

Consider . . .

NEW LEGISLATION:

Please take a moment to review the following legislative summary. Unless stated otherwise, the following new laws go into effect on January 1, 2004.

1. CONTRACTORS & CONSTRUCTION CONTRACTS

Claims Against Contractors

(SB 909; 2003 Or Laws Ch. 660)

A residential owner may not commence arbitration or litigation for claims of construction defects on “residences” unless the owner first follows a new “right to cure” procedure. The owner must send a written notice to each party the owner intends to name as a defendant and must include a description of each alleged defect and the remediation the owner believes is necessary. These parties can include contractors, subcontractors or suppliers. An owner who fails to follow these new procedures cannot maintain an arbitration or litigation.

The notice must include any reports or other documents evidencing the defects. Parties that receive these notices can send similar secondary notices to other parties that the recipient believes may share responsibility for the alleged defects. These secondary notices must be sent within 14 days of the date the first notice was received.

A party receiving one of these notices has the right: (1) to make a request for a visual examination of the residence (this must be sent to the owner within 14 days after receiving the initial notice); and (2) to inspect the residence (this request must be made within 14 days after the visual examination). Within 90 days of first receiving its notice, the party must send the owner a written response that addresses the allegations of defective work.

Prompt Payment

(SB 906 (§§54-60); 2003 Or Laws Ch. 675)

SB 906 creates new rules concerning prompt payment of amounts owing on private projects in Oregon. These new rules do not apply to public improvement projects or projects that are defined as residential under ORS 87.021.

For projects lasting more than 60 days, an owner must make progress payments on a 30-day cycle. The only exception is if the contract and each page of the plans and specifications include a written “alternative billing cycle” notice. Owners and contractors can require lien waivers and require that those waivers be notarized.

The owner must pay progress payments within 14 days after the contractor submits its billing. Billings are deemed certified 10 days after their receipt unless the owner gives a written notice of the specific reasons why any portion of a billing will not be paid. The statute lists nine reasons why the owner can decline to pay a portion of a billing. Upon final completion, the owner must pay the entire balance within 7 days of the owner’s approval of construction. Similar rules apply to the relations between original contractors and subcontractors/suppliers.

The failure to make payments as required under this new law results in the claimant being entitled to interest at 1.5% per month (18% per annum) together with attorney fees and costs in any action, claim or arbitration. The failure to reasonably account for construction contract payments can result in disciplinary action by the Construction Contractors Board.

If an owner fails to meet the payment deadlines, the contractor can, upon 7 days’ written notice, suspend its performance. If the suspension lasts over 30 days, the contractor can terminate the contract. Subcontractors have similar rights.

Notices under this new law must be either personal delivery, certified mail return receipt requested or any other method that allows

independent third-party verification. The rights under this bill may not be contractually waived. The bill provides that these rights apply to contracts for which the plans were published after January 1, 2004.

“Unlicensed” Contractor Claims

(SB 906 (§71); 2003 Or Laws Ch. 675)

SB 906 makes a substantial revision to ORS 701.065. As of October 1, 2003, contractors with CCB license defects can seek administrative or civil remedies against construction contractors, construction suppliers, architects or engineers if the claim arises out of defects, deficiencies or inadequate performance of the work or products provided. The prior version of ORS 701.065 provided that contractors who were not properly licensed were essentially barred from any administrative or civil remedies.

Contractor Licensing

(HB 2564 2003; Or Laws Ch. 136)

The Department of Consumer and Business Services (the location of the Building Codes Division) is now mandated to establish a system whereby a contractor who has two or more licenses issued by the Division can hold a single combined license. This bill applies only to licenses issued through the Electrical and Elevator Board, the Board of Boiler Rules and the State Plumbing Board (all of which are part of the Building Codes Division). It does not apply to licenses issued through the Construction Contractors Board.

Building Code Changes

(SB 906 (§§1-53); 2003 Or Laws Ch. 675)

The One and Two Family Dwelling Code is now known as the Low-Rise Residential Dwelling Code. There are two new boards with the state Building Codes Division: the Residential Structures Board and the Mechanical Board. The existing Building Codes Structures Board is changed from 15 to 9 members and the types of required parties on this board have been changed. This bill was declared an “emergency” and became effective as of August 8, 2003.

Building Plan Review

(SB 711; 2003 Or Laws Ch. 367)

This bill creates a new ability for licensed engineers and architects who prepare construction plans for one and two family dwellings to avoid plan review by the local building official. The engineer or architect must be certified by the Building Codes Division as a one and two family dwelling plans examiner and the building must be of conventional light frame construction.

The bill also creates new authority for the Building Codes Division to allow local jurisdictions to make electrical and plumbing code plan review mandatory only for complex structures (a term that is not defined by the statutes).

Also, the bill allows the Building Codes Division to adopt rules “necessary to interpret, harmonize, streamline, adjust, administer or enforce the state building code” in order to avoid language that is “unclear, duplicative or in conflict with another or when the code does not adequately address a project of a unique type or scope.” The Department Director must report to the Legislature no later than January 30, 2005 as to any rules adopted in this regard.

Electronic Permits

(SB 713; 2003 Or Laws Ch. 336)

This bill allows the Building Codes Division to study the feasibility of a database that would allow electronic submission of permit applications, issuance of minor labor and other appropriate permits, and scheduling for inspections (and tracking of corrections and approvals). The Department Director must report to the Legislature no later than January 30, 2005 as to the implementation of this program. The bill also creates a “sunset” date of January 2, 2006, when the bill will automatically be repealed.

Minor & Alternative Permits

(SB 714; 2003 Or Laws Ch. 368)

This bill takes a Portland area program and applies it statewide. Under this program, the Building Codes Division (and local municipalities) may allow special programs for permitting and inspecting minor construction work. Also, the program allows alternative permit and inspection services for commercial, manufacturing, industrial

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and institutional facilities (unless the construction work involves life-safety work).

Essential Projects

(SB 715; 2003 Or Laws Ch. 369)

This bill is intended to allow “fast track” approval for construction of “essential projects.” These projects are defined as: (1) State owned and operated developments; (2) Developments essential to the state’s economic well-being as designated by the Economic and Community Development Department; (3) Projects over 100,000 square feet and in industrial areas listed as ready for development by the Economic and Community Development Department; and (4) Projects over 100,000 square feet and in the “traded sector” (a term defined by ORS 285A.010).

Permit applicants can request that the Building Codes Division administer and enforce the building codes for the project, including plan review and permit issuance. If the Building Codes Division feels that the local building jurisdiction has inadequate resources, the State can undertake all necessary actions on its own.

Construction Contracts

(SB 906 (§58); 2003 Or Laws Ch. 675)

The 2001 Legislature adopted HB 2414 (ORS 81.100 et al) that limited the effectiveness of non-Oregon choice of law provisions in construction agreements. Now, SB 906 re-addresses and expands on that issue.

Now, construction contracts in Oregon may not include an out-of-state choice of law provision and also may not include an out-of-state forum selection clause. Any such provisions are deemed void and unenforceable. The bill provides that these changes apply to contracts for which the plans were published after January 1, 2004.

Electrical Products

(HB 2717; 2003 Or Laws Ch. 299)

This bill makes revisions to the Oregon Electric Safety Law concerning industrial electrical equipment that reduces the process of insuring that equipment. “Industrial electrical equipment” means electrical devices that are used in industry or government. This bill was declared an

“emergency” and became effective as of June 11, 2003.

Wells

(HB 2210; 2003 Or Laws Ch. 144)

This increases the bond or letter of credit from \$4,000 to \$10,000 that must be posted by anyone who offers services to construct, alter, abandon or convert wells. Also, in order to obtain a permit to work on wells, the applicant must post a bond or letter of credit in the amount of \$5,000, an increase from the prior limit of \$2,000.

Landscape Contractors

(SB 919; 2003 Or Laws Ch. 659)

This bill clarifies the existing prohibition on using the word “landscape” in a business name without being licensed through the Landscape Contractors Board (“LCB”). Now, an unlicensed person or entity may not use the words “landscape contractor,” “landscape gardener” or “landscaper” or any other use of the word “landscape” unless the person or entity is licensed through the LCB. The prohibition includes the use of business cards, signs or other advertising methods. The only exception continues to be for “landscape maintenance” businesses whose name does not include any other connotation.

2. CONSTRUCTION CONTRACTORS BOARD (“CCB”)

CCB Notices & Fees

(HB 2233; 2003 Or Laws Ch. 294)

As a new requirement, parties wishing to file claims through the CCB must first send a notice to the contractor. The notice must be sent certified mail and must be sent at least 30 days prior to filing the claim. If the time period for filing a CCB claim is within 45 days of expiring, the claim filing deadline is extended until 60 days after the notice is mailed.

The CCB now has an increased ability to impose a fee for filing a CCB claim. The amount of the fee may not exceed the filing fee for a circuit court lawsuit. The CCB may charge a different fee for residential versus commercial claims. Upon

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application and showing of need, the CCB may waive this filing fee.

On a procedural note, there is a small change in the deadline for filing a claim concerning a large commercial structure. Previously, ORS 701.046 provided that the claimant could deliver a copy of the complaint to the CCB and the contractor's surety no later than the earlier of 90 days after filing the lawsuit or 14 days before the first day of trial. Now, the deadline is the earlier of those two deadlines or 30 days prior to the court issuing a judgment. This addresses the issue of when the plaintiff seeks a default judgment less than 90 days after filing the lawsuit.

Contractor Insurance

(SB 943; 2003 Or Laws Ch _____)

This bill gives the CCB authority to adopt rules allowing an alternative to the insurance requirement for licensed construction contractors. Instead of providing proof of the traditional insurance coverage (liability, personal injury and property damage), contractors can provide an "alternative form of security" in a form yet to be determined. Because the legislature did not specify what would constitute an "alternative form of security," the CCB will form a work group to address the relevant issues. While this bill was declared an "emergency" and became effective upon its passage (August 25, 2003), it will likely take some time for the CCB to evaluate whether there is any acceptable "alternative form of security."

CCB Licensing #1

(SB 575; 2003 Or Laws Ch 329)

The list of parties exempt from CCB licensing (found in ORS 701.010) is expanded to include businesses that supply personnel to licensed contractors. In order to meet this exemption, the personnel must be performing construction work under the direction and supervision of the licensed contractor.

CCB Licensing #2

(HB 3218; 2003 Or Laws Ch 285)

The list of parties exempt from CCB licensing (found in ORS 701.010) is expanded to include qualified intermediaries in a Section 1031 tax-free property exchange. The qualified intermediary must not perform any construction activities in order to meet this exemption.

Developer CCB Licensing

(SB 906 (§§68-76); 2003 Or Laws Ch. 675)

The CCB must institute a new license class for contractors who are licensed developers. "Licensed developers" are defined as contractors who own real property and arrange for construction work by licensed contractors who have sole responsibility for all phases of construction. The licensed developer itself may not perform any on-site construction work. Licensed developers are exempt from the regular contractor examination.

This bill then revises ORS 701.065 to carve out a new exception for licensed developers. ORS 701.065 now provides that contractors who are not properly licensed are essentially barred from any administrative or civil remedies. Under these new changes, a licensed developer can "cure" defects in its licensing within certain limitations. Also, there is a special "safe harbor" for licensed developers where, if they obtain their CCB license prior to April 1, 2004, then they can seek remedies for work performed prior to April 1, 2004 (so long as, during performance of that work, the party met the basic licensed developer requirements). These provisions of this bill will become operative on October 1, 2003.

3. REAL PROPERTY

Construction Lien "Protection"

(HB 3539; 2003 Or Laws Ch 778)

This bill is intended to protect residential homebuyers against construction liens that attach to the property after the sale is closed. The bill applies to the sale of any new home or condominium with a sales price over \$50,000 and to any existing home that had over \$50,000 in improvements during the three months prior to the sale date. The bill does not apply if the structure has four or more units.

If a residence fits within the above definitions, then the owner must provide one of six

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forms of “protection” for the purchaser: (1) Title insurance against construction liens; (2) An escrow account that is at least 25% of the sale price; (3) A bond or letter of credit in an amount that is at least 25% of the sale price; (4) Written waivers from every potential claimant with at least \$5,000 in lien rights; (5) Close the sale after the deadline for recording a lien; or (6) Obtain a written waiver from the purchaser in a form set out in the statute. Prior to the sale, the owner must give the purchaser written notice of which form of protection is being provided (or that protection is not required). That written notice must be in a form that is designated by the Construction Contractors Board.

A violation of these new requirements is a Class A misdemeanor and can also be an Unlawful Trade Practice. Also, a purchaser can sue the seller for up to twice the amount of actual damages and can recover his reasonable costs and attorney fees. The statute of limitation for such suits is two years after the sale closing date. This new bill also sets forth a number of defenses a seller can raise against claims that the seller violated these new requirements. Finally, this bill is effective only concerning sales that occur on or after January 1, 2004.

Construction Lien Notices

(HB 3539; 2003 Or Laws Ch 778)

Aside from the new lien “protection” provisions, this bill reverses a change in the “pre-lien” notice requirements (ORS 87.021) that was created by the 2001 Oregon Legislature. That change created a “circular” definition problem under the statute. Now, HB 3539 repeals that change and the notice requirements are as they were prior to the 2001 Oregon Legislature.

Seller Disclosures

(SB 515; 2003 Or Laws Ch. 328)

This bill modifies the disclosure requirements for sellers of residential real estate. Previously, a seller could choose to either “disclose” or “disclaim” issues concerning the house. Now, all sellers must complete a revised seller’s property disclosure statement. Upon receipt of the disclosure statement, a buyer has five business days to revoke the offer. If the seller fails

to deliver a completed disclosure statement to the buyer, then the buyer’s revocation period extends up to the time of closing.

The only times a seller does not have to deliver a completed disclosure statement is: (1) The first sale of a house that has never been occupied (in that instance, the seller must provide a different statement); (2) A sale by a financial institution that obtained title by foreclosure or similar means; (3) Sale by court-appointed parties (receivers, trustees, etc.); or (4) Sale by governmental agencies.

The seller disclosure form itself has been modified from the prior form. A few of these modifications relate to some of the recent construction defect litigation.

4. DESIGN PROFESSIONALS

Discipline of Architects

(SB 211; 2003 Or Laws Ch. 165)

The authority of the Board of Architect Examiners is now expanded to include two new grounds under which it can discipline an architect: (1) Being convicted of a crime under circumstances that relate to the practice of architecture; and (2) Being the subject of disciplinary action taken by another jurisdiction.

Claims against Design Professionals

(SB 611; 2003 Or Laws Ch. 418)

This bill revises the way in which a party can file legal claims against construction design professionals (architects, engineers, landscape architects and land surveyors). Upon filing any lawsuit or related claim against a design professional, the attorney must include with the claim an affidavit that the attorney has consulted a licensed construction design professional who will testify as to the liability of the construction design professional in the matter at issue.

The affidavit must assert that the expert witness will testify: (1) The defendant’s conduct failed to meet the applicable standard of professional care, and (2) The alleged conduct was the cause of the claimed damages. In lieu of this affidavit, the attorney can submit an affidavit swearing the applicable statute of limitations is about to expire and the attorney will submit a

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qualifying affidavit within 30 days after filing the claim. The bill limits the types of claimants that it applies to (in other words, there are some claimants who do not have to meet these new criteria). This bill applies only to claims filed on or after January 1, 2004.

5. PUBLIC WORKS PROJECTS

Subcontract Disclosures

(HB 3422; 2003 Or Laws Ch. 535)

The law has once again been revised in regard to the disclosures that must be made by bidders on public improvement contracts. First, the disclosures must now be made within two hours after bid opening (previously, it was four hours after bid opening). Second, disclosures must be made only if the public improvement contract value exceeds \$100,000 (previously, it was \$75,000). Third, the disclosure must now include the dollar amount of each disclosed subcontractor (as well as the prior requirement to disclose the name and category of work). Fourth, there is now a statutory disclosure form. If there are no subcontractors that meet the disclosure criteria, then the form must be turned in with the word “none” written on it. The failure to submit the form means the bid is deemed nonresponsive. Finally, this is an “emergency” bill that applies to all public improvements that are first advertised after August 1, 2003.

Public Contracts

(HB 2341; 2003 Or Laws Ch _____)

The Oregon Legislature adopted major revisions to ORS Chapter 279, which addresses public contracting. This bill revises the requirements and procedures for public contracting and creates three new ORS Chapters. ORS Chapter 279A will be General Provisions, ORS 279B will be Other Public Procurements, and ORS 279C will be Public Improvements. The operative date for this bill is March 1, 2005.

Energy Conservation

(HB 3476; 2003 Or Laws Ch. 562)

This bill allows “energy savings performance contracts” to be exempt from the public procurement requirements of ORS Chapter

279. These contracts are defined as one between a public agency and a qualified energy service company for all aspects of energy conservation measures. It can include design build contracts. The Oregon Attorney General must adopt model rules that can be used by public bodies concerning the relevant procedures.

6. DEBTOR/CREDITOR

Garnishments

(HB 2274; 2003 Or Laws Ch. 085)

This bill makes a number of small revisions to the laws concerning garnishments. Some of them make minor changes in the standard garnishment forms. The only major change is that now, a single writ can be issued for two or more debtors if they are jointly liable on the debt. If the garnishee holds more property of those debtors than is necessary to satisfy the writ in full, then the garnishee may choose which debtor’s property to hold.

Chattel Liens

(HB 2059; 2003 Or Laws Ch. 193)

Now, interested parties can “bond off” a possessory chattel lien similarly to bonding off a construction lien claim. This new right only arises if the lien claim is for \$750 or more. Either the lien debtor or any interested party can use a surety bond or a cash deposit as a substitute for the chattel. In the event of a foreclosure lawsuit, the lien claim is satisfied out of the bond or money. The bond or money must be in an amount equal to 200% of the lien claim amount.

The person wanting to bond off the chattel lien must follow a number of procedural steps such as giving notice and recording an affidavit. The failure to timely follow these steps will result in the chattel remaining subject to the foreclosure lawsuit.

7. LEGAL/PROCEDURAL

Arbitration

(HB 2279; 2003 Or Laws Ch 598)

This bill adopts the Revised Uniform Arbitration Act. In some ways, this is a major re-

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drafting of Oregon's general arbitration statutes. In other ways, the basic rules remain unchanged.

A complete discussion of these changes is beyond the scope of this newsletter. However, a few points include: (1) After September 1, 2004, these new provisions apply to an arbitration agreement no matter when the agreement was entered; (2) Certain provisions may not be waived in the arbitration agreement (although many of them can be waived after a dispute arises); (3) An arbitrator has a continuing obligation to disclose all facts that a "reasonable person" would consider likely to affect the arbitrator's impartiality (the failure to do so may vacate the award); and (4) An arbitrator can award attorney fees, costs, arbitration fees and punitive damages.

Administrative Hearings

(HB 2526; 2003 Or Laws Ch. 075)

This is a "housecleaning" bill that addresses a number of issues concerning the agency formerly known as the Hearing Officer Panel. The agency's new name is the Office of Administrative Hearings. The first issue is that the old HOP was under a sunset provision – that provision has been repealed and the agency is now a permanent agency. The second issue is that the persons formerly known as hearings officers will now formally be known as Administrative Law Judges. This is the agency that handles CCB hearings. This is an "emergency" bill that became effective as of May 22, 2003.

Attorney Fees

(SB 41; 2003 Or Laws Ch. 393)

This bill overrides prior case law and now provides that the prevailing party in a lawsuit who claims a contract (express or implied) was partly or wholly void or unenforceable can still recover its attorney fees if the contract or a statute included an attorney fee provision. In general, this applies to actions based on contracts entered after January 1, 2004.

Judgments

(HB 2646; 2003 Or Laws Ch. 576)

This bill is a lengthy overhaul of the existing laws concerning judgments. While most of the changes are minor in nature (for example, the "clerk

of the court" is now known as the "court administrator"), there are a few substantive changes. Because of its substantial size (almost 320 pages) and breadth (it addresses all aspects of judgments), however, attorneys will want to review the bill carefully.

FIRM NEWS:

DOUGLAS R. HOOKLAND is now licensed to practice law in Idaho.

MICHAEL J. SCOTT will make a presentation on October 22, 2003 as part of a seminar entitled "Law for Design Professionals in Oregon." If you would like a brochure, please contact this office.

DOUGLAS R. HOOKLAND, DOUGLAS L. GALLAGHER and **ALAN L. MITCHELL** will present an all-day seminar on December 12, 2003 (in Portland) entitled "Oregon and Washington Construction Lien and Bond Law." A copy of the brochure is enclosed.

DOUGLAS R. HOOKLAND and **ALAN L. MITCHELL** will make presentations as part of an all-day seminar on December 10, 2003 (in Portland) entitled "Advanced Construction Law in Oregon." If you would like a brochure, please contact this office.

This newsletter is published quarterly by the law firm of Scott ♦ Hookland LLP for the benefit of its clients and friends and is intended to inform them about legal matters of interest. While this information is meant to be current, we do not promise or guarantee that the information is correct, complete or up-to-date. This information is not intended to and should not be considered to provide legal advice or create an attorney-client relationship. No action should be undertaken in reliance hereon without professional legal counsel.
Alan L. Mitchell, Editor

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