STATE OF OREGON COMPENDIUM OF CONSTRUCTION LAW

Prepared by:
Thomas A. Ped
Kevin A. Schummer
Williams Kastner
1001 SW Fifth Avenue, 16th Floor
Portland, Oregon 97204
(503) 944-6988
tped@williamskastner.com
kschummer@williamskastner.com
www.williamskastner.com

Revised 2016

COMPENDIUM OF OREGON CONSTRUCTION LAW

I. BREACH OF CONTRACT

A breach of contract occurs when one party fails to perform as required by the contract. *Kantor v. Boise Cascade Corp*., 75 Or. App. 698, 708 P.2d 356 (1985), *rev den* 300 Or. 506 (1986). To state a claim for breach of contract, the plaintiff must allege the existence of a contract, its relevant terms, plaintiff's full performance and lack of breach, and defendant's breach resulting in damage to plaintiff. *Slover v. Oregon State Bd. of Clinical Social Workers*, 144 Ore. App. 565, 570, 927 P.2d 1098 (1996).

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.

A contractor has an implied duty to perform its work in a proper and workmanlike manner. *Newlee v. Heyting*, 167 Or. 288, 292, 117 P.2d 829 (1941). In addition, 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).

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 a workmanlike performance in a custom construction contract does not give rise to a duty in negligence to the owner. *Jones v. Emerald Pac. Homes*, 188 Or App 471, 478, 71 P3d 574, *rev den* 336 Or. 135 (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).

And, deficient performance that results in damage to property other than the work itself can give rise to a tort claim. *Oak Crest Construction Co. v. Austin Mutual Ins*., 329 Ore. 620, 998 P.2d 1254 (2000).

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).

In *Yeats v. Polygon Northwest Co.*, 268 Or. App. 256, 341 P.3d 864 (2014), a subcontractor's employee was injured in a fall at a worksite. He then sued the general contractor under Oregon's Employer Liability Law (ELL) and negligence. The court held that a general contractor's right to require additional safety measures or terminate the contract for safety violations did not control the manner in which the subcontractor carried out its safety requirements, particularly because the contract placed safety responsibility upon the subcontractor. ELL liability is not established by direction of work, "[r]ather, it is only triggered if the defendant actually controlled the manner or method – *i.e. how* – the plaintiff or plaintiff's employer performs that work." *Id.* at 278.

III. BREACH OF WARRANTY

Strict liability is imposed for breaches of warranty. *Chandler v. Bunick*, 279 Or 353, 356, 569 P2d 1037 (1977).

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

As noted, 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. Workmanlike manner is "work done in an ordinarily skillful manner, as a skilled workman should do it." *Newlee v. Heyting*, 167 Or 288, 292-93, 117 P2d 829 (1941).

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, *i.e.,* a "spec" home. *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).

Developer-sellers of developed but unimproved residential lots do not offer implied warranties. *Cook v. Salishan Properties*, 279, Or 333, 337-338, 569 P2d 1033 (1977); *Beri, Inc. v. Salishan Properties, Inc.*, 282 Or 569, 575, 580 P2d 173 (1978).

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. QUANTUM MERUIT CLAIMS

A claim for *quantum meruit* is a quasi-contractual claim. *Safeport,Inc. v. Equipment Roundup & Manufacturing, Inc*., 184 Or App 690, 706, 60 P3d 1076 *rev den* 335 Or 255, 66 P3d 1025 (2002). The elements of a claim are a benefit conferred, awareness by the recipient that a benefit has been received, and judicial recognition that, under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it. *Id*.

In *Tum-A-Lum Lumber v. Patrick*, 95 Or App 719, 770 P2d 964 (1989), the defendant property owner hired a contractor to build a barn, and the plaintiff supplied materials to the contractor for use in the construction. The contractor ceased work before the barn was finished, and the defendant did not pay for the materials. Instead of filing a construction lien or suing the contractor directly, the plaintiff filed a *quantum meruit* claim against the property owner. Noting cases from other jurisdictions, the court held:

'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. *** No direct contractual relationship existed between the parties here. For these reasons, a furnisher of materials must exhaust all remedies against the contractor *before* the "enrichment" can be "unjust."' 95 Or App 719, 721-2 [Italic included in original.]

In *L.S. Henricksen Construction, Inc. v. Shea*, 155 Or App 156, 961 P2d 295, rev den 328 Or 40, 977 P2d 1170 (1998), the court made clear that a subcontractor may not include the general contractor and the owner in the same suit. Citing *Tum-A-Lum*, the court stated: "Initiating a remedy *** is not the same as exhausting that remedy, and it is exhaustion that the law requires." 155 Or App 156, 160. Consequently, the claim against the owner could not go forward until the subcontractor had completed its suit against the general.

V. PAY-WHEN-PAID CLAUSES

The majority rule from other jurisdictions is that pay-when-paid clauses are interpreted to entitle a subcontractor to payment within a reasonable time after performance, regardless of the owner's failure to pay the contractor for the work.

In *Mignot v. Parkhill*, 237 Or 450, 457-8, 391 P2d 755 (1964), the court stated that where the contract contains a definite and unambiguous promise to pay for labor and materials performed and furnished, or for other services, equally clear and unambiguous language, expressing the intention that the happening of a contingency over which the promisee has no control shall be a condition precedent to payment, must

be found in the contract before the positive and absolute agreement to pay will be considered as superseded."

VI. STATUTORY PROTECTIONS FOR ARCHITECTS AND ENGINEERS

Claims against architects and engineers must be “certified” before suit can be brought:

> **31.300 Pleading requirements for actions against construction design professionals.**
>
> (1) As used in this section, “design professional” means an architect, landscape architect, professional engineer or professional land surveyor registered under ORS chapter 671 or 672 or licensed to practice as an architect, landscape architect, professional engineer or professional land surveyor in another state.
>
> (2) A complaint, cross-claim, counterclaim or third-party complaint asserting a claim against a design professional that arises out of the provision of services within the course and scope of the activities for which the person is registered or licensed may not be filed unless the claimant’s attorney certifies that the attorney has consulted a design professional with similar credentials who is qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional. The certification must contain a statement that a design professional with similar credentials who is qualified to testify as to the standard of professional skill and care applicable to the alleged facts, is available and willing to testify that:
>
> (a) The alleged conduct of the design professional failed to meet the standard of professional skill and care ordinarily provided by other design professionals with similar credentials, experience and expertise and practicing under the same or similar circumstances; and
>
> (b) The alleged conduct was a cause of the claimed damages, losses or other harm.
>
> (3) In lieu of providing the certification described in subsection (2) of this section, the claimant’s attorney may file with the court at the time of filing a complaint, cross-claim, counterclaim or third-party complaint an affidavit that states:
>
> (a) The applicable statute of limitations is about to expire;
>
> (b) The certification required under subsection (2) of this section will be filed within 30 days after filing the complaint, cross-claim,

counterclaim or third-party complaint or such longer time as the court may allow for good cause shown; and

(c) The attorney has made such inquiry as is reasonable under the circumstances and has made a good faith attempt to consult with at least one registered or licensed design professional who is qualified to testify as to the standard of professional skill and care applicable to the alleged facts, as required by subsection (2) of this section.

(4) Upon motion of the design professional, the court shall enter judgment dismissing any complaint, cross-claim, counterclaim or third-party complaint against any design professional that fails to comply with the requirements of this section.

(5) This section applies only to a complaint, cross-claim, counterclaim or third-party complaint against a design professional by any plaintiff who:

(a) Is a design professional, contractor, subcontractor or other person providing labor, materials or services for the real property improvement that is the subject of the claim;

(b) Is the owner, lessor, lessee, renter or occupier of the real property improvement that is the subject of the claim;

(c) Is involved in the operation or management of the real property improvement that is the subject of the claim;

(d) Has contracted with or otherwise employed the design professional; or

(e) Is a person for whose benefit the design professional performed services. [2003 c.418 §1; 2015 c.610 §1]

VII. 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).

VIII. 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).

In *Wyland v. W.W.Grainger, Inc.* No. 3:13-CV-00863-AA, 2015 WL3657265 (D. Or. June 11, 2015), plaintiff suffered a work place injury, sued the distributor for negligence and strict liability, and the distributor sought indemnity from the suppliers. After *Eclectic* was issued (see below), the suppliers moved for summary judgment, arguing that *Eclectic* precluded recovery on the theory of common-law indemnity. The court agreed as to negligence but not strict liability because it is not based on fault. Further, Oregon courts typically hesitate to apportion fault in a strict liability case.

Rains v. Stayton Builders Mart, Inc., 264 Or. App. 636, 336 P.2d 483 (2014), rev allowed, 357 Or. 111 (2015), held that a claim remains justiciable even after the plaintiff and one of the defendants agreed to a floor and ceiling amount of damages if the defendant was found liable. On appeal, the other defendant argued that there was no longer a controversy because the co-defendant had an incentive to be found liable and then pursue indemnity. The court disagreed because the agreement between that co-defendant and plaintiff did not establish exposure. Unless or until a party has "'no interest' in the outcome of a case because it could 'neither gain nor lose anything as a result of trial,'" a justiciable controversy remained. *Id.* at 646.

IX. INDEMNITY CLAIMS

There are three elements in an indemnity claim: (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).

Oregon has an "anti-indemnity" statute with respect to construction contracts, which prevents a putative indemnitee from recovering from an indemnitor for the indemnitee's fault. ORS 30.140 provides:

> **30.140 Certain indemnification provisions in construction agreement void.** (1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.
>
> (2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors.
>
> (3) As used in this section, "construction agreement" means any written agreement for the planning, design, construction, alteration, repair, improvement or maintenance of any building, highway, road excavation or other structure, project, development or improvement attached to real estate including moving, demolition or tunneling in connection therewith.
>
> (4) This section does not apply to:
>
> (a) Any real property lease or rental agreement between a landlord and tenant whether or not any provision of the lease or rental agreement relates to or involves planning, design, construction, alteration, repair,

improvement or maintenance as long as the predominant purpose of the lease or rental agreement is not planning, design, construction, alteration, repair, improvement or maintenance of real property; or

(b) Any personal property lease or rental agreement.

(5) No provision of this section shall be construed to apply to a "railroad" as defined in ORS 824.200. [1973 c.570 §§1,2; 1987 c.774 §25; 1995 c.704 §1; 1997 c.858 §1; 2007 c.413 §1]

In *Walsh Const. Co. v. Mutual of Enumclaw*, 338 Or 1, 10, 104 P3d 1146 (2005), the court held that a contractual provision which required the subcontractor to purchase additional insurance covering the contractor for the contractor's negligence was void under ORS 30.140.

However, an indemnity clause that offends ORS 30.140(1) because it requires a subcontractor to indemnify a contractor for the contractor's own negligence remains enforceable to the extent that it also requires the subcontractor to indemnify the contractor for the subcontractor's negligence. *Montara Owners Association v. La Noue Development LLC et al*., 259 Or. App. 657, 682-83, 317 P.3d 257 (2013). Even if a subcontractor is found to owe an indemnity obligation to the general contractor, it need not indemnify the general contractor for liabilities related to allegations for which the subcontractor is not responsible, as determined by the parties' subcontract and by the jury in the underlying matter. *See Sunset Presbyterian v. Andersen et al.*, (Dec 31, 2014) (slip op. at 317).

Montara was appealed to the Supreme Court of Oregon. 357 Ore. 333, 353 P.3d 536 (2015). It held that attorney fees are recoverable by the contractor defending against the original claimant as consequential damages against the subcontractors even though the fees arise out of the same action. This must be done via post trial ORCP 68 procedure.

Common-law indemnity claims are no longer enforceable in Oregon in negligence claims. In *Eclectic Investment, LLC v. Patterson*, 357 Or. 25, 346 P.3d 468 *modified* 357 Or. 327 (2015), the Supreme Court held common-law indemnity claims are incompatible with Oregon's comparative fault system established in ORS 31.610. That statute provides that each defendant is only severally liable so each defendant is only liable for its percentage of fault. So long as a tortfeasor is liable for its liability alone and not for the liability of other tortfeasors, it has no ability to pursue indemnity from other tortfeasors.

Based on *Wyland v. W.W. Grainger*, above, the *Eclectic* holding may not extend to strict liability claims.

Liberty Oaks Homeowners Association v. Liberty Oaks, LLC, 267 Or. App. 401, 341 P.3d 109 (2014) found that third party indemnity claims are moot if the defendant/third

party plaintiff is found not liable in the underlying claim. The owner sued the developer who, in turn, sued the subcontractors. Separate judgments were entered: one in favor of the developer against the owners and the other in favor of the subcontractors in the third party claims. The judgments were appealed. During the pendency of the appeal, the owner and contractor settled their dispute. As part of the settlement, the contractor assigned its claims to the owner, who pursued the subcontractors for indemnity. The court of appeals held that the final judgment dismissed the primary complaint. Since the contractor was not liable, any derivative claims alleged in a third party complaint were moot.

In *Riverview Condominium Association v. Cypress Ventures*, 266 Or. App. 612, 338 P.3d 755 (2014) (*Riverview Condo II*), the owner sued the contractor who filed against the subcontractors seeking indemnity. See below pg. 14 for *Riverview Condo I*.

For *Riverview Condo II*, the subcontractors argued that common-law indemnity and statutory contribution claims did not accrue until a party seeking indemnity or contribution actually made a payment. The court disagreed and held that this would "unreasonably restrict the ability of courts to decide what are genuine and present controversies between potentially liable parties." *Id.* at 616. Unsettled questions in a case did not render the case unripe, make the whole controversy contingent, or otherwise unjusticiable.

X. 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).

Tort claims arising out of alleged construction defects must be brought within six years of the date that the cause of action accrues, ORS 12.080(3), subject to the statute of ultimate repose. *Riverview Condominium Ass'n v. Cypress Ventures, Inc. (Riverview Condo I)*, 266 Or. App. 574, 600 (2014) (See below pge 14). Such claims accrue when the plaintiff discovers or should have discovered the damage. *Id.* at 600–01.

Claims for misrepresentation are governed by a two-year statute of limitations. ORS 12.110(1); *Id.* at 606. A discovery rule applies to these claims as well. *Id.*

Tavtigian-Coburn v. All Star Custom Homes, LLC, 266 Or. App. 220, 33 P.3d 925 (2014) held that the statute of limitations begins to run when the injured party knew or should have known of the injury, unless otherwise specified. Thus, ORS 12.080(3) incorporates a discovery rule.

Goodwin v. Kingsmen Plastering, Inc., 267 Or. App. 506, 340 P.3d 169 (2014) *rev allowed* 357 Or. 111, 346 P.3d 1212 (2015) affirmed both *Riverview Condo. I* and *Tavtigian-Coburn* as those cases relate to ORS 12.080(3). *Riverview Condo I* held that ORS 12.080(3) applied to construction defect claims while *Tavtigian-Coburn* held that the same statute incorporated a discovery rule.

XI. STATUTE OF REPOSE

Parties may decide by contract when the statutes of limitation and repose accrue. *See Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 355 Or. 286, 291 (2014).

The statute of ultimate repose for construction claims is found in ORS 12.135, which provides:

> **12.135 Action for damages from construction, alteration or repair of improvement to real property; "substantial completion" defined; application.** (1) 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.
>
> (2) An action against a person by 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 not more than 10 years after

substantial completion or abandonment of such construction, alteration or repair of the improvement to real property.

(3)(a) Notwithstanding subsections (1) and (2) of this section, an action against a person registered to practice architecture under ORS 671.010 to 671.220, a person registered to practice landscape architecture under ORS 671.310 to 671.459 or a person registered to practice engineering under ORS 672.002 to 672.325 to recover damages for injury to a person, property or to any interest in property, including damages for delay or economic loss, regardless of legal theory, arising out of the construction, alteration or repair of any improvement to real property must be commenced before the earliest of:

(A) Two years after the date the injury or damage is first discovered or in the exercise of reasonable care should have been discovered;

(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 subparagraph (B) of this paragraph.

(b) This subsection applies to actions brought by any person or public body.

(4) For purposes of this section:

(a) “Public body” has the meaning given that term in ORS 174.109; and

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

(5) For purposes of this section, an improvement to real property is considered abandoned on the same date that the improvement is considered abandoned under ORS 87.045.

(6) This section:

(a) Applies to an action against a manufacturer, distributor, seller or lessor of a manufactured dwelling, as defined in ORS 446.003, or of a prefabricated structure, as defined in ORS 455.010; and

(b) Does not apply to actions against any person in actual possession and control of the improvement, as owner, tenant or otherwise, at the time such cause of action accrues. [1971 c.664 §§2,3,4; 1983 c.437 §1; 1991 c.968 §1; 2009 c.485 §3; 2009 c.715 §1; 2013 c.469 §1]

Substantial completion under ORS 12.135(4)(b) encompasses two concepts. *PIH Beaverton, LLC v. Super One, Inc.*, 355 Or. 267, 283 (2014). With respect to when a contractee accepts the construction in writing, written acceptance does not necessarily occur when the property owner posts a "completion notice" alerting subcontractors that work is sufficiently complete to permit them to file liens. Rather, the facts must show clearly that the owner received the construction and "consented or assented to it as having reached a particular state of completion."

Where there is no written acceptance, substantial completion can occur only after construction was fully complete, and not simply the date where the construction was sufficiently complete for its intended use or occupancy. *Id.* at 284.

In construction defect claims, the statute of repose does not accrue until both the following conditions are met: the construction is fully complete and the owner accepts the new construction as complete. In *Riverview Condo I* (see above, pg 10) the court held that ORS 12.135 applied to construction defect claims. Therefore, the statute of repose begins to run at the time the construction is **fully complete**, not just sufficiently complete for its intended purpose. Moreover, "fully complete" required acceptance of completed construction.

Most recently, the Supreme Court of Oregon decided *Shell v. Schollander Cos.*, 2016 Ore. LEXIS 124, 358 Or. 552 (2016) in which the court held that 12.115 applied because the contract for sale was for a spec home, i.e., an existing building, as opposed to new construction.

In summary, for construction defect claims for improvements to real property, the controlling statue of repose is ORS 12.135. It does not begin to accrue until construction is both "fully complete" and accepted as completed. Based on the cases above, this applies to new construction only. As to existing buildings and based on *Shell*, ORS 12.115 is the controlling statute of repose, and it runs from the date the act or omission complained of occurred.

XII. 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).

Benson Tower Condominium Owners Association v. Victaulic Co., No. 3:13-cv-01010-SI (D. Or Oct. 15, 2014)(*Benson Tower I*) denied summary judgment in favor of the contractor and held that damage to a building's water system may be considered property damage in addition to economic loss. The court agreed with the plaintiff that contamination of water is considered property damage. The defective plumbing damaged more than just itself, which was introduced via expert testimony.

XIII. 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.

XIV. 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).

XV. 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 P 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).

Attorney fees are discretionary per ORS 34.210(2) and prevailing parties are not automatically entitled to them. They are "permissive, predicated on the trial court's exercise of discretion." *State ex rel Stewart v. City of Salem*, 268 Or. App. 491, 497, 343 P.3d 264 (2015).

"Recovery" means when a money judgment is granted against an insurer. It does not mean when the insured accepted a settlement payment and summary judgment was entered in favor of the insurer. The claim was moot. In *Triangle Holdings, II, LLC, v. Stewart Title Guaranty Co.*, 266 Or. App. 531, 337 P.3d 1013 (2014), the plaintiff-lender argued that it was entitled to attorney fees under ORS 742.061(1). The title company-defendant argued that the plaintiff did not recover an award. The court agreed; the lender accepted payment instead of negotiating attorney fees or requesting a stipulated judgment as part of acceptance.

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.

XVI. 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.

An occurrence generally takes place when damage due to an unexpected event occurs during the policy period. *St. Paul Fire & Marine Insur. Co., Inc. v. McCormick & Baxter Creosoting Co.,* 324 Or 184, 196, 923 P 2d 1200 (1996).

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. Gutoski,* 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.

On the other hand, extrinsic evidence can be considered to determine a threshold issue as to whether a particular person or entity qualifies as an insured under the policy, e.g., in circumstances involving a possible additional insured. *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or App 468, 477-78, 240 P3d 67 (2010), *rev den* 349 Ore. 602, 249 P3d 123, 2011 Or LEXIS 68 (2011).

A duty to defend exists even if the complaint alleges events that occurred outside the policy period. A proper denial can only occur when the allegations conclusively demonstrate no coverage. *Seneca Insurance Co. v. James River Insurance Co.*, 2014 US. Dist. LEXIS 97156, 2014 WL 3547376 (D. Or. July 14, 2014), involved a declaratory action involving two insurance companies and their duties. Seneca defended a contractor in a construction defect case; James River did not. The district court held that "James River could not eliminate the possibility that the alleged damage occurred during the policy period based on the allegations of the Complaint. Accordingly, the court finds James River's duty to defend was triggered by the allegations…" *Id.* at 20-21.

The duty to defend does not extend to a known-loss. The plaintiff in *Alkemade v. Quanta Indemnity Co.*, 28 F. Supp. 3d 1125 (D. Or. 2014) knew that his home experienced recurring damage due to the home being built on expanding clay soils. The contractor made several unsuccessful attempts to stabilize the home before it and the homeowners entered into a settlement that included assigned rights against the contractor's insurers. The owner then sued the insurer. The district court found no duty to defend and granted summary judgment to the insurer as the contractor knew of the underlying problems prior to the effective dates of the policy.

A similar case held differently. The Ninth Circuit found that a policy that lacked definitions will have ordinary definitions applied. Thus, the policy allowed for known damage prior to the policy's effective date without precluding indemnity for other damage found during the effective dates. *Kaady v. Mid-Continent Casualty Co.*, 790 F.3d 995 (9th Cir. 2015).

In *Sunset Presbyterian Church v. Anderson Construction*, 2658 Or. App 309, 341 P.3d 192 (2014), following assignment of rights, the church sought full attorney fees damages from the subcontractor that the general contractor accrued during litigation. The church failed to allocate costs associated with the subcontractor's work as against other claims. Therefore, the court did not award any damages. While the subcontractor was liable under the indemnity provision of its subcontract, its liability did not extend beyond its scope of work.

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.

A standard form liability insurance policy may be found to provide coverage for all adjudicated construction defect claims so long any "property damage" for which the insured is responsible took place during the policy period. *FountainCourt Homeowners' Association v. FountainCourt Development, LLC, et al.*, 264 Or. App. 468 (2014). In *Fountaincourt*, a homeowner's association sued a contractor's insurance company to collect as judgment creditors on a contractor's insurance policy. *Id.* at 480. The homeowners had previously obtained a judgment that the contractor was negligent in installing defective siding, windows, caulking and flashing, which had led to water intrusion damaging the contractor's work and other parts of the structures. *Id.* at 480. In a subsequent garnishment proceeding against the subcontractor's insurance company, the court held that it was the insurer's burden to prove how much of the underlyling damages was attributable to the contractor's work. *Id.* at 485. The court also held that because some of the damage occurred during the insurance company's policy period, the insurance company had to pay for all of it unless it could prove that specific costs were for damage occurring solely outside its year of coverage. *Id.* at 488.

E. Indemnity and "additinal 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.*

F. Reformation

In the underlying case of *A&T Siding, Inc. v. Capital Specialty Ins. Corp.*, 358 Or. 32, 359 P.3d 1178 (2015), an owner and contractor agreed to a settlement with an unconditional release and agreement not to execute. The agreement was later modified to eliminate these two clauses. Additional litigation ensued between the contractor and insurer, which was removed to federal court. There, the insurer was found not liable because the contractor attempted to create additional insurance obligations through the amendment of the settlement. The contractor appealed, and the Ninth Circuit certified the case to the Oregon Supreme Court, which held that the reformation attempt by the

contractor and owner failed. The "mistake" the owner and contractor attempted to cure was a mistaken assumption about interpretation. The legal consequences were the mistake, not the agreement.

A general contractor sued for reformation of its insurance policy and for negligent procurement of insurance in *5 Star, Inc. v. Atlantic Casualty Insurance Co.*, 269 Or. App. 51, 344 P.3d 467 (2015). A subcontractor's employee was injured on the job and filed suit; the general contractor settled and agreed to pursue its claim against the insurer on behalf of the plaintiffs. The claim was initially denied as the insurer cited policy exclusions for coverage of claims arising out of the actions of subcontractors. This suit followed.

The trial court granted summary judgment to the insurer and the Court of Appeals affirmed. The contractor argued that Oregon law mandated contractors carry insurance that covered acts by subcontractors; since it was sold a policy that did not meet the requirements, it should be reformed. The Court did not agree and held that the law placed the obligation on the contractor, not the insurer.

G. Policy Interpretation

Who bears the burden of proving or disproving coverage? In *QBE Insurance Corp. v. Creston Court Condo., Inc.*, 58 F. Supp 3d 1137 (D. Or. 2014), the developer's insurance company accepted the tender under a reservation of rights and filed a declaratory action that it had no duty to defend. The primary contention was who must prove or disprove coverage. The general rule in Oregon is that the insured bears the initial burden of proving coverage. Here, the court held that the insurer must prove the lack of coverage as it filed the declaratory action.

Additionally, there was a question whether the developer was named under the policy. The insurer attempted to use extrinsic evidence to show that the developer was not, in fact, a named defendant. The court held that if the insured's identity can be determined by the face of the policy, "it is one of the contract interpretation and, consequently, extrinsic evidence is not permitted." *Id.* at 1147-1148. Ultimately, the court held that the developer was not a named insured. But due to allegations in the complaint that the developer acted as the named insured's real estate manager, a duty to defend existed.

XVII. OTHER STATUTES

A. Notice of defects 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 "notice of defects" 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.

C. Little Miller Act

A claimant can recover on a bond under the Little Miller Act as long as it pleads a claim for the bond under ORS 279C.600 and obtains a recovery against the contractor. In *State v. Ross Bros. & Co. Inc.*, 268 Ore. App. 438, 342 P.2d 1026 (2015), a subcontractor sued the general contractor and its bond surety for uncompensated services under the Little Miller Act. The trial court ruled in favor of the subcontractor on a theory of quantum meruit as against the contractor, but not the surety. As to the surety, the Court of Appeals held that the subcontractor did not have to incorporate a theory of quantum meruit into its bond claim. The subcontractor merely has to plead a claim under ORS 279C.600 to recover on the bond

If there is an assignment of Little Miller Act claims from a primary subcontractor down to a secondary subcontractor, notice must also be made up to the general contractor that the claim is for a secondary subcontractor. Additionally, the notice must be made within 90 days. "[T]he Court finds that the notice requirement is a condition precedent to recovery under the Miller Act…." *United States ex. rel. Northwest Cascade Inc. v. Colamette Constr. Co.*, 2014 U.S. Dist. LEXIS 143662 (D. Or. Oct. 8, 2014).

XVIII. 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 apprize 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.

Attaching a blank 'Notice of Right to Lien' form to a construction contract fails to satisfy the requirements of ORS 87.021. The exception under ORS 87.021(3) for work performed on-site did not apply to the plaintiff, an engineering firm, because its on-site work consisted of measurements and sampling. The bulk of engineering services were done at plaintiff's office. *Multi/Tech Eng'g Servs. V. Innovative Design & Constr., LLC*, 274 Ore. App. 389, 360 P.3d 701 (2015).

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, on tractors, 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 attorney's 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. 120 Day Requirement

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 attorney's 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 attorney's 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 attorney's 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.