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CONSTRUCTION LABOR CONTRACTORS

Tim Dolan

House Bill 2977 (2013 Or Laws Ch 584) created a new classification of "construction labor contractor" (to be codified in ORS 658.015 to 658.991). The definition of a Construction Labor Contractor is someone who solicits, supplies, recruits, or employs workers to perform labor for construction projects.

The bill becomes effective on July 1, 2015. Currently, the Wage and Hour Division of BOLI is working on administrative rules to be adopted by the end of 2014 so that they will be in place when the bill becomes effective.

Excluded from the definition of "construction labor contractors" are the following:

1. "Staffing agencies" e.g. temporary employment agencies;
2. Someone who has a construction contract with the property owner;
3. An owner who hires persons to work on the owners own property;
4. Labor Unions.

During the rule making process, BOLI will consider fine tuning and clarifying definitions of the above.

Thus, contractors who have a contract for construction activities are not covered. However, if they used a non-temporary employment agency construction labor contractor to supply workers, they had better make sure they are licensed. HB 2977 creates a cause of action against persons using an unlicensed contractor.

BOLI's website will allow you to access a list of licensed construction labor contractors, just as you can access a list of licensed farm labor contractors now. BOLI can also be called at 971-673-0844 to confirm whether a construction labor contractor is properly licensed.

HB 2977 amends ORS 658.465 to make any person who knowingly uses the services of an unlicensed construction labor contractor personally, jointly and severally liable with the person acting as a labor contractor to the same extent and in the same manner as provided in ORS 658.453(4). This provides for actual damages or $1,000, whichever amount is greater, for each violation. A worker also has a right of action against the labor contractor and any person using an unlicensed labor contractor. In addition, BOLI may assess a civil penalty not to exceed $2,000 against any person who uses an unlicensed labor contractor without first examining the labor contractor's license and retaining a copy of it.

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RE-LEVELING THE PLAYING FIELD THE *METCALF CONSTRUCTION* DECISION

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The Federal Circuit's recent decision in *Metcalf Construction Company, Inc. v. U.S.*, 742 F.3d 984 (Fed.Cir. 2014) re-leveled the contracting playing field for construction contractors, including design-build contractors.

In *Metcalf*, the problem came to a head in September of 2012 when the Court of Federal Claims ("CFC") issued the initial decision in the *Metcalf* case. *See Metcalf*, 107 Fed. Cl. 786 (2012). In reaching its decision, the CFC set legal precedence that unduly shifted the burden to contractors such that viable claims for implied duty of good faith and fair dealing appeared a thing of the past. However, Judge Taranto's recent opinion on behalf of the Court of Appeals for the Federal Circuit overturned this sweeping shift in legal precedence, and re-balanced the owner/contractor relationship.

A. Case History

In 2002, the U.S. Navy awarded Metcalf Construction Co. a $49 million contract to design and build 212 housing units at the Marine Corps Base in Hawaii. Almost immediately, the project ballooned beyond original scope and costs due to unexpected site conditions – moderate to high expansive soil conditions and unacceptably high levels of chlordane (a compound used in pesticide) in the soil. In response, Metcalf was forced to re-design the project utilizing more costly construction methods including post-tension concrete slabs and disposal of the soils containing high levels of chlordane.

Despite encountering differing site conditions and the need for associated re-design, the Navy denied Metcalf's request for an equitable adjustment, stating that there were no material differences in pre- and post-bid soil assessments. Ultimately, Metcalf finished the project a few months behind schedule and with a final cost of construction totaling roughly $76 million, $27 million over budget.

Rightfully frustrated, Metcalf filed a claim for damages with the Navy's contracting officer, arguing that "the Navy materially breached … the implied duty of good faith and fair dealing under the contract." Among its allegations, Metcalf asserted reliance upon the Navy's own request for proposals that affirmatively stated that (1) the soil had only a "slight expansion potential" and (2) chlordane "[r]emediation actions are not required since the levels are acceptable." The contracting officer denied the claim, and Metcalf filed suit in the CFC. In turn, the Navy counterclaimed for liquidated damages.

The CFC concluded that Metcalf failed to establish liability under all claims (with two limited exceptions) and awarded the Navy liquidated damages due to missing the agreed completion date. On December 28, 2012, the CFC entered a final judgment in favor of the Navy.

B. Good Faith and Fair Dealing

In overturning the ruling of the CFC, the Court began its analysis by noting that "[e]very contract imposes upon each party a duty of good faith and fair dealing," including contracts with the Government. The duty encompasses both a duty to cooperate with the other contracting party, and a duty not to hinder the other party's performance. "[T]he implied duty exists because it is rarely possible to anticipate in contract language every possible act or omission by a party that undermines a bargain", and "the nature of that bargain is central to keeping the duty focused on honoring the reasonable expectations created." *Metcalf* at 991.

However, a number of recent decisions have improperly merged the implied duty of good faith and fair dealing (specific to contract related claims) with another legal theory - the presumption of good faith on behalf of Government employees (found in sovereign capacity cases). *See Cal. Human Dev. Corp. v. U.S.*, 87 Fed. Cl. 282 (2009); *Keeter Trading Co.*

v. U.S., 85 Fed. Cl. 613 (2009); *N. Star Alaska Housing Corp. v. U.S.*, 76 Fed. Cl. 158 (2007). This tangle of legal theories created a new hybrid of decisions requiring that the Government specifically target the contractor and "reappropriate the benefits [that] the other party expected to obtain from the transaction." *Metcalf*, 742 F.3d at 992. The CFC in *Metalf* was among those that were caught up on this amalgam of legal theories.

The Federal Circuit untangled this morass and corrected the course of good faith and fair dealing claims. First, it re-affirmed that the specified targeting requirement is *not* a general requirement applicable across the board, but rather is only applied to dual authority circumstances found in cases such as *Precision Pine & Timber, Inc. v. U.S.*, 596 F.3d 817 (Fed. Cir. 2010). Second, the Court rejected the Navy's alternate argument that no breach occurred because Metcalf could not identify a specific contract provision that was violated. Judge Taranto noted in his opinion, "the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's right to the benefits of the contract." *Metcalf* at 994, *citing Racine & Laramie, Ltd. v. California Dep't of Parks and Rec.*, 11 Cal.App.4th 1026, 1031-32, 14 Cal.Rptr.2d 335, 339 (1992). Based on this understanding, the Court reversed the case for reconsideration on the differing site condition claims (upon which the Court further opined in its decision).

C. Going Forward

As a result of this significant decision, courts have reaffirmed that the government (including state and local government bodies) is held to the same implied duty of good faith and fair dealing when it contracts with third parties. Therefore, the government cannot merely circumvent its obligations to contractors by pointing out a lack of specific contractual language between the parties. This re-leveling between the parties will play a critical role going forward regarding the viability of claims for additional contract time and costs, including but not limited to claims involving differing site conditions. In turn, contractors will be better able to cost their potential exposure to risk on future public projects.

SUBCONTRACTOR OR JOINT EMPLOYMENT? THE LINE MAY NOT BE CLEAR

Steve Norman

Subcontracting is the backbone of construction. Nearly every construction project involves a prime contractor entering a series of subcontracts with contractors that specialize in a particular trade to perform work for which the prime contractor is responsible. A prime contractor's responsibility upstream is generally undiminished by subcontracting. The prime contractor normally remains fully responsible for its work and the work by each of its subcontractors.

Prime contractors, therefore, have a keen interest in their subcontractors' work performance and may have a tendency to become closely involved with a subcontractor's work.. This may have unintended consequences.

Close involvement may increase a prime contractor's potential for liability to a subcontractor's employees for unpaid wages by being deemed a "joint employer." As a joint employer, the prime contractor would share responsibility for unpaid minimum and overtime wages, and, potentially, penalty wages and attorney fees arising out of the failure to pay such wages.

Joint employment is not determined by easy-to-define concepts such as direct control or payroll responsibility. *Bonnette v. Cal. Health & Welfare Agency*, 704 F2d 1465, 1469 (9th Cir. 1983) (adopting joint employer test under FLSA); *Cejas Commercial Interiors v. Torres-Lizama*.

260 Or App 87 (2013) (adopting joint employer test under ORS 653.010). Rather, joint employment is determined by the "economic realities" test which

> . . covers a broader group of relationships, including some situations where the worker is not directed or controlled by the employer, but, nonetheless, as a matter of economic reality, depends on the employer such that the employer is responsible for ensuring that the worker receives at least minimum wage.

Cejas at 97.

Determining "economic reality" involves a factually intensive inquiry into the entire relationship between the purported joint employers. Decisions by the Oregon Court of Appeals and the 9th Circuit have identified at least thirteen different factors that may be considered. *Cejas* at 106; *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997). These factors address issues such as control and supervision of the employee, facts underlying the payment of wages, type of work performed, location of work, and duration of the working relationship.

Two recent decisions illustrate the application of the factors.

Cejas: This December 2013 Oregon Court of Appeals decision addressed the efforts of two employees of a sub-subcontractor ("Viewpoint") to recover unpaid minimum wages from the subcontractor ("Cejas"). Cejas was awarded the drywall subcontract for construction of a mixed use development in Portland. Cejas then sub-subcontracted with Viewpoint to hang and tape the drywall, while Cejas would do the remaining work "which required more time and expertise." Payments to Viewpoint were on a square footage basis. Cejas paid Viewpoint in full, but Viewpoint left two of its employees unpaid.

The court reviewed the entire relationship between Cejas and Viewpoint to determine that Cejas was not a joint employer of the unpaid workers. The evidence summarized by the court included: unpaid employees were not directly supervised by Cejas; Cejas did not control how the employees were paid; Cejas had no right to hire or fire Viewpoint employees and did not control Viewpoint's work hours; Viewpoint was not a regular subcontractor of Cejas; Cejas paid Viewpoint on a production basis regardless of Viewpoint's labor costs; and Viewpoint was a bona fide enterprise that was licensed and bonded by the Oregon Construction Contractors Board.

Lemus: This 40 page December 2011 decision was made by Oregon District Court Magistrate Judge Paul Papak. *Lemus v. Timberland Apartments, LLC* (USDC 3:10-cv-01071). In *Lemus*, a large volume builder (referred to herein as Polygon) subcontracted with JC Builders to provide framing at its job sites. JC Builders had at least 30 employees and 85% of its Oregon revenue was derived from Polygon projects. JC Builders collapsed shortly after Polygon terminated its relationship with JC Builders for performance issues.

In *Lemus*, a single employee sought unpaid minimum and overtime wages from Polygon as his joint employer. The evidence considered by the court included: Polygon reserved the right to fire JC employees who smoked on the job site or was under the influence of alcohol or drugs; Polygon advanced at least one payment to JC so JC could meet payroll; Polygon reserved the right to pay JC employees directly and to require lien waivers from JC employees; Polygon set schedules and worksite hours; Polygon exercised supervision over JC employees and could require such employees to correct work; Polygon collected JC payroll information; Polygon had the ability to move JC employees from job site to job site; and the unskilled nature of the work. The court weighed these factors to determine that Polygon was a joint employer under the FLSA and Oregon wage laws liable to Lemus for unpaid wages, statutory penalty wages, and attorney fees.

A policy behind the economic realities test is to protect employees from subterfuge outsourcing relationships designed to evade the FLSA or other labor laws. *Zheng v. Liberty Apparel Co. Inc.*, 355 F3d 61, 72 (2d Cir 2003). In *Lemus*, however, Polygon arguably had bona

fide reasons for its level of involvement, such as insuring a safe workplace, performing correct and quality work, and avoiding lien claims by unpaid employees. The court appeared to acknowledge this, stating that his decision "does not imply that all developer/general contractors are joint employers of their subcontractors' employees, nor does it preclude general contractors from exercising the necessary level of supervision of subcontractors to ensure compliance with safety requirements and building specifications." Nonetheless, the court found the circumstances weighed in favor of joint employment.

A thirteen factor inquiry into the entire relationship between a contractor and subcontractor is not amenable to bright line tests, and such claims will have to be evaluated on a case by case basis. While the level of involvement that creates joint employment cannot be quantified, the more dependent a subcontractor's employee is on the prime contractor for payment of wages, the more likely joint employment may be found. Prime contractors should take care to identify and mitigate potential claims as they arise. Otherwise, a much more expensive claim may emerge down the road.

CONSTRUCTION LAW 101 IN NORTH DAKOTA

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Oil and gas production, and the process of "fracking", have created opportunities in North Dakota for everyone in the construction industry. Oregon based contractors, subcontractors, and material and equipment suppliers venturing into North Dakota (and their attorneys) should get educated on key aspects of North Dakota construction law. This article provides basic information on North Dakota contractor licensing requirements, construction liens, and how North Dakota statutes and case law treat some important construction contract provisions and situations.

Contractor Licensure:

Chapter 43-07 of the North Dakota Century Code ("NDCC") regulates contractors. In summary, a "contractor" is defined as any person in the business of constructing, repairing, altering, or demolishing every type of structure, project, development, or improvement coming within the definition of real or personal property. NDCC 43-07-01 1. No person may engage in the business or act in the capacity of a contractor when the price per job exceeds $2,000, nor may they maintain any claim, action, suit or proceeding in any court related to their business or capacity as a contractor without first having a contractor license. NDCC 43-07-02. Contact the North Dakota Secretary of State about construction contractor licensing at www.nd.gov/sos/licensing/. The telephone number is (701) 328-3665.

To obtain a license, a contractor must complete and submit an application specifying the class of license desired, including a copy of a certificate of liability insurance, and a statement from the North Dakota Workforce Safety and Insurance Department that the contractor has secured adequate workforce safety and insurance coverage. NDCC 43-07-04 1. There is no license bond requirement. There are four (4) license classes to choose from. Class A: no limitation on value of any single contract project. Class B: the holder cannot perform any single contract project in excess of $250,000. Class C: the holder cannot perform any single contract project in excess of $120,000. Class D: the holder cannot perform any single contract project in excess of $50,000. NDCC 43-07-05. The statute exempts from the licensing requirement only material suppliers and authorized representatives of Federal, State, and local governments. NDCC 43-07-08.

Each contractor's license expires on March 1st of every year. NDCC 43-07-09. To renew its license, a contractor must obtain a certificate of renewal from the Secretary of State, which is accomplished by filing an application that includes a list of each project, contract, and subcontract completed by the contractor during the preceding calendar year in the state over $25,000 and the

nature of the work of each such project, contract, or subcontract. The contractor must also submit a certificate of liability insurance and a certification that it has submitted all payroll taxes due at the time of renewal. NDCC 43-07-10 1. The renewal application must be submitted to the Secretary of State by March 1st of each year; otherwise, the contractor's license is not in good standing and the contractor is considered unlicensed. NDCC 43-07-10 3. Within sixty (60) days after March 1st, the contractor must be notified by mail that its license is not in good standing, and the contractor then has until June 1st to renew by paying a penalty fee and submitting its application for renewal with the renewal fee. After June 1st, any license not renewed is revoked. NDCC 43-07-10 3.

Notice of Defect on Residential Projects:

Like many states, North Dakota requires contractors and owners involved with residential improvements to take certain action prior to taking formal legal action related to alleged defects in construction. The controlling statute is NDCC 43-07-26. The statute applies to the construction of one and two family dwellings, and improvements exceeding $2,000 to a dwelling. Before making any non-emergency repair or instituting any action for breach of warranty, a purchaser or owner of a dwelling must give written notice by mail to the contractor within six (6) months after knowledge of a defect, advising the contractor of the defect and giving the contractor a reasonable time to comply with the statute. Within a reasonable time after receiving the notice, the contractor must inspect the defect and provide a response to the purchaser or owner and, if appropriate, remedy the defect within a reasonable time thereafter. A contractor must provide the purchaser or owner written notice of the requirements of NDCC 43-07-26 at the time of sale closing or at the time of completion of the improvement. The statute defines "reasonable time" to mean thirty (30) business days after the notice is mailed or any shorter period of time as may be appropriate under the circumstances.

Indemnity Clauses:

Unlike many states, North Dakota does not prohibit the parties to a construction contract from requiring the indemnitor to indemnify the indemnitee against damages caused by the indemnitee's negligence. If the indemnity clause is broadly and clearly worded, it is likely that a prime contractor will be obligated to indemnify and defend a property owner from claims and/or liability arising from the property owner's negligence, and that a subcontractor will be similarly obligated to a prime contractor for claims and/or liability arising from the prime contractor's negligence. In *Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co.*, 825 NW 2d 872, 2012 ND 259 (2012), the North Dakota Supreme Court applied the statute for rules interpreting indemnity contracts (NDCC 22-02-07) to an indemnity clause in a contract between the City of Valley City and an engineer. The clause required the engineer to indemnify the City from liability arising out of the engineer's negligence. A subcontractor sued to recover for additional compensation to remove and replace concrete the engineer had rejected. The indemnity clause only required the engineer to indemnify the City for liability arising out of the engineer's negligence, and it did NOT require the engineer to indemnify the City against claims. At trial, the subcontractor did not establish its claim for additional compensation, and the engineer was not found negligence. Nevertheless, the City incurred substantial attorney fees and costs defending the lawsuit, and it sought recovery of those fees and costs from the engineer under the indemnity clause. In denying the City recovery, the court interpreted NDCC 22-02-07, and concluded that by limiting the indemnity obligation to situations where negligence and liability have been established, the parties intended that the engineer would only be liable for indemnity if it was found negligent.

In *Myers v. ANR Pipeline Co.*, 959 F. 2d 1443 (8th Cir. 1992), the prime contractor was engaged to design and construct a gas metering station, and employed a subcontractor to install the

electrical equipment and wiring. After an explosion killed one person, the prime contractor third partied in the subcontractor claiming indemnification for attorney fees and costs to defend the personal injury suits. The subcontract contained an indemnity clause requiring the subcontractor to indemnify the prime contractor for all loss or damage sustained as a result of the subcontractor's operations and to pay all costs and expenses and attorney fees arising or allegedly arising out of the subcontractor's performance. The subcontract also required the subcontractor to defend the prime contractor from all suits or claims to recover damages on account of any injury caused by any act or omission with respect to the subcontractor's work. The subcontract also required the subcontractor to insure the prime contractor. The *Myers* court noted that under North Dakota law an indemnity agreement will not be interpreted to indemnify a party against the consequences of its own negligence unless that construction is very clearly intended. *Myers*, 959 F.2d at 1445. In holding the subcontractor was obligated to indemnify the prime contractor for the attorney fees and costs the prime contractor incurred to defend the personal injury suits, the court found that the parties clearly intended the subcontractor must indemnify the prime contractor against its own negligence because the indemnity clause broadly and clearly included damages arising out of the prime contractor's negligence, and because the subcontract also included hold harmless and insurance obligations by the subcontractor. *Id.* at 1448.

Based on NDCC 22-02-07, *Specialized Contracting*, and *Myers*, an indemnity clause broadly requiring an indemnitor to indemnify and hold an indemnitee harmless from ALL claims and liabilities arising or related to the work, coupled with an obligation to defend and insure the indemnitee, should be enforceable such that the prime contractor should be obligated to fully indemnify a property owner even for claims arising out of the property owner's negligence, and a subcontractor should be obligated to fully indemnify a prime contractor even for claims arising out of the prime contractor's negligence.

Conditional Payment Clauses:

North Dakota courts have not specifically addressed whether or to what extent "pay when paid" or "pay if paid" clauses are enforceable. However, if clearly worded, these clauses are probably enforceable. In *Gift v. Ehrichs*, 284 N.W. 2d 435, 439-440 (ND Supreme Court 1979), the court held payment was due on a promissory note within a reasonable time where the promise to pay was absolute yet called for annual payment whenever the corporation realized sufficient net profits to lawfully declare and pay a dividend and was lawfully able to purchase its own shares in accordance with the applicable statute. The court reasoned that the provision calling for payment whenever sufficient profits were realized addressed only when and how payments would be made, and did not create a condition precedent to the payment obligations. *Id.*

A clearly worded "pay when paid" clause should permit the prime contractor a reasonable period of time to obtain payment from the owner before being obligated to pay a subcontractor. Likewise, a clearly worded "pay if paid" clause, that makes the prime contractor's payment obligation expressly conditioned upon first receiving payment from the property owner for the subcontractor's work, should be enforceable.

No Damages for Delay Clauses:

These clauses are probably enforceable on private and public projects. *See Markwed Excavating, Inc. v. City of Mandan*, 791 NW 2d 22, 2010 ND 220 (2010). In this case Markwed contracted with the City of Mandan to install a storm sewer improvement. Their contract included a clear, unambiguous no damages for delay clause, which permitted Markwed an extension of time only for any and all delays cause by the City or its design professional, and that Markwed was not entitled to any compensation for such delays. Markwed incurred delays by the City and the engineer failing to timely obtain easements for Markwed to access the land. In holding the no damages for delay clause enforceable, the court concluded that exculpatory clauses are strictly construed against the benefitted party and will not

be enforced if they are ambiguous, but that parties are bound by clear and unambiguous language evidencing intent to extinguish liability. The court also noted NDCC 9-07-19, which requires that any ambiguity in a contract between a public body and a private person always be construed against the private person.

Prompt Pay Act:

North Dakota's Prompt Pay Act applies on public works projects, and is set forth in NDCC 13-01.1. The public body must pay for goods and/or services on the date required in the contract, and if the contract does not specify a payment date, within forty-five (45) days after receipt of the invoice for the goods and/or services. NDCC 13-01.1-01. Interest accrues at the rate of 1.75% per month (21% per annum), unless a different rate is specified in the contract. NDCC 13-01.1-02. This obligation to pay interest does not apply if the failure to pay timely is because of a dispute between the public body and prime contractor, or between the prime contractor and a subcontractor or supplier, over the amount due or compliance with the contract or subcontract. If resolution of the dispute is in favor of the prime contractor, subcontractor, or supplier, interest must accrue and be paid as provided by the statute. NDCC 13-01.1-05. A prime contractor must pay its subcontractors and suppliers within forty-five (45) days after receiving payment from the public body, or pay interest to its subcontractors and suppliers at the rate of 1.75% per month (21% per annum), unless the contract with the subcontractor or supplier provides a different interest rate. NDCC 13-01.1-06.

Construction Liens:

North Dakota has separate statutes for construction lien rights for (a) oil or gas wells or pipelines, and (b) all other improvements. This article provides information only on lien rights for improvements that are NOT oil or gas wells or pipelines.

A person has lien rights who, at the request of the property owner, agent or trustee of the property owner, the prime contractor, or any subcontractor of any tier, furnishes labor, materials, rental equipment, architectural services, construction staking, engineering, land surveying, mapping, or soil testing, to build, alter, remove, repair, or demolish any improvement upon or beneath the surface of any land, or in grading, seeding, sodding, or planting for landscaping purposes, or in equipping any improvement with fixtures or permanent apparatus. NDCC 35-27-01 7. and 35-27-02. As defined by statute, "subcontractor" may include a supplier, so a supplier to a supplier may have lien rights.

North Dakota is a "derivative" lien state, which means any lien is only for the difference between the price paid by the property owner to the prime contractor and the price or value of the contribution to improve the land, and no lien is allowed if the property owner has paid the full price or value of the total contribution to improve the land. *See* NDCC 35-27-02; and *Kirkland v. Oberquell*, 405 NW 2d 21 (ND Supreme Court 1987).

At least ten (10) days before recording a lien, all lien claimants must send to the property owner a written notice by certified mail stating that a lien will be claimed. NDCC 35-27-02. A lien must be recorded within 90 days after all the lien claimant's contribution is done. NDCC 35-27 13. Trifling or small amounts of work may count, but it is suggested the 90 day period to record be run from a full day of work that is not warranty or repair work. The lien must describe the property, state the amount due, provide dates of first and last contribution, and the name of the person/entity with whom the lien claimant contracted. NDCC 35-27-13. The lien must be notarized, and it is recommended that the lien also be verified. A lien claim can be recorded after the 90 day period, but it is void as to (a) good faith purchasers or encumbrancers whose rights accrued before the lien is recorded, and (b) the property owner to the extent of the amount paid to the prime contractor before the lien is recorded. NDCC 35-27-14.

The lien claimant must give the property owner written notice of the intent to enforce the lien by foreclosing it. If written notice is given by

personal service, the lien claimant must give the notice at least ten (10) days before foreclosing its lien. If the written notice is given by registered mail, the lien claimant must give the notice at least twenty (20) days before foreclosing the lien. NDCC 35-27-24. A lawsuit to foreclose the lien must be commenced no later than three (3) years after the lien is recorded. NDCC 35-27-25. If the lien claimant receives written demand to commence suit on the lien within thirty (30) days from the property owner, agent of the property owner, or the prime contractor, the lien becomes invalid unless the lien claimant commences suit within thirty (30) days. NDCC 35-27-25. A property owner who successfully contests the validity or accuracy of a lien in court is entitled by statute (NDCC 35-27-24.1) to recover its reasonable attorney fees, but a successful lien claimant is NOT entitled to recover its reasonable attorney fees. As such, to recover their attorney fees, any lien claimant should include an attorney fee clause in its contract and contract only with solvent persons or entities.

Bonding Off Liens:

North Dakota permits a property owner to remove a construction lien recorded against its property by following the procedure set forth in NDCC Chapter 35-21. The owner of the property, or of a substantial interest in the property, must file with the District Court for the County in which the lien has been filed an application for the release of the lien, and an affidavit describing the owner's interest in the property and stating that the owner has a defense against the collection of the lien, or a part of it, that a disagreement exists between the parties as to the amount or validity of the lien, and that the owner desires to discharge the lien from the records. NDCC 35-21-02. The property owner must also file an undertaking (bond) in an amount not less than the lien, with two sureties, to the effect that the property owner will pay any amount that may be recovered by the lien claimant, plus all costs. NDCC 35-21-02.

A copy of the application for release of lien, the affidavit, and the undertaking (bond), together with a notice of when exception to the sureties must be made, must be served on the lien claimant, its agent, or its attorney personally or by registered mail. NDCC 35-21-03. If the court clerk receives an exception to the sufficiency of the sureties within seven (7) days of the date of service, the clerk shall schedule a hearing at which the sureties may be justified. NDCC 35-21-04. The clerk provides notice of the hearing to the lien claimant and the applicant for discharge of the lien. If the clerk does not timely receive an exception to the sufficiently of the sureties, the clerk issues an order stating the lien is discharged by undertaking and directing the recorder to file the order of discharge to terminate the lien and to remove the lien from any computerized index system on which it appears. NDCC 35-21-04. If the sureties justify at a hearing, and if the undertaking is approved, the judge enters an order that the lien is discharged by the undertaking and directs the recorder to file the order of discharge and terminate the lien on any computerized index system. After the order, the lien is of no effect. Query: If the lien has no effect, what legal theory does the lien claimant assert (lien foreclosure, breach of contract, etc.) against the property owner and sureties to collect on its claim for payment?

The statute does not permit a lender, prime contractor, subcontractor, or any other interested party, to apply to bond off. Query: How can a prime contractor or subcontractor having a contractual obligation to bond off a lien, do so? For an unknown reason, the statute also requires two sureties on the bond.

Conclusion:

Construction law in North Dakota is unique. Oregon attorneys having clients providing, or considering providing, labor, materials, equipment, or professional services on projects in North Dakota would be prudent to have their clients speak with competent North Dakota counsel to reduce risk and increase the prompt and cost effective resolution of disputes when they arise.

TAKING THE HIGH ROAD

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Occasionally one of the "old farts" has to remind all of us that in our pursuits of fame and riches we need to be mindful of a "higher calling." I am reluctantly picking up that mantle, not because I am conceding my advanced stage or suggesting I have achieved some well-earned wisdom, but because I have seen an alarming trend of gamesmanship and wastefulness that I just am having a tough time swallowing---so I am not. Let me start with a couple examples, and then suggest an alternative (or two).

An owner and an architect are negotiating a contract for a large, commercial project, and they understandably are initially deferring to the AIA family of documents to memorialize the deal. Remember, the AIA represents the "industry standard" for these special commercial transactions, and one of the goals of using this form is to reduce haggling over terms and create certainly on interpretation and outcomes.

During the negotiations, a slew of changes to the standard terms and conditions are under scrutiny by the owner's counsel. One of the terms and conditions relates to the standard of care. The AIA form incorporates the national industry standard of care, the very one we all learned in law school for architects and engineers (i.e., "exercise the degree of care for similarly situated architects in the same or similar locality"). The owner's attorney demands that the contract require the architect to exercise "the highest standard of care and employ the best products available" or something to this effect.

Now we all can appreciate that an owner may want something more than "reasonable" or "average" for its new commercial building, and there are ways to incorporate this degree of excellence into the design without much fanfare. The client has every right to require excellent service.

But going down the path of changing the standard of care has commercial implications that simply are daunting to cure. What IS the highest standard? What does that even mean? Is this an objective "reasonable person" standard or a subjective standard?

More importantly, changing the standard of care in the contract basically renders the architect incapable of securing insurance because the architect's E&O carriers have no way to understand the difference between "reasonable" and "highest" standard of care, because there is virtually no case law that addresses this new negligence standard. How does the carrier adjust for the heightened risk? What happens if the architect proceeds with the owner's requested revision, there is a loss, and the carrier denies liability because the architect assuming a standard of care higher than that covered in the policy?

The negotiation gets protracted. Carriers are consulted and involved. The resulting negotiation turns into a heated and protracted battle that, in the end, results in an expensive attorney fee for the completed contract, and worse yet, undermines the business relationship at its earliest stages.

The second example relates to a litigated matter. An owner and a general contractor are in a payment dispute over a modest payment request. The contractor files a claim of construction lien to secure payment (and invoke attorney fees).

The owner and its counsel refuse to engage in any expedited resolution process and instead require that the matter proceed with full blown discovery, complete depositions, and two weeks of trial---a process, which if carried out, will ensure that the attorney fees will dwarf the amount in dispute, and turn the matter into a battle over attorney fees. The owner's counsel concedes that the facts are legitimately disputed on the payment claim, and there is risk to the owner that it will owe the money (and the significant attorney fee) if the owner is not successful in its defense.

The owner thereafter follows through on its assertive defense, and both parties expend more than the amount at issue. The outcome is complicated by an extended attorney fee fight that candidly is challenging for the trial court to comprehend and digest. Admonishments to counsel for their lack of a resolution-oriented approach are shared. The attorney fee award is discounted to such an extent that from a cost-benefit point of view, the prevailing party certainly did not benefit.

Yes, certainly, clients are entitled to a zealous representation. And, on occasion, matters have to be fully and completely litigated and/or negotiated. But these instances are becoming far too common.

Whether it is a lack of will, or a lack of insight, or simply a desire to "please" a client (and secure a fee), taking a client down a path where the only persons to benefit will be the lawyers is short sighted and ultimately damaging to all of us in our industry. And in more and more circumstances, the clients are turning on their lawyers and blaming them for the very circumstance that was forecasted and advised (hopefully in writing). We are losing client trust and confidence, writing off time and working for free, and undermining the integrity of the good work we do.

My proposed answer: Do more than just give the pros and cons, with the proverbial "cover my backside" letter. Take the high road; be courageous, and tell a client you don't want to be part of a train wreck. They likely will respect you more for your resolve and for your insight, and likely will turn back to you when they need "candid" advice, the very type of engagement we all strive to secure.

And if taking the high road is not possible, for all the reasons we are familiar, don't be afraid to reach out for help. Call someone you know and trust, and get their perspective. There are very good practitioners and mediators in our industry who are willing to sit down for coffee, even occasionally with the client. Find them, and don't be afraid to make the call.

You can remind the client that your effectiveness is measured in large part upon your reputation, and securing a reputation as a resourceful, but reasonable and insightful practitioner will not be all that bad in the long run. Be resolution-oriented. A recently retired practitioner in our circles did quite well over his legal career doing just that. We need more like him.

THE IMPORTANCE OF DETERMINING "COMMENCEMENT OF THE IMPROVEMENT"

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Determination of whether a construction lien claim has priority over a trust deed or mortgage often decides when, or if, the lien claim will be paid. The term "commencement of improvement", defined in ORS 87.005(1), plays a key role in deciding priority.

Under ORS 87.025(1), liens created under ORS 87.010(2) and (6) have priority over liens, mortgages or other encumbrances on the land that were not recorded at the time of the commencement of the improvement. ORS 87.010(2) creates the lien for labor and equipment used in preparing a lot or adjoining street, and ORS 87.010(6) creates the lien for an architect, land surveyor or other person who prepares plans, drawings, surveys or specifications that are used for landscaping or for preparation of a lot or parcel of land.

ORS 87.025(2) covers the priority of the remainder of the ORS 87.010 liens--those liens created under ORS 87.010(1), (4) and (5) and "perfected under ORS 87.035". In turn, ORS 87.025(7) provides in pertinent part that "[t]he perfection of a lien under ORS 87.035 relates to the date of "commencement of the improvement" as defined in ORS 87.005."

The text of ORS 87.005(1) is as follows: "Commencement of the improvement means the first actual preparation or construction upon the site *or* the first delivery to the site of materials of such substantial character as to notify interested persons that preparation or construction upon the site has begun or is about to begin." (*emphasis added*).

This definition was added to the Construction Lien Law in 1975 (ch. 466 § 2) as part of House Bill 2336 (1975). *Testimony Presented to the Senate Judiciary Committee Concerning House Bill 2336 before the S. Jud. Comm., 1975 Leg., OR (Donald R. Husband, Chairman, Advisory Committee on Lien Law Revision, May 8, 1975).*

Three terms in ORS 87.005(1), "construction", "improvement", and "preparation", are defined in ORS 87.005.

"Construction" is defined in ORS 87.005(2) to mean "creating or making an improvement or performing an alteration, partial construction, or repair in and upon an improvement."

"Improvement" is defined in ORS 87.005(5) to mean "a building, wharf, bridge, ditch, flume, reservoir, well, tunnel, fence, street, sidewalk, machinery, aqueduct or other structure or substructure."

"Preparation" is defined in ORS 87.005(9) to mean "excavating, surveying, landscaping, demolishing or detaching existing structures or leveling, filling in or otherwise making land ready for construction".

At first glance the ORS 87.005(1) definition of "completion of the improvement" may appear ambiguous because of the proviso at the end. That proviso – "of such substantial character as to notify interested persons that preparation or construction upon the site has begun or is about to begin" – either modifies the preceding phrase "the first delivery to the site of materials" and/or the next preceding phrase "the first actual preparation or construction upon the site."

The legislative history does not shed any light on this issue. There is no discussion in the legislative history of the subject proviso or the intended meaning of the definition of "commencement of the improvement." The legislative history simply states, in relation to the overall changes in the lien law in House Bill 2336, that as far as priorities were concerned, "[t]here was no substantive change with existing law and the only purpose was to codify." *Minutes, House Judiciary Committee, April 7, 1975 at p. 2.*

However, there is an important canon of statutory construction that supports a conclusion that the proviso at the end of ORS 87.005(1) modifies only the phrase "the first delivery to the site of materials". That canon of statutory construction, known as the "doctrine of the last antecedent", was explained in *Service Employees Int'l Union Local 503 v. DAS*, 183 Or App 594, 602-03, 54 P 3d 1043 (2002), and applied to a state risk management statute at issue in that case. The Court stated that the "doctrine of the last antecedent" is as follows:

> "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. . . .
>
> Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."

Service Employees, 183 Or App at 603 (*citing State v. Webb*, 324 Or 380, 386, 927 P 2d 79 (1996) (*quoting* Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.33, 270 (5th ed 1992)).

The *Service Employees* court noted that the proviso at issue in that case was not separated by a comma from the last antecedent phrase, and that there was not any other textual indicator that the

proviso modified anything other than the last antecedent phrase. *Service Employees*, 183 Or App at 603.

Similarly, the proviso at the end of ORS 87.005(1) is not separated by a comma from the last antecedent phrase. Further, there is no other textual indicator that the proviso modifies anything other than the phrase "the first delivery to the site of materials".

Applying the "doctrine of the last antecedent" to ORS 87.005(1), the first actual preparation or construction upon the site does not need to be of "substantial character" in order to constitute "commencement of the improvement."

The case of *SERA Architects v. Klahowya Construction*, 253 Or App 348, 362, 290 P 2d 881 (2012) *rev den* 353 Or 533 (2013) confuses the issue because of the specific facts of that case and the manner in which the court quoted portions of ORS 87.005(1). That case related to a lien under ORS 87.010(5) and the relation-back of the priority of the lien to when a general contractor started work on the project. The court stated that "commencement of the improvement" is defined in ORS 87.005 (1) as the 'first actual preparation or construction upon the site . . . of such substantial character as to notify interested persons that preparation or construction upon the site has begun or about to begin.'" *SERA Architects*, 253 Or App at 358. (*text omitted in original*). The court omitted from its citation to ORS 87.005(1) the phrase "or the first delivery to the site of materials", thereby making it appear that the court was observing that the first actual preparation or construction had to be of "substantial character."

However, there was no delivery of materials at issue in the *SERA Architects* case, and therefore no need for the court to include the phrase "or the first delivery to the site of materials" in its citation to ORS 87.005(1).

Rather, the work at issue in that case involved a general contractor demolishing existing cabins on the proposed development and the clearing of trees.

Further, the date of commencement of improvement of the project was undisputed and therefore there was no need for the court to even discuss the extent of the general contractor's work. *SERA Architects*, 253 Or App at 360.

In conclusion, regardless of whether a client's involvement in a project involves preparation or construction, or the delivery of materials, it remains important for the client not only to clearly document the timing of the client's own preparation or construction or delivery, but also to be able to document the time of the first actual preparation or construction upon the site, and the first substantial delivery of materials to the site.

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