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ASSESSING THE IMPACTS OF COMMUNITY BENEFITS AGREEMENTS

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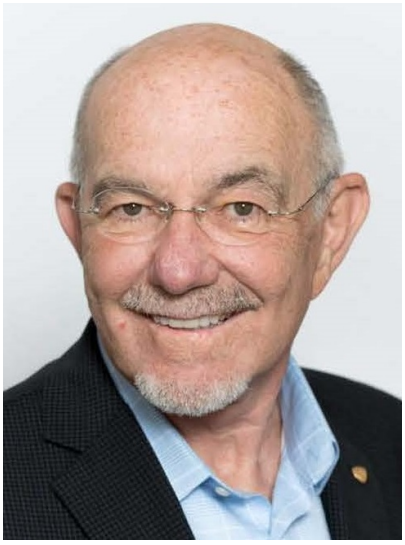
Several recent public construction projects in Oregon have incorporated a requirement for a Community Benefits Agreement (CBA) in the contract documents. CBAs are intended to have a positive effect on their local community, but their impact can extend far beyond the intended beneficiaries: significantly affecting subcontractors, workers, owners, and other project participants. Attorneys representing each of these parties need to use care in understanding how a specific project's CBA may affect their clients' success with a project.



James A. Chaney

What is a CBA?

Public agencies often seek to leverage public funds to achieve social benefits, especially for members of under-served or under-represented groups. In Oregon, a number of public agencies have adopted policies applicable to new construction projects that seek to extend the impact of the public investment in the project, with mandates for such things as specific hiring, training, and subcontracting policies.[1] The CBA itself is a written agreement incorporating those policies that typically includes, and is commonly negotiated between, the prime contractor, the agency, and representative

[1]Barnard, Casey, and Carlyn Hood, *The Community Benefits Agreement [CBA]: A Proven Tool for Advancing Portland's Commitment to Equity in Contracting and Workforce Diversity*, CBA Labor-Management Oversight Committee, April, 2016.

community groups. Such agreements also often include among their signatories a large number of trade unions as well.

The Origin of CBAs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The concept of community benefits agreements had its beginnings in the early 1990s, for the purpose of addressing the impacts of development projects on communities.[2] Prior to this, a number of high-profile urban development projects sited in low-income neighborhoods had been criticized for their negative impacts on surrounding communities. Proponents of early CBAs sought to involve community groups in establishing a set of rules or guidelines that developers would be obliged to abide by, with the purpose of ensuring that the local community benefitted from the development project.[3] The best known early examples of CBAs are from projects related to the entertainment industry in Los Angeles, such as the Staples Center, that were constructed in low-income areas.[4] These agreements focused on wages, hiring, and training opportunities for community members, along with more site-specific obligations for such things as traffic improvements.

Evolution and Hybridization of CBAs

Since the 1990s, the range of intended benefits that may be wrapped into a CBA has broadened. With the advent of the "Smart Growth" movement in the late 2000s, concepts such as affordable housing and transportation alternatives became common elements found in CBAs.[5] Within the last decade, the CBAs adopted by government agencies in Oregon have included goals for participation by minority-owned, women-owned, disadvantaged, and emerging small businesses (M/W/DBE/ESB), along with hiring and training goals.[6] Generally, these CBAs have been used on large projects constructed by a Construction Manager/General Contractor (CM/GC). Increasingly, the method most commonly employed to carry out CBAs on large projects has been through Project Labor Agreements executed between the agency, CM/GC, trade unions, and selected community organizations, which add an obligation for union representation to the Agreement's terms.

Project Labor Agreements

At its core, a Project Labor Agreement (PLA) requires that all contractors on a project be or become signatory to the relevant trade union's collective bargaining agreement. Public agencies PLAs have their origin in the 1930s, following the passage in 1931 of the Davis Bacon Act.[7] Davis Bacon mandated a process for determining minimum wage rates for federal construction

[2] Salkin, Patricia E. and Amy Levine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, (September 1, 2008) UCLA JOURNAL OF ENVIRONMENT LAW & POLICY, VOL. 26, 2008; ALBANY LAW SCHOOL RESEARCH PAPER NO. 09-04.
[3] *Id.* at 292.
[4] *Id.* at 301, 304.
[5] *Id.* at 298.
[6] *See*, e.g., Northwest Labor Press, *Portland ready to move on Community Benefits Agreement*, https://nwlaborpress.org/2017/10/portland-ready-to-move-on-community-benefits-agreement.html, (last visited August 30, 2019).
[7] March 3, 1931 ch. 444, 46 stat 1494, 40 U.S.C. §3141.

projects, with the effect that the Act promoted organized labor, since the prevailing wage almost always was equivalent to the area collective bargaining rate. A consequence of the law and its implementation was to exclude non-union contractors from federal projects. With union wage rates already underwritten by Davis Bacon, subsequent federal construction projects such as Hoover and Grand Coulee incorporated a PLA. These agreements primarily focused upon exclusive union representation, standard pay rates, and prevention of labor disputes.

The prohibition on subcontracting work to non-union contractors in PLAs has been challenged, without great success. In *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982), the Supreme Court held that such agreements did not violate 29 U.S.C. §158(e) because they were sheltered under the self-contained construction industry proviso. The National Labor Relations Board (NLRB) in the companion case of *Local 701, IUOE v. NLRB* held that these agreements could not be enforced through self-help.[8] PLAs have also been challenged for their lawfulness under the National Labor Relations Act (NLRA): an Associated Builders and Contractors group challenged a Massachusetts agency's decision to enter into a project agreement, arguing that the NLRA preempted state law. While the 1st Circuit agreed with the argument, the Supreme Court reversed.[9] The Court held that the Authority was acting in its proprietary, not regulatory, role and thus preemption did not apply.

Recent Public Agency CBAs

The City of Portland adopted policies for CBAs beginning in 2012, which were first used in the construction of two Portland Water Bureau projects.[10] The City of Portland's CBA policy at that time involved a number of community organizations who provided oversight and outreach, and a considerable expense of more than half a million dollars to implement the plan.[11] The City's model CBA has been since revamped, and is now set up to be entered into jointly by the City, CM/GC, trade unions, and community organizations. Along with such common CBA goals as hiring and training, the 2017 version explicitly requires those subcontractors and their employees are union, with certain exceptions for a limited number of "core employees" of non-union subcontractors, and a waiver of union requirements for certified DBEs.

The most prominent recent project being completed under a CBA may be the Multnomah County Courthouse replacement. That project's Request for Proposals for CM/GC services mandated that the CM/GC enter into a labor agreement for the project, while requiring that "a fair opportunity must be extended both to signatory firms and non-signatory firms."[12] The Multnomah Courthouse project's CBA is explicitly titled a "Project Labor Agreement," and while non-union subcontractors may bid on the project, they must, if selected, comply with the union-only provisions of the CBA, and may bring to the site only a limited number of "core employees."[13] All others must be hired from existing members of the union having jurisdiction.

[8] 239 NLRB 274, 277.
[9] 507 U.S. 218 (1993).

[10] City of Portland (Oregon), Community Benefits Agreement Pilot Evaluation, Final Report, May 9, 2016, §3.
[11] Andrews, Garret, *Pilot Errors: Test Run of Community Benefits Agreements Reveals Flaws*, DJC OREGON, July 20, 2016.
[12] Multnomah County (Oregon), Multnomah County Central Courthouse CM/GC, Solicitation Number RFP #4000003353.
[13] Multnomah County (Oregon), Multnomah County Central Courthouse Project Labor Agreement, February 13, 2017.

CBAs are on the radar of other public agencies, as well: construction for the current Knight Campus project at the University of Oregon is under a CBA along similar lines of the Portland and Multnomah agreements. Other agencies, including counties and school boards outside the Portland metropolitan area, have been approached or are already considering, CBAs in one form or another.

Client Considerations for CBAs

CBAs appear to be an established fixture in public construction projects, at least for the near future, and perhaps beyond. Whether a project's CBA includes within it a PLA or not, there are multiple considerations that must be taken into account to understand the impact of a CBA on each party that will be subject to the agreement. Attorneys should be prepared to assist their clients in understanding how a specific project's CBA may affect their clients' success that project. In particular, with respect to specific project participants:

Public Agencies. As has been stated, a public agency owner, encouraged or assisted by community groups, is usually the driving force behind adoption of a CBA, as the agency seeks to leverage its investment in a major project to result in positive impacts upon the community. The agency must create a process to identify and involve community stakeholders, establish its priorities for the most important target benefits, and find a way to quantify the benefits so that meaningful targets can be established and results measured in an objective manner. Potential benefits may include:

- More hiring and training opportunities for disadvantaged persons,
- Increased participation by M/W/DBE/ESBs, and disabled- or veteran-owned subcontractors,
- Greater community engagement with the construction process, and
- Reduced work stoppages or jurisdictional conflicts.

Potential risks for public owners may include:

- Additional administrative burden on the agency to establish and oversee the CBA and coordinate with community groups,
- Reduced competition, if the CBA places barriers on non-union subcontractors,
- Reduced local workforce participation, if the structure of the CBA discourages local subcontractor participation, and
- A lack of conclusive information on cost-effectiveness unless the CBA is structured to provide for it.

Subcontractors. For all subcontractors, a CBA may increase a subcontractor's costs through limiting the number of existing employees that may be brought to the project, along with the costs of identifying qualifying workers, orienting new hires, and increased mentoring and training, as well as potentially interfering with established sub-subcontractor relationships. If the project includes a PLA, the PLA may not produce a significant impact on that subcontractor. However, it is not uncommon for a subcontractor to be signatory to a union contract for one trade but employ workers other than that trade on a non-union basis. With respect to the non-union trades, that "union" subcontractor will be in the same position as a non-union subcontractor.

Non-union subcontractors who are required to be union for a single project face additional burdens beyond the limitation of bringing only "core employees" to the site. There may be, for example, resistance from current employees to joining a union, or the subcontractor may find it harder to recruit workers from the union, as well as coping with an inability to move employees back and forth from other jobs to the covered project. A subcontractor that provides its own benefit plans may have difficulty reconciling the hourly costs paid into a union's benefit plans with their existing plans. Moreover, current employees who join a union for a single project may bear significant costs for initiation fees and will be at risk of losing the benefits paid into their accounts for the project if

they do not work long enough in the union to vest those benefits.

CM/GC. For the CM/GC, a CBA, especially if combined with a PLA, may benefit the CM/GC by simplifying the subcontracting process, reducing the potential for jurisdictional conflict and work stoppages, and providing readier access to established apprenticeship and training programs to meet the requirements of the CBA. However, use of a CBA necessarily increases the administrative burden of bidding and managing the projects, and may result in unanticipated or unreimbursed costs. And, if the CBA's terms reduce potential competition, or discourage local subcontractor participation, the CM/GC may have to accommodate increased costs or time to complete the project.

Conclusion

If successful, Community Benefits Agreements have the potential to provide a broader range of benefits to the community, benefits that extend beyond the usual beneficiaries of construction dollars (the workers and contractors). Anecdotal evidence based on the handful of CBAs already completed in Oregon suggests that many of these intended benefits do in fact occur, though the attempts to quantify these benefits thus far have not met with much success.[14, 15] In addition, in some cases the cost of administering CBAs has been significant. As a result, it is likely to be some time before a definitive answer on CBA's success and cost-effectiveness is known.

Until then, CBAs are likely to continue to be part of many agencies' construction projects, and their terms will continue to affect how contractors, subcontractors, and owners must evaluate their potential risks and rewards for that project.

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[14] City of Portland (Oregon), Community Benefits Agreement Pilot Evaluation, §5.
[15] Andrews, Garret, *Community Benefits Agreements Draw City Opposition*, DJC OREGON, September 21, 2016.

AVOIDING EMPLOYEE RETALIATION CLAIMS

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I've recently had the unfortunate experience of managing a number of cases for contractors who, despite their best efforts to follow the letter of the law in regards to employee management, have found themselves the target of lawsuits alleging retaliation. Often, the retaliation claims arose because the contractor asked a trusted adviser whether they could legally terminate a problem employee instead of asking whether they could do so *without becoming the object of a lawsuit*. The answers to these questions often differ dramatically, resulting in an expensive and frustrating lesson for the contractor. The goal of this article is to provide guidance for contractors to help them avoid retaliation lawsuits altogether.

Over the last decade, employers have become increasingly subject to lawsuits alleging retaliation. In fact, the EEOC reported in 2018 that retaliation claims make up over 50% of all charges filed, outnumbering both gender (32.3%) and race

(32.2%) discrimination claims brought against employers.[16] Two primary elements have contributed to the accelerated growth of these claims: recent developments in employment-related statutes and case law have significantly reduced the bar for plaintiffs to plead retaliation and prevail on summary judgment motions; and juries have sided with plaintiffs in a majority of cases taken to trial.[17] For these reasons, if an employer is served with a complaint alleging retaliation, there is little left to be done but to reach for a checkbook. The odds are a plaintiff's attorney has reviewed the employee's file and found the elements necessary to prevail on a summary judgment motion. Thus, the best defense to a retaliation claim is simply to avoid becoming subject to one.

What Is Retaliation?

Retaliation is defined as an employer's adverse action against an employee because that employee engaged in a protected activity. In Oregon, a *prima facie* claim of retaliation contains three elements: employee engaged in protected activity; employer took an adverse employment action against employee; and an appearance of a causal connection between the two. *See Portland State Univ. v. Portland State Univ.*, 352 Or 697 (2012).

What are protected activities?

Most employers understand that employees have a right to take protected leave or file for workers' compensation benefits due to a work injury, but the courts define a protected activity in a much broader fashion. Protected activities can include a wide variety of employee activities including requesting religious accommodations, complaining about wage inequity, picketing an employer to protest discrimination, or refusing to comply with an employer's direction that the employee believes is discriminatory. As to the last point, the courts don't require that the direction actually be illegal, only that an employee have a "reasonable and good-faith belief" that he or she was opposing an unlawful discriminatory practice and the manner of opposition was reasonable. *See Trent v. Valley Elec. Ass'n,* 41 F3d 524, 526–527 (9th Cir 1994). Employee complaints do not have to be formal, written complaints to company executives, verbal complaints have been found sufficient to satisfy the element of protected activity. *See Gifford v. Atchison, T. & S.F.R. Co.*, 685 F2d 1149 (9th Cir 1982).

Adverse Employment Actions

The courts define adverse employment actions as "any adverse treatment . . . that is reasonably likely to deter" protected activity. *See Ray v. Henderson*, 217 F3d 1234, 1242-1243 (9th Cir 2000); *see also Portland State Univ. v. Portland State Univ.*, 352 Or 697, 712 (2012) (citing *Burlington Northern & Santa Fe Ry. V. White*, 548 US 53, 67-70 (2006)). Clearly, termination, demotion, suspension or a reduction in pay or hours of an employee are the most obvious examples of adverse employment actions. However, courts have held that such minimal acts as schedule changes, cubicle moves, and failing to include the employee in after-hours social events could fall under the umbrella of an adverse action. Even employer's actions against third parties can be found to be adverse if they affect the employee. *Thompson v. North American Stainless, LP*, 562 US 170 (2011) (terminating employee's fiancée after employee filed discrimination complaint was adverse treatment).

Causal Connection

For employers, the most problematic aspect of this claim is the courts' generous perspective on a plaintiff's burden of proof on the causal connection between the adverse employment

[16] EEOC Press Release, April 10, 2019, found at https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm (last visited October 10, 2019).
[17] Meinert, Dori, *Retaliation Claims Are Greatest Legal Risk*, The SHRM Blog, March 22, 2012.

action and the protected activity. The EEOC has suggested that retaliation can be established by creating a "convincing mosaic" of circumstantial evidence which infers a causal connection between the activities, a framework that has been adopted by some courts. *See Langenbach v. Wal-Mart Stores, Inc.*, 761 F3d 792 (2012). The most influential of these facts is the temporal proximity between the two actions. Generally, the closer in time the adverse action is to the protected activity, the stronger the causal link appears. *See Van Asdale v. Int'l Game Tech*., 577 F3d 989, 1003 (9th Cir. 2009) (when an adverse action follows on the heels of a protected activity, causation can be inferred from timing alone); *Portland Ass'n of Teachers v. Multnomah Sch. Dist. No. 1*, 171 Or App 161, 625 (2000). Other factors the courts look to in determining the employer's motive often include: whether the manager who is alleged to have taken the adverse action is the subject of the protected activity; whether the employee had a record of poor performance prior to engaging in the protected activity; whether the employer treated the employee more harshly than other employees who committed a similar offense; or in general any facts, which taken together, appear as if the employer is ostracizing the employee.[18]

Oregon Law at Summary Judgment

Oregon courts have set the bar so low for a plaintiff's burden of proof on a motion for summary judgment that all that is essentially required is that the plaintiff be able to plead enough facts to establish a *prima facie* case. Federal courts apply a three-step burden-shifting analysis to summary judgment motions claiming retaliation: (1) plaintiff presents facts sufficient to prove *prima facie* claim on all three elements; (2) employer may present facts sufficient to show there was a non-retaliatory animus for the adverse employment action; (3) burden shifts to plaintiff to refute employer's defense. *See McDonnell Douglas Corp. v. Green*, 411 US 792 (1973). Oregon courts have rejected this analysis, instead finding that a genuine issue of material fact exists and a defendant's motion for summary judgment must be denied when a plaintiff establishes a *prima facie* case of discrimination and the defendant offers evidence of a nondiscriminatory motive. *See Williams v. Freightliner, LLC*, 196 Or App 83, (2004); *see also Callan v. Confed. of Oreg. Sch. Adm.*, 79 Or App 73, n.3 (1986) (plaintiff's initial prima facie burden is "virtually impervious" to summary judgment); *Ledesma v. Freightliner Corp.*, 97 Or App 379, 383 (1989). Given this low evidentiary burden on a plaintiff, and the fact that an employer's defenses simply create a question of fact, most employers faced with a complaint alleging retaliation must consider the costs and risks of taking the suit all the way through to trial.

How Does This Happen?

A typical example of how easily an employer can be subject to a retaliation claim starts with something as simple as an employee suffering an injury on the job and filing for workers' compensation benefits. The contractor conforms to all legal requirements during the employee's leave and places the employee back into the position held once the employee is released to return to work. Prior to the injury, the employee had received average performance reviews, and the personnel file was devoid of any negative history, despite the fact employee had at times been tardy or absent without permission. At some point shortly after returning to work, the employee informally asks if it would be possible to be transferred to a different project in order to perform slightly different work in order to "rest" the injured area. Employee's supervisor, wanting to be a "good guy," transfers the employee to a

[18] *EEOC Enforcement Guidance on Retaliation and Related Issues*, pp. 42-50 (Aug. 25, 2016) Found at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftn160 (last visited November 6, 2019).

different project, failing to record the transfer in the employee's file as the employee's request. Months later, the employee is terminated for tardiness and absenteeism after receiving repeated verbal and written warnings pursuant to employer's policy. Shortly thereafter, the employer receives a letter from the terminated employee's new attorney, requesting the employee's personnel records pursuant to ORS 652.750. Under the statute, an employer is required to provide to the employee within forty-five days upon request, "the personnel records of the employee that are used or have been used to determine the employee's . . . employment termination . . . ." ORS 652.750(2). The employer complies, confident that the personnel records will show that they followed their policies in terminating the employee. Shortly thereafter, employer is served with a complaint alleging retaliation.

In this scenario, employer has unwittingly provided enough causal facts for the employee to file a *prima facie* claim of retaliation. First, the personnel records prior to the employee's protected activity showed nothing negative, documented discipline for absences and tardiness began after the employee returned to work. Secondly, the transfer just a few days after the employee returned to work would be considered an adverse employment action if so pled by the employee, because nothing in the employee's personnel file documents the reason for the transfer. Now, the temporal proximity between the employee's protected activity and an adverse employment action is just days, and could be framed as the beginning of a pattern of continuing adverse actions with the intent to terminate the employee for taking leave under workers' compensation. This fact pattern would almost certainly survive summary judgment.

How Employers Can Prevent Retaliation Claims

The best way to defend against retaliation claims is to simply avoid them. Be proactive and educate managers. The following steps can be part of an effective strategy:[19, 20]

- **Implement an Anti-Retaliation Policy.** Add an anti-retaliation policy to existing anti-discrimination and harassment policies that encourages employees to report discriminatory or unlawful activities and defines a process for making and handling such complaints.

- **Train Managers and Supervisors.** Provide training for managers and supervisors as to what actions may be considered retaliatory and how to respond to complaints. Specific attention should be given to treatment of an employee who has lodged a complaint or otherwise engaged in protected activity to insure retaliation is not ongoing.

- **Address Complaints Proactively.** In certain situations after an employee has either lodged a complaint or engaged in another form of protected activity, the employer may want to proactively engage with the employee to reduce any threat of retaliation. In the event the employee seeks different working conditions, any changes should be memorialized in writing and contain the employee's acknowledgment

[19] Nagele-Piazza, Lisa, How to Prevent Workplace Retaliation Claims, SHRM HR Daily Newsletter, March 26, 2018, found at https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/how-to-prevent-a-workplace-retaliation-claim.aspx

[20] *EEOC Enforcement Guidance on Retaliation and Related Issues*, pp. 61-64 (Aug. 25, 2016) Found at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftn160 (last visited November 6, 2019).

that the changes were mutually agreed upon.

- **Closely Review Subsequent Employment Actions.** After an employee has engaged in any protected activity, the employee's manager should be advised to engage human resources, legal counsel and/or senior management in regards to any proposed changes affecting the employee to reduce the risk of exposure to a retaliation claim.

- **Closely Monitor Responses to Claims.** Once a claim has been filed, employers must be diligent in researching the whole story behind a claim to insure they have a correct understanding of the facts. Common issues that arise in deposition are erroneous information or details and facts that have been left out of information submitted previously. Employee attorneys will use inconsistencies in deposition testimony as proof the employer is untruthful, casting a shadow on any defenses the employer may have. Employers would be wise to engage an experienced employment law attorney in these situations, well before submitting any information to a third party.

Despite these precautions, it's probable than an employer will at some point be subject to either a BOLI claim or a complaint which alleges discrimination and retaliation. In this situation, it's important to obtain advice from experienced employment law attorney immediately, not only to have an objective third party to gather the facts, but also to insure no retaliation is ongoing. In addition to the best practices noted above, employers should obtain an employment practices insurance policy. Although deductibles are high, many insurers offer resources for the insured to help them avoid liability, such as hotlines manned by experienced employment law attorneys. Similar to general liability policies, once a claim is made, defense counsel will be provided, although coverage for losses will be subject to the policy terms and conditions.

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THIRD-PARTY BENEFICIARY CLAIMS ARISING OUT OF THE BREACH OF A JOINT CHECK AGREEMENT

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Joint check agreements are common in the construction industry. Joint check agreements are commonly entered into between a general contractor and subcontractor for payment to a sub-subcontractor or supplier, or may be entered into by other parties, including between an owner and general contractor for payment to a subcontractor. The purpose of a joint check agreement is to reduce the credit risk of failure to pay the person who provided the labor, materials and equipment. *See* 3 *Bruner & O'Connor Construction Law* § 8:52 (2019)

Breaches of joint check agreements, as with contracts in general, come in many forms, from a joint payee forging the other payee's signature on the joint check, or otherwise negotiating the joint check without the other payee's signature, or from an owner or general contractor failing to issue a joint check. This article focuses on the liability of the owner or general contractor under a third-party beneficiary theory for breach of an agreement to issue a joint check.

Third-Party Beneficiary Theory

As observed by the Oregon Court of Appeals, "joint check obligations are a 'classic example of a third-party beneficiary contract.'" *Gender Machine Works, Inc. v. Eidal Intern. Sales Corp*., 145 Or App 198, 207 (1996)(*citing T.S.I., Inc. v. Metric Constructors, Inc.*, 817 F2d 94, 96-97 (11th Cir 1987).

For the subcontractor or supplier to enforce the joint check agreement, it must be an intended beneficiary of the agreement, as opposed to an incidental beneficiary. *See Sisters of St. Joseph v. Russell, 318 Or 370, 374-75 (1994); see also Northwest Airlines v. Crosetti Bros*., 258 Or 340, 346 (1971).

The *Gender Machine Works* case involved the building of an industrial shredding machine for Archers Daniel Midland Company ("ADM") to shred scrap tires for use as fuel at a cogeneration plant at one of ADM's manufacturing facilities. *Gender Machine*, 145 Or App at 201. Eidal International Sales Corporation ("Eidal") performed a minor amount of work on the shredder and sold the shredder to ADM. *Id*.

Eidal and Gender Machine entered into an agreement whereby Gender Machine would receive the full $225,000 purchase price paid by ADM for the shredding machine. Subsequently, Eidal faxed to ADM a letter stating that Gender Machine was performing a substantial amount of work on the shredder and stating that payment was to be made by ADM in both Eidal's and Gender Machine's names. *Id*. at 202.

ADM's representative signed the letter and handwrote a notation on it, acknowledging that he understood that the check for the $225,000 purchase price should be jointly payable to Eidal and Gender Machine. *Id*.

After the shredder was built and shipped to ADM, Eidal sent ADM an invoice for the $225,000 sum, but the invoice did not refer to Gender Machine or the joint check agreement. *Id*. Subsequently, ADM sent Eidal a check for $225,000, made payable to Eidal only, which Eidal deposited in its account without telling Gender Machine. Eidal later made a payment from its own account to Gender Machine for only a portion of the $225,000 sum owing to it. *Id*.

Gender Machine filed suit against Eidal and ADM alleging several claims, including a claim under a third-party beneficiary theory. *Id*. at 203.

In analyzing whether Gender Machine was entitled to enforce the joint check agreement, the Court summarized the principles set forth in the *Sisters of St. Joseph* case, *supra*, and the *Northwest Airlines* case, *supra*--intent to benefit the beneficiary; issuance of the check would have satisfied a duty from the promisee to the beneficiary; and the promisor's performance would have benefited the beneficiary. The Court noted that, "[t]hus, in this case if (1) ADM and Eidal intended to benefit Gender by issuing a joint check; (2) ADM's performance would have satisfied a duty of Eidal to Gender; and (3) ADM's performance would have benefitted Gender, Gender was a third-party creditor beneficiary who was entitled to enforce the contract." *Id*. at 206-207.

The Court held that these elements were met and that Gender Machine was an intended creditor beneficiary of ADM's joint payment obligation, noting that the signed letter agreement identified Gender Machine as performing substantial work on the project and that payment was to be made jointly to Eidal and Gender Machine. *Id*. at 207.

Defenses to a Third-Party Beneficiary Claim

As stated in 13 *Williston on Contracts* § 37:57 (4th ed.), "the foundation of an intended beneficiary's rights lies in the contract between the promisor and promise." (*citations omitted*). Thus, in general, "any defense connected to the formation

of the contract, such as capacity, want of mutual assent, or consideration or any similar invalidating cause, may be raised by the promisor against the beneficiary." *Id*.

Further, in general, "a third-party creditor beneficiary's right to recover against the promisor is subject to any claim or defense arising from the beneficiary's own conduct or agreement." *Sisters of St. Joseph*, 318 Or at 379 (*citing Restatement (Second) of Contracts* § 309 (4) and *comment c* (1981).

The defense of payment by the promisor to the promisee, which is a defense not related to the formation of the contract or arising out of the beneficiary's conduct, cannot be asserted as a defense to the third-party beneficiary's claim against the promisor. This principle was made clear in the *Gender Machine* case. There, the promisor ADM had argued that its $225,000 payment to Eidal was a defense to the claim of third-party beneficiary Gender Machine against ADM. *Gender Machine*, 145 Or App at 210. In rejecting that argument, the Court stated that ADM "has not identified any persuasive reason why a promisor should be permitted to breach a joint payment obligation and then assert a defense of payment against the unpaid joint obligee. We perceive none." *Id*. at 211.

The Court found persuasive the practical argument by Gender Machine that "[i]f ADM's argument were the law, the promisor under a Joint Check Agreement would never be liable for issuing payment solely to one of the joint payees. Thus, the other payee would have no legal protection, and a promisor's obligation would be illusory." *Id*. at 210.

Discussion

Proving the three elements needed for a third-party beneficiary to enforce a joint check agreement—intent to benefit the beneficiary; issuance of the check would have satisfied a duty from the promisee to the beneficiary; and the promisor's performance would have benefited the beneficiary—depends not only on the circumstances but also on the language used by the parties in the joint check agreement.
The element of showing intent by the promisor and promise to benefit the third-party beneficiary is critical. An incidental beneficiary, as contrasted with an intended, or creditor, beneficiary is not entitled to a claim against the promisor. *Sisters of St. Joseph v. Russell, supra,* 318 Or at 375 (". . . if the third party has paid no value *and* there is no intention to confer a contract right on that party, then the party is an incidental beneficiary who is not entitled to an action on the contract.").

As a practical matter, if the joint check agreement is a two-party agreement executed by the promisor and promisee, as in the *Gender Machine* case, the subcontractor or supplier should insist on review and approval of the agreement by its counsel to determine if the above elements are met, and on being provided with a fully executed copy of the agreement, before beginning its performance.

Sometimes, there will be a three-party agreement among the owner, general contractor and subcontractor for issuance of a joint check. If that is the case, the subcontractor has a direct breach of contract claim against the owner in case of breach, in addition to a third-party beneficiary claim.

In the *Gender Machine* case, *supra*, the Court did not find that Gender Machine had a "first party" contract with ADM, because the communications that formed the joint check agreement were between ADM and Eidal. *See Gender Machine*, 145 Or App at 205. Thus, Gender Machine's claim against ADM was limited to a third-party beneficiary claim.

In sum, if the parties decide to use a joint check agreement, such an agreement can be an aid to all involved in the construction project, if properly drafted and executed, and performed. These agreements help provide assurance to the owner

and general contractor that work will continue on the project and that there will not be a bond claim filed or lien claim recorded, and help provide assurance to the subcontractor or supplier that they will be paid for the labor, materials or equipment that they have provided.

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LOST IN TRANSLATION: MARRYING OREGON CCB LICENSING REQUIREMENTS WITH THE WORLD TRADE ORGANIZATION GOVERNMENT PROCUREMENT AGREEMENT

Alix Town
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Alix Town

With the United Nations week in September, news feeds are filled with stories about multi-national efforts to combat the world's global problems such as climate change. These multi-national efforts are often times memorialized with grand agreements, which eventually are intended to be instituted at the state and sub-state level. However, the intended commitments of these agreements can be, and sometimes are, lost in translation.

One such agreement is the World Trade Organization Government Procurement Agreement ("GPA"). The GPA is an agreement between certain WTO member states to open government procurement to international competition based on the concept that governments benefit more from increased competition and free trade within their procurement markets than from protectionist measures.

While the Federal Government is automatically a member of the GPA, due to Article X of the U.S. Constitution, the states independently choose to join the GPA and can choose which agencies it will cover under the GPA. Oregon chose to include the Department of Administrative Services ("DAS"), which procures construction services among other goods and services. However, the Construction Contractor's Board ("CCB") licensing process is one such example of an intended commitment lost in translation as only domestic (American) entities can register.

Article V:1 of the GPA states:

> With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favorable than the treatment the Party, including its procuring entities, accords to:
>
> (a) Domestic goods, services and suppliers; and
>
> (b) Goods, services and suppliers of any other Party

Essentially this means that GPA members will not discriminate against other members in any measure relating to a covered procurement. A covered procurement for construction services is a procurement valued above $6,897,500.00.

In order to make it easier to recover child support payments, Congress enacted legislation that required states to have procedures for recording social security numbers for any individual applying for an occupational license. 42 U.S.C. § 666(a)(13). In Oregon, the CCB Licensing Application requires companies to provide the social security numbers for its corporate officers in

accordance with ORS 25.785, ORS 701.046 and 42 U.S.C. § 666(a)(13). ORS 25.785 is a general statute supporting enforcement of child support payments. It requires the state licensing boards to collect social security numbers or in the alternative accept a written statement from the individual that they have not been issued social security numbers.

However, ORS 701.046, which specifically applies to CCB licensing, does not give CCB the option to accept a written statement from the individual that he or she has not been issued a social security number. Ultimately, ORS 701.046, which specifies the CCB application requirements, effectively prohibits foreign firms from participating in DAS construction services procurements in Oregon because CCB cannot issue them a license. This directly contradicts Article V:1(a) of the GPA, which requires the members to treat foreign service suppliers the same as domestic ones. In this instance, the solution is a simple one. ORS 701.046 could be made to conform to ORS 25.785 and allow for an individual to identify that they have not been issued a Social Security Number.

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NEW OREGON CONSTRUCTION CASE LAW & LEGISLATION

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CONTRACT TERMS

FORUM-SELECTION CLAUSE: A contract for the installation of a structure may be considered a "construction contract", such that Oregon law does not permit out-of-state forum-selection clauses. *J. Lilly, LLC v. Clearspan Fabric Structures, Int., Inc.*, No. 3:18-cv-01104-JE, 2018 WL 4773545 (D Or Oct. 2, 2018).

Plaintiff owner ("Owner") entered into agreements with defendant manufacturer ("Manufacturer") for the purchase, construction, and installation of a commercial greenhouse for Owner's Oregon business. Owner alleged that significant defects became apparent after construction was completed; and brought suit asserting claims for breach of contract and breach of warranty against Manufacturer after Manufacturer's repair attempts were unsuccessful.


D. Gary Christensen

The agreements between Owner and Manufacturer comprised two contracts—the Construction Agreement and the Equipment Capital Lease Agreement (the "ECLA"). The Construction Agreement set out the specifications

for the greenhouse, the construction services to be rendered, the total contract price, payment terms, and included by way of attachment an itemized Order Confirmation and installation/product warranties. The ECLA set out the payment terms for the equipment and referenced the Order Confirmation included in the Construction Agreement. Both agreements contained nearly identical forum-selection clauses that required dispute resolution in Connecticut.

Manufacturer filed a motion to transfer venue to Connecticut under 28 U.S.C. §1404(a), based on the forum-selection clause. The district court, in denying Manufacturer's motion, set out the threshold determination of "whether the forum-selection clauses at issue are valid." Owner argued only the Construction Agreement was at issue and its forum-selection clause was invalid per ORS 701.640, whereby the Oregon legislature invalidated choice of law and forum selection clauses in construction contracts that require the preference of any other state. A "construction contract" is in turn defined in ORS 701.620.

Manufacturer argued that the ECLA was the only contract at issue and it was not a "construction contract" per ORS 701.620, as the installation work was simply supplemental to the purchase of the greenhouse. The court rejected both arguments and concluded that the two contracts, though separate, were integral components of an overall agreement and "both relate to the creation and making of a building or structure." As such, the forum-selection clauses of both agreements were held invalid under Oregon law. Absent a valid forum-selection clause, the court concluded that Manufacturer did not defeat Owner's choice of forum based on the traditional factor analysis for 28 U.S.C. §1404(a) motions to transfer venue.

CIVIL PROCEDURE

STATUTE OF REPOSE: When an Oregon product liability action involves a product manufactured in a state without a statute of repose for an equivalent civil action, Oregon's statute of repose does not govern the action. *Miller v. Ford Motor Co.*, 363 Or 105, 419 P3d 392 (2018).

In May 2012, plaintiff consumer's ("Consumer") Ford Escape caught fire while in her parking garage allegedly due to a faulty sensor in its engine compartment. Consumer filed a product liability action against defendant manufacturer ("Manufacturer") in April 2014.

In June 2001, Manufacturer constructed the subject Escape in Missouri and it was first sold in September 2001. Based on the subject timing, Manufacturer moved for summary judgment, arguing that Oregon's ten-year statute of repose barred Consumer's claims "because the Escape was first sold to a consumer more than 10 years before she filed her action." The district court denied the motion concluding that the statute of repose did not apply because ORS 30.905(2)(b) - also known as the "look-away provision" - required the court to apply the repose period from the state of manufacture (and in this case Missouri did not have an applicable statute of repose). Manufacturer appealed the judgment, then Ninth Circuit, after briefing and argument, certified the question at issue to the Oregon Supreme Court.

ORS 30.905(2) provides that "[a] product liability civil action must be commenced before the later of: (a) [t]en years after the date on which the product was first purchased for use or consumption; or (b) [t]he expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured * * *." It does not explicitly state what should occur when the manufacturing state does not have a statute of repose that would govern an "equivalent civil action."

The court determined that when the manufacturing state has no statute of repose for an equivalent civil action, the claim is not bound by any statute of repose. In reviewing the statute's context and

recent legislative history, the court noted that the legislature intended "to allow Oregonians to bring their claims involving products manufactured out of state in Oregon courts" and "to extend that benefit to *all* Oregonians with such claims, not just to those with claims involving states that had enacted statutes of repose."

The court explained that the lawmakers discussed, prior to the passage of ORS 30.905(2)(b), the possibility that the law would lead to "unlimited liability" for manufacturers when a product was manufactured in a state with no statute of repose; but, nevertheless did not modify the bill's language. The court reasoned that the legislature was aware of the negative side effects and still intended to promote the Oregon plaintiff's ability to sue out-of-state manufacturers in Oregon courts. The court held that "when an Oregon product liability action involves a product that was manufactured in a state that has no statute of repose for an equivalent civil action, then the action in Oregon also is not subject to a statute of repose."

CONSTRUCTION LIENS

REVIVAL OF LIEN RIGHTS: Later work may revive the right to assert a construction lien if such work constitutes one part of a single contract. Further, additional work is not trivial or trifling when the contract specifically requires that certain work to be completed and when that work is significant to the project. *Bethlehem Construction, Inc. v. PGE*, 298 Or App 348, ___ P3d ___ (2019).

Defendant owner ("Owner") contracted with a general contractor ("Contractor") to build a power plant. Contractor subcontracted with plaintiff subcontractor ("Subcontractor") to produce and deliver precast concrete panels to be used in the construction. The panels were produced and delivered in April 2015, and Subcontractor submitted its final billing to Contractor at that time. In December 2015, Contractor contacted Subcontractor with a request for additional work - an engineering opinion. The parties agreed to a change order for the additional work priced at $578.13.

On December 18, 2015, Owner terminated its contract with Contractor. On January 11, 2016, Subcontractor remained unpaid and recorded a lien covering the original fabrication contract and the engineering analysis change order.

Contractor never paid Subcontractor the final amount due on the original scope of work or the amount owed on the change order. In February 2016, Owner contracted with Subcontractor directly for an engineering opinion about a design change affecting the panels. Owner and Subcontractor agreed to a second change order, and Owner paid for that work.

Subcontractor later filed a lien foreclosure action. Owner argued that Subcontractor's lien was untimely because it failed to record the lien within the 75-day deadline to perfect outlined in ORS 87.035(1). Specifically, within 75 days after the date that the lien claimant "cease[s] to provide labor, rent equipment or furnish materials."


Vanessa Triplett

The trial court granted summary judgment for Subcontractor, concluding that Subcontractor's lien was timely because it did not cease to provide labor or furnish material until after it performed the additional change order work requested by Contractor in December. On appeal, Owner argued that the December change order work could not revive Subcontractor's lien rights because (1) the work under the original contract was complete in April

2015 and the December change order was a separate contract as a matter of law; and (2) the December change order work was trivial and thus insufficient to revive a lien claim under Oregon case law.

The court of appeals affirmed the trial court decision, reasoning that the December change order demonstrated that Contractor and Subcontractor "shared [an] intention that the later work and the earlier work comprised two parts of one single contract." In particular, the appellate court noted that the later December change order entitled "Change Order Request" had the original subcontract number and name in the "reference" field; and specified the "scope of change" to the original subcontract. Consequently, the court held that no rational trier of fact could conclude that the parties intended the December work to take place under a separate contract.

The court also observed that "the later-performed work was directly related to the original work and was in furtherance of [Subcontractor's] original obligation." The court stated that the later-performed work "was significant because, absent the engineering opinion, [Contractor] could not rely on the panels to perform their structural function." The court further noted that the relatively low cost of the additional work was irrelevant, and that no rational trier of fact could conclude that the additional work was trivial.

COMPELLED DISCLOSURE

REQUIRED SEISMIC PLACARDS, TENANT NOTIFICATIONS AND THE FIRST AMENDMENT: To compel content-based disclosure, the government must show that the compelled disclosure is narrowly tailored to serve compelling state interests, or, if the disclosure is "commercial speech", that the compelled disclosure is purely factual, noncontroversial, and not unjustified or unduly burdensome. *Masonry Bldg. Owners of Or. v. Wheeler*, No. 3:18-cv-02194-AC, ___ F Supp 3d ___, 2019 WL 2304252 (D Or May 30, 2019).

In October 2018 and February 2019, the City of Portland ("City") adopted ordinances requiring all owners of unreinforced masonry ("URM") buildings failing to meet designated seismic standards to: (1) post a placard at the entrance of each building warning that the building might be unsafe in an earthquake, or be subject to fines, (2) notify existing tenants and prospective tenants in writing that the building is constructed of URM, and (3) acknowledge their compliance with the ordinance requirements ("Ordinance"). Masonry Building Owners of Oregon, *et al*. ("Plaintiffs") sought declaratory and injunctive relief from the Ordinance contending it violated the First Amendment by compelling speech that was "not narrowly tailored to address a compelling government interest."

The court noted that "preliminary injunction is an extraordinary remedy never awarded as of right"; however, in the context of the First Amendment there is an "inherent tension." "The moving party bears the initial burden of making a colorable claim that its First Amendment right have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction."

The City initially argued that the Ordinance provisions are government speech and posed no First Amendment issues. The court rejected this premise as the Ordinance required Plaintiffs to relay the City's message on their private property without receipt of public funding for the same.

As a result, the Ordinance was required to pass application of the First Amendment; which provides that "a regulation that compels a disclosure is a content-based regulation of speech, subject to heightened scrutiny, unless an exception applies." The court found there was no debate that the Ordinance was content-based because it regulated only URM building owners' speech.

Therefore, it was subject to strict scrutiny unless it fell within an exception - in this case "commercial speech".

The entrance placard requirement was found not to be commercial speech and therefore remained subject to strict scrutiny. To survive strict scrutiny, the City needed to establish the "placard provision was narrowly drawn to serve a compelling government interest." The court found that the City's shifting post-hoc rationalizations did "little to advance the City's stated purposes of passing the Ordinance." Additionally, even if one presumed compelling interests, the placard provision was not narrowly tailored to achieve those interests. The policy was over-inclusive in that it required that all targeted URM buildings post the placards, despite the URM database's inaccuracies and the retrofitting efforts that some building owners had already performed.

Alternatively, the tenant notification provision was found to be "commercial speech" and subject to lesser scrutiny. However, despite the lesser standard of scrutiny, the City failed to meet the three part showing required - that the compelled speech was purely factual, noncontroversial, and not unjustified or unduly burdensome.

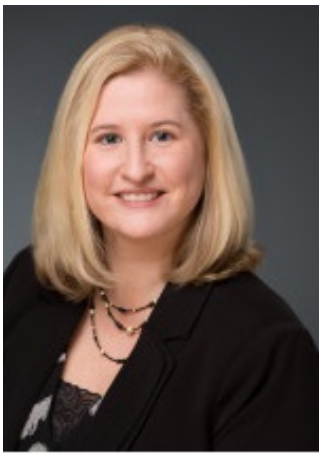
As a result, the court concluded that Plaintiffs demonstrated they were likely to succeed on the merits of their First Amendment claim with respect to both the entrance placard and tenant notification provisions of the Ordinance. Ultimately, the court granted Plaintiffs' motion for preliminary injunction, after addressing the remaining preliminary injunction factors.

EVIDENCE

INADMISSIBLE COMMUNICATIONS: To strike factual allegations under Rule 408 of the Federal Rules of Evidence, the allegations must constitute an "offer, acceptance, or promise to accept 'a valuable consideration in compromising or attempting to compromise' any claim." To strike allegations as "confidential mediation communications" under ORS 36.222, the allegations must occur while the mediation is underway and relate to the substance of the mediated dispute. *City of Tillamook Or. v. Kennedy Jenks Consultants, Inc.*, No. 3:18-cv-02054-BR, 2019 WL 1639930 (D Or Apr. 16, 2019).

Plaintiff City of Tillamook ("City") entered a contract with defendant consultant ("Consultant") for the planning, design, contract administration, and construction of a wastewater treatment project (the "Project"). Consultant advised the City regarding all aspects of the Project.

Under Consultant's guidance, the City hired a general contractor ("Contractor"). During construction, Contractor discovered numerous errors in Consultant's design, which did not meet the regulatory and performance criteria required by the City. Completion of the Project was delayed and Contractor submitted claims for additional time and compensation to complete. Upon Consultant's advice, the City refused to pay Contractor's final pay application, to release its retention, and denied all of Contractor's claims. Contractor then filed an action against the City, and the jury entered a verdict in Contractor's favor.



Tara M. Johnson

Subsequently, the City filed an action against Consultant for breach of contract, professional negligence, and breach of fiduciary duty. Consultant moved to strike paragraphs from the City's complaint pursuant to FRCP 12(f), arguing that the paragraphs contained inadmissible settlement communications under

Fed R Evid 408 and/or inadmissible mediation communications under ORS 6.222. Plaintiff responded that "the disputed material [did] not contain allegations of communications made during a settlement conference or mediation communications."

Under the Fed R Evid 408 analysis, the court outlined the rule's prohibited uses and found that the paragraphs in question did not allege any "offer, acceptance, or promise to accept 'a valuable consideration in compromising or attempting to compromise' any claim." Instead, the paragraphs merely alleged: (1) trial court's order to mediate; (2) the City's tender and Consultant's refusal of defense; (3) advisement the City would accept a reasonable settlement offer if one was made; (4) Consultant's refusal to participate in mediation; (5) Consultant's refusal to pay the settlement with Contractor; and (6) a legal conclusion. The court found that none of those statements constituted the type of evidence that Fed R Evid 408 bars and declined to strike the paragraphs accordingly.

In analyzing the subject paragraphs under ORS 36.222 and whether they should be struck for "disclose[d] confidential mediation communications" , the court relied on *Alfieri v. Solomon*, 358 Or 383, 365 P3d 99 (2015). In *Alfieri*, the Oregon Supreme Court concluded that "mediation" refers to "only that part of the process in which the mediator is a participant" and that "mediation communications" are only exchanges that occur "during the time that the mediation is underway" and that "relate to the substance of the dispute being mediated." The court rejected Consultant's efforts to strike paragraphs from the complaint because they related to communications that occurred either before or after the mediation took place and because Consultant was not even a party to the mediation.

INSURANCE

BINDER INTERPRETATION: In the absence of reference to forthcoming revisions in the four corners of the document, temporary insurance contracts, known as "binders", "shall be construed according to the terms and conditions of the policy." The coverage terms of the renewal binder must be enforced as they appear without regard to extrinsic evidence. *Alterra Am. Ins. Co. v. James W. Fowler Co.,* 347 F Supp 3d 604 (D Or 2018).

Defendant contractor ("Contractor") purchased and renewed its equipment insurance coverage from plaintiff insurer ("Insurer") beginning in 2011. Contractor was incorporated in Oregon and Insurer in Delaware. Contractor purchased and paid premiums to Insurer's agent located in Washington.

In October 2015, Contractor prepared to renew its equipment insurance by creating a Revised Equipment Schedule (the "October Schedule"), which Insurer received mid-October. The October Schedule listed the machinery, equipment, and tools that Contractor wanted to insure under the renewed policy. On October 23, 2015, Contractor expressed concern to Insurer's agent that the October Schedule might be incomplete. On October 28, 2015, Insurer responded to Contractor's concern by writing, "[w]e'll adjust accordingly after they have had an opportunity to review [the] equipment schedule and values." The same day, Insurer issued a renewal binder to Contractor for the renewed policy effective November 1, 2015. The binder contained the October Schedule and limited the coverage to $9,306,134.

On the first day of the policy period, a tunnel caved in on one of Contractor's projects causing Contractor to suffer substantial equipment losses. On November 13, 2015, Contractor submitted a second Revised Equipment Schedule (the "November Schedule") with deletions, additions,

and revision of equipment and equipment values. Contractor added equipment that had been lost in the tunnel collapse and that was valued at $2,926,300. Insurer made payments for items listed on the October Schedule, but the amount associated with equipment added on the November Schedule was not reimbursed, on the grounds that it had not been included in the October Schedule. Insurer then filed suit, seeking a declaratory judgment that it was not obligated to reimburse Contractor for the loss of any equipment not included on the October Schedule.

The court concluded that coverage was limited to the items listed on the October Schedule referenced in the renewal binder. The court stated that the Oregon rules of contract interpretation applicable to insurance policy terms also apply to binders. The court summarized this process as first looking to the text of the document for the plain, ordinary meaning for the terms, and then, if more than one interpretation is possible, analyzing the ambiguous term in the context of the other provisions. If ambiguity remains, courts will interpret the term against the drafter. Although extrinsic evidence will not be considered (only the four corners of the policy), when a written instrument refers to another writing as part of a continuing agreement, "the other writing is itself part of the contract."

Because the subject binder referenced only the October Schedule and not any forthcoming revised schedule, the policy's coverage existed only for the equipment listed on the October Schedule. Although Insurer acknowledged Contractor's concern that the October Schedule was incomplete, the court found that the acknowledgment was "at best an agreement to negotiate a new contract in future" rather than an agreement to cover all equipment communicated at a future date. The court concluded that the $9,306,134 coverage limitation could be reasonably understood to include only the October Schedule—thus, the coverage beginning November 1, 2015, did not include the items listed on the November Schedule.

DUTY TO DEFEND: Liability policies insure risk of tort liability, not contractual liability. If the insured is being sued for a breach of contractual obligation that does not fit within the coverage under the policy, the insurer does not have a duty to defend the insured. *H.D.D. Co., Inc. v. Navigators Specialty Ins. Co.*, No. 3:19-cv-00115-BR, 2019 WL 2996911 (D Or July 9, 2019).

Plaintiff insured ("Insured") was hired by a general contractor ("Contractor") to construct a portion of a natural-gas transmission pipeline. Contractor refused to pay the full contract price to Insured because Insured had allegedly breached the contract by delaying completion of its work.

Contractor served Insured with a demand for arbitration (the "Demand") to resolve the dispute, and Insured tendered the defense of the Demand to its insurer ("Insurer") under the project CCIP policy. Insurer rejected Insured's tender of defense because the claim asserted by Contractor was not covered by the policy. Insured brought a declaratory judgment suit against Insurer, arguing that project delays were caused by property damage and therefore would be covered under the policy.

The court rejected Insured's argument and granted Insurer's cross-motion for summary judgment. The court explained that although the duty to defend arises if the complaint provides any basis for which the insurer covers, the purpose of commercial general liability policies is to "insure against injury to persons and damage to other property caused by inferior workmanship". The purpose of such policies is not to insure contractual liability for workmanship. The damages claimed by Contractor did not fall under the meaning of "occurrence" (an accident) or "property damage" (physical injury to or loss of use of tangible property) under the policy. Rather,

they were solely contractual in nature. Because Insured failed to state a plausible claim that the breach would be covered by the policy, the court concluded that Insurer did not have a duty to defend.

DUTY TO DEFEND/INDEMNIFY: When a general contractor fails to meet any conditions precedent to coverage under an insurance policy, the insurer does not have a duty to defend or a duty to indemnify the insured. So long as an insurance policy does not require a subcontractor to indemnify or defend a general contractor for the general contractor's own liability, the policy does not violate Oregon's anti-indemnity statute. *Probuilders Specialty Ins. Co. v. Phoenix Contracting, Inc.*, 743 F App'x 876 (9th Cir 2018).

Defendant general contractor ("Contractor") was hired by plaintiff owner ("Owner") to provide general contracting services. Contractor supervised multiple subcontractors for the project. Ten years later, Owner discovered construction defects in the project that led to water intrusion and caused substantial damage. Owner filed suit against Contractor for breach of contract and negligence. Contractor tendered defense and indemnity of the lawsuit to its Insurer. Insurer accepted, subject to a full reservation of rights. While the lawsuit was underway, Insurer sought a declaratory judgment that it had no duty to defend or indemnify Contractor because Contractor had not fulfilled the insurance policy's condition precedent to coverage.

The insurance policy required a condition precedent to coverage for any claim based on work performed by Contractor's subcontractors. Before the loss giving rise to the claim, Contractor was required to: (1) receive written indemnity from each subcontractor for all liabilities arising from the subcontractor's work; (2) obtain certificates of insurances from each subcontractor indicating that Contractor was named as an additional insured; and (3) maintain records demonstrating compliance with (1) and (2).

The district court granted summary judgment for Insurer, and the Ninth Circuit affirmed on appeal. Contractor did not dispute that it failed to fulfill the condition precedent for claims arising from the work of its subcontractors, but argued instead that Oregon law bars an insurer from denying coverage through a technical defense. The district court rejected Contractor's argument, stating that although the third requirement was a technical provision, the first and second requirements were the provisions relevant to the claim and were not merely technical provisions. On appeal, the Ninth Circuit concluded that the condition precedent also did not violate Oregon's anti-indemnity or comparative negligence statutes because it sought to indemnify Contractor from liability for the subcontractors' negligence, not from Contractor's fault. Because the condition precedent for the claims against Contractor was not satisfied, the Ninth Circuit affirmed the district court's holding that Insurer had no duty to defend or indemnify Contractor.

INSURANCE COVERAGE: When damage is initially covered by an insurance policy but the cause of the damage is later found to be excluded from coverage, the damage may still be covered if the insured can prove that concurrent or multiple loss occurred or that coverage can be restored under the policy's ensuing-loss provision. *12W RPO, LLC v. Affiliated FM Ins. Co.*, 353 F Supp 3d 1039 (D Or 2018).

Plaintiff landlord of building ("Insured") submitted two claims to defendant insurer ("Insurer"). The first claim alleging damage and requesting repair costs because materials making up the building's plumbing system had decomposed, disintegrated, and dissolved into sludge, causing damage to the building's water supply. The Insured's second claim was that film adhered to the glass units in the building had peeled away, causing the glass to

take on a mottled appearance. Insurer denied coverage for both claims, stating that the causes of these losses were excluded from coverage under the policy.

The district court granted summary judgment in favor of Insurer, rejecting Insured's argument under the concurrent or multiple loss theory and the ensuing/resulting loss provision.

The court concluded that the Insured had failed to create an issue of fact under the concurrent or multiple loss theory. Under the concurrent or multiple loss theory, if an excluded cause and a covered cause converge to cause damage, the damage may be covered. The excluded cause, however, cannot be the "efficient proximate cause" of the damage (i.e., the predominating cause). In both claims, Insured failed to even mention the efficient proximate cause standard, and consequently failed to meet its burden of proof and create an issue of fact.

The district court also found that the excluded perils caused the loss and was not subject to the ensuing/resulting loss provision. Although ensuing/resulting loss provisions operate "to carve out an exception to a policy exclusion", the provisions only cover losses that are wholly separate and independent from the excluded cause and will not cover specifically excluded losses. The court agreed with Insurer that the ensuing losses had been caused by excluded perils.

Although Insured argued that the first claim arose from decomposition and not deterioration or contamination, the court concluded that the claim ultimately arose from deterioration of the materials and water contamination, which were perils excluded from coverage. The court also concluded that the second claim had arisen from the excluded peril of manufacturing defect and did not result in a separate, secondary loss. Because these ensuing losses were excluded, and because Insured failed to show damage that was wholly separate and independent from the excluded cause, coverage was not reinstated under the ensuing/resulting loss provision.

New Oregon Legislation

HB 2007 AND CLEAN DIESEL REQUIREMENTS FOR PUBLIC CONTRACTS:

Amends the public contracting code to require that select public improvement contracts require at least 80 percent of the total fleet of diesel motor vehicles be: powered by 2010 or newer diesel engines, and nonroad diesel engines meet or exceed U.S. Environmental Protection Agency Tier 4 exhaust emission standards for nonroad compression ignition engines. These new requirements only apply to public improvement contracts meeting three criteria: (1) valued at $20 million or more, (2) contracting agency is a ***state*** agency; and (3) the improvement is located in Multnomah, Clackamas or Washington counties. The Act applies to public improvement contracts advertised or solicited on or after January 1, 2022; or if not advertised or solicited, public improvement contracts entered into on or after January 1, 2022. Signed into law July 3, 2019. Effective August 9, 2019.

HB 2007 AND TITLING AND REGISTRATION:

Amends the vehicle code regarding titling and registration of diesel engine trucks. As of January 1, 2025, the Oregon Department of Transportation ("ODOT") may not issue a *certificate of title* for a medium-duty truck (GVWR 14,001 to 26,000) powered by a 2009 or older diesel engine, or a heavy-duty truck (GVWR 26,001+) powered by a 2006 or older diesel engine, if the address of the owner is located in Multnomah, Clackamas or Washington counties. As of January 1, 2029, ODOT may not issue *registration or renewal of registration* for a medium-duty truck powered by a 2009 or older diesel engine, or a heavy-duty truck powered by a 2006 or older diesel engine, if the address of the owner is located in Multnomah, Clackamas or Washington counties. However,

owners can avoid these year-based restrictions if the subject truck has been retrofitted with approved retrofit technology and the owner has proof of certification of the retrofit. Signed into law July 3, 2019. Effective August 9, 2019.

HB 2306 AND ISSUANCE OF RESIDENTIAL BUILDING PERMITS:

A city or county may not deny a residential building permit if: (1) substantial completion occurs and (2) the developer, declarant, or owner has obtained a bond or alternative form of financial guarantee to secure completion of the remaining work. "Substantial completion" requires that the appropriate body has inspected and tested the following and found them acceptable under the code: (1) the water supply system, (2) the fire hydrant system, (3) the sewage disposal system, (4) the stormwater drainage system, (5) the curbs, (6) the street signs necessary for access by emergency vehicles, and (7) the roads necessary for access by emergency vehicles. Signed into law June 17, 2019. Effective January 1, 2020.

HB 2415 AND RETAINAGE FOR CONTRACTS OVER $500,000:

Amends ORS 279C.570 (public improvement projects) and ORS 701.420 (construction and home improvement projects) to read that if the contract price exceeds $500,000, the contracting agency must place the retainage (the withheld portion of the payment) into an interest-bearing escrow account. Interest accrues from the date on which the payment request is approved until the date on which the retainage is paid to the contractor. Amendments apply to contracts entered into on or after the effective date of the act. Signed into law June 25, 2019. Effective January 1, 2020.

HB 2496 AND GREEN ENERGY:

Amends ORS 279C.527 & ORS 279C.528, which govern the requirements for the inclusion of green or woody biomass energy technology in public improvement contracts. Changes definition of "green energy technology" to include systems that use solar energy to reduce the energy from other sources by at least 10 percent (formerly 20 percent) and systems that store on-site batteries that generate electricity from solar or geothermal energy. Excludes "battery storage" from the types of green energy technology that may be constructed away from the building site if certain criteria are met.

Redefines "total contract price" to include all costs anticipated in constructing, reconstructing, or significantly renovating a public building. "Total contract price" excludes the costs of: the bid or award process for a public contract; employee and equipment transportation to and from a public building; occupying alternative facilities; ordinary operating costs; off-site equipment storage; labor costs for employees of a contracting agency; retrofitting ability to withstand a seismic event; and work that is tenuously related to the construction work performed on the public building.

Amends the applicable green energy technology determination criteria for public improvement contracts to include public building contracts with a total contract price of $5 million or more. Requires such contracts to provide for at least 1.5 percent of the total contract price toward the inclusion of appropriate green energy technology. Amends requirements for permissible substitution of appropriate green energy technology with woody biomass energy technology in construction work performed on a public building. Amends the requirements for a written determination whether green or woody biomass energy technology is appropriate.

If a project is composed of multiple buildings, the amendments allow the contracting agency to consolidate the green energy technology in one public building. It is now permissible to consolidate in one public building if the total amount expended on green energy technology for

a project is an aggregate of the amount expended on each building in the same project.

The amendments apply to a contracting agency's advertisements and solicitations. Signed into law May 28, 2019. Effective on September 29, 2019.

HB 2769 AND PROSPECTIVE CONSULTANTS:

Creates a provision in ORS 279C.110 that allows an agency contracting for architectural, engineering, photogrammetric mapping, transportation, or land surveying services to use a prospective consultant's pricing policies, proposals, or other pricing information as a part of the screening and selection process. The RFP must include how it will rank proposals from prospective consultants, a cost estimate, and a sufficiently detailed scope of the work. The pricing proposal must consist of an estimate of hours and hourly rates and may not be given more than 15 percent of the weight in the overall evaluation. The agency must also evaluate prospective consultants by their qualifications according to ORS 279.C110(3). The agency must announce the score and rank for each prospective consultant, and may request a pricing proposal from the top three prospective consultants. The contracting agency and the selected consultant will refine and finalize the rates, number of hours, maximum compensation level, and performance schedule of the project. Signed into law May 3, 2019. Effective on September 29, 2019.

HB 3143 AND DEFINITIONS OF "ENGINEERING", "LAND SURVEYING", AND "PHOTOGRAMMETRIC MAPPING":

Amends the statutory definitions of "practice of engineering" and "practice of land surveying" in ORS 672.005, specifying that persons are engaged in such practices when the services are done "for others." Amends ORS 672.007 to read that a person is practicing or offering to practice engineering, land surveying, or photogrammetric mapping if he or she purports to be a professional or registered professional, or if he or she bids to perform commercial or professional work within that practice. Signed into law May 6, 2019. Effective January 1, 2020.

HB 3193 AND UNPAID WAGES:

Adds a provision to ORS 652.310 to 652.414 stating that upon receipt of any valid wage claim against a contractor, the Commissioner of the Oregon Bureau of Labor and Industries ("BOLI") must notify the Oregon Construction Contractors Board ("CCB") within 30 days. If the contractor fails to pay the wages that are found due and the contractor fails to pay upon demand, the Commissioner must serve an order of determination as prescribed by ORS 652.332. The order of determination must notify the contractor that failure to pay within 60 days of the date of the order becomes final will result in notification to the CCB and the suspension of the contractor's CCB license. The Commissioner must then notify the CCB of the failure to pay pursuant to a final order (as provided in the order of determination), unless a motion to stay the order is pending or has been granted.

The CCB may use notification of a final order in determining: (1) whether to revoke, suspend, or refuse to issue a license; (2) place a contractor on probation; and (3) require a contractor to pay a higher amount for a surety bond. If the notice is used to increase the amount required for a contractor's surety bond, the amount that a complainant may recover from the bond will be proportionately increased, and the total amount payable to a complainant is $3,000, plus up to 50 percent of the amount of the bond that exceeds the amount ordinarily required. Notice of a valid wage claim meets the notice of intent to file a CCB complaint required under ORS 701.133.

Also amends ORS 701.146 (complaints involving work on commercial structures) to read that the complainant may recover payment from the contractor's bond or by obtaining a final order issued by BOLI that states the unpaid wages owed by the contractor. ORS 652.414 is amended to

increase the amount of unpaid wages that the Commissioner must pay from $4,000 to $10,000, if BOLI determines that the employer is no longer doing business and does not have sufficient assets to pay the wage claim. Signed into law June 20, 2019. Effective January 1, 2020.

HB 5010 AND CONSTRUCTION CONTRACTORS BOARD:

Establishes $15,262,377 as the maximum limit for payment of expenses collected or received by the CCB. Includes fees, moneys, miscellaneous receipts, and other revenues, but excludes lottery funds and federal funds. Signed into law April 22, 2019. Effective July 1, 2019.

SB 369 AND STATUTES OF LIMITATION FOR IMPROVEMENTS TO REAL PROPERTY:

Amends the ORS 12.135 definition of "substantial completion" to mean the earliest of: (1) the date on which the contractee accepts the improvement as complete; (2) the date on which a public body issues a certificate of occupancy for the improvement; or (3) the date on which the owner uses or occupies the improvement for its intended purpose. Signed into law June 11, 2019. Effective January 1, 2020.

SB 410 AND RECREATIONAL VEHICLES AND STRUCTURES:

Eliminates the regulation of recreational vehicle and recreational structure construction by the Department of Consumer and Business Services. "Recreational structure" was defined as a campground structure without plumbing, heating, or cooking facilities intended to be used for a limited time for recreational, seasonal, emergency, or transitional purposes. Recreational structures may include yurts, cabins, fabric structures, or other similar structures. Also amends sections within ORS Chapter 446 ("Manufactured Dwellings and Structures; Parks; Tourist Facilities") to use "manufactured dwellings" rather than "manufactured structures." Signed into law June 17, 2019. Effective January 1, 2020.

SB 455 AND HIGHER EDUCATION QUALIFIED CONTRACTS:

Amends the definition of "qualified contracts" in ORS 352.629 (use of apprentices, minority individuals, and women in qualified contracts). Increases the estimated cost amount required from $200,000 to $8 million and provides that these contract costs may be paid in whole or in part by the state of Oregon. Identifies "institutions of higher education" as those listed in ORS 352.002, a community college, or the Oregon Health and Science University ("OHSU"). Provides that an institution of higher education may only award a qualified contract to a contractor that is a training agent; meaning that it is registered with a local joint committee and BOLI's Apprenticeship and Training Division. The contractor may subcontract only to subcontractors that are training agents, unless compliance would cause unreasonable expense or delay or would limit the pool of bidders to three or fewer. Requires all institutions of higher education to report to the joint committees on the amount of qualified contract work performed by apprentices, women, and minority individuals. For Portland State University, Oregon State University, the University of Oregon, and OHSU, the statute applies to qualified contracts advertised or entered on or after January 1, 2020. For all other institutions of higher education, the statute applies on or after January 1, 2021. Signed into law July 15, 2019. Effective January 1, 2020.

SB 471 AND CONFLICT MINERALS:

Amends ORS Chapter 279B to require that a state contracting agency's request for proposals for public contracts must require a prospective contractor to state whether, and to what extent, any of the materials it intends to use are "conflict minerals" and that the contractor's current practices comply with the Organization for Economic Cooperation and Development's guidance. "Conflict minerals" include columbite-tantalite or an ore for tantalum; casserite or an ore for tin; wolframite or an ore for tungsten; gold; a

derivative of the identified minerals; and any other mineral or derivative mineral that finances the conflict in or around the Democratic Republic of Congo. The state contracting agency must give preference to prospective contractors that meet these requirements. Signed into law June 7, 2019. Effective September 29, 2019

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THE YEAR THAT WAS: 2019 IN REVIEW FROM THE OUTGOING SECTION CHAIR

Tyler J. Storti
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Tyler J. Storti

It has been my distinct honor and privilege to serve as Chair of the Construction Law Section this year. With this being the Section's last Newsletter of the year (and with Yours Truly not having any valuable legal insights on cutting-edge construction law topics to include in a "real" article), I wanted to take this opportunity to offer a "Year-In-Review"-type submission. As this was also my ninth and – under the Bar's term limit regime -- final year as a full member of the Section, this is also somewhat of a swan song.

With perhaps one exception (more on that below), it was business as usual in 2019 for the Section. Despite a continuing decline in the number of paying members of the Section, which translates into decreased revenues, the Section will fulfill each of its goals and end the year in strong financial shape. The October CLE held at the Oregon State Bar Center in Tigard was very well-attended by lawyers from around the State. The able speakers expertly presented on a wide array of topics relevant to our membership to rave reviews. The vast bulk of the credit belongs to the CLE Committee (Bill Fig, Sandra Fraser, Jim Chaney and Tara Johnson) and to the speakers for their substantial efforts, though other Section members and representatives of the Bar meaningfully contributed as well. A hearty thanks to you all.

Financially, the Section was able to carry out its plans for the year, while also preserving a healthy balance in the Section's bank account. The Bar prohibits Sections from carrying balances in excess of certain limits, which presents one budgetary constraint. The

unpredictable membership numbers, which have been declining for several years running, poses an obstacle on the other end. Treasurer Jakob Lutkavage-Dvorscak prudently navigated those challenges for the Section's benefit. Subject to approval, we will be in a position once again to make charitable donations to deserving charities on the Bar's pre-approved list.

One notable development this year that will result in a change recognized in 2020 is that the Section passed a slight dues increase from $15 to $20 per year. The modest increase will bring our Section in line with many other sections in that regard and will allow the flexibility to provide even more valuable services to the membership, Bar and legal community for years to come. Those improvements may include additional CLEs and seminars to be held (as the Section has done in the past on an approximately every-other-year basis) in more geographically diverse locations outside

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the Portland Metro area. The funding will also allow the Section to more realistically explore the possibility of utilizing video recording capabilities to further expand the Section's reach across the State.

Thank you to the other officers and members of the Executive Committee (EC) for your selfless investment of time, energy and expertise this year, and to the Section as a whole for allowing me to serve as Chair. Next year, I will be relegated to the ranks of the Advisory Members of the EC, joining a number of past officers and long-time Section stalwarts. We have a well-qualified, dedicated and diverse slate of officers and EC members poised to lead the Section boldly into the future. The future looks bright, indeed!

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