

Notice Regarding New Clackamas County Circuit Court Construction Litigation Procedures

NEW REFEREE PROCEDURE

Beginning immediately the Clackamas County Circuit Court will allow parties to opt out of the normal 12-month trial system in construction litigation cases by participating in a new Referee system based on ORCP 65. The Referee system is a procedure that was designed to deal with complex construction litigation (especially construction defect cases). If the parties do not choose to participate in this program, they will not be granted trial extensions beyond the 12-month period designated in UTCR 7.020(5) absent extenuating circumstances upon application. Cases in the Referee system will be designated complex cases under UTCR 7.030 for purpose of trial scheduling. The parties will be responsible for the Referee's fees.

REFEREE AUTHORITY

Under the Referee system, the Referee will have the authority to manage discovery and case scheduling, including submitting a recommended trial date all parties agree to which is within 18 months of initial filing date. Any request for trial extension beyond 18 months will require the Referee's recommendation to do so and approval by Presiding Court. In no event will a trial date setting be allowed beyond 24 months. The Referee will have the authority to rule on discovery motions. The Referee will also have the authority to hear and decide motions to join parties beyond the 90 days specified in ORCP 22, however, the Referee may only allow the joinder of additional parties during the one year period following the initial filing date. The Referee shall have authority to rule on Rule 21 motions as well as motions relating to discovery issues. The Referee shall also have authority to rule on summary judgment motions with the consent of the parties. All decisions rendered by, or orders issued by, the Referee may be reviewed by Presiding Court or its designee upon application under ORCP 65E(3).

REFEREE SELECTION

The parties can stipulate to being part of the new Referee system. Absent a stipulation, any party can file a Motion to Designate as Complex Litigation and Appoint Referee (motion) asking the Court to rule on whether the case will be allowed to go into the new system. The motion must be filed with the Presiding Court or Presiding's designee no later than 30 days after the date the party is served with Summons and Complaint.

The plaintiff must file the motion no later than 30 days after the last party is joined or within 180 days of filing, whichever is sooner.

The parties have three options for selecting a Referee: 1) pick a Referee from a list provided by the Court; 2) stipulate to a Referee; or 3) the Presiding Court will select a Referee at a scheduling conference if the parties do not select one by a date certain.

The Court will maintain a list of pre-qualified Referees. Referees will be required to meet the qualifications established for court appointed arbitrators under UTCR 13.090, except that a Referee shall also have a minimum of 7 years experience handling construction matters or be a Senior Judge for the State of Oregon. The rule is to be applied to the Referee system by substituting the term "Referee" for the term "arbitrator".

The rights, obligations, and procedures established for arbitrators and conciliators and parties under ORS 36.476 (Disclosure by Proposed Arbitrators and Conciliators; Waiver of Disclosure; Grounds for Challenge), ORS 36.478 (Procedure for Challenging Arbitrator), ORS 36.480 (Withdrawal of Arbitrator; Termination of Mandate) and ORS 36.482 (Substitute Arbitrator; Effect of Substitution) will apply equally to Referees and the parties under the Referee system, including without limitation, parties brought into the suit after the Referee is appointed. The statutes are to be applied to the Referee system by substituting the term "Referee" for the term "arbitrator". In addition, a party which anticipates bringing third party practice claims under ORCP Rule 22C will provide the Referee a list naming all the potential third/fourth/etc party defendants so that the Referee can make the disclosure required under ORS 36.476.

CRITERIA FOR REFERENCE

In addition to the criteria contained in UTCR 7.030(2) the Court will also consider: 1) the amount(s) in controversy; and 2) the involvement of insurance carriers and insurance coverage issues.

CONTENTS OF ORDER APPOINTING REFEREE; TWO TRACK SYSTEM

The Referee will operate on two simultaneous “tracks”. The first track is the core case. As part of the core case, once a Referee has been agreed upon or appointed the parties will submit a recommended Order Confirming Appointment of Referee in Complex Construction Case (Order) to the Court for review, approval, and execution. A generic form of Order is attached for reference. The second track will address any applicable insurance coverage issues.

The Order will contain mandatory provisions and optional (but encouraged) provisions. The mandatory provisions will include: 1) discovery deadlines; 2) dispositive motion deadlines; 3) alternative dispute resolution deadlines (including a deadline for selection of a mediator - who may be someone other than the Referee); 4) a presentation by the Plaintiff(s) of a defect list, a.k.a. Bill of Particulars; 5) a Defendant’s statement of which of its third/fourth/etc. party defendants performed the work being complained of in the Third/Fourth/etc. Party Complaint; and 6) a trial date. The optional provisions may include: 1) the response of each party to the claims against it; 2) the preparation of and a timeline for the scope of repair proposed by Plaintiff(s); 3) a demand by a Third/Fourth/etc. Party Plaintiff to those defendants it sued in the case; 4) a joint defense response to the statement of claims, defects and damages of Plaintiff(s); 5) a joint defense scope of repairs; 6) disclosure of experts; 7) exchange of expert reports; 8) depositions of experts; 9) depositions of other witnesses; and 10) any other collaborate effort to expedite and streamline the litigation.

On the second coverage track, the Referee may require each party to submit the following: 1) the names of all potential insurance carriers for each party; 2) copies of the Reservation of Rights letters from each carrier; 3) the name and contact information for the adjuster for each carrier; 4) copies of each carrier’s policy for each party. The Referee will have the ability to advise the parties to retain coverage counsel. Regardless of whether or not the Referee chooses to provide this advice, the Referee shall not be deemed to be providing legal advice.

The Referee will have the ability to require the parties to engage in mediation on either or both of the two “tracks”. For insurance-related mediation, the Referee may require insurance adjusters to physically attend the mediation and that the adjuster have complete authority to settle the claim. The mediator will be someone other than the Referee. However, the mediator will report any non-compliance to the Referee, who will have the power to hear show cause motions for remedial contempt.

If mediation does not resolve the case, the Referee will prepare a report discussing the value of each of the claims (both monetarily and legally) and an allocation of responsibility among the parties. The Referee will submit a copy of this report under seal to the court to be used only after trial on the merits, and the trial judge may consider the Referee’s report as a factor in considering the reasonableness of attorneys’ fee awards, if attorneys’ fees are at issue in the case.

If you have any questions regarding the new Referee system you may call Eva Marcotrigiano in the Presiding Court at 503-722-2732.

Dated: April 16, 2007

/s/ Steven L. Maurer

Clackamas County Presiding Judge