# Construction Law Newsletter

Published by the Section on Construction Law of the Oregon State Bar

ISSUE No. 49 November, 2014


## RECENT CHANGES IN THE FALSE CLAIMS ACT


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The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, was enacted during the Civil War to protect the Union Army. Congress was concerned that suppliers of goods to the Union Army were defrauding the Army, so the FCA imposed penalties on any person who knowingly submitted a false claim to the government. Relatively recent changes to the FCA, when combined with the federal government's more aggressive pursuit of allegedly false claims (especially in connection with certifications concerning small and disadvantaged businesses), have increased public works contractors' exposure to FCA liability.

The FCA was most recently amended in 2009 by the Fraud Enforcement and Recovery Act of 2009. The 2009 amendments expanded the scope of liability by, among other things, lowering the bar to assert a claim.[1] And, since that time, prosecutions by the federal government for FCA violations have steadily increased, including with respect to projects requiring participation by subcontractors qualifying for certifications by the Small Business Administration ("SBA") and the Disadvantaged Business Enterprise Program ("DBE").

Imagine the following common scenario: client is a prime contractor that routinely works on large-scale federally funded highway projects. These projects contain a DBE goal of a certain percentage of the total contract sum. Client's project manager has arranged for several DBE subcontractors to work on the project. During performance of the contract, one of the DBE subcontractors is de-certified as a DBE business. Client's accounting department continues to submit de-certified subcontractor's work on its DBE compliance forms. Now, due to this relatively minor oversight, client faces allegations of alleged violations of the FCA.

This article addresses the FCA in the context of false certifications related to the DBE program. First, the article provides an overview regarding the elements of an FCA claim and focuses on recent developments bearing on the knowledge requirement, in particular. Second, the article examines damages under the FCA and explains how the government often uses more recent statutory changes to aggressively seek large damages even without sustaining any actual damage. Finally, the article suggests some ways in which public works contractors and their attorneys may seek to reduce the possibility of FCA liability in this context.

**There is a relatively low bar for the government.**

The FCA prohibits certain acts of fraud upon the government. Among other prohibited acts, no person may "knowingly present[] . . . a

[1] For example, the 2009 amendments removed from 31 U.S.C. § 3729(a)(1)(A) the requirement that the false claim had to be presented to the United States Government. Similarly, the 2009 amendments removed from 31 U.S.C. § 3729(a)(1)(B) the requirement that the defendant was actually paid for the false claim.

false or fraudulent claim for payment or approval." § 3729(a)(1)(A).

To state a claim under the FCA, the government (or a *qui tam* plaintiff) must prove four elements: (1) that the defendant made a false statement or engaged in a fraudulent course of conduct; (2) such statement or conduct was made or carried out with the requisite scienter; (3) the statement or conduct was material; and (4) the statement or conduct caused the government to pay out money. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003).

The second element of the FCA claim is that a defendant acted with the requisite scienter, which is statutorily defined as "knowledge." Knowledge, in turn, has three separate definitions. The knowledge requirement is satisfied if the defendant "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." § 3729(b)(1).

Legislative history of the knowledge requirement demonstrates that the FCA targets those companies who bury their head in the sand and refuse to learn information that an individual exercising reasonable judgment would have reason to know. *See Laymon v. Bombardier Transportation (Holdings) USA, Inc.*, 2009 U.S. Dist. LEXIS 24403, *40, 2009 WL 793627 (W.D. Pa. March 23, 2009). The FCA will hold a defendant liable if the defendant "turned a blind eye to the false claim." *Id*. The knowledge requirement, then, has been interpreted "to be a linear extension of 'gross negligence.'" *Id*.

When interpreting this knowledge requirement, some courts have set a relatively low bar to prove the requisite scienter. Some courts have held that if even one employee knows or should have known that a contractor is submitting a false claim to the government, then the contractor has knowledge of the false claim. *See Harrison v. Westinghouse*, 352 F.3d at 919. Such liberal interpretations can greatly reduce the government's burden and increase the contractor's risk of FCA liability.

**The government may not have to prove any actual damages.**

Though the fourth element of the FCA claim is damages, some courts have held that, in fact, damages are not always a "necessary" element for a successful claim. *See Laymon v. Bombardier*, 2009 U.S. Dist. LEXIS 24403 at *45, *citing Rex Trailer Co. v. United States*, 350 U.S. 148, 152-3 (1956). Recovery under the FCA "is not dependent upon the government's sustaining monetary damages." *Id*. "Therefore, there may be FCA liability even where the government suffered no injury." *Id*. If the government does not suffer actual harm, then "statutory damages may still be appropriate." *Id*. at *47.

The measure of actual damages is "compensation for a loss or injury sustained." *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994). In *Ab-Tech Construction*, the government made 21 progress payments totaling $1.4 million. *Id*. On that basis, the government sought treble damages in the amount of $4.2 million. *Id*. But the court did not "go along with this demand." *Id*. Since the government got "essentially what it paid for," the court was unable to discern any basis upon which to uphold the government's demand for treble damages. *Id*.

In the Small Business Jobs Act of 2010, Congress created a presumed loss rule that creates a presumption of actual damages in an amount equal to the value of the contract in certain circumstances where a business's size status is willfully misrepresented:

> In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative

> research and development agreement, or grant whenever it is established that a business concern other than a small business concern ***willfully*** sought and received the award by misrepresentation.

15 U.S.C. § 632(w) (emphasis added). Although this presumption is rebuttable, the presumption of damages could increase the risk for contractors involved in contracts with mandatory small business set-asides if someone on the project deliberately misrepresents its size.

**Statutory damages are automatic upon a finding of liability.**

The measure of statutory damages is independent of the measure for actual damages. In *Ab-Tech Construction*, despite finding no grounds for actual damages, the court did award full penalties for statutory damages. *Id*. The statutory damages are penalties that are authorized by the FCA to address a broad range of ancillary harms that the government may have suffered because of the deception. *Id*. Statutory penalties are assessed at a minimum of $5,000 and a maximum of $10,000 (adjusted for inflation). 31 U.S.C. § 3729(a).

Each false claim submitted to the government carries a statutory penalty. The court explained in *Ab-Tech Construction*, "each separate submission seeking payment from the Government is a claim for purposes of the False Claims Act, even when such submissions are made pursuant to one overall contract." *Ab-Tech Construction*, 31 Fed. Cl. at 435. In *Ab-Tech Construction*, the defendant was liable for 21 times the statutory penalty because it submitted 21 false claims. Thus, despite the government suffering no actual damages, the *Ab-Tech Construction* court found that it was nevertheless entitled to an award of $220,000. *Id*. The court went on to explain that "even if the total amount demanded should exceed the Government's actual out-of-pocket costs, the figure would nevertheless be justified given that the Government is also due compensation for the very real, though largely unquantifiable, injury to the [Small Business Administration] program." *Id*.

**Reducing the risk of prosecution under the FCA.**

Public contractors that routinely deal with DBE program requirements are advised to create a position that specializes in DBE compliance. This DBE compliance officer should be aware of the DBE program requirements, monitor DBE compliance on federally-funded contracts, establish a relationship with the state or federal compliance offices for the client's projects, and handle all paperwork and reports that relate to the DBE program.

First, the DBE compliance officer should be aware of the DBE program requirements. The compliance officer should be familiar with the state and federal licensing programs and should be familiar with navigating the DBE certification databases. The compliance officer should also be familiar with the requirement that the DBE contractor perform a "commercially useful function" on the project. See 46 C.F.R. §§ 26.55(c)-(d).

Second, the DBE compliance officer should monitor ongoing projects to ensure DBE program compliance. Prior to submitting any DBE program form, the compliance officer should double-check the state and federal databases to ensure that the DBE subcontractor has not been de-certified. The compliance officer should also monitor the DBE subcontractor's work to ensure that the subcontractor is performing a commercially useful function. Often, it will be impractical for the DBE compliance officer to be on-site at any project. Instead, the compliance officer should interview key project personnel (such as project managers and supervisors) regarding DBE compliance. Importantly, the compliance officer should document those conversations to create a record of DBE compliance.

Third, the DBE compliance officer should establish a good working relationship with the state or federal compliance offices for the client's projects. Although not a formal requirement, many advantages can be gained from maintaining a good relationship with the compliance office.

Finally, all DBE compliance paperwork should be handled by the compliance officer. Often, forms are filled out incorrectly because of communication breakdowns within large organizations. If all communications regarding DBE subcontractors are directed to the attention of the compliance officer, there is significantly less risk that information will slip through the cracks.

Perhaps best of all, establishing a DBE compliance officer may, in itself, go some way toward decreasing potential liability for FCA violations by demonstrating the client's good faith efforts to comply with the program requirements. *See* 49 C.F.R. § 26.87(j) (forgiving prime contractors who fail to meet the DBE contract goal, but who make a good faith effort to do so).

**Conclusion**

Public contractors are increasingly at risk for FCA liability due to recent changes to the statutes enacted by Congress. Combined with a directive from the top levels of the federal executive branch to prosecute fraud in the DBE program, large public contractors should be on high alert that they could face liability under the FCA. As explained above, the damages and penalties for FCA violations can be quite severe. Public contractors should give serious consideration to the establishment of a DBE compliance officer in order to minimize the large potential for liability that can be created by minor errors in paperwork.

## OREGON CONSTRUCTION CASE LAW UPDATE 2014

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**NEGLIGENCE/CONSTRUCTION LIABILITY LAW: ORS 701.140 does not create liability for a contractor based on improper work that the contractor was not hired to perform. A negligence claim under ORS 701.140 is not distinct from a common-law negligence. To recover economic damages, plaintiff must demonstrate a special relationship between the parties.**

***Hettle v. Construction Contractors Board*, 260 Or App 135, 316 P3d 344 (2013).** As part of the sale of a home, seller agreed to have a licensed contractor that was cleaning the roof "identify and correct [the] source of [a] water intrusion" identified in a previous inspection report, and "repair/replace and paint all water damaged areas." The contractor found that there was "absolutely no mold, dry rot[,] or other damage" and recommended replacing only the bottom sill of both windows. Purchaser later discovered water leaks in one of the windows and filed a claim with the Construction Contractors Board (the "CCB"), alleging that respondent had performed negligent and improper work in examining windows.

The CCB found the contractor free from liability because it had been hired for roof-cleaning services, and examined the windows only incidentally to the original roofing services. "The evidence in the record does not support a conclusion that [r]espondent * * * improperly performed the work that *he contracted to perform*."

The court of appeals upheld the CCB, finding that there was no "special relationship" between purchaser and contractor because contractor interacted only with seller. The court refused to extend *Meininger v. Henris Roofing &*

*Supply*, 137 Or App 451, 905 P2d 861 (1995) to all cases in which a contractor performs an inspection and creates an inspection report. Here, the court found sufficient evidence to show that respondent was not aware that his opinions would be relied on by complainant.

**NEGLIGENCE/SPECIAL RELATIONSHIP: No special relationship exists if defendant (a) had no independent decision-making abilities and (b) was required to receive outside approval before performing.**

***N. Clackamas Cnty. Water Comm'n v. Siemens Water Techs. Corp.*, No. 3:13-cv-01441-ST, 2014 WL 197811 (D Or Jan 14, 2014).** Plaintiff contracted with defendant to provide a low-pressure membrane filtration system (membranes that screen impurities) for a water treatment plant. The membrane modules began breaking at an above-average rate, and the problem continued even after defendant replaced the broken membranes with "improved technology." Plaintiff asserted a negligence claim based on the design and installation of a defective water filtration system in the plant.

The court noted that a negligence claim premised on economic loss requires a showing of a "special relationship" which is established when "one party delegates to the other the authority to make important decisions with the understanding that the authority is to be exercised on behalf of and for the benefit of the authorizer." In this case, the court found that there was no special relationship between the plaintiff and defendant because (a) defendant did not make any independent decisions and (b) defendant was required to receive approval from a designated engineer before making any changes to the filtration systems.

The court ultimately permitted the negligence claim because the alleged property damage was not purely an economic loss, and therefore no special relationship was required.

**NEGLIGENCE/BUSINESS FORMATION: Members of a limited liability company can be individually liable for their own negligent conduct in managing the LLC. A sole member of an LLC can be liable under the Employers Liability Law even if day-to-day responsibility is delegated to a manager. Members of an LLC are not protected by the workers compensation statute's "exclusive remedy" provision against employer claims arising prior to June 24, 2013.**

***Cortez v. Nacco Material Handling Group, Inc.* 356 Or 254 (2014).** Employee brought claims against the sole member of his employer, a limited liability company, for injuries sustained at work. The LLC was member-managed but the member delegated safety responsibility to other employees of the LLC. The trial court granted summary judgment to the defendant, the sole member of the LLC, finding that both the employer and the member-managed LLC were immune from claims by employees under the workers compensation "exclusive remedy" provision. The court of appeals reversed, noting that members of the LLC are not immunized under the workers compensation statute. The Supreme Court affirmed.

ORS 63.165 does not bar claims that result from the member's own negligence, and there is sufficient evidence for a jury to find that the member negligently delegated safety responsibility. The employee also could maintain a claim under the Employer Liability Law, even though it did not directly control the "risk producing" activity, because it retained the right to control that activity. Finally, the workers compensation "exclusive remedy" provision does not immunize members of an LLC from direct employee claims.

NOTE: The legislature amended the workers compensation statute to bar claims against limited liability company members for all claims covered by workers compensation arising after January 24, 2013. *See* ORS 656.018; ORS 656.202.

**IMPROPER INDEMNITY CLAUSES: An indemnity clause that requires a subcontractor to indemnify a contractor for the contractor's own negligence in violation of ORS 30.140(1) remains enforceable to the extent that it also requires the subcontractor to indemnify the contractor for the subcontractor's negligence.**

***Montara Owners Assn. v. La Noue Development, LLC*, 259 Or App 657, 317 P3d 257 (2013).** Homeowners association brought claims against general contractor for construction defects. Contractor brought third-party claims against subcontractor.

The subcontract contained an indemnity provision requiring subcontractor to indemnify contractor for losses arising out of subcontractor's work, including losses caused in part by contractor's own negligence. The trial court ruled that the indemnity clause was void under ORS 30.140(1), which states that an agreement requiring a person "to indemnify another against liability for damage arising out of * * * damage to property caused in whole or in part by the negligence of the indemnitee is void."

The court of appeals reversed, finding that "[a]n indemnity clause that offends ORS 30.140(1) because it requires a subcontractor to indemnify a contractor for the contractor's own negligence remains enforceable to the extent that it also requires the subcontractor to indemnify the contractor for the subcontractor's negligence." Because ORS 30.140(2) permits a party to indemnify another for losses arising out of the fault of the indemnitor, the language in ORS 30.140(1) that says "[e]xcept to the extent provided under subsection (2) of this section" demonstrated legislative intent to enforce indemnity provisions to the extent permitted by ORS 30.140(2) even if those provisions also violate ORS 30.140(1).

**INDEMNITY: Determining whether a party is liable to a joint tortfeasor for indemnity depends on the equities, and a court is not bound by strict distinctions with respect to active vs. passive or primary vs. secondary liability to the injured party.**

***Eclectic Investment, LLC v. Patterson*, 261 Or App 457, 323 P3d 473 (2014).** Owner brought suit against contractor and the county for negligence based on property damage caused by excavation work performed by contractor and approved by the county. Jury found that owner was over 50 percent contributorily negligent and therefore not entitled to damages.

The county sought indemnity from contractor for legal fees. The county claimed that contractor was liable for common-law indemnity because contractor was the "active" or "primary" tortfeasor, whereas the county's was merely a "passive" or "secondary" tortfeasor. The trial court ruled in favor of contractor, because the county approved of the work.

The court of appeals upheld the trial court's ruling, finding that the active/passive and primary/secondary distinctions are merely considerations for a court assessing common-law indemnity. The court stated that there is no "all-encompassing rule" for determining indemnity between tortfeasors. Rather, the question before the court is one of equity, and the court must determine "whether the defendant *should have* discharged the obligation rather than the plaintiff."

**LICENSURE REQUIRED FOR COUNTER-CLAIM: ORS 701.131(1) precludes a contractor who was not properly licensed with the CCB from maintaining a counterclaim for unpaid compensation.**

***Stellar J Corp. v. Smith & Loveless, Inc.*, No. 12-35780, 2014 WL 2884556 (9th Cir June 26, 2014).** Contractor hired subcontractor to supply and installation of a wastewater treatment system. Subcontractor breached the contract and contractor sued. Subcontractor counterclaimed for unpaid compensation. Contractor was granted partial summary judgment dismissing subcontractor's counterclaim because subcontractor was not licensed with the CCB.

ORS 701.131(1) (2008) provided that "a contractor may not perfect a construction lien, file a complaint with the [CCB] or commence an arbitration or a *court action* for compensation" unless the contractor had a valid license at the time of the contract and throughout the course of the work. Defendant claimed that the language of the statute prevented a contractor only from initiating a claim for compensation, but did not preclude a counterclaim in an already-existing court proceeding. Defendant cited a footnote in *Pincetich v. Nolan*, 252 Or App 42, 285 P3d 759 (2012), that suggested that the statute did not preclude a counterclaim for unpaid compensation by an unlicensed construction worker.

The Ninth Circuit rejected defendant's position that the footnote in *Pincetich* was controlling. The court concluded that under the statutory analysis process, the phrase "court action" was equivalent to "claim" or "cause of action," which would include counterclaims.

**COLLECTION OF JUDGMENT: When a plaintiff has a judgment containing both a money award and the right to foreclose on secured property, ORS 88.060(2) does not require that the foreclosed properties be sold before plaintiff can collect money by garnishing debtor's bank accounts.**

***Merrill Lynch Commercial Finance Corp. v. Hemstreet*, 261 Or App 220, 323 P3d 361 (2014)**. Creditor obtained a judgment against debtors containing both a money award and foreclosure of trust deeds. To collect on this judgment, creditor began garnishing debtors' bank accounts. Debtors challenged the garnishment, arguing that under ORS 88.060(2) (governing enforcement of judgments when proceeds of the sale of foreclosed properties do not cover the debt deficiency) a creditor is required to sell all properties in foreclosure before pursuing the money judgment via garnishment.

The trial court rejected debtor's challenge to the writs because creditor was "entitled to pursue all collection activity to enforce the [confessed judgment], including but not limited to writs of garnishment and execution, * * * notwithstanding that the execution sales of the mortgaged property have not yet been completed."

The court of appeals affirmed, finding that ORS 88.060(2) applies only to creditors that *do not* have an independent money judgment. The statute is permissive, as opposed to prohibitive, in that it obviates the need for a creditor to file a separate case if the foreclosure sale proceeds do not satisfy a foreclosure judgment. The statute does not apply when a creditor has a money judgment *and* the right to foreclose.

**THIRD PARTY CLAIMS/INDEMNITY: Claims against a third party defendant for indemnity may be maintained even though the third-party plaintiff has not yet made a payment to the plaintiff.**

***Riverview Condo. Assoc. v. Cypress Ventures, Inc., et al.*, 2014 WL 5465524 (Or App Oct 29, 2014).** Condominium Association brought suit against developer and contractor for negligent construction. Contractor made third party claims against subcontractors for common law indemnity and contribution. Subcontractors claimed that third-party claims are not ripe because common-law indemnity claims and statutory contribution claims do not accrue until the party seeking indemnity or contribution has actually made a payment to a third party. The court of appeals rejected the subcontractor's argument, noting that ripeness depends on whether the controversy involves present facts as opposed to hypothetical future events. Even though the subcontractor's potential liability was contingent on the liability of the contractor, the parties have present and competing interests to determine their respective fault based on completed events. Therefore, third-party claims under ORCP 22 do not "run afoul of constitutional ripeness principles."

**INSURANCE DUTY TO DEFEND: The "owned property exclusion" in an insurance policy obtained by a developer does not eliminate the duty to defend even if the damaged occurred before the sale of the property. The complaint must conclusively establish that the insured knew of the damage in order for the "knowledge limitation" to negate the duty to defend. Finally, the "known loss doctrine" does not negate the duty to defend.**

***Freitag v. Catlin Indem. Co.*, No. 6:12-cv-1111-TC, 2013 US Dist LEXIS 105725 (D Or June 11, 2013), *magistrate ruling confirmed*, 2013 WL 3874077 (D Or July 23, 2013).** Property-developer obtained insurance from Catlin Specialty Insurance in 2007 to cover a property being developed for housing. Once the property was occupied, a dispute arose after discovery of water intrusion from poorly installed windows. A group of unit owners filed a complaint against the developer. Catlin denied the tender for a defense, arguing that there was no coverage because the windows had allegedly been installed in 2005 and 2006, before the developer purchased the insurance policy. The developer brought this suit.

On cross-motions for summary judgment, Catlin argued that the "owned property exclusion" eliminated the duty to defend because the alleged damage had occurred while the developer owned the property. The court rejected this argument because the result would be unreasonable, in that the developer purchased an insurance policy that did not insure anything.

Catlin next argued that the "knowledge limitation" or the "known loss doctrine" eliminated the duty to defend. The policy provided a specific exclusion from coverage in situations in which the insured *knew* that the damage had occurred before the policy period. The court found, however, that the unit owners' underlying complaint did not conclusively establish knowledge of damage or type of damage, before the inception of the policy. The court similarly rejected another of Catlin's defenses based on the "known loss doctrine," which "disallows coverage where the loss to be insured is in progress or substantially likely to occur when the insurance contract is issued," because Oregon state courts have not refused to apply this doctrine to duty-to-defend cases. Ultimately, the court found that the unit owners' complaint was sufficient to trigger Catlin's duty to defend under the insuring agreement.

**INSURANCE COVERAGE/DUTY TO DEFEND: In determining whether an insurer has a duty to defend, courts may consider only the facts alleged in the complaint and the language in the insurance policy, regardless of whether information extrinsic to the complaint conclusively establishes that the claim at issue is not covered.**

***Navigators Ins. Co. v. K & O Contr., LLC, No.* 03:12-cv-02076-HU, 2013 US Dist LEXIS 171731 (D Or Sept. 23, 2013), *adopted and summary judgment denied*, 2013 US Dist LEXIS 171392 (D Or Dec. 4, 2013).** In 2004 and 2005, Home Forward contracted with Walsh to act as general contractor for construction of the Willow Tree Apartments in Portland. K&O Contracting LLC was a subcontractor on the project. After construction was complete, Home Forward discovered water leaks and water intrusion in the interiors of apartments and the community center. Home Forward sued Walsh for construction defects and Walsh filed a third-party complaint against K&O and other subcontractors. In its notice letter to K&O, Walsh stated that the apartments were "constructed in 2004-2005."

K&O had a commercial general liability insurance policy with Navigators beginning July 12, 2010. K&O tendered the claim to Navigators, and Navigators sought declaratory relief that it owed no duty to defend or indemnify K&O or any of the other parties because the policy "exclude[d] work done before inception of K&O's policies with Navigators" and, according to Walsh's notice letter, the construction was completed in 2005.

The general rule is courts may consider only the facts alleged in the complaint and the policy language, "regardless of whether information extrinsic to the complaint could establish that the claim at issue is not covered," unless an exception applies. None of the known exceptions applied and the court refused to create a new exception when extrinsic evidence conclusively determines that the insurer has no duty to indemnify. The duty to defend and the duty to indemnify are not "coextensive" and involve different legal standards. The court found that it was impossible to determine from the face of the complaint whether the alleged damage was due to K&O's activities within the policy's coverage period. As a result, Navigators had a duty to defend K&O.

**TERMINATION OF DUTY TO DEFEND: Oregon courts have established no rule about when an insurer's duty to defend ends. Extrinsic evidence, no matter how conclusive, cannot be used to end the duty to defend.**

***Navigators Ins. Co. v. K & O Contr., LLC, No.*** **03:12-cv-02076-HU, 2013 US Dist LEXIS 171731 (D Or Sept. 23, 2013),** ***adopted and summary judgment denied,*** **2013 US Dist LEXIS 171392 (D Or Dec. 4, 2013).** *See facts from case in previous section.* Oregon state appellate courts have not directly addressed the question of when an insurer's duty to defend a lawsuit ends. The prevailing view among other states is that an insurer's duty to defend ends once the insurer "establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision." That view, however, has never been adopted by an Oregon appellate court.

In this case, Navigators had definitive evidence that any liability attributable to K&O would not be covered under the insurance policy. Although the court admitted that courts in other states would likely allow Navigators to terminate its defense of K&O after establishing that there was no legal or factual basis requiring indemnification, the court refused to extend that rule to Oregon. Rather, the court determined that until an Oregon appellate court provides a definitive ruling on the subject, an insurer's duty to defend continues regardless of extrinsic evidence that appears to exonerate insurance companies from the need to defend.

**INSURANCE CONTRACT INTERPRETATION: Use of extrinsic evidence is permitted in interpreting nonstandard and negotiated insurance contract provisions, but not in standard or nonnegotiated insurance contract provisions.**

***First Mercury Ins. Co. v. Waterside Condo. Ass'n,*** **No. 3:12-cv-02348-ST, 2013 WL 6383883 (D Or Dec. 5, 2013).** Contractor was hired to build a condominium complex. Contractor had three one-year commercial general liability policies with insurer that spanned 2005-2006, 2006-2007, and 2007-2008. After the project was completed the owner filed suit against contractor due to water intrusion and property damage. Contractor tendered the claim but insurer denied coverage, arguing that it had no obligation to indemnify contractor.

Coverage hinged on the interpretation of the terms of the insurance policies. Both parties disputed the meaning, and insurer argued that extrinsic evidence should be used to determine the parties' intent as to the ambiguous terms. Unlike regular contracts, in insurance contracts, the courts are not permitted to consider extrinsic evidence but rather must construe the ambiguous provision against the drafter. The court noted that this difference in contract interpretation results from the difference between construing ambiguous language in a nonnegotiated standard policy provision and a policy provision that is negotiated and nonstandard.

Here, the court loosened the rule against considering extrinsic evidence in insurance policies by finding that extrinsic evidence may be used to interpret insurance contracts as long as they are negotiated and nonstandard contract forms because "the rule of liberal construction in favor of the insured is subordinate to the rule that * * * the primary and governing consideration is to ascertain the intent of the parties." This approach did not help insurer, however, because the court found that the policies at issue were standard, nonnegotiated forms.

**RECOVERY OF INSURANCE PROCEEDS: Judgment against insured may be collected by judgment-creditor via garnishment of insurance company. Underlying judgment awarding damages for property damage may be *prima facie* determinative of insurance company's liability in subsequent garnishment proceeding.**

***FountainCourt Homeowners' Assoc. v. FountainCourt Development,* 264 Or App 468 (2014).** Plaintiff, a homeowners' association, sued the developer, general contractor, and certain subcontractors, including Sideco, for property damage caused by negligent construction of a condominium. Sideco tendered the claim to its insurer, which accepted defense under a full reservation of rights. The jury verdict found that Sideco was negligent and that the negligence caused property damage to plaintiff.

After entry of the judgment, plaintiff mailed a writ of garnishment to insurer for the amount of the judgment. Insurer responded that it had no property belonging to Sideco and denied owning any debt to Sideco. Plaintiff moved for an order to show cause why judgment should not be entered against insurer. After an evidentiary bench hearing, the trial court entered an order finding that plaintiff had met its burden of proving coverage and that insurer failed to prove that any portion of the judgment against Sideco was excluded by the policy. A supplemental judgment in the full amount of the jury's verdict was entered against insurer.

The appellate court upheld the trial court's order because plaintiff had met its burden of proving that the amount due to plaintiff by Sideco was covered by the commercial general liability policy's grant of coverage. Plaintiff's sole claim against Sideco was based on a theory of negligence causing physical property damage. Further, the trial court instructed the jury that plaintiff must allege and prove physical damage to its property in order to prevail. Therefore, the judgment was sufficient to establish plaintiff's *prima facie* burden of proving coverage under the policy.

Significantly, the court of appeals found that in cases of continuing and progressive damage across different policy periods, the liability for property damage may be the same in every triggered policy period. There is no need to allocate damage among policy periods.

**INSURANCE/ATTORNEY FEES: Under ORS 742.061(1), an insured has not obtained "recovery" against an insurer for purposes of entitlement to attorney fees where the insured accepted settlement payment by the insurer and summary judgment is granted in favor of the insurer because the claim became moot. "Recovery" is obtained by an insured only when a money judgment is granted against the insurer.**

***Triangle Holdings, II, LLC v. Stewart Title Guaranty Co.*, 2014 WL 5365977 (Or App Oct 22, 2014)** Plaintiff-lender loaned money to a builder and in exchange received a trust deed to certain real property. Lender obtained a title insurance policy from defendant-title company. After construction liens were placed on the real property, lender notified title company, paid the liens and sought reimbursement. After non-payment by title company, lender filed suit to collect reimbursement for the liens it paid. Approximately nine months later, lender accepted payment from the title company for the full amount of the liens plus interest. Title company moved for summary judgment arguing that lender's claim was moot. Trial court granted title company's motion and denied lender's request for attorney fees. Lender appealed.

Lender argued it was entitled to attorney fees under ORS 742.061(1) because its met the three requirements of the statute: (1) there was no settlement within six months of proof of loss, (2) lender brought action on the policy, and (3) lender's "recovery" exceeded the amount of any tender made by title company within the six month period following proof of loss (i.e. none). Title company argued lender did not satisfy the requirements because it did not "recover" through a money judgment. The Court held that, under *Becker v. DeLeone*, Triangle had no "recovery" because an insured must recover a money judgment against the insurer, and that this interpretation upheld the statutory purpose of ORS 742.061(1). Important to the court's analysis was that lender had accepted payment, which it did not have to do. Rather, lender could have negotiated payment of attorney fees or a stipulated judgment as part of accepting the payment or proceeded to trial to obtain a money judgment.

**STATUTE OF LIMITATION/ACCRUAL CLAUSE: A statute of limitation begins to accrue at the time the injured party knew or should have known of the injury, unless a different limitation is prescribed.**

***Rice v. Rabb*, 354 Or 721, 320 P3d 554 (2014).** Plaintiff brought suit against defendant for conversion and replevin after defendant refused to return personal property belonging to the plaintiff. The personal property had been loaned by plaintiff's parents to a local organization to be put on public display. In 2000, defendant demanded that the local organization turn over the personal property, which it did. Plaintiff, who is blind, did not discover that defendant had taken possession of the property until 2007.

Defendant sought to dismiss plaintiff's claims because the applicable statute of limitations had run by the time plaintiff filed suit. Specifically, ORS 12.080(4) provides a six year statute of limitations on any action for takin of personal property. Defendant argued that the six year statute began to run at the time of the taking. Plaintiff argued that the six year statute began to run at the time plaintiff discovered the taking. The trial court granted the motion to dismiss, and the court of appeals affirmed. The Oregon Supreme Court reversed.

The court held that ORS 12.080(4) incorporates a discovery rule, meaning that the statute of limitations does not begin to run until the injured party knew or should have known of the injury. ORS 12.080(4) does not set forth when the six year period begins to run and, as a result, the court looked to ORS 12.010 to determine when limitation period begins. ORS 12.010 states that unless a different limitation is prescribed by statute, actions shall only be commenced "after the cause of action shall have accrued." "Accrued," according to the court, by definition incorporates a discovery rule because for a cause of action to be maintained by a person, that individual must have knowledge of the injury. The court further reasoned that where the legislature did not intend for a discovery rule to apply to a statute of limitation it used terms other than "accrue," such as "occurs." Therefore, a statute of limitation that does not otherwise specify when the statute begins to run will be viewed as incorporating a discovery rule.

**STATUTE OF LIMITATION/ACCRUAL CLAUSE: The statute of limitations for a claim for injury to an interest in real property, including a construction defect claim for negligence, begins to accrue at the time the injury party knew or should have known of the injury.**

***Tavtigian-Coburn v. All Star Custom Homes, LLC*, 266 Or App 220 (2014).** Homeowner brought suit against contractor for negligent construction of a home. The trial court granted the contractor's motion for summary judgment on the grounds that the claim was untimely under ORS 12.080(3). ORS 12.080(3) establishes a six year statute of limitation for claims involving injury to any interest in real property. Homeowner appealed, claiming that the trial court erred by concluding that ORS 12.080(3) does not embody a discovery rule.

While the case was under advisement, the

Oregon Supreme Court issued its decision in *Rice v. Rabb*, discussed above, which held that unless otherwise specified, a statute of limitations begins to accrue at the time the injured party knew or should have known of the injury. The court of appeals held that the reasoning in *Rice* governed the court's analysis of ORS 12.080(3). Based on that analysis, the court reversed the trial court's order because the contractor presented no evidence that the homeowner discovered or reasonably should have discovered their claims more than six years before filing them.

**STATUTE OF LIMITATION/STATUTE OF REPOSE/ACCRUAL CLAUSE: An accrual clause in a construction contract can modify when the applicable statute of limitations begins to run. Accrual under the statute of ultimate repose, ORS 12.135, in the absence of an architect's certificate of substantial completion is the date on which the owner accepts the facility as being finally complete.**

***Sunset Presbyterian Church v. Brockamp & Jaeger*, 355 Or 286, 325 P3d 730 (2014).** Sunset Presbyterian Church brought an action against its general contractor and subcontractors for negligent construction of a new facility. Construction began in 1998, and Sunset held its first church service in February 1999. In May 1999 the county issued a certificate of final occupancy, but it wasn't until November 1999 that the architect issued approval for final payment. Water damage that led to Sunset's tort claims was discovered in early 2009. ORS 12.135 establishes a ten-year repose period for all claims arising from the construction, alteration, or repair of an improvement to real property. Defendants argued that Sunset's action was barred because (a) it did not commence within the applicable statute of limitations and (b) it did not commence within ten years of substantial completion of the project as required by ORS 12.135.

The trial court granted summary judgment to contractor and the subcontractors based on the statute of limitations. On appeal, the court of appeals reversed. The Oregon Supreme Court affirmed the court of appeals, holding that the contract provided the date of substantial completion for purposes of the accrual clause. The parties' contract provided that claims accrue on the "date of substantial completion," but defined the "substantial completion date" as the day on which a certificate of substantial completion is issued by the architect. Based on the contract definition, the court found that the "substantial completion date" is the date on which an architect issues a certificate of substantial completion. Contractor did not introduce a certificate of substantial completion. Because there was conflicting evidence about the date of substantial completion, the court held that the trial court had erred in granting defendants' motion for summary judgment.

In addressing whether the claim was barred by the ten-year statute of ultimate repose, ORS 12.135, the court determined that in the absence of a written acceptance, the limitations period "begins to run on the date on which the contractee accepts the construction as fully complete, as opposed to accepting the construction as 'sufficiently complete for its intended use or occupancy.'"

**STATUTE OF REPOSE/ACCRUAL CLAUSE /INDEMNITY: Notice of completion recorded by owner is not a written acceptance of completion for purposes of starting the statute of ultimate repose. Without a written acceptance, the statute of repose does not begin to accrue until the construction is fully complete, rather than substantially complete.**

***PIH Beaverton, LLC v. Super One, Inc.*, 355 Or 267, 323 P3d 961 (2014).** Plaintiff PIH Beaverton purchased a hotel from VIP in 2006. PIH discovered construction defects and sued Super One, the general contractor, and various subcontractors more than ten years after VIP had recorded a notice of completion under ORS 87.045 but less than ten years after Washington County issued its notice of final completion. Super One moved for summary judgment, arguing that the statute of ultimate repose barred the claim.

The parties disputed whether the project had reached "substantial completion" for ultimate-repose purposes under ORS 12.135(3) when VIP's recorded its notice of completion for purposes of perfecting construction liens. The court of appeals determined that VIP's notice was not an acceptance in writing of an improvement to real property. Filing a notice under ORS 87.045 "does not necessarily equal substantial completion for purposes of starting the statute of [ultimate repose] for bringing a construction defect suit." Because the notice did not amount to acceptance in writing under ORS 12.135, there was a question of fact about when substantial completion occurred.

The Oregon Supreme Court affirmed and remanded the case, holding that summary judgment was not appropriate because there was conflicting evidence about the date of final completion. Specifically, the Oregon Supreme Court found that the recording and posting of a completion notice under ORS 87.045 of the Construction Lien Law does not establish the date on which the ORS 12.135 ten-year statute of ultimate repose begins to run. The court stated that in the absence of a written acceptance, the construction must be fully complete for the statute-of-repose period to accrue. In this case, acceptance of a "substantially complete" (as opposed to "fully complete") facility, and operation of that facility, was insufficient to start the clock on the statute of ultimate repose.

**STATUTE OF REPOSE/ACCRUAL CLAUSE/STATUTE OF LIMITATIONS: The statute of repose does not begin to accrue until the construction is fully complete *and* the owner accepts the new construction as complete. The proper statute of limitation for a construction defect claim is ORS 12.080(3), which provides a six year period that accrues at the time the claimant knew or should have known of the injury. Non-defect claims for economic damages are governed by ORS 12.110.**

***Riverview Condo. Assoc. v. Cypress Ventures, Inc., et al.*, 2014 WL 5466505 (Or App Oct 29, 2014).** Condominium Association brought suit against developer and contractor for negligent construction. Contractor completed construction in early 2000, and the building received final permits and the contractor received final payment in May of that year. The association filed the lawsuit in July 2010. The trial court granted the contractor's motion for summary judgment on the grounds that the 10-year statute of repose under ORS 12.115, as opposed to ORS 12.135, applied. The statute of repose under ORS 12.115 begins to accrue at the time of the act or omission complained of, whereas the statute of repose under ORS 12.135 begins to accrue at the time of substantial completion.

During the appeal, the court issued its decision in *Sunset Presbyterian Church v. Brockamp & Jaeger*, which held that ORS 12.115 is inapplicable for claims arising from construction of an improvement to real property. Under ORS 12.135, the statute of repose begins to run at the time the construction is fully complete, not just sufficiently complete for its intended purpose. Further, the period of repose does not begin until the owner has accepted the construction as complete. Here, based on the evidence offered, a reasonable trier of fact would not be compelled to conclude that the developer had accepted the construction. Accordingly, the court reversed.

The contractor also argued that the negligent construction claims were barred by the two-year statute of limitations under ORS 12.110. The court rejected this argument, reaffirming the application of ORS 12.080(3)'s six-year statute of limitation to construction-defect claims alleging "injury to the interest of another in real property."

The court did agree with the contractor's argument that ORS 12.110's two-year statute of limitation applied to the association's negligent misrepresentation claims, because those claims are based on financial injury, as opposed to injury to real property.

**STATUTE OF REPOSE/NEGLIGENCE: ORS 12.135 applies to claims arising from only construction contracts. Negligence claims arising from a purchase and sale agreement are governed by the more general statute of repose, ORS 12.115.**

***Shell v. The Schollander Companies, Inc.*, 265 Or App 624 (2014).** Defendant constructed a home on property owned by the defendant. Prior to completion of the home, defendant and plaintiff executed a "Real Estate Sale Agreement" for plaintiff's purchase of the home. Under addenda to the agreement, defendant was required to perform certain repair work prior to closing on the sale of the home. More than ten years after substantial completion of the home but less than ten years after the close of the sale, plaintiff sued defendant for negligent construction for damage to the home by water intrusion.

The trial court granted defendant's motion for summary judgment on the grounds that plaintiff did not initiate her action within the 10-year statute of repose required by ORS 12.115, which is triggered by the "act or omission complained of." Plaintiff appealed, arguing that the court should apply ORS 12.135, in which the 10-year repose period commences at the time of "substantial completion."

The court of appeals affirmed the trial court's summary judgment, stating that ORS 12.135 applies to actions that derive only from *construction* contracts. In this case, the primary agreement between plaintiff and defendant was not a construction contract, but rather a purchase-and-sale contract. Accordingly, the applicable statute of ultimate repose was ORS 12.115. Because it was undisputed that the alleged negligent conduct complained of (i.e., installation of the exterior sheathing) occurred more than 10 years before the civil action was initiated, summary judgment was appropriate.

**CLAIM NOTICE: In an action under the Miller Act for an open-book account, a notice of demand will be considered timely as to all deliveries made on the account if served within 90 days of the last delivery.**

***Ramona Equip. Rental, Inc. v. Carolina Cas. Ins. Co.*, 755 F3d 1063 (9th Cir 2014).** Ramona Equipment Rental, Inc., rented equipment on an open-book account to defendants for a federal construction project. When defendants failed to pay for rentals, Ramona filed an action under the Miller Act, 40 USC §§ 3131-3134, and served a 90-day notice of its claim on July 25, 2008. In response, defendants argued that Ramona's 90-day notice was untimely as to all rental equipment furnished to the project more than 90 days before the July 25, 2008, service date.

The Miller Act requires that a laborer with no direct relationship to the general contractor provide written notice to the contractor within 90 days from the date on which the person provided the labor or supplies on which the claim is based. The district court found that Ramona's service was timely because Ramona had provided notice within 90 days of its last delivery. The issue on appeal was whether Ramona's notice was timely for rental equipment furnished more than 90 days before the notice. The Ninth Circuit affirmed the trial court and held that a 90-day notice was timely. "[I]f all the goods in a series of deliveries by a supplier on an open book account are used on the same government project, the ninety-day notice is timely as to all of the deliveries if it is given within ninety days from the last delivery."

**APPLICATION OF FEDERAL REGULATIONS: Public works projects must provide for federal apprenticeship standards in order to have a "federal purpose" under the National Apprenticeship Act of 1937. In California, projects without a federal purpose may use only state-approved apprenticeship programs.**

***Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Relations*, 730 F3d 1024 (9th Cir 2013).** Plaintiff Independent Training and Apprenticeship Program ("I-TAP") is an apprenticeship program approved by the Department of Labor (the "DOL") for projects with "federal purposes." The use of apprentices for federal works is governed by the National Apprenticeship Act of 1937 (also known as the "Fitzgerald Act"), which states that public works projects with "federal purposes" may use only eligible apprentice programs recognized by the DOL.

After I-TAP provided apprentices for two construction projects, the California Department of Industrial Relations (the "CDIR") threatened to impose fines because the contractors were using apprentices enrolled with I-TAP on public works projects that the CDIR asserted were not for federal purposes. Plaintiff filed suit seeking declaratory and injunctive relief, principally on the ground that the CDIR's actions were inconsistent with the federal regulations and hence preempted. The district court denied plaintiff's motion for injunctive relief after finding that the projects at issue were for "federal purposes."

On appeal, plaintiff's preemption claim turns on whether the three construction projects at issue were for "federal purposes" under 29 CFR § 29.2. If so, the CDIR's refusal to allow the contractors to treat I-TAP enrollees as recognized apprentices would conflict with federal law because I-TAP is a registered program for federal purposes. The Ninth Circuit determined that the definition of "federal purposes" as "any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship" was ambiguous and adopted a new interpretation provided by the Secretary of Labor.

Under the new interpretation, "federal purposes" refers to projects that are "'conditioned' on conformity to the Department's apprenticeship standards" (i.e., federal bonds did not condition the projects' financial assistance on the use of federal apprenticeship standards). The court affirmed the district court's decision, agreeing that plaintiff's projects were not for federal purposes.

## THE FRANKENSTATUTE: ORS 12.135

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Like the monster in "Frankenstein," Oregon's statute of ultimate repose ("SUR") applicable to certain construction defect claims is composed of different body parts that are roughly stitched together: Only ORS 12.135(1) uses terms and concepts borrowed from other bodies of construction law. As a result of such borrowing, the application of ORS 12.135 to a given set of circumstances may be surprisingly complex.

**The Statute of Ultimate Repose.** A statute of ultimate repose, in contrast to a statute of limitation, generally provides a maximum time period for asserting a claim without regard to the injured party's knowledge of the harm or claim. The SUR found in ORS 12.135(1), which applies to claims by non-public plaintiffs, is no different.[2] This statute generally applies to claims arising from the "construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from the person having furnished design, planning, surveying, architectural or engineering services for the improvement." The SUR period under ORS 12.135(1) is determined by the type of "structure:"

[2] The original 1971 bill that became ORS 12.135 "began with the objective of fixing a starting date for applying the statutory time limits to actions against construction contractors in contract, tort, or otherwise, while maintaining the existing differences in the limitation periods." *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Or. 243, 250 (1980).

Ten (10) years for a "small commercial structure," a "residential structure" or, if owned or maintained by a homeowner's or unit owner's association, a "large commercial structure;" or

Six (6) years for a "large commercial structure" that is NOT owned or maintained by a homeowner's or unit owner's association.

ORS 12.135(1). The event that triggers or commences the SUR period is based upon the acceptance by the "contractee" of the construction, alteration or repair (a paraphrasing of the definition of "substantial completion" found in ORS 12.135(4)(b))[3] – or "abandonment" of the construction, alteration or repair of the improvement by the person providing labor, material or equipment. ORS 12.135(5).

**Borrowing Words and Phrases from Different Bodies (Of Law).** The ORS 12.135 SUR explicitly incorporates definitions from both the amendments to the Oregon Contractors Licensing Act (ORS 701.002 *et seq.*) and Oregon's Construction Lien Law (ORS 87.001 to 87.060 and 87.075 to 87.093).

The definitions of the types of "structures" that determine whether a six year or ten year SUR applies are borrowed from ORS Chapter 701.005. In Chapter 701, these definitions provide the basis for describing contractor license endorsement requirements (residential or commercial) and the Oregon Construction Contractors Board ("CCB") dispute resolution jurisdiction for complaints against those contractor surety bonds. These "structure" definitions were added to ORS 12.135 by the 2009 legislature and apply to claims arising on or after January 1, 2010. 2009 Or Law Ch. 715, Section 3.

[3] "Substantial completion" means "the date when the contractee accepts in writing the of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such written acceptance, the date of acceptance of the completed construction, alteration or repair of such improvement by the contractee." ORS 12.135(4)(b).

The simplest of the three definitions is "large commercial structure." It means a structure (or appurtenance thereto) that does not meet the definitions of "residential structure" or "small commercial structure." ORS 701.005(11). Determination of what structure (or appurtenance thereto) is "residential" (ORS 701.005(15)) or "small commercial" (ORS 701.005(17)) requires careful comparison of each statutory definition and the actual structure and circumstances.

ORS 12.135 also provides that an "improvement" is considered "abandoned" for SUR purposes using the same definition that the Oregon Lien Law uses to fix the commencement of the 75 day deadline for some lien claimants to record a valid lien against an improvement. See ORS 12.125(5) (incorporating the ORS 87.045 definition of "abandonment" by reference).

**Unintended Complexity?** Against this background of borrowing definitions significant complexity is born. Some potential results not yet revealed by reported case law (to this author's knowledge) may include:

**a. Different Potential SUR Periods For Construction on an 11,000 SF Ground Area Leasehold (Maybe 6 Years) vs. 11,000 SF Ground Area Building (10 Years).** A project involving 11,000 square feet in ground area may be subject to a six year (if small commercial) or ten year (if large commercial) SUR period. ORS 12.135(1). For contractor licensing purposes, if a contractor renovates an 11,000 square foot office building for the building owner, the structure may be considered a "*large* commercial structure" (to qualify as a small commercial building, the building must have a ground area of 10,000 square feet or less, along with other requirements). See ORS 701.005(17)(a). But if the contractor renovates an 11,000 square foot leasehold space in a larger office building, then the leasehold space may be considered a "*small* commercial structure." See ORS 701.005(17)(b). For licensing purposes, a contractor easily sidesteps the need to consider these complexities by simply obtaining the license endorsements to work on both small and large commercial structure projects. There is no such opportunity to side step the analysis for SUR purposes.[4]

**b. "Construction, Alteration or Repair" to a Building of Any Size for Less Than $250,000 May Be a 10 Year SUR.** A structure that meets the definition of a "small commercial structure" includes: "*A nonresidential structure of any size* for which the contract price of all construction contractor work to be performed on the structure as part of a construction project does not total more than $250,000." ORS 701.005(17)(c). Accordingly, a reroof of a twelve-story commercial office building that involves less than $250,000 in total cost may be subject to a ten (10) year SUR, whereas building the office building new may be subject to a six (6) year SUR if it otherwise does not meet any of the other potential definitions of a "small commercial structure" under ORS 701.005(17).

**c. Certain "Improvements" (Like Cell Towers, Docks and Bridges) Built for Non-Public Owners May Not be Subject to the Six Year SUR under ORS 12.135.** The SUR applies to "improvements" that meet one of the ORS 701.005 "structure" definitions. By the plain terms of these definitions, there must be a "structure" or "unit" (or an appurtenance to such a structure or unit) – which strongly implies the structure or unit can be occupied for use. By contrast, the Lien Law definition of "improvement" is much broader and includes "wharf, bridge, ditch, flume, reservoir, well, tunnel, fence, street, sidewalk, machinery, aqueduct or other structure or superstructure." ORS 87.005(5).[5] This observation raises the question: Did the 2009 amendments tying the 10 and 6 year SUR to the construction or repair of a "structure" have the effect of now *excluding* other "improvements" such as a cell tower, dock or bridge that are not "appurtenant to" a "commercial" or "residential" structure that apparently fits within an ORS 701.005 definition?[6] If a project does not fall within the description of ORS 12.135(1), then a private litigant's negligence claims related to these improvements may be subject to a general 10 year SUR under ORS 12.115 that may begin to run from an earlier date (the time of the negligent "act or omission") as was the case is *Shell v. Schollander*, No. A150509 (Or App Sept. 24, 2014) (Plaintiff did not fall within scope of ORS 12.135(1) and (4)(b), so an SUR that accrued from an earlier date under ORS 12.115 applied).

**d. *Shell v. Schollander Development* Opinion Suggests Contracts Incidentally Related to Construction May be Subject to ORS 12.135's SUR.** In the recent case of *Shell v. Schollander Development*, the Court of Appeals highlighted that ORS 12.135 only applies to those plaintiffs who are a "contractee" of the specific construction work that gave rise to the defective construction. Under the Court's analysis,

[4] The example provided here has in fact been simplified. The definition of "small commercial structure" also includes vertical requirements: "a height of not more than 20 feet from the top surface of the lowest flooring to the highest interior overhead finish of the structure." See ORS 701.005(17).

[5] One could argue that the express incorporation of the Lien Law concept "abandonment of an improvement" in ORS 12.135(5) means that the Lien Law's broad definition of "improvement" similarly applies when the term "improvement" is used in ORS 12.135(1). However, accepting this argument is not necessary to the point made – an "improvement to real property" is a much broader concept than the "structure" definitions provided in ORS 701.005.

[6] This is not to suggest that a contractor that builds cell towers, tunnels or bridges that are unrelated to a "commercial structure" or "residential structure" need not carry a contractor's license. The licensure requirement is not tied to any type of structure. See ORS 701.021(1) (any person who "undertakes, offers to undertake or submits a bid to do work as a contractor must have a current license"…). While arguably a contractor that only builds tunnels might argue it is unnecessary to obtain a license endorsement, as a practical matter, this is simply not an option as a license requires a bond, and the licensing scheme requires obtaining the bond in connection with a license endorsement. See ORS 701.021(2-4) (identifying types of endorsements); 701.068(1) (requirement of license is bond) and (2)(bond is required for each endorsement type held).

however, agreements that are not traditionally thought of as "construction agreements" may be included within ORS 12.135.

In *Shell*, the Court held that ORS 12.135's SUR did not apply to a "general contractor" who sold a home to a buyer under a "Real Estate Sale Agreement" ("Sale Agreement"). *See Shell*, p. 3. The Court's reasoning is that "substantial completion" under ORS 12.135 requires acceptance of the construction work by plaintiff in the capacity of a "contractee" to a contract for construction work. Because the plaintiff-homebuyer purchased a nearly completed home – where the work complained of had been completed prior to entry of the Sale Agreement – ORS 12.135 did not apply. The Court reasoned that it was not enough that an addendum to the Sale Agreement contained the general contractor's promise to provide some unrelated construction services (generally work related to finishes, interior improvements, and a post-completion inspection). The Court reiterated its holding as follows:

> Put another way, plaintiff's complaint does not allege negligence with respect to inspections, remediation, or any of the other activities that, in the addenda, defendant promised to perform.

*See Shell*, p. 12. By the above-quoted dicta, the *Shell* court seems to suggest that if a claim arose out of the construction work described in the Sale Agreement addendum, then that claim might still be timely under ORS 12.135(1). If so, it would seem that other agreements which only incidentally contain construction work <u>may</u> also be subject to the ORS 12.135 SUR. In addition to a Sale Agreement addendum, such examples might include a lease that includes tenant improvements; easements for well, septic or surface water systems; or option to purchase agreements.[7]

**Conclusion.** Superficially, using definitions from other areas of construction law has appeal. Terms used in different areas of law may be continually refined through court decisions. However, when examining these terms and the associated case law more carefully, the statute perhaps provides more pitfalls and false security than originally intended. For all parties who are concerned about whether work performed on a construction project remains subject to a construction defect claim, trying to predict whether the ORS 12.135 SUR or some other statute of ultimate repose applies could be scary.

## CONSTRUCTION REQUIREMENTS FOR MEDICAL MARIJUANA FACILITIES

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Cardholders under the Oregon Medical Marijuana Program can obtain medical marijuana from registered facilities. Medical marijuana facilities are strictly regulated by the Oregon Health Authority. The regulations are found at OAR 333-008-0000 through 333-008-1400. Contractors performing tenant improvements or original construction work for such facilities would do well to familiarize themselves with the security requirements under the applicable regulations.

### Keep It Safe

A medical marijuana facility must have adequate safeguards against theft or diversion of the marijuana. OAR 333-008-1140(2). For example, commercial grade, non-residential door locks must be installed at every external door. OAR 333-008-1140(3). All usable marijuana must be kept in a safe. OAR 333-008-(5)(b). A "safe" means "a metal receptacle with a locking mechanism capable of storing all usable marijuana

[7] **Caution:** The *Shell* case did not discuss the potential impact of ORS 12.135(6)(b), which provides the statute "does not apply to actions against any person in actual possession and control of the improvement, as owner, tenant or otherwise, at the time such cause of action accrues."

at a registered facility that is rendered immobile by being securely anchored to a permanent structure of the building, or a 'vault.'" A "vault" is an "enclosed area that is constructed of steel-reinforced or block concrete and has a door that contains a multiple-position combination lock or the equivalent, or a relocking device or equivalent, and a steel plate with a thickness of at least one-half inch."

**(Be Able To) Sound the Alarm**

A facility must have a security alarm system, installed by an alarm installation company, on all entry or exit points and perimeter windows. OAR 333-008-1150(1). The facility must be continuously monitored by the alarm system. OAR 333-008-1150(3). The alarm system must be able to detect movement inside the facility, be programmed to notify a security company that will notify the facility operator in the event of a breach, and have at least two "panic buttons" located inside the facility that are linked to the alarm system. OAR 333-008-1150(4). ("Panic button" is not defined in the regulations, but presumably a button will activate the alarm system.)

**24-Hour Video**

A facility must also have a fully operational video surveillance recording system. At a minimum, the system must consist of cameras, video monitors, digital archiving devices, and a color printer capable of producing still photos. OAR 333-008-1160(3). The camera coverage must include all secure and restricted areas, point of sale areas, points of entry to or exit from secure and restricted access areas, and all points of entry to or exit from the facility. OAR 333-008-1170(1). The camera placement must be capable of identifying activity occurring within fifteen feet of all points of entry and exit and shall allow for the clear and certain identification of any individual and activities on the facility premises. OAR 333-008-1170(3).

The camera views of all secure and restricted access areas and points of entry to or exit from the registered facility must be continuously monitored by motion sensor video equipment or similar technology 24 hours a day. OAR 333-008-1180(1). The surveillance recordings must be kept for a minimum of 30 days and be in a format that can be easily accessed for viewing. OAR 333-008-1180(2)(a). The surveillance system must also be capable of producing a color still photograph from any camera image, and the date and time must be embedded on all surveillance recordings without significantly obscuring the picture. OAR 333-008-1180(2)(b) and (c).

Video surveillance equipment must have sufficient batter backup to support a minimum of one hour of recording time in the event of a power outage. OAR 333-008-1160(3)(c). All video equipment and recordings must be stored in a locked secure area that is accessible only by the facility operator and employees and the Authority. OAR 333-008-1160(4).

**Conclusion**

One would expect these requirements for security at a medical marijuana facility to be included in the specifications for any construction or tenant improvement work. A failure to comply with these regulations could subject the person responsible for the facility to an enforcement action by the Oregon Health Authority. A contractor can provide good service to its customer by ensuring that the security requirements under the regulations are incorporated fully in the scope of work.

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