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HOMEBUILDERS RISK INSURANCE COVERAGE BY FAILING TO OBTAIN ADDITIONAL INSURED STATUS ON SUBCONTRACTOR INSURANCE POLICIES

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A. Introduction. Many small (and some big) homebuilders do not seem to adequately investigate or understand the coverage provided by their insurance. Home building in Oregon is a risky business. Under current case law, a contractor risks financial ruin from construction defect lawsuits by not only its immediate customer (the owner or purchaser), but also future owners of the building or improvement with whom the contractor has no direct agreement or relationship. *See e.g. Harris v. Suniga*, 344 Or 301 (2008). A residential homebuilder may be subject to construction defect claims up to ten years after "substantial completion." *See* ORS 12.135(1) & (4)(b)).

Some risks are mitigated by the fact that contractors (of any tier or trade) must purchase commercial general liability ("CGL") insurance as a condition of obtaining and maintaining an Oregon construction contractor's license. *See* ORS 701.073. Yet many contractors fail to investigate or understand the many exclusions and conditions to their insurance coverage.

This article focuses on the specific condition found in many homebuilder policies that requires obtaining additional insured status on subcontractor policies, purportedly as a condition of the homebuilder's policy coverage.[1]

B. Insurance Primer. As a general insurance primer, a CGL insurance policy is an agreement whereby the contractor pays a premium, and in exchange, the insurance company (or insurer) agrees to do two things. First, the insurer agrees to pay those sums that the contractor (as the "insured") becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applies. This is often referred to as the insurer's indemnity obligation (to pay damages). Second, the insurer agrees to defend the contractor against any "suit" seeking those damages to which the insurance applies. This is often referred to as the insurer's defense obligation (which typically includes appointing an attorney to defend the contractor in a legal action at the insurer's expense).

One of the most important questions is what are the damages to which the insurance applies? A "standard" CGL insurance policy is about sixteen or more pages long and contains numerous "exclusions" to the types of damages to

[1] The focus of this article is compliance with a specific type of endorsement found in many homebuilder insurance policies. Every contractor (of any tier or trade) should regularly consult with an experienced insurance professional or broker to assure the appropriate insurance coverages are purchased based on a particular contractor's potential business risks and requirements. The exclusions and conditions found in CGL insurance policies may impact different contractors in significantly different ways, depending on the nature of the project, the scope of work, or insurance required by the project specifications (often an issue in larger commercial projects).

which the insurance applies and "conditions" the contractor must satisfy to receive the benefits of the policy. The "scope" of insurance coverage is further modified (reduced or expanded) by numerous insurance policy endorsements to the standard policy that address particular products or circumstances. Common endorsements found in homebuilder's CGL policies that *reduce* the scope of insurance coverage include exclusions related to damages caused by lead, asbestos, silica dust, exterior insulation finish systems (EIFS) or mold, or damages related to roof operations, multi-family housing, land subsidence, etc.

C. "Subcontractor Warranty" Endorsement. This article focuses on the CGL policy endorsement commonly titled an "Oregon Special Condition Endorsement," "Contractors Special Conditions," "Subcontractor Warranty Endorsement," or "Construction Manager, Independent Contractor or Subcontractor Warranty." The endorsement is referred to here as the "Subcontractor Warranty" endorsement. The use of "warranty" in the title of the endorsement does not refer to a subcontractor's contract warranty obligations, but presumably a "warranty" the homebuilder purportedly makes to its insurance carrier that the homebuilder uses independent contractors in the manner required by the language of the endorsement.[2]

In simple terms, an underlying purpose of the Subcontractor Warranty endorsement is to shift the expense of subcontractor mistakes (that lead to damages covered by insurance) onto the subcontractor's insurer rather than the homebuilder's insurer. A Subcontractor Warranty endorsement generally[3] contains each of the following requirements:

- The homebuilder use written contracts with its subcontractors, which in many cases must include an "indemnity" provision in a specific form for the benefit of the homebuilder;

- The homebuilder must be an additional insured on the subcontractor's insurance policy; and

- The homebuilder must obtain certificate and insurance endorsement showing additional insured status.

Some of the endorsements have additional requirements the homebuilder must meet, including record keeping requirements and other minimum insurance requirements the homebuilder must assure is procured by its subcontractors.

D. Certificates of Insurance Generally Are Not Sufficient to Establish Homebuilder as Additional Insured on Subcontractor Policy. Some believe a certificate of insurance from a subcontractor that lists the homebuilder as an "additional named insured" on the subcontractor's policy is sufficient to establish the homebuilder is indeed an additional insured on the subcontractor policy. This belief is often wrong. While specific circumstances may influence the outcome, generally an insurance certificate (usually issued by the subcontractor's broker) is not binding on the insurance company; only the actual insurance policy (usually the endorsement portion of the policy) can establish additional insured status. *See e.g. Postlewait Const., Inc. v. Great American Ins. Companies*, 720 P.2d 805, 106 Wn.2d 96 (Wash., 1986); *Atlas Assurance Co., Ltd v. Harper, Robinson Shipping Co.*, 508 F2d 1381, 1387 (9th Cir. 1975) (a certificate is not an insurance policy, it only states a policy exists); *Boseman v. Connecticut General Life Ins. Co.*, 301 US 196, 203 (1937) (a certificate is "*not part of the contract of, or necessary to, the insurance. * * * It served merely as evidence of the insurance * * **").

E. An Agreement Is Required to Establish Additional Insured Status – Usually Written. The steps a homebuilder should take to become an additional insured *on the subcontractor's policy* are – naturally – governed by the terms of the

[2] This article does not address the enforceability of this type of endorsement or warranty.

[3] Obviously, the requirements of the specific insurance endorsement must be obtained and reviewed.

subcontractor's policy. Accordingly, the homebuilder should take two steps.

First, the homebuilder should confirm the subcontractor's insurance policy provides for adding other insureds to the policy. Typically, this means a homebuilder should demand proof in the form of the actual policy endorsement or portion of the policy.

Second, the homebuilder should confirm the steps required by the *subcontractor's insurance policy* to add the homebuilder as an additional insured are satisfied. Two methods insurers use to add an additional insured to a policy include: 1) by an endorsement that specifically identifies the name of the parties to be added to the subcontractor's policy as an additional insured; or 2) by a "blanket" endorsement (or provision in the CGL policy) that generally provides a person is an additional named insured on the subcontractor's insurance policy if the subcontractor is "required" to add the person as an additional insured "by reason of a written contract or agreement."

Accordingly, a homebuilder should use its own form of subcontract or addendum to subcontractor proposals – because otherwise – the "magic words" that contractually require the subcontractor to add the homebuilder as an additional insured will probably not exist in the subcontractor's proposal or form of agreement (if there is a written agreement). This author is aware of at least one subcontractor insurance policy endorsement form whereby the contractor may be an additional insured on the subcontractor policy if they have an "oral agreement" with a certificate of insurance showing that person or organization as an additional insured has been issued. Yet proof of written agreement is far easier than proof of an oral agreement – thereby making it highly advisable for homebuilders to use their own form of written subcontract.

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F. Consequences of Failing to Satisfy Subcontractor Warranty Endorsement. Simply put, a homebuilder's compliance with the Subcontractor Warranty is often purported to be a condition of the insurer's duty to pay damages or defend the homebuilder. If a homebuilder fails to meet all the conditions of the Subcontractor Warranty, many of these Subcontractor Warranty endorsement forms suggest the insurer may take the position it can disclaim its obligation to indemnify the homebuilder or even decline or discontinue defense of the insured. One Subcontractor Warranty form reviewed by this author from a 2016-2017 CGL insurance policy, rather than disclaim the insurer's obligation to defend or indemnify the homebuilder, purports to permit the insurer to recalculate its premium charged to the homebuilder to the (presumably higher) rate the insurer "would have charged had [the homebuilder] done the work [it]self." While this Article takes no position on the enforceability or wisdom of the insurer taking such positions, one thing is clear: The homebuilder risks significant liability, if not financial ruin, in the event of a claim if the home builder fails to comply with the Subcontractor Warranty endorsement.[4]

G. Conclusion. Insurance coverage is a very complex topic and the needs of a homebuilder (or any contractor) may vary significantly based on a number of factors. All contractors generally should ake three steps to lessen the risk of an unexpected

[4] Even if a homebuilder's CGL insurance policy does not include a Subcontractor Warranty endorsement, there are benefits to taking similar steps to obtain additional insured status on its subcontractors' insurance policies and an appropriate indemnity clause. For example, in the event the homebuilder's policy wholly excludes coverage for the project or type of damage incurred, it is possible the subcontractor's insurance does not contain a similar exclusion. Therefore, the homebuilder's additional insured status may prove to be of significant value, if nothing else, to potentially pay for the homebuilder's legal defense of third party claims based on defects caused by a subcontractor's defective work.

future liability that could have been covered by insurance.

First, contractors should regularly review their insurance policies and consult with their insurance professionals to learn about their uninsured risks and conditions to obtaining insurance coverage, including the steps necessary to comply with any Subcontractor Warranty (or other) endorsement that may be found as part of their CGL insurance policy.

Second, contractors should use written subcontracts with language to appropriately assign responsibilities and risks, including language necessary to comply with any requirements found in the contractor's insurance policy *and* its subcontractors' policies for adding additional insureds.

Third, contractors must actually follow through administratively, including using those subcontracts and obtaining proof of additional insured status (by securing a copy of both a broker's certificate *and* a copy of the relevant portion of the subcontractor's policy). While failing to satisfy these steps is not necessarily fatal, a contractor may leave much to chance and circumstances without doing so.

UNJUST ENRICHMENT: A HIGH WIRE ACT OF UNCERTAINTY

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"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[1] In the construction context, subcontractors working on private projects have lien rights securing payment. However, it is not uncommon for subcontractors to void their lien rights inadvertently. In that scenario, when the subcontractor remains unpaid by the general contractor, because of insolvency or another reason, the subcontractor may look to the owner for payment under the theory of unjust enrichment. Whether the subcontractor will be successful pursuing that claim is another story.

The three common elements of an unjust enrichment claim are: (1) a benefit conferred, (2) awareness by the recipient that it received the benefit, and (3) that it would be unjust to allow the recipient to retain the benefit without requiring payment.[2] In construction disputes, the first two elements are almost always satisfied: owners receive benefits from the materials and services the subcontractor provides and owners are generally aware they are receiving those benefits. The key issue in almost all construction disputes involving unjust enrichment is whether the owner's retention of the benefit without payment would be "unjust." In other words, what makes enrichment unjust?

Generally, any one of the following three factors makes enrichment unjust: "'(1) the plaintiff had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; or (3) society's reasonable expectations of security of person and property would be defeated by non-payment.'"[3] In the construction context, however, the subcontractor must have exhausted its remedies against the general contractor for an owner to be unjustly enriched. For example, in *Tum-A-Lum Lumber v. Patrick*, 95 Or App 719 (1989), the plaintiff was a material supplier for the construction of a barn on the defendant's property. The general contractor ceased working on the project, and the owner would not pay for the materials provided for the project. The material supplier sued the owner for unjust enrichment. In reviewing the claim, the Court observed as follows:

> In order to state a claim for unjust enrichment, a complaint must contain allegations that the 'enrichment' was 'unjust.' The mere fact that a benefit was

[1] Restatement of Restitution (1937), § 1.

[2] *Grimstad v. Knudson*, 283 Or App 28, 42 (2016) (quoting *Winters v. County of Clatsop*, 210 Or App 417, 421 (2007)).

[3] *Id*. (quoting *Cron v. Zimmer*, 255 Or App 114, 130 (2013))

> conferred is insufficient. On facts similar to those alleged by plaintiff, a majority of courts have held that, before recovery can be obtained against the landowner, the furnisher of the materials must have exhausted all remedies against the contractor and still remain unpaid.
> We adopt the majority rule and hold that, under facts such as pled here, a material element that must be alleged and proved for a claim of unjust enrichment to succeed is that the remedies against the contractor were exhausted. * * * [A] furnisher of materials must exhaust all remedies against the contractor before the 'enrichment' can be 'unjust.'[4]

Thus, before an owner's enrichment will be considered "unjust," the unpaid subcontractor must first "exhaust" its remedies against the general contractor.

What is exhaustion of remedies?

At one end of the spectrum, courts hold that simply naming the general contractor in the lawsuit is not exhaustion.[5] Beyond that, however, Oregon courts have yet to rule on what it means to "exhaust" remedies. Nevertheless, the two primary authorities cited by the courts in *Tum-A-Lum Lumber*, *Idaho Lumber*, and *Paschall* provide some guidance.

The court in *Idaho Lumber* adopted the same exhaustion requirement and found it satisfied by the general contractor's bankruptcy:

> Idaho Lumber furnished labor and materials, benefitting the property of Buck [the owner] with whom it had no privity of contract. Idaho Lumber then brought suit against Walker [the general contractor], with whom it did have a contract, but was thwarted by Walker's subsequent bankruptcy. Therefore, Idaho Lumber may maintain an action in quasi-contract against Buck to recover the benefit unjustly retained, so long as the essential elements of quasi-contract are present.[6]

Similarly, the court in *Paschall* found the same exhaustion requirement satisfied by the general contractor's bankruptcy.[7] The question remains, however, whether the remedies are "exhausted" at the filing of the bankruptcy petition or must the supplier or subcontractor pursue their claims to completion in the bankruptcy proceeding prior to seeking payment from the owner. Again, while there is no Oregon case on point, other jurisdictions have addressed this issue. For example, in *UTCO Associates LTD. v. Zimmerman*,[8] the Court confirmed an aggrieved subcontractor under Utah law would have to see the bankruptcy proceeding through to the end before it could assert its unjust enrichment claim against the owner unless pursuit of a claim in bankruptcy would, "'in all likelihood, be fruitless.'"[9]

The substantive principles distilled from *Idaho Lumber*, *Paschall*, and *UTCO*, are as follows: (a) it is not unjust for an owner to retain

[4] *Tum-A-Lum*, 95 Or App at 721-22 (citing *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P2d 647 (1985) and *Paschall's, Inc. v. Dozier*, 219 Tenn 45, 407 SW2d 150 (1966)). *See also Star Mountain Ranch v. Paramore*, 98 Or App 606, 610-11 (1989) ("[A] supplier cannot state a claim for unjust enrichment against a landowner unless the supplier first exhausts all the remedies that it may have had against the contractor").

[5] L.*S. Henriksen Construction, Inc. v. Shea*, 155 Or App 156 (1998).

[6] 701 P2d at 655-56.

[7] 407 SW2d at 152 (noting the person ordering the materials "was adjudicated a bankrupt"); *id.* at 155-56 (remanding "to determine whether or not the defendant [owner] has been so unjustly enriched at the detriment of the complainant [subcontractor] so as to require him to make compensation therefor").

[8] 419 Utah Adv. Rep 7, 27.P3d 177 (2001).

[9] *UTCO*, 27 P3d 177 at 181 (citing *Knight v. Post*, 748 P2d 1097, 1099 (1988)).

the benefit of a subcontractor without payment *unless* the subcontractor cannot obtain payment from the general contractor; and (b) the general contractor's bankruptcy exhausts the subcontractor's remedies against it where pursuit of the claim in bankruptcy would be fruitless. Viewed in this light, the exhaustion requirement has a practical element: in order for the owner to be unjustly enriched, the subcontractor must have no practical remedy against the general contractor.

Does exhaustion include pursuing lien rights?

Again, the issue is unsettled in Oregon. The Court in *Tum-A-Lum Lumber* references lien rights and exhaustion in an ambiguous manner. The *Tum-A-Lum Lumber* opinion states the plaintiff "could have filed a construction lien against defendants' property pursuant to ORS 87.001, *et seq.*" and then notes that "plaintiff did not sue the contractor or file a lien against the property," which "clearly establishes that plaintiff did not exhaust its remedies against the contractor."[10] This suggests the Court in *Tum-A-Lum Lumber* equated a failure to properly perfect a construction lien with a failure to exhaust available remedies. However, the Court's observations were relegated to a series of footnotes. Had the Court desired to equate a failure to perfect a construction lien with a failure to exhaust available remedies it could easily have done so in clear simple language: the issue of exhaustion and lien rights was squarely before the Court. Further, the Court made clear that, before proceeding against the owner in unjust enrichment, the subcontractor was required to exhaust its remedies "against the contractor." A lien foreclosure claim is not necessarily a remedy against the contractor. While a general contractor would be a necessary party to a lien foreclosure action by an aggrieved subcontractor[11], the foreclosure claim itself is not against the contractor *per se*—the lien simply serves as a security device if the claimant otherwise proves its entitlement to recovery of amounts owed by the contractor. Should the sale of the property upon foreclosure satisfy the amounts owed the aggrieved subcontractor, no further recovery would take place against the contractor. Thus, whether an element of a subcontractor's unjust enrichment claim includes pursuit of lien rights is unsettled under Oregon law and the subject of continued litigation.

Is payment to the general contractor an element of the unjust enrichment claim or a defense?

Perhaps the most commonly asserted fact—in cases where it is a fact— is the issue of owner's payment. Specifically, where the owner already paid the general contractor for all, or at least a substantial part of, the amount due, does equity require the owner to pay twice? Related to this issue is who has the burden to prove payment: does the subcontractor need to prove that the owner did *not* pay the general contractor or does the owner need to prove that they *did* pay the general contractor?

Not surprisingly, there is no clear answer to these issues under Oregon law. National authorities suggest the owner's full payment to the general contractor defeats an unpaid subcontractor's unjust enrichment claim, but a partial payment does not.[12] The requirement for

[10] 95 Or App at 721, fn. 2, 722, fn. 4.

[11] ORS 87.060(7).

[12] *See e.g., Nation Elec. Contracting, LLC v. St. Dimitrie Romanian Orthodox Church*, 144 Conn App 808, 74 A3d 474 (2013) (affirming unjust enrichment verdict for subcontractor's unpaid work despite owner's partial payment to general contractor); *Ontiveros Insulation Co., Inc. v. Sanchez*, 129 NM 200, 3 P3d 695 (N.M.Ct.App.2000) (holding that, where homeowners had not paid a very "substantial amount" of funds due to a general contractor, the subcontractors could pursue quasi-contractual relief against the homeowners); *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So2d 383, 388 (Fla. Dist. Ct. App. 1997), as modified on clarification (June 4, 1997) (noting that "while it may be unjust that a subcontractor was not paid for its services, that injustice was not visited upon the subcontractor by the owner who paid the general contractor in full, but by the general contractor who hired the sub"); *Flooring Systems, Inc. v. Radisson Group, Inc.*, 160 Ariz 224, 772 P2d 578 (1989) (affirming unpaid subcontractor's unjust enrichment claim where owner withheld $25,000 in retainage); *Federal Land Bank of New Orleans v. Jones*, 456 So.2d 1 (1984)(affirming unpaid subcontractor's unjust enrichment

full payment makes sense because in a partial payment scenario, the owner is retaining a benefit it otherwise agreed to pay for. No published Oregon opinion has decided this issue.

As noted above, the third element of an unjust enrichment claim is that "'it would be unjust to allow the recipient to retain the benefit without requiring her to pay for it.'"[13] This element does not indicate whether an owner's payment to the general contractor is an element of the claim. However, if the owner already paid for the improvement, it may not be unjust for him to retain the benefit without paying again for the same improvement: "unjust enrichment claims distill to the issue of the 'acquisition or retention' of property under circumstances where injustice would result if the defendant was not forced to return the property to the plaintiff."[14]

Nevertheless, Oregon is no stranger to requiring an owner to pay twice for the same work.[15] Further, to require the subcontractor to prove the negative, *i.e.*., that the owner did not pay the general contractor, raises an almost insurmountable obstacle to the subcontractor's recovery. Typically, a subcontractor would not be aware of whether the general contractor was paid, in part, in full, or not at all. It would be next to impossible for the subcontractor to prove this negative fact because they do not traditionally have access to those payment documents.

Where the substantive law does not dictate which party has the burden of proof on an issue, Oregon Courts consider the following factors when allocating the burden of proof:

> 1. Precedent; 2. Whether the facts are within the peculiar knowledge of a party; 3. Whether the party has the burden of pleading the affirmative allegation; 4. Upon whose case is the existence of the fact essential; 5. Probability. The extent to which a party's contention departs from conduct which would be expected in the light of ordinary human experience; 6. Whether disfavored contentions (fraud, contributory negligence, statute of limitations, truth in defamation) should be handicapped; 7. In case of a statute, whether the application of the statute is essential to a party's right to recover; 8. In case of a statute, the policy which the statute aims to effect; 9. Timing. Whether matters occurring after the accrual of a cause of action should be treated as affirmative defenses; 10. Whether the burden should be imposed upon the one who pleads the facts; 11. Whether the burden should be imposed on the one who invokes the judicial remedy.[16]

Issues over whether owner's full or partial payment is an element of the unjust enrichment

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claim where owner made two out of three disbursements to general contractor); *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. Ct. App. 1984) ("In resolving the issue whether a landowner has been unjustly enriched by a subcontractor's improvements on the owner's real estate, the courts have repeatedly looked to whether the landowner has already paid the general contractor the amount due the general contractor under their express contract. * * * If the owner has indeed paid the general contractor for the materials, the owner's retention of them without further payment has been found not to constitute unjust enrichment") (internal citations omitted); *Holiday Dev. Co. v. J.A. Tobin Constr. Co.*, 219 Kan. 701, 549 P.2d 1376, 1383 (1976) (explaining, in an analogous unjust enrichment case, that "the prime contractor may already have been paid in full by the owner for the improvements furnished by the subcontractor or materialman and there really is no unjust enrichment"); *Paschall's, supra.* 219 Tenn 45, 57, 407 SW2d 150, 155 (observing in conclusion that the "most significant requirement" for an unjust enrichment claim was whether the owner already paid for the work: "if the landowner has given any consideration to any person for the improvements, it would not be unjust for him to retain the benefit without paying the furnisher").

[13] *Grimstad, supra.*

[14] *Id*., 283 Or App at 44.

[15] *See* ORS 87.023.

[16] *Nelson v. Hughes*, 290 Or 653, 658-59 (1981).

claim or defense and who has the burden to prove payment will be hotly contested.

Conclusion

Obviously, the unpaid subcontractor's best option for recovery is to perfect and pursue its lien rights timely. Where that is not possible, and the general contractor is insolvent or otherwise a fruitless source of recovery, the subcontractor may look to the owner for payment under a theory of unjust enrichment. Whether a subcontractor will be successful is uncertain. However, one thing is certain: until the Oregon courts resolve the issues outlined above, uncertainty will breed further disputes.

A GUIDE TO CONSTRUCTION CONTRACTORS BOARD BONDS AND BOND CLAIMS

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All contractors licensed with the Oregon Construction Contractors Board ("CCB") must provide a surety bond (also referred to as a license bond) as a condition of obtaining and renewing their CCB license. Because of the relatively low bond amounts required for a CCB license and regulations regarding how much a claimant may receive from a CCB license bond, the CCB license bond is often overlooked as a means to collect money from a contractor. However, in my experience, complaints against a CCB license bond can be effective means to collect from a contractor. That is partly because of the effect that an unpaid judgment can have on a contractor's CCB license. This article addresses CCB license bond requirements, the CCB complaint process (which must be followed to secure the right to payment from a CCB license bond), and how to leverage an unpaid judgment against a contractor licensed with the CCB into payment.

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A. Background on Licenses and Bonds.

1. What is a license bond?

A license bond is a type of surety bond required by a governmental entity as a prerequisite to receiving a specific business license. A surety bond is a promise by a surety or guarantor to pay one party (the obligee) a certain amount if a second party (the principal) fails to meet some obligation, such as failing to fulfill the terms of a construction contract. A surety bond protects the obligee against losses resulting from the principal's failure to meet the obligation. A license bond serves as a contract between three parties: (1) the principal (*e.g.*, a contractor performing construction work pursuant to its contractor's license); (2) the obligee (*e.g.*, the governmental agency, such as the CCB, which requires the license bond, for the benefit of persons who have filed a timely complaint against a contractor's license bond and receive a judgment against the contractor); and (3) the surety (*i.e.*, the company that issues the bond and ensures that the principal's obligations will be performed). If the obligations of the contractor are not met, the CCB may order that the surety pay the complainant.

A license bond is different than an insurance policy. A license bond is security that the contractor will fulfill its contractual obligations. A CCB license bond generally covers breach of contract and negligent and improper work performed by the licensed contractor. The purpose of a CCB license bond is to help ensure that a contractor licensed with the CCB pays a final order issued by the CCB to pay damages to a complainant. If the contractor fails to do so, the complainant may receive some or all of its damages from contractor's CCB license bond. If a surety makes payment to a CCB complainant because the contractor failed to pay a final order issued by the CCB, the contractor is required by its contract with the surety to repay the surety for the losses incurred by the surety.

Contractors are often surprised to find out that, contrary to their liability insurance policy, if the surety pays a CCB award for damages the

surety will expect to be reimbursed in full by the contractor. To the extent the surety incurs attorney's fees in obtaining reimbursement from the contractor, its contract with the contractor will also likely permit the surety to recover its attorney's fees from the contractor. In addition, if the contractor is a corporation or LLC, the surety will likely require at least one personal guaranty from the owners or members of the entity.

2. Bond Amounts Differ for Commercial and Residential Contractors

Commercial contractors in Oregon are required to provide a CCB license bond in the amount of $75,000, $50,000, or $20,000 – the amount depends upon the contractor's commercial endorsement classification at the CCB (*i.e.*, Commercial General Contractor Level 1, Commercial Specialty Contractor Level 1, Commercial General Contractor Level 2, Commercial Specialty Contractor Level 2, and Commercial Developer).

Residential contractors in Oregon are required to provide a CCB license bond in the amount of $20,000, $15,000, or $10,000 – the amount depends upon the contractor's residential endorsement classification at the CCB (*i.e.*, Residential General Contractor, Residential Specialty Contractor, or Residential Limited Contractor).

Contractors licensed at the CCB with both a commercial endorsement and a residential endorsement are required to provide two CCB license bonds – one for their commercial endorsement and one for their residential endorsement. The CCB can also require contractors under certain circumstances to provide an increased license bond up to five times the amount otherwise required for the category of license chosen at the CCB. Those circumstances include a business or owner of a business that has unpaid debts under a final order, arbitration award or determination of the CCB.

3. Residential vs. Commercial Endorsements

Contractors with only a Residential endorsement at the CCB may work on any residential or small commercial structure or project in Oregon. For purposes of CCB license endorsements and complaints against CCB license bonds, "residential" includes residential structures and small commercial structures. A "Residential Structure" is defined as: a site built home; a structure that contains one or more dwelling units and is four stories or less above grade; a condominium, rental residential unit or other residential dwelling unit that is part of a larger structure (if the property interest in the unit is separate from the property interest in the larger structure); a modular home constructed off-site; a manufactured dwelling; and a floating home.

A "Small Commercial Structure" is defined as: a nonresidential structure that has a ground area of 10,000 square feet or less, including exterior walls, and 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; a nonresidential leasehold, rental unit, or other unit that is part of a larger structure, if the unit has a ground area of 12,000 square feet or less, excluding exterior walls, and a height of not more than 20 feet from the top surface of the lowest flooring to the highest interior overhead finish of the unit; or a nonresidential structure of any size if the contract price for all construction to be performed on the structure as part of a construction project does not total more than $250,000.

Contractors with only a Commercial endorsement at the CCB may work on any Small Commercial Structure or large commercial structure or project in Oregon. For purposes of CCB license endorsements and complaints against CCB license bonds, commercial includes Small Commercial Structures (as defined above) and large commercial structures. Large Commercial Structure is defined as a structure that is not a Residential Structure or a Small Commercial Structure.

If a contractor has a Residential endorsement with the CCB, their CCB license bond is available only for payments ordered by the CCB involving Residential or Small Commercial Structures or for the development of property zoned for or intended for use compatible with Residential or Small Commercial Structures. If a contractor has a Commercial Endorsement with the CCB, their CCB license bond is only available for payments ordered by the CCB involving Small or Large Commercial Structures or the development of property zoned or intended for use compatible with Small or Large Commercial Structures.

If a contractor has both a Residential and a Commercial endorsement with the CCB (thus, they have 2 license bonds on file with the CCB), the license bond for their Residential endorsement is available only for payments ordered by the CCB involving Residential or Small Commercial Structures and the license bond for their Commercial endorsement is only available for payments ordered by the CCB involving Small or Large Commercial structures.

The CCB has separate procedures with respect to filing complaints against a contractor's license bond depending upon whether the complaint is against a residential or commercial bond. In general, complaints against residential license bonds are first filed at the CCB on a CCB complaint form and then filed in court. The procedure for complaints against commercial license bonds requires that the complainant first file a lawsuit and then file a CCB complaint form with the CCB and the surety. The distinction between the two procedures is important and failure to follow the proper procedure could result in dismissal of the complaint by the CCB and loss of the ability to access the license bond.

B. Complaints Against CCB License Bonds.

In order to secure the right to receive payment from a CCB license surety bond, the complainant must file a timely complaint against the contractor at the CCB. But, because the CCB no longer adjudicates complaints in house, the complainant must also file a complaint in court, arbitration, or, in certain circumstances, at the Oregon Bureau of Labor & Industries (BOLI) against the contractor. That is because only Oregon court judgments and BOLI final orders are payable from a contractor's CCB license bond. The process to secure the right to receive payment from a CCB license bond, and the requirements regarding the filing of the CCB complaint and lawsuit/BOLI complaint, differ depending upon the type of property that is the subject of the complaint (*i.e.*, Residential or Commercial) and whether the contractor has a Residential or Commercial endorsement at the CCB.

1. Parties Who Have the Right to Receive Payment From a CCB License Bond

The following parties may receive payment from a contractor's CCB license bond:

1. Property owners who allege breach of contract, negligence, or improper work;
2. Property owners who expended funds in discharging a construction lien;
3. Employees alleging non-payment of wages;
4. Suppliers alleging non-payment for materials sold;
5. Subcontractors alleging non-payment for labor or materials provided; and
6. Primary contractors alleging breach of contract, negligence, or improper work.

2. Pre-Complaint Notice

Before filing a CCB complaint, all complainants must provide notice of their intent to file a CCB complaint to the contractor. The pre-complaint notice must be sent via certified mail to the contractor's last known address at the CCB at least 30 days before they file their CCB complaint. There are no regulations with respect to what must be included in the pre-complaint notice other than notifying the contractor that the complainant

intends to file a CCB complaint against the contractor. Please note that if a complainant follows the CCB complaint process for the resolution of complaints involving work on Residential structures or certain small commercial structures they do not have to also abide by Oregon's Notice of Defect law.

3. Deadlines To File CCB Complaints

In order to secure the right to receive payment from a CCB license bond, the complainant must file their complaint with the CCB in a timely manner. All complainants must use the complaint form provided by the CCB (which you can find on the CCB website). It is important to note that a party cannot access a contractor's CCB license bond if the contractor was not actively licensed with the CCB for at least part of the time they were working on the subject project. If the complainant fails to file their complaint with the CCB within the following deadlines, they will lose their right to receive payment from the contractor's CCB license bond. The below deadlines apply to complaints against Residential bonds and Commercial bonds.

1. For work relating to new structures, property owners must file their CCB complaint within one year from the date the new structure was first occupied or within two years of substantial completion of the structure, whichever is earlier;
2. For work relating to existing structures, property owners must file their CCB complaint within one year of substantial completion of the work;
3. Employees must file their CCB complaint within one year from the date the wages were earned;
4. Suppliers must file their CCB complaints within one year of the date the materials were sold;
5. Subcontractors must file their CCB complaints within one year from the date their work was completed;
6. Primary contractors must file their CCB complaints relating to new structures within 14 months from the date the structure was first occupied or two years after substantial completion of the structure, whichever is earlier;
7. Primary contractors must file their CCB complaints relating to existing structures within 14 months from the date the subcontractor substantially completed work.

Complaints against a CCB commercial bond must be filed with the CCB and the contractor's bonding company before a court judgment is issued or a BOLI hearing is held. Complaints against a CCB residential bond can be filed with the CCB either before or after filing in court. However, the timing of the filing of a complaint at the CCB may affect the complainant's priority against a CCB license bond. As such, it is recommended that complaints against residential bonds be filed at the CCB before they are filed in court and that complaints against commercial bonds be filed with the CCB (and the contractor's bonding company) as soon as possible after filing in court. The CCB may charge a $50 processing fee to administer the complaint. The CCB will notify the complainant sometime after the complaint has been filed with the CCB if the complaint is within the CCB's jurisdiction and if the complainant is required to pay the $50 processing fee.

4. CCB On-site Meeting for Residential Complaints

For complaints involving Residential Structures or certain Small Commercial Structures, the CCB may schedule one or more on-site meetings or telephone mediations between the complainant and respondent for the purpose of reviewing the complaint items and discussing settlement of the complaint. If the complainant has already filed a complaint against the contractor in court, the CCB generally will not schedule an on-site meeting unless both parties agree to and request such a meeting. That is one of the reasons why parties who file CCB complaints against Residential contractors often wait to file a lawsuit against the contractor until after the CCB on-site

meeting. The CCB generally does not hold on-site meetings for complaints against CCB Commercial contractors.

Most of the CCB on-site meetings involve complaints filed by Residential property owners. CCB complaints are often settled at the CCB on-site meeting. Sometime after the complainant files their CCB complaint involving Residential property, the CCB will arrange for a CCB mediator to facilitate the on-site meeting, view the complaint items, and attempt to resolve the complaint. The CCB does not charge the parties for the services of the CCB mediator. If settlement is reached, the CCB mediator will usually draft the Settlement Agreement while still on site. If settlement is not reached at the CCB on-site meeting, the CCB mediator generally issues an investigation report which includes their observations and opinions. If the complaint is not settled at the CCB on-site meeting, the complainant must go to court and obtain a judgment against the contractor in order to secure the right to receive payment from the contractor's CCB license surety bond.

CCB on-site settlement agreements may require the contractor to pay money to the complainant or perform repairs or additional work as consideration for the settlement. This author is generally wary of CCB settlements that require the contractor to perform repairs or additional work. While the CCB mediator may assist the parties after an on-site settlement agreement has been reached with regard to repairs or additional work performed as consideration for the settlement, it is generally preferable (especially for the complainant) that the settlement not require the contractor to perform repairs or additional work. Settlement agreements drafted by a CCB mediator often state that the settlement is deemed to be a substituted agreement—meaning that if one party believes the other party to the CCB settlement agreement failed to fulfill their duties and obligations under the CCB settlement agreement they may only be able to sue the breaching party for breach of the settlement agreement (and not pursuant to the underlying construction contract).

5. Complaint Process if Matter Not Settled at CCB Onsite Meeting

If a CCB complaint is not resolved at the CCB onsite meeting, the complainant must obtain a judgment in court (pursuant to small claims or circuit court judgment or an arbitration or BOLI award) against the contractor in order to secure the right to receive payment from the contractor's CCB license surety bond. The complainant must file a certified copy of the judgment against the contractor within 30 days of the final judgment.

If the complaint involves Residential or Small Commercial Property, the complainant could receive a court judgment against the contractor before they file their CCB complaint, but if they file in court before filing their CCB complaint, the complainant may lose priority against the contractor's bond. As such, this author generally recommends that if the complaint involves Residential or Small Commercial Property that the complainant file a complaint against the contractor at the CCB before they file a lawsuit or initiate arbitration. By doing so, the complainant may also have the opportunity to participate in the CCB's on-site investigation/mediation process.

6. Priorities and Limits against CCB License Surety Bonds

Priorities against CCB license bonds are different for residential and commercial bonds. For both residential and commercial bonds, the first complaint filed in a timely manner with the CCB establishes a priority period for all complaints filed against a contractor's CCB license bond within 90 days of the first complaint filed against a contractor at the CCB. Thereafter, priorities as to residential and commercial CCB license bonds are specified below.

<u>Priorities for CCB Residential license bonds</u>:

1. Complaints filed by owners of Residential and Small Commercial Structures against Residential contractors have payment priority to the full extent of the bond over all

other types of complaints received by the CCB in any 90 day period.

2. If all complaints filed by owners of Residential or Small Commercial Structures do not exhaust the contractor's Residential bond, the bond is available for payment for all other types of complaints relating to Residential or Small Commercial Structures. However, the total amount paid from any one Residential bond for non-owner complaints may not exceed $3,000. In addition, if there are multiple non-owner complaints filed within the 90 day period, the $3,000 is pro-rated between the non-owner complaints. Subcontractors and suppliers are often surprised to learn that the most they can get from a CCB residential bond is $3,000 (or less if there are multiple complaints filed within the 90 day period).
3. If the total amount payable for complaints that were filed within the 90 day period does not exceed the amount of the bond available for payment, the bond is available for the payment of complaints filed in subsequent 90 day periods (in the same priority as specified above).

Priorities for CCB Commercial license bonds:

1. Complaints filed by persons furnishing labor to a Commercial contractor or amounts owed by a Commercial contractor for employee benefits have payment priority to the full extent of the Commercial bond over all other types of CCB complaints.
2. If complaints for labor or employee benefits do not exhaust the bond, then amounts due as a result of all other types of Commercial complaints may be satisfied from the bond.
3. If complaints for labor, employee benefits, and all other types of Commercial complaints do not exhaust the bond, then complaints for costs, interest and attorneys fees resulting from Commercial complaints may be satisfied from the bond (costs, interest, and attorney's fees are not available from Residential bonds).
4. If the total amount payable for complaints that were filed within the 90 day period does not exceed the amount of the bond available for payment, the bond is available for the payment of complaints filed in subsequent 90 day periods (in the same priority as specified above).

C. CCB Can Suspend Contractors Who Have Unpaid Construction Debt.

While the license bond amounts required by the CCB for purposes of obtaining a CCB license are fairly low and may not be enough to satisfy one or all complaints on a particular project, there may still be reason for a person to utilize CCB regulations to assist with the recovery of damages from a contractor. That is, if a contractor has unsatisfied construction debt (defined as an amount owed under a judgment, arbitration award, or civil penalty that has become final by operation of law arising from construction activities within the United States), the CCB may revoke or suspend the contractor's CCB license. Furthermore, if the CCB were to revoke or suspend a contractor's license for failure to pay construction debt, such action may also cause the CCB to suspend or revoke other CCB licenses held by the owners, officers, and members of the entity that failed to pay the construction debt.

Failure to satisfy construction debt may also cause the CCB to refuse to issue a new license to any owners, officers, or members of the CCB licensee who had unpaid construction debt. As such, persons involved with a construction business that fails to pay construction debt that was incurred while they were part of the business may not be able to obtain a new CCB license (as an owner, officer, or member) until the construction debt from their prior construction

business has been satisfied (assuming the debt wasn't discharged in bankruptcy).

This author has had success assisting clients with the collection of damages from a contractor because the CCB suspended, or threatened to suspend, the contractor's CCB license as a result of them failing to pay construction debt. When faced with the possibility of having their CCB license suspended, or being unable to obtain a new CCB license, because of unpaid construction debt, a number of contractors have satisfied their construction debt so as to avoid having their license suspended by the CCB. If its license is suspended by the CCB, the contractor cannot legally perform work as a contractor in Oregon and can be penalized by the CCB if it is caught performing construction work in Oregon without a license. In addition, a contractor cannot commence a lawsuit or arbitration for the performance of construction work or file a construction lien if it was not licensed with the CCB while performing the work for which it seeks compensation.

With respect to the CCB refusing to issue a new license to a person or entity who has unpaid construction debt, the CCB application form requires all applicants to provide information on their Oregon licensing histories and their licensing history in other states. Said information must include the Oregon and other state licensing histories for any person associated with the applicant who is, or has been, involved as an owner, partner, officer, or member in a construction business located in Oregon or another state. As such, the CCB may refuse to issue a license to an applicant if they had unpaid construction debt, whether the debt arose in Oregon or in another state.

CCB regulations require that a contractor send to the CCB a copy of a final judgment entered by a circuit court in Oregon, or by an equivalent court in another state, if the judgment orders the contractor to pay damages that arise from breach of contract or negligent or improper work and that relate to construction or proposed construction of a Residential structure (but, remember the broad definition of Residential). The contractor must deliver a copy of the judgment to the CCB no later than 45 days after the final judgment was entered, unless they pay the final judgment within 30 days from the date the judgment was entered. The CCB regulations further state that in determining whether to impose a disciplinary sanction for failure to report a final judgment, the CCB shall give due consideration to any past or current attempts by the contractor to make payments toward satisfaction of the judgment.

In this author's practice, if a client is granted a judgment against a contractor licensed with the CCB (whether the judgment is issued in Oregon or another state), this author normally sends a letter to the contractor shortly after the judgment has been entered notifying them of the CCB regulations which require them to send a copy of the unpaid judgment to the CCB. This letter also informs them that the CCB may revoke or suspend their CCB license (or refuse to issue a new license to them) if the licensee owes construction debt, and that their failure to satisfy the construction debt will also likely affect any other CCB licenses held by the owners, officers, or members of the licensee. The letter generally closes by notifying the contractor of the date by which the judgment must be paid (*i.e.*, 30 days after it becomes final), the 45 day deadline by which they are required to notify the CCB if the judgment remains unpaid, and that we will promptly notify the CCB of the unpaid judgment if it has not been paid by the 45 day deadline.

If the contractor has not paid the construction debt within 45 days after the judgment becomes final, the claimant should notify the CCB of the judgment. Upon such notice, the CCB generally moves fairly quickly to take the steps to revoke or suspend the contractor's CCB license. Otherwise, the claimant should reach out to them and inquire as to what actions they are taking with regard to the unpaid construction debt and remind them of their rules and laws regarding unpaid construction debt.

D. Summary

The CCB complaint process can be an effective and efficient way to collect damages from a contractor licensed with the CCB. Even though a contractor's CCB license bond may not be enough to satisfy the damages stemming from their breach of contract or negligent or improper work, one should not overlook the CCB and CCB complaint process as a means for collecting from a contractor licensed with the CCB. In addition, the CCB on-site investigation/mediation process provides an inexpensive way for the resolution of complaints relating to Residential and Small Commercial Structures.

If a CCB licensee has unpaid construction debt, in most cases they will need to satisfy it if they or the licensee's owners, partners, officers, or members desire to operate as a licensed contractor in Oregon. If they fail to satisfy the construction debt in a timely manner, they risk having their CCB license revoked or suspended. The CCB could also refuse to issue a new contractor's CCB license, or renew an existing contractor's license, for failure to satisfy unpaid construction debt. That may be enough leverage to get your client paid even if the contractor's CCB license bond was not sufficient to satisfy the damages awarded against a licensed contractor in Oregon.

THE 2011 AMENDMENTS TO THE CONSTRUCTION CONTRACTORS BOARD DISPUTE RESOLUTION PROCEDURE ARE HERE TO STAY

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From its inception in 1971, the Oregon Construction Contractors Board ("CCB") has operated a dispute resolution services program in which agency staff facilitate the resolution of disputes between licensed contractors and their customers. Prior to 2011, complaints filed with the CCB against licensed residential and small commercial contractors had a two-step procedure:

1. An on-site investigation and a CCB facilitated mediation; and
2. If any party was dissatisfied with the results of the mediated resolution, a hearing was conducted through the Office of Administrative Hearings ("OAH").

The CCB, itself, was responsible for all of the costs associated with the OAH hearing process.

The CCB derives approximately 78% of its funding from licensing fees. The remaining sources of funding come from education (approximately 11%), and civil penalties (approximately 9%, with 80% of penalties going to the State General Fund).

In 2011, the CCB was facing a budget shortfall of approximately $1.3 million due to a significant drop in the number of construction contractor licenses. In response to the financial struggles of the CCB, and other state agencies, Senate Bill 939 was signed into law. Senate Bill 939 significantly modified the CCB dispute resolution services program. One of the biggest changes to the program was the elimination of CCB funded OAH hearings. Effective July 1, 2011, ORS 701.145(5), entitled resolution of complaints involving work on residential structures or certain small commercial structures, was amended. It now provides that if a dispute is not resolved through CCB sponsored mediation efforts, the complainant must file a circuit court action or arbitration against the contractor. This is the process detailed by Van White, in his preceding article in this Issue:

- A pre-complaint notice is mailed to the contractor;
- A complaint is timely filed with the CCB against a licensed residential or small commercial contractor;
- The CCB reviews the complaint and determines if it has authority;
- If the CCB has authority to process the complaint, it requests a processing fee;
- An on-site meeting occurs;

- CCB staff attempt to mediate the dispute;
- If mediation fails, complainant must obtain a court judgment or an arbitration award;
- Complainant then timely submits the court judgment or arbitration award to the CCB, and the contractor or contractor's surety is responsible for payment.

There were two other significant impacts of Senate Bill 939. First, the repeal of ORS 701.148, which previously allowed the CCB to require that OAH hearings were held as arbitrations. Second, the repeal of ORS 87.058, which previously allowed a property owner to obtain a stay of a construction lien foreclosure action by filing a complaint with the CCB, under certain circumstances.

Notably, Senate Bill 939 contained sunset provisions, providing that the pre-2011 two-step dispute resolution process, including OAH hearings, would be reinstated on July 1, 2017. Apparently, the rationale for the sunset provisions was the optimistic expectation that by 2017 the CCB would again have adequate revenues to reinstate its previous dispute resolution process. However, despite CCB revenues reaching stability in 2014, they have not risen substantially since. From 2009 through 2011, the CCB had 43,000 licensees, a budget of $15.1 million, and 80 employees. From 2015 to the present, the CCB has 35,000 licensees, a budget of $14.4 million and 62 employees.

Despite the CCB's continued financial struggles, it appears as though the amended dispute resolution process is more effective than its pre-2011 predecessor. According to the CCB, the new process resulted in a higher percentage of claims being settled, and a higher percentage of settlement awards ultimately paid:

- Complaints settled: Pre-2011 – 32%; Post-2011 – 35%
- Amounts Paid (% of amounts awarded): Pre-2011 – 35%; Post-2011 – 57%.

In 2016, in anticipation of the sunset provisions included in Senate Bill 939, the CCB requested legislation cancelling the restoration of its pre-2011 dispute resolution procedures. The result was House Bill 4121, which took effect January 1, 2017, and makes permanent the amendments introduced in Senate Bill 939. In support of the bill, the CCB cited the positive increases in settlements for aggrieved complainants, a greater incentive for parties to settle, and stated candidly, that it simply lacked sufficient revenue to return to the old process.

ANTI-ASSIGNMENT CLAUSES IN CONTRACTOR INSURANCE POLICIES

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The Oregon Court of Appeals recently held in *Clinton Condominiums Owners Association v. Truck Ins. Exch.*, 282 Or App 484 (Nov. 30, 2016), that a contractor could not assign breach of contact claims against its insurer because of an anti-assignment clause in the contractor's insurance policy. The *Clinton* decision illustrates an important limitation on the use of covenant judgments. Anti-assignment clauses can prevent an insured from assigning claims against its insurer, especially in cases where there is no excess judgment.

The *Clinton* plaintiff initially filed negligence and breach of contract claims against a contractor that performed work at its condominium. The contractor tendered the plaintiff's claims to its insurer, who denied the claims. The plaintiff later settled its claims against the contractor and, as part of the settlement, the contractor assigned any claims it had against its insurer to the plaintiff. The plaintiff then filed suit against the contractor's insurer alleging breach of the contractor's policy.

The insurer moved for summary judgment on the grounds that there was an anti-assignment clause in the contractor's policy. The anti-assignment clause provided that the contractor

could not assign any claims against the insurer without the insurer's consent. In response, the *Clinton* plaintiff argued the anti-assignment clause was unenforceable under ORS 31.825, which provides "[a] defendant in a tort action against whom a judgment has been rendered may assign any cause of action that defendant has against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered."

The trial court granted summary judgment in the insurer's favor and the Court of Appeals affirmed, holding that ORS 31.825 only relates to an insured assigning excess judgment claims against its insurer. ORS 31.825 does not relate to breach of duty to defend and duty to indemnify claims where there is no excess judgment. Therefore, the anti-assignment clause in the contractor's policy was valid and enforceable by the insurer.

The *Clinton* decision comes on the heels of *Brownstone Homes Condo Ass'n v. Brownstone Forest Heights, LLC*, 358 Or 223 (2015). In *Brownstone*, the Oregon Supreme Court simplified the procedural steps for an insured to enter into a valid assignment and covenant judgment. *Brownstone* did not address, however, the related question of whether an anti-assignment clause can prevent an insured from assigning its claims against its insurer at all.

Clinton is instructive. The text of the insured's policy and the amount of the covenant judgment should be considered as part of any assignment. In many cases, the text of an insured's policy will prohibit the insured from assigning claims against its insurer. If that is the case, an assignment may not be valid unless there is an excess judgment against the insured and the insured can assign its claim pursuant to ORS 31.825.

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THE STATUTE OF REPOSE FOR "LARGE COMMERCIAL STRUCTURES"

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In 2009, the legislature amended ORS 12.135 to provide for two statutes of ultimate repose for claims arising out of construction services: a 6-year ultimate repose period for "large commercial structures," and a 10-year ultimate repose period for all other structures. ORS 12.135(1) (2009) provides as follows:

> An action against a person by a plaintiff who is not a public body, whether in contract, tort or otherwise, arising from the person having performed 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, must be commenced before the earliest of:
> (a) The applicable period of limitation otherwise established by law;
> (b) Ten years after substantial completion or abandonment of the construction, alteration or repair of a small commercial structure, as defined in ORS 701.005, a residential structure, as defined in ORS 701.005, or a large commercial structure, as defined in ORS 701.005, that is owned or maintained by a homeowners association, as defined in ORS 94.550, or that is owned or maintained by an association of unit owners, as defined in ORS 100.005; or
> (c) Six years after substantial completion or abandonment of the

> construction, alteration or repair of a large commercial structure, as defined in ORS 701.005 other than a large commercial structure described in paragraph (b) of this subsection.

Prior to this amendment, ORS 12.135 provided only one statute of ultimate repose, which was "10 years from substantial completion or abandonment of such construction, alteration or repair of the improvement to real property." *Waxman v. Waxman & Associates, Inc.*, 224 Or App 499 (2008) (analyzing ORS 12.135 (2004)).
To assist design professionals, contractors, and property owners in applying the 2009 amendment, the legislature included a note providing that the amendments "appl[ied] only to causes of action arising on or after the effective date of this 2009 Act [January 1, 2010]." Oregon Laws 2009, Ch. 715, § 3.

This clarifying note, however, has left open debate about the statute of repose applicable to large commercial structures which where construction took place prior to January 1, 2010. Accordingly, some property owners argue that the 2009 amendments to ORS 12.135(1) apply only to claims whose underlying facts originated after January 1, 2010, that is, that the 2009 amendments do not apply to construction activities before January 1, 2010.

A "cause" in this context means "a ground of legal action * ** the presupposition or underlying facts of a transaction in civil law." WEBSTER'S THIRD NEW INT'L DICTIONARY 356 (1993) (emphasis added). *See also* Black's Law Dictionary 174 (7th ed., abridged 2000) (defining a "cause of action" as the "group of underlying facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person"). The word "arise" means "to originate from a specified source * * * of circumstances and occurrences a: to come about, b: to come up, c: to take place." *Id.* at 117.

Whipple v. Howser, 291 Or 475 (1981) is instructive. In *Whipple*, the Oregon Supreme Court analyzed the distinction between "accrued" and "commenced" in the context of a similar clause. There, the legislative note provided as follows: "This Act does not apply to an action or other proceeding commenced before the effective date of this Act." *Whipple*, 291 Or at 483. Interpreting this note, the Court in *Whipple* determined that because the legislature had omitted the word "accrued" and used "commenced," the Act would apply to any claim that had been commenced after the effective date, even if the cause of action had accrued before the effective date of the act. *Id*. at 486. In doing so, the Court noted as follows:

> Had the legislature intended that the act also apply to actions or proceedings which had "accrued" before the effective date of that act, as well as those "commenced" prior to that date, it would have been a simple matter to add the word "accrued," so as to read:
>
> 'This Act does not apply to an action or other proceeding which accrued or commenced before the effective date of this Act.'

Id.

Although the triggering language is not identical to ORS 12.135, the *Whipple* opinion highlights potential ongoing confusion regarding the application of the statute of repose to "large commercial structures" built prior to January 1, 2010. This is because dates of discovery or accrual are irrelevant to the analysis under a statute of repose, as opposed to a statute of limitations. As in *Whipple*, the matter could have been clarified had the legislature stated the 2009 amendments would apply to claims which had "accrued" after the effective date, or which were filed after the effective date.

Moreover, use of the word "arising" does not clarify whether the legislature intended to adopt "accrual" as the trigger date. The legislature

was not codifying existing case law, but was creating a new repose period that had been unknown in Oregon before then. If arise were to mean accrue, the effective date of January 1, 2010 would open numerous fact-specific determinations, because application of the discovery rule applicable in several contexts about the "accrual" of claims is almost always a question of fact for the jury. *Zabriskie v. Lowengart*, 252 Or App 543, 549 (2012) ("In this context, as in others, '[a]pplication of the discovery rule presents a factual question for determination by a jury unless the only conclusion that a jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter.'") (quoting *Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or 270, 278 (2011)).

Property owners seeking to apply a 10-year statute of repose for large commercial structures constructed prior to 2010 find further support in the argument that retroactive application of the 2010 shortened statute of repose may defy the expectations of contracting parties at the time of their work. Generally, reductions in statutes of repose and limitations are considered to apply prospectively. When large commercial structures were constructed before the relevant amendments, contracts, insurance, and risk analysis were historically based on a 10-year statute of repose. Because parties conduct business under the laws applicable to their actions at the time they make them, "the general rule expressed in this court's cases is that a statute that shortens a limitation period applies prospectively if the legislature does not express a contrary intent." *Boone v. Wright*, 314 Or 135, 139 (1992).

When this amendment was enacted in mid-2009, advance notice gave contractors, their insurance companies, their risk managers, and their lawyers several months' notice to adjust contracts, insurance premiums, and risk assessments for construction work to be performed after January 1, 2010. This also put property owners on notice that when they hired contractors going forward, the time for claims on large commercial projects would be reduced from 10 to 6 years. Thus, courts weighing the application of the 10-year ultimate repose period to large commercial structures built before the 2010 effective date may determine that a 10-year statute of repose meets the expectations of the parties involved.

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