Construction Law Newsletter

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MESSAGE FROM THE CHAIR

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Your board set an active agenda for this year. We set three major goals. The first was an expansion of our web site at the Oregon State Bar – www.osbar.org/section/construction . Our goal was to allow the tracking of bills by the membership. While we were unable to put the tracking directly on the website, we were able to provide access to bill monitoring through www.capitolonramp.com/cor/guests/1405480.

This comprehensive web site allows you to monitor bills of interest related to the construction industry. You are able to read the bill, track where it is in the legislative system and determine which ORS section is impacted by the bill. Angela Otto took on the time consuming responsibility of reviewing the numerous bills introduced and worked with Beth Richley at the Bar to get this information on the web site. We would appreciate any comments and suggestions that you may have on either of the two web sites.

Our second goal was to work with Judge Koch and Judge Wittmayer of Multnomah County to assist with developing a process for complex construction cases. The judges contacted our board, in part because of their frustration with case delays, especially those resulting from last minute issues that complicate case resolution and result in requests for trial setovers. This newsletter contains our draft recommendations to the judges (see following article) plus a copy of a proposed Order (attached at the end of this newsletter). The recommendations are a result of discussions with the judges, input from some local mediators and arbitrators as well as committee discussions.

Our recommendation is to allow for a special master program that would assist the judges in complex construction cases. The special master would have limited authority to hear motions, raise issues early in the case and assist the parties with scheduling discovery, mediation and trial dates. The result is a procedural structure to move the case through the system while relieving the judges of day to day case monitoring.

All costs for the special master would be borne by the parties to the case. The two draft documents in this newsletter were sent to Judges Koch and Wittmayer earlier this month. The first document describes the overall process (see following article) and the second is a sample order (attached at the end of this newsletter). The board would appreciate your comments on our draft proposal. Please send any comments to me no later than June 15, 2005.

The third goal for the year was to sponsor a seminar. Given that many Oregon attorneys are now practicing in Washington, Alan Mitchell and I are working with the Clark County Bar Association on a seminar that compares Oregon and Washington Construction Law. We are currently planning for this joint seminar to be held in early November of this year. In addition, there was a request to do a late afternoon seminar on the expectations of in-house counsel. We are looking for volunteers to assist with and participate in the in-house counsel seminar. If anyone is interested, please contact me. As always, if you have ideas on seminars that you would like the committee to sponsor or would like to assist us with a seminar, please let us know. You can contact Jack Levy (503-227-2424) or me (503-232-1410).

SUGGESTIONS FOR MULTNOMAH COUNTY CONSTRUCTION LITIGATION PROCEDURES

NOTE: The following is the memorandum that the Executive Committee provided to Judge Koch and Judge Wittmayer.

THRESHOLD ISSUES

We were unable to come up with an "automatic" method (like the "Claim of More than $10,000" case caption notation) that would allow the court staff to determine which new cases should go into this new system. Instead, we discussed the following system.

The Court can allow parties to choose one of two case systems: (1) Normal 12-month trial system; or (2) a new Special Master system. If the parties choose the normal system, they will not be granted trial extensions beyond the 12-month period.

Of course, the parties can stipulate to being part of the new Special Master system. If there is no stipulation, then any party can file a motion asking the Court to rule on whether the case will be allowed to go into the new system. These motions must be filed no later than 30 days after the date the party is served with Summons and Complaint.

The plaintiff must file one of these motions no later than 30 days after the last party is joined.

We came up with the following criteria for the Court to consider in deciding whether to grant one of these motions: (1) The number of parties; (2) The amount(s) in controversy; and (3) The involvement of insurance carriers and insurance coverage issues.

SPECIAL MASTER SYSTEM

The special master (SM) is the procedural means of dealing with complex construction litigation (especially construction defect cases). The parties would pay the SM's fees. The SM is chosen from a pre-qualified panel (preferably judges or attorneys who have experience in construction defect litigation). The Court can give the parties three options: (1) Pick an SM from a list provided by the Court; (2) Stipulate to an SM; or (3) The Court will select an SM if the parties do not select one by a date certain.

The SM operates on two simultaneous "tracks." The first track is the regular case. As part of the regular case, the SM will require the parties to sign a Case Management Order (see the draft Order at the end of this newsletter). The second track deals with the insurance issues (primarily the coverage issue).

The Case Management Order will have both mandatory provisions and optional (but encouraged) provisions. Some of the mandatory provisions will require the parties to list discovery deadlines, dispositive motion deadlines, alternative dispute resolution deadlines (including a deadline for selection of a mediator – who will be someone other than the SM), and trial dates. Some of the optional provisions will be to list out all of the defect claims, which party did which work, agree upon a deadline to disclose experts and exchange expert reports, and the response of each party to the claims against it. The Case Management Order will be signed by the Court and will include a deadline for the SM to submit a final report to the Court.

The SM will hear joinder motions and discovery motions. The SM will then make a recommendation and/or findings to the Court, who will sign the actual Order arising out of those motions. QUESTION: Does the SM have the legal authority to make rulings and issue orders?

On the second track, the SM will require each party to submit the following: (1) The names of all potential insurance carriers for each party; (2) Copies of the Reservation of Rights letters from each carrier; (3) The name and contact information for the adjuster for each carrier; (4) Copies of each carrier's policy for each party. The SM will have the ability to advise the parties to retain coverage counsel. The SM will want to make it clear that he/she is not providing any legal advice.

The SM will have the ability to require the parties to engage in mediation on either or both of the two "tracks." For insurance-related mediation, the SM will require that the adjusters physically attend the mediation and that the adjuster have complete authority to settle the claim. The mediator will be someone other than the SM. However, the mediator will report any non-compliance to the SM, who will have the power to hear show cause motions for contempt.

One of the SM's jobs will be to prepare a report discussing the value of each of the claims (both monetarily and legally) and the allocation between the parties. The SM will submit a copy of this report to the judge to be used only after trial on the merits if the Court is considering the issue of attorney fee awards.

REVISIONS TO THE AIA A201 GENERAL CONDITIONS?

NOTE: In mid-2004, Kip Childs of Stoel Rives approached the Executive Committee with the idea of having our section submit comments about the AIA's pending revisions to the A201 General Conditions. Kip agreed to head up a subcommittee that drafted the following comments, which were approved by the entire Executive Committee and sent to the AIA last December.

The Executive Committee would like to thank Kip for his hard work and "above the call of duty" efforts on this project.

Alan Mitchell, Newsletter Editor

I. INTRODUCTION

These comments are submitted by an ad hoc committee of the Construction Law Section of the Oregon State Bar. The committee was formed for the specific limited purpose of preparing comments on the A201 contract.

While our committee was comprised of attorneys whose practices involve representing various players in the construction industry (*e.g.*, owners, architects, contractors and subcontractors), our objective was to offer comments that would promote basic principals of fairness for everyone involved, rather than the interests of simply one participant.

Some on our committee expressed the opinion, which we suspect the AIA has heard before, that the A201 has an owner/architect bias. One example of this is Art. 4.6.4, which prohibits joinder or consolidation in one legal proceeding of claims involving the Architect with claims involving the Owner and the Contractor. We encourage the AIA to be scrupulous in seeking to create a contract that is as neutral as possible to all parties involved.

Many of the issues addressed by the A201 are subject to some level of disagreement and many provisions may be appropriate for one type of construction project, but not another. Rather than coming down entirely on one side of an issue or the other, the AIA should consider, with respect to some articles, providing alternative contract provisions from which parties could chose. While this would be a departure from the goal of creating a single and complete contract that only requires blanks to be filled in, it may be the best method for moving away from the appearance of bias that can sometimes be reflected in offering only one version of a particular provision. Furthermore, we note that the A201 currently contains at least one set of alternative provisions from which the Owner may chose - Art. 11.2.1 provides that the Owner shall carry liability insurance, and Art. 11.3.1 provides that, optionally, the Owner may require the Contractor to purchase Project Management Protective Liability insurance. It should be possible to offer similar alternative options with respect to other provisions in the Contract.

The topics that attracted the most attention on our committee were the claims resolution provisions (Arts. 4.3 through 4.6). This was no doubt due in part to our committee being comprised mostly of attorneys with significant litigation practices. A principal concern expressed was that the procedures set out in those provisions are often not followed precisely by parties and that

it might be better for the A201 to provide more flexible dispute resolution procedures to better reflect actual practice.

II. COMMENTS

ART. 1.2 CORRELATION AND INTENT OF CONTRACT DOCUMENTS

It would be helpful to add a new provision (perhaps Art. 1.2.1.4) indicating an order of priority for the Contract Documents in the event of any conflicts between them. One possible order of priority would be the following: (i) modifications to the Contract, (ii) the Agreement, (iii) the General Conditions, (iv) Addenda, (v) the Drawings and (vi) the Specifications.

ART. 3.4 LABOR AND MATERIALS

Art. 3.4 should provide that the Contractor shall keep the Project free of all liens by Subcontractors and suppliers and post any bond that may be necessary for removing any lien against the Project. See also our comments regarding Art. 9 (Payments And Completion).

Art. 3.4 should require the Contractor to take reasonable steps to maintain labor harmony on the Project. This can often be an issue when there are both union and non-union trades working on a Project.

Art. 3.4.2 should provide that, by proposing any substitution, the Contractor warrants that such substitution is in all respects equal or superior and will come with the same manufacturers' warranties as would have been provided with the specified product.

ART. 3.10.1 CONTRACTOR'S CONSTRUCTION SCHEDULES

In our collective experience, both the construction schedule and the schedule of values (see Art. 9.2.1) are prepared prior to execution of the contract and are attached as exhibits. It would be more appropriate for Art. 3.10.1 to provide that the construction schedule and the schedule of values are attached as exhibits and to leave it to parties to amend this article in those situations where those schedules are not prepared in advance of contract execution.

Art. 3.10 should include a provision specifying the recovery action that will be required when the Contractor gets behind in the schedule. Such a provision could, for example, authorize the Owner to demand that the Contractor (i) work overtime, (ii) retain additional employees, and (iii) subcontract additional portions of work.

ART. 3.18 INDEMNIFICATION

In addition to providing that the Contractor shall indemnify and hold the Owner, Architect and others harmless against certain claims, Art. 3.18 should also specifically provide that the Contractor shall "defend" such parties. Absent such language, the indemnified parties could be responsible for the attorney fees and other litigation costs associated with defending claims for which they are being indemnified.

Art. 3.18 carves out from the Contractor's indemnification obligation liability for damages to the work itself. This limitation should not apply if there is insurance to cover such liability, and in some cases there will be such coverage. It would therefore be more appropriate to (i) change the language "(other than the Work itself)" to read "(including the Work itself)", and (ii) add a sentence providing essentially that the Contractor's obligation to indemnify and defend the Owner against property damage to the Work itself shall apply only to the extent such damage is covered by insurance.

When the builder is required to carry builder's risk insurance, the exclusion contained in the indemnification provision (that the Contractor is not liable for damage to the Work itself) is inconsistent. If Art. 3.18 is to retain the carve-out for damages to the Work itself, then, if the Contractor is required to carry builder's risk insurance, the Contractor's indemnification obligation should extend to damage to the work itself.

The Contractor's indemnification liability should not be limited to just personal injury and property damages, since other types of damages could arise for which indemnification is appropriate.

ART. 4.3.2 TIME LIMITS ON CLAIMS

The requirement that claims be initiated within 21 days after occurrence of the event giving rise to the claim, or within 21 days after the claimant first recognizes the condition, is often not followed. While it is reasonable to expect one party to notify the other of a potential claim within a reasonably short period of time, it is often unfair to require a party to formally initiate a claim within 21 days. Some defects require significant investigation in order to properly evaluate their causes and to determine who was responsible for them, and that investigation can often take longer than 21 days. Furthermore, parties often spend considerable time attempting to resolve issues informally without first proceeding through the formal dispute resolution procedures. In such circumstances, it is unfair to deny a claim on the ground that the party asserting it failed to formally initiate the claims procedures within 21 days.

It would be more appropriate for this provision to impose a two-step requirement – first, that notice of a potential claim be provide within 21 days, and second that any claim be formally initiated within a "reasonable time" thereafter, rather than within 21 days. While a "reasonable time" standard is obviously less definite than a "21 day" standard, it would probably be more appropriate in light of the time that is needed for evaluating many claims.

The requirement that claims be initiated by written notice to the Architect and the other party should be modified to require such notice only with respect to claims that arise prior to the completion of construction. It is unreasonable to require the Owner to provide notice to the Architect prior to initiating legal proceedings on claims for latent defects that are discovered months, and in some cases years, after construction is completed.

ART. 4.3.10 CONSEQUENTIAL DAMAGES

Article 4.3.10 purports to be a waiver of all consequential damages claims between the Contractor and the Owner. Many commentators feel that Article 4.3.10 is a direct reaction to the *Perini* case (*Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 129 N.J. 479 (1992)).

The *Perini* case has received much attention, in part because of the apparent disparity between the large damages awarded to the owner and the relatively small potential benefits available to the contractor. The owner hired Perini to provide coordination services for the remodel of a casino in Atlantic City and agreed to pay Perini $600,000. The remodel was not completed on time and the court awarded the owner $14.5 million in consequential damages. The case has caused significant concern for contractors. The objective of Art. 4.3.10 was to prevent the type of disparate results that arguably occurred in *Perini.*

Some on our committee believe that Art. 4.3.10 should be deleted. While every rule has the potential for creating aberrational results, such as what arguably occurred in *Perini*, such results should not dictate the rule. Since the rule permitting recovery of consequential damages under breach of contract claims is well established, the burden should be on parties to negotiate a waiver or limitation of consequential damages, rather than to negotiate an entitlement to them.

If Art. 4.3.10 is to be retained, it should be revised to clarify its scope and its interplay with other A201 provisions.

(1) While it is helpful to include examples of what constitute consequential damages, the words "without limitation" should be added to the phrase "[t]his mutual waiver includes" in order to clarify that the list of examples is not intended to be exhaustive.

(2) The article should specifically state whether it is intended to serve as a no-damages-for-delay clause. If it is so intended, then it should contain some savings language for those jurisdictions that contain statutes rendering no-damages-for-delay clauses unenforceable.

(3) There are potential inconsistencies between Art. 4.3.10 and other A201 articles that provide for what might be considered

consequential damages. Those provisions include (i) Art. 3.17.1 (Contractor to hold Owner harmless for loss arising from infringement of copyright or patent rights), (ii) Article 5.4.2 (providing for equitable adjustments to subcontractors), (iii) Article 6.2.3 (establishing liability for delay damages), (iv) Article 10.5 (establishing responsibility for costs due to hazardous materials), and (v) Art. 11.1.1.5 (requiring the Contractor to procure insurance coverage for, among other things, "injury to or destruction of tangible property, including loss of use resulting therefrom").

Article 4.3.10 is potentially inconsistent with Art. 7 of the AIA A111 (1997), which identifies the costs of work for which the Contractor may be paid. While Art. 7.2.2 of the A111 provides for reimbursement of wages or salaries of personnel stationed at the Contractor's principal or other non-site offices, such wages and salaries would arguably be considered consequential damages under Art. 4.3.10 of the A201. Additionally, while Art. 7.6.6 of the A111 provides for the recovery of data processing costs, such costs likewise would probably be considered consequential damages under Art. 4.3.10 of the A201.

ART. 4.4 RESOLUTION OF CLAIMS AND DISPUTES

Many on our committee are concerned with the Architect serving as the initial arbiter of claims. The Architect often does not want to serve as the arbiter and therefore often avoids that role.

Because the Owner is the Architect's client, the Architect has an inherent conflict of interest in serving as the arbiter. The Architect is often hesitant to rule against the Owner, and the Contractor is often unwilling to trust that the Architect is unbiased. In addition to the inherent conflict of interest resulting from the architect-client relationship, the Architect also often has an additional conflict when the Claims relate to allegations by the Contractor against the Architect.

While it may be appropriate to provide that <u>at either the Owner or the Contractor's discretion</u> Claims <u>may</u> initially be submitted to the Architect for resolution, this should not be mandatory. The A201 should specifically acknowledge that the failure to present a claim or dispute initially to the Architect for resolution shall not preclude either party's right to pursue other dispute resolution procedures.

The requirement that claims first be submitted to the Architect is particularly troubling with respect to claims for either latent defects or warranty items that arise several months, and in some cases several years, after construction is completed. Any requirement that the Architect be the initial arbiter of claims should be limited to claims that arise prior to completion of construction.

ART. 4.5 MEDIATION

The requirement of Art. 4.5.1 that mediation is a condition precedent to further legal proceedings should be deleted or substantially modified as it raises a number of practical problems.

First, the requirement that mediation be a condition precedent to further legal proceedings can work a substantial hardship upon a party (usually an Owner) who discovers a claim shortly before the potential running of a statute of limitations. If the mediation requirement is to be retained, it should specifically provide that a legal proceeding may be instituted in order to stop the running of a stature of limitations, provided that the proceeding is stayed pending mediation.

Second, while parties can be compelled to attend a mediation, they cannot be compelled to participate in good faith. If a party is prepared to mediate in good faith, such party will likely agree to do so voluntarily, in which case Art. 4.5.1 is unnecessary. On the other hand, if a party is not prepared to mediate in good faith, Art. 4.5.1 will accomplish nothing other than to cause delay.

Third, even when parties are willing to mediate disputes, they often realize the importance of conducting discovery before doing so. Parties should therefore have the ability to avail themselves of the discovery procedures that are available in a litigation forum before being compelled to mediate.

Finally, particularly with larger and more complicated claims, it is unreasonable to expect that an early mediation will be successful. The process of defining, narrowing and focusing issues often needs to be accomplished through some level of litigation. It is unreasonable to expect that such a process will be accomplished in the course of simply preparing for a mediation.

While it is appropriate to encourage early mediation, it is unreasonable to expect that it will be productive in all cases. If the AIA believes that mediation should be mandatory, it would be sufficient to require that parties participate in mediation prior to a final arbitration hearing or trial, but not prior to the institution of a legal proceeding.

ART. 4.6 ARBITRATION

Article 4.6 should contain a venue provision stating essentially that, unless the parties agree otherwise, any arbitration of Claims shall be conducted in the same location as the Project.

While we recognize that parties will sometimes wish to omit an attorney fee provision, some on our committee believe it would be better to include such a provision and leave it to the parties to delete it if they so chose. Our collective experience is that attorney fee provisions are more often included than excluded.

A provision should be added either to Art. 4.6 or elsewhere in the Contract (possibly Art. 13.7) stating that the commencement of an arbitration proceeding is equivalent to the commencement of a lawsuit for statute of limitations purposes. While that might seem apparent to most, our committee is aware of case law that has held to the contrary. Such a provision should also clarify when an action is deemed to be commenced for statute of limitations purposes. One possibility would be that, for statute of limitations purposes, an action shall be deemed to be commenced on the date that a demand for arbitration is mailed to the opposing party.

ART. 4.6.4 LIMITATION ON CONSOLIDATION OR JOINDER

Art. 4.6.6 should be modified to specifically provide that the Architect, Subcontractors and suppliers may be made parties to any arbitration or legal proceeding, provided that any claims asserted against them involve issues of fact or law that are substantially related to other Claims asserted in the proceeding. If the Architect, the Subcontractors or any suppliers desire to avoid consolidation and joinder in any legal proceedings between the Owner and the Contractor, they need to address that issue in their own contracts. In the majority of circumstances, consolidation and joinder are in both the Owner and the Contractor's interest. Art. 4.6.4 would appear to benefit only the Architect who is not even a party to the A201 Contract.

ART. 4.6.5 CLAIMS AND TIMELY ASSERTION OF CLAIMS

Rather than requiring that all Claims be asserted in the demand for arbitration, Art. 4.6.5 should be modified to instead require only that all Claims be asserted in the same arbitration or legal proceeding. As the provision is currently drafted, a party who omits a Claim in the initial demand for arbitration is arguably precluded from latter asserting that Claim, even in the same proceeding.

While Art. 4.6.5 requires that all known Claims be asserted in the demand for arbitration, the AAA Construction Industry Arbitration Rules do not require anything more of a demand than that it contain a statement setting forth the nature of the dispute. Those rules do not require that claims be alleged with any specificity and they often are not so alleged. This provision would therefore seem to impose a requirement that is more specific that what the AAA Rules require.

An alternative way of wording Art. 4.6.5 would be to state essentially that a final and binding arbitration award shall be conclusive of all Claims that were or could have been asserted in the arbitration proceeding.

ART. 7 CHANGES IN THE WORK

Either Art. 7.2 (Change Orders) or Art. 7.3 (Construction Change Directives) should include a provision (i) indicating record-keeping procedures the Contractor is required to follow with respect to any change orders or change directives, and (ii) providing the Owner with audit rights with respect to such record-keeping.

ART. 9 PAYMENTS AND COMPLETION

Nothing in Art. 9 or elsewhere in the A201 specifically recognizes the Owner's right to pay subcontractors or suppliers directly or to make payments by way of joint checks when there are reasons to be concerned with potential liens or bond claims. These are standard practices in the construction industry and should be specifically recognized by the A201.

ART. 9.2.1 SCHEDULE OF VALUES

See comments regarding Art. 3.10.1 (Contractor's Construction Schedules).

ART. 9.6 PROGRESS PAYMENTS

Nothing in Art. 9.6 requires the Contractor to provide partial lien releases as a condition to the receipt of progress payments. Since this is a standard practice in the industry, the A201 should include such a requirement.

ART. 9.8 SUBSTANTIAL COMPLETION

Art. 9.8.1 should be amended to provide that either an approval upon final inspection or the issuance of a temporary or final certificate of occupancy by the appropriate governmental authority shall constitute a rebuttable presumption of Substantial Completion.

ART. 9.10 FINAL COMPLETION AND FINAL PAYMENT

Art. 9.10.4 provides that final payment by the Owner constitutes a release of all claims, except certain listed claims. That list should include "all Claims expressly reserved by the Owner". It is appropriate for the Owner to have the unilateral right to reserve specific identified claims at the time of making final payment.

ART. 10.3 HAZARDOUS MATERIALS

Art. 10.3 needs to be expanded to specifically address not just hazardous materials, but also wetland conditions and archeological sites.

ART. 11 INSURANCE AND BONDS

We recognize that Art. 11 is a complicated provision that will almost always contain some revisions by the parties and that it is therefore difficult for the AIA to draft a standard form provision. Nevertheless, we believe that the following additional issues should be considered for inclusion in Art. 11: (i) insurance coverage during any warranty periods, (ii) identity and treatment of additional insureds, (iii) policy limits, and (iv) professional liability insurance requirements for design-build situations.

Art. 11.3, which provides that the Owner, as an alternative to purchasing liability insurance may require the Contractor to purchase Project Management Protective Liability insurance. No one on our committee has ever seen this provision invoked. While the parties can always insert such a provision as an alternative to Art. 11.2, it is probably unnecessary to retain it in the A201.

The second sentence of Art. 11.4.3 should be revised to clarify that it is a waiver only of loss-of-use damages which are otherwise insured.

ART. 11.4 PROPERTY INSURANCE

The 1987 version of the A201 required the Contractor to obtain property insurance. The 1997 version changed that to require the Owner to obtain the property insurance. Since the Contractor is in a better position to protect and safeguard the Project, it is more appropriate for the Contractor be given the incentive to do so. Imposing upon the Contractor responsibility for procuring property insurance would provide that incentive. We therefore recommend that Art. 11.4 be amended accordingly.

ART. 12.2.2 UNCOVERING AND CORRECTION OF WORK AFTER SUBSTANTIAL COMPLETION

Art. 12.2.2.1 provides a procedure by which the Contractor is required to correct defective work following notice within the one-year correction period. While it is unlikely that this was intended to be the exclusive remedy available to Owners, some courts have interpreted the notice requirement of Art. 12.2.2.1 as creating an exclusive remedy and have barred actions where no notice was given. Some courts have even interpreted the one-year notice requirement of Art. 12.2.2.1 to bar all claims not brought within the one-year period. *See Grass Range High School District No. 27 v. Wallace Diteman, Inc.*, 155 Mont. 10, 465 P2d 814 (1970). The wording of Art. 12.2.2.1 should be revised to clarify that it is limited to correction claims.

The phrase "and to make a claim for breach of warranty" should either be deleted or modified to read "and to make a claim for breach of warranty as to that nonconformity". As this provision is currently drafted, it can be interpreted to preclude any warranty claim on the ground that the Owner failed to notify the Contractor within one year of the need for some correction work.

ART. 13 MISCELLANEOUS PROVISIONS

Art. 13 should include a severability clause providing that in the event that any provision of the Contract is found to be in conflict with any law, the remaining provisions of the Contract shall remain in full force, and the arbitrator or court shall give the offending provision the fullest meaning permitted by law.

ART. 13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

Art. 13.7 does not adequately address when the statute of limitations period commences to run with respect to latent defects. The provision presumes that the owner is aware of all claims either upon completion of construction or within the one-year warranty period. The provision should state that any applicable statute of limitations with respect to claims for latent defects shall commence to run from the date the Owner knew or reasonably should have known of such defect.

DESIGN-BUILD ISSUES

The Contractor is often responsible for designing and building limited portions of projects, such as the electrical or the HVAC systems. While the AIA A191 is intended for design-build projects, the A201 is more appropriate for projects on which the Contractor is responsible for designing only limited features of the work. The A201 should therefore address issues that arise in such situations with provisions that (i) identify the design-build work for which the Contractor is responsible, (ii) require the design work to be performed by a registered design professional, (iii) require professional liability insurance coverage for the design professional, and (iv) require the design professional to coordinate his or her work with the Architect.

SOFTWARE AND CUSTOMER SERVICE

Some members of our committee consider the current electronic version of the AIA contracts to not be user-friendly. Perhaps the most significant concern is the inability to easily access contracts prepared using prior versions of the software. With the most recent version of the software, prior contracts can be viewed only as PDF files, making it very difficult to cut-and-paste language that a user has drafted for prior contracts.

It would be helpful if there was an easier process for renewing the annual license. In particular, it would be helpful if the annual renewal was tracked from the expiration date of the current year's license, rather than from the date the next year's license is purchased.

Can there be an option for the software to be network-based, with one license file on the network that tracks which users have the software? With this option, the license could automatically include the right to publish documents on a document hub.

The customer support via telephone has not been easy to use or helpful. Can the AIA improve this?

WHAT IS THE STATUTE OF LIMITATION FOR CONSTRUCTION CLAIMS?

Tom Murphy
Scott ◆ Hookland LLP

In March 2005, the Tillamook County Circuit Court ruled that the statute of limitations applicable to a claim for breach of a construction contract is ten years. The builder of a custom home had finished his work in 1996, and the owners took occupancy almost immediately.

The owners commenced legal action in 2004, more than seven years after substantial completion of the house, alleging that the omission of certain flashings gave rise to a claim for breach of contract. The builder moved to dismiss on the basis that ORS 12.080(1) barred the claim. The owners argued that construction claims are expressly excluded from ORS 12.080(1).

ORS 12.080(1) provides:

> "An action upon a contract or liability, express or implied, excepting those mentioned in ORS 12.070, 12.110 and 12.135 and except as otherwise provided in ORS 72.7250 * * * shall be commenced within six years."

Thus, according to the express language of ORS 12.080(1), an action upon a contract "mentioned" in ORS 12.135 is excepted out of the six-year limitation period imposed by ORS 12.080.

ORS 12.135(1) "mentions" the following category of action:

> "An action against a person, whether in contract, tort or otherwise, arising from such person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof * * *"

ORS 12.135(1) requires that an action for the construction, alteration or repair of an improvement to real property or for the supervision or inspection thereof be commenced "within the applicable period of limitation otherwise established by law." The owners argued that, since no other statute of limitation was applicable, ORS 12.140 governed their breach of contract claim against the builder:

> "An action for any cause not otherwise provided for shall be commenced within 10 years."

The trial court agreed with the owners that their claim was not subject to ORS 12.080, but did not agree that ORS 12.140 governed their claim. He held that their claim against the builder was subject to the 10-year limitation period of ORS 12.135 ("but in any such event such action shall be commenced within 10 years from the date of substantial completion"), and denied the builder's motion to dismiss the owners' breach of contract claim.

The same court's rationale may well apply to a construction-related claim based upon negligence rather than contract. ORS 12.080(3) requires that an action for "injury to any interest of another in real property" be brought within six years. However, ORS 12.080(3), like ORS 12.080(1), excepts out actions mentioned in ORS 12.135. In turn, the 2-year catchall statute of limitations of ORS 12.110(1) applies to negligence claims that are "not especially enumerated in" ORS Chapter 12.

One could argue that the owners' claims against the builder were not merely mentioned but were specifically enumerated in ORS 12.135. However, the judge did not reach the issue of what statute of limitations might apply to the owners' negligence claim. Instead, he ruled that the owners had not demonstrated the type of "special relationship" required to maintain a tort claim in the aftermath of *Jones v. Emerald Pacific Homes*, 188 Or App 471, 71 P3d 574 (2003) and hence dismissed the alternative count of negligence for failure to state a claim.

At the time of this newsletter, this case remains pending.

OREGON'S LAND USE REVOLT

Jay Richardson and
Aaron Blankenship
Buckley LeChevallier PC

Ballot Measure 37 ("M37") became effective on December 2, 2004. Regardless of whether M37 is the end of land-use planning, an overdue check on government, or something in the middle, M37 is now the law.

So What Exactly Did Ballot Measure 37 Do?

If an Oregon public agency ("Agency") enforces certain land use regulations ("Regulations") enacted before December 2, 2004, or enforces a Regulation enacted after that date, and that Regulation:

1. restricts the use of real property, and

2. reduces the fair market value of the real property,

then the Agency must do one of the following (at its election):

1. pay the landowner compensation equal to the reduction in fair market value caused by enactment or enforcement of the Regulation, or

2. modify, remove or waive enforcement of the Regulation (collectively referred to as a "waiver") so that the landowner can use the property as permitted at the time the landowner acquired the property. See M37, §§ (1), (2), and (8). (Because Measure 37 has not been codified, all citations are to the text of Measure 37.)

Should you File a M37 Claim?

A landowner interested in filing a M37 claim should answer the following questions:

A. Do You Own Oregon Real Property?

M37 applies to real property, or an "interest" in real property, located in Oregon. See M37, § (1). An interest in real property is assumed to include life estates, remainders and reversions (collectively "Real Property").

B. When Did You Acquire Real Property?

Pre-Existing Regulations. Simply put, M37 does not apply to any Regulation enacted *before* the date that you purchased, inherited or otherwise acquired the Real Property. See, M37, § (3). In essence, you are charged with knowing what Regulations apply to the Real Property at the date of acquisition.

Family Member Exception. If you acquired the Real Property from a Family Member (defined below), then you cannot file a M37 claim for any Regulations in place before that earliest family member acquired the property. See M37, § (3) E.

"Family members" are a vast collection of individuals and entities including your wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild, an estate of any of the foregoing family members, or a legal entity owned by any one or a combination of these family members. See M37, § (11) A.

Example 1: John Smith acquired Real Property in 1999 through the will of his father, Stan. Stan acquired the property in 1949 from his father, Robert. Robert acquired the property January 1, 1890 from a non-family member. John can file a M37 claim for any Regulation that became effective after January 1, 1890.

NOTE: The requirement of an uninterrupted chain of family members is assumed, but is not expressly required in the M37 statues.

Example 2: John acquired Real Property in 1999 from a development company unrelated to John. At the date of acquisition, the land had a Regulation affecting it. John cannot file a M37 claim because of that Regulation.

QUESTION: What happens if a landowner transfers a partial interest in the

property to a developer in a joint venture arrangement? Can the landowner still file a M37 claim? No one knows for certain.

C. Is the Agency Enforcing a M37 Regulation?

A M37 Regulation includes practically every type of law or order issued by an Oregon Agency including:

1. Any statute regulating the use of land;

2. Administrative rules and goals of the Land Conservation and Development Commission (LCDC);

3. Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

4. Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

5. Statutes and administrative rules regulating farming and forest practices.

See M37, § (11) B.

A M37 claim may not be filed for any Regulation that:

1. Restricts or prohibits common law public nuisances;

2. Restricts or prohibits activities for the protection of public heath and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

3. Restricts or prohibit the use of Real Property for the purpose of selling pornography or performing nude dancing; or

4. Was required to be enacted to comply with federal law, such as flood plain building restrictions.

See M37, § (3).

D. Did the Regulation Have the Effect of Reducing the Fair Market Value of your Land?

You must show that the Regulation reduced the fair market value of your Real Property. See M37, § (1). The M37 statute does not provide any guidance on how a reduction in fair market value is to be determined. The statute merely refers to the reduction in fair market value of the affected Real Property caused by the Regulation as of the date that you make a written claim. See M37, § (2).

Filing a Claim

Statutes of Limitations; Waiver Alternative. If the answer to the above questions is favorable, then the next step is to file a M37 claim with the agency responsible for the Regulation. For Regulations that existed *before* December 2, 2004, you have two years after the enactment of the Regulation to file a claim. See M37, § (5). For Regulations enacted *after* December 2, 2004, a claim must be filed within two years after the *later* of (1) the date of enactment of the offending Regulation, or (2) the date you submit a land use application in which the Regulation is an approval criterion. *Id.*

If you file a M37 claim, then the Agency must pay just compensation within 180 days after the claim is filed. See M37, §4. If the Agency does not pay just compensation, then the Agency must waive, in whole or part, the applicable Regulation so that you can deal with the Real Property for any use that was permitted at the time you acquired it. There is no "family member" concept if the Agency chooses to waive the Regulation. See M37, §§6, 8. It is not entirely clear whether the Agency must complete the waiver process within the same 180 day period.

Recent Developments

On February 24, 2005, the Oregon Attorney General released an opinion regarding waivers under M37. The AG determined that waivers of land use laws granted under M37 are not transferable to new owners; *i.e.* a M37 waiver does not "run with the land." It is not clear what impact the opinion will have, but assuming that the opinion is followed by the courts and local governments, the value of a M37 waiver will decrease dramatically, if not entirely.

First, the opinion could mean that a waiver cannot be transferred to a subsequent owner of the property. This means that a subsequent owner may

acquire property with a non-conforming use. Second, it could mean that a property owner who obtains a waiver could not sell their property to a real estate developer before development begins. In any case, the opinion will certainly result in a reduction of M37 claims and land transfers.

Cities and counties are enacting ordinances addressing M37 claims as well. Faced with several years of fiscal shortfalls and stretched budgets, most cities and counties have decided to charge substantial application fees to cover administrative costs. Crook County decided to charge an application fee is $1,500.00, and the City of Canby elected to charge applicants an hourly rate for staff research and analysis.

In Bend, the City Counsel passed an ordinance that allows neighbors to sue M37 applicants that use the waivers to change their property, and in Eugene, the City Counsel passed an ordinance making development facilitated by M37 illegal for a new owner. The legality of these ordinances and regulations will no doubt be tested, and at present, most cities and counties are finding it difficult to strike a balance that makes everyone happy.

The state legislature is also wrestling with M37. Senate Bill 1037 appears to be the most comprehensive piece of proposed legislation. Senate Bill 1037 clarifies the claims process by specifying the information that needs to be included in a claim, and the general procedures for filing and reviewing a claim. Senate Bill 1037 also directs claims for single family dwellings in rural areas into the existing statutory "lot-of-record" process, which is amended to apply to a larger class of property owners.

In addition, Senate Bill 82 creates a task force to review the last 30 years of Oregon's land use regulations. The goal being the determination of where we have been and where we want to go.

As the legislative session continues, there is no doubt that these bills will see major changes. The only certainty at this point is that the legislature will address M37's impact on Oregon's financial and physical landscape.

Conclusion

M37 is new, untested in Oregon Courts and Agencies and subject to almost certain refinement by the legislature. Other than possible filing fees, professional fees and paperwork, there appears to be no down-side to filing a M37 claim. Before doing so, however, a claimant should fully explore all of the ramifications of a Waiver, which is an Agency's likely response.

ARE YOU METADATA SAVVY?

Alan Mitchell
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A few years ago, only serious computer people knew the word "metadata" or what it meant. Now, not knowing about metadata may hurt your practice. There are at least two ways in which attorneys should know about metadata: (1) electronic discovery and (2) emailing documents.

First, what is "metadata"? In general, it is the hidden data within electronic files (some call it the "data about data" or embedded data). For example, when you save a word processing document (e.g., a letter), your computer physically stores it in several places on its hard drive. In doing so, the word processing software creates metadata that marks where the file pieces are stored. Then, when you click on the "file open" button, the software uses that hidden metadata to retrieve and re-organize the letter for your use.

Some word processing programs store different amounts of metadata about their files. Microsoft Word, for example, will store metadata about prior versions of a document (including additions and deletions). The metadata may also include the names of the author of the document as well as those who added later modifications.

In terms of electronic discovery, metadata can be important for a number of reasons. For example, it can tell you when a file was created and when it was modified. This can be particularly important in discovery of emails and application file documents that are time sensitive. Emails, for

example, generally include information about the author, creation date, attachments (including what version of the attached documents), and who were additional recipients (including bcc).

Obviously, metadata can have a number of applications in a litigation situation. If you don't know what metadata is and how it can be used, you may not be requesting valuable information from your electronic discovery expert and using your expert's capabilities to uncover probative information. Further, you may not fully understand your expert's work product. Thus, part of your initial interactions with an electronic discovery expert will be utilizing your knowledge of metadata and maximizing the benefit it can have for your case.

The second way in which metadata can be important is providing an electronic document in its native electronic file format (often done via email). For example, if you email a Word document to opposing counsel, the recipient may be able to look at some of the hidden data about your document. Again, that data can include the deleted names of prior parties or comments inserted by the original author or a partner.

Obviously, this can have potential impacts not only on the current transaction but also on the ethical and professional responsibilities for both attorneys. For example, was confidential or strategic information disclosed? Also, does the recipient attorney have an obligation to avoid looking for hidden metadata or disclose what was discovered?

So what do you do? Probably the easiest solution is converting the documents to Adobe's PDF format (portable document format). PDF is an image only (or an image with searchable text), the documents will not have its original metadata (the PDF version will have its own metadata). Also, PDF files can usually be opened by other parties who may have different word processing software and the original formatting will be preserved. (If you can't open a PDF document, go to *adobe.com* to download the latest version of their free Adobe Acrobat Reader.)

Another option is to save the document in RTF format (rich text format). This format is accessible to most word processing programs and strips most of the metadata from the file. However, it still includes some types of metadata. Thus, it is not as "clean" as using a PDF format to share documents.

Once again, technology creates new ways in which lawyers must learn about things they never thought could be an issue. As these issues increase, I grow more sympathetic to my father, who retired in the late 1980s after 55 years of practicing law with the comment of "I just can't keep up with the technology anymore."

RECENT CASE LAW DEVELOPMENTS

D. Gary Christensen and
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A. Breach of Contract or Breach of Implied Warranty

***Country Mut. Ins. v. Gyllenberg Constr.*, No. CV-03-856-ST (D Or July 2, 2004)**

WHEN AN OWNER AND CONTRACTOR DIRECTLY CONTRADICT EACH OTHER AS TO WHAT WAS INCLUDED IN THE CONTRACT AT SIGNING, SUMMARY JUDGMENT WILL NOT BE GRANTED.

The claim against defendant Gyllenberg arose when the roof of a house owned by James and Carole Webb began to leak. After the leak was discovered, plaintiff Country Mutual Insurance Company made payment to the Webbs pursuant to their policy. Plaintiff sought subrogation from Gyllenberg, who had built the Webbs' house. Gyllenberg moved for summary judgment against plaintiff's claim that Gyllenberg had breached its contract by failing to install and/or choose the proper roofing panels for the construction.

There was no dispute that the Webbs and Gyllenberg had signed a construction contract, but the parties disputed the terms of that contract and whether Gyllenberg breached those terms. The

construction contract specifically referenced and incorporated Exhibits A and B. But the parties disagreed whether the contract included Exhibits A and B as submitted by Gyllenberg during discovery. The motion for summary judgment against the breach-of-contract claim was denied because the court ruled that a material issue of fact existed regarding the existence and substance of Exhibits A and B, and whether they had indeed been attached and made part of the contract when the Webbs signed it.

***McFadden v. Dryvit Sys.*, No. CV-04-103-ST (D Or Oct. 8, 2004)**

PLAINTIFF WITHIN THE NORMAL DISTRIBUTION CHAIN IS NOT REQUIRED TO HAVE PRIVITY WITH SELLER TO RECOVER PROPERTY DAMAGES BASED ON CLAIM FOR BREACH OF IMPLIED WARRANTY.

Defendant Dryvit Systems, Inc., manufactured two types of EIFS: (1) a barrier system and (2) a newer moisture-drainage system. Plaintiffs contacted Dryvit for information on its products, and Dryvit referred them to its local representative for further assistance. The local representative advised plaintiffs that Exterior Specialty Systems, Inc. ("ESSI"), was certified by Dryvit and that ESSI was the only applicator whose work Dryvit would warrant. Plaintiffs hired ESSI to install Dryvit's newer moisture-drainage system on their adjoining townhouses.

Three years later, plaintiffs discovered that ESSI had installed a barrier system, not a drainage system, and also discovered dry rot in 15 to 20 percent of their townhomes caused by water trapped behind the Dryvit EIFS. Plaintiffs filed a complaint against Dryvit, claiming breach of implied warranty of merchantability and breach of implied warranty of fitness. Dryvit argued that because plaintiffs were seeking property damage, they must demonstrate privity of contract between themselves and Dryvit.

The court ruled that a plaintiff within the normal distribution chain may recover property damages from a seller with whom he is not in privity based on breach of an implied warranty. Because plaintiffs were in the normal distribution chain for EIFS, they could seek property damages from Dryvit for breach of implied warranty.

B. Indemnity and Insurance

***Walsh Const. Co. v. Mutual of Enumclaw*, 338 Or 1, 104 P3d 1146 (2005)**

TERM REQUIRING UPSTREAM PARTY TO BE COVERED AS ADDITIONAL INSURED IS SUBJECT TO ORS 30.140, OREGON'S "ANTI-INDEMNIFICATION" STATUTE.

A subcontractor's employee was injured at the worksite and made a claim against the general contractor, who tendered the claim to the subcontractor's liability insurance carrier under an additional-insured endorsement. The insurer declined to investigate the claims, and the general contractor settled with the injured worker and then brought this breach-of-contract action against the subcontractor's insurer.

The subcontractor's policy contained a blanket additional insurance endorsement that added as insureds "any * * * organization * * * whom you are required to add as an additional insured on this policy under a written contract or agreement." The trial court, on cross-motions for summary judgment, granted defendant insurer's motion and dismissed the action, holding that ORS 30.140(1) voids contractual requirements to provide additional-insured endorsements for another party. The supreme court affirmed, reasoning that the statute applied to insurance requirements in construction contracts as well as indemnification provisions.

Subsection (1) of the statute therefore bars not only indemnity provisions in which one party is protected against its own negligence, but also insurance requirements that could have the same result. In the cross-motions, the general contractor had not asserted any fault of the subcontractor for causing its employee's injury, so the supreme court limited its analysis to ORS 30.140(1) and declined to address the effect of ORS 30.140(2), which permits indemnification (and presumably insurance) to protect the upstream party to the extent of the downstream party's fault. Consequently, because the additional-insured endorsement provision of the contract was void under subsection (1) of the statute,

the insurer had no duty to defend or indemnify in this case.

***MW Builders, Inc. v. Safeco Ins. Co. of Am.*, No. 02-1578-AS, 2004 US Dist LEXIS 18866 (D Or Sept. 14, 2004)**

ORS 30.140(1) DOES NOT PRECLUDE SUBCONTRACTOR FROM OBTAINING ADDITIONAL-INSURED COVERAGE FOR CONTRACTOR FOR DAMAGES RESULTING FROM SUBCONTRACTOR'S NEGLIGENCE.

A subcontractor purchased an insurance policy from an insurer that did not include an endorsement naming the general contractor as an additional insured, despite express requirements of the subcontract between the general contractor and subcontractor that the general contractor be named as additional insured on the subcontractor's policy.

On summary judgment, the court found that the contractor was an additional insured on those policies that contained an endorsement stating, "ADDITIONAL INSURED—OWNERS, LESSEES OR CONTRACTORS—AUTOMATIC STATUS WHEN REQUIRED CONSTRUCTION AGREEMENT WITH YOU." The court then rejected the insurer's argument that ORS 30.140 precluded additional insurance coverage for the contractor because, in contrast to the situation in *Walsh*, the contractor sought defense and indemnity from the insurer for damages paid as a result of the fault and negligence of the subcontractor.

***Tudor Ins. Co. v. Howard S. Wright Constr. Co.*, No. Civ 04-480-ST, Findings and Recommendation, (D Or Dec. 23, 2004), adopted by 2005 WL 425464 (D Or Feb. 18, 2005), amended on other grounds by Opinion and Order (Apr. 6, 2005)**

AN ADDITIONAL-INSURED ENDORSEMENT INDEMNIFYING A GENERAL CONTRACTOR FOR THE SUBCONTRACTOR'S NEGLIGENCE IN CAUSING INJURY TO EMPLOYEES IS PERMISSIBLE UNDER ORS 30.140(2).

Pursuant to a subcontract between the general contractor and subcontractor, the subcontractor's insurer included the general contractor in its policy as an additional insured. After being injured at the construction site because of the subcontractor's negligence, the subcontractor's employee filed a lawsuit against the general contractor, which then tendered its defense to the insurer. The insurer sought a declaratory judgment relieving the insurer of its obligation to defend or indemnify the general contractor.

The district court held that ORS 30.140(2) permits construction contracts to require a subcontractor to obtain an additional-insured endorsement indirectly indemnifying the general contractor for the subcontractor's fault in causing injury to the subcontractor's employee. Consequently, the insurer had a duty to defend and indemnify the general contractor in this case.

***Assurance Co. v. Wall & Associates LLC*, 379 F3d 557 (9th Cir 2004)**

IN AN INSURANCE CONTRACT, "COLLAPSE" REFERS TO IMMINENT COLLAPSE AS WELL AS ACTUAL COLLAPSE.

In this contract interpretation case, the insured, Wall & Associates, sought coverage for decay and deterioration from water intrusion that led to a brick façade's falling off the building with the slightest touch. The insurer, Assurance Company of America, claimed that the damage was not covered because there had been no actual collapse of the insured building.

The Ninth Circuit, finding that the term "collapse" was ambiguous and that any ambiguities must be resolved against the drafter-insurer and in favor of the insured, held that Washington law does not require actual collapse in policies providing coverage for risk of direct physical loss involving collapse of a covered building. This interpretation is consistent with the majority of jurisdictions in assigning the more liberal standard of "substantial impairment of structural integrity" to the use of "collapse" in insurance policies, as opposed to the minority view, which requires that the structure actually fall down. This interpretation also avoids requiring an insured seeking the benefits of its insurance to neglect repairs and allow a building to fall, "a course of action which could not possibly

comport with the expectation and intent of the insured, or advance the best interest of the insured, the public, or even the insurer."

C. Public Contracts

***Dental v. City of Salem,* 196 Or App 574, 103 P3d 1150 (2004)**

A PUBLIC CONTRACTING AGENCY HAS DISCRETION TO DECIDE WHETHER TO REJECT A BID THAT DOES NOT COMPLY WITH ALL PRESCRIBED REQUIREMENTS.

The defendant city rejected plaintiff's public-contract bids as nonresponsive because the bids did not include letters of appointment for nonpreference towing from the Oregon State Police, as required by the city's request for proposals. The city appealed an ORCP 67 B judgment declaring that the city had improperly rejected the three bids and ordering the city to reevaluate the bids on their merits.

The appellate court reversed the trial court, holding that the city had not abused its discretion in rejecting plaintiff's bids. ORS 279.035 grants a public contracting agency discretion in deciding whether to reject a bid that does not comply with all prescribed requirements. Nothing in the city's public contracting rules limited that discretion or required the city to forgive certain mistakes. In fact, the rules required the city to reject nonresponsive bids such as plaintiff's.

D. Negligence

***Safeco Ins. Co. of Am. v. Olstedt Constr., Inc.*, No. CV-02-1680-ST, 2004 WL 1050877 (D Or, May 7, 2004), report and recommendation adopted by 2004 WL 3103945 (D Or July 14, 2004)**

CONTRACTOR'S VIOLATION OF OSHA REGULATIONS DOES NOT MAKE CONTRACTOR NEGLIGENT PER SE AGAINST HOMEOWNER BECAUSE HOMEOWNERS ARE NOT WITHIN THE CLASS OF PERSONS THAT THE REGULATIONS SEEK TO PROTECT.

Plaintiff Safeco sought subrogation from defendant contractor, who caused a fire during the construction of the policyholder homeowners' house. Safeco moved for summary judgment, claiming that the contractor had violated several Oregon regulations and statutes governing the storage and handling of propane tanks and was negligent per se for violating OSHA regulations regarding the storage and handling of liquid petroleum gas containers.

The court denied the motion, finding that there were genuine issues of material fact as to whether the storage and handling of the propane tanks violated the Oregon Uniform Fire Code. The court also found that the OSHA regulations were meant to protect employees from risks in the workplace, not homeowners from fire damage, so the homeowners were not within the class of persons that the regulations sought to protect.

***International Paper Co. v. TCR Northwest 1993, Inc.*, No. Civ. 02-496-JE, 2004 WL 1173182 (D Or May 25, 2004), report and recommendation adopted by 2004 WL 1592080 (D Or July 12, 2004)**

SUBCONTRACTORS MAY BE LIABLE TO PROPERTY OWNER ONLY IF THEIR CONTRACTUAL OBLIGATIONS TO GENERAL CONTRACTORS GIVE RISE TO EXTRA-CONTRACTUAL DUTIES.

Plaintiff's subsidiary was an exterior siding supplier that was sued by the owners of apartment complexes with defective siding that caused massive property damage. Plaintiff's subsidiary settled with the apartments' owners. Plaintiff then brought an action against the general contractor and subcontractors who had performed work on the complexes, claiming indemnity, statutory contribution, and equitable apportionment. Several subcontractors moved for summary judgment, on the grounds that they could not be liable to the apartment owners in tort.

The court noted that the absence of the contractual relationship between a subcontractor and an owner does not negate the theoretical possibility of subcontractor liability to a building owner for negligent construction. But the court granted the subcontractors' motion, holding that in the absence of a contractual relationship with the owners, the

subcontractors could be liable only if their contractual obligations to the general contractor gave rise to extra-contractual duties to protect the interests of the owners as the intended beneficiaries of the contracts between the general contractor and subcontractors.

E. Attorney Fees

***Squier Associates, Inc. v. Secor Investments, LLC*, 196 Or App 617, 103 P3d 1129 (2004)**

PREVAILING PARTY MAY RECOVER ATTORNEY FEES FOR ALL RELATED CLAIMS, COUNTERCLAIMS, AND CROSS-CLAIMS.

Plaintiff, an environmental company, sued a property owner for payment. Two contracts were involved: a May 1996 contract for a Level I environmental site assessment and a December 1996 contract for a Level II environmental site assessment. The December contract provided for attorney fees and money for staff time to be reimbursed to the prevailing party.

At trial, plaintiff was found to be the prevailing party, but the trial court awarded plaintiff less than a third of the fees that plaintiff sought to recover. The trial court found that while all the claims in the case "related" to the December contract claim, they were sufficiently "independent" from the December contract claim, so that only attorney fees incurred by plaintiff for the December contract claim would be awarded.

The court of appeals vacated the supplemental judgment regarding attorney fees, and held that all of plaintiff's efforts in the litigation (including refuting defendant's defenses and counterclaims regarding the May 1996 contract) were related to the December contract. Moreover, on remand, the trial court was instructed to determine how much money for staff time was recoverable by plaintiff pursuant to the attorney-fee provision. The trial court had not expressly contemplated staff time in the award.

***Dimeo v. Gesik*, 197 Or App 560, 106 P3d 697 (2005)**

CLAIMS MUST BE OBJECTIVELY REASONABLE THROUGHOUT THE COURSE OF LITIGATION TO AVOID AN ATTORNEY-FEE AWARD TO AN OPPOSING PARTY.

Plaintiff prevailed in its claim against Western Bank, and successfully defended a counterclaim for equitable subrogation. The Oregon Court of Appeals reversed the trial court's award of attorney fees to plaintiff under ORS 20.105(1), finding that the bank had had an objectively reasonable basis for its counterclaim at the time the claim was asserted.

On reconsideration, the court of appeals clarified its decision, holding that a party has a continuing duty to evaluate its position throughout the course of litigation, and that a claim that was objectively reasonable when asserted may become unreasonable when viewed in light of additional evidence or changes in the law. The court then upheld the reversal of the attorney-fee award, finding that the bank's position had been reasonable throughout the litigation.

F. Licensing

***Becklin v. Board of Examiners for Engineering*, 195 Or App 186, 97 P3d 1216, rev denied, 338 Or 16 (2004)**

BOARD OF EXAMINERS FOR ENGINEERING AND LAND SURVEYING ("BOARD") AFFIRMED IN ITS ORDER PENALIZING UNLICENSED ENGINEER.

ORS Chapter 672 regulates the practice of engineering, and those who practice engineering must be registered unless certain exceptions apply. A director of the Grants Pass Irrigation District ("GPID") was designated as the liaison with GPID's engineering consultants, though he himself was not a licensed engineer. For a proposed project for fish screens, GPID, through petitioner, submitted an "engineering proposal" to the National Marine Fisheries Service ("NMFS"). When NMFS raised concerns about the proposals, petitioner stood by the "engineering proposal," and at a later public meeting, petitioner stated, among other things, that he was the engineer in charge.

After an administrative law judge initially found no violation of ORS ch 672, the Board modified the ALJ's proposed order and concluded that petitioner had violated ORS ch 672. On review, the Oregon Court of Appeals affirmed the Board, noting several supporting pieces of evidence, including that petitioner had engaged in "detailed technical discussions," and concluding that petitioner's activities did not fit within the statutory exceptions from the engineering registrations requirement.

G. Workers' Compensation

***Randall v. Ocean View Construction Co.*, 196 Or App 153, 100 P3d 1088 (2004)**

INJURED WORKER MIGHT BE SUBJECT WORKER FOR WORKERS' COMPENSATION PURPOSES DESPITE BEING LICENSED WITH CCB.

Claimant was a licensed contractor. He agreed to work on an hourly basis for Ocean View, itself a licensed contractor. Claimant was injured during the work. The Workers' Compensation Division determined that claimant was not entitled to benefits because he was not a "subject worker" under the workers' compensation statutes. After a hearing, an administrative law judge affirmed on the basis that "under ORS 656.027(7)(b), claimant conclusively was presumed to be an independent contractor because he had a CCB license and was involved at the time of his injuries in activities subject to the licensing statute."

The Oregon Court of Appeals found that claimant's activities during the work were not subject to the licensing statute. The work he performed did not require a license because he was employed by a contractor who had its own valid CCB license. The court of appeals thus determined that the conclusive presumption of ORS 656.027(7)(b) did not apply, and reversed and remanded for the determination whether claimant was an independent contractor.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

_____ _____ Plaintiff(s), vs. _____ _____ Defendants. _____	CASE NO. _____ ORDER APPOINTING SPECIAL MASTER IN COMPLEX CONSTRUCTION CASE REGARDING _____ (THE "PROJECT")

_____ [NAME], _____ [ADDRESS], _____ [PHONE], _____ [FAX] , having been appointed Special Master pursuant to ORCP 65B(2), on a showing that exceptional conditions require it, to hear and determine certain pre-trial matters including discovery, discovery motions, case management and settlement negotiations and to report findings and make recommendations to the Court, and good cause appearing,

IT IS HEREBY RECOMMENDED:

1. Exceptional Conditions Requiring Reference without Agreement (check applicable boxes):

_____ Complex Construction Case

_____ Number of Parties

_____ Amount(s) in controversy

_____ Involvement of Insurance Coverage Issues

_____ Other (set forth in detail)

2. Scope of Order. This Order Appointing Special Master, as may be modified and supplemented by further orders of this Court, shall govern all further discovery, case management, and settlement matters in this action. All such matters shall be set for hearing and heard before the Special Master. Before setting such matters, available dates must be verified with the Special Master. The Special Master shall not be responsible for hearing ORCP 21 Motions, motions for summary judgment, motions for dismissal, or other substantive motions as addressed in paragraph 5, unless by unanimous consent by all parties.

3. Scheduling Teleconference. Counsel for all parties shall conduct a telephone conference no later than 30 days after service of the Complaint, Third-Party Complaint or final "third-party practice" pleadings under ORCP 22 , whichever occurs last, to establish a schedule for 1) discovery deadlines, 2) dispositive motion deadlines, 3) alternative dispute resolution date, and 4) trial date. In the event this Scheduling Teleconference does not occur within the time prescribed in this Order or if the parties cannot agree on the required deadlines or dates, counsel for any party may request the Special Master to conduct a Scheduling Teleconference with all counsel and the Special Master shall do so on a schedule convenient to the Special Master. The Special Master shall be the final arbiter of the schedule subject to a party's opportunity to apply for *de novo* review pursuant to paragraph 5. The Special Master shall have the discretion to schedule additional teleconferences with the parties' counsel for case scheduling or other purposes and will notify counsel of the call-in number and the confirmation number for such teleconferences.

4. Service of this Order. A copy of this Order and all subsequent Orders shall be served with any third-party practice pleading under ORCP 22 bringing in a new party for any claims related to or arising from the Project. Failure to comply with this paragraph may result in a discovery sanction, at the discretion of the Special Master, upon motion to the Special Master.

5. Hearings: Review. All matters of any kind pertaining to discovery, case management and settlement matters shall be noticed to be heard before the Special Master. The time limitations applicable to serving the Special Master with a motion to compel or to produce, and oppositions and replies thereto, shall be as set forth in all court rules with respect to timely

filings of said pleadings with the Court, unless shortened by the Special Master. Such motions may be heard by the Special Master, at the discretion of the Special Master, for good cause shown, on a shortened time and on an informal basis. Matters involving substantive legal issues not related to discovery, case management, or settlement matters, shall be submitted to the Court upon proper motion and notice, unless by unanimous consent of all parties to submit such matters to the Special Master. Rulings of the Special Master may be reviewed by hearing *de novo* before the Court. A party must file their motion for a *de novo* hearing within 15 days of service of the ruling from the Special Master. If the request is not filed within that time period, the ruling of the Special Master will become final and subject to enforcement by order of the Court confirming the ruling.

6. Investigation and/or Destructive Testing by Plaintiff(s). Absent any stipulation by all parties' counsel, Plaintiff(s) shall provide prior, written notice of the dates of all "investigation and/or destructive testing" to all counsel. "Investigation and/or destructive testing" means the dismantling of any of he components or materials related to the Project for the purpose of analyzing, testing, inspection or other evaluation, the results or outcome of which are intended to be used at trial or any other legal proceeding (including but not limited to use in connection with summary judgment motions). Such notice must be sent by fax, overnight mail or hand-delivered not less than fifteen (15) business days prior to the first date of any testing. Notice of the specific location(s) and time(s) for all inspections and testing shall be provided to all counsel not less than seven (7) working days prior to each inspection date, with subsequent updates of the location schedule to be provided as necessary. Counsel and experts for each party in the case may attend to observe. Any dispute arising out of the time, place and manner of investigation and/or destructive testing, upon motion of a party, shall be resolved by the Special Master. If timely notice is not given, all evidence obtained by Plaintiff(s), including any and all findings, analyses and opinions of Plaintiff(s) and its consultant(s) and expert(s) based or derived from

such investigation and/or testing will be barred from use in the trial of this action upon motion of the aggrieved party.

7. Repairs by Plaintiff(s). Plaintiff(s) shall provide seven (7) working days prior written notice to all counsel before performing any repairs involving the Project, except that Plaintiff(s) may perform "emergency repairs," so long as written notice is given to all parties within twenty-four (24) hours after counsel for Plaintiff(s) has actual notice of such repairs. "Emergency repairs" are those repairs which, in accordance with recognized engineering or construction practices, are deemed immediately necessary to prevent imminent injury to persons or property. If timely notice is not given, all evidence obtained by Plaintiff(s), including any and all findings, analyses, and opinions of Plaintiff(s) and its consultant(s) and expert(s) based on or derived from such repairs may be barred in the Court's discretion from use at trial. In deciding whether such evidence is excluded on this basis, the Court may consider the prejudicial effect of the lack of notice to Defendants, and whether such actions were intentional, resulted from mistake, inadvertence, surprise or excusable neglect. However, the Court may also consider any other factors it may deem as relevant in deciding whether to exclude evidence that was procured by Plaintiff(s) without proper notice to Defendants as described in this paragraph. Plaintiff(s) will make all best efforts to save any removed materials, if practical and if requested by one of the Defendants. Defendants will have access to such materials upon request.

8. Investigation and/or Destructive Testing by Defendants. Absent any stipulation by all parties, all defense destructive testing will be completed 180 days from service of the last third party practice pleading under ORCP 22 unless otherwise ordered by the Special Master. Defendants shall give notice to all parties not less than 15 business days prior to the first date of any testing or invasive inspection. To the extent practicable, Defendants shall coordinate their

respective testing or invasive inspection with other Defendants so as to minimize the impact to the Project and its occupants. All arrangements for destructive testing shall be made through counsel for Plaintiff(s). Notice of the specific location(s) and time(s) for all inspections and testing shall be provided to all counsel not less than seven (7) working days prior to each inspection date, with subsequent updates of the location schedule to be provided as necessary. Counsel and experts for each party in the case may attend to observe. Any dispute arising out of the time, place and manner of investigation and/or destructive testing, upon motion of a party, shall be resolved by the Special Master. If timely notice is not given, all evidence obtained by the investigating/testing party, including any and all findings, analyses and opinions of its consultant(s) and expert(s) based or derived from such investigation and/or testing will be barred from use in the trial of this action upon motion of the aggrieved party.

9. Optional Provisions. Upon stipulation by all parties, the Special Master may facilitate an expedited and streamlined discovery process that may include:

1) a presentation by the Plaintiff(s) of a defect list, aka Bill of Particulars;

2) a Defendant's statement of which of its third/fourth/etc. party defendants performed the work being complained of in the Third/Fourth/etc. Party Complaint;

3) the response of each party to the claims against it;

4) the preparation of and a timeline for the scope of repair proposed by Plaintiff(s);

5) a demand by a Third/Fourth/etc. Party Plaintiff to those defendants it sued in this case;

6) a joint defense response to the statement of claims, defects and damages of Plaintiff(s);

7) a joint defense scope of repairs;

8) disclosure of experts;

9) exchange of expert reports;

10) depositions of experts; and/or

11) depositions of other witnesses.

The parties may also stipulate to any other collaborate effort to expedite and streamline the litigation. At the request of any party's counsel, the Special Master shall conduct a teleconference among all counsel, at the Special Master's convenience, to inquire whether and to what extent all counsel are willing to agree to these optional activities. Conversations and documents produced and exchanged in the course of these optional expediting/streamlining activities shall be considered confidential settlement communications under Oregon Evidence Code Rule 408. They cannot be used for any purpose connected with the trial nor does the party's voluntary participation in these optional activities subject that party, its clients or expert to any discovery requirements beyond what is required in the ORCP, including, without limitation, that no party shall be required to produce its expert witness for deposition.

10. Insurance Issues. Where applicable, the Special Master will require each party to submit within 45 days from the Special Master's order, the following: 1) the names of all potential insurance carriers for each party, 2) copies of all reservations of rights letters from each carrier, 3) the name and contact information for the adjusters for each carrier, and 4) copies of each carrier's insurance policy for each party. The Special Master may increase the time for production of insurance information upon the *ex parte* motion of a party. These documents shall be provided to any other party that requests them at the requesting party's own copying expense. The Special Master has the ability to advise a party that he, she or it may want to retain independent insurance coverage counsel, at that party's sole expense. Regardless of whether or

not the Special Master chooses to provide this advice, the Special Master shall not be deemed to be providing legal advice.

11. Further Status Conferences. At such time as the Special Master may find it necessary, all parties shall attend further status conferences before the Special Master.

12. Settlement Discussions. On the date to be determined by the Special Master, the Special Master may order the parties to commence Mandatory Settlement Conferences with a separate mediator, which shall continue from time to time thereafter at the discretion of the Special Master. All counsel and their principals and insurance representatives where applicable will be required to personally attend with authority for settlement. The parties' experts and/or consultants may be required to attend at the discretion of the Special Master. The mediator will report any non-attendance at the Mandatory Settlement Conference to the Special Master. The Special Master is authorized to hear show cause motions for contempt brought by any party against another who failed to appear with counsel, principals and insurance representatives where applicable at the Mandatory Settlement Conferences. Said show cause motion shall be briefed under the timeline prescribed in UTCR 5.030. The Special Master may excuse a party's attorney, principal, and/or insurance representative upon the *ex parte* request of the party's counsel. The cost of the mediator's services will be split in the same manner as prescribed in paragraph 14 for the Special Master Fees.

After the last Mandatory Settlement Conference, if the case does not settle, the Special Master shall prepare a report discussing the value of each of the claims, counter-claims, cross-claims and third-party claims, both monetarily and legally, and shall prepare an allocation of responsibility among the parties. The Special Master will submit a copy of this report to the parties' counsel prior to the trial of the case. Counsel shall deliver a copy of the Special

Master's report to their respective clients and insurance representatives. The Special Master will also submit a copy of this report to the trial judge after trial on the merits if the court is considering the issue of attorney fee awards. The Court may use the Special Master's report to assist in its determination of reasonableness of attorney's fees.

13. Ex Parte Orders. All applications to the Special Master for *Ex Parte* Orders require twenty-four (24) hour telephone or fax notice to all parties affected by the motion.

14. Special Master Fees. The Special Master's fees and costs will be billed from time to time during the pendency of this action. Each party shall pay an equal share of the Special Master's fees and costs, however, on a party's application to the Special Master, the Special Master, as justice requires in his or her sole discretion, may order a different allocation of fees and costs.

APPROVED AND RECOMMENDED:

Dated:_____ _____

Special Master

IT IS SO ORDERED:

Dated:_____ _____

Multnomah County Presiding Judge

OREGON STATE BAR
Construction Law Section
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P.O. Box 1689
Lake Oswego, OR 97035-0889