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ORS 12.135(2): THE DISCOVERY RULE IN OREGON'S STATUTE OF ULTIMATE REPOSE

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Oregon law imposes different deadlines for claims arising out of construction projects. For example, ORS 12.080 imposes a six year statute of limitations for breach of contract while ORS 12.115 imposes a two year statute for negligent injury to person or property.

Oregon law also includes a statute of "ultimate repose" for construction claims. ORS 12.135(1). A statute of ultimate repose sets a "rigid deadline" for the initiation of a legal action that cannot be extended. *See, e.g., Shasta View Irrigation Dist. v. Amoco Chemicals*, 329 Or 151, 162, 986 P2d 536 (1999).

ORS 12.135(1) establishes the statute of ultimate repose for construction claims at ten years. It provides that actions:

> * * * arising from such person having performed the construction * * * of any improvement to real property * * * or from such person having furnished the design * * * or engineering services for such improvement should be brought within the ordinary period required by law but in any event such action shall be commenced within 10 years from substantial completion or abandonment of such construction * * *. (Emphasis added.)

However, the second section, ORS 12.135(2), appears to establish a two year statute of limitations, coupled with the 10 year statute of ultimate repose, for claims against architects, landscape architects and engineers. That statute begins to run from the date the injury is discovered, or should have been discovered:

> (2) Notwithstanding subsection (1) of this section, **an action** against a person for the practice of architecture, as defined in ORS 671.010, the practice of landscape architecture, as defined in ORS 671.310, or the practice of engineering, as defined in ORS 672.005, **to recover damages for injury** to a person, property or to any interest in property, including damages for delay or economic loss, regardless of legal theory, arising from the construction, alteration or repair of any improvement to real property **shall be commenced within two years from the date the injury or damage is first discovered or in the exercise of reasonable care should have been discovered**; but in any event the action shall be commenced within 10 years from substantial completion or abandonment of the construction, alteration or repair. (Emphasis added.)

ORS 12.135(2) was adopted by 1991 Or Laws 968, § 1. Since that time, no Oregon case has directly construed it.

The meaning of this provision is governed by rules of statutory interpretation set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611, 859 P2d 1143 (1993). The first step in the *PGE v. BOLI* analysis requires an examination of the text and the context of the provision in question. If a statute's meaning is clear after examination of its text and context, no further analysis is required. If its meaning is not clear from its text and context, the court may then resort to legislative history to discern the legislature's intent. *PGE v. BOLI*, *supra*, 611-12.

Therefore, we begin with the text of the statute. ORS 12.135(2) does not define the terms "injury" or "damage." While a typical rule of construction is to give words their "plain and ordinary" meaning, a different rule applies when a statute uses a term of art. In ORS 12.135(2), the terms "injury" and "damage," when coupled with the words "discovered or should have been

discovered" are terms of art that reference not only the fact of harm but recognition of who caused the harm and the tortious conduct involved.

The intent to use the words "injury" and "damage" as terms of art is clear not simply from the context of ORS 12.135(2), but also from its context. Context includes related statutes and case law interpreting those statutes. *PGE v. BOLI, supra*, at 611; *Gaston v. Parsons*, 318 Or 247, 252, 864 P2d 1319 (1994).

A significant number of other statutes of limitation in ORS Chapter 12 begin to run when an injury is "first discovered or in the exercise of reasonable care should have been discovered." *See, e.g.*, ORS 12.110(4), 12.110(5), 12.117(1), and ORS 12.137. Oregon cases have interpreted the word "injury" in these related statutes as a term of art that includes discovery not only of the harm, but the identity of the person who caused the harm and recognition of their tortious conduct.

For example, in *Gaston v. Parsons, supra*, the court interpreted a medical malpractice statute of limitations, ORS 12.110(4), which required actions to be brought within two years of the date the "injury was discovered or in the exercise of reasonable care should have been discovered."[1] In interpreting the statute, the court stated:

> This court's prior decisions indicate that the use of the word "injury" in statutes of limitations does not refer to injury in the ordinary sense-that is, physical harm. Instead, those decisions have recognized that discovery of "injury" is comprised of different components, some of which are harm, identity of the tortfeasor and causation. [Multiple citations omitted.] (Emphasis added.) *Id.*, 253.

Therefore, the court used the following rule of statutory interpretation in regard to the word "injury":

> * * * words in a statute that have a well-defined legal meaning are to be given that meaning in construing the statute. [Citations omitted.] As used in ORS 12.110(4), "injury" is such a word. *Id.*[2]

The court then held that the term "injury" in the context of a medical malpractice statute of limitations included three elements: 1) harm; 2) causation; and 3) tortious conduct. *Gaston v. Parsons, supra*, 318 Or at 255.

This term of art has been used on multiple occasions in ORS Chapter 12. For example, in *Gladhart v. Oregon Vineyard Supply Company*, 332 Or 226, 234, 26 P3d 817 (2001), the court recognized that "* * * by 1977, the legislature clearly had demonstrated its ability to express a discovery rule in numerous other limitation statutes [citing seven different statutes of limitations]." *See Armstrong v. Rogue Federal Credit Union*, 328 Or 154, 160, 969 P2d 382 (1998) (legislature's demonstrated ability to condition cause of action provides context for statutory construction).

When the legislature adopted ORS 12.135(2) in 1991, the term "injury" was a term of art that already was well established. Therefore, it could be argued that the meaning of the word "injury" is clear from the context of ORS 12.135(2), and no further analysis is required.

Turning next to the meaning of the word "damage," the text of ORS 12.135(2) discloses only two possibilities. First, the word could be synonymous for "injury." This is the interpretation

[1] ORS 12.110(4) provided, in part, that: "An action to recover damages for injuries to the person arising from any medical, surgical or dental treatment, omission or operation shall be commended within two years from the date when the injury is first discovered or in the exercise of reasonable care should have been discovered." (Emphasis added.)

[2] *Accord: Leupold & Stevens, Inc. v. City of Beaverton*, 206 Or App 368, 376, 138 P2d 23 (2006)("When the legislature employs terms that have come to be regarded as 'terms of art,' however, we assume that the legislature intended the statute to be given that specialized meaning. [Citation omitted].")

supported by the text of the statute, which first refers to actions to recover "damages for injury" and then later states that such actions for "injury or damage" shall be commenced within two years of the date of the its discovery. It is possible that in this statute, the words "injury" and "damage" are synonymous.

Second, the word "damage" could mean "physical harm." This seems unlikely given the text of the statute. If this was the correct interpretation, however, the statute of limitations would begin to run from one of two different dates, either the date of "injury" or the date of "damage."

If the legislature intended to start the statutory time period running from one of two different times, it seems likely the legislature would have included language informing which time period applies in the event of a conflict. For example, it could have added the phrase, "whichever occurs first." However, it did not do so, and those words cannot be implied. ORS 174.010 (In the construction of a statute, the court is not to "insert what has been omitted.")

Of course, if the text and context of the statute is unclear, the court may resort to legislative history to resolve the ambiguity. The starting point for this inquiry is the 1971 version of the statute. The 1971 version read, in part:

> An action to recover damages for injuries to a person or to property arising from another person having performed * * * the design, planning, surveying, architectural or engineering services for such improvement shall be commenced within two years from the date of such injury to the person or property; provided that such action shall be commended with in 10 years from substantial completion of such construction, alteration or repair of the improvement to real property. (Emphasis added.)

The 1971 version of the statute was interpreted as imposing a two year deadline on claims against architects and engineers. *Kashmir Corp. v. Barnes*, 278 Or 433, 564 P2d 693 (1977), called into question by *Securities-Intermountain, Inc. v. Sunset Fuel Co*., 289 Or. 243, 251 n. 4, 611 P.2d 1158 (1980).[3] *Securities- Intermountain, Inc. v. Sunset Fuel* held that ORS 12.135(1) was not applicable to claims for "financial loss such as reduced value of the completed project due to unsatisfactory performance." *Id.*, 251.

In 1983, the statute was amended to provide that the claims should be commenced within the application period of limitation otherwise established by law" and in no event later than 10 years. 1983 Or Laws c.664 §1. As a result, contract claims against design professionals would be either six years for breach of contract, or two years in tort and not the two year rule of the 1971 version.

In 1991, the statute again was amended and the current language inserted, providing that claims shall be commenced against design professionals "within two years from the date the injury or damage is first discovered or in the exercise of reasonable care should have been discovered."

The minutes of the 1991 legislative history do not disclose any discussion about the meaning of the phrase "first discovered or in the exercise of reasonable care should have been discovered." However, the legislature did discuss when "claims" would begin to run. For example, Committee Counsel Greg Chaimov stated:

> A5 Amendments (Exhibit H) reduce the statute of limitations of suing architects and other building professionals from 10 years from "substantial completion" of construction to two years from when claim was discovered. (Emphasis added.) House Committee, June 7, 1991, page 6.

Stephen Kafoury, testifying in favor of the bill, also referred to the words "claims." *Id.* p. 1. So did Charlie Williamson, who opposed the bill. *Id*., p. 2.

[3] The version of ORS 12.135 in effect in 1977 did not apply to claims involving economic damage. The assumption by the parties in *Kashmir Corp.* that it did apply to economic damage was deemed "erroneous" by the court in *Securities-Intermountain. Id.* 251 n. 4.

The use of the word "claim" by legislative counsel, proponents, and opponents of the measure, helps demonstrate the legislature's intent. One cannot have a "claim" unless one knows more than simply that one has suffered harm or damage. The term "claim" requires one to know the identity of the person against whom the claim is made and the reasons for the claim. Moreover, there is nothing in the legislative history that suggests the legislature was trying to give a different meaning to the word "injury" or the phrase regarding discovery than it gave in others.

In summary, legislative history discloses that the terms "injury" and "damage" are synonymous and that the legislature intended to incorporate a "discovery" rule in ORS 12.135(2). The recent case of *Waxman v. Waxman & Associates, Inc.* 224 Or App 499, 511 (2008) lends credence to this interpretation. In that case the court, in *dicta*, referred to ORS 12.135(2) as a statute with a discovery provision.

The next question is: "How much must a plaintiff know before the statute is triggered?" While this is a fact-specific question, more than "mere suspicion" will be required if Oregon courts interpret ORS 12.135(2) in the same way as similar statutes of limitations. For example, the court in *Gaston v. Parsons* stated:

> The discovery rule is designed to give plaintiffs a reasonable opportunity to be aware of their claim. [Citation omitted.] Actual knowledge that each element is present is not required. On the other hand, a mere suspicion in insufficient to begin the statute of limitations to run. We believe that a quantum of awareness between the two extremes is contemplated by the statute. Therefore, the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the three elements (harm, causation and tortious conduct) exists. *Id*., 318 Or at 255-56. (Emphasis added.)

In *Keller v. Armstrong World Industries, Inc*., 342 Or 23, 147 P3d 1154 (2006) one could argue that the plaintiff had more than "mere suspicion." The issue in *Keller* was whether plaintiff's claims based on his medical condition of asbestosis were properly dismissed on the basis of the statute of limitations. The applicable statute, ORS 30.907(1), required filing an action "no later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the disease and the cause thereof." *Id*., 31.

The Supreme Court held the claims had been improperly dismissed, despite ample evidence plaintiff suspected the cause of his injury many years before he filed his lawsuit. The facts showed that in 1986 plaintiff was warned to sell his muffler business (at a time when mufflers were wrapped with asbestos) because exposure to asbestos could be harmful. At that time, he was diagnosed with a "mild interstitial fibrosis, but no asbestos bodies." *Id*., 27.

In 1991, a second physician had "a suspicion [plaintiff] has mild pulmonary fibrosis, possibly related to asbestos exposure." *Id.* In 1993, plaintiff visited an emergency room and its records showed he was treated for "asbestosis." *Id*., 28. In 1994, the first physician said the etiology of plaintiff's disease was uncertain. Nevertheless, that same year plaintiff stated on a social security disability application that he had "asbestos lungs." *Id*., 29.

In 1995, plaintiff filed a workers' compensation claim based on "asbestos lung." Nonetheless, that same year a third doctor stated plaintiff did not have asbestos-related conditions. *Id.* In 2000, plaintiff's fourth doctor stated that the most likely etiology of his disease was "asbestosis." *Id*., 30. Plaintiff's lawsuit soon followed in 2000.

Defendants argued plaintiff's lawsuit was untimely because plaintiff discovered, or should have discovered, the nature of his illness more than two years before the year 2000. The court disagreed. Although two doctors had identified asbestos as a "possible cause" to his condition, a third doctor in 1995 stated that asbestos was not the cause. The court concluded the overall record was

sufficient to create a material issue of fact in regard to whether plaintiff actually discovered his condition. The fact that plaintiff referred to his own condition as an "asbestos lung" was not dispositive because:

> Plaintiff's own supposition, uninformed by any medical diagnosis that asbestos had caused his respiratory problems, is not sufficient to establish actual discovery of that fact." *Id*., 34.

The court also held that a reasonable juror could find that plaintiff neither discovered, nor in the exercise of reasonable care should have discovered, that he had an asbestos-related disease until the year 2000. *Id*., 38.

In summary, ORS 12.135(2) not only contains a ten year statute of ultimate repose for architects, engineers and landscape architects, but also contains a two year statute of limitations that can be extended if the injured party has not "discovered" the injury, the identity of the person causing the harm, and the tortious conduct.

POTENTIAL TRAPS FOR CONSTRUCTION LIEN CLAIMANTS

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Anyone familiar with Oregon's construction lien statutes knows that there are many deadlines and hoops to jump through in order to protect a claimant's construction lien rights. There are two statutory deadlines that may be unfamiliar to many lien claimants, because they are not invoked very often. If you have to protect your client's lien rights on occasion, you should be aware of these rules.

Under many circumstances, contractors, suppliers, and certain other parties who have a right to file a construction lien on an Oregon project are required to serve on certain parties, including a project owner, a pre-lien notice of right to a lien ("pre-lien notice") in order to protect their lien rights. Project owners, upon receipt of the pre-lien notice, have a statutory right to issue a written request seeking certain information about the basis for the charges or the nature of the contract giving rise to the lien rights.

The statute (ORS 87.027) requires the party issuing the pre-lien notice to deliver a response with certain required information within 15 days of the date it received the request. Once the party with lien rights files its lien claim and has given the owner the statutory notice of intent to foreclose its construction lien, another statute (ORS 87.057) shortens the deadline for compliance to 5 calendar days.

If the lien claimant does not timely comply with the owner's request under either statute, the lien claimant will not be entitled to recover any attorney fees or costs incurred in enforcing the construction lien, even if the claimant ultimately wins in the lien foreclosure lawsuit. This can be a big blow to a lien claimant, who may be forced to invest a lot of money in attorney fees and costs to foreclose its construction lien.

In a recent case, the lien claimant did everything to perfect its lien rights except timely comply with the owner's request for information after the owner received the lien claimants' pre-lien notice. This turned out to be a big mistake. While the lien claimant was entitled to foreclose its lien, it was not entitled to recover roughly $75,000 in attorney fees and costs it incurred in obtaining a judgment of foreclosure on the lien claim.

The deadlines discussed above are just two of the many pitfalls under Oregon's construction lien statutes that put a claimant at risk for jeopardizing its lien rights, lien priority, or ability to recover attorney fees and costs. As you can see, when it comes to protecting lien enforcement rights, potential or actual lien claimants should comply with all required deadlines and take even the most casual written or oral request for information seriously, even if they do not refer to the applicable statute. An attorney with any questions about protecting its client's lien rights

should consult with an attorney experienced in these issues who can work through the complicated and precarious construction lien statutes.

CCB LICENSING STATUTES: A LOW COST COLLECTION TOOL?

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Even in the best of times, clients face problems collecting payment from a proverbial "judgment proof" contractor, where for whatever reason lien rights or payment bond rights (public works, private or CCB) are unavailable or unavailing. Current economic conditions seem to have greatly increased the frequency of these types of claims.

In bleak circumstances it may seem unwise to advise the client to invest even the cost of obtaining a default judgment. Still, where the deadbeat contractor or its principals are anticipated to remain in or rejoin the contracting business, the client may opt to pursue a claim that would otherwise be considered uncollectible, gambling on the chance payment may result from the CCB applying license statutes designed to address such unpaid debts from construction activities.

On the flip side, when you find yourself advising a contractor that is unable to pay its obligations, make sure to consider that even if the claimant for some reason is unable to pursue a claim with the CCB, allowing unpaid judgments (or in some cases even debts) arising from construction activities may jeopardize not only on the client's existing CCB license but also affect licensing of a new or related entity.

1. How do the statutes allow the CCB to address unpaid debts arising from construction activities where no license bond claim has been made?

While their terms are permissive rather than mandatory, ORS 701.098 and ORS 701.102 generally provide that the CCB may revoke, suspend or refuse to issue or reissue a license where the contractor/proposed contractor, or an officer, owner or "responsible managing individual" (RMI), is subject to a "construction debt," which is defined as an unpaid judgment arising from construction activities, or an unpaid CCB final order. The CCB sanction may extend to the individual owners, officers and RMI of the debtor contractor, as well as to other entities with which any of them are affiliated. In two limited circumstances discussed below, a judgment or final CCB order is not even required for the CCB to act.

These statutes and corresponding regulations also set out permissive CCB sanctions for certain criminal convictions and agency discipline, but since those issues are generally not tied directly to collection of unpaid debts this article leaves those issues for another time.

ORS 701.102 is the operative section that sets out permissive sanctions for past unresolved construction debts, and specifically allows the CCB to enter sanctions against individuals who were owners, officers or an RMI of the debtor entity at the time the debt was incurred and against other contractor entities with which they may be affiliated:

> (1) As used in this section, "construction contractor license" means a license issued within the United States to engage in the business of construction contracting.
>
> (2) The Construction Contractors Board may **revoke, suspend or refuse to issue a license** required under this chapter to a business if:
>
> (a) **The business owes a construction debt** or has had a construction contractor license revoked or suspended;
>
> (b) **An owner, officer or responsible managing individual of the business owes a construction debt** or has had a construction contractor license revoked or suspended;
>
> (c) **An owner, officer or responsible managing individual of the business was an**

owner, officer or responsible managing individual of another business at the time the other business incurred a construction debt that is owing or at the time of an event that resulted in the revocation or suspension of the other business's construction contractor license; or

(d) The board determines that an owner, officer or responsible managing individual of the business is not fit for licensure, based upon information submitted under ORS 701.046 or discovered by a board investigation under ORS 701.225." (Emphasis added.)

In addition, under OAR 812-005-0210(c), the CCB may require a bond, letter of credit or cash deposit of up to five times the normally required amount, if it determines that a current or previous license of an owner or officer has an unpaid construction debt that exceeds the amount of the security otherwise called for. While perhaps helping prospective future claimants, imposing an increased security requirement by itself would do little to cause payment of the unpaid construction debt.

2. To what types of debts do these statutes and regulations apply?

ORS 701.005 (4) defines "construction debt" as a final order or arbitration award issued by the CCB, or a final judgment either "arising from construction activities within the United States" or based on a contractor's failure to provide workers' compensation insurance. Note that this is not limited only to work done within Oregon or to judgments entered in Oregon.

The phrase "construction activities" used in ORS 701.005(4) is not limited or further defined, and thus must be presumed to include all types of construction projects.

Compare this to ORS 701.046, discussed below, which requires contractors, once licensed, to self-report only final judgments that arise from their residential construction activities.

The two exceptions where the CCB may impose a sanction against the contractor (but not the owner, officers or RMI) without a final order or judgment are: (1) upon evidence of the contractor's failure to make payment that resulted in the filing of a lien, (ORS 701.098(1)(d)); or (2) upon evidence the contractor failed to make payment to a lower tier on a public improvement project within 90 days after the contractor's receipt of funds (ORS 701.098(1)(i)). [Note that, effective July 1, 2010, ORS 701.098(1)(d) and (i) will be re-lettered as sub-sections (e) and (j), respectively.]

3. Construction debts follow an owner, officer or RMI, as those terms are broadly defined

ORS 701.094 defines "owner" for purposes of ORS 701.098 and 701.102 as a sole proprietor of, partner in or holder of a controlling interest in a business or a "person defined as an owner by Construction Contractors Board rule," while specifically excluding an "investor who has no right to manage a business" (giving three specific examples: one who is solely a minority shareholder, or a member of a manager-managed limited liability company, or a limited partner in a limited partnership who does not participate in the control of the business).

OAR 812-002-0537 defines "owner" for purposes of ORS 701.102 to include, in addition to those described in "ORS 701.077," (which was the corresponding definition statute before it was re-numbered ORS 701.094 in 2005), a general partner of a limited partnership, a majority stockholder, a managing member or other member in a limited liability company, or "a person who has a financial interest in a business and manages or shares in the management of the business."

ORS 701.005(11) defines "officer" to include not just corporate officers and managers/members of limited liability companies, but also those who may be specifically defined under CCB rule, including a person who "may exercise substantial control over a business".

It is arguable whether CCB implemented the "may exercise substantial control" language as part of its administrative rule definition of "officer." OAR 812-002-0533 defines "officer" to include a "person described as an 'officer' in ORS 701.005," as well as a partner in a partnership, or

"a responsible managing individual described in ORS 701.078" or a "person who has a financial interest in a business and manages or shares in the management of the business" or "an individual who has a financial interest in another business and who is an officer of that other business if that other business owns more than fifty percent of the particular business."

Under ORS 701.105 (15), "responsible managing individual" means an individual who:

> "(a) Is an owner described in ORS 701.094 or an employee of the business;
>
> (b) Exercises management or supervisory authority, as defined by the board by rule, over the construction activities of the business; and
>
> (c)(A) Has successfully completed the training and testing required for licensing under ORS 701.122 within a period identified by the board by rule;
>
> (B) Has demonstrated experience required by the board by rule; or
>
> (C) Has complied with the licensing requirements of ORS 446.395.

Given these expansive definitions, unpaid construction debts of one entity may follow and affect the licensing of the debtor contractor's owners, officers and RMIs, and multiple other entities with which they are or may become affiliated. Note that an individual owner, officer or RMI of the judgment debtor contractor may avoid CCB sanctions if the individual is discharged in bankruptcy. See, *Ray v. State of Oregon*, 355 BR 253 (Bkrptcy. D. Or. 2006).

3. Contractor Reporting Obligations

Under ORS 701.046(1)(b) and (j), and OAR 812-003-0260, a CCB license application requires disclosure going back 5 years by the applicant, including its owners and officers, of "construction debts" and any type of judgment or administrative order for the payment of money entered in any state, as well as any pending court action or administrative action seeking the payment of money. Older, unsatisfied construction debts or other judgments or orders need not be listed.

If the applicant discloses an unresolved construction debt, the CCB will be able to withhold the license until the debt is paid. Given the 5-year time period and the nature of deadbeats, this disclosure requirement may need supplementation in the form of the notice and reminder to the CCB by the part of judgement creditor.

In contrast to the fairly expansive disclosure called for in ORS 701.046 on the part of license applicants and their owners and officers, existing licensees are subject to a much more limited ongoing self-reporting requirement under ORS 701.109, which is applicable only to unpaid judgments arising as to residential structures.

ORS 701.109 requires a licensed contractor to report, within 45 days of entry, any final judgment (including a judgment entered upon confirmation of an arbitration award) against the contractor that has not been appealed (with a bond to prevent execution) relating to its "breach of contract or from negligent or improper work and that relate to the construction or proposed construction of a residential structure," expressly including unpaid/un-appealed judgments entered in other states by courts equivalent to Oregon's Circuit Courts. This more limited self-reporting requirement for licensed contractors thus exempts an entire category of "construction debt," (i.e., all construction activities not involving a residential structure).

Low-cost self help will increase your client's chances of recovery. Rather than relying on the disclosure and limited self-reporting requirements of ORS 701.046 and 701.109, your client should send the CCB, by certified mail, a conformed copy of the unpaid judgment against a licensee arising from construction activity (or, if applicable notice of unpaid debts owed to your client of a type covered under ORS 701.098(1)(d) and (i)). Your client should also identify each of the owners, officers and RMI associated with the debtor contractor licensee at the time the debt arose, and also periodically search the CCB website to determine if the contractor or those individuals are involved with any (other) licensed

entities so as to give new notices as may be necessary.

CONSTRUCTION-RELATED PENDING LEGISLATION

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The following is a short summary of the status of construction related legislation as of May 5, 2009. This list is not a complete list of all construction related legislation. The status of bills is rapidly changing, so this is no more than a snapshot of the bills listed. The author is not aware of all amendments to these bills that are under consideration by the legislators and committees handling the bills.

The legislature must adjourn by June 30, 2009. With some exceptions, bills that have not been voted out committee in the house of origin are dead. By May 20, bills must have arrived in the second chamber to consider them and have had a work session in their assigned committee in that chamber. (In other words, House bills must have had a work session in a Senate committee and vice versa.) An apparently dead bill can be placed back in front of the legislature if the leadership of the House or Senate wants to take the trouble to do it.

SB 50 Related to notice required for claim on contractor's payment bond. Passed by the Senate. In House committee.

SB 51 Related to prevailing wage on public contracts. Referred to Ways and Means. Now in Senate committee.

SB 53 Related to prevailing wage on public contracts. Passed by the Senate. In House committee.

SB 55 Related to prevailing wage on public contracts. Passed by the Senate. In House committee.

SB 147 Related to the Landscape Contractors Board. Passed by the Senate. In House committee.

SB 202A A CCB housekeeping bill to clean up the definition of contractor with respect to chimney sweeps. Senate passed it. House committee sent it the House floor with a do-pass recommendation.

SB 203A Raises the threshold requirement for residential contractors to give the "Information Notice to Owner" regarding construction liens from $1,000 to $2,000. Authorizes CCB to sanction exempt contractors who hire employees. Allows two years to renew a lapsed license. Deletes the requirement that written contracts summarize notices required to be given to a homeowner or buyer. Senate passed it. Hearing scheduled in the House.

SB 204 Clarifies that CCB residential contractor bonds may only be applied to complaints against residential contractors and that CCB commercial contractor bonds may only be applied to complaints against commercial contractors. Senate passed it. House committee sent it the House floor with a do-pass recommendation.

SB 205 Cleans up and clarifies required maintenance schedule, cancellation of contracts, warranty requirement and consumer notice. Senate passed it. Hearing scheduled in the House.

SB 206 Makes certain information collected by the CCB confidential and exempts certain individuals from providing information. Senate passed it. House committee sent it the House floor with a do-pass recommendation.

HB 2134 Related to administration of the state lead-based paint program.

HB 2349 Related to value given to release lien. Passed the House.

HB 2366 Authorizes a court to dismiss a construction lien if the owner shows that he or she paid the prime contractor for the work that is the subject of the lien. **This would be a significant**

change to the lien law. Passed the House. In the Senate.

HB 2434 Sets statute of repose for certain actions involving large commercial structures at six years unless the plaintiff is a public body. Then it is ten years. Passed the House.

HB 2626 Related to Oregon Department of Energy programs. In House Revenue Committee. (Deadlines do not apply to the Revenue Committee.)

HB 2867 Related to public contracting. Referred to Rules.

HB 2907 Related to interstate agreements on prevailing wages. On House floor for a vote.

HB 2953 Related to bidding requirements on public improvements. On House floor for a vote.

HB 2955 Related to retainage on public improvements. On House floor for a vote.

HB 2962 Originally related to the certificate of occupancy. Has been gutted and stuffed with a bill on another subject.

HB 3127 Establishes a board of locksmiths in the CCB. In Ways and Means (another committee exempt from the legislative time limitations).

LENDER DISCOVERY ISSUES

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Those of us who practice in the area of construction lien claims know that there have been significant changes in the banking industry. In a recent instance, our client held the coveted first priority position relative to the construction lender. While this is normally a blessing, there are situations where it creates significant complications.

In a recent situation, the construction lender was a local bank that, during the course of the construction project, was forced into receivership by the Federal Deposit Insurance Corporation ("FDIC"). In its receivership capacity, the FDIC took ownership and control of the construction loan. The FDIC is a federal agency and therefore not subject to state court jurisdiction based the doctrine of sovereign immunity and the Supremacy Clause. However, to foreclose a lien claim, the action must be brought in state court in the county where the real property is located. The question ultimately became "where do I file suit in order to properly foreclose when the construction lender is the FDIC?"

The solution to this problem may be less difficult than anticipated. In 28 U.S.C. §2410, the statutes specifically waive sovereign immunity in regard to quiet title and foreclosure actions concerning real or personal property to which the United States claims a mortgage or other lien. This allows suit to be brought in any district or state court having jurisdiction over the subject matter. Therefore, the state court foreclosure action could include the FDIC as a defendant.

However, the waiver of sovereign immunity is subject to a condition precedent found in 28 U.S.C. §1444. This provision states that any action brought under section 2410 against the United States in any state court may be removed to the district court of the United States for the district and division in which the action is pending. Therefore, the United States has the unqualified option to remove the lien foreclosure action to federal district court. *See E.C. Robinson Lumber Co. v. Hughes*, 355 F.Supp. 1363 (E.D.MO 1972), *citing Hood v. United States*, 256 F.2d 522 (9th Cir.1958).

If the United States chooses to remove the case to federal district court, pendant jurisdiction will also assume the accompanying claims. More specifically, if a construction lien foreclosure action is brought with the typical associated claims of breach of contract and quantum meruit, then those companion claims will also be removed to federal district court. It is also possible that one or more parties may then seek to sever these claims and remand them back to the state court.

It is always to difficult walk the fine line drawn regarding the waiver of sovereign immunity. Be careful to review the case-specific application of sections 2410 and 1444 closely, because the waiver of sovereign immunity under section 2410 must be construed narrowly. *U.S. v. Rhodes*, 913 F.2d 839 (10th Cir. 1990), *cert den*. 489 U.S. 237, 80 S.Ct. 1108 (1960).

Even if you not required to name a federal agency as a party, you may still encounter obstacles in the event you need to subpoena documents from a federal agency such as the FDIC. If the federal agency is not a party to the matter there are two significant roadblocks to obtaining documents. First, the government agency will likely contend that the case *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) when combined with agency regulation permits federal agencies to quash a subpoena.

In *Touhy*, an inmate, Touhy, subpoenaed an FBI agent in hopes of obtaining documents supporting his claim. The judge granted Touhy's motion to compel and ordered the agent to produce the documents. The agent refused citing a Department of Justice rule that required any employee of the department who was served with a subpoena for department records to "respectfully decline" to produce them unless expressly directed otherwise by the Attorney General. The judge found the agent in contempt, and the agent appealed. The U.S. Supreme Court found that the DOJ's internal rule was properly enacted under the "housekeeping statute", and ruled that the agent properly refused to respond.

Most federal agencies have *Touhy* rules permitting them to respectfully decline to respond to subpoenas, absent permission of the agency head. Additionally, federal agencies may also assert a second roadblock of sovereign immunity. The Ninth Circuit has held that a state court has no jurisdiction to subpoena a federal official because of sovereign immunity, *In re Elko County Grand Jury*, 109 F.3d 554, 556 (9th Cir. 1997), but it has declined to extend that holding to federal court subpoenas, *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774 (9th Cir. 1994).

Generally, if there is a *Touhy* dispute in a state court matter, the government can remove the case under 28 U.S.C. §1442 on the jurisdictional basis of contempt. In the event of removal, the federal court may decide whether to adjudicate any remaining issues involving the subpoena. *See Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986). Therefore, a state court litigant who persists in subpoenaing a federal official may become involved in a pointless proceeding that may not even permit debate on the merits of the subpoena itself.

In the face of these subpoena concerns, first determine if the federal agency at issue has *Touhy* styles rules pertaining to subpoenas. If not, proceed with issuing a state court subpoena. If there are applicable *Touhy* styles rules, which is generally the case, consider filing a Freedom of Information Act request. 5 U.S.C. § 552. This is the most cost effective means of obtaining the documents in light of a potential *Touhy* refusal. Keep in mind that it is important to review any agency specific procedures and requirements for such a request to ensure a prompt and accurate response.

The more difficult and cost prohibitive means of obtaining the documents would be to file a direct action against the federal agency itself in federal court to settle enforcement issues relating to the document request. This method is recommended as a last resort effort, however, in light of specific need for the federal agency's documents.

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