Construction Law Newsletter

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MESSAGE FROM THE CHAIR

Angela Otto
Stewart Sokol & Gray

Greetings from your new Section chair. On behalf of the 2009 Executive Committee, I wish to express our extreme gratitude for our newsletter editor and outgoing chair, Alan Mitchell. During Alan's tenure, the Executive Committee spent a lot of energy and time improving and implementing the Section's new website, which I am pleased to report is now up and running at http://www.osbarconstruction.com.

I encourage you all to spend a few moments reviewing the website as—in addition to general information about the Section—it includes copies of past newsletters (*see* Current Issues tab), a member directory, schedules of upcoming committee meetings and CLEs, and identifies various subcommittees (which you, as Section members, are always welcome to join and/or provide feedback).

This year the Executive Committee plans to meet approximately once every two months. As noted above, a schedule of these meetings is available on the website. Our first goal for 2009 is to keep the website updated with fresh information. If you have any information or suggestions concerning the website, please feel free to send them to our website editor, Jim Van Dyke, at jvd@ci.portland.or.us. Remember, the website is intended to assist you in your practice. If you have suggestions on ways to improve it, let us know.

Our second goal is to publish three newsletters in 2009 and to make these newsletters more readily available by electronic distribution to Section members. We also hope to make all past newsletters not only available on the website, but also searchable for your convenience.

During the 2008 term, the Executive Committee formed the below subcommittees to further develop the longstanding (and in some cases the relatively new) general goals of the Section. During the 2009 term, it is one of our goals to get you—as Section members—more involved in providing us feedback as to CLE programs, legislative updates, the tri-county referee programs, etc. Let us know what you want, need and expect from your Executive Committee.

- **Legislative Subcommittee** – General purpose is to monitor any new changes in construction-related laws, to obtain input from and funnel information to Section members about new or proposed changes in construction law, and to determine whether the Executive Committee should recommend any changes that would improve existing law. Note that the intent is to merely *inspire* existing law, not promote or lobby for laws that might be divisive among Section members. Current subcommittee members include Gary Christensen, Darien Loiselle, and Jason Alexander. If you have any concerns or proposed amendments for the 2011 term, please feel free to contact Darien Loiselle at dloiselle@schwabe.com.

- **Referee Program Oversight Subcommittee** – General purpose is to monitor the referee programs currently utilized by Multnomah, Clackamas and Washington Counties

in complex, multi-party construction cases, to obtain feedback and funnel information to Section members regarding these programs, to determine whether the Executive Committee or Section should recommend any changes to the programs, and to consider whether the Executive Committee or Section should promote statewide adoption of these programs. Current subcommittee members include James Prichard and Pete Viteznik. Again, if you have any input on the referee programs or suggestions concerning the same, please feel free to contact Pete Viteznik at pviteznik@kilmerlaw.com.

- **Cyclical CLE Subcommittee** – general purpose is to establish an annual one to one and one-half day CLE program to address a rotating schedule of basic construction law topics. The CLE is to be held in different locations around the state and to provide two to three years' worth of different topics that will then be updated and cycled through every two or three years. Current subcommittee members include: Gary Christensen, Jim Van Dyke and James Prichard. The Executive Committee is working on plans for a CLE program to take place in Bend, Oregon in May 2009. Please look for updates on both the website and through email alerts.

- **Brown Bag CLE Series Subcommittee** – General purpose is to continue the Brown Bag CLE series instituted during the 2006 term. The series is intended to give new construction law practitioners a "nuts and bolts" background on the important, basic issues and concepts at work within the construction industry. Each session will be held at Smith Freed & Eberhard, 111 SW 5th Avenue, in the ground-floor Training Room. The sessions will start at noon and are scheduled to last approximately 50 minutes. The current schedule for this free lunchtime CLE program is as follows:

2/19/09	Interpreting Building Codes
3/12/09	Reading Plans and Specifications
4/16/09	Construction Delay Claims
6/18/09	Mold and Indoor Air Quality Issues in Construction
8/20/09	Construction Defect Claims
10/15/09	Insurance Coverage for Construction Claims
12/17/09	Public Contracting

For those of you not located in the Portland metro area, the Executive Committee hopes to provide video links of these CLE series on the website before the end of the 2009 term. For changes and/or updates to the schedule, please see the website. To reserve your seat for particular sessions or the whole series, please contact Jessica Berg at (503) 227-2424 or jberg@smithfreed.com.

Finally, a list of current members of the Executive Committee is as follows:

Angela M. Otto	Chair
Gary D. Christensen	Chair-Elect
Alan L. Mitchell	Past Chair
James H. Van Dyke	Treasurer
Darien S. Loiselle	Secretary

Members-at-large:

Jason W. Alexander

Timothy M. Dolan

William J. Boyd

J. Daniel Gragg

Thomas A. Ped

James C. Prichard

Peter J. Viteznik

Robert L. O'Halloran

Daniel R. Schantz

Please feel free to contact any member with any suggestions or questions.

Thank you for the opportunity to serve as your 2009 Section chair. I look forward to an eventful and successful year that meets or exceeds our goals.

NEW *WAXMAN* CASE CLARIFIES SOL FOR CONTRACT CLAIMS

David Gilbert
Stewart Sokol & Gray

In its recent *Waxman* decision, the Oregon Court of Appeals has clarified the statute of limitations for breach of construction contract claims. *Waxman v. Waxman*, 224 Or App 499 (2008).

The plaintiff homeowners brought multiple claims against the defendant builder/developer, including breach of contract claims, even though it had been eight or nine years since substantial completion of the homes at issue. The homeowners argued that their contract claims were not barred by the six year statute of limitations set forth in ORS 12.0880 because the ten year statute of ultimate repose in ORS 12.135 extended the time in which to bring a breach of construction contract claim. Plaintiffs made this argument based on an apparent inconsistency in the phrasing of ORS 12.080 (governing contract claims generally) and ORS 12.135 (governing construction contracts).

The Court of Appeals rejected that argument, holding that (1) a six year statute of limitations applies to construction contract claims; (2) a contract claim commences no later than the date of the alleged breach; and (3) there is no "discovery rule" for a construction contract claim (i.e., the claim accrues when the alleged breach occurs, not when the plaintiff discovers the alleged breach).

By its holding, the Court of Appeals has fixed what has long been seen as an apparent inconsistency in the statutes of limitation regarding construction contract claims. The decision gives some assurance to contractors and developers that they should not be held liable for contract claims filed more than six years following contract completion.

2009 CASE LAW UPDATE

Gary Christensen
Jeffrey Sagalewicz
Miller Nash

1. Agency.

A manufacturer's territory manager may have apparent authority to create warranties if the manufacturer's actions reasonably lead the customer to believe the territory manager is authorized to provide a warranty.

Taylor v. Ramsay-Gerding Construction Co., 345 Or 403, 196 P3d 532 (2008).

Plaintiffs hired Ramsay-Gerding Construction Company to build a stucco-clad hotel. Plaintiffs halted construction after becoming concerned that metal fittings included in the stucco system could rust. Plaintiffs allowed construction to continue, after the stucco manufacturer's territory manager recommended the use of a corrosion inhibitor on the fittings and represented that plaintiffs would receive a five-year warranty on the stucco system. After construction had been completed and during the contract closeout, plaintiffs requested, and the territory manager delivered, a letter confirming the warranty.

Shortly after project completion, plaintiffs identified rusting visible through the stucco. The installer and manufacturer visited the site, but no one fixed the problem, leading to a claim that the stucco manufacturer had breached the warranty. The stucco manufacturer defended by asserting that there was no warranty because the territory manager did not have authority to issue a warranty.

The jury found that a warranty existed and that the manufacturer had breached it. The manufacturer appealed, and the court of appeals reversed, holding that plaintiffs had to establish more than evidence of the territory manager's title and role as a sales agent. Instead, plaintiffs had to produce evidence that the manufacturer conferred on the territory manager authority to issue the warranty or that persons in the territory manager's

position customarily had the authority to issue warranties and that plaintiffs were aware of the territory manager's position.

The supreme court reversed. Plaintiffs had set forth sufficient evidence for a jury to find apparent authority, showing that the manufacturer had taken steps to create apparent authority to provide a warranty by giving territory managers actual authority to help process warranties, communicate with customers about warranties on the manufacturer's letterhead, visit jobsites and solve problems (such as plaintiffs' rust problem), sell add-on products, and answer questions about the system. Plaintiffs also showed that they were actually aware at the time the territory manager offered the warranty that he was generally in charge of the region, even though plaintiffs were unaware of the territory manager's precise title and learned of the territory manager's responsibilities only through the contractor (as opposed to the manufacturer). Because of the territory manager's position and actual authority to allay concerns about rust, it was reasonable for plaintiffs to believe that one way in which the territory manager was authorized to allay concerns was by issuing a warranty.

2. <u>Arbitration Agreements</u>.

Parties to arbitration agreements governed by the Federal Arbitration Act (the "FAA") may not contractually modify the judicial standard of review of an arbitrator's award.

> *Hall Street Associates, LLC v. Mattel, Inc.*, ____ U.S. ____, 128 S Ct 1396, 170 L Ed 2d 254 (2008).

After lessee Mattel, Inc., gave notice of its intent to terminate a lease from Hall Street Associates ("Hall"), Hall filed an action contesting Mattel's right to terminate the lease and asserting that the lease required Mattel to indemnify Hall for certain costs related to environmental cleanup required at the site. Mattel won on the termination issue, and the parties agreed to submit the indemnification issue to arbitration, with the court entering the arbitration agreement as an order. The arbitration agreement allowed the district court to vacate or modify any arbitration award if the arbitrator's award was not supported by substantial evidence or included erroneous conclusions of law. This standard for vacatur and modification differed from the standard included within the FAA.

After the initial arbitration award favored Mattel, Hall sought review from the district court, which vacated the award because the award was based on erroneous conclusions of law. On remand, the arbitrator's decision favored Hall, and the district court upheld the award with a slight modification. Both parties appealed.

The Ninth Circuit reversed, holding that arbitration-agreement terms fixing the mode of judicial review are unenforceable because the FAA provides specific, statutorily-defined standards for review. Eventually, the Supreme Court granted review, affirming the Ninth Circuit's decision and holding that Sections 10 and 11 of the FAA provide the exclusive grounds for modifying or vacating an award, and so the parties could not modify the standard in their arbitration agreements.

In reaching its holding, the Supreme Court rejected Hall's argument that Sections 10 and 11 of the FAA were not the exclusive grounds for vacatur and modification. Hall had cited *Wilko v. Swan*, 346 US 427, 74 S Ct 182, 98 L Ed 168 (1953), for the proposition that the courts have expanded judicial-review authority to reverse an arbitrator's manifest disregard of the law. But the Supreme Court rejected the argument, instead interpreting *Wilko* as expressly rejecting a court's general review of arbitration award for legal errors.

The Supreme Court also rejected Hall's argument that the FAA's general policy of enforcing the agreements between parties should favor an interpretation that parties could contract for their own agreed-upon standards of review. The Supreme Court held that this argument was inconsistent with the language of the FAA and could lead to cumbersome review of arbitration awards, defeating the FAA's purpose of promoting expeditious resolution of claims.

Importantly, the Supreme Court's decision applied only to those agreements reviewed by a district court under the FAA. Whether parties could agree to different standards of review when a

different statute provided the basis for judicial review of an arbitration award was not decided.

3. Conferral.

The requirement to confer with opposing counsel before filing a motion is mandatory, even if conferral would be futile. UTCR 5.010.

Anderson v. State Farm Mutual Auto Ins. Co., 217 Or App 592, 177 P3d 31 (2008).

Defendant filed a motion to dismiss plaintiff's lawsuit under ORCP 21 A(3) because an identical action was pending, certifying in the motion that counsel had made a good-faith effort to confer before filing the motion, as required by UTCR 5.010(1) and (3). At the hearing, defendant admitted that it had not attempted to confer and that the certification had been erroneously included as part of a form used for the motion. Defendant argued that its noncompliance with UTCR 5.010 should be excused, however, because attempts to confer would have been futile and if the court denied the motion, defendant would simply confer and then refile it. The trial court excused defendant's noncompliance with UTCR 5.010, and plaintiff appealed.

The court of appeals reversed. The conferral and certification requirements under UTCR 5.010 are unambiguous and mandatory. "Futility" was not an acceptable excuse for disobeying the rule's requirements. Additionally, defendant had failed to present any evidence that the rule's application would cause injustice or hardship, so defendant was not entitled to relief from the rule under UTCR 1.100 (which allows the trial court to grant relief from the UTCRs when their application will cause injustice and hardship).

4. Economic Loss.

The economic-loss doctrine does not bar a negligence action against a builder by a subsequent purchaser when property damage results from the builder's negligence.

Harris v. Suniga, 344 Or 301, 180 P3d 12 (2008).

Defendants were general contractors of an apartment complex. Plaintiffs purchased the complex from the original owners and did not have a contractual relationship with defendants. Plaintiffs alleged that defendants had negligently built the complex by failing to install required flashing on the decks, concrete walkways, landings, gutters, laminates, and bellybands, and that defendants had failed to properly install certain wall caps, fasten trim to the outside of windows, and paint the siding.

Defendants moved for summary judgment, contending that the economic-loss rule barred plaintiffs' negligence claim because plaintiffs did not have a special relationship with defendants. Plaintiffs countered that the economic-loss doctrine did not apply because they had properly alleged that defendants caused the property damage. The trial court granted defendants summary judgment. The court of appeals reversed, and defendants appealed to the Oregon Supreme Court.

The supreme court affirmed the court of appeals. First, it rejected defendants' attempt to characterize plaintiffs' injury as an economic loss. Defendants had asserted that plaintiffs' real injury was an investment loss caused by overpaying for the complex given its damaged condition at the time of purchase. Defendants reasoned that any damage that they could have caused happened before plaintiffs purchased the property, and thus plaintiffs' injury was caused by their failure to discount the purchase price to reflect the existing property damage. In other words, plaintiffs had made a poor investment decision.

The supreme court, however, thought that defendants' argument blurred the traditional distinction between economic loss and property damage. All physical injury to property has an element of economic loss—a damaged piece of property is worth less than one without damage. But the types of economic loss included within the economic-loss doctrine (such as losses to the value of a stock price resulting from negligent accounting practices or the loss of a testamentary gift resulting from a lawyer's negligence in drafting a will) did not traditionally have any element of property damage. The court refused to hold that an investment loss derived from a

physical injury to property (dry rot) was barred by the economic-loss doctrine.

Defendants also argued that even if the dry rot were characterized as property damage with respect to the original purchaser, it should not be characterized as property damage to plaintiffs' property because plaintiffs purchased the property long after any negligent act by defendants. This argument was rejected based on the supreme court's prior holding in *Newman v. Tualatin Development Co., Inc.*, 287 Or 47, 597 P2d 800 (1979), which allowed later purchasers of property to maintain an action against the original contractor if the later purchasers could prove negligence.

The supreme court also refused to address arguments submitted by friends of the court. On one hand, pro-contractor briefing argued that a decision allowing plaintiffs to maintain a negligence action would lead to the odd result whereby later purchasers could have more rights than the original contracting purchaser because, absent a special relationship, an original purchaser can assert only a contract claim. On the other hand, pro-plaintiff briefing asserted that the court should remove the requirement that an original contracting purchaser allege a special relationship in order to maintain a negligence action against a contractor. The court refused to address either argument because the case did not involve a contract.

5. Expert Testimony.

A court may not exclude expert testimony solely because another expert disputes the validity of the expert testimony.

Kennedy v. Eden Advanced Pest Technologies, 222 Or App 431, 193 P3d 1030 (2008).

Plaintiff alleged that he suffered a lasting reaction to toxic chemicals that Eden Advanced Pest Technologies had used in ridding plaintiff's house of an ant problem. According to plaintiff, Eden used toxic chemicals even though plaintiff had requested that Eden use a nontoxic pesticide because plaintiff suffered from chemical sensitivity.

Although plaintiff received judgment in the amount of $120,000 at trial, plaintiff appealed because, among other things, the court had excluded expert testimony concerning the diagnosis of plaintiff's chemical sensitivity. The trial court excluded the evidence based on testimony from Eden's expert, who opined that chemical sensitivity was not recognized as a scientific medical diagnosis and challenged plaintiff's expert's qualifications and methodology. The trial court also found persuasive the decisions of other jurisdictions and federal courts that rejected chemical sensitivity as a scientifically valid diagnosis.

The court of appeals reversed and remanded. Whether an expert's testimony is admissible does not turn on whether the other party or other jurisdictions accept the validity of the expert's opinion. Instead, the question is whether truth-finding is better served by admission or exclusion of the evidence, guided by the seven factors identified by the Oregon Supreme Court in *State v. Brown*, 297 Or 404, 687 P2d 751 (1984). Applying the *Brown* factors, the court determined that plaintiff's expert's testimony was admissible.

6. Negligence Liability — Special Relationships.

An agent may contract around the special, extracontractual duty to provide material information about the matters to which the agent is entrusted.

Boyer v. Salomon Smith Barney, 344 Or 583, 188 P3d 233 (2008).

Robert Boyer sued his broker Salomon Smith Barney for negligence and breach of contract arising out of financial losses connected with trades of commodities contracts. Salomon Smith Barney moved for judgment on the pleadings with respect to the negligence claim, arguing that Boyer's only remedy was in contract because Salomon Smith Barney did not owe Boyer any duty independent of those prescribed by the contract. The trial court granted the motion, and Boyer appealed. After the court of appeals affirmed the trial court, Boyer appealed to the Oregon Supreme Court.

Boyer's negligence claim mainly alleged that Salomon Smith Barney had breached a duty to inform Boyer of material information by accepting certain orders without informing Boyer that he would have to sell them within a day; had canceled orders without informing Boyer that he had insufficient funds to place them; and had sold certain contracts to cover margin positions without informing him. Citing *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 831 P2d 7 (1992), the supreme court accepted that Salomon Smith Barney's relationship as agent to Boyer could carry with it certain special duties arising independent of the contract. It also recognized that one of the independent duties could be the duty to provide material information relevant to the matters entrusted to the agent. Referring to the Restatement (Second) of Agency § 381 (1958), however, the court held that the duty to provide material information could be limited by agreement.

Boyer had agreed in his account agreement to limit Salomon Smith Barney's duty to provide material information in certain circumstances. If Boyer failed to sufficiently fund his account, Salomon Smith Barney had discretion to sell positions and cancel orders without prior notice or demand. Because Boyer's negligence allegations arose out of the breach of a duty that Boyer had contractually agreed would not apply, he failed to plead a cause of action in negligence.

7. Offer of Judgment: Service and Filing.

A defendant seeking to cut off a plaintiff's right to recover attorney fees incurred after plaintiff rejected an offer of judgment made under ORCP 54 E must have filed the original offer with the court.

Wilmoth v. Ann Sacks Tile and Stone, Inc., 224 Or App 315, 197 P3d 567 (2008).

Plaintiff succeeded on a retaliation claim and was awarded damages and attorney fees. Among other issues, defendant appealed the award of attorney fees because plaintiff had failed to recover more than an unaccepted offer of judgment that defendant had tendered under ORCP 54 E. Plaintiff had not filed the offer with the court at the time it was sent to defendant. Defendant contended that only accepted offers need be filed with the court, and that it would be illogical to require unaccepted offers to be filed because, under ORCP 54 E, unaccepted offers are deemed withdrawn and cannot be evidence at trial.

The court of appeals affirmed the trial court, reasoning that defendant's offer of judgment was invalid because it had not been filed with the court according to ORCP 9. ORCP 9 A requires that offers of judgment be "served" on each of the parties. And ORCP 9 C requires that, except for certain discovery pleadings, documents required to be served must be filed with the court within a reasonable time after service.

8. Offer of Judgment: Not Limit on Sanctions.

The limitation in ORCP 54 E(3) against a party's recovery of attorney fees incurred after the rejection of an offer of judgment does not constrain a trial court's ability to award a sanction under ORCP 46 C for a party's failure to respond to a request for admission.

Elliott v. Progressive Halcyon Ins. Co., 222 Or App 586, 194 P3d 828 (2008).

Defendant had made an offer of judgment under ORCP 54 E in the amount of $10,000 in an effort to resolve plaintiff's claim related to an auto accident. Plaintiff rejected the offer, but at trial the jury awarded plaintiff only $8,509.64 in damages. The court also awarded plaintiff his costs and disbursements plus $1,200 in attorney fees under ORCP 46 C based on defendant's failure to admit certain facts. Defendant appealed the awards of costs and disbursements and attorney fees based on plaintiff's failure to recover more than the amount of the offer of judgment.

The court of appeals first analyzed plaintiff's judgment and determined that plaintiff's recovery did not best defendant's $10,000 offer of judgment. When comparing the judgment to the offer, the court concluded that only the $8,509.64 damage award, filing fees of $234, and a prevailing-party fee of $275 could be included in the judgment for purposes of the comparison. The prevailing-party fee was included because, had plaintiff accepted the offer, he

would have been entitled under ORS 20.190(2)(a)(A) to recover the fee. But all other costs incurred after the offer were not included. Additionally, the court rejected plaintiff's contention that the attorney fees related to the sanction should be included in the judgment for comparison purposes because the right to collect the sanction under ORCP 46 C did not arise until after the offer when plaintiff proved at trial the facts that defendant had failed to admit.

Next, the court analyzed whether plaintiff was entitled to the sanction under ORCP 46 C notwithstanding ORCP 54 E(3)'s bar against the recovery of attorney fees post-offer when plaintiff's judgment fails to beat the offer. ORCP 54 E(3)'s bar is in place to encourage settlement and penalize a plaintiff who spurns what turns out to be a reasonable settlement by barring the attorney fees that a prevailing plaintiff would otherwise have the right to recover. Sanctions under ORCP 46 C, however, are unrelated to whether a party prevails at trial. They are to reimburse the expenses incurred to prove facts that were unreasonably denied. And sanctions under ORCP 46 C are awarded by order of the court, not by judgment. Accordingly, the bar in ORCP 54 E(3) does not preclude a sanction under ORCP 46 C.

9. <u>Prejudgment Interest/Tender</u>.

A party seeking to enforce a repudiated settlement agreement is liable for prejudgment interest unless the party effectively tenders to the repudiating party the payment due under the settlement agreement.

McDowell Welding & Pipefitting v. US Gypsum Co., 345 Or 272, 193 P3d 9 (2008).

Plaintiff subcontractor sought additional compensation from defendants for additional work that plaintiff had performed on a construction project. The parties negotiated a settlement agreement, but shortly after, plaintiff repudiated the agreement and sued defendants for breach of contract. Defendants asserted as an affirmative defense and counterclaim for specific performance that plaintiff had released its claims under a settlement agreement.

The trial court bifurcated plaintiff's claims to resolve the counterclaim first. After denying plaintiff's request for a jury trial, the trial court in a bench trial found that a settlement agreement existed, ordering plaintiff to execute releases, and defendants to pay the principal amount due under the settlement. Plaintiff appealed the denial of his request for a jury trial and the trial court's failure to order defendants to tender prejudgment interest along with the principal amount due under the settlement. The court of appeals affirmed.

The supreme court affirmed the denial of the request for a jury trial, but ruled that plaintiff was entitled to prejudgment interest on the amount due under the settlement agreement. Citing *Wittick v. Miles*, 268 Or 451, 455, 521 P2d 349 (1974), the court held that defendants can specifically enforce a repudiated contract only if they made plaintiff whole under the contract, which would include any interest due on the principal amount previously withheld.

The court rejected defendants' argument that they cut off plaintiff's right to interest by tendering payment to plaintiff shortly after the settlement agreement had been made and before it was repudiated. To constitute a tender, defendants had to be more than ready to pay. They had to actually produce and make available for acceptance the money or offer in writing to pay a particular sum of money. Although defendants had requested information that would have allowed them to pay plaintiff and its subcontractors in the future, the promise to pay in the future did not equate to a tender, and thus did not defeat plaintiff's claim for prejudgment interest.

10. <u>Professional Licensing</u>.

A person practices architecture if the person produces plans and designs for a building, even if the building is never erected.

Davis v. Board of Architect Examiners, 222 Or App 370, 193 P3d 1019 (2008).

The Board of Architect Examiners fined Davis for practicing architecture without a license because he prepared plans and designs for a strip mall in Lincoln City. Davis asserted that the statutory term "practice of architecture" did not

apply if the buildings were never erected. The court held, however, that the state need not wait until a building was erected to find a violation. The public-safety purpose of the licensing requirement was served by prohibiting activities undertaken in contemplation of erecting a building.

11. Statute of Limitations.

The six-year period identified in ORS 12.080(1) applies to an action for breach of a construction contract. ORS 12.080(1) does not contain a discovery rule.

Waxman v. Waxman, 224 Or App 499, 198 P3d 445 (2008).

Defendant contractor built four townhomes in the mid-1990s, one of which plaintiffs purchased in 2001 from the original owner. The townhome owners later discovered several defects in the townhome complex's common elements, and an arbitration was initiated by all the owners against the contractor. Eventually, two of the original owners settled with the contractor, and the other original owner won a damages award after a full evidentiary hearing. But the contractor successfully challenged the eligibility of plaintiffs to participate in the arbitration because they were not parties to the arbitration agreement, which was found in the purchase and sale contracts between the builder and the original owners.

In the meantime, plaintiffs obtained an assignment of the original owner's contract rights, and in September 2005 initiated a separate action against the contractor for breach of contract and negligence. On summary judgment, the court dismissed plaintiffs' breach-of-contract claims based on the six-year statute of limitations in ORS 12.080(1). The court also dismissed the negligence claim as barred by the economic-loss doctrine. Finally, the court refused to grant summary judgment to plaintiffs based on the preclusive effect of the arbitration decision. Plaintiffs appealed.

The court affirmed dismissal of the contract claim, holding that the statute of limitations for a claim for breach of construction contract is the six-year period governed by ORS 12.080(1). The court rejected plaintiffs' argument that ORS 12.135 created a ten-year limitation period for construction-contract claims, focusing on the distinction between statutes of limitation and statutes of ultimate repose.

ORS 12.135(1) is a statute of ultimate repose that sets the maximum time within which a specific type of claim can be filed regardless of exceptions or other circumstances. But ORS 12.080(1) and ORS 12.135(2) are statutes of limitation, setting the time within which an action must be commenced unless tolled by express exceptions (such as a discovery rule) or other applicable circumstances (e.g., infancy).

When considering this distinction in the context of the legislative history and the rules of statutory construction, the court held that the language in the statute of limitation in ORS 12.080(1) referencing ORS 12.135 necessarily refers only to the statute of limitations in ORS 12.135(2) and not the statute of ultimate repose found in ORS 12.135(1). The court went on to hold that ORS 12.080(1) does not contain a discovery rule, so actions against contractors for a breach of construction contract must be commenced within six years from the breach.

Additionally, citing *Harris v. Suniga*, 344 Or 301, 180 P3d 12 (2008), the court of appeals reversed the dismissal of the negligence claim because plaintiffs' claim involved property damage. The court also affirmed the trial court's decision to not give preclusive effect to the arbitration award because it was unclear from the face of the award whether the contractor's liability was in contract (in which case, plaintiffs' claims were barred) or in tort (in which case, plaintiffs' claims may not have been barred).

12. Waiver.

A party may waive the right to enforce a time-of-performance clause in a contract by conduct.

Soliz v. Jimenez, 222 Or App 251, 193 P3d 34 (2008).

Plaintiffs entered into a purchase and sale agreement to purchase a residence from defendant,

agreeing to close the transaction on May 31, 2005. Because plaintiffs' funding was available before the closing date, plaintiffs and the title company requested an accelerated closing for May 27, 2005. Defendant initially refused, apparently misunderstanding the request because of a language barrier. The next day, defendant received a letter from plaintiffs' attorney threatening litigation if defendant did not perform the contract or rescind the agreement and return plaintiffs' escrow deposit within ten days. The letter also expressly reserved all of plaintiffs' rights under the agreement. Defendant then hired an attorney, and the parties began settlement discussions, which extended beyond the May 31, 2005, closing date in the agreement.

During negotiations, plaintiffs' attorney agreed to consider defendant's counteroffer to rescind, and the attorneys agreed that neither would take adverse action without further notice. Eventually, plaintiffs filed suit, demanding specific performance of the agreement or damages for breach. The trial court held that defendant had breached the agreement by failing to close on May 31, 2005, concluding that defendant's ability to ignore the closing date was conditioned on acceptance of the offer to rescind the agreement.

The court of appeals reversed, concluding that the letter sent by plaintiffs' attorney and the postclosing negotiations between the parties constituted a waiver of the requirement that defendant perform on May 31, 2005. In particular, by its terms, the letter implied that plaintiffs would accept performance of the agreement sometime after May 31, 2005, during the ten days in which defendant had to respond to the letter. The general reservation of rights did not prevail over the specific demand to perform by a new date.

Additionally, defendant's conduct by negotiating after the closing and assurances that plaintiffs would consider offers made during the negotiations confirmed to defendant the waiver of the requirement to perform the agreement by May 31, 2005. The waiver of the time of performance, however, did not waive performance altogether. The court reversed the summary judgment because a factual issue remained concerning whether defendant had performed the agreement within a reasonable time.

CCB COMPLAINT ISSUES - UPDATE

Alan Mitchell
Mitchell Law Office

Many practitioners are familiar with filing complaints against contractors through the Oregon Construction Contractors Board (CCB). This article outlines the changes to those procedures.

Most of these issues arise out of the separate "residential" and/or "commercial" endorsement held by contractors. Effective July 1, 2008, all contractors who renew or first obtain a CCB license must select one or both of those endorsements. As of July 1, 2010, all contractors will have made those selections.

1. Filing CCB Complaints

If you want to assert a complaint against a contractor through the CCB, you must follow their procedural rules. The failure to correctly follow those rules may result in the agency dismissing your complaint.

Under the new rules, the first decision point is to look at the nature of the project. If the project is "residential" or "small commercial," then a residential-endorsed contractor can perform the work. If the project is a "large commercial" or "small commercial" one, then a commercial-endorsement contractor can perform the work. Note carefully the new definitions for those three terms (found in ORS 701.005).

If the contractor has only a residential endorsement, then you file your complaint directly with the agency (as set out in 701.145). This process is little changed from prior years.

If the contractor has only a commercial endorsement, then you must file a lawsuit or arbitration before you can file a CCB complaint. Note carefully the timelines for filing that CCB complaint.

Third, if the contractor has both a residential and commercial endorsement, then the nature of the structure determines the method by which you file a CCB complaint. See ORS 701.139 for an outline of the above rules.

2. Payments from CCB Surety Bonds

For many, a primary purpose in filing a CCB complaint is to obtain payment from the contractor's license surety bond. There are new rules in this area also.

First, the size of bonds has been increased. For example, the minimum bond for a general contractor is $20,000, while a level 1 commercial general contractor must have a $75,000 bond.

Second, for complaints against residential-endorsed contractors, the bond payment procedures have not changed in any major way. Once the CCB complaint goes to a Final Order and the contractor does not pay, then the surety will write a check to the complainant. Like before, the maximum recovery available to a non-owner claimant is $3,000 of the surety bond. ORS 701.153.

Third, for complaints against commercial-endorsed contractors, the bond payment procedures have substantially changed. Now, the priorities are as follows: (1) Labor or employee claims are paid first; (2) All other claims are paid second. The only limit on these payments is the amount of the bond. Also, if the above complaints do not exhaust the bond, then the claimant can recover costs, interest, and attorney fees from the surety bond. ORS 701.157.

Whether complaints are against residential-endorsed contractors or commercial-endorsed contractors, the old "90-day" rules continue to apply.

As a final note, one other issue that has not changed is that, if the complaint is not paid in full out of the surety bond (or by the contractor), then the unpaid amounts will result in suspension of the contractor's license until the Final Order is paid in full.

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