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In This Issue

CCB Spotlight: Responsible Managing Individuals
Van M. White III……..... 1

2018 Legislative Roundup
Jakob Lutkavage-Dvorscak.…..…..…..…..…..… 2

The Contractors Special Conditions Endorsement
Jacob Zahniser ……... 4

Proving Lost Profit Claims
Steven F. Cade ……...……. 5

The Pitfalls of a Poorly Drafted Lien Release
Stephanie Holmberg…...……. 6

Ambiguity in Time and Materials Contracts Can Preclude Summary Judgment
Dave Anderson…...……..... 8

Defining "Substantial Completion" to Avoid Disputes
Stacey A. Martinson…...…….. 10

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CCB Spotlight: Responsible Managing Individuals

Van M. White III
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Most contractors licensed with the Construction Contractors Board must designate at least one individual as their Responsible Managing Individual ("RMI"). The RMI is the individual selected by the contractor to complete the 16 hours of pre-requisite training and pass the Oregon pre-license test prior to the contractor obtaining a CCB license (unless they meet the CCB experience exemption). The RMI may be an owner, officer, partner, or employee of the business. The RMI must manage or supervise the activities of the business by participating in (1) the administration of construction contracts; or (2) the administration of the day to day operations.

Problems can develop for contractors when the individual designated as their RMI leaves the business, especially if they abruptly leave the business. Prior to a new law that went into effect in January, when an RMI left the business, the business had to immediately appoint a new RMI. If they failed to do so, the CCB could suspend their license. However, it is often difficult for a business to immediately appoint a new RMI because the business may not employ an individual who had completed the CCB pre-requisite education or passed the pre-licensure test and whose scope of work for the business includes management or supervisory authority over the construction activities of the business.

A new law went into effect on January 1, 2018 that provides contractors more time to appoint a

qualified individual from their business as their RMI. The new law allows the business to appoint a temporary RMI for up to 14 days to give them additional time to select a permanent RMI who has completed the 16 hours of pre-requisite training and passed the Oregon pre-license test. The temporary RMI may be an owner, officer, partner, or employee of the business. The business must promptly notify the CCB of the temporary RMI appointment for it to be valid. To appoint a temporary RMI, the contractor must:

(1) Notify the CCB within three calendar days of appointing a temporary RMI by submitting a CCB Temporary RMI Request form (found on the CCB website); and

(2) Appoint a permanent RMI and notify the CCB that they have done so by submitting an RMI change form (found on the CCB website) within 14 days of notifying the CCB of the temporary RMI.

If the contractor does not appoint a permanent RMI within 14 days, the contractor's license will be referred to the CCB Enforcement Division for disciplinary action.

The 14 day period granted by the new law to allow a contractor to appoint a permanent RMI was an attempt to provide the business enough time for a qualified individual from the business to complete the required pre-license training and pass the pre-licensure test (assuming they don't meet the CCB experience exemption). However, it may be difficult for the individual to complete 16 hours of pre-license training and pass the pre-license test in 14 days or less.

OAR 812-006-0100 holds that failure to maintain an RMI will result in suspension of the contractor's license. As such, it is very important that a contractor always have a qualified permanent RMI or be ready to appoint as new permanent RMI within 14 days of their old RMI leaving the business. In addition to the CCB's ability to penalize and/or suspend a contractor for failure to maintain a permanent RMI, failure to maintain an RMI at all times could cause the contractor to lose the right to sue for compensation pursuant to ORS 701.131.

RMI's leave businesses for a number of reasons, including death of an RMI or the abrupt departure of a disgruntled RMI. The CCB suggests the way to avoid problems that can arise when an RMI leaves the business is to name multiple RMI's. In order to avoid a suspension of their CCB license or lose the right to sue for compensation for their construction work, contractors should plan ahead to ensure that they always maintain an RMI and/or have another individual on staff who can promptly step in as their permanent RMI if the individual named as their RMI leaves the business.

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2018 LEGISLATIVE SESSION ROUNDUP

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The abbreviated 2018 Oregon Legislative Session ended on Saturday March 3, 2018. Because it was an even numbered year this was a short 35-day session. Enough time to get a few things passed, cause some trouble, and provide a glimpse of how the six-month long session next year might look. Again this year the construction industry played defense mostly looking to head off costly new regulations, additional state mandates, and prevent a raid on SAIF to help reduce PERS liability. Additionally, contractors should be seeking tax advice to understand how the federal tax changes and the Oregon tax changes may affect their bottom lines.

- **SAIF funds kept safe.** As you may know, Oregon faces a real crisis in funding its PERS obligations. There is more than $20 billion in unfunded liability for PERS. This is putting a cash squeeze on state and local jurisdictions which ultimately affects their ability to provide other services. Despite repeated attempts to address the unfunded liability Oregon has failed to fix the problem for various reasons from lack of political support to unfavorable court rulings. The latest big idea was to take SAIF surplus funds to pay down the PERS liability. Since Oregon contractors (and many other businesses) utilize SAIF the effect of raiding the surplus funds would have likely caused increases in workers compensation premiums for the construction industry.

- **Off-road diesel vehicle regulations kept in the shop.** For the third session in a row some political actors attempted to import California's more stringent off-road diesel equipment regulations that would have imposed significant additional costs for contractors. For the third session in a row the bills were defeated. But, expect the issue to appear in 2019 and depending on the 2018 mid-term election results in Oregon it could be more likely to finally pass.

- **Wage theft liability expansion halted.** HB 4154 proposed to impose liability on general contractors for unpaid wages of subcontractor employees under certain conditions—those included a BOLI wage claim finding that the wage claim was valid but unenforceable against the subcontractor and that the subcontractor had not been paid in full. The bill passed the House but died in committee in the Senate.

- **Taxes, taxes, taxes.** The 2017 federal tax changes caused additional issues with Oregon tax law. Now this author is not a tax attorney or accountant but contractors should speaking with their tax professionals to understand how changes in the federal and state law may affect their businesses—everything from business entity type to depreciation appears to have been affected by the tax code revisions. SB 1528 decoupled Oregon from some of the federal tax law on pass-through entities. However, the Governor convened a one-day special session in May 2018 to pass legislation to provide additional relief for sole propietorships that missed out on the tax relief in the 2013 "Grand Bargain." Again, contractors should be talking to their tax professionals to understand all of the implications on their businesses.

- **CCB Licensure Revisions.** HB 4141 created a pilot program for contractors with more than eight years of experience and whose business is outside of the Willamette Valley that would allow the contractor to take the residential license exam without first taking the class and also waiving the exam fee. The idea is that by decreasing the entry barriers in non-Willamette Valley areas of Oregon that more experienced contractors could be enticed into starting their own contracting businesses

- **Distracted Driving Law distractions**. Following the 2017 enactment of the newer, more stringent laws regarding mobile phone usage while driving, the construction industry sought and received a small exemption for mobile phone usage when the phones were being used during the course of construction work.

Those were the most significant issues in the most recent legislative session. The issues defeated are likely to reappear in 2019. The Democrats control both Oregon chambers currently and are only one seat away in each chamber of having the three-fifths supermajorities necessary to pass revenue increasing legislation without Republican support. The 2018 mid-term elections could provide the supermajority in either chamber especially given the current national political climate.

If that occurs expect to see aggressive tax-reform bills such as the gross-receipts tax that was voted down in Ballot Measure 97 in 2016 and the similar proposals introduced in the 2017 Legislative Session. There likely would be other revenue-increasing proposals as well. That said, a supermajority does not guarantee those ideas will garner complete support from the caucus and be enacted. Also expect to see renewed pushes on stricter environmental regulations.

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THE CONTRACTORS SPECIAL CONDITIONS ENDORSEMENT

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Every insurance policy contains conditions to coverage, obligations with which the insured must comply to receive the benefit of coverage for a claim. In construction cases, there are three conditions that typically come into play: (1) the insured must give notice of the claim; (2) the insured must cooperate in the investigation and defense of the claim; and (3) the insured cannot voluntarily commit itself to an obligation or expense without the insurer's approval.

More and more insurance policies, however, include a "Contractors Special Conditions" endorsement, which creates a "condition precedent" to coverage for any claim "in whole or in part based upon" a subcontractor's work by requiring the insured prime contractor to (1) receive an indemnity agreement from the subcontractor; (2) receive certificates of insurance from the subcontractor showing the prime contractor as an additionally insured; and (3) maintain records evidencing compliance with these obligations. Unfortunately, this endorsement is typically not brought to the attention of the prime contractor insured, who fails to study or understand the policy him or herself, such that the prime contractor insured unwittingly violates the endorsement (particularly the record keeping aspect of it) years before a claim arises. Considering defect claims typically arise years after the project is complete, this endorsement is drawing more and more traction in coverage disputes over defect claims particularly because the penalty for noncompliance is loss of coverage.

For example, in *ProBuilders Specialty Insurance Company, RRG v. Phoenix Contracting, Inc.*, Case No. 6:16-cv-00601-AA (D. Or. January 2, 2017), the Court enforced the "Contractors Special Conditions" endorsement to bar coverage of defect claims under a prime contractor's CGL policy, ruling that the endorsement was unambiguous and precluded all coverage for liability "in whole or in part" arising out of the work of subcontractors. While the Court suggested that if the only failure was to maintain records of subcontracts and COIs, that may fall into the category of "technical violation" that will not allow the insurer to escape coverage, the prime contractor admitted it failed to satisfy the conditions of the endorsement. The Court enforced the unambiguous provision and precluded coverage, going so far as to suggest the carrier may seek to claw back defense dollars spent defending the claim.

While the *ProBuilders* decision is currently on appeal, the decision tracks similar holdings out of California. In *Scottsdale Ins. Co. v. Essex Ins. Co.*, 98 Cal. App. 4th 86 (2002) the Court held that a substantially similar contractor's warranty endorsement was a condition to coverage, did not make the policy illusory, was not ambiguous, was fully enforceable, and that the insured's failure to comply with the terms of the endorsement precluded coverage. Even more troubling is the decision in *N. Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal. App. 4th 272 (2009) where the Court held that the contractor's warranty endorsement even applied retroactively to contracts that the insured had already entered into with subcontractors, even if

those subcontracts were executed years before issuance of the policy containing the endorsement.

More recently, however, in *Certain Underwriters at Lloyds v. ProBuilders Specialty Ins.* Co., 241 Cal. App. 4th 721 (2015), *as modified on denial of reh'g* (Nov. 13, 2015), the California Court of Appeals refused to find that the Contractors Special Conditions endorsement excused ProBuilders from contributing to the defense. The court noted that the CSC provision applied only to claims against a prime contractor "in whole or in part based on work performed by" subcontractors, but did not purport to apply to claims against the prime contractor for its own negligence or other misfeasance. The court held that ProBuilders had not conclusively shown that all of the claims against the prime contractor were limited to work performed by subcontractors and in fact there were allegations of the prime contractor's own negligence. Further, although there was evidence of incomplete compliance with the CSC requirements, the *ProBuilders* court found that evidence of only one subcontractor's indemnity agreement or certificate of additional insured coverage was sufficient to preclude summary judgment in favor of ProBuilders.

As the courts work through the contours of this condition to coverage, the prime contractor insured must understand all conditions to coverage. If its applicable policy contains a "Contractors Special Conditions" endorsement, the prime contractor insured must not only follow the conditions, they should maintain record showing compliance for the 10-year ultimate repose period. Otherwise, the prime contractor insured risks losing coverage for defect claims that may arise years after the project.

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PROVING LOST PROFIT CLAIMS

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A general contractor is unable to fulfill a contract because one of its subcontractors makes an error causing property damages. The general contractor comes to you seeking help recovering for the damages it had to pay its customer to recover from the error. The general contractor also, however, believes that it has lost substantial amounts of new business from this customer, and other customers, who no longer have faith in its work. What evidence do you need to get this lost profit claim to trial?

The answer may surprise you.

In Oregon, a party seeking to recover lost profit damages does not need to put on an economist or other expert. Courts have allowed business owners to take claims to juries just on the word of the proprietor by using a test that only requires "reasonable certainty" to recover lost profits. This is "not a demanding standard," and it can be re-phrased as requiring only a "reasonable probability" of lost profits. *City of Eugene v. Monaco*, 171 Or App 681, 688 (2000).

The party seeking to recover for lost profits must show both that profits have been lost, and that the cause of the loss was the defendant's conduct. The fact of the loss *can* be shown by expert projections. However, the fact of lost profits can also be shown simply by having the owner or CFO of an established business testify as to profits before and after the defendant's conduct. Causation in this area, as is generally the case in Oregon, is then most often left to a jury.

For example, in *City of Eugene v. Monaco*, a landlord sued its tenant for recovery of lease payments, having evicted the tenant business. The tenant counterclaimed for lost profits for wrongful eviction. The tenant's evidence was that he had made a certain profit before the eviction, and after the eviction, in his new place, he made less profit. 171 Or App at 688. Even though there were logical holes in the evidence (such as the cost of labor), this evidence was sufficient to go to a jury.

Similarly, a novice developer who lost out on the profit from the construction and sale of a new single-family dwelling was able to recover that profit from the seller who conveyed him the wrong lot. *Peterson v. McCavic*, 249 Or App 343, 354-55 (2012). The developer's evidence of lost profits consisted entirely of his own estimate of construction costs "you know 250[,000] to 300[,000]" and his estimate of the sales price. Yet that evidence was sufficient to go to a jury.
As to the causation question, generally simply showing that profits differed before and after the defendant's conduct is sufficient to raise a jury question of causation. For example, in *Hillstrom v. McDonald's Corp.*, 88 Or App 44, 448 (1988), the court affirmed a verdict awarding lost profits on plaintiff's breach of contract claim even though plaintiff's evidence on causation was simply that the profits before the breach were higher than after the breach. The plaintiff was not required to prove that each specific breach led to a specific lost profit amount, but only that there was a breach, and that lost profits resulted. *Id.*

By contrast, lost profit claims have only been taken away from a jury where the evidence is wholly speculative. For example, a directed verdict should have been granted where, in a claim for breach of an agreement to develop and sell a business, the only evidence of lost profits was the breaching party's pre-agreement statement that he had previously made a million dollars in a similar venture. *Jessen v. Colton*, 134 Or App 327, 330 (1995). Similarly, where the plaintiff's profits actually increased after the breach, the simple method of showing lost profits in *Peterson* and *City of Eugene* was insufficient to avoid directed verdict. *Kwipco, Inc. v. General Trailer Co., Inc.*, 267 Or 184, 188 (1973).

Besides not being necessary, experts who are unfamiliar with the industry may not be credible to jurors. At a recent trial, this author used a corporate employee to establish the amount of lost profits. This employee did not have an economics degree, but did have a solid background in construction management. The defendant put on a professional economist to criticize the lost profit methodology. Although the economist was impressively credentialed and presented well, the jury awarded the full amount sought, putting its trust in the employee with boots-on-the-ground experience.

In conclusion: prepare your lost profit claim carefully and with a credible and experienced lay witness and you may be able to recover for your client something besides standard damages.

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THE PITFALLS OF A POORLY DRAFTED LIEN RELEASE

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Most construction clients are familiar with how lien releases are used in the payment process on construction projects. Regardless of what they are technically called – e.g. "lien release," "lien waiver," "release of right to lien," etc. – clients generally understand that these documents function in the same way: to reflect an agreement that in exchange for payment, a contractor (or subcontractor or supplier) waives its claim and/or lien rights, as tied to a certain date or dollar amount. However, clients often do not fully appreciate that a

lien release can (and should) be treated like a separate contract negotiation to ensure the given client is adequately protected. Beware, poorly-drafted lien releases are dangerous.

The purpose of lien waivers differs depending on whether the party is paying or getting paid. For a project owner or contractor issuing payment, the lien release provides certainty that the party being paid will not assert claims and/or record a lien on the property at issue, again – as those claims relate to a certain date or dollar amount. For the party getting paid, a lien release encourages the release of payment by offering this additional layer of protection from future claims. For both parties, the lien release helps keep the project moving efficiently and provides a helpful tracking tool for project costs and completion status.

Although clients may understand the general purpose and necessity of lien releases, often they become complacent in agreeing to be bound by the specific language of these documents without careful consideration of the release's specific language. There is not one standard form lien waiver or release. While there are 12 states in the country that statutorily mandate the content of lien releases (California, for example), Oregon is not one of them. Whether the lien waivers and releases are conditional (relating to progress payments) or unconditional (relating to final payment), clients often end up agreeing to be bound by terms they do not understand or fully appreciate. And because the lien releases can often look like run-of-the-mill form documents, clients often assume there is either no reason to review lien releases or clarify their terms. This pattern of complacency can cause problems. On the one hand, a poorly drafted or ambiguous lien release may fail to provide the level of protection ultimately desired by the party making payment, causing the party to mistakenly assume that all claims pertaining to a certain payment amount or date have been waived. Conversely, a party receiving payment may end up waiving more than intended if details of the release are not absolutely clear.

For example, a lien release may not be clear in terms of the scope of the release component. If it only uses the term "lien," the argument could be made that the release does not apply to non-lien claims. As another example, the timing of the release may be unclear, providing that the particular release is effective "to the extent of payment." Parties may argue about whether this release includes change order or extra work that arose or was performed prior to the progress payment at issue but for which costs have not yet been paid. This confusion is exacerbated if the extra work has not yet been formally codified through parties' system of memorializing changed, modified, and/or extra work. Time and time again, we see clients unclear about what exactly is being released, and it is easy to see why given the risk of ambiguous language.

As a final example, parties will often seek help from attorneys during the course of construction to administer a disputed change, modification and/or extra work request. While those issues are pending, the payment process continues to proceed, often without thought to the fact that there could be ongoing execution of "standard" lien releases – sometimes with unintended consequences.

Oregon courts have held that standard rules of contract construction apply to releases. *See Ristau v. Wescold, Inc.*, 318 Or 383, 387 (1994). While this provides us with some instruction regarding how the content of lien releases will be analyzed, going through the contract interpretation process – either pre-litigation between the parties or with an arbitrator or judge – can be confusing, costly and time consuming. Like other contract details for construction projects, lien releases should be tailored to reflect the particular payment scheme being used, taking into consideration the timing of payments as agreed between the parties. It is better to take the time upfront to confirm lien releases accurately reflect the parties' intent and are as unambiguous as possible rather than have to argue over the scope of the release down the road.

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AMBIGUITY IN TIME AND MATERIALS CONTRACTS CAN PRECLUDE SUMMARY JUDGMENT

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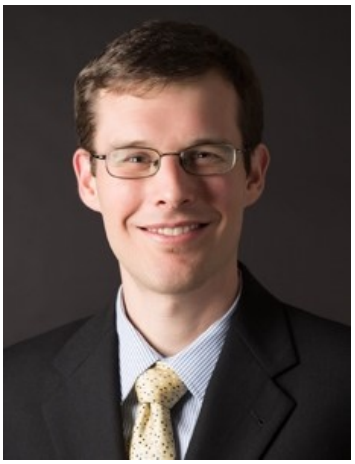

An easy way to get any contractor's attention is to offer a presentation or discussion on how to be paid on a job. Typically, such presentations involve discussions about change orders, notice compliance or other areas where *process* might trip up a contractor. But a discussion about the form of contract delivery is also important. The age-old "time and materials" contract is likely not one that attorneys have deeply considered recently. Yet such a contract is potentially ambiguous, meaning that an unpaid contractor may have to proceed to trial prior to obtaining a judgment to secure payment for work performed.

Construction payment disputes that wind up in litigation frequently evolve into dueling claims. One side alleges a lack of payment. The other side typically claims that work was not properly performed. This sort of litigation is a well plowed field. But one issue that appears to have gone unnoticed by many Oregon lawyers is whether a "time and materials" contract unambiguously entitles a contractor to payment for the time and materials it expends on a given project.

Assuming that there is no ambiguity regarding scope, the argument would simply fixate on what the parties intended for their contract to mean when stated that the owner would pay the contractor's time and materials on the project. This argument begins innocently enough with Oregon's well-established case law on contract interpretation. The court will examine the text of the disputed provision, "time and materials," in the context of the contract as a whole. *Yogman v. Parrott*, 325 Or 358, 363-64, 937 P2d 1019 (1997).

To many contractor clients, this analysis seems simple: the payment obligation amounts to the value of the time the contractor spent plus the cost of materials procured by the contractor and maybe a markup if it is a cost-plus contract. A fact-finder at trial could possibly feel this way too, but an Oregon court considering a motion for summary judgment is not likely to be so simple minded.

A few more principles come into play. First, Oregon law allows parties to offer extrinsic evidence of the intent of the parties at the time of contractor formation for the purpose of creating an ambiguity. *Batzer Const., Inc. v. Boyer*, 204 Or App 309, 317 (2006). Second, first-level *Yogman* analysis requires courts to consider the text of the disputed provision *in context*, meaning that the subject matter of the contract is also relevant to a determination of whether the term "time and materials" is ambiguous. *Yogman*, 325 Or at 363-64 ("Words or terms of a contract are ambiguous when they reasonably can, in context, be given more than one meaning." (Quotations and citations omitted.))

That approach to contract interpretation spelled out by *Yogman* and explained in *Batzer Constr., Inc.* begins to pull apart the summary judgment record for a plaintiff-contractor. Enter *Mathis v. Thunderbird Village, Inc.*, 236 Or 425, 434, 389 P2d 343, 347 (1964). In that case, a contractor sought payment under a cost-plus contract. The owner contended that certain items listed in the cost-plus invoice were improper. The court, referring the disputed contractual provision that referred to "all materials, labor . . .," concluded that the term was ambiguous because the term did not specifically define the materials and labor that would be provided.

Thunderbird Village, Inc. therefore provides a map for rendering as ambiguous claims on time and materials contracts. Litigants may not be surprised to discover that there is ambiguity in the event that

one party disputes the propriety of the other's use of a particular item of materials or the amount of time used in construction of the project. That is to say, litigants may expect to see specific factual disputes about the course and scope of work performed by the contractor. In this sense, even a losing summary judgment motion or motion that is successful only in part can be useful in narrowing issues to be tried. Because ORCP 47 permits parties to seek summary judgment in whole or in part, lawyers may be wise to consider seeking partial summary judgment to eliminate any further litigation over amounts that are not reasonably in dispute.

But where ORCP 47 might give an incremental gain, it also takes away. A party may choose to additionally offer an expert opinion. Under ORCP 47 E, a party need not disclose the expert witness opinion that is necessary to establish a genuine issue of material fact, of course. And a party may argue that an expert on construction management is necessary to evaluate the quantum of time and material that a contractor reasonably expended on the project. Recall that *Yogman* permits a court to find an ambiguity if the *context* of a contract is considered. An expert opinion about reasonable time and materials can provide such context.

Further, if there were discussions about a rough estimate provided by a contractor, *Batzer Constr., Inc.* may permit a court to consider that rough estimate to determine whether the amount claimed is consistent with the contracting parties' intent. An illustration sets the trap – say a roofer builds a new roof on a single-family home pursuant to a "time and materials contract." The roofer should not get summary judgment on its claim for $100,000 million spent constructing the new roof. And if that is the case, the court might be asked to draw a finer line at the point that is a reasonable amount of time and materials. Yet most Oregon judges would not draw such a line at the stage of summary judgment. Either through an expert witness or contemporaneous rough estimates of costs by a contractor, an owner is likely to be able to create a fact issue to avoid summary judgment.

For many construction clients who are in the business of managing each payment and expect each payment on time, it is an empty bromide to promise vindication at a trial several months later. However, there are some choices that can be at the time of contracting that could help the situation: first, a contractor could insist on identifying estimates of time and anticipated lists of materials that might be required on the project. The risk here is that a loss in flexibility for the contractor in performance of the contract. Second, the contract begins to look much more like a lump sum contract and, as stated above, the estimates can be used to challenge propriety of the final cost.

The more practical approach is to encourage clients to disclose their financial progress routinely and resolve any small disputes before they become big disputes. When a contractor provides routine updates on costs, the owner has fewer grounds to complain at the end of the project regarding the propriety of certain costs or materials. Or if there is a complaint, it is likely to be narrower. This proactive approach is the best way to manage a "time and materials contract," ensure payment at the end of the project, and, if payment is not forthcoming, win at summary judgment.

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DEFINING "SUBSTANTIAL COMPLETION" TO AVOID DISPUTES

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As both a transactional and litigation construction attorney, I frequently notice how a dispute could have been avoided by clearly drafted contract provisions. One of those provisions is the definition of "substantial completion." The concept of substantial completion is a crucial issue. Not only does substantial completion start the clock running for the Oregon statute of ultimate repose for construction-related claims, it can also trigger several other start dates, including payment provisions, warranty obligations, correction periods, and liquidated damages. Therefore, the term "substantial completion" is an essential concept that should not be forgotten during the drafting stages of the construction contract.

I. THE DEFINITIONS OF "SUBSTANTIAL COMPLETION."

Oregon law and the standard construction contract forms all provide different definitions for "substantial completion." Below is a summary of some of them and how the term has been interpreted.

A. The Standard Construction Contract Forms.

Many construction contracts are based on form documents issued by either the American Institute of Architects ("AIA") or ConsensusDocs. These form documents each contain a different definition of "substantial completion."

1. AIA Document A201-2017.

The form documents produced by AIA[1] are some of the most widely used contract forms in the construction industry. Simply stated, AIA provides that the date of substantial completion is when the architect, after conducting required inspections, certifies that the work is complete by issuing an AIA Certificate of Substantial Completion. *See* AIA Document G704-2017.

Specifically, Section 8.1.3 of AIA Document A201-2017, General Conditions of the Contract for Construction (the "2017 AIA General Conditions"), provides that the "date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8." Section 9.8.1 states: "Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." Sections 9.8.2 to 9.8.5 specify the process for the certification, including having the contractor notify the architect when it believes the work is substantially complete, the architect's conducting inspections, and the architect's preparing the Certificate of Substantial Completion.

In sum, the AIA form document assumes that an architect has significant involvement in the administration of the contract and will actually issue the Certificate of Substantial Completion. As addressed below, the AIA's process and definition of "substantial completion" can result in disputes when there is no architect actively involved in contract administration, there is no Certificate of Substantial Completion, or when the parties disagree with the architect's determination.

[1] AIA updates its core form documents every ten years, and recently released its 2017 edition of some form documents. The definition of "substantial completion" in the 2017 version was not substantively revised from its 2007 version.

2. ConsensusDocs 200—Standard Agreement and General Conditions Between Owner and Constructor.

ConsensusDocs also provides a library of standard form agreements that are commonly used throughout the construction industry. These forms also define "substantial completion." For example, Section 2.4.24 of the ConsensusDocs 200—Standard Agreement and General Conditions Between Owner and Constructor (2011, revised 2017) ("ConsensusDocs 200") provides as follows:

> "Substantial Completion" of the Work, or designated portion, occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that the Owner may occupy or utilize the Project or designated portion, for the use for which it is intended, without unapproved disruption. The issuance of a certificate of occupancy is not a prerequisite for Substantial Completion if the certificate of occupancy cannot be obtained due to factors beyond Constructor's control. This date shall be confirmed by a Certificate of Substantial Completion signed by the Parties.

Unlike the AIA forms, the ConsensusDocs definition of "substantial completion" does not have the architect (referred to in the ConsensusDocs as the "design professional") issuing the Certificate of Substantial Completion.[2] Rather, the contractor prepares the Certificate of Substantial Completion form, but the owner must provide written approval. *See* ConsensusDocs 200, Sections 9.6.1 to 9.6.4.

[2] Like AIA, ConsensusDocs has a form Certificate of Substantial Completion. *See, e.g.*, ConsensusDocs 280 — Certificate of Substantial Completion.

B. Oregon Case Law and ORS 12.135.

In addition to the contractual definitions of "substantial completion" above, ORS 12.135 also provides a definition which differs from the form documents. ORS 12.135(1) provides either a ten-year or a six-year statute of ultimate repose, depending on the type of structure, for actions "arising from the person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from the person having furnished design, planning, surveying, architectural or engineering services for the improvement." The applicable statute of ultimate repose is triggered by the "substantial completion" date:

> "'Substantial completion' means the date when the contractee accepts in writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such written acceptance, the date of acceptance of the completed construction, alteration or repair of such improvement by the contractee." ORS 12.135(4)(b).

This definition contemplates two scenarios under which the statute of ultimate repose is triggered: (1) at the contractee's written acceptance; and (2) if there is no written acceptance, at the acceptance of completed construction.

In 2014, the Oregon Supreme Court issued two decisions, *PIH Beaverton, LLC v. Super One, Inc.*, 355 Or 267, 323 P3d 961 (2014), and *Sunset Presbyterian Church v. Brockamp & Jaeger* 355 Or 286, 325 P3d 730 (2014), addressing the definition of "substantial completion" in ORS 12.135. Both of these cases involved a standard form AIA agreement that contemplated that the architect would issue an AIA Certificate of Substantial Completion certifying when the work

was substantially complete. No such certificates were issued, however, and the Court was tasked with interpreting when the statute of ultimate repose was triggered.

In *PIH Beaverton*, a property owner filed a negligent-construction case on May 23, 2007. The defendants argued that the plaintiff's claims were time-barred because the previous owner had posted a "completion notice" under ORS 87.045 (a construction lien statute) on February 13, 1997—more than ten years before the suit was filed. The Court examined the AIA agreement between the parties and determined that although the agreement contemplated the architect's issuing a Certificate of Substantial Completion, no certificate had been issued. Because of the lack of certificate, the Court turned to whether a completion notice could be considered written acceptance by an owner. After examining the legislative history of both ORS 12.135 and ORS 87.045, the Court determined that a notice posted for the purposes of a lien does not establish that the owner accepted. 355 Or at 279. The Court clarified that its decision did not mean that "the only document that can constitute a written acceptance under that statute is an acceptance of the terms of a Certificate of Substantial Completion as provided in a standard AIA contract," but that rather it was a question of fact when substantial completion occurred. 355 Or at 280.

In *Sunset Presbyterian Church*, the Court interpreted issues similar to those as in *PIH Beaverton*. Again, the central issue was a dispute about when substantial completion had occurred. As in *PIH Beaverton*, "substantial completion" was defined in the AIA agreement between the owner and general contractor as being when the architect issued a Certificate of Substantial Completion. But no Certificate of Substantial Completion was issued. Therefore, without "written acceptance" as defined by the construction contract, the defendant argued that other evidence, including in part the occupation of the building, could establish acceptance of the work. Because the evidence was conflicting, the Court disagreed and held that it was a question of fact to be determined by the trial court. Importantly, the Court acknowledged that "[p]arties who enter into contracts choose the policies that they wish to have apply to their transactions," and that the Court was not "at liberty to create a new contract for the parties." 355 Or at 294 (internal quotation marks and citation omitted).

II. DRAFTING CONSIDERATIONS.

Because Oregon courts will give deference to the contract language, it is important to consider the definition of "substantial completion" when drafting construction contracts to avoid costly disputes in the future. As with any other form document, the form language may be a good starting point but should never be automatically assumed or accepted as the best language for a particular project. A drafter should consider the following:

- Knowledge of the Project. Not all projects should be treated the same, and defining "substantial completion" will be depend on the type of project, duration, contract sum, and risks of each party. This means that the drafting of a "substantial completion" contract provision for a hospital or school may be greatly different from that for a parking garage.

- Form Documents. Again, the language of any form construction contract should not be presumed to accurately reflect the reality of the project. For example, the AIA form documents contemplate the involvement of an architect that will issue an AIA Certificate of Substantial Completion. For many projects, the architect may not be responsible for performing these duties. If not, the language will need to be revised to reflect what will realistically occur for that project.

- List of Items. If the project has very specific requirements before substantial completion, the drafter can add the specific items that must be established before written acceptance. With this additional list, both parties have clear expectations about what is necessary to achieve substantial completion.

- Alternatives to a Certificate of Substantial Completion. The drafter should consider whether to use a Certificate of Substantial Completion to establish the substantial completion date. For example, some drafters routinely insert that substantial completion should be governed by a certificate of occupancy. The drafter may also consider stating that if a Certificate of Substantial Completion is not issued, then the date of the certificate of occupancy should be considered the substantial completion date.

- Review of All Provisions. The drafter should remember that in the standard form agreement, "substantial completion" triggers several other provisions, and consider whether those provisions should be revised. For example, Section 15.1.2 of the 2017 AIA General Conditions provides an accrual clause that any claim must be commenced not more than ten years after substantial completion, and that Section 12.1 triggers the correction of the work period.

- Governing Law. Finally, if the project is not subject to Oregon law, it is imperative that the contract drafter review how "substantial completion" is defined under the applicable governing law.

In sum, considering that the decision in *PIH Beaverton* took seven years and no doubt an extraordinary amount of attorney fees to get to the final decision, parties should invest some time during the drafting stage of a construction contract to address "substantial completion" to avoid costly disputes in the future.

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