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CONSTRUCTION LIENS AND PROBATE ESTATES

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What would happen if an ORS 87.035 construction lien was timely recorded against a homeowner's personal residence, but the homeowner died and a probate opened before the ORS 87.035 foreclosure complaint was filed?

First of all, let's look at probate claims in general. A claim is defined as the liability of a decedent, whether arising in tort or contract. ORS 111.005(7). ORS 115.005(1) requires that claims against an estate must be presented to the personal representative. In other words, a claim is an assertion by a creditor who seeks to be paid a dollar amount from an estate for a debt incurred during the decedent's lifetime.

ORS 115.325 goes on to state that, as a general rule, a claim must be filed and disallowed before an action may be maintained. A personal representative has sixty (60) days from presentment to disallow a claim. ORS 115.135. If the claim is disallowed, then the claimant has thirty (30) days to either seek summary determination or file suit. ORS 115.145. A summary determination is an abbreviated procedure within the probate court that results in loss of appeal rights. ORS 115.165.

However, it is noteworthy that ORS 115.005(5)(a) does not require a claim to be filed and disallowed before an action to enforce a lien against property of an estate. ORS 115.065(1) also does not require a probate claim to be filed, but allows you to rely on the lien without filing a claim or presenting as an unsecured claim.

Okay then, so far so good. The fact that the homeowner died before the filing of the foreclosure suit doesn't require a claim filing/disallowance procedure as a prerequisite to filing suit. You could just name the personal representative as the defendant and file the foreclosure complaint. (If no probate has been opened, you would file the foreclosure in accordance with ORCP 20I and serve it per ORCP 7D(6)(e) publication).

If there is not enough value in the collateral to pay off the lien and costs, then what do you do? ORS 115.065 deals with claims on secured debts. First, any claim must describe the security. ORS 115.065(2). Second, if the claimant pursues the foreclosure, then any unpaid deficiency will be treated as an unsecured claim. ORS 115.065(5). In other words, you can proceed with the foreclosure and preserve your right to a deficiency judgment as an unsecured claim.

It would seem prudent to file the lien foreclosure suit in Circuit Court and also file an ORS 115.065(2) probate claim within the four month deadline described in ORS 115.005. ORS 115.005 gives priority to unsecured general claims filed within four (4) months of the published Notice to Interested Parties. It may be problematic to file suit, obtain service, obtain judgment, have a foreclosure sale, obtain a deficiency, then file a claim before these four months run and you lose priority vis-a-vis other timely filed unsecured claims.

A couple of Oregon cases, none directly on point, deal with similar situations: In *Meissner v. Murphy*, 58 Or. App. 174, 647 P.2d 972 (1982), a timber sale contract foreclosure was filed against an estate without benefit of a pre-suit probate claim. A claim was submitted to the probate court, who then denied it after the foreclosure suit was filed. The trial court granted plaintiff a strict foreclosure, but denied plaintiff a deficiency judgment. The Court of Appeals affirmed, holding that filing the suit without a pre-suit probate claim amounted to an ORS 115.065(1) suit, and thereby limited its recourse to recovery of the security only.

In *Heiller v. Nelson*, 127 Or. App. 189, 872 P.2d 26 (1994), a secured judgment lien creditor filed a probate claim as a secured creditor. The trial court held that filing the claim waived the security. The Court of Appeals reversed, holding that the filing of the claim did not waive the security.

In *Estate of Hill v. Great Western National Bank*, 557 P2d 1367, 27 Or. App. 893 (1976), the bank had an unperfected UCC lien on suit settlement proceeds. The personal representative argued that the bank became a general unsecured creditor in that the personal representative became in effect a judgment lien creditor with priority over an unperfected security interest. The bank maintained that the personal representative stepped into the shoes of decedent and did not enjoy lien creditor priority. The Court of Appeals held that the personal representative steps into the shoes of the decedent and cannot invalidate an unperfected security interest by using judgment lien creditor status.

Another interesting angle is ORS 115.225, which generally holds that a devisee of real estate takes it to subject of existing encumbrances. However, ORS 115.255(3) states that the beneficiary of a specifically devised piece of real estate that is subject to a construction lien (an involuntary encumbrance) can compel the estate's personal representative to pay the lien claim out of the general, non-specifically devised estate assets. They could be a valuable ally.

Here is how I reconcile all this:

It is important to investigate the dynamics of the estate. You can view the probate file and look at the will at the courthouse. The personal representative must file an inventory of assets within sixty (60) days of appointment, ORS 113.115. If it is obvious that there is significant cash to pay the amount of the lien, the expense of foreclosure may be avoided and collection secured via a probate claim. If there is any doubt that the estate is solvent enough to pay the claim in full, filing a probate claim as a secured creditor under ORS 115.165 and ORS 115.065(2) and timely filing of a foreclosure suit is in order.

CONSTRUCTION LIEN CLAIMS: BONDING AND CASH DEPOSITS

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Most construction law practitioners are familiar with the advantages and potential issues associated with recording construction lien claims. However, we rarely discuss the benefits and potential pitfalls of bonding or cash depositing off construction lien claims. The following is a brief summary of these issues.

1. What is Meant by Bonding or Cash Depositing Off a Lien

If a construction lien claim is properly and timely recorded, the lien claim will attach to and encumber the subject real property and improvements. In turn, the lien claim can potentially be adjudicated and the subject real property and improvements foreclosed upon for purposes of paying the underlying claim. However, the lien claim does not necessarily have to encumber the real property and improvements throughout this process. Instead, ORS Chapter 87 provides ways in which the lien can be transferred to and encumber another source of payment.

Specifically, the lien claim can be removed from the real property and improvements and attached to either a surety bond or a cash deposit. This process is not as simple and straightforward as just obtaining a surety bond or depositing a sum of cash. Chapter 87 sets out an exacting set of guidelines for pursuing either of these choices. If the guidelines are properly followed, then the real property and improvements are protected from foreclosure.

2. Who Should Consider Bonding or Cash Depositing Off a Lien

Once a lien claim is recorded against real property, numerous parties are potentially affected. The affected parties may have different rationale for wanting the lien claim released from the real property, but they must all meet common criteria for accomplishing this task.

A. Owners

Owners are always affected by the recording of a lien and frequently have an interest in releasing lien claims from their real property and improvements. A common rationale for this interest is that the terms of most lending and security agreements related to the purchase of real property (e.g. mortgages and deeds of trust) contain provisions stating that the recording of an encumbrance on the subject real property is a material breach of the agreement. To avoid being held in breach, owners may need to consider bonding or cash depositing off the subject lien claim.

B. Prime Contractors

Prime contractors should also consider the benefits of bonding or cash depositing off lien claims. For example, prime contracts frequently require that the subject real property and improvements be kept free from any construction-related encumbrances, including claims of construction lien. In turn, if such a lien is recorded, the contract typically requires that the prime contractor hold the owner harmless and indemnify against the lien claim. In this scenario, the owner frequently withholds funds from the prime contractor pending resolution and removal of the lien claim.

Prime contractors can bond or cash deposit off the lien claim to assist in obtaining final payment from the owner. Once the lien claim is removed from the real property, then the owner will no longer be affected by the lien claim and may be more willing to make the final/closeout payment to the prime contractor.

C. All Interested Parties

Aside from the reasons listed above, another reason for taking this step is the potential tactical advantage. Bonds and cash deposits are required to be posted in fixed amounts (<u>see</u> Section 4 below). This fixed sum is the entire balance that a successful lien claimant can potentially recover, if the bonding or cash depositing off is properly accomplished. Therefore, interested parties can potentially limit a lien claimant's ultimate recovery to the fixed amount of the bond/cash deposit. Of course, those limits do not apply to parties in contractual privity.

3. When Can Bonding or Cash Depositing Off Occur

An interested party can bond or cash deposit off a lien claim at any time after the claim of lien is recorded. ORS 87.076(3).

4. How is Bonding or Cash Depositing Achieved

There are several sequential steps to properly bonding or cash depositing off a lien claim. It is critical that each of these steps be fully and completely complied with; otherwise, the lien will not attach to the bond or cash deposit. *Tualatin Valley Builders Supply, Inc. v. TMT Homes of Oregon, Inc.*, 179 Or App 575 (2002).

A. File the Surety Bond or the Cash Deposit

1. Surety Bond

The process for obtaining and recording a lien release surety bond has not changed significantly in recent years. Specifically, ORS 87.076(1) requires the following:

- The surety must be authorized to issue surety bonds in the State of Oregon.
- The surety must prepare and execute a bond stating that the bond principal shall pay the amount of the claim and all costs and attorney fees that are awarded against the improvement or land on account of the lien.
- The bond must be issued in an amount not less than 150 percent of the amount claimed under the lien, or $1,000, whichever is greater.
- The bond must be recorded with the recording officer of the county in which the lien was recorded.

2. Cash Deposit

There is an alternative to obtaining and recording a bond; a party can instead provide a cash deposit. This substitute to bonding was long overlooked, but is becoming increasingly more popular. In part, that is due to recent statutory changes relating to cash depositing and growing trends in bonding security.

It is becoming increasingly common for surety companies to require that the principal on a lien release bond must post either actual monies or equivalently valued security equal to the bond value as a prerequisite to issuance of the bond. Thus, since the principal is already "on the hook" in the amount of the surety bond, plus the out of pocket costs for the surety bond (typically, 2% of the surety bond amount), many principals are turning to the cash deposit option.

Furthermore, the 2009 revisions to the lien statutes enhanced the potential incentives for cash depositing. Specifically, interested parties who file cash deposits are now entitled to any investment income generated by their cash deposit. Therefore, interested parties can continue to earn interest on the funds while they are tied up in litigation of the underlying lien claim. Although this may be of limited incentive in the current financial market, there is still potential gain. Of course, as with any investment, the cash depositor bears the risk of any investment loss.

The process for obtaining and filing a cash deposit has not changed significantly, despite the 2009 legislative changes. ORS 87.076(2) requires the following:

- Compile monies, or the equivalent of money, for purposes of the cash deposit.
- The monies, or the equivalent of money, must be in an amount not less than 150 percent of the amount claimed under the lien, or $1,000, whichever is greater.
- Deposit the monies, or the equivalent of money, with the treasurer of the county in which the lien was recorded.

NOTE: Not every county has a designated "county treasurer" (for example, Washington County). In that case, you should contact the county's financial officer to confirm the proper person/department in which to file the deposit. One source of information as to Oregon county treasurers is the Oregon Association of County Treasurers and Financial Officers - http://www.oactfo.org/.

B. Provide Notice of the Bond Filing or Cash Deposit

In addition to filing the bond or depositing the cash, the interested party must also provide notice of the filing or deposit to the lien claimant. ORS 87.078(1) requires the interested party to:

- Serve lien claimant by personal delivery, registered mail, or certified mail with written notice of the bond filing or cash deposit;
- The notice must state the location and time of the cash deposit or bond filing (and include a copy of the surety bond);
- Complete this not later than 20 days after the bond filing or cash deposit.

Failure to timely provide this statutory notice to the lien claimant will mean that the lien claim will continue to encumber the subject real property and improvements and leave them subject to foreclosure. ORS 87.078(2). Thus, the efforts to file the bond or deposit the cash will have no legal effect.

C. Filing the Affidavit of Notice

To confirm that proper notice is given, ORS 87.081 requires that an affidavit of notice be recorded. Specifically, following service of the notice described above, the interested party must file with the recording officer of the county in which the lien was recorded an affidavit stating that such notice was served.

After following and completing each of these three critical steps, the construction lien claim will no longer be attached to the real property and improvements. Instead, it will automatically attach to the recently filed bond or deposited cash.

5. Challenge to Adequacy of the Bond

Upon receiving notice of the bond filing, a lien claimant can challenge the adequacy of the bond. If the lien claimant finds the bond inadequate for any reason, *other than the amount of the bond*, the lien claimant must within ten (10) days of receipt of the notice of filing, petition the circuit court in the county in which the lien was recorded for a determination of the adequacy of the bond. The petition must state in detail the reasons for inadequacy, and must be sent by certified or registered mail to the person who filed the bond not later than (2) days after filing with the court.

After a hearing on the petition, the court will determine if the bond is inadequate. If the bond is found to be inadequate, the court shall order the person who filed the bond to take certain actions that are intended to make the bond adequate to protect the lien claim.

There is no related challenge for cash deposits, because there is an unstated assumption that there can be no concern as to the adequacy of a cash deposit other than the amount of the deposit.

6. The Demand of Release - A Potential Tactical Advantage or Mistake

A party that has the right to file a surety bond or deposit cash is permitted to make demand upon the lien claimant for release of the lien claim. However, the decision to make this demand must be evaluated carefully.

ORS 87.076(4) provides that an interested party may serve the lien claimant (by personal delivery, registered mail, or certified mail) with a written demand:

- To release the lien claim; and
- That if the lien claim is not so released, the interested party may recover the actual costs the interested party incurs in complying with the bonding/cash deposit statutes or the sum of $500, whichever is greater.

If – <u>and only if</u> – all of the following events occur, may the interested party then recover the above-referenced damages (as well as any other remedy permitted):

- The lien is not released within ten (10) days of the demand and notice being delivered;
- The lien claimant does not timely file suit to foreclose the lien; and
- The interested party properly files a bond or deposits cash.

At first glance, it may seem that making this type of demand can give a potentially easy means of recovery. However, practitioners must be cautious that the demand may benefit either party. ORS 87.076(4)(c) states that, if a lien claimant is served with a statutory demand to release lien and the lien claimant is the prevailing party in the suit to foreclose the lien, then in addition to the other costs and attorney fees, the court may allow the actual costs incurred in addressing the demand or the sum of $500, whichever is greater.

Therefore, the lien claimant can potentially be the ultimate victor when faced with a demand of this nature. As a result, this statutory lien release demand should only be used on those occasions when the lien is clearly invalid and the lien claimant refuses to release the lien despite its invalidity. At all other times, the interested party is risking the potential for additional recovery by the lien claimant.

7. Foreclosure Upon a Bond or Cash Deposit

A foreclosure action upon a bond or cash deposit looks much the same as a foreclosure action upon the real property and improvements. The difference is that if the statutory three-step process is properly and timely completed, then the real property and its owners(s) will not be in the subject of the foreclosure action.

A. Timeline to Foreclose

The timeline for foreclosure does not differ from a traditional lien claim. The construction lien must be foreclosed against the bond or cash deposit within 120 days after the lien is recorded. ORS 87.055.

B. Parties to Action

If each and every step for bonding or cash depositing is met, then the owner of the real property is no longer a necessary party to the action (unless the owner posted the bond or cash deposit). If a surety bond was posted, then the principal on the bond must be named in the foreclosure action, and the surety on the lien release bond may be named in the suit (although this is not mandatory).

When a cash deposit has been made, the depositor of the cash deposit must be named in the foreclosure action. However, the county or an officer or employee of the county may **<u>not</u>** be named as a party to the foreclosure upon the cash deposit. This was part of the 2009 legislative revisions. *See* ORS 87.083(2).

C. Satisfaction From the Bond or Cash Deposit

If the court finds the lien claim enforceable, then the lien must be satisfied out of the bond or deposited cash. In the case of a bond, the court judgment must include an order directing the bond principal and bond surety (if named) to satisfy the judgment pursuant with the bond. In the case of a cash deposit, the court judgment must include an order specifying to the county treasurer the amount of the deposit that must be released to the lien claimant/judgment creditor and the remaining amount that the county treasurer must release to the party that deposited the funds.

D. Disposition of Bond or Cash Deposit if Lien Disallowed

If the court disallows the lien claim, then the court judgment shall include an order to return the bond or the deposited funds to the interested party that filed the bond or deposited the monies.

8. Conclusion

As you can see, the statutory requirements for bonding or cash depositing off a lien claim are not overly difficult or complex. In turn, the potential benefits can be of significant value for an interested party willing to undertake the effort. However, it is critical that each step is timely and fully met, or their efforts will be for naught.

CONSTRUCTION TRUST FUND ACTS: A CONTRACTOR'S BEST FRIEND

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As Oregon contractors move beyond our borders in search of work, practitioners should be aware of, and generally familiar with, Construction Trust Fund Acts ("CTFA's") found in many jurisdictions. Although there is variation from state-to-state, for the most part they give protection to owners, contractors, and suppliers in relationship to payments received upstream for goods or services furnished on a construction project.

Most CTFA's impress a trust on construction payments and loan receipts that are made for the improvement of certain real property. An owner, contractor, or subcontractor who receives these funds, or has control of them, is a trustee of the funds and the statutory language provides all the necessary provisions to establish a trust upon those funds. *Restatement of Laws 2d (Trusts)*, §17.

A trustee who retains, uses, or diverts trust funds without first fully paying the beneficiaries of the trust has generally misappropriated the funds. Penalties can be quite severe, ranging from personal civil liability (Ariz. Rev. Stat. §33-1005 (2012), to felony criminal liability (Ga. Code Ann. §16-8-15 (2012); S.D. Codified Laws § 44-9-13 (2012), (Mich. Comp. Law §570.152 (2012); Minn. Stat. §514.02 (2012); Colo. Rev. Stat. Ann. §38-22-127 (2012); Tex. Prop. Code §162.032 (2012).

Normally, to make out a civil cause of action under a CTFA, a plaintiff needs to establish the following elements:

- The defendant is an owner, contractor, or subcontractor on the project for which the claimant asserts they are unpaid ;
- An entity paid the owner, contractor, or subcontractor for labor or materials on the project at issue;
- The defendant retained or used those funds, or any part of those funds,
- For any purpose other than to first pay contractors, subcontractors, materialman, and laborers who were engaged to provide labor or supply material for the specific project.

One important aspect of a CTFA is the role it can play in a bankruptcy proceeding. CTFA's provide a basis for asserting that money possessed by the bankrupt entity is held in trust and is not property of the estate. 11 U.S.C. §541(d); *In re BI Fin. Servs. Group, Inc.*, 854 F.2d 351 (9th Cir. 1988). The "beneficiaries" of the trust can, and often do, seek relief from the bankruptcy estate on that basis. *Universal Bonding Ins. Co. v. Gittens & Sprinkle Enterprises, Inc.*, 960 F.2d 366 (3d Cir. 1992). In addition, contractors also use CTFA's to object to a discharge on the basis of defalcation, one of the enumerated reasons for denying a discharge. 11 U.S.C. §523(a)(4).

As with most uniform acts, there is often a lack of uniformity from state to state. Consultation with a local attorney prior to commencement of the project and at the time of contract formation will help guide parties in the negotiation of the contract payment terms through a better understanding of the risks associated with insolvency or non-payment.

PUBLIC-PRIVATE PARTNERSHIPS: UNIQUE LEGAL ISSUES

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For the past several years, more and more infrastructure, transportation, healthcare, and even large commercial construction projects have been carried out via a relatively new delivery method known as Public-Private Partnerships (commonly, "PPP"). Though these types of projects take many different forms, their complex nature and the combination of public and private stakeholders and properties involved give rise to several overarching legal issues, especially regarding the rights and remedies available to contractors, subcontractors, and suppliers performing work and furnishing labor and equipment for the entity administering the PPP project. This article summarizes some of the qualities that differentiate PPP projects from traditional public and private works construction projects, and focuses on the legal effects of those differences, particularly for lower-tier subcontractors and laborers.

I. What Are PPP Projects and What Makes Them Unique?

Until fairly recently, the vast bulk of construction projects in the United States could generally be categorized as either public works construction or private works construction. With very few exceptions, a given project was either one or the other. With the advent of PPP projects, that line can be significantly blurred.

PPP projects are a hybrid with characteristics of both private and public works construction. One author has defined PPP projects as the "close collaboration of a public entity(s) and a private entity, or team, to structure, negotiate and implement the finance, design, development, construction and operation of building(s)" and other improvements. John Stainback, *Public/Private Finance and Development: Methodology/Deal Structuring/Developer Solicitation* (John Wiley & Sons, Inc. 2000). But the complexity, flexibility, and different customizations of PPP projects defy any one-size-fits-all definition.

Public and governmental entities of all sorts may be stakeholders in a PPP project, including federal, state and local government bodies and agencies, school districts, public universities, and municipal corporations. Those public concerns are joined by private stakeholders, including any combination of business entities, private universities, hospitals, banks, investors, and financiers. In some instances, a new and separate PPP entity is formed by these stakeholders, which may have the qualities of a quasi-public entity or a new private corporation or development entity. The bottom line is that the project is to some extent jointly owned and/or administered by both private and public stakeholders, and both private and public entities share in the risks and rewards of the project.

Whether or not a new and separate PPP entity is formed, PPP projects are carried out utilizing an array of project delivery methods. However, the methods more commonly used are design-build, design-build-operate, design-build-finance, and design-build-finance-operate delivery methods, which are more conducive to the shared risks and rewards attendant with PPP projects. Under a typical design-build-finance-operate project, the government grants a private sector partner the right to develop a to-be-built improvement. Usually, the private partner takes on the responsibility for the financing and construction of the improvement, and then operates the improvement in accordance with pre-determined standards agreed upon with the government. A portion of the private entity's payment is made in the form of user charges (such as a highway toll) or a future stream of government performance payments. Sometimes the resulting improvement remains public property and sometimes the property, or portions thereof become private, and in some instances the private entity is given a long-term leasehold or franchise interest in the PPP project's property.

II. PPP Projects in Oregon

PPP construction projects have commenced in many states and internationally over the past decade. Typical projects are highways and toll roads, light-rail projects, hospitals, airports, and sports arenas. PPP projects have also sprung up in Oregon. Examples include the Portland Airport MAX Light Rail development (which included a finance-develop-build arrangement between Tri-Met, City of Portland, Port of Portland, and private contracting and engineering firm Bechtel), and the OUS/OHSU Collaborative Life Sciences Building (which is currently under construction at Portland's South Waterfront, and will ultimately house portions of OHSU, Oregon State University, and Portland State University under one roof).

Notably, in 2003, the Oregon Legislature passed the Oregon Innovative Partnerships Program ("OIPP"), which specifically authorized the Oregon Department of Transportation ("ODOT") to "[d]evelop partnerships with private entities and units of government" in connection with establishing a program to "[d]evelop an expedited project delivery process" that "[m]aximize[s] innovation" in the "planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing and operation of transportation projects." ORS 367.804(1).

Under the OIPP, ODOT executed an agreement with the Oregon Transportation Improvement Group ("OTIG"), which is comprised of several private companies with various areas of expertise, including financing, design, engineering, construction, and operation/management of transportation facilities, to deliver new transportation infrastructure to the state. Under the auspices of the OIPP, OTIG has analyzed multiple proposed projects and their feasibility for development using the PPP delivery method. Two such projects are the South I-205 Corridor Improvements (which contemplates adding lanes to I-205, widening the George Abernathy Bridge, and operating portions of the highway using tolls) and the Sunrise Corridor project (which would construct toll roadways as a more direct alternative to OR 212/224), the former of which OTIG reported could be a candidate for PPP.

III. Unique Legal Issues for Contractors on Oregon PPP Projects

As PPP projects become more prevalent in Oregon, construction attorneys and their clients should be aware of some important issues that may arise on such projects. This article addresses two that are of primary concern to contractors: construction liens and Little Miller Act bond requirements.

A. <u>Construction Liens on Oregon PPP Projects</u>

On traditional private projects, a primary remedy available to unpaid contractors is a construction lien under ORS Chapter 87. Where the project owner is a private entity and the property on which the improvement is being built is privately held, a lien may be recorded. However, liens are not available on purely public projects in Oregon. The basic policy reasoning behind this rule is that public property "whether constructed by the state or any of its public corporations" is held in trust for the public use and if such property was subject to sale upon execution, "the title thereto might become vested in a private person, thereby depriving the public of its right to the use of such property, and public policy forbids that the public shall be deprived even temporarily of such use." *Bank of Idaho v. Malheur Co.*, 30 Or. 420, 423 (1896)

The question is likely to be more complicated and difficult to ascertain where a PPP project is involved because it may not be readily apparent who owns the property at issue. In some PPP projects, the land may be entirely publicly owned, while in others the private stakeholders may have an ownership interest in the property. It is also conceivable that some parts of the underlying land and improvements on a large-scale PPP project could be owned publicly, while other parts may be owned privately. In such cases, it is conceivable that liens may be available as to portions of the project, but not others. If, for instance, a private entity holds an interest in the completed project in the form of a franchise or license, a lien on that interest may be available to an unpaid subcontractor. Such an example may be possible under ORS 383.017(1), which enables ODOT to "award any contract, franchise, license or agreement related to a tollway project." Because this interest is a private interest, the interest itself could be the subject of a lien. There is no Oregon case law directly on point, but a California court reached exactly such a holding applying California law in a case arising out of a large PPP transportation project.

In *S. Bay Expressway, L.P. v. Otay River Constructors* (*In re S. Bay Expressway, L.P.*), 434 B.R. 589 (Bankr. S.D. Cal. 2010) ("*S. Bay Expressway*"), the PPP development entity was granted a leasehold interest in the publicly owned property in the form of a governmental franchise, which "is a special privilege granted to a private enterprise by a duly-empowered governmental entity to use public property to provide vital public services . . . in exchange for payment of franchise fees." 434 B.R. at 592–98. The bankruptcy court found that the mechanic's liens could attach to the private leasehold and franchise interests, because (while California law prohibits the attachment of a lien to public property) attachment to less than a fee simple interest was permitted:

> It is basic California law that principles of sovereign immunity preclude mechanic's liens asserted against public property. Because of sovereign immunity, any right to assert a mechanic's lien against public property must be expressly provided for by statute. However, the Court already explained that Streets and Highways Code § 143 does not deem this project to be exclusively public property. Debtors possess distinct private property interests against which the mechanic's liens are asserted. The assertion of mechanic's liens solely against a private property interest in public property does not implicate principles of sovereign immunity. . . . Here, the mechanic's liens are asserted against Debtors' private property interests, not the concurrent property interest of Caltrans. It is well established, and legally undisputed, that California law permits mechanic's liens against less than a fee simple estate.

Id. at 601 (citations omitted).

Similarly, in *Industrial Asphalt, Inc. v. Garrett Corp.*, cited in *S. Bay Expressway*, the court allowed a mechanic's lien against the private entity's leasehold interest in public real property at Los Angeles International Airport. 180 Cal. App. 3d 1001, 1004 (1986). A Wisconsin court also upheld a lien against privately owned components of pipe lines and pumping works of a company that supplied water to a city. *National Foundry v. Oconto Water Co.*, 52 F. 43, 48 (Wis. 1892).

Thus, depending on the structure of the PPP project, a lien against purely privately owned portions of the project may be permitted by law. Although Oregon law is undeveloped in this area, it is possible that it could recognize such a lien.

Another possible solution, especially for large PPP projects, might be for the public agency stakeholders to push through statutes or regulations that would exempt a given type of PPP project from the prohibition on liens. Under Oregon law, with a statutory exemption, public property may be subject to a lien in certain circumstances. *Portland Lumbering & Mfg. Co. v. School Dist.*, 13 Or. 283, 286 (1886). Such a statute would need to be clearly drafted and specifically targeted to the class of PPP projects at issue. But such legislation is one option to protect laborers on specific classes of PPP projects.

B. Applicability to PPP Projects of Oregon's Little Miller Act.

In the traditional project delivery model, the inapplicability of the private construction lien remedy on public projects was addressed by adding a requirement that the general contractor post a payment bond. The Miller Act, 40 U.S.C. § 3131 *et seq*., codified that requirement on federal projects and most states, including Oregon, eventually followed suit with what are commonly known as "Little Miller Acts." Oregon's Little Miller Act is codified in ORS 279C.380 and 279C.600 through 279C.625 and requires payment bonds for the protection of persons supplying labor or materials to performance of the work on all "public improvement contracts." ORS 279C.380. Absent project or agency-specific legislation, whether or not such bonds would be required on a given PPP project depends on whether that particular PPP project qualifies as a "public improvement contract."

"Public improvement contract" is defined as "a public contract for a public improvement . . . [but] does not include a public contract for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement." ORS 279A.010(dd). "Public improvement" is "a project for construction, reconstruction or major renovation on real property by or for a contracting agency." ORS 279A.010(cc). Furthermore, "public contract" is defined as "a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement . . . [but] does not include grants." ORS 279A.010(z). "Contracting agency" is "a public body authorized by law to conduct a procurement." ORS 279A.010(b). Based on a purely definitional analysis, it would seem that Oregon's Little Miller Act would require the posting of bonds whenever a PPP project qualified as a "public improvement." Because of the breadth of the definition, it is likely to encompass most projects in which a public body is involved.

However, the above definitional analysis can be altered by statute and the Oregon Little Miller Act (among other public contracting provisions in ORS Chapter 279C) has specifically been excepted from the provisions with which PPP transportation projects let through the OIPP must comply. ORS 367.806 provides that "[t]he provisions of ORS 279.835 to 279.855 and ORS Chapters 279A, 279B and 279C do not apply to concepts or proposals submitted under ORS 367.804, or to agreements entered into under this section, except that if public moneys are used to pay any costs of construction of public works that is part of a project, the provisions of ORS 279C.800 to 279C.870 apply to the public works." ORS 279C.800 through 279C.870 contain Oregon's prevailing wage rate requirements, which would still apply to PPP projects through OIPP where public moneys are involved. A similar exception exists for regulating worker hours under ORS 279C.540. However, PPP projects under OIPP are excepted from all other public contracting provisions of ORS Chapter 279C, including the payment bond requirements of the Oregon Little Miller Act. In these OIPP transportation PPP projects at least, if the property involved is public property and the contract documents do not require payment bonds that would have otherwise been required on public works projects, an unpaid subcontractor could be left without the remedy of a lien or a payment bond claim. This is a potentially very harsh result.

To alleviate some of the possible pitfalls with this exemption, ODOT has promulgated regulations regarding the review and award of these OIPP projects. In particular, the regulations contemplate a review and analysis of the payment provisions and procedures. OAR 731-070-0020. Most relevant is the requirement that the contract must provide "bonding, financial guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the Project." OAR 731-070-0200(3). Thus, the OIPP seems to attempt to reconcile two competing interests—the desire to promote flexibility and innovation by exempting OIPP projects from strict compliance with bonding requirements (and the strict competitive bidding provisions) of ORS Chapter 279C, with the need to ensure payment of project laborers.

The picture is less clear for PPP projects outside of the OIPP landscape. But, as described above, there are likely arguments that can be made by unpaid contractors (depending on the details of the particular PPP project) to either enforce a construction lien (against the private property interests at issue) or to pursue a payment bond claim (assuming the PPP owner required and/or the prime contractor posted an appropriate bond). Even if the Little Miller Act did not apply, the stakeholders could voluntarily incorporate bonding requirements into the contract documents to protect lower tier subcontractors and laborers. Contractors considering becoming involved in PPP projects at all levels would be wise to ensure such protections are in place, especially where traditional lien rights are questionable.

IV. Conclusion

As PPP projects become more commonplace in Oregon and nationwide, the law in the areas discussed in this article (and in other areas) will continue to evolve. However, in the meantime, attorneys representing clients that are considering becoming involved in PPP projects should keep in mind that the world they are entering may present very different risks than the traditional public and private works projects to which they are accustomed. Attorneys should help their clients carefully evaluate what remedies might be available if, for example, they are not paid for their work. The answers may not be readily apparent or straightforward.

ABRAHAM'S BINDING OF THE STATUTE OF LIMITATION FOR NEGLIGENT CONSTRUCTION

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Until recently, many construction defect litigators understood the statute of limitation for a negligence based construction defect action to be 6 years. That understanding was based on a plain reading of the 6 year statute found in ORS 12.080(3), which states:

> "An action for waste or trespass upon or for interference with or injury to any interest of another in real property… shall be commenced within six years."

In addition, proponents of the 6 year statute routinely cited case such as *Sutter v. Bingham Const., Inc*., 81 Or App 16, 20 (1986); *Taylor v. Settecase*, 69 Or App 222, 228 (1984); and, *Beveridge v. King*, 292 Or 771 (1982). However, with last year's decision (or rather footnoting) in *Abraham v. T. Henry Construction*, 350 Or 29 (2011), the time for commencing a negligent construction case is no longer clear.

In *Sutter v. Bingham*, the Court of Appeals addressed whether a claim for damages from a leaky roof was governed by the 6 year statute of limitation found in ORS 12.080(3) or the 2 year statute of limitation found in ORS 12.110(1). In that case, the Court of Appeals held that an action to recover damages from a leaky roof was an action to recover damages for an injury to an "interest of another in real property" and, therefore, that the applicable statute of limitation was the 6 year period found ORS 12.080(3). *Id.* at 20-21. The Court also rejected the argument that the 2 year limitation found in ORS 12.110(1) should somehow apply. Similarly, in the cases of *Taylor v. Settecase*, 69 Or App 222, 228 (1984) and *Beveridge v. King*, 292 Or 771 (1982), the Supreme Court and Court of Appeals held that construction defect claims were actions for damage to the "interest of another in real property" and were, therefore, within the 6 year limitation of ORS 12.080(3).

In the *Abraham* decision, the Supreme Court seems to have moved away from their previous reading of ORS 12.080(3), as well the prior decisions in *Sutter v. Bingham, Taylor v. Settecase, and Beveridge v. King, supra*.

In *Abraham*, plaintiffs hired defendants to build their house. Sometime after the house was completed, plaintiffs discovered extensive water intrusion and water related damage in their home. Plaintiffs then sued the various contractors who built the house, alleging that the water intrusion and water damage was the direct result of defendants' faulty work and failure to comply with the Oregon Building code. In their underlying Complaint, plaintiffs asserted claims against the defendant contractors for negligence, negligence *per se*, and breach of contract.

Defendants moved for summary judgment, arguing that: (1) plaintiffs' contract claims were barred by the 6 year statute of limitation found in ORS 12.080(1); and, (2) plaintiffs' could not sustain a negligence claim because they did not have a "special relationship" with defendants that implicated a standard of care beyond what was implicated in the contract. *Abraham*, 350 Or at 33. The trial court granted defendants motions. *Id.*

On appeal, the Court of Appeals ruled that plaintiffs' contract claim was time barred but that their negligence claims could proceed because the Oregon building code provided a standard of care that was independent of the contract. *Id.* The Oregon Supreme Court was then asked to decide whether a claim for property damage arising from construction defects could lie in tort, in addition to contract, when the homeowner and builder were in contractual privity. *Id.* Ultimately, the

Supreme Court affirmed the Court of Appeals' decision, holding that plaintiffs' could maintain both negligence and breach of contract claims, so long as the alleged property damage was reasonably foreseeable, and that the sought after remedy was not forbidden or foreclosed by the contract itself. *Id.* at 40.

Although the Supreme Court's analysis could have ended there, as its decision in no way hinged on whether ORS 12.080 or 12.110 applied, the Supreme Court nevertheless included the following dicta, via a footnote:

> "Tort Claims arising out of the construction of a house must be brought within 2 years of the date that the cause of action accrues…. Tort claims ordinarily accrue when the plaintiff discovers or should have discovered the injury. "

Abraham, 350 Or at 34 fn. 3, *citing* ORS 12.110 and *Barry v. Brenner,* 245 Or 307, 311-12 (1966).

For ease of reference, ORS 12.110(1), i.e. the applicable portion of the 2 year statute cited by the *Abraham* Court, states:

> "**Action <u>for certain injuries to person</u> not arising on contract; action for overtime or premium pay; action for professional malpractice; effect of fraud or deceit; action for injuries to person arising from nuclear incident**.
>
> (1) An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit…."

ORS 12.110(a) (underlining added).

Meanwhile, ORS 12.080 states:

> "**12.080 Action on certain contracts or liabilities.**
>
> ***
>
> (3) An action for waste or trespass upon or for interference with or injury to any interest of another in real property, excepting those mentioned in ORS 12.050, 12.060, 12.135, 12.137 and 273.241….shall be commenced within six years."

Based on a plain reading of the two statutes, ORS 12.110 seemingly only refers to claims for "injury to the person or rights of another" and does not specifically mention claims for damage to real property or claims for negligent construction. ORS 12.080, on the other hand, does seem to expressly contemplate and, in fact, refers to "action[s] for… injury to any interest of another in real property." Presumably, actions for negligent construction and the resulting property would fall into the latter category.

Nevertheless, with Oregon's highest court having stated that the statute of limitation for negligent construction is 2 years, the fate of ORS 12.080(3)'s application to construction defect actions is unknown. Some Oregon trial courts now strictly adhere to the 2 year limitation detailed in the *Abraham* footnote, while others simply dismiss the footnote as dicta and continue to apply the 6 year statute. Some Courts have even applied a hybrid version of *Abraham* and ORS 12.110, ruling that the statute of limitation for negligent construction is 2 years, but without a discovery rule. Meanwhile, the careful practitioner is left to survey the changing landscape and to try and keep abreast of whatever rulings have come out of their respective county, all while being prepared to defer to ORS 12.110 and the *Abraham* footnote.

Much like the biblical story of Abraham and Isaac[1], the *Abraham* footnote has

[1] According to the biblical story of Abraham and Isaac, commonly referred to as the "Binding of Isaac," God tested Abraham's faith by

placed many Oregon practitioners in an impossible quandary. They must either follow the *Abraham* footnote and apply what has historically been the wrong statute of limitation, or they can ignore the footnote altogether and risk great consequence. Either way, there is always hope that the Supreme Court will divinely intervene and answer the question once and for all.

SHOULD THE CCB'S AUTHORITY BE EXPANDED RE: PAST CRIMINAL CONDUCT?

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Does a felony conviction in the past five years for federal bank fraud or sexual assault on federal lands prevent a person from obtaining a contractor's license (whether in the person's own name or as an officer or member of a company)? How about a state felony conviction of false swearing, perjury, forgery or knowingly negotiating bad checks?

You might be surprised to learn that the Oregon Construction Contractor's Board ("CCB") does not have clear authority to require disclosure of such information as part of the license application process or to use such a conviction itself as a basis for suspending a current licensee.

This article is a call to legislators to expand the CCB's authority to better weed out the very small minority of people seeking to become contractors *before* they harm consumers and construction businesses alike.

The Current Statutory System Unnecessarily Limits the CCB's Authority to Act before Harm Occurs.

According to the Oregon CCB Contractor License Instructions and Application (revised March 2012), a person applying for a contractor's license (or the officer or member of an entity applying for a license) is required to disclose certain criminal indictments or convictions that occurred within five years of the date of application. The criminal convictions that must be disclosed on the application are listed in ORS 701.098(1)(i). See ORS 701.046(1)(j).

ORS 701.098(1)(i) is the source of the CCB's authority to consider the specific criminal convictions that may be the basis to "revoke, suspend or refuse to issue or reissue a license" after notice and opportunity for a hearing. The statutory list of criminal convictions lists certain crimes against a person such as murder, first degree assault or robbery, sexual abuse, and property, such as first degree theft (items worth $1,000) or arson, or theft by extortion. Theft by extortion is a crime that involves theft accompanied with acts that instill fear of physical harm to person or property or commission of additional crimes.

The above-list of crimes, however, draws a line that excludes several similar felony crimes, as well as felonies involving dishonesty. Similarly, the CCB's implementation of ORS 701.046(1)(j) (the authority to require listing criminal convictions as part of the license application process), strongly suggests that applicants need not list *federal* felony convictions on the license application.

As a result, the CCB's authority to act prospectively to deny licenses to the small minority of applicants with felony criminal histories is limited. Instead, the current statutory framework generally only equips the CCB to react after a problem has already occurred.

So, in light of these limitations, here are a few suggestions:

commanding Abraham to offer his son Isaac as a sacrifice. (Genesis 22:5 and 22:8). After Abraham bound Isaac to an altar and was prepared to make the sacrifice, God intervened at the last minute, stopped Abraham, and told him that he had adequately tested Abraham's faith.

Clarify CCB Authority to "Revoke, Suspend or Refuse" Based Upon "Equivalent" Federal Felony Crimes.

ORS 701.098(1)(i) refers to the statutory list of felonies as "crimes of this state" and extends the CCB's authority to consider an "equivalent crime in another state." By referring to crimes of "this state" or "another state," however, the statute does not answer the CCB's authority extends to a federal equivalent crime.

If ORS 701.098(1)(i) is limited only to crimes of "states," then some truly unfortunate consequences may result. For example, felony sexual assault of a person under state law is clearly a basis the CCB may consider for refusing to license an applicant or revoking a current licensee under the current statute, yet felony sexual assault under the equivalent *federal* statute (such an assault committed on federal lands) would *not* be a basis for refusing to license an applicant or revoking a licensee.

As ORS 701.098(1)(i) is implemented by the CCB, the lack of clarity in the statute is carried through to the current CCB license application (revised March 2012). In the section regarding prior criminal convictions, the application form requires listing the "state" and "county" where a conviction occurred. Does the form lead applicants to the conclusion that someone convicted of a federal "equivalent" felony is not required to make any disclosure? A statement on the application that "federal equivalent" convictions must be listed on the application would put any ambiguity to rest.

CCB Should Be Authorized to Request that Applicants Disclose Additional Felony Convictions, Including Lesser Degree Felonies and Felonies Involving Dishonesty.

As noted above, the CCB's authority under ORS 701.046(1)(j) to request information about felony convictions on the license application is limited to the crimes that may serve as the basis of license refusal or revocation under ORS 701.098(1)(i). So if the problem is that ORS 701.098(1)(i) lists too few crimes, why not simply pass legislation that adds more?

A significant reason is that the CCB's authority to discipline or revoke licenses based on criminal convictions is limited by ORS 607.280(3). This statute provides in general that most state agencies may not discipline or deny a license to a person for a crime that is not "substantially related to the fitness and ability of the applicant or licensee to engage in the activity for which the license is required." Whether a crime is "substantially related" to an applicant or licensee's fitness to engage in a certain activity requiring state licensure can be a very fact-specific issue. *See e.g Dearborn v. Real Estate Agency*, 334 Or 493 (2002) (conviction on drug possession charges based on plea agreement, after indicted crimes of promoting prostitution, endangering a child and providing obscene materials to a child were dismissed, did not deny a realtor a license) and *Macks v. Dep't of Educ.*, 241 Or.App. 333(2011) (telephonic harassment of ex-boyfriend did not deny school bus driver certificate).

Notwithstanding these limitations, the question of why not amend ORS 701.098(1)(i) to permit the CCB to require license applicants to listing "all felony convictions" within the prior five years is worth examining. For example, the crime of assault in the first degree provides *in part*:

> **ORS 163.185 Assault in the first degree.** (1) A person commits the crime of assault in the first degree if the person:
>
> (a) Intentionally causes ***serious*** physical injury to another ***by means of a deadly or dangerous weapon***; [or]
>
> (b) Intentionally or knowingly causes serious physical injury to a child under six years of age; (***Emphasis added***).

Given that contractors work in a person's home, clearly most convictions of an assault crime is "substantially related" to the person's fitness to be a contractor. Accordingly, "Assault in the First Degree" is listed in ORS 701.098(1)(i). Yet an applicant is *not* required to disclose the felony crime of "assault in the second degree," which provides *in part*:

> **ORS 163.175 Assault in the second degree.** (1) A person commits the crime of assault in the second degree if the person:
>
> (a) Intentionally or knowingly causes ***serious physical injury*** to another;
>
> (b) Intentionally or knowingly causes ***physical injury to another by means of a deadly or dangerous weapon***; or
>
> (c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

Ultimately, what difference does it matter if a person caused "*serious* physical injury" with a deadly weapon (first degree assault) or *only* "*physical injury*" with a deadly weapon (second degree assault)? Since the crimes listed in ORS 701.098(1)(i) still must pass muster with the ORS 607.280(3) requirement that the crime must be "substantially related" to the fitness and ability of the applicant applying for a contractor's license, why not require disclosure of second degree felonies?

The same question regarding the expansion of crimes listed in ORS 701.098(1)(i) should be asked about felonies based on a person's dishonesty. Any felony based on a person's dishonest conduct proved to the criminal standard of "beyond a reasonable doubt" or entered into as part of a criminal plea – *should be* a basis for denying a license to a contractor.

Contractors handle large sums of consumers' money with significant risk to consumers, particularly because a consumer's home is often the consumer's most valuable asset. A dishonest person may falsify payment applications to construction lenders that results in the project running out of funds before the home or remodel is completed. A dishonest person may mishandle monies owed to other parties with the ability to record a construction lien that may result in the owner paying twice for the same work or materials. A dishonest person may seek to obtain a substantial "down payment" from consumers without the intention of performing any work. Given these risks – which are significantly higher financial risks to a homeowner than are posed by many other licensed professions – it seems the CCB should be entitled to at least *request* this information of an applicant.

Interestingly, the CCB already recognizes that "dishonest or fraudulent conduct" or financial responsibility is substantially related to the contractor's fitness to engage in construction contracting. See OAR 812-005-0280(1). The problem is, without statutory authority to require information as part of the application process, how is the CCB to learn of a new applicant's "dishonest or fraudulent conduct" or financial responsibility? In such a situation, the CCB is left to react to problems caused by dishonest people who are already licensed, rather than preventing those same dishonest people from obtaining a license in the first place.

Expansion of Crimes Disclosed By Applicants Also Enables CCB To Make Better Use Of Other Tools.

The CCB has other tools in the toolbox beyond the power to revoke or refuse to license a contractor. These tools include increasing bond amounts and self-reporting rules. While both tools likely would remain constrained by ORS 607.280(3)'s requirement that a criminal conviction must be substantially related to the person's fitness to be a contractor, disclosure of additional criminal convictions information would seemingly make these tools more effective to prevent harm sooner.

The CCB has broad authority under ORS 701.068(6) to require a bond that is up to five times the amount otherwise required by the applicant or licensee's endorsement should the applicant or licensee have a prior history of claims that exceeds the bond amount ordinarily required by the specific endorsement type (i.e. the $20,000 residential bond or the $20,000 commercial bond).

The CCB does not purport to have authority to consider criminal convictions to initially increase a contractor's bond requirement. Yet once the bond amount is increased, CCB regulations do provide for the *absence* of the crimes currently listed under ORS 701.098(1)(i) as a factor showing financial responsibility to *decrease* a bond amount. Clear statutory authority requiring disclosure of felonies based on dishonesty in the application would seemingly enhance the CCB's ability to exercise its authority to require a higher bond of certain applicants at the outset by providing more information about a licensee's financial responsibility.

An additional tool is the requirement that a current licensee must also self-report the conviction of a crime listed in ORS 701.098(1)(i) to the CCB within thirty (30) days. See OAR 812-003-0440. One might expect that current licensees who are convicted of various felony crimes might not be inclined to report the conviction. Yet if ORS 701.098(1)(i) is expanded, a revocation of a license based on a crime committed during the time the person is a licensed contractor (or an officer or member) would strengthen the CCB's ability to discipline and potentially revoke the licensee. How? The CCB could point to the failure to *report* the crime – not the criminal conviction itself -- as a basis for discipline, including potentially revoking the licensee. See ORS 701.098(1)(b) (authorizing discipline, after notice and a hearing, for violation of a board rule).

Conclusion.

Statutory limitations that authorize the CCB to require disclosure of only certain felonies and the lack of clear authority to request "federal equivalent" convictions unnecessary limits the CCB's ability to weed out bad actors during the application process. As a result, the CCB can generally only be reactive – acting after a problem occurs – rather than proactive in the protection of consumers and maintaining the integrity of the industry.

CASE LAW UPDATE

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Oregon courts have been busy this past year discussing issues that affect construction attorneys. This is our annual digest of relevant cases. It is not exhaustive, and one should always verify holdings from the cases themselves. There are often other holdings that are not summarized here for purposes of brevity and relevance to construction law.

ADMINISTRATIVE PENALTIES:
OR-OSHA evidence showing that an employer exercised due diligence in promoting safety and employee adherence to OR-OSHA rules must be considered in determining an employer's constructive knowledge of a safety violation. *Oregon Occupational Safety & Health v. CC & L Roofing*, 248 Or App 50, 273 P3d 178 (2012).

OR-OSHA cited CC & L Roofing Co., Inc. ("CC&L"), for a "serious" violation of safety standards because an employee and his supervisor were working without fall protection. ORS 654.086. The ALJ held that CC&L had done an adequate job of training and that the supervisor had willfully violated company policy, which had exercised reasonable diligence to ensure that its workers adhered to the company's safety rules. Therefore, the supervisor's willful misconduct could not be imputed to CC&L. The court of appeals affirmed, holding that OR-OSHA must prove as part of its prima facie case that a supervisor acted within his scope of duty. The ALJ properly considered CC&L's evidence of a safety program to conclude that CC&L made reasonable efforts to follow OR-OSHA rules and that a supervisor ignoring the safety program was a rogue employee whose knowledge would not be imputed to CC&L.

ATTORNEY FEES FOR TORTS I:
A defendant asserting counterclaims in a small tort action need not provide a timely prefiling written settlement demand to plaintiff in order to recover attorney fees. *Halperin v. Pitts*, No. SC S059505 (Or Oct. 4, 2012).

Attorney fees may be recovered by prevailing parties in small tort actions for less than $5,500 under ORS 20.080, but plaintiffs filing these actions must first give a written settlement demand to defendants or lose the right to fees. Defendants who allege counterclaims in tort, however, need not make any prefiling demand upon plaintiffs. Thus, in a quiet title and trespass action between two neighbors in which defendant prevailed on his statutory trespass claim, he could recover his attorney fees without having extended a demand before filing the counterclaim. The statute contains no requirement of a demand for defendants, but does for plaintiffs. The court cannot read a requirement into the statute that does not exist in the text itself, thus overruling the court's earlier *obiter dicta* that a prefiling demand was also required from defendants as a prerequisite to recover attorney fees.

ATTORNEY FEES FOR TORTS II:
Amounts alleged in separate and distinct claims for the same economic damages are not aggregated to determine whether damages exceed the statutory cap of ORS 20.080. *Bedford v. Merety Monger Trust*, No. A146562, 2012 WL 3594621 (Or Ct App Aug. 22, 2012). Plaintiff alleged four separate claims for relief based on defendant's shutting off the water delivery system that provided water to plaintiff's property. Each claim sought a different amount of damages, but the two tort claims together totaled more than the $5,500 limit of ORS 20.080 for recovery of attorney fees in small tort claims. The court found that each of the tort claims sought recovery for the same economic loss suffered by plaintiff, not different damages arising from the same operative facts. Earlier decisions had held that the total demand, including all tort causes of action, should be considered to determine whether claimed damages exceed the cap of ORS 20.080, but the court here clarified that when multiple alternative claims seek recovery of the same economic damages, the demands should not be aggregated. Whether plaintiff prevailed on one or all of the alternative theories, it could not obtain a money award for more than the economic loss alleged in either of the claims.

CONSTRUCTION LIENS:
A contractor who accepts a mortgage or trust deed to secure payment for work forfeits the right to claim a construction lien for the same work. *Evergreen Pacific, Inc. v. Cedar Brook Way, LLC*, 251 Or App 194, 284 P3d 509 (2012).

After filing a construction lien, a contractor entered into a settlement agreement with the property owner to pay for the construction work and for some additional future work. The settlement agreement was secured by trust deed, junior in priority to the bank's trust deed. The contractor filed a release stating that it "fully waive[d], release[d] and discharge[d]" the previously filed lien claim. The owner later defaulted on its bank loan and (1) the bank foreclosed its trust deed and (2) the contractor filed and foreclosed on a new construction lien. The construction lien was invalid, however, because a contractor waives its lien if it also takes a mortgage to secure the debt. By taking a mortgage, a contractor creates a lien record on which others have a right to rely. (Please see the case note on this issue by Editor Alan Mitchell elsewhere in this edition.)

CONTRACT FORMATION:
When a party states that negotiations will not result in an enforceable contract until a definitive agreement is signed by both parties, a binding contract cannot be formed by expressions of acceptance short of a signed agreement. *Erection Co. v. W&W Steel, LLC*, No. 11-805-JE, 2011 WL 5008325 (D Or Oct. 20, 2011).

The Erection Company submitted a bid to W&W Steel offering to perform steel erection work. W&W e-mailed TEC a letter of intent ("LOI") that included four provisions notifying TEC that neither party would be contractually bound until both parties had signed a formal and definitive subcontract. After months of back-and-forth negotiation of the subcontract, W&W sent TEC a redlined "final" version, regarding which the parties exchanged clarifying e-mail messages and appeared to agree, resulting in W&W's reply stating: "Ok, When can we expect the executed subcontract to be returned?" But TEC that same day also tendered a submittal to W&W that tried to change delivery terms for its work. No subcontract was signed. Two weeks later, W&W notified TEC that there had been no "meeting of the minds" and that the steel erection work would be subcontracted to another party.

The court agreed that no contract had been formed and denied the subcontractor's motion to compel arbitration. The LOI demonstrated W&W's unequivocal intent to be bound only when a formal subcontract had been signed by both parties. Because nothing in W&W's subsequent conduct manifested an intention to enter into a binding agreement contrary to this condition of the LOI, the "Ok" in W&W's e-mail did not create an enforceable contract. Further, the "Ok" did not unambiguously indicate acceptance of the subcontract terms, given its tender of a submittal that same day proposing different delivery terms than were contained in the agreement.

CONTRACTOR LICENSURE & CLAIMS BAR:

The exception in ORS 701.131(2)(c) that allows an unlicensed contractor to pursue claims against other licensees applies only to construction defect claims and not claims for payment. *Pincetich v. Nolan*, 252 Or App 42, 285 P3d 759 (2012).

Plaintiff-contractor claimed that defendants had failed to pay all amounts due to him for his work constructing defendants' residence. Defendants moved to dismiss under ORS 701.131(1) because the contractor had not been continuously licensed as a general contractor during the project. (His license had lapsed for 14 days because his liability insurance had lapsed.) ORS 701.131(2)(c) allows an unlicensed contractor to maintain an action against a person subject to ORS chapter 701, 671, or 672 if the proceeding arises out of that person's services on the project. The contractor argued that the owners were residential developers subject to ORS chapter 701. But according to the legislative history, ORS 701.131(2)(c) allows an unlicensed contractor to pursue third-party claims in construction defect cases only against parties who caused or contributed to the defect. The contractor's claims were barred.

Of note, however, the court of appeals identified in dicta that the current language of ORS 701.131(1) may allow an unlicensed contractor to assert counterclaims or third-party claims for nonpayment. Whereas past versions of the statute barred claims for compensation, the current version of ORS 701.131(1) bars an unlicensed contractor from commencing an "action" for compensation. Accordingly, nothing in ORS 701.131(1) prevents an unlicensed contractor from filing a "counterclaim or third-party claim, even if that claim seeks compensation for construction work, provided the contractor does not commence a court action for compensation."

INSURANCE:

A policy exclusion for "professional services" does not encompass a construction contractor's acts of managing, coordinating, and overseeing the work of subcontractors unless such acts are clearly stated in the policy or are shown to require "specialized knowledge." *State Farm & Cas. Co. v. Lorrick Pac., LLC*, No. 03:11-CV-834-HZ, 2012 WL 1432603 (D Or Apr. 24, 2012).

State Farm sought a declaratory judgment that it was not obligated to indemnify a contractor from construction defect claims because Lorrick's policy contained a term that excluded coverage for "professional services," including "supervisory" services. It argued that the contractor had managed, supervised, and overseen the work of subcontractors and therefore provided supervisory services on the project. The policy did not explicitly define the term "professional services," but earlier state case law had interpreted it to include services "arising out of a vocation, calling, occupation or employment involving specialized knowledge, labor, or skill, [when] the labor or skill involved is predominantly mental or intellectual rather than physical or manual." In this case, a question of fact remained whether Lorrick had been hired to perform work requiring specialized knowledge. State Farm did not show how the dictionary meaning of "supervise" would include "coordinating" others. Ultimately, the court found that the policy language was ambiguous and construed it against State Farm.

INSURANCE/DISCOVERY OF CLAIM:
When an insured should have discovered loss under the policy is generally a question of fact reserved for the jury. *Ass'n of Unit Owners of Marina Riverhouse v. State Farm Fire & Cas. Co.*, No. 3:11-CV-307-MO, 2011 WL 4544630 (D Or Sept. 29, 2011).

During a reconstruction project, a marina discovered that three covered support pilings had disintegrated and fallen into pieces. State Farm, which insured the marina against "collapse" under its property coverage, denied the claim because the policy required claims to be brought within two years from the loss, under a "discovery rule." State Farm presented evidence that the marina should have discovered the loss or at least made further inquiry more than two years before filing the action. Although there was no real dispute about the evidence, the court concluded that a jury could make various reasonable inferences from the evidence, and thus summary judgment was not appropriate.

JOINT EMPLOYMENT:
When a general contractor wields significant economic control over the employees of a subcontractor, the general contractor may become a joint employer under FLSA and Oregon wage laws. *Lemus v. Timberland Apartments, L.L.C.*, No. 3:10-CV-01071-PK, 2011 WL 7069078 (D Or Dec. 21, 2011).

Plaintiff, Jesus Lemus, sued to recover unpaid wages as a construction worker from its direct employer, JC Builders, Inc., and the project developer, Polygon. On cross-motions for summary judgment, the case turned on whether JC Builders and Polygon were joint employers under the Fair Labor Standards Act ("FLSA") and Oregon wage laws. To determine whether multiple entities are joint employers of a single employee under FLSA, the court applied the Ninth Circuit's "economic reality" test "'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."' *Bonnette v. Cal. Health & Welfare Agency*, 704 F2d 1465, 1470 (9th Cir 1983). Polygon met each of these factors by maintaining a limited right to hire and fire JC Builders' employees, indirectly controlling work schedules by enforcing working-hour policies and scheduling material deliveries, advancing payment to ensure that JC Builders' employees were paid their wages, and requesting lien releases detailing individual hours and wages for all of JC Builders' employees. The court concluded that Polygon had wielded such significant economic control over JC Builders that it was deemed to be a joint employer under FLSA and Oregon wage laws.

LIS PENDENS:
A notice of pendency of an action is an encumbrance on property but must be based on claims that put the title, lien, or interest in the property at stake. An improper notice can be struck and attorney fees awarded. *Vukanovich v. Kine*, 251 Or App 807, 285 P3d 733 (2012).

When a notice of pendency of an action (formerly, "lis pendens") is filed against a litigant's property based on litigation that does not place in jeopardy title to, a lien upon, or an interest in the property, the property owner may move to strike the notice and claim attorney fees under ORS 205.460. Defendant signed a letter of understanding with plaintiff to form a limited liability company that would purchase real estate from Umpqua Bank. Neither party had any interest in the property at that time. Later, defendant withdrew support for purchasing the property with plaintiff and, unbeknownst to plaintiff, created another company that purchased the property from the bank. When plaintiff learned of the purchase, he sued for specific performance of the letter of understanding and to obtain half the interest in or profits from the property and other damages. The same day he filed his complaint, plaintiff also recorded in the real property records a statutory notice of pendency of an action, which stated that the suit was to "compel defendants to convey a 50% interest in the real property to Plaintiff pursuant to [the letter of understanding], for damages resulting from the defendants' breach of [the letter of understanding], or some combination of these remedies."

The court of appeals affirmed a limited judgment striking the notice and awarding fees against plaintiff, finding that a notice of pendency of an action is an encumbrance on real property of the type contemplated in ORS 205.450 to .470, which allows petitions to strike "invalid claims of encumbrance." The complaint did not "involve, affect, or bring into question 'the title to or any interest in or lien upon real property'" and could create no risk to title or interests in the property.

LLC MEMBER LIABILITY:
A member of an Oregon LLC is not protected from employee injury claims by the workers' compensation bar. *Cortez v. Nacco Materials Handling Group*, 248 Or App 435, 274 P3d 202 (2012).

The exclusive-remedy provision of ORS 656.018, which bars actions against employers and their owners for employee injury claims covered by workers' compensation insurance, does not protect members of Oregon limited liability companies. As written, the statute does not include members of LLC entities within the group protected from liability for injuries when statutory workers' compensation remedies are available. Thus, a worker injured by a forklift while employed by an LLC could sue the sole member of the LLC based on the member's alleged negligence in managing the LLC without regard to certain safety matters. While the LLC statute, ORS 63.165, protects the member from personal liability for the liabilities of the LLC, it does not bar claims for the member's own tortious conduct toward others.

PARTNER'S LIABILITY:
To obtain a judgment against a partner in a partnership, the partner must be named and served as a party. A judgment cannot name as a judgment-debtor a partnership defendant and a nonparty partner of the partnership. *Halone's Auto Repair v. B & R Auto Wrecking*, 251 Or App 818, 285 P3d 739 (2012).

In a breach-of-warranty action by a partnership against a wrecking company, defendant prevailed and was awarded its attorney fees against plaintiff partnership. The judgment entered, however, identified both the named plaintiff partnership and one of its individual partners as judgment-debtors. The individual had not been named as a party in the action. The judgment was reversed and remanded for entry of judgment against the partnership only. "[A] successful claim against a partnership may not simply identify an individual partner as the judgment debtor if only the partnership was named as a party. To do so would make one partner individually liable for partnership debts for which *all* the partners are jointly and severally liable * * *."

CASE NOTE: TRUST DEEDS AND LIEN CLAIMS

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A recent opinion by the Oregon Court of Appeals affirms some old case law on an issue that seems to recur on a sporadic basis. In *Evergreen Pacific v. Cedar Brook Way*, 251 Or App 194 (2012), the Court held that the taking of a trust deed acts as a waiver of a construction lien claim. The court relied on *Trullinger v. Kofoed*, 7 Or 228, 232 (1879) to reach its decision.

The case revolved around work performed by NW Kodiak Construction LLC on a project in Washington County. For various reasons, multiple parties (including NW Kodiak) recorded construction lien claims and a number of them filed foreclosure lawsuits, which were consolidated.

NW Kodiak's lien claim was for about $192,000 and it asserted that it had a senior priority over the construction lender. In response, the lender froze further payments on the project. Eventually, the property owner and NW Kodiak entered into a settlement agreement whereby NW Kodiak agreed to repair some of its work, to perform some new work, and to release its lien claim in exchange for the owner's promise to pay the full $192,000, plus about $10,000 for the new work.

The owner paid part of the $192,000 and gave NW Kodiak a trust deed for the balance of that amount. The parties' settlement agreement included a statement that it was not intended to be "a release or waiver of [NW Kodiak's] right to record a lien against the property … for all amounts due in the event of a default of the payment terms of this agreement."

When NW Kodiak performed all of the work and the owner did not pay, NW Kodiak recorded a lien claim for the full balance owing (about $122,000). NW Kodiak eventually filed a foreclosure action.

In response, the bank argued the lien was invalid due to the *Trullinger* case. NW Kodiak contended that *Trullinger* was inapplicable because of the express reservation of lien rights in the settlement agreement. The trial court entered judgment in favor of NW Kodiak.

On appeal, the parties raised the same issues. The Court of Appeals held that *Trullinger* created a "bright-lien rule" and reversed the trial court's decision. The Court set out the following rule: "When a contractor takes a mortgage to secure a construction debt, the contractor forfeits the right to a construction lien." The Court also favorably cited *Spaulding Log. Co. v. Ryckman*, 139 Or 230, 239–242 (1932), which held that a mortgage agreed to but not executed waives a lien claim. The Court apparently accepted that the bank was fully aware of the reservation of NW Kodiak's lien rights in the settlement agreement. Its holding was based upon NW Kodiak's act in accepting a trust deed, not the actual impact upon or prejudice to the bank. Consequently, it is doubtful that including an express reservation of lien rights in the body of the trust deed itself (so that it appears in the public record) would alter the outcome.

The author is aware of at least one other situation where a contractor has recorded a construction lien claim after having recorded a trust deed. In that instance, the lien was ruled unenforceable, but the court never reached the "trust deed versus lien claim" issue. However, it illustrates that the NW Kodiak situation is not unique.

For practitioners, the caution is to remember that old case law can still be valid law and to recognize that, while an issue may not have lengthy discussion in the CLE books, it can still be an important issue.

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