000 square feet and did not include tenant space in large buildings. Now, small commercial structures include free-standing buildings up to 10,000 sq. ft. and tenant spaces up to 12,000 sq. ft. Work on a small commercial structure also includes any job where the total job cost is less than $250,000, no matter what the building size is.

This change affects complaints against a contractor's bond and the kind of work a contractor will be able to perform in the future.

Need to choose a license endorsement

As of now, contractors who obtain a new license or renew their license must make some decisions regarding the kind of work they will do under that license. All contractors must obtain an endorsement on their license that limits them to work on residential structures or commercial structures. Beginning July 1, 2010, contractors who work on residential structures will need a residential endorsement and contractors who work on large commercial structures will need a commercial endorsement. Work on small commercial structures can be done by a contractor holding either endorsement. A contractor that works on both residential and large commercial structures will need both endorsements (also known as a dual endorsement). Many specialty contractors will need a dual endorsement.

A contractor must select an endorsement before it renews its license or obtains a new one. This decision will affect the insurance, bond and experience required under the selected endorsement.

Commercial endorsement levels

Contractors who select a commercial endorsement must also select an endorsement level. Commercial general and specialty level 1 endorsements require much higher bond and insurance levels than level 2 endorsements. Although the law does not limit the type of work a contractor can do with a level 2 endorsement versus a level 1 endorsement, owners and developers may require a level 1 endorsement for any contractor submitting a bid on their projects.

Licensing requirements

The licensing requirements are now greater. All contractors will have to present higher bonds and some will have to present higher insurance policies. Commercially endorsed contractors will need to satisfy experience requirements. Contractors need to start the renewal process earlier to allow for possible delays in finding bonds and insurance at a reasonable premium rate.

Written contract requirements

A written contract has always been required for work for the owner of a residential structure if the aggregate contract price exceeded $2,000. But there were no specific contract requirements. Now, ORS 701.305 and OAR 812-012-0110 set out a list of required contract terms. Note that, with the expansion of the definition of residential structures, written contracts will be required on a larger class of buildings.

Beginning last January, if a contractor did not have a written contract where one is required under ORS 701.305, the contractor has no lien rights. See ORS 87.037.

New consumer notice requirements

New notice requirements have replaced the former requirements for a consumer notification form (former ORS 701.055) and the notification of procedure form (former ORS 701.590). Under new statute ORS 701.330, a contractor must deliver a consumer notice form and a notice of procedure form as required by rules adopted by the CCB. You can find the new forms on the CCB website. New rule OAR 812-012-0130 requires that the forms need only be delivered if a written contract is required under ORS 701.305 (see above) and must be delivered on or before the date of the contract. This is a significant loosening of the delivery requirement. However, the rule also requires that a contractor keep proof of delivery of these notices and the Information Notice to Owner form (ORS 87.093) for two years.

The delivery requirements for the Information Notice to Owner remain unchanged. This notice must be delivered if the contract exceeds $1,000.

Warranty and Maintenance Schedule Requirements

Under ORS 701.320, a contractor who constructs a new residential structure must offer a warranty "against defects in materials and workmanship" to the buyer. This applies to a home with a sale contract dated after July 1. The law does not authorize the CCB to regulate the terms of the warranty; thus, contractors are on their own as to the content of the warranty. Lacking authority in this area, the CCB does not plan to adopt a rule limiting the terms of the required warranty offer.

Under ORS 701.335, a contractor who constructs a new residential structure must provide a maintenance schedule to the buyer. In its June 24 meeting, the CCB will adopt a rule specifying minimum terms for this schedule. See the CCB website for a copy of the proposed rule (From the Home Page, go to Statutes and Rules, and then to Administrative Rule Notices. There are five notices for the June 24 meeting. Look for the one that includes adoption of new rule OAR 812-001-0240.)

Under ORS 701.340, beginning on July 1, a commercial general contractor level 1 or 2 that constructs a new large commercial structure must provide "a two year warranty of the building envelop and penetration components against defects in materials and workmanship." The warranty must provide for annual inspections by the general contractor of the envelope and penetration components. The warranty can exclude improper maintenance by the owner.

New Workers Compensation Requirement for Commercial Contractors (2010)

Beginning in July of 2010, contractors with a commercial endorsement must carry workers compensation insurance, whether they qualify as an exempt class of business entity or not.

Reporting Final Judgments

Contractors must report a final judgment that orders the contractor to pay damages arising from construction activities if the judgment was entered after January 1, 2008. There are exceptions to this rule. See ORS 701.109.

For More Information

This is not a complete list of the changes to CCB law. For instance, I didn't cover the licensing exemption for flipping a limited number of home reconstruction projects, the prohibition on barrier EFIS or the licensing of chimney cleaners. For more information, visit the CCB website. Start with the links to "What's New for Contractors (Jan 1, 2008)" and the "2007 Legislative Guide."

INSURANCE 101 FOR CONSTRUCTION LAWYERS – PART II

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This article is the second half of our discussion of general liability insurance fundamentals for construction contractors. Part II addresses several more complex coverage arguments raised by carriers in the construction context, limitations on coverage found in additional insured endorsements (including Oregon's anti-indemnity statute), recent case law in the insurance arena, and a practice pointer on how to begin the search for a contractor's insurance information and policies.

I. <u>DEALING WITH CONSTRUCTION-RELATED COVERAGE ISSUES: DAMAGE DURING THE POLICY PERIOD, CONDOMINIUM EXLUSIONS, AND EIFS EXLUSIONS</u>

A. <u>Timing of Construction Allegations</u>

Insurance policies generally provide coverage for "property damage" that occurs during the policy period. Insurance companies who issue liability policies to contractors around the time of construction carefully review the relationship between the policy period and the work in question to determine whether there could have been any property damage during the policy period. If, for example, the complaint alleges that work on a project began on January 25, 2003, an insurer whose policy period ended on January 24, 2003 would deny coverage because there would be no potential for property damage during the policy period.

Based on the widely-held belief among insurers that liability policies only provide construction defect coverage for "completed operations" (i.e., coverage is only available for property damage that takes place after completion of the project), insurers will also refuse to provide coverage where the complaint alleges a completion date that follows the expiration of the policy. If the same complaint instead alleges that the work was completed on February 25, 2004, the insurer whose policy ended on February 24, 2004 may deny coverage based on its position that no covered property damage could have taken place during the policy period.

Contractors can respond to these arguments in two ways. First, see whether the *complaint's allegations* indicate the timing of the work. If the completion date is not contained in the complaint, the insurance company cannot consider that date in its defense determination. Even if the insurer would be correct in that no property damage occurred during the policy period, the insurer still has an obligation to defend the contractor if the complaint does not specifically and conclusively allege facts eliminating the possibility of an indemnity obligation.

The second issue to be raised with the insurer is the actual timing of when "property damage" occurs. In large projects with multiple buildings or that occur in separate phases, the completion of work may vary from unit to unit, floor to floor, building to building, or from phase to phase. Certain subcontractors, moreover, finish their work long before a certificate of occupancy or similar document evidences completion of the general contractor's work.

B. <u>Exclusions for Apartments, Townhouses, and Condominiums</u>

Insurers, facing an increased number of claims relating to apartments, townhouses, and condominiums due to the proliferation of construction defect litigation, have added endorsements purporting to exclude coverage for such claims. These exclusions can take several different forms. One is known as the "Multi-Unit Residential Buildings" ("MURB") exclusion, which according to insurers excludes coverage for apartments, townhouses, and condominiums. MURB exclusions often exclude coverage for any MURB with more than a set number of units "per structure." Attorneys evaluating these exclusions need to pay close attention to the language of the exclusion, including the definition of what constitutes a MURB.

If, for example, the MURB exclusion sets the number of units per structure at 12 (meaning that a structure with 13 or more units is not covered), then two issues must be evaluated. First, examine the complaint to see whether it alleges how many buildings are in the project, and how many units are in each building. Regardless of how many units each building actually contains, if the complaint does not provide sufficient information to allow the insurer to positively determine the existence of 13 or more units per structure, the insurer may not deny a defense to the insured based on the MURB exclusion. Second, contractors can successfully argue that the "per structure" limitation will only limit coverage where each building has more than 12 units. Thus, a project with 50 units may still be covered if each building has 12 or fewer units.

Another form of exclusion used is the "Designated Work" exclusion, which purports to exclude coverage for damage arising out of certain listed work. The description of the work can be modified on a policy-by-policy basis, so a careful review of what may and what may not be affected by the exclusion is essential in evaluating the coverage afforded by the policy as a whole. One form of Designated Work exclusion lists work on "multi-family habitational structures," apartments, townhomes, and condominiums.

An analysis similar to that conducted on the MURB exclusion should be undertaken for exclusions purporting to limit coverage for apartments, townhomes, condominiums, and the like. Does the exclusion define what constitutes an "apartment"? Does the project qualify as an apartment? Is the exclusion limited to "new construction" or to "ongoing operations"? Each of these factors may significantly impact the scope of the exclusion.

C. Exterior Insulation and Finish System (EIFS) Exclusions

Insurers have also attempted to limit coverage available for claims involving exterior insulation and finish systems (EIFS). By adding an EIFS exclusion to a policy an insurer may hope to either eliminate or limit any potential coverage for claims arising from buildings clad with EIFS. Many EIFS exclusions have unique language, requiring, as with MURB exclusions, a careful examination to determine its applicability. Some of the areas to evaluate include:

(1) Does the cladding system in question fit within the definition of EIFS provided by the exclusion?

(2) Does the exclusion apply to EIFS work performed by subcontractors?

(3) Does the exclusion apply to just the damage arising out of EIFS, or does it attempt to preclude even damage that is completely unrelated to EIFS?

(4) Do the allegations of the complaint match the language of the exclusion?

(5) Do aesthetic EIFS accents and forms fall within the definition of an excluded EIFS system?

(6) Is the EIFS exclusion included in a policy issued during the period in time when OAR 812-002-0380 arguably prohibited such exclusions for EIFS contractors?

One common example is where the project incorporates aesthetic "EIFS" accents or forms. The issue raised by this is whether these forms constitute an EIFS system as defined by the exclusionary language. Do aesthetic forms around windows constitute an exterior cladding system? Do the forms include (a) insulation board, (b) adhesive and/or mechanical fasteners, (c) reinforcing mesh, and (d) a finish coat? Each of these elements should be closely analyzed to determine the potential applicability of the exclusion. Moreover, a contractor can obtain a defense from the insurer – even where the underlying facts are such that no indemnity coverage exists – if the operative complaint does not trigger the EIFS exclusion.

II. ADDITIONAL INSURED COVERAGE

As we discussed in Part I, insurance coverage for a contractor can also come by way of another party's insurance policy. This coverage in an insurance policy may be triggered either by provisions in a construction contract requiring one contractor to indemnify the other, or from contractual language requiring one contractor to name the other as an additional insured on the policy.

In order to obtain insurance coverage, the contractual indemnity and insurance requirements in construction contracts need to be carefully drafted. Too often we see the unfortunate consequences of a contractor (a) failing to incorporate the correct language (in some cases, any language at all) requiring indemnity and requiring the procurement of additional insured coverage and (b) even where the contracts require additional insured coverage, failing to obtain the actual additional insured endorsements. The certificates of insurance are all too often provided, accepted, and relied upon. The additional insured endorsements prove the existence and define the scope of the coverage provided. More attention to these contractual and administrative details at project commencement would enhance the contractor's position when the need for liability coverage arises.

Insurers often deny additional insured tenders, seemingly as a matter of course. The insurers rely upon a number of arguments to support their denials of coverage. We discussed the dilemma of the all-too often relied upon certificates of insurance in Part I. Three additional arguments we see asserted by insurers on a consistent basis are discussed below.

A. Scope of coverage is limited to ongoing operations / no completed operations coverage.

Many additional insured endorsements limit coverage to liability arising out of ongoing operations. The insurance industry has taken the position that coverage is limited to property damage occurring during the course of construction under these additional insured endorsements. This position significantly limits or eliminates the coverage available. In the construction defect context, the dispute most often centers on property damage occurring after operations are complete, and insurers argue that the "ongoing operations" limitation in these additional insured endorsements precludes "completed operations" coverage.

There is, however, some authority to the contrary. By definition, all construction defect liability *arises out of* ongoing operations. *See Valley Insurance Co. v. Wellington Cheswick*, 2006 WL 3030282 (W.D. Wash, October 20, 2006), vacated on other grounds, 2007 WL 1531674 (W.D.Wash. 2007). *Valley Insurance* holds that the "ongoing operations" additional insured language means only that <u>liability</u> must arise from ongoing operations, not that property damage must occur during those ongoing operations ("While the property damage may not have occurred during those ongoing operations, the alleged liability did." *Id*.).

B. <u>Coverage under endorsement terminates at the end of the policy period or completion of the contract</u>.

Some versions of the additional insured endorsement state that the coverage provided to the additional insured terminates at the end of the policy period or at the completion of work under the contract. While this may appear logical, its impact can be drastic under the interpretation advanced by insurance companies. Some insurers argue that once the policy period / contract work ends, there is no more coverage – even if the damage or liability arises during the period of coverage – if the claim against the contractor is made after the additional insured coverage expires. The operation of this language is similar to the "ongoing operations" language discussed above, in that insurers use it to argue that no "completed operations" coverage is provided. Note that additional insureds have valid arguments for coverage for liability occurring when they enjoyed additional insured status.

Even under the insurers' view, there may, however, be a covered period of time during the policy period that requires, at a minimum, a duty to defend. For example, consider the point in time from completion of the named insured's / subcontractor's work to the point in time where the additional insured / general contractor completes its work. All too often, the insurers ignore this potential coverage until confronted by the contractor's counsel.

C. <u>Scope of coverage is either void, in light of ORS 30.140, or is limited to vicarious liability</u>.

Insurers also use Oregon's anti-indemnity statute, ORS 30.140, to argue that no coverage exists under an otherwise applicable additional insured endorsement. Insurers contend that a party claiming to be an additional insured under a policy does not qualify as an additional insured where that portion of the subcontract requiring the subcontractor to name the owner, developer, or general contractor as an additional insured is void under ORS 30.140 and *Walsh Construction Co. v. Mutual of Enumclaw*, 338 Or. 1 (2005).

1. <u>*Walsh* and ORS 30.140 Should Not Apply Where the Additional Insured Is Specifically Named on the Endorsement</u>

Insurance policies typically grant additional insured status through one of two methods: (a) a blanket additional insured provision, which grants additional insured status to any individual or person meeting the requirements of the provision (which generally make qualification as an additional insured dependent upon the existence of a contract requiring such additional insured coverage); or (b) a provision that specifically lists the name of the additional insured.

Walsh dealt with "a blanket additional insured endorsement that automatically extended the coverage that the subcontract required." 338

Or. at 4. This meant that the insurer could only ascertain the identity of additional insureds by examining the indemnity/insurance provisions of the subcontracts. Citing ORS 30.140(1),[2] the Oregon Supreme Court voided the particular subcontract at issue (or at least its provisions relating to indemnity and insurance). Without the blanket additional insured endorsement, the general contractor could not qualify as an additional insured under the policy.

If insurers are correct that *Walsh* and ORS 30.140(1) can entirely void the indemnity and insurance provisions of subcontracts (a doubtful proposition in light of the case law referenced below), the fact that an insurance policy specifically names a party as an additional insured means that reference to the contract is unnecessary and the absence of subcontract provisions requiring additional insured coverage is irrelevant. The specifically-named additional insured would have rights under the policy completely independent of the subcontract and, therefore, any invalidation of the subcontract pursuant to ORS 30.140 would have no impact.

2. <u>ORS 30.140(2) Tempers both *Walsh* and ORS 30.140(1)</u>

Cases interpreting ORS 30.140(2)[3] (decided before and after *Walsh*) have upheld additional insured endorsements where the fault of the subcontractor was implicated, at least in part. The United States District Court for the District of Oregon found, in *Hoffman Const. Co. of Oregon v. Travelers Indem. Ins. Co.*, 2005 WL 3689487 (D.Or. 2005) (Not Reported in F.Supp.2d), that "ORS 30.140(2) permits construction agreements that require a subcontractor to obtain an "additional insured" endorsement indirectly indemnifying the general contractor for the subcontractor's fault in causing injury." *Id.*, at *5. In *Walsh*, subsection (2) did not apply: "It is undisputed that the exception described in subsection (2) does not apply in this case. We are concerned solely with the construction and application of subsection (1)." *Walsh*, 338 Or. at 6.

Other cases contain similar rulings. *See Tudor Insurance Co. v. Wright*, CV No. 04-480-ST, Order, p. 3 (Marsh, J., Order adopting Findings and Recommendations, Feb. 18, 2005) (*Quoted in Hoffman Const.*, 2005 WL 3689487); *Richardson v. Howard Wright Const. Co.*, 2007 WL 1467411, at *5-6 (D. Or. 2007) ("[A]s this court concluded in *Tudor*, '*Walsh* is no obstacle to finding that ORS 30.140(2) applies' when fault by the subcontractor is alleged to have caused the injury, in whole or in part"); *MW Builders, Inc. v. Safeco Insurance Company of America*, 2004 WL 2058390, at *10 (D. Or. 2004); and *Hays v. Centennial Floors, Inc.*, 133 Or.App. 689 (1995).

In *Hays*, the parties agreed that the language in the subcontract was broad enough to require the subcontractor to indemnify the general contractor for its negligence, including its sole negligence. "[C]onsequently," the court held, "ORS 30.140(2) voids the clause to the extent that its application would require [the subcontractor] to indemnify [the general contractor] for its sole negligence." 133 Or App at 695. The *Hays* court cited, in support of its ruling that ORS 30.140(1) only applies when the situation involves the sole negligence of the indemnitee, supporting legislative history: "This is only the indemnification when the indemnifying party is not negligent at all, that somebody who is solely negligent is passing the buck on somebody else." *Hays*, 133 Or App at 695 fn. 3. In light of ORS

2 "Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void."

3 "This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors."

30.140(2) and the case law noted above, contractors have solid arguments to counter insurers' attempts to void any potential coverage under ORS 30.140(1) and *Walsh*.

III. RECENT CASES IMPACTING INSURANCE COVERAGE

A. *Harris v. Suniga*, 344 Or. 301 (March 20, 2008).

Defendant general contractors built an apartment complex for an investment company. The investment company sold the apartment complex to plaintiffs. Shortly after purchasing the complex, plaintiffs discovered certain defects in the construction.

The plaintiffs then sued the defendants for construction defects. The defendants moved for summary judgment, arguing that plaintiffs' negligence claim was barred by the "economic loss" doctrine; that is, because the damage to the apartment building is in the nature of purely economic loss, a claim for negligence will not lie in the absence of a special relationship between the parties. The trial court agreed with defendants and entered judgment dismissing plaintiffs' claim.

The Court of Appeals reversed, holding that deterioration to the physical structure of a building because of defective construction is property damage and not "economic loss," and that the economic loss doctrine, as it has developed in Oregon, does not bar a negligence claim by a subsequent purchaser against the builder to recover damages for the costs of repairing structural damage resulting from defects in construction. *Harris v. Suniga,* 209 Or App 410, 423 (2006) (*quoted in Bunnell v. Dalton Const., Inc.*, 210 Or App 138, 142 (2006)). The Oregon Supreme Court affirmed the Court of Appeals on March 20, 2008.

While *Harris v. Suniga* addresses the liability of a contractor, not an insurer, it impacts how insurance companies respond to claims involving second or third generation property owners. Insurers have at times argued, based on Oregon's economic loss rule, that damages alleged in construction defect lawsuits are not damages because of property damage; rather, they are simply claims for economic loss and, as such, are not covered. *Harris v. Suniga* should eliminate this argument, as the Oregon Supreme Court specifically ruled that property owners, no matter how remote from the original construction, have claims in negligence based on property damage.

B. *Goddard v. Farmers Ins. Co. of Oregon*, 344 Or. 232 (March 6, 2008).

In one of the most recent cases nationally addressing the constitutionality of a punitive damages award, the Oregon Supreme Court reviewed a punitive damages award against an insurance company for its bad faith failure to settle a third party's claim against its insured within policy limits.[4] The Supreme Court ruled that the punitive damages award of $20,718,576 was unconstitutionally excessive, in violation of due process. Although the insurer's actions were repeated, were directed at a financially vulnerable victim, were not confined to that victim alone, and involved intentional malice and deceit, the insurer's conduct did not cause physical harm or involve a reckless disregard for the health or safety of others, and the ratio of punitive damages to the actual and potential harm of approximately $1.28 million suffered by the insured was around sixteen-to-one.

According to the Oregon Supreme Court,

(1) as a general rule, the federal constitution prohibits any punitive damages award that significantly exceeds four times the amount of the injured party's

[4] The estate of a motor vehicle accident victim, as the assignee of an insured-tortfeasor, following an $863,274 jury verdict for the estate in a wrongful death action against the tortfeasor, brought an action against the tortfeasor's liability insurer, alleging that the insurer's failure to settle the wrongful death action within policy limits was an act of bad faith. The trial court entered summary judgment in favor of the insurer. The Court of Appeals, 173 Or App 633, reversed and remanded. After remand, the jury awarded the estate compensatory damages of $863,274 and punitive damages of $20,718,576. After subsequent motions were appealed, the estate sought review from the Oregon Supreme Court.

compensatory damages, as long as the injuries caused by the defendant were economic, not physical;

(2) an award of punitive damages at sixteen times the actual and potential harm to the plaintiff was unconstitutionally excessive; and

(3) the punitive damages award was warranted at an amount four times the economic harm to the plaintiff.

These guidelines from the Oregon Supreme Court frame the potential scope of a punitive damages award claim against an insurance company where there is no physical harm or disregard for the health or safety of others.

C. *Holloway v. Republic Indemnity Co. of America*, 341 Or. 642 (2006).

After receiving an assignment of rights from the insured restaurant, a restaurant employee sued the insurer for breach of its duties to defend and indemnify the restaurant. The action was based on underlying claims by the employee that she was subject to sexual harassment, constructive discharge, and intentional infliction of emotional distress based on the actions of a co-worker.

The trial court concluded that the insurer had no duty to defend or indemnify the restaurant because of coverage exclusions in policy. The Court of Appeals, 201 Or App 376, reversed. The Supreme Court allowed review, reversed the Court of Appeals, and affirmed the circuit court, holding that an anti-assignment provision in the insurance policy rendered invalid the insured's assignment of its rights under the policy to the employee.

Before *Holloway*, policy holders could execute a stipulated judgment, a covenant not to execute, and assign their rights to allow plaintiffs to pursue claims directly against the insurance company. With *Holloway*, this strategy is not advisable where the policy contains an anti-assignment clause (either before or after a loss).

The impact of *Holloway* can be mitigated by taking advantage of ORS 742.031 (allowing for a direct action against the insurer when the plaintiff obtains a final judgment against the insured and the judgment is not satisfied within 30 days after it is rendered) or ORS 18.352 (allowing for garnishment of the proceeds of an insurance policy upon a judgment against the insured).

Other *Holloway* mitigation strategies include the use of a loan receipt or similar vehicle and a plaintiff-funded suit by the insured (maintaining security in the proceeds of the suit). Finally, note that "bad faith" failure to settle claims can involve extra-contractual breaches of duty. An assignment of such a claim should not be limited by a contractual anti-assignment provision.

D. *Cascade Corp. v. American Home Assurance Co.*, 206 Or App 1 (2006).

Cascade Corporation brought an action against its primary and excess liability insurers to recover for defense costs and for pollution remediation. Cascade settled the claims against all of its insurers except for one excess insurer. The trial court required the non-settling insurer to pay a small percentage of Cascade's liability and awarded attorney fees, but refused to award prejudgment interest.

The Court of Appeals affirmed in part, reversed in part, and remanded, holding, in part, that:

(1) Settlement with the other excess liability insurers did not reduce the non-settling excess insurer's liability for the percentage that its limits bore to the limits of all excess policies;

(2) Insured was entitled to its attorney fees for work before its settlement with the primary insurers; and

(3) Prejudgment interest began to run on the date of settlement with the primary insurers.

The *Cascade Corp.* court relied extensively on the Oregon Supreme Court's *Lamb-Weston* case – a case involving an allocation of liability between two insurers on the risk for an automobile accident. The allocation in *Cascade Corp.* amongst the various insurers was based on a comparison of "other insurance" provisions and policy limits (The "*Lamb-Weston*" approach). One premise of *Lamb-Weston* quoted by the *Cascade* court was that "it must be conceded by each insurance company that if the other was not an insurer against this occurrence then it would be liable for the full amount." 206 Or App at 8.

This language in the *Cascade Corp.* opinion has been argued by insureds to represent an adoption by Oregon courts of the "all sums" argument, much like Washington under the *B&L Trucking* case.[5] Under this theory, no matter how much property damage actually happens during a given policy period, once an insurer is liable for some damage, it must pay until its limit is exhausted. Liability policies typically provide coverage for "those sums that the insured becomes legally obligated to pay as damages because of … 'property damage.'" The damages are the monetary approximation of what it will take to repair the project. Usually the same damages – *i.e.*, the same repair – exist for each policy period. Insurers have done their best to dispute that reading of *Cascade Corp.*[6]

IV. PARTING PRACTICE POINTER

When faced with difficulties in tracking down information on a client's insurance carriers and policies (an obstacle faced all-too often by counsel for insureds), try the Oregon Construction Contractors Board ("CCB") website: https://ccbed.ccb.state.or.us/ccb_frames/consumer_info/ccb_index.htm. By utilizing the CCB website's Contractor License Search function, counsel can retrieve basic information (carrier name, policy number, policy period, and policy limits) for a client's current and historical insurance carriers. While the information found on the CCB website is not always accurate (the CCB information is only as accurate as the information contained on the certificates of insurance submitted to the CCB by the contractors), it is often the best place to start compiling an insurance history for a contractor.

5 *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc.*, 134 Wash.2d 413, 424, 951 P.2d 150 (1998) ("all insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages.").

6 Insurers argue that *Cascade Corp* does not affect obligations between insurers who cover the same loss, only the insured's rights *vis-a-vis* a given insurer. Insurers also argue that the environmental context of *Cascade Corp.* distinguishes it from other cases. Construction defect cases, however, are similar to environmental cases, in that property damage may occur in multiple policy periods in both types of cases. Insurers also argue that *Cascade Corp.* does not directly address time on the risk issues, and that they may therefore still be able to limit exposure where most of the damage occurs outside their policy period. Finally, insurers argue that *Cascade Corp.* does not address whether an allocation of coverage can be made to the insured for periods where the insured has no coverage.

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