

Construction Law Newsletter

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MESSAGE FROM THE CHAIR

Janelle Chorzempa
Marvin, Chorzempa & Larson, PC

This was a very productive year for the Construction Law Section. I would like to thank all the board members and those that participated in September's CLE and annual meeting. This year's accomplishments were truly a team effort. The referee system for complex litigation is in place in Multnomah County. A special thanks to Jack Levy, Darien Loiselle and Alan Mitchell for their efforts. As the board will monitor the referee system, it is important that you provide your board members with comments – both good and bad – so that the system can be modified if necessary.

This year we tracked the legislation that was applicable to construction law. Hopefully you took advantage of it by visiting the web site. This was a time consuming effort to review the various bills and determine the appropriate legislation to follow. Angela Otto did an excellent job and various other board members added bills to the list as well.

We completed one CLE at our annual meeting and are doing a second jointly with Clark County Bar Association. Both CLEs have been proposed over the past several years and this year's board implemented them. The CLE in September was headed by Jim VanDyke, and dealt with in-house counsel's expectation of retained counsel. We had a great turnout for an excellent presentation. On November 4, we held a joint CLE with the Clark County Bar that compared aspects of Oregon and Washington construction law. Alan Mitchell and I found the Clark County Bar to be very receptive to working with us.

Finally, after the elections at our yearly meeting, the new board beginning January 2006 is as follows:

Jack Levy – Chair

Dana Anderson – Chair Elect

Alan Mitchell – Secretary

Angelo Otto - Treasurer

Janelle Chorzempa – Past Chair

Members at large:

Nancy Cary:

Gary Christensen

Darien Loiselle

James Van Dyke

Jason Alexander

John Berge

This is a reminder that the board invites your participation and ideas on how this section can assist you in your practice. Jack Levy and the board will provide this section good leadership for 2006. Ideas on CLE's, the website and articles for our newsletter are welcome.

2005 LEGISLATIVE UPDATE

Dana Anderson; Dept. of Justice
Alan Mitchell; Scott Hookland LLP
Angela Otto; Stewart, Sokol & Gray

Please take a moment to review the following legislative summary of a few bills of interest to those associated with the construction industry. This is not intended to be a complete list of all new legislation and it is not intended to analyze or fully set out all provisions of any given bill. Unless stated otherwise, the following new laws go into effect on January 1, 2006.

1. CONTRACTORS & CONSTRUCTION CONTRACTS

Recorded Warranties

(SB 574; 2005 Or Laws Ch. 169)

This bill authorizes contractors who build new residential or commercial structures to record a written agreement signed by both the contractor and the original owner that sets out "any express warranties" provided by the contractor. This document will "benefit and burden" the property for ten years after the date of recording. There are no statutory restrictions on the content of these notices. Thus, the bill does not prohibit a "warranty" that is more of a warranty disclaimer than an actual warranty.

Building Trade Licensing

(HB 2181; 2005 Or Laws Ch. 758)

This bill gives broader authority to several agencies other than the Construction Contractors Board ("CCB") that administer building trades. In particular, it gives the Department of Consumer and Business Services ("DCBS") (through its Plumbing Board and its Electrical and Elevator Board) the ability to deny, suspend, or revoke the licenses of plumbers and electricians who violate various laws and regulations. For example, the agency can take action if the business has any unpaid final orders or if any of the owners were also owners of other businesses that have unpaid final orders. The maximum period of disqualification from holding one of these licenses is five years.

This is a lengthy bill (30 pages) and anyone working in the plumbing or electrical business is encouraged to read it in full.

Disqualifying Certain Contractors

(HB 3273; 2005 Or Laws Ch. 416)

This bill allows DCBS (which regulates electricians and plumbers) to disqualify persons from obtaining or renewing their license, registration, certificate or certification. This gives DCBS powers similar to those granted to the CCB several years ago.

For example, DCBS can disqualify a plumber or electrician due to prior civil penalties or other prior adverse actions by DCBS. Also, DCBS can disqualify the contractor when DCBS took similar adverse actions against a prior company where the contractor had direct or indirect control. In the latter situation, the disqualification period cannot exceed five years.

DCBS also now has the authority to revoke a specialty registration or certificate if the contractor made false or misleading statements on its application or if the contractor fails to comply with the applicable registration rules and regulations. The department can assess up to a \$5,000 civil penalty in those situations.

Electrical Work

(HB 2596; 2005 Or Laws Ch. 570)

This bill authorizes the Director of DCBS, after consultation with the Electrical and Elevator Board and State Board of Examiners for Engineering and Land Surveying, to adopt rules designating classes of board licensees that may perform certain functions relating to noncomplex electrical installations without additional license, permit, certificate or registration.

Independent Contractors

(SB 323; 2005 Or Laws Ch. 533)

This bill completely redefines the term "independent contractor" for a broad range of laws, including those relating to income tax, workers compensation, unemployment insurance, architects, landscape contractors, construction contractors, and others. A number of affected state agencies have formed a "task force" to discuss how they will apply this new definition.

Written Contracts

(SB 1002; 2005 Or Laws Ch. 249)

Previously, the threshold amount for requiring a residential construction contract to be written was \$2,500. Now, the threshold is \$2,000. Despite legislative attempts to make non-complying contracts voidable by the consumer, the bill does not affect the existing language that such non-complying contracts are not void.

Low-Rise Building Code

(HB 2303; 2005 Or Laws Ch 435)

This bill allows DCBS to make sure that the structural specialty code and mechanical specialty code are in conformance with the Low-Rise Residential Dwelling Code. This corrects a prior conflict in the law.

Disability Accessibility

(HB 2525; 2005 Or Laws Ch. 734)

This bill directs the CCB to establish a model list of features that would make residential housing more accessible to persons with disabilities. Developers could include those features as available options. This bill was declared an “emergency” and became effective on August 17, 2005. The bill also includes provisions relating to construction standards for wineries.

Prefabricated Structures

(SB 328; 2005 Or Laws Ch. 310)

This bill exempts residential prefabricated structures intended for delivery in another state from certain Oregon construction code requirements and enforcement. These structures do not have to comply with Oregon’s building code, are not subject to plan review and are not subject to inspection. If a structure is installed in Oregon, it must meet Oregon codes.

Plumbers and Backflow Prevention Devices

(HB 3093; 2005 Or Laws Ch. 736)

This bill prohibits the Department of Human Services (“DHS”) from requiring journeyman and apprentice plumbers to obtain DHS certification to test backflow prevention device assemblies. DHS will require plumbers to complete a state-approved training program for these assemblies.

Plumbing Code Review

(HB 3092; 2005 Or Laws Ch. 661)

This bill corrects an issue that arose when the 2003 legislature exempted certain buildings from plumbing code review. Now, the DCBS must adopt rules making it clear that plumbing code plan review is mandatory only for certain “complex” structures. This bill was declared an “emergency” and became effective on July 27, 2005.

Special Permits and Inspections

(HB 3304; 2005 Or Laws Ch. 288)

This bill makes minor revisions to municipalities’ enforcement and administration of special alternative permit and inspection programs.

Building Codes

(SB 421; 2005 Or Laws Ch. 833)

This bill requires DCBS to establish building code administrative regions for all areas of Oregon. The goals are to promote consistent interpretation of the building code, to resolve disputes between building officials and the public, and to provide oversight of the state building code statutes and administrative rules. The bill was declared an “emergency” and became effective September 2, 2005.

Asbestos Lawsuits

(HB 3159; 2005 Or Laws Ch. 740)

This bill exempts certain licensed construction contractors from product liability civil actions brought for damages related to asbestos. The bill lists three criteria that a contractor must meet in order to qualify for this exemption. The exemption does not apply if the contractor installed asbestos when the plans and specifications did not call for it or if the owner or owner’s representative did not expressly allow the use of asbestos.

2. CONSTRUCTION CONTRACTORS BOARD

Commercial Project Claims

(HB 2071; 2005 Or Laws Ch. 263)

Persons wishing to file CCB claims relating to large commercial structures must now include a completed CCB claim form in addition to a copy of the lawsuit. This new rule applies to claims made

after January 1, 2006. (The CCB's web site has downloadable claim forms.)

CCB Dispute Resolution Revisions

(HB 2072; 2005 Or Laws Ch. 207)

This bill reorganizes and clarifies some existing rules and allows the CCB to pass certain new rules relating to arbitrations and contested case hearings. It also allows the CCB to waive its pre-claim notice if the contractor has actual knowledge of the dispute (note that this CCB pre-claim notice is different than the notice of defect required before filing a construction defect lawsuit). The CCB now has the authority to waive the filing fee for all labor claimants.

Standards for Home Inspectors

(HB 2075; 2005 Or Laws Ch. 114)

This bill requires the CCB to adopt minimum standards of practice and professional conduct for certified home inspectors.

Task Force on Construction Claims

(HB 2078; 2005 Or Laws Ch. 647)

This bill creates a new nine-member "Task Force on Construction Claims." Its purpose is to "study the relationship between construction claims and construction industry practices, construction defects, consumer protection, and state-mandated requirements for contractors." The Task Force is jointly administered by CCB and DCBS. This bill was declared an "emergency" and became effective on July 27, 2005.

RMI Requirements

(HB 2200; 2005 Or Laws Ch. 432)

This bill redefines the terms "owner," "officer," and "responsible managing individual" under the CCB statutes. It also creates a new term of "construction debts" that is used when the CCB is determining whether to issue or renew a license. All of these revisions are basically clarification of prior law.

3. LANDSCAPE CONTRACTORS BOARD **("LCB")**

Landscape Contractors

(HB 2069; 2005 Or Laws Ch 609)

This is a multi-faceted bill that should be studied by anyone associated with landscape contracting.

The bill grants the LCB the authority to implement and create rules that:

- create an inactive status for individual landscape contractors and landscaping business licenses for those who request this status;
- allow the LCB to put a landscaping business and landscape contractor on probation if three or more claims are filed against the business in a 12 month period;
- allow the LCB to refuse to issue, revoke, or suspend a license for certain criminal or fraudulent conduct and other consumer safety issues; and
- create a "stepped" bonding requirement to a maximum of \$15,000 for projects over \$25,000 in value.

In addition, the bill cleans up statutory confusion by:

- amending the definition of landscape contractor and landscaping business; and
- amending the list of types of work that the are (and are not) subject to LCB jurisdiction

Finally, the bill allows a landscaping business to conduct business on farm land when the business is done in conjunction with the production of nursery stock on the land.

4. REAL PROPERTY & REALTORS

Real Estate Licensee Discipline

(HB 2604; 2005 Or Laws Ch 393)

This bill modifies the grounds for discipline of real estate licensees. It also allows brokers to create a business entity to receive commissions from the broker's principal broker.

Lawsuits against Real Estate Licensees

(HB 2634; 2005 Or Laws Ch 277)

Previously legislatures barred professional negligence against design professionals unless the lawsuit included an expert affidavit that the defendant's conduct was negligent. This bill now extends that pleading requirement to lawsuits asserting professional negligence against real estate licensees. This limitation only applies to those persons who contracted with or received the benefit of services from a real estate licensee.

Real Estate Disclosures

(SB 353; 2005 Or Laws Ch 311)

This bill requires a Measure 37 “disclaimer” to be included in all agreements that transfer or contract to transfer title to real property. This disclaimer is to be made part of the existing “land use laws and regulations” disclaimer.

Homeowner Associations

(SB 955; 2005 Or Laws Ch 543)

This bill expands on the existing requirement for declarants and boards of directors of homeowner associations to conduct a reserve study (and set up a reserve account) for a 30-year plan for maintenance, repair and replacement of common elements and association property. Now, the plan must be “appropriate for the size and complexity of the common property” and “address issues that include but are not limited to warranties and the useful life of the common property.” Neither the old law nor the new one state what happens if a declarant fails to fulfill these obligations.

5. DESIGN PROFESSIONALS

Registration Renewal Dates

(HB 2590; 2003 Or Laws Ch. 25)

This changes the statutory registration renewal date for landscape architects and landscape architects in training from October 31 of each year to a date set by State Landscape Architect Board. This bill was declared an “emergency” and became effective on May 11, 2005.

6. PUBLIC WORKS PROJECTS

Payment Bonds for Wages

(SB 477; 2005 Or Laws Ch 360)

Contractors and subcontractors on public improvement projects must now file a \$30,000 bond with the CCB to ensure payment of claims relating to worker wages. This applies only if the contractor or subcontractor must pay prevailing wages.

Businesses that are certified as disadvantaged, minority, women, or emerging small business enterprises can elect not to file this bond for the first year after obtaining that certification.

If BOLI finds that workers were not paid all wages, it must first make claims against this bond before it can make a claim against the prime

contractor’s project payment bond. As a consequence of this change, all claimants under Oregon’s Little Miller Act must now revise their form of notice.

Contractors may not allow subcontractors to begin work unless confirming that the subcontractor has an appropriate bond in place with the CCB. All public works contracts and subcontracts must include language concerning these new bonds.

Like the regular CCB surety bond, this will be a single bond, not one for every project. The CCB must post information about these bonds on its web site.

These new requirements apply to public contracts first bid after January 1, 2006.

Revisions to Chapter “279”

(HB 2214; 2005 Or Laws Ch. 103)

The 2003 Oregon Legislature adopted a major revision of Oregon’s public contracting laws (formerly Chapter 279; now Chapters 279A, 279B, and 279C). This bill makes certain “technical revisions” to those changes. While most of these are minor, parties interested in public contracting should review this bill. For example, transportation project contracts below \$50,000 and other public improvement contracts below \$100,000 are now exempt from competitive bidding (as well as the bid bond, payment bond, and performance bond requirements). An initial comparison of this exemption and the new payment bond provisions of SB 477 indicates that this exemption does not apply to the new payment bond provision.

Steel Pricing Adjustments in Public Contracts

(HB 2077; 2005 Or Laws Ch. 557)

This bill is a response to the recent rapid increases in steel pricing. It requires that ODOT must adjust the amount it pays to a contractor if the contractor demonstrates that the market price increased by more than ten percent.

This bill was deemed an “emergency” and became effective on July 20, 2005. The bill’s payment adjustment portions apply to public contracts entered after April 1, 2003 and before October 1, 2005. It applies even if the contract has been completed. In addition, ODOT must now include a “steel price escalation” clause in all of its public contracts.

“Not Qualified” Contractor List

(HB 3017; 2005 Or Laws Ch. 409)

This bill corrects a minor “glitch” in the “not qualified” list maintained by the CCB. The prior statute only required that a contractor remain on that list for not less than six months after the CCB received a complaint. Since it sometimes took more than six months to process these complaints, this new bill removes the “after receipt of the CCB” language. Now, the CCB will begin counting the six-month period from the date its “not qualified” order becomes final.

Non-resident bidders

(HB 3206; 2005 Or Laws Ch 413)

This bill prohibits Oregon public contracting agencies from awarding certain public contracts to education service districts that are “nonresident bidders.”

Design Professional Services

(HB 3272; 2005 Or Laws Ch 509)

This bill modifies the conditions under which local contracting agencies select candidates to provide architectural, engineering or land surveying services.

Notice of Award

(SB 316; 2005 Or Laws Ch 351)

For all public contracts with a value of \$5,000 or more, the applicable state agency must notify the Advocate for Minority, Women and Emerging Small Business about both the bid and contract award.

Documenting Low Bidders

(SB 1006; 2005 Or Laws Ch 376)

Public contracting agencies must now document their determination of the lowest responsible bidder and confirmation that the bidder was not on the CCB’s “not qualified” list. The agencies must use the form set out in the bill and submit the form to the CCB within 30 days of letting the contract.

Emerging Small Businesses

(SB 173; 2005 Or Laws Ch 683)

This bill modifies the eligibility requirements for certification of a business as an emerging small business. It also extends the period

of time during which an eligible business may be certified. In addition, it allows reinstatement of a formerly certified business that has eligibility remaining under these new requirements.

Wages for Flaggers

(SB 136; 2005 Or Laws Ch 153)

This bill modifies ORS 279C.810 to remove the requirement that contractors and subcontractors must pay state prevailing wage rates to flaggers on projects regulated under the federal Davis-Bacon Act.

7. DEBTOR/CREDITOR

Home Solicitation Sales

(SB 214; 2005 Or Laws Ch. 223)

This bill revises certain home solicitation sales provisions. It now excludes the situation where homeowners ask a contractor to come to their residence to perform repair or maintenance work. If the homeowners agree to purchase additional work, then the home solicitation laws apply. All contracts subject to the home solicitation laws must be in writing and include certain specified information (including the three day cancellation right) that is different from the prior disclosures.

Homestead Exemption

(SB 273; 2005 Or Laws Ch. 456)

This bill increases the normal homestead exemption from \$25,000 to \$30,000 for a single debtor, and from \$33,000 to \$39,600 for joint debtors who are members of same household

8. LEGAL/PROCEDURAL

Employee wages

(HB 3319; 2005 Or Laws Ch 664)

This bill modifies the provisions relating to payment of wages and penalty liability if an employee quits employment without giving employer 48 hours' notice. It also prohibits the assessment of penalty wages against an employer if it cures any insufficient termination payment within five days of the employee submitting a final time card.

Execution Sales

(SB 920; 2005 Or Laws Ch 542)

This bill revises the laws relating to writs of execution and execution sales of real property.

Email Notice of Rulemaking

(HB 2204; 2005 Or Laws Ch 17)

State agencies may now notify interested parties of proposed rulemaking actions via email.

2005 CASE LAW UPDATE

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A. Defense of Failure of CCB License: A defense based on a contractor's failure to be continuously licensed with the CCB is waived if not raised at trial.

Mount Hood Community College et al and K & H Drywall, Inc. v. Federal Ins. Co. and Keeton Construction Co., 199 Or App 146, 111 P3d 752 (April 13, 2005)

A community college awarded a public contract to defendant Keeton Construction Co. to perform various services in the construction of a new building and the remodel of an existing building. When Keeton terminated its contract with the plaintiff, K & H Drywall, Inc., the plaintiff sued under various claims and defendants counterclaimed.

After a bench trial, the trial court issued a letter opinion finding in favor of plaintiff and dismissing defendants' counterclaim.

Weeks later, defendants moved to dismiss all of plaintiff's claims on the ground that plaintiff failed to prove that it was continuously licensed with the Construction Contractors' Board. Defendants acknowledged they had not raised the issue at trial or as an affirmative defense, but argued that it was a jurisdictional issue that could be raised at any time. The trial court denied the motion as untimely and rejected the argument that the issue was jurisdictional.

The court of appeals affirmed the trial court, holding that the motion was not timely because it

was filed after the court had issued its letter opinion, even if the judgment had yet to be entered in the court docket. Ruling otherwise would circumvent the language and purpose of ORCP 54 B(2).

The court also held that ORS Chapter 701, which requires contractor licensing, is not jurisdictional. Nothing in the statute suggests that failure to prove that a contractor is licensed deprives the court of jurisdiction over a dispute. Rather, the act is a consumer protection statute designed to protect the public from irresponsible builders. The court relied on its opinion in Beckwith v. Frazey, 86 Or App 236, 738 P2d 1003, rev denied, 304 Or 279 (1987) stating that "ORS 701.065 is not jurisdictional."

B. Construction Liens: Lien is valid when perfected within 75 days of contractor's tardy demobilization and clean-up of jobsite.

Ken Hood Constr. Co. v. Pacific Coast Constr., Inc., 201 Or App 568 (September 21, 2005)

After a restaurant construction project fell through, the parties disagreed about whether the owner/developer instructed the parties to cease work while certain permits were being obtained. One subcontractor continued work and the general contractor refused to pay for work it performed, arguing that the work was not authorized. That subcontractor filed two liens, which were foreclosed. A number of parties were named on various other claims; only the construction lien claim is discussed here.

The trial court found that the contractor's two liens were not effective because both were filed more than 75 days after the contractor's work was performed. This was based in part on the determination that demobilization of equipment and removal of debris from the job site did not constitute work on the project under the meaning of ORS 87.035(1), which states that a lien must be filed within 75 days of the date on which a party "ceased to provide labor or after completion of construction, whichever is earlier."

The court of appeals reversed in part, holding that the removal of equipment and debris benefited the developer, was within the scope of the contractor's work under the contract, and occurred less than 75 days before the first lien was filed. (Because the restaurant was never completed, at no point was the construction "substantially complete" under the meaning of ORS 87.035(1).) The first lien was held to be effective.

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