STATE OF OREGON
CONSTRUCTION LAW COMPRENDIUM

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I. BREACH OF CONTRACT

Most construction claims are for breach of contract, both of express and of implied duties. The elements of a breach claim are: (1) the existence of an agreement, express or implied; (2) consideration; (3) performance by the plaintiff; (4) breach by the defendant; and (5) damages.

Frequently litigated contract provisions include: (1) notice; (2) site investigation; (3) waiver of rights; (4) changed condition; (5) change orders; (6) disclaimers; (7) no damages for delay; (8) scope of work; and (9) time extensions. Other claims often stem from: (1) changes in sequence; (2) late or defective owner-furnished items; (3) acceleration of performance requirements; (4) delays or suspensions in the work; (5) excessive inspections; (6) precompletion termination.

Oregon law recognizes that contracts necessarily contain implied provisions in order to “effectuate the intention of the parties.” Upper Columbia River Towing Co. v. Glens Falls Ins. Co., 179 F Supp 705, 708-709 (D Or 1959). One such provision is that neither party will injure or destroy the right of the other party to the fruits of the contract. Perkins v. Standard Oil Co., 235 Or 7, 16, 383 P2d 107, 383 P2d 1002 (1963). In addition to what is generally implied in contracts, there are provisions specific to construction contracts. For example, a contract between a general contractor and a subcontractor contains an implied affirmative duty for all parties to act in a way that does not impede progress of the job or increase the cost of performance by another party. Elte, Inc. v. S.S. Mullen, Inc. 469 F2d 1127, 1132-1133 (9th Cir. 1972).

A duty of good faith and fair dealing is implied it into every contract. See Wegroup PC v. State of Oregon, 131 Or App 346, 885 P2d 709 (1994).

II. NEGLIGENCE

The primary tort arising in construction claims is negligence. Such claims are based on an affirmative duty of the obligor to use reasonable care in performing all contractual promises. In any negligence claim in Oregon, the plaintiff must allege facts showing that the defendant “unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.” Fazzolari v. Portland School Dist. No. 1J, 303 Or 1, 17, 734 P2d 1326 (1987).

A contractual obligation to provide “workmanlike” performance in a custom construction contract does give rise to a duty in negligence to the owner. Jones v. Emerald Pac. Homes, 188 Or App 471, 478, 71 P3d 574 (2003). However, a contract in which one party gives the other authority to make important decisions on its behalf and for its benefit can create a “special relationship,” Vtech Comm. v. Robert Half, Inc., 190 Or App 81, 77 P3d 1154 (2003), but a sales agreement in which a supplier selects products does not, Moore Excavating v. Consol. Supply Co., 186 Or App 324, 63 P3d 592 (2003).

A nonprivity owner, i.e. a subsequent purchaser, can sue a builder in negligence. Harris v. Suniga, 209 Or App 410, 417, 149 P3d 224 (2006); Newman v. Tualitan Development Co., 287 Or 47, 597 P2d 800 (1979); See also Bunnell v. Dalton Construction, Inc., 210 Or App 138,
143, 149 P3d 1240 (2006) (allowing a nonprivity owner to maintain a negligent construction claim against a builder for damages to the building resulting from construction defects). The characterization of damage to a building resulting from negligent construction as property damage rather than economic loss is not affected by the purchaser’s knowledge of construction defects prior to purchasing the building. Bunnell, 210 Or App at 143-44.

A violation of OSHA regulations is not negligence per se against a homeowner because homeowners are not within the class of persons OSHA seeks to protect. Safeco Ins. Co. of America v. Olstedt Construction, Inc., 2004 WL 1050877 (D Or 2004).

Tort claims arising out of the construction of a house must be brought within two years of the date that the cause of action accrues, but, in any event, within 10 years of the house being substantially complete. Tort claims ordinarily accrue when the plaintiff discovers or should have discovered the injury. Abraham v. T. Henry Construction, Inc., 350 Or 29, 34 n.3, 249 P3d 534 (2011).

III. BREACH OF WARRANTY


A. Breach of Express Warranty

Express warranties are written assurances of fact on which a party may rely. While no particular words are required to form an express warranty, the intent to warranty must appear. Express warranties are enforced according to their terms. Oregon has not yet decided whether, in residential construction agreements and sales, express warranties can ever negate the protection implied by law. The predominant law in other states is that there must be clear and conspicuous language negating the implied warranties.

B. Breach of Implied Warranty

Several implied warranties give rise to causes of action.

i. Fitness of Plans and Specifications

Oregon adopted the Spearin doctrine (established in US v. Spearin, 248 US 132, 136 (1918)), which requires an owner to warrant that plans and specifications supplied to a contractor are adequate. Barbour & Son v. Highway Com., 248 Or 247, 257-58, 433 P2d 817 (1967), and restated in Gen. Constr. v. Ore. Fish Com., 26 Or App 577, 581-82, 552 P2d 185 (1976). The doctrine comprises two warranties: (1) accuracy, and (2) suitability. The author implicitly warrants that his or her plans and specs are “adequate, accurate, and complete, and, if followed, an acceptable result would follow.” Gilbert Pac. Corp. v. Dep’t of Transp., 110 Or App 171, 175, 822, P2d 729 (1991) (rejecting argument that a provision allowing for changes and alterations in plans negated the implied warranty). The implied warranty, however, will not protect a contractor who advised an owner that his or her selected plan was suitable. Bhattarai v. Stein, 119 Or App 133, 849 P2d 1153 (1993).
ii. Workmanlike Manner

Generally, a warranty that all work will be performed in accordance with plans, specs and codes, and in a good and workmanlike manner, is implied into every construction agreement.


iii. Habitability

An implied warranty that a residence is fit for habitation is imposed on the contractor/seller who builds a home for later sale. Yepsen v. Burgess, 269 Or 635, 641, 525 P2d 1019 (1974). A contractor who builds a house according to the owner’s plans is not subject to this warranty. Chandler v. Bunick, 279 Or 353, 357-58, 569 P2d 1037 (1977).


Design professionals are not subject to implied warranties; they are responsible only for what is in the contract between the parties. White v. Pallay, 119 Or 97, 247 P 316 (1926) (reaffirmed in Scott & Payne v. Potomac Ins. Co., 217 Or 323, 341 P2d 1083 (1959)). Thus, any warranty by the designer must be express.

IV. MISREPRESENTATION AND FRAUD

Both misrepresentation and fraud are available in construction claims. A fraud claim requires a plaintiff to show, by clear and convincing evidence, nine separate factors. “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.” Or. Pub. Emples. Ret. Bd. v. Simat, Helliesen & Eichner, 191 Or App 408, 423-424, 83 P3d 350 (2004) (citing Conzelmann v. N.W.P. & D. Prod. Co., 190 Or 332, 350, 225 P2d 757 (1950)). All of the factors must be shown, and the absence of any one will bar recovery. Palmberg v. Astoria, 112 Or 353, 382-383, 229 P 380 (1924).

One who makes a fraudulent misrepresentation can be liable to the person or class of persons he or she intends or has reason to expect will rely on the representation. Handy v. Beck, 282 Ore. 653, 665-664, 581 P2d 68 (Or., 1978) (liability is for pecuniary losses).

Negligent misrepresentation in an arm’s-length transaction, causing only economic losses, is not actionable. Onita Pacific Corp. v. Trustees of Bronson, 315 Or 149, 165, 843 P2d 890 (1992).
V. STRICT LIABILITY CLAIMS

ORS 30.920 imposes strict liability on one who sells or leases “any product in defective condition unreasonably dangerous” to others. Warrantors who breach their warranties are held strictly liable, even when they have exercised all reasonable or possible care. Chandler v. Bunick, 279 Or 353, 356, 569 P2d 1037 (1977). Condominiums are not considered “products” within the meaning of ORS 30.920, so a strict product liability claim cannot be based on the defective design and construction of the condo. Ass’n of Unit Owners of Bridgeview Condos. v. Dunning, 187 Or App 595, 599, 69 P3d 788 (2003). However, a contractor may be liable for a floor installation when the ingredients were mixed at the project site in order to create the finished product. Brokenshire v. Rivas and Rivas, Ltd., 142 Or App 555, 922 P2d 696 (1996) (finding that the floor was a combination of service and product).

VI. INDEMNITY CLAIMS

There are three elements in an indemnity claim. One Oregon case has described them as: (1) the claimant discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the defendant ought to pay. Maurmann v. Del Morrow Construction, Inc., 182 Or App 171, 177, 48 P3d 185 (2002) (quoting Fulton Ins. v. White Motor Corp., 261 Or 206, 210, 493 P2d 138 (1972)). The third element invokes an analysis of active/passive fault and primary/secondary liability. Such an analysis has not yet been applied in the contract context, but “there is no reason for a distinction between indemnity in tort cases and in contract . . . cases with respect to evaluation of fault.” Star Mountain Ranch v. Paramore, 98 Or App 606, 609, 780 P2d 758 (1989).

An indemnity action brought where a third party has claims against the defendant requires the putative indemnitee to show that the third party is legally prevented from bringing suit against the defendant. Moore Excavating v. Consol. Supply Co., 186 Or App 324, 63 P3d 592 (2003).

Express indemnity provisions are upheld in agreements that have a primary purpose other than indemnity. Cook v. Southern Pac. Transp. Co., 50 Or App 547, 551, 623 P2d 1125 (1981) (citing Elte, Inc. v. S.S. Mullen, Inc., 469 F2d 1127 (9th Cir. 1972)). Such provisions are construed against holding that coverage extends to the negligence of the indemnitee unless a contrary intention is expressly stated in the contract or is apparent from the circumstances of the parties and their relationship. Blanchfill v. Better Builds, Inc., 160 Or App 527, 982 P2d 53 (1999).

Blanchfill held that broad, indefinite language, like “any and all claims,” without reference to particular risks, will give rise to an inquiry by the court about the extent of indemnification. The inquiry considers several factors, including: (1) the parties’ relative status (financial, sophistication, dynamics of bargaining); (2) the extent to which putative indemnitee’s activities exposed putative indemnitee to new or different liability, and (3) putative indemnitee’s reasonably anticipated benefit under the agreement versus exposure to liability for indemnitee’s conduct. Id. at 534, 540.
A provision providing indemnification “from” any claim will require the indemitor only to reimburse the indemnitee for third-party claims; using the word “for” would invoke coverage of the indemnitee’s own costs. Jacobson v. Crown Zellerbach, 273 Or 15, 22, 539 P2d 641 (1975).

A contract provision explicitly indemnifying an indemnitee for its own negligent actions is held void under Oregon law. ORS 30.140 prohibits certain indemnity provisions in construction contracts. Specifically, it bars any provision requiring a person, their surety, or their insurer to indemnify for damages caused by an indemnitee’s negligence and “arising out of death or bodily injury to persons or damage to property.” ORS 30.140(1). However, a party can be required to indemnify for the same type of damages if they are caused by the fault of the indemnitee’s agents, representatives or subcontractors.

Subject to this “anti-indemnification statute” are any provisions requiring an upstream party to be covered as an additional insured. Walsh Const. Co. v. Mutual of Enumclaw, 338 Or 1, 10, 104 P3d 1146 (2005) (holding that ORS 30.140 voids any contractual requirements to provide additional insured endorsements for another party).

Finally, of note is ORS 656.018, providing that the exclusive liability of a complying employer for an injury to one of its employees is workers’ compensation benefits; any agreement by a complying employer to indemnify a third party against the costs arising out of an injury to its employee is void.

VII. STATUTOFFREPOSE/STATUTE OF LIMITATIONS

The statute of limitations for contract actions is six years from the time the cause of action accrues. ORS 12.080(1). A breach of contract claim accrues from the time of the breach (usually occurring when construction is completed), even if the breach is not discovered until much later. Waxman v. Waxman & Associates, Inc., 224 Or App 499, 510, 198 P 3d 445 (2008).

Similarly, the limit for actions involving injury, interference, waste or trespass upon real property is six-years. ORS 12.080(3). The limits for negligence (“any injury to the person or rights of another, not arising on contract”), ORS 12.110(1), and for injuries caused by architects, landscape architects and engineers, “arising from the construction, alteration or repair of any improvement to real property,” ORS 12.135(2), are two years. The courts reject attempts to circumvent the two-year statute for torts by characterizing an injury as contractual. See, e.g., Dowell v. Mossberg, 226 Or 173, 178-184, 355 P2d 624, 359 P2d 541 (1961). The ultimate period of repose for certain construction claims is 10 years from substantial completion or abandonment of construction, alteration or repair of the property. ORS 12.135.

Some claims fall under Oregon’s Unlawful Trade Practices Act, which imposes a one-year statute of limitations from the date of discovering the claim. ORS 646.638(6). Certain sales associated with construction projects fall under UCC Article 2, which has a four-year statute of limitations. ORS 72.7250(1). The clock starts once the cause of action accrues, which, unless the warranty extends to future performance, is when the tender of delivery is made. Country Mut. Ins. v. Gyllenberg Constr., Inc., (D Or Aug. 19, 2004).
VIII. ECONOMIC LOSS DOCTRINE

In an arm’s-length transactions, purely economic losses arising from a tort are not actionable. Onita Pac. Corp. v. Trustees of Bronson, 315 Or 149, 165, 843 P2d 890 (1992), Hale v. Groce, 204 Or 281, 283-84, 744 P2d 1289 (1987); Roberts v. Fearey, 162 Or App 546, 549, 986 P2d 690 (1999). Onita was a non-construction case that prohibited recovery of economic loss based on negligent misrepresentation, absent a “duty of care” that goes beyond that general duty to exercise reasonable care. Courts have noted that architects and engineers are among those who would owe such a duty of care. See Jones v. Emerald Pac. Homes, Inc., 188 Or App 471, 478-479, 71 P3d 574, rev den, 336 Or 125 (2003).

Economic loss refers to “financial losses such as indebtedness incurred and return of monies paid, as distinguished from damages for injury to person or property.” Onita, 315 Or at 159 n. 6. While the court has not defined absolute boundaries regarding what constitutes economic loss, the court has held that damage to a building resulting from negligent construction is property damage, not economic loss. Harris v. Suniga, 209 Or App 410, 423, 149 P3d 224 (2006) (holding a purchaser may maintain a negligent construction claim against a builder for damage to the building absent any showing of a special relationship between the purchaser and the builder because damage to a building is property damage, not economic loss); Bunnell v. Dalton Construction, Inc., 210 Or App 138, 149 P3d 1240 (2006).

IX. ECONOMIC WASTE

If the cost of repair would generate undue economic waste, the owner is limited to diminished value – the difference between the actual value of building as constructed and what its value would have been had it been constructed as required by the contract. Newlee v. Heyting, 167 Or 288, 293, 117 P2d 829 (1941).

Economic waste is based on several considerations, including the relationship between the cost of repairs and the contract price, the amount of money that the contractor saved as a result of the breach, the nature of the repairs required, the usefulness of the building as constructed, and a comparison of the result that would be received under the diminished value rule. See, e.g., Schmauch v. Johnston, 274 Or 441, 446-47, 547 P2d 119 (1976). An example where economic waste was not found is in Bhattarai v. Stein, 119 Or App 133, 135-37, 849 P2d 1153 (1993), where the court upheld an award of $21,250 for replacement or repair of an overly steep driveway in a home costing $124,618.

X. DELAY DAMAGES

A contractor’s breach resulting in inexcusable delay entitles the owner to the interest on the capital invested in a project during the period of delay. However, in place of interest, the owner can recover the reasonable rental value of the completed project or the anticipated profits lost due to the breach if it is shown with reasonable certainty that but for the delay a commercial project would have been completed and usable. Stubblefield v. Montgomery Ward & Co., 163 Or 432, 454, 96 P2d 774 (1939).
For delays in residences, rental value is the proper damage, even if rental was not intended. Gregory v. Weber, 51 Or App 547, 552, 626 P2d 392 (1981). Lost profits are proper only if shown with reasonable certainty that defendant’s breach caused the damage, lost profits were foreseeable, and profits would have been earned. Randles v. Nickum & Kelly S. & G. Co., 169 Or 284, 286, 127 P2d 347 (1942).

An owner-caused delay entitles the contractor to costs incurred because of the delay, such as the costs of extended project duration and increases in labor and material costs. Northeast Clackamas C.E. Co-op. v. Continental Cas. Co., 221 F2d 329, 335 (9th Cir. 1955). If the contractor is forced to accelerate construction because the owner delayed but refused to extend the deadline for completion, a contractor can get additional compensation for such damages as overtime, reduced labor productivity, or additional items of equipment.

In the case of concurrent delay, the owner can recover only for the delay period proven to be entirely the contractor’s fault. Valley Inland Pac. Constructors v. Clack. Water Dist., 43 Or App 527, 537, 603 P2d 1381 (1979).

No-damages-for-delay clauses are generally enforceable in private construction contracts, but they are void as against public policy in public construction contracts. ORS 279C.315 (formerly ORS 279.063).

XI. RECOVERABLE DAMAGES

A. Direct and Indirect Damages

From a contractor’s breach of contract, an owner can recover either (1) the cost of repair, or (2) diminished value. The cost of repair is awarded only when it is prudent. Turner v. Jackson, 139 Or 539, 560, 4 P2d 925 (1931), adhered to on reh’g, 139 Or 539 (1932). That is, if the cost of repair would generate undue economic waste, the owner is limited to diminished value. Newlee v. Heyting, 167 Or 288, 293, 117 P2d 829 (1941).

From an owner’s breach of contract, a contractor can recover the actual costs of performing or preparing to perform, along with any profit that would have been made if the project had been completed. Verret v. Leagjeld, 263 Or 112, 115, 501 P2d 780 (1972); Pac. Bridge Co. v. Oregon Hassam Co., 67 Or 576, 580, 134 P2d 1184 (1913).

Compensatory damages are recoverable only if they were reasonably foreseeable by parties at time of contracting. Cont. Plants v. Measured Mkt., 274 Or 621, 625-26, 547 P2d 1368 (1976). For example, a plaintiff may be able to recover lost profits, costs, expenses, interest, taxes, and losses on collateral contracts. See, e.g., Siegner v. Interstate Production Credit Assn., 109 Or App 417, 436, 820 P2d 20 (1991); Senior Estates v. Bauman Homes, 272 Or App 19, 23, 799 P2d 180 (1990). Speculative damages, which are not recoverable, might include insurance costs not contemplated at time of contracting. Senior Estates, 272 Or App at 590.

B. Loss of Use
Generally, loss of use of the project can be recovered by an owner for a contractor’s unexcused delay. Loss of use is an appropriate award when the injury is temporary or can be repaired; for permanent injuries, diminution in property value is a more appropriate award. Millers Mut. Fire Ins. Co. v. Wildish Constr. Co., 306 Or 102, 116, 758 P2d 836 (1988).

C. Punitive Damages

There is no recovery of punitive damages for breach of contract. Farris v. United States Fidelity & Guaranty Co., 284 Or 453, 466, 587 P2d 1015 (1978). Punitive damages can be recovered in some tort actions, for example fraud.

In order to get punitive damages in Oregon, a party must file a motion to amend to include a claim for such damages -- they cannot simply plead punitive damages in the original complaint. The plaintiff must then prove by clear and convincing evidence, that the party against whom punitive damages are sought “has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.” ORS 18.537(1).

E. Emotional Distress

Damages for purely psychic or emotional loss are not recoverable in contract. Hammond v. Central Lane Communications Center, 312 Or 17, 24, 816 P2d 593 (1991).

F. Attorney’s Fees

Generally, attorney’s fees can only be recovered if authorized by statute or by the terms of the contract. Brookshire v. Johnson, 274 Or 19, 21, 544 P2d 164 (1976). Several statutes in Oregon provide for awards of attorney fees in contract cases. See, e.g., ORS 20.082; ORS 20.083; ORS 20.096; ORS 20.097. Attorney fee awards may also be made in breach of warranty cases. ORS 20.098. Aside from statutes, attorney fees may be recoverable if the party’s breach caused the nonbreaching party to become involved in litigation with a third party. Raymond v. Feldmann, 124 Or App 543, 546, 863 P2d 1269 (1993).

In actions brought under Oregon’s prompt-payment statutes, prevailing parties are entitled to reasonable costs and attorney fees. For private contracts, costs and fees are recoverable in actions to collect payments or interest. ORS 701.625(13), ORS 701.630(6). For public works, costs and fees are recoverable in actions to recover interest. ORS 279c.570(6) (formerly 279.435(6)). Cases have excluded from such recovery fees incurred in seeking other claims. See RL Coats v. St. of Or., 144 Or App 449, 455, 927 P2d 108 (1996).

In actions brought on any insurance policy, the plaintiff can recover attorney fees if (1) the plaintiff’s settlement is not made within six months from filing proof of with the insurer, (2) the action is brought in state court, and (3) the plaintiff’s recovery exceeds any amount offered by the defendant. If the action was brought on a contractor’s bond under one of several statutes, and the plaintiff’s recovery does not exceed any settlement offer by the defendant, the surety can recover attorney fees. ORS 742.061(1).
G. Expert Fees and Costs

In general, ORCP 68 allows for costs and disbursements to be awarded to a prevailing party. However, “costs and disbursements” under ORCP 68A does not include expert witness fees. It does allow for “fees for officers and witnesses”; the fees for witnesses are provided by statute. Hancock v. Suzanne Properties, Inc., 63 Or App 809, 815, 666 P2d 857 (1983). In breach of warranty cases involving claims under a certain amount, the statute explicitly allows for compensation of expert witnesses. ORS 20.098. The statutes governing attorney fee awards in contract suits do not have any provision concerning expert fees. See, e.g., ORS 20.096; ORS 20.097.

XII. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

A. Insurance Requirements for Contractors; the “typical” Policy

ORS 701.073 requires that all licensed contractors be insured. Specifically, contractors must have in effect public liability, personal injury and property damage insurance covering the work of the contractor … including the covering of liability for products and completed operations according to the terms of the policy and subject to applicable policy exclusions, for an amount not less than the applicable amount set forth in ORS 701.081 or 701.084.

The typical insurance policy does not cover defective workmanship, but only personal injury or property damage resulting from the contractor’s work. Exclusions for liability arising from specific kinds of construction projects (e.g., multi-family dwellings or tract home projects) are common, and the insured should consult his own policy to determine which exclusions apply.

B. “Occurrence-based” Policies Versus “Claims-made” Policies

Construction liability policies come in two forms: an “occurrence-based” policy and a “claims-made” policy. An occurrence-based policy covers liability that results from work performed during the effective term of the policy, regardless of whether the policy is in effect when the damage is discovered or reported to the insurer. A claims-made policy, on the other hand, covers claims that are reported while the policy is in force. While the former emphasizes the time of the act from which the insured’s liability ultimately arose, the latter looks to the time that the insured’s potential liability was reported to the insurer. Understanding the difference between an occurrence-based policy and a claims-made policy is essential to ensuring complete coverage over time among multiple policies.

To describe the event that gives rise to liability, occurrence based policies will usually use either the term “occurrence” or the term “accident.” The meanings of those terms are discussed below.

In St. Paul, the insured’s regular business operations caused severe soil and groundwater contamination. Several of the policies at issue defined an “occurrence” as “a happening or a continuous or repeated exposure to the same general conditions, which, unexpected by the insured, causes injury to or destruction of corporeal property during the policy period.” The insurers whose policies had expired before the insured actually cleaned up the contamination argued that no “occurrence” had taken place until the insured was forced to spend money to clean-up the contamination, which was the time of the “injury,” so their policies did not cover the claim. Id. at 200.

The court rejected this argument, stating that the “clear words” of the policy contradicted this interpretation and that “[t]he policies do not make an ‘occurrence’ depend on the fixing of financial responsibility, or damages.” Id. at 201. As long the surrounding land and water was physically contaminated “at some point in the course of the policy period,” coverage existed.

C. Duty to Defend and Duty to Indemnify

Every insurance policy includes two separate and distinct duties respecting covered claims – the duty to defend and the duty to indemnify. City of Burns v. Northwestern Mutual, 248 Or 364, 368, 434 P 2d 465 (1967). The duty to defend is broader, requiring the insurer to defend the insured if the claim against the insured, as stated in the complaint, could potentially impose liability for conduct covered by the policy. Ledford v. Northwest Farm Bureau Insurance Co., 319 Or 397, 399-400, 877 P 2d 80 (1992). Conversely, even if it does not appear that the insurer has a duty to defend based on the allegations in the complaint, a duty to indemnify may later arise if it appears that coverage exists from facts actually proved at trial. Id. at 401.

D. Property Damage (Covered) vs. Defective Workmanship (Not Covered)

Generally speaking, property damage involves loss arising from physical damage to tangible property, such as where a defective product explodes, causing physical damage to other property. On the other hand, purely economic damages, which are not covered, involve money spent or profits lost as a result of defective work or products, such as money spent on additional labor necessary to cure the defect, or profits lost because the opening of a business is delayed by a construction defect.

Wyoming Sawmills, Inc. v. Transportation Insurance Co., 228 Or 401, 578 P 2d 1253 (1978) illustrates the distinction between “property damage” caused by the insured’s defective product (covered) and consequential or economic damages resulting from that defective product (not covered). There, the plaintiff-insured sold defective 2 X 4 studs to be used in constructing buildings. The purchaser of the studs sued the insured for the cost of new studs and the cost of labor to remove and replace the studs. The insured acknowledged that the policy did not cover the cost of replacement studs, because the policy specifically excluded from coverage the insured own defective work or materials.
The court held that the diminution in the value of the building was not a “physical injury” to “tangible property,” but rather, “consequential or intangible” damages flowing from the insured’s own defective material. The court made clear that the policy would have covered physical damage to other parts of the buildings resulting from the need to replace the defective studs – which would constitute “physical injury” to “tangible property” - but not the labor to replace the defective studs themselves, which is a purely economic loss that does not involve property damage.

E. Indemnity and “Other Insured” Endorsements

ORS 30.140 prohibits construction contracts from requiring one person (a contractor, sub-contractor, etc.) to indemnify another person against liability caused by the indemnitee’s own negligence. The Oregon Supreme Court has interpreted this statute broadly, holding that a provision in a construction contract requiring one person to insure a second person (as an “additional insured”) against that second person’s own negligence is also unenforceable under ORS 30.140. Walsh Construction Co. v. Mutual of Enumclaw, 388 Or 1, 10, 104 P 3d 1146 (2005). The court reasoned that, whether a subcontractor is itself required to indemnify a contractor (or vice versa) or is only required to purchase insurance that covers the contractor for the contractor’s own negligence, “the ultimate - and statutorily forbidden - end is the same.” Id.

XIII. NEW LEGISLATION

A. Right to cure ORS 701.560 – 701.595

Residential homeowners must now provide contractors, subcontractors, and suppliers with a notice of defect before they can commence litigation or compel arbitration. The “right to cure” procedure begins with a written notice describing each defect, detailing the remediation the owner thinks is necessary, and stating that the owner may seek court action or arbitration. The notice, which must be sent by registered mail to each party intended as a defendant, must include any documents that evidence the defects. Within 14 days of receiving notice, the contractor may make a written request for a visual examination; within 14 days of visual examination, the contractor may make a written request for inspection. Additionally, the contractor must respond in writing within 90 days of the notice. The response can include an offer to work or pay compensation to the owner. The owner can begin legal action only if the contractor does not perform in accordance with any offer, the contractor fails to respond or fails to provide an offer, or the owner rejects any offer in the contractor’s response. ORS 701.560 – 701.595.

B. Prompt Payment

The Prompt Payment Act, ORS 701.620 – 701.645, requires progress payments to contractors and subcontractors on private construction projects anticipated to last 60 days or longer. This is in addition to the prompt payment policy already in place for public works projects.
XIV. CONSTRUCTION LIENS

A. Laying the Groundwork for a Construction Lien

i. Classes of Lien Claimants

ORS 87.010 entitles five classes of persons involved in the “construction of any improvement” to real property to claim a lien: (1) persons performing labor, (2) persons transporting materials, (3) persons furnishing materials, (4) persons renting equipment, or (5) professionals who prepare construction plans or specifications, or supervise construction, such as architects, landscape architects, land surveyors, or engineers. ORS 87.010.

Notably, an “improvement” need not be made to a structure. For example, the improvement may be to a street or related to landscaping. ORS 87.010(1), (6).

ii. Notices to be provided by prime contractor to owner of residential home

On a residential project, a prime contractor must provide an owner with three notices: A Consumer Protection Notice, Notice of Procedure, and Information Notice to Owners About Construction Liens (the “Information Notice”). The first two notices apprise an owner of how to select a contractor and the procedure for asserting a claim in the event the work is defective. The Information Notice provides information about construction liens. If a prime contractor fails to provide the Information Notice at the time of contracting, the right to assert a lien is lost. The forms for these notices can be found at the Oregon Construction Contractors Board website, www.CCB.state.or.us.

iii. Notice of Right to a Lien

In the residential construction context, for a subcontractor-lien claimant to secure a lien covering all work performed and/or materials supplied, the lien claimant must have provided a “Notice of Right to a Lien” to the owner not more than eight weekdays (as defined by ORS 187.010) after commencing work and/or providing materials. ORS 87.021. The notice must substantially follow the form set forth in ORS 87.023.

If this notice is given to the owner more than eight days after the claimant began work, the claimant’s lien will cover only the portion of work performed and/or labor provided after the date that is eight weekdays before the “Notice of Right to a Lien” was provided.

No similar notice requirement normally exists in the commercial construction context, but one exception exists. A materials supplier whose contract is with the general contractor – not the owner - must provide a Notice of Right to a Lien to the owner in both the residential and commercial contexts.
Notably, a construction lien only has priority over other interests in the subject property to the extent that the holders of those interests received a Notice of Right to a Lien before the lien claimant provided labor and/or supplies. ORS 87.025(3). To ensure priority, contractors, sub-contractors and materials-suppliers should therefore always provide notice to any mortgagee of the subject property within eight days of providing labor and/or materials.

B. The Mechanics of Filing (Perfecting) a Lien; Notice to Property Owner

Any person claiming a lien for furnishing labor or equipment (including rented equipment) must record the lien within 75 days after (1) furnishing labor or equipment, or (2) completion of construction (as defined by ORS 87.045), whichever is earlier. Professionals who prepare plans or specifications, or supervise construction, must file the lien within 75 days after completion of construction.

The lien must be recorded with the recording office of the county where the improved land is situated. ORS 87.035(2). The claim of lien must include the amount demanded as payment, the name of the real property owner, the name of the person with whom the person filing the lien contracted (whether he be the property owner or his agent), and a description of the subject property. ORS 87.035(3). In addition, the lien claim must be “verified by the oath of the person filing or some other person having knowledge of the facts,” who must describe the circumstances giving rise to the lien and the basis of his personal knowledge of those circumstances, in a signed and notarized statement. ORS 87.035(4).

Within 20 days after filing the lien, notice of the lien, including a copy of the claim of lien, must be mailed to the property owner and any mortgagee(s). ORS 87.039(1).

C. Owner’s Right to a Detailed Written Justification of Amounts Claimed by Lien Claimant

A landowner who has received notice of the filing of a lien may demand a written justification of the claimed balance owed, including a list of materials supplied or labor furnished, as well as a statement of the contractual basis for supplying materials or labor. ORS 87.027. The lien claimant must respond to this demand within 15 days, not including weekends or holidays. A failure to respond within 15 days results in a loss of attorneys fees and costs, which are normally allowable to a party successfully foreclosing a lien. ORS 87.060.

D. Use of a Bond to Release a Lien

To release a perfected lien (i.e., a lien that is filed and recorded), a landowner may file a bond in the recording office where the lien is recorded. ORS 87.076. The bond must be issued by a corporation authorized to issue surety bonds in the State of Oregon, in an amount not less than 150 percent of the amount claimed under the lien or $1000, whichever is greater.

E. Foreclosing the Lien

i. 120DayRequirement

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Normally, suit must be brought to enforce a construction lien within 120 days of its filing. ORS 87.055. If extended payment terms are agreed on, however, the validity of the lien may be extended to 120 days from the date on which such extended payment is to be completed (not to exceed two years from the date the lien was initially filed) by stating the extended payment terms in the claim of lien.

ii. Notice of Intent to Foreclose

At least 10 days before filing suit, the lien claimant must notify the owner and any mortgagee of his intent to file suit to foreclose the lien. ORS 87.057. The owner may again demand a written justification of the amount claimed under the lien, which must be provided within five days of the demand. The failure to provide this written justification of amounts claimed will result in loss of otherwise available attorneys fees and costs.

iii. Proper Parties and Venue

Suit should be brought in the circuit court of the county in which the improved property is located. ORS 87.060(1). The lien claimant must name as parties persons against whom a personal judgment is sought, other construction lien claimants, and the owners whose interests are subject to the claim of lien. ORS 87.060(7). No judgment is effective against persons not named in the action, so any other person who may allege priority over the perfected lien should also be made a party. The priority of construction liens as against other encumbrances is outlined in ORS 87.025, but is beyond the scope of this article.

iv. Pleading Requirements and Damages

The lien claimant must plead and prove both the validity of the lien and compliance with notice and other procedural requirements of the lien statute. A party who successfully forecloses a lien is generally entitled to attorneys fees in the foreclosure action, as well recovery of the cost of recording the lien and obtaining title reports required for preparing and foreclosing the lien. ORS 87.060. But, as noted above, a lien claimant should be sure to comply with the lien statute’s strict procedural requirements to ensure eligibility to recover attorneys fees and other costs of pursuing the foreclosure action.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.