Construction Law Newsletter

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MESSAGE FROM THE CHAIR

Alan Mitchell
Mitchell Law Office

As the new chair of the Executive Committee, I am grateful for the opportunity to give back something to our section. Our section members exhibit great collegiality and working on the Executive Committee has been a reflection of that.

Our first goal this year is to continue our efforts to present interesting, cost-effective CLE opportunities. Currently, we are planning to continue the lunchtime mini-CLE programs along the lines of last year's programs. We are also planning a series of "sticks and bricks" programs to present information about the actual methods of construction currently in use. Finally, December 5, 2008 will bring our biannual half-day CCB seminar – with the recent legislative changes, there should be plenty of new information.

A second goal is to roll out the section website. The website will include announcement of upcoming CLE programs and links to useful resources. We are also researching the idea of videotaping our CLE presentations and making them available on the website.

Of course, we will continue publishing our section newsletter. If you have new associates in your office, publishing a newsletter article is a great way to start getting their name known.

If you have any questions, comments, or concerns with our section or the Executive Committee, my email address is at the end of the newsletter and I would like to hear from you.

Finally, the list of current board members is at the end of this newsletter. Please feel free to contact any board member with any suggestions or questions.

RULING KEEPS SURETY BOND COSTS FROM SOARING

Kelly Hagen, Dan Knox & Darien Loiselle
Schwabe Williamson & Wyatt

The construction industry in Oregon just dodged a big bullet. In a recent decision, the Oregon Supreme Court ruled that public works bonds aren't subject to penalties and liquidated damages claims for late payment of wages. Had the decision come out the other way, the cost of surety bonds on construction projects in Oregon would have gone through the roof.

The plaintiffs in *North Marion School District No. 15 v. Acstar Insurance Co.* were 47 workers on a public works project in Salem. Their employer, a subcontractor on the project, became insolvent and was unable to pay these employees' wages. Instead, the employees were discharged.

The defendants in the case were sureties that had issued bonds on the project. State law requires contractors on public works projects to purchase bonds to be used to pay employees and suppliers in the event that they have financial difficulties. Acstar Insurance issued a bond to the subcontractor that employed plaintiffs.

After the subcontractor defaulted on its wage payments, Acstar received claims against its bond from plaintiffs, but the claims didn't specify the amount of wages due as required by law. The

attorneys for plaintiffs asserted it was Acstar's responsibility to know how much was due each plaintiff.

Acstar worked with the bankrupt subcontractor and the state Bureau of Labor and Industries to determine how much each employee was owed. Acstar paid the plaintiffs in full within a few weeks of their termination.

Five days after Acstar paid them, 47 employees filed a lawsuit to recover penalty wages and liquidated damages over and above their earned wages. Plaintiffs alleged that since they had not received their final paychecks from the subcontractor within the time required by law, they could recover from the bond penalty wages under Oregon's wage-and-hour law and liquidated damages under Oregon's prevailing wage rate statute.

Acstar responded, first, that it was not the plaintiffs' employer and therefore wasn't obligated to pay them their final checks within the time required of employers. Second, Acstar maintained that the prevailing wage statute doesn't require timely payment; rather, Acstar said, it requires payment at the prevailing rate. Since plaintiffs were paid in full at the prevailing rate of wage, Acstar argued there was no violation of the public works law.

Acstar also pointed out the practical impossibility of the plaintiffs' demands: No surety can discover an employer's insolvency, confirm the amount of wages due each employee, make sure enough of the bond remains to pay debts to other employees and to suppliers, and accomplish all that within the 24 hours given employers under the penalty wage statute. If that's the law, Acstar urged, then all employer defaults will result in penalty wages and liquidated damages, and the cost of purchasing construction bonds in Oregon will be prohibitive.

The trial court agreed and ruled against the employees. Acstar wasn't an "employer" for purposes of the penalty wage law and therefore wasn't responsible for penalty wages. It made no sense, the court reasoned, to threaten bondholders with penalty wages when the law's purpose is to encourage timely payment by employers. The court also held that late payment of wages doesn't violate the prevailing wage rate law. Since plaintiffs were paid wages at the prevailing rate, the court concluded that the public works law was satisfied.

The employees filed an appeal with the Oregon Court of Appeals, which upheld the trial court and sided with Acstar. The employees then asked the Oregon Supreme Court to review the case.

The Supreme Court's decision offered three rulings that bear directly on the cost of construction bonds. The first affects all construction projects, not just public works. The court held that, unlike employers, sureties aren't subject to penalty wages for "late" payment absent a clear mandate from the Legislature.

The second ruling is that the prevailing wage statute is concerned only with the rate of wages paid. Since plaintiffs were paid at the prevailing rate, there was no violation of the statute.

The third ruling follows from the second: Late payment of wages under the wage-and-hour law doesn't violate the prevailing wage rate statute. The latter is concerned with the wage rate paid, not when wages are paid. The court thereby refused to marry the timeliness requirements of the wage-and-hour laws to the sections of the public works law that provide for claims against bonds. This combination of remedies, the court held, would produce a windfall never intended by the Legislature.

The moral of the story is that the systems worked. The public works statute functioned as intended: Acstar's bond provided the funds with which to pay wages owed by a bankrupt subcontractor. And the judicial system worked as well: By refusing to endorse theories of recovery never contemplated by the Legislature, the court exercised laudable judicial restraint that has kept the cost of construction bonds in Oregon within reach.

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"CARROTS & STICKS" FOR GREEN BUILDING IN OREGON

Jason Alexander
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In the past 12 months green building, once considered a small niche in the construction industry, has begun to garner substantial attention across much of the United States, including Oregon. More than a trend, green building promises to be a significant aspect of building practices in the near and long-term future.

Put simply, green building means environmentally sensitive building practices. Buildings constructed using green building principles are typically built with fewer and/or recycled materials, consume less energy, emit less pollution, result in less natural habitat loss and have better indoor air quality.

Portland's Proposed High Performance Green Building Policy

Several "carrots" or government incentives for green building have existed in Oregon for a number of years, foremost of which is the Business Energy Tax Credit. However, in November 2007, the City of Portland announced plans for a green building policy that not only includes carrots but also a "stick" – a carbon fee would be imposed upon builders if they undertake new commercial or residential construction or do major commercial remodels that are not at least 30% more energy efficient than the 2007 minimum code. Conversely, those builders exceeding the green standards would be paid an incentive by the City, funded by the carbon fees paid by others. The City would also require, as part of every existing home sale, that an energy efficiency report be done by home inspectors and disclosed to potential buyers.

According to the City's Office of Sustainable Development, the proposed green building policy has three major elements:

1. For new construction, either receive a rebate or pay a fee, depending on the level of the building's energy efficiency as constructed.

If builders exceed Oregon's 2007 minimum energy performance standard by 45% or higher, they will receive a rebate from the City, as well as be eligible for the Business Energy Tax Credit from the Oregon Department of Energy and other incentives from the Energy Trust of Oregon, both of which are discussed below.

If builders exceed Oregon's 2007 minimum energy performance standards by 30-40%, they will be eligible for the Business Energy Tax Credit from the Oregon Department of Energy and other incentives from the Energy Trust of Oregon (discussed below).

Builders that do not construct to a standard at least 30% more energy efficient than the 2007 minimum code would pay a one-time carbon pollution fee for the projected carbon pollution from operating the building for 30 to 50 years.

The one-time fee would be based on carbon emitted from a building's operations, at a cost of $12 per ton of carbon pollution. The rebate would operate in a similar fashion, rewarding $12 per ton of carbon pollution reductions.

2. Existing buildings, performance ratings and upgrades.

As presently anticipated, the green building policy would require home sellers to disclose to potential buyers the home's energy and storm water performance, using a standardized home rating system. Commercial building lessors and sellers would also disclose to potential tenants or buyers the building's energy and storm water performance.

The City is also considering requiring commercial building owners to upgrade lighting and/or HVAC systems when seeking an electrical or mechanical permit or when selling the building. Such upgrades would be exempt from "non-

conforming use" requirements (e.g., seismic retrofits).

3. <u>Technical assistance, workforce training and recognition.</u>

For those who "build greener" (which is not yet defined but presumably means 45% more energy efficient than code), the City would also provide permitting assistance, workforce training and recognition on City websites and printed materials.

Upcoming public meetings and City Council vote on proposed policy.

The City's Office of Sustainable Development plans to conduct public meetings to discuss details of the proposed policy. The first meeting was on January 29, 2008.

A Stakeholder Committee, established by City Commissioner Dan Salzman, will hold a series of meetings in February and March 2008 to provide recommendations to refine the Policy, after which a final draft will be sent to the City Council for consideration. It is presently expected that the City Council would vote on the proposed policy in June 2008 and that, if passed, the ordinances would likely be in place by 2010. Information about Portland's green building policy is available through the Office of Sustainable Development, www.portlandonline.com/OSD/greenbuilding and its Green Building Hotline: (503) 823-5431.

Revisions to the Business Energy Tax Credit

The Oregon Business Energy Tax Credit ("BETC") provides a credit against owed Oregon income taxes. It can be taken by a cross-section of projects and industries, including the construction industry. The most common means in which the construction industry can benefit from the BETC is in the construction of dwellings. In particular, the BETC applies to: 1) High Performance Homes; 2) Homebuilder Installed Renewable Energy Facilities; 3) Appliances for Rental Dwellings; and 4) Rental Dwelling Weatherization.

The 2007 Oregon Legislature made numerous changes to the BETC program. The Oregon Department of Energy adopted revised rules in December 2007 for many aspects of the BETC program. Following is a brief summary of the BETC, including recent revisions.

<u>Qualifying projects</u>

The BETC applies to homebuilders that install Renewable Energy Facilities on the homes they construct (e.g., solar space heating, solar water heating), including on "High Performance Homes." The Oregon Department of Energy has included a definition for High-Performance Home in revisions to the BETC regulations, effective December 1, 2007. See OAR 330-090-110(33). It means, among other things, that the home is a new dwelling unit constructed by a licensed builder under the Oregon Residential Specialty Code that has its own space conditioning and water heating systems, complies with the specifications listed in the BETC Technical Requirements and is intended for sale to an end-use homebuyer.

General retrofit projects, in addition to those for lighting, and weatherization projects for rental property, may be eligible for the program. Retrofit projects must be 10% more energy efficient than existing installation; lighting retrofit must be 25% more efficient than existing lighting.

The BETC also applies to:

- Renewable energy equipment manufacturers. The tax credit for manufacturing facilities is equal to 50% of the certified cost, up to a maximum credit amount of $20 million.
- Projects that use solar, wind, hydro, geothermal, biomass, or fuel cells (renewable fuels only) to produce energy, displace energy, or reclaim energy from waste may qualify for the BETC.
- Cogeneration projects may be eligible (i.e., the use of a heat engine or a power station to simultaneously generate both electricity and useful heat), as may projects that develop new markets for recycled materials or recycle materials not required by law.
- Projects that reduce employee commuting (or work-related travel) and investments in cleaner-burning fuels may qualify.

Value of credit

The value of the tax credit is:

- Homebuilder Installed Renewable Energy Facilities – 50% of the eligible project costs up to $9,000 per single-family home, or up to $12,000 if the building also meets the criteria for a High Performance Home.
- If completed on or after January 1, 2007, 50 percent of the eligible project costs (up to $20 million maximum) for High Efficiency Combined Heat and Power, Renewable Energy Resource Generation, Renewable Energy Resource Equipment Manufacturing Facilities.
- 35 percent of eligible project costs for all other projects ($10 million maximum).

Costs covered

The credit can cover costs for acquiring, erecting, building or installing a facility, including costs for engineering and design fees, title searches, escrow fees and government fees, materials and supplies, qualified employee work, and legal fees related to development of the facility (non-litigation related).

Maintenance costs are not eligible, nor are costs for replacing equipment at the end of its useful life or equipment required to meet codes or other government regulations.

Timing for taking the credit

You must apply for the tax credit before starting your project.

The 50% tax credit is taken over five years: 10% each year. The 35% credit is also taken over five years: 10 percent in the first and second years and 5 percent each year thereafter. If you can't take the full tax credit each year, you can carry the unused credit forward up to eight years. Any unused credit can be carried forward up to eight years. A party with eligible project costs of $20,000 or less may take the tax credit in one year. These changes are retroactive to include projects beginning on or after January 1, 2007; and the sunset date is January 1, 2016.

Pass-through option allows tax-exempt organizations to transfer the credit

Under the pass-through option, a tax-exempt organization may transfer its tax credit for an eligible project to a partner with a tax liability. The value of the credit transferred is not dollar for dollar. Rather, a pass-through rate is established based upon the project costs and value of the BETC (*e.g.*, 50% BETC with more than $20,000 in eligible qualifying costs = 33.5% pass-through rate, 50% BETC with less than $20,000 in qualifying costs = 43.5% pass-through rate).

More information regarding the BETC is available on the Oregon Department of Energy website: www.oregon.gov/energy/cons/bus/betc.html.

Energy Trust - Business Energy Efficiency Rebates for Existing Buildings

Energy Trust of Oregon provides incentives for its commercial, agricultural and institutional customers to increase the energy efficiency of their existing buildings. The business must be served by Portland General Electric, Pacific Power, NW Natural or Cascade Natural Gas in Oregon, and it must be paying the public purpose charge.

The standard incentive program provides prescribed rebates for the retrofit of various equipment (e.g., electric motors, water heaters, lighting, furnaces, boilers, heat pumps, air conditioners, building insulation, food service equipment and other items, pending approval).

Incentive amounts vary, and they include:

HVAC Units:	$120 - $300 (varies by size)
Electric Motors:	$10 - $2,000 (varies by horsepower)
Insulation:	$0.20 per sq. ft.
Hot Water Tanks:	$2.50/kBtu/hr
Tankless Water Heaters:	$30 - $40.00/gpm
Boilers:	$2.00/kBtu/hr

Custom Measures: 25% of the total approved cost not to exceed 12¢/annual kWh saved.

Projects must be pre-approved before making any equipment purchases or initiating any work.

Business customers that retrofit existing buildings through measures not covered under the standard incentive program can still receive financial assistance from Energy Trust through the custom incentive program. Approved custom efficiency projects are eligible for incentives up to 25% of the total approved cost not to exceed 12¢/annual kWh saved. To qualify for a custom incentive, the energy savings must be at least 25% of the current energy use for lighting equipment and 10% for all other equipment and measures. Both standard and custom incentives for existing buildings are capped at $250,000 per site per year.

More information regarding this program can be found at http://www.energytrust.org/buildingefficiency/index.html.

Energy Trust - Business Energy Efficiency Rebates for New Buildings and Major Renovations

Energy Trust of Oregon also offers commercial and industrial businesses in Oregon a variety of ways to receive funding for new building construction or major renovation projects which utilize energy efficient equipment and design standards. Only customers of Pacific Power, Portland General Electric, NW Natural and Cascade Natural Gas are eligible to participate in this program.

Incentives are available on four separate tracks:

The Standard Track - provides up to $50,000 for approved energy efficient measures including lighting and lighting controls, motors, variable speed drives, air conditioning, heat pumps, air-to-air heat exchangers, demand control ventilation, chillers and natural gas-powered water heaters, kitchen equipment and heating equipment.

The Custom Track - provides up to $200,000 for approved projects. The incentive is based on the difference between the expected energy use of a building of its size based on the Oregon Energy Code, and the actual energy use of the building after one year.

The LEED NC Track - awards up to $200,000 in incentives to new construction projects which achieve LEED NC Versions 2.0, 2.1 and 2.2. Incentive amounts are calculated using average energy use values for different occupancies (building uses) in the Pacific Northwest. Incentives differ, depending on whether the project is new construction or a major renovation.

The Energy Star™ Track - offers incentives to eligible new building projects that achieve the ENERGY STAR™ building performance certification from the U.S. Environmental Protection Agency (EPA). ENERGY STAR™ incentives provide $1,000 to $15,000 per eligible project.

More information regarding this program can be found at:

www.energytrust.org/newbuildingefficiency/index.html.

Additional Information

For additional information on green building or environmental law issues, please contact Patrick G. Rowe at (503) 227-1111 or *prowe@sussmanshank.com*.

CONSTRUCTION STORMWATER GENERAL PERMITS IN OREGON

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Across the United States, stormwater runoff from construction activities and industrial sites are major causes of pollution in surface waters. A National Pollutant Discharge Elimination System (NPDES) permit is required for stormwater discharges to surface waters from construction and industrial activities if stormwater

from rain or snow melt leaves a site through a "point source" and reaches surface waters either directly or through storm drainage. A point source is a natural or human-made conveyance (*e.g.,* pipes, culverts, ditches, catch basins, or any other type of channel).

During the first two decades after the 1972 passage of the Clean Water Act, most NPDES permits were issued individually to particular facilities or dischargers. Over time, it became apparent that the process for issuing permits to individual dischargers was time consuming, and could be inefficient, given redundancies in permit requirements for similar types of activities. As a result, the Environmental Protection Agency (EPA) and state environmental agencies, such as the Oregon Department of Environmental Quality (ODEQ) began to implement "general permits." A general NPDES permit is used to regulate a large number of facilities that engage in similar activities (*e.g.,* construction), which result in similar discharges to surface waters. Rather than subject each such facility to individual permit review and approval, permitting agencies issue a general permit containing conditions necessary to protect water quality.[1]

In Oregon, there are two basic categories of general permits for stormwater discharge – construction and industrial.[2] Following are highlights of the major components of the construction stormwater general permit.

Construction Stormwater Permit 1200-C

ODEQ has developed NPDES Stormwater Discharge General Permit #1200-C to cover construction activities that disturb one or more acres.[3]

[1] EPA has authorized 45 states to implement their own construction stormwater general permits; thus EPA remains the permitting authority only in Alaska, Idaho, Massachusetts, New Hampshire, New Mexico, the District of Columbia, certain U.S. territories, and many Native American lands.

[2] See ORS § 340-045-0033 for a complete list of all NPDES general permits adopted by ODEQ.

[3] Also included are activities that will disturb less than one acre if such activities are part of a larger common plan of development that will disturb one or more acres over time.

What types of projects need a permit?

A permit is required if: 1) a construction project disturbs one or more acres of land through clearing, grading, excavating, or stockpiling of fill material and 2) there is any possibility that stormwater could run off the site during construction and into surface waters or conveyance systems leading to surface waters. Oregon has over 100,000 miles of rivers, over 6,200 lakes, nine major estuaries and over 360 coastal miles. Given this amount of surface water, it is almost assured that stormwater runoff from a construction site will reach a surface water. However, if the topography and location of a site is such that there is no possibility that rainfall or snowmelt could leave the site or enter a waterway, a permit is not needed.

1200-C permit requirements

The goal of the general permit is to prevent sediment and contaminants from reaching surface waters. Effective January 1, 2006, the permit registrant must not cause a violation of instream surface water quality standards. To achieve this goal, the 1200-C permit requires permittees to prepare an Erosion and Sediment Control Plan (ESCP) and incorporate Best Management Practices (BMPs) into their land disturbing construction work. If the permit registrant develops and implements the ESCP as established in the general permit, ODEQ assumes that the discharges authorized by the permit will not cause a violation of water quality standards.

ESCP

Who must prepare the ESCP

The ESCP provides detailed information about the construction site, and erosion and sediment control measures that will be taken at the site. If the construction will disturb 20 acres or more, the ESCP must be prepared and stamped by an Oregon Registered Professional Engineer ("P.E."), Landscape Architect or Certified Professional in Erosion and Sediment Control. A P.E. must also prepare the ESCP for any size site with engineered facilities for erosion or sediment control (*e.g.*, settling ponds, diversion structures).

For all other sites, the ESCP must be prepared by someone with knowledge of the site and training in the design, installation and maintenance of erosion and sediment control practices.

Timing & public review

The ESCP must be submitted to ODEQ or its Agent[4] with a permit application at least 30 days before starting the construction project.[5]

Further, in Oregon, as of June 1, 2006, all construction projects disturbing five (5) or more acres are subject to public review. A public review period of 14-calendar days will begin after ODEQ or its Agent has determined that the application is complete.[6]

After public review, ODEQ will review any public comments and determine if the ESCP is adequate. ODEQ may request that the permit registrant change the plan based on public comment.

Substantive requirements

The ESCP consists of the following:

Part I: ESCP Narrative Form

This must include, among other elements, a site description, qualifications of the person(s) who prepared the ESCP and summary of any local government requirements.

Part II: Best Management Practices and ESCP Implementation Schedule

Description of proposed erosion and sediment control measures and other best management practices (BMPs) to be used at the site. For example pre-construction fencing or other methods to protect riparian areas, trees and vegetation, during construction wet weather BMPs, runoff controls (slope drains, diversion dikes, energy dissipaters), erosion prevention methods (*e.g.*, top-soiling, compost blankets), sediment controls, non-stormwater pollution controls (*e.g.*, proper storage of hazardous materials, covering of stockpiles) and inspection and maintenance requirements). Rationale for the BMPs chosen must be provided, as must a schedule for implementing the ESCP.

Part III: Drawings (construction plans)

The ESCP must also include, among other items, a site (project location) map and erosion and sediment control and construction notes.

Action Plan

If, in spite of the ESCP, significant amounts of sediment enter surface waters, the permittee should take immediate corrective action within 24 hours and submit an Action Plan to ODEQ or its Agent within 10 calendar days identifying the corrective actions taken to cease the discharge.

Requirements where the receiving water is already impaired

If stormwater from the site discharges to a water body that is listed as being impaired for turbidity (clarity) or sedimentation or that is subject to a "total maximum daily load" ("TMDL") requirement[7], ODEQ will require that

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[4] ODEQ agents include the City of Eugene, City of Hermiston, City of Myrtle Creek, City of Troutdale, Clean Water Services serving Washington County, Clackamas County and Rogue Valley Sewer Services, serving Talent, Phoenix, Central Point and portions of Jackson County.

[5] Note that pre-permit approval submission of a control plan is required in Oregon and in only a handful of other states. EPA and many other states have a "self-implementing" plan, under which the permittee simply develops the plan and then submits a Notice of Intent to the regulatory agency, informing it of its activity and intent to implement the plan.

[6] As a result of recent litigation, ODEQ adopted the public notice and comment requirement for the 1200-C general permit in October 2006. The public notice process is different from the NPDES Individual Wastewater Discharge permits in two main areas: the duration of the posting is for two weeks (14 days) and no physical public notice documents are used; rather, the public notice is posed on ODEQ's website (interested persons can request regular e-mail notification of all such notices). Requiring public notice will delay assignment of general permit coverage. Presently, Indiana and Washington are the only other states that require public participation in the general permit process. Other states will likely require public participation in the general permit process in the future, however, given recent court decisions favoring public involvement.

[7] As of June 2006, this applied to approximately 1% of all 1200-C permit registrants. This may increase, as ODEQ continues to assess and establish TMDLs for water bodies across the state.

stormwater runoff samples be collected and analyzed for turbidity and compared to a benchmark value. If any stormwater exceeds the benchmark, the permit registrant must evaluate its BMPs and ESCP and take corrective actions. If corrective actions fail to address the problem, additional, specified BMPs to control and treat sediment and turbidity must be implemented. Alternatively, the sampling can be foregone and specified BMPs immediately implemented.

1200-C Permit Fees

New permits costs $771, which includes a $380 fee for a new permit application and a $391 first year annual fee.

Land Use Compatibility Statement

Last, note that a Land Use Compatibility Statement ("LUCS") will also be required. The LUCS form is distributed with ODEQ Permit or approval applications. The business or individual applying for an ODEQ permit completes the Applicant's Section of the LUCS, then submits the form to the local land use planning authority. The local planning staff reviews the LUCS, fills out the Local Government Section, signs and dates and returns the LUCS to the applicant. The completed LUCS is included in the permit or approval application submittal to ODEQ.

Additional Information

For additional information on how this or other stormwater general permits may affect your project or facility, please contact Patrick Rowe at (503) 227-1111 or prowe@sussmanshank.com.

CASE LAW UPDATE

Gary Christensen
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A. Additional Insured Coverage.

An insurer has no duty to defend a general contractor named as an additional insured on a subcontractor's policy if plaintiff's complaint fails to allege fault of the subcontractor.

Richardson v. Howard S. Wright Constr. Co., No. CV-05-1419-ST, 2007 WL 1467411 (D Or May 18, 2007). Howard S. Wright Construction Co. was the general contractor on a construction project at the Clatskanie Elementary School, and third-party defendant Don Herbst Painting, Inc., was the painting subcontractor hired by Wright. The subcontract required Herbst to indemnify Wright for liability arising out of Herbst's work and to name Wright as an additional insured on Herbst's commercial liability policy. The policy included an exclusion stating: "No coverage will be provided if, in the absence of this endorsement, no liability would be imposed by law on you. Coverage shall be limited to the extent of your negligence or fault according to the applicable principles of comparative fault."

In 2003, plaintiff Kenny Richardson fell from scaffolding while working as a painter for Herbst. Richardson made a claim against Herbst's workers' compensation insurance and then sued Wright, alleging negligence and a claim under Oregon's Employer Liability Act. Wright tendered defense of the suit to Herbst's insurer, American States Insurance Company, and, after the tender was denied, filed a third-party action against American States and Herbst.

On cross-motions for summary judgment, American States and Herbst argued that the additional insured agreement was void under ORS 30.140(1) because it required insurance coverage for bodily injuries caused in whole or in part by

the negligence of Wright. It also argued that the coverage was barred by the exclusion in the policy. Wright asserted that to the extent that there was no coverage, Herbst had breached its contract to obtain coverage.

The court held that ORS 30.140 did not void the additional insured agreement. First, both the subcontract and the insurance policy limited the scope of insurance provided to Wright to the extent of Herbst's negligence or fault; in other words, it did not provide coverage for Wright's own fault in whole or in part. Second, even if the language required indemnification in whole or in part by Wright, it was unenforceable only to the extent that it violated ORS 30.140. Oregon federal courts had already addressed this issue and come to the same conclusion in *Tudor Insurance Co. v. Howard S. Wright Construction Co.*, No. CV-04-480-ST, 2005 WL 783060 (D Or Apr. 5, 2005).

Although the additional insured agreement was valid, under the facts alleged by plaintiff Richardson, American States had no duty to defend in this case. Richardson alleged that Wright "was completely and solely responsible" for the injuries. Wright argued, however, that the allegations in its answer, the scaffolding agreement with Herbst (which placed responsibility for the scaffolding on Herbst), and testimony by Richardson indicating that he had inspected the scaffolding on the day he was injured showed that Herbst was at least partially responsible for the injuries. The court rejected Wright's argument as being outside the "eight corners" of the complaint and policy, which is all a court considers when determining a duty to defend. The court also found that there was no ambiguity in Richardson's allegations that would allow it to interpret the allegations to include the subcontractor Herbst.

With respect to the independent duty to indemnify, American States argued that its policy exclusion meant that Wright could not recover indemnity as a matter of law because Herbst could not have liability to Richardson under Oregon's workers' compensation laws. The court rejected American States' argument, holding that the exclusion was ambiguous and had to be construed against the insurer in favor of coverage for Wright. But whether the exclusion applied could not be determined until facts were developed that would allow Wright to prove as a defense to Richardson's claims that Herbst was liable in whole or part for the injuries.

Finally, the court held that Herbst had not breached its contract with Wright because it did obtain the insurance coverage to the extent required by the subcontract, even though plaintiff's claim was not wholly covered.

B. Contract Formation and Contractual Limitations on Actions.

Acceptance of a settlement offer must be within a reasonable time. Contracting parties are free to choose a limitation period for initiating an action based on the contract notwithstanding the periods set forth in ORS 12.080.

Reedsport School Dist. No. 105 v. Gulf Ins. Co., 210 Or App 679, 152 P3d 988 (2007). Plaintiff Reedsport School District No. 105 (the "District') entered into a public improvement contract with Brill's Contracting, Inc., to reroof a gymnasium at a high school. Brill's obtained a performance bond from defendant Gulf Insurance Company to secure Brill's performance of the improvement contract. According to the bond's terms, an action on the bond had to be brought within two years after Brill's ceased working or within two years after Gulf Insurance refused to pay a valid claim on the bond.

In February 1998, the District notified Brill's that the work was not satisfactory. In May 1998, Gulf Insurance responded with an offer of $32,619 to settle the District's claims, which the District rejected shortly thereafter. In April 1999, Gulf Insurance renewed the offer and, alternatively, asked the District to confirm that it was still pursuing the claim. The District did not respond until 19 months later, when it unconditionally accepted the renewed offer.

Gulf Insurance refused to pay, and the District initiated suit in March 2003, more than five years after declaring Brill's in default and

notifying Gulf Insurance of the claim. The District asserted claims for breach of the bond and breach of the settlement agreement. Gulf Insurance defended the first claim based on the limitations period contained in the bond for actions on the bond. As for the second claim, Gulf Insurance argued that the parties had never entered into a settlement agreement. The trial court rejected Gulf Insurance's arguments and entered judgment on both claims with a money award based on the breach of the bond.

The court of appeals reversed. Contracting parties are free to agree to the applicable limitations period affecting their contract. Here, the parties agreed to a two-year period, but the District did not bring the action until over five years later. The court rejected the District's argument that the six-year limitations period in ORS 12.080 is exclusive for all contractual disputes. The District also argued that it should not be bound by the bond terms because it had not been directly involved in negotiating the terms. The court rejected the argument because the District was statutorily required to approve the bond and could have rejected the limitations period.

The court of appeals also held that the parties had not entered into a settlement agreement because the District failed to accept the offer in a reasonable time. Because Gulf Insurance did not limit the time for acceptance, the offer was open for a reasonable time. But the District failed to identify circumstances justifying acceptance 19 months after the offer as reasonable.

C. Economic Loss.

Oregon's economic loss rule does not bar a negligence claim by a subsequent purchaser of real property against the builder to recover damages for the costs of repairing structural damage as a result of defects in construction.

Bunnell v. Dalton Construction, Inc., 210 Or App 138, 149 P3d 1240 (2006). Defendant Dalton Construction, Inc., built a home and sold it to the Evanses in 1997. The Evanses sold the home to the Bunnells in 2003. During the Bunnells' inspection before purchasing the home, they discovered certain defects in the installation of the siding, but the inspector could not determine the total defects until the siding was removed. Based on the information, the Bunnells negotiated a discount of $2,500 off the $520,000 purchase price. When the siding was removed, the Bunnells discovered substantial damage from water intrusion and sued Dalton for negligence in the installation of the siding, ventilation, windows, stone flashing, and weatherproofing. The trial court dismissed the claims based on Dalton's argument that the damages were purely economic loss.

The court of appeals reversed. Citing *Harris v. Suniga*, 209 Or App 410, 149 P3d 224 (2006), the court held that deterioration to the physical structure of a building because of defective construction is property damage and not economic loss. Because a nonprivity owner can bring a negligence claim against a builder, the court rejected Dalton's contention that the Bunnells were not damaged because the property damage had been inflicted on the Bunnells' predecessor. Additionally, the fact that the Bunnells were aware of some defects did not preclude them from recovering in negligence. Previous knowledge of the defects is not relevant to determining whether a loss is economic or property damage. Previous knowledge could be relevant, however, in determining comparative fault or mitigation of damages.

NOTE: *Bunnell v. Dalton Construction, Inc.* and *Harris v. Suniga* are currently under review by the Oregon Supreme Court.

D. Judgments.

A limited judgment is valid notwithstanding that it fails to use the term "adjudged" or "no just reason for delay"; if cases are consolidated for trial but not all purposes, a general judgment is appealable even though it does not dispose of all claims in one of the consolidated cases; a properly titled general judgment disposes of all claims in an action whether or not the court expressly disposes of each claim; a supplemental judgment is valid only if entered after a general judgment.

Interstate Roofing, Inc. v. Springville Corp., No. A135686, 2008 WL 89683 (Or Ct App Jan. 9, 2008).

Interstate Roofing, Inc., pleaded three claims against Springville Corporation: foreclosure of a construction lien, breach of contract, and quantum meruit, together with a request for attorney fees. Springville counterclaimed for breach of contract and negligence, together with a request for attorney fees. The case was bifurcated for trial to the court on the foreclosure claim and Springville's counterclaims. The trial court issued a limited judgment and money award, which stated that the construction lien was invalid because it was overstated, that Springville was awarded breach-of-contract damages, and that Springville could not recover in tort. Several months later, the court issued a supplemental judgment awarding Springville attorney fees related to the breach-of-contract claim. Shortly thereafter, Interstate voluntarily dismissed the remaining claims, and the court issued a general judgment.

Springville then filed a notice of appeal from all three judgments. Interstate moved to dismiss the appeal from the limited judgment as untimely filed and to dismiss the appeal from the general and supplemental judgment for want of a conclusive general judgment. Springville also moved for a determination of the appealability of the general judgment.

The court granted Interstate's motion to dismiss the appeal from the limited judgment. Springville failed to file a notice of appeal from the limited judgment until more than seven months after it was entered. Springville, however, argued that the limited judgment was not appealable when it was entered because the limited judgment did not contain the term "adjudged" in the adjudicative part of the document and because the limited judgment did not include the term "there is no just reason for delay." The court rejected both arguments. The court held that no part of ORS Chapter 18 required the use of the term "adjudged" in a form of judgment. And although a judgment entered under ORCP 67 B requires the determination that there be no just reason for delay, in ORS 18.052(1) the legislature removed the requirement that a document entitled "Limited Judgment" reflect the determination that there is no just reason for delay.

The court also determined that the general judgment was appealable. The question over appealability arose because the case had been consolidated with an indemnity action brought by Springville against another party. The general judgment issued in this case, however, failed to dispose of any claim in the indemnity case. Springville asserted that until the court reduced to judgment all the claims in both cases, none of the judgments were conclusive or appealable. Rejecting Springville's assertion, the court held that to the extent that there was a consolidation of cases, it was for one or more joint hearings and a joint trial, not for all purposes. The cases were not "made into one case" for the purpose of determining the conclusiveness of judgments entered in the case, and thus the fact that the general judgment did not dispose of claims in the other case did not prevent the general judgment from being appealable.

The court denied Interstate's motion to dismiss for want of a conclusive general judgment. Neither the limited judgment nor the general judgment explicitly disposed of Interstate's lien foreclosure claim or Springville's negligence claim. Citing ORS 18.082(2) and (3), the court held that a properly titled general judgment disposes of all claims with prejudice, whether or not expressly disposed of in a judgment. ORS 18.082(5), which states that ORS 18.082(3) does not apply to general judgments of dismissal, did not impede the court's conclusion. When the court enters a general judgment of dismissal, ORS 18.082(5) means only that the dismissal is without prejudice; the judgment still disposes of all claims.

Finally, the court vacated the supplemental judgment with instructions for the trial court to reenter it. Interstate argued that under ORS 18.005(17), the supplemental judgment could not be entered until after the general judgment, and thus, the supplemental judgment was not appealable because the general judgment was not

conclusive. Interstate was right for the wrong reason. As stated above, the general judgment was conclusive, but the record showed that the supplemental judgment had been entered four days before the general judgment. Even though literal application of ORS 18.005(17) could put a prevailing party in a limited judgment in the position of having to wait months to obtain an attorney-fee award related to a claim disposed of in a limited judgment, the statute provides that a supplemental judgment entered before entry of the general judgment is invalid.

E. Prevailing-Wage Rule.

BOLI's interpretations of its prevailing-wage-rate rules are entitled to deference by the court if the interpretations are plausible and not inconsistent with the rule or other law.

Coats-Sellers v. State, 209 Or App 281, 147 P3d 946 (2006), *rev denied*, 342 Or 523 (2007). Plaintiff contracted with the Oregon Department of Transportation ("ODOT") to pave a portion of a highway. The contract incorporated Oregon's Bureau of Labor and Industries ("BOLI") rules concerning the payment of prevailing wages to workers on public projects. A BOLI rule defined "borrow pits" as part of the site of work (and subject to the prevailing-wage requirement) if the borrow pits were dedicated to the public project and located near the project site, with the exception of borrow pits established before bids were opened for a particular project.

During the project, BOLI determined that plaintiff was not paying prevailing wages to workers at its borrow pit located approximately eight miles from the jobsite, which eventually led to ODOT's withholding payment from plaintiff. As a result, plaintiff sued ODOT and BOLI for breach of contract, and ODOT counterclaimed for breach of contract based on the failure to pay prevailing wages. The trial court granted plaintiff summary judgment, holding that plaintiff's borrow pit was not part of the "site of work."

The issue for the court of appeals was whether BOLI had properly construed its rules when determining that plaintiff's borrow-pit workers were subject to the prevailing-wage rules. The court accepted BOLI's argument that its interpretation of the rule as incorporated into the contract was plausible given the location of the pit and other factors. Because courts defer to agency interpretations of their own rules if the interpretations are plausible and not inconsistent with the wording of the rules or any other source of law, the court reversed the trial court, holding that BOLI had properly determined that plaintiff's borrow pits were part of the "site of work."

F. Prevailing-Wage Rules.

Under former ORS 279.348, a project is a "public works" only if a public agency is a party to the construction contract or if, at the time of construction, it was committed to own or use the property.

Portland Development Comm. v. BOLI, 216 Or App 72, 171 P3d 1012 (2007). In 2000, the Portland Development Commission ("PDC") purchased a dilapidated site located within one of its urban renewal districts that was commonly known as the "Tin Roof property." PDC later agreed to sell the Tin Roof property to a private developer with the ultimate goal that the developer would lease the property back to a local business that wanted to relocate its headquarters at the site. PDC provided the developer with special financing to purchase the site and conditioned the sale on the developer's agreement to comply with PDC's general goals and objectives for the redevelopment area and to grant PDC the authority to review and approve significant changes to the project to the extent that the changes deviated from the initial conceptual plan. Without any input from PDC, the developer selected, hired, and contracted with a contractor to perform the work. PDC did not supervise the contractor in any way. Midway through construction, the Oregon Bureau of Labor and Industries ("BOLI") notified PDC that the project was subject to the prevailing-wage statutes. BOLI contended that because PDC had contracted for the building, the development qualified as a public works under former ORS 279.348(3). The trial court rejected BOLI's argument and granted summary judgment against BOLI. The court of appeals affirmed.

BOLI argued that PDC's goal when selling the project to the developer was to produce a new building for the relocating business, and thus it was a public works. BOLI contended that a building was a public works anytime the ultimate goal of the public agency's contract was to produce a building, whether or not the agency owned or later used the building. Although plausible from the text of the statute, the court rejected BOLI's argument. Instead, the court accepted PDC's argument that the statute applied only to those projects for which the public agency was a party to the construction contract or, at the time of construction, was committed to own or use the property. Turning to the legislative history behind ORS 279.348(3), the court held that the language "contracted for" was added to the statute to address situations in which a project is initiated based on the promise of a public agency to lease or own the completed building. But PDC did not intend to lease or own the Tin Roof property. And because PDC was also not a party to the construction contract, the project was not a public works notwithstanding that PDC retained some control over the type and style of the development of the property to ensure that it met PDC's redevelopment goals and objectives.

G. Statutory Notices.

A party receives a notice of assignment when it reaches the specific building designated in a contract as the address for the receipt of notices.

KeyBank National Assn. v. DPR Construction, 209 Or App 435, 149 P3d 233 (2006). DPR Construction subcontracted to Protocol, Inc., for cleaning management services at a jobsite at the Intel campus in Hillsboro, Oregon. According to the contract between DPR and Protocol, DPR's address for notices was "2501 NW 229th Ave., RS3-309, Hillsboro, OR 97124." The street address was the general mailing address at the Intel campus, while RS3-309 designated a specific trailer at the jobsite. Intel's practice after it received the mail was to internally direct it to the trailer.

In late 2003, Protocol defaulted on a loan from KeyBank. Because KeyBank had a security interest in Protocol's accounts receivable, KeyBank sent a notice to DPR on January 5, 2004, to remit funds owing Protocol directly to KeyBank. The notice arrived at the Intel campus on January 9. On January 16, DPR paid Protocol $65,000. One hour after making the payment, an Intel employee informed DPR of the notice from KeyBank, which DPR retrieved the same day. KeyBank sued DPR for conversion of the $65,000, but the trial court granted summary judgment in favor of DPR because the stipulated facts established that DPR had not received the notice of assignment until after it had paid Protocol.

The Oregon Court of Appeals affirmed. Under ORS 71.2010(26), a notice is not received until delivered at the address designated by the parties as the place for receipt of notices. Delivery to the general mailing address at the Intel campus was insufficient because the parties had designated a specific trailer, namely, RS3-309. Because the statute clearly defined the receipt of notice as receipt at the place designated by the parties, the court rejected KeyBank's argument that it was being unfairly burdened with risk that Intel's internal mail delivery system would fail.

H. Statutory Notices.

The procedural scheme of ORS 701.560 to ORS 701.595 applies to residential construction performed before the statutes' January 1, 2004, enactment.

Strizver v. Wilsey, 210 Or App 33, 150 P3d 10 (2006), *rev denied*, 342 Or 474 (2007). In 2003, the Wilseys entered into and performed a contract to build a residence for the Strizvers. In fall 2003, the Strizvers notified the Wilseys of certain defects under a contractual provision concerning notice of defects, but the Wilseys did not respond. In fall 2004, the Strizvers filed suit. The court granted the Wilseys' motion to dismiss because the Strizvers had not followed the notice procedures set forth in ORS 701.595, which was enacted January 1, 2004. The Strizvers appealed, arguing that the statute should not have been applied retroactively.

The Oregon Court of Appeals affirmed.

Although the statute did not have an express retroactivity clause, taken as a whole, it applies when a plaintiff commences a court action after January 1, 2004, regardless of when the construction at issue took place.

[Note: The authors encourage readers to forward opinions that impact Oregon construction law practice, particularly opinions from Oregon Circuit courts, to Jeff Sagalewicz at jeff.sagalewicz@millernash.com for inclusion in future updates.]

INSURANCE 101 FOR CONSTRUCTION LAWYERS – PART I: FUNDAMENTALS OF LIABILITY COVERAGE FOR CONTRACTORS

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This article provides an overview of some of the fundamental issues regarding general liability insurance for construction contractors. These include the purpose of liability insurance, tendering claims, and potential insurance traps for construction attorneys.

The next issue of this newsletter will include a discussion of additional, more complex, insurance coverage issues such as strategies for defeating some of the coverage arguments raised by carriers, various types of coverage found in additional insured endorsements, decisional treatment of Oregon's anti-indemnity statute, and recent case law in the insurance arena.

I. GENERAL LIABILITY INSURANCE FOR CONTRACTORS

General liability insurance provides an insured with protection against two types of potential loss resulting from a lawsuit. First, it covers damages awarded to a third party (the plaintiff) because of injury or damage for which the insured is legally responsible. Second, it covers the cost of defending the insured against the claims alleged in the suit. Defense costs, which include attorney fees, consultant fees, and other legal expenses, can add up quickly even when plaintiffs' claims are meritless. The indemnity (payment of damages on the insured's behalf) and defense (payment of legal expenses) duties constitute an insurer's primary obligations under a general liability insurance policy.

While insurance exists for various types of loss a contractor may experience, general liability insurance only insures against the potential loss arising from claims against the insured. General liability insurance does not protect a contractor from, for example, damage to its own property, or damage to or loss of its equipment. The following chart summarizes some types of loss that generally are not covered by general liability insurance, and references the type of policy that would provide the necessary coverage:

Nature of Liability / Damage / Loss	Appropriate Insurance Policy
Bodily injury, property damage, and cleanup costs due to pollution	Environmental Liability / Pollution Insurance
Claims against an organization arising from mistakes by directors and officers of a corporation	Directors and Officers Liability Insurance
Damage to an insured's equipment or tools	Inland Marine Insurance; Contractors Equipment Floater
Loss caused by dishonest or fraudulent acts of an employee	Commercial Crime Insurance
Damage to property during the course of construction	Builder's Risk Insurance

II. Tendering Claims to General Liability Insurers

A. Deciding Whether to Tender to The Insurer

When a claim is made or a suit is filed against a contractor, the contractor and its counsel need to decide whether to tender the claim to its liability insurers. In order to trigger coverage under a general liability policy, the insurance company must first receive notice of the claim. This process is called tendering the claim.

While a contractor may not initially know whether a particular policy provides coverage for a lawsuit, it should strongly consider tendering the claim to its insurer as soon as possible. When considering whether to tender, contractors may need to find out if the tender may, regardless of the insurer's ultimate response, increase the contractor's future premiums or make it difficult for the contractor to find coverage with the same or another insurance carrier in the future. Nonrenewal of a policy can be a particular problem in the construction field where coverage for certain trades and projects has narrowed with the increase in construction defect litigation. In addition, contractors may not wish to tender to certain carriers where coverage may be needed for payment of other claims.

Where possible, contractors should consult their risk managers, brokers, or attorneys to discuss the possible impact of a tender on their insurance programs. Unless, however, a contractor has made an informed decision with sound professional advice to not tender, the best advice is to tender a claim, and to tender it as soon as possible.

B. The Mechanics of Tendering a Claim

The initial tender can impact the handling and outcome of a claim. After locating its insurance policies (a task made unnecessarily difficult by document retention policies that do not specifically require permanent retention of all insurance policies, however old) and deciding whether to tender the claim, a contractor will need to decide:

1. Whether to make a "short form" or a "long form" tender;
2. Who should make the tender; and
3. When to make the tender.

A short form tender simply notifies the insurance company of the case, usually by attaching a copy of the complaint or other form of written demand to a short letter tendering the defense and requesting indemnity. An "additional insured" party to the insurance contract should enclose with the tender letter all certificate and endorsements in its possession evidencing its additional insured status (as well as a copy of the construction contract creating the additional insured requirement when the additional insured endorsement provides blanket or automatic coverage based on the construction contract). A short form tender is appropriate where coverage is relatively clear or as a precursor to a long form tender, enabling the contractor to establish an earlier date of tender and, therefore, an earlier date for potential reimbursement of defense costs from the insurer.

A "long form" tender provides the insurer with an analysis of why coverage exists under the policy terms for the claim. Contractors may want to supplement their initial tender with a long form tender when coverage is not obvious for a variety of reasons, including the following: (1) situations where the area of coverage is uncharted or controversial and the contractor wants the insurer to know that it is sophisticated and aggressive; (2) when the contractor suspects that a blanket denial will come from the carrier and wishes to speed up the pace of the anticipated coverage dispute. Long form tenders do run the risk, however, of educating insurance adjusters to coverage defenses that otherwise may have not been reserved by the insurer. Thus, if time permits, it may be best to provide the contractor's coverage analysis to the insurer only in response to the specific points of denial raised by the insurer.

Contractors generally should not leave this crucial tendering task to a risk manager or broker unless a short form tender is all that the contractor intends to send. Where the tendering task is

delegated to a risk manager or broker, the contractor should follow up to ensure timely tender, to confirm tender under all potentially relevant policies, and to make sure it has adequate documentation of the tenders. Long form tenders usually include an analysis of the triggering events and the law, and typically have more effect when sent by counsel. Moreover, coverage for contractors often requires creative and unconventional approaches, which risk managers and brokers may not be trained to consider. There may be reasons, however, to send a long-form tender over the signature of the risk manager or broker, such as not wishing to convey an overly-aggressive tone by revealing the retention of coverage counsel.

Tenders should be made to the contractor's general liability insurers for the relevant time period (in a construction defect case this would span from start of construction to the present), as well as to other sources, depending on the type of claim and the position of the insured. Some examples include tendering to a homeowners association's carrier (on behalf of a developer) and tendering to another contractor's carrier (as an additional insured).

Up-to-date contact information for admitted carriers can be located with the Oregon Insurance Division's insurance company search engine (http://www4.cbs.state.or.us/ex/ins/inslic/company/index.cfm). Contact information for non-admitted carriers, also called surplus lines carriers, may be found on the Surplus Line Association of Oregon's website (www.slaor.org/Insurance.aspx). Policy forms may also contain contact information for tendering claims, though the contact information contained in older policies may no longer be accurate.

In addition to forwarding a copy of a complaint to the insurer upon receipt, the following are examples of claims that should be tendered as soon as possible:

1. Notice of defect letter sent pursuant to ORS 701.565;

2. Secondary notice of defect letter sent pursuant to ORS 701.570; and

3. Written demands from owners relating to construction defects not affected by ORS 701.565 and 701.570.

Some policies are written on a "claims made and reported" basis. These policies are triggered only if the claim is made against and reported by the insured to its carrier within the policy period. Failure to tender on time can forfeit coverage under such policies. Most other policies contain provisions requiring notice "as soon as practicable" (for example) or requiring the insurer's consent before incurring any expenses, and insurers will argue that they are not required to reimburse attorney fees incurred prior to notice to the insurer. Again, sooner is better.

III. Common Insurance Traps and Pitfalls For Construction Attorneys

Construction attorneys often take on multiple roles, each of which requires the attorney to address a variety of issues. Some of the roles may include drafting construction contracts, dealing with construction financing or liens, advising clients on insurance coverage, defending an insured against lawsuits, and tendering claims to insurance companies. With such varied responsibilities, the nuances of the insurance process can become traps for construction attorneys. Some of these potential problems are briefly discussed below.

A. Insurance Coverage Requirements in Construction Contracts

Insurance coverage problems often begin with construction contracts that do not include basic requirements for insurance coverage. To adequately protect a contractor every construction contract should contain minimum requirements for insurance coverage. Contractors should discuss with their attorneys what insurance requirements to include. Points to consider include the following:

1. Required limits;

2. Coverage for completed operations[8];

3. Length of coverage after final payment and completed operations;

4. Nature and form of coverage for additional insureds;

5. Coverage for contractual liability; and

6. Whether the insurance provided by the contractor is to be considered primary and non-contributory.

Other contractual provisions, such as indemnity requirements, also have bearing on coverage and should be reviewed. Advice from counsel may vary according to the trade and bargaining position of each contractor, but contractors should continually evaluate and update the insurance language in their contracts to provide the best protection from claims arising out of their projects. Without the proper contractual language regarding insurance requirements, the extent of insurance money available to settle claims or pay judgments may be diminished, increasing the exposure for all of the contractors.

B. Contractual Requirements for Additional Insured Coverage

Many construction contracts require additional insured coverage for entities such as developers and general contractors. Too many times, however, these developers and general contractors who are contractually entitled to additional insured coverage under subcontractors' policies fail to follow through and collect the required certificates of insurance evidencing this additional insured coverage.

In addition to requiring all subcontractors to provide *certificates* of additional insured status, the contract documents should specifically require – and the developer and general contractor should enforce compliance with this obligation – that the subcontractors provide copies of the additional insured *endorsements*. In addition, developers and general contractors should take care to ensure that the endorsements provided by the subcontractors either specifically name the necessary parties as additional insureds or that the language of the endorsement automatically makes the necessary parties additional insureds by virtue of the requirements of the construction contracts (the former is preferable).

At the same time, counsel for subcontractors should confirm that the subcontractors comply with any contractual obligations to procure additional insured coverage for developers or general contractors. Otherwise, a denial by the insurance company of an additional insured's tender leaves the subcontractor susceptible to a breach of contract claim for failure to procure the insurance required by the construction contract, which may be asserted in yet another lawsuit.

Too often insurance companies deny additional insured tenders from developers and general contractors for the specific reason that they have no record of ever having issued any additional insured endorsements. Copies of the endorsements foreclose this argument, forcing insurers to take the additional insured claims more seriously.

Do not overlook the possibility of additional insured coverage under policies issued to other entities. Although the additional insured will not typically have possession of the actual policy, the applicability of this coverage (and, at least, the ability to tender) can be gleaned from the certificate and endorsement forms.

C. Timing and Scope of Tenders

As noted above, late tenders create unnecessary problems with insurers, from limitations on recovery of pre-tender defense costs to complete denials of coverage. In addition, tenders that do not apprise the insurer of all claims against the insured – or that tender on behalf of one entity and not on behalf of another related

[8] Note that Section 19 of House Bill 2654, effective January 1, 2008, imposes on contractors the obligation of obtaining coverage for liability of products and completed operations. *See also*, OAR 812-003-0200(e). A step forward, this new requirement is only effective at the time of each contractor's CCB license renewal, meaning that a contractor with a December renewal can perform construction without having to comply with Section 19 for most of 2008.

entity – give insurance companies reason to deny claims that may otherwise be covered. Ensure that tenders are timely. Ensure that tenders request both a defense against and indemnity for all claims asserted. Finally, ensure that tenders are made on behalf of all entities – and individuals – that are implicated by the claims.

D. Following Up on Factually-Based Denials

Under Oregon law defense obligations are triggered by the allegations in the complaint – regardless of their truth or merit – and nothing else. Some insurance adjusters deny claims based on information not contained in the complaint. Carriers have been known, for example, to deny claims for a defense where the construction was "obviously" still in progress at the expiration of the policy. The denial letter from the adjuster will indicate that because the project was not a "completed operation" no coverage exists under the policy.

While an insurer may – or may not – have a valid point on indemnity, if the basis for the denial comes from information gleaned from sources outside the complaint the insurer still has a defense obligation. If the first letter back from the carrier contains a denial based on information gleaned outside the complaint, a polite response through a letter discussing Oregon law on the topic (perhaps citing *Ledford v. Gutoski*, 319 Or 397, 399-400 (1994)) and pointing out the lack of relevant allegations supporting the denial in the complaint may go a long way toward procuring a defense for the contractor.

IV. Conclusion

The involvement of insurance coverage in construction litigation is often essential to satisfactory resolution of claims against contractors. Construction attorneys can help their clients achieve that satisfactory resolution with careful planning and detailed attention to insurance coverage from the contracting process to the assertion of arguments in favor of indemnity.

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