OREGON

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I. CONSTRUCTION LIEN BASICS

A. Pre-Claim Notices

Oregon statutes require certain contractors to provide one or more notices to property owners prior to perfecting—or recording—a construction lien on the owner of property.

1. Notice of Right to Lien

In order to later file a lien, a contractor who works on a residential improvement, and is not hired directly by the owner of the improvement, must provide a Notice of Right to Lien to the owner.[1] The term "owner" includes lessees, as well as fee simple owners. Where multiple owners exist, a contractor should send notices to all owners to ensure its lien rights are preserved.

The notice should be sent as soon as possible after the contractor begins providing labor, materials, services or equipment. Where a Notice of Right to Lien is required, a contractor's lien is perfected only as to those services or materials provided "after a date which is eight days, not including Saturdays, Sundays and other holidays . . . , before the notice is delivered or mailed."[2] A Notice is therefore only retroactively effective as to work performed within eight days of the Notice (excluding weekends and holidays).

Under ORS 87.021, a contractor is not required to send a Notice on a commercial project, if its work falls into one of the following three categories:

- It provided labor only;
- It provided labor and materials only; or
- It provided rental equipment only.

If a contractor properly sends a required Notice of Right to Lien to the mortgagees on the property, the materials portion of its lien takes priority over a mortgage. In the event a contractor failed to send a Notice of Right to Lien to a mortgagee (thereby causing the contractor to lose priority as to the materials portion of its lien), the Claim of Lien should segregate the remaining

balance between those outstanding amounts related to materials and non-materials (e.g. labor, equipment, etc.). Otherwise, the court may find that it cannot determine the lien amounts which are entitled to priority over a pre-existing mortgage. In which case, it may find the entire lien to be invalid or otherwise unenforceable as to the mortgage.[3]

2. Information Notice to Owner

As a supplement to owners, Oregon law also requires original contractors (those who contract directly with an owner – typically the general contractor) to provide owners of residential improvements with a general notice regarding construction liens.[4]

If the contract is in writing, the notice must be provided at the signing of a written contract.[5] An Information Notice is only required when the aggregate contract price exceeds $2,000.[6]

B. Claim of Construction Lien

1. Written Contracts Required

Effective January 1, 2008, a written construction contract is required for residential projects exceeding $2,000.[7] If the price increases above $2,000 during the course of construction, the contractor must send a written contract to the owner within five days. If a contractor fails to execute a written contract, it forfeits its rights to lien the property at issue. This provision applies to only "original contractors" on residential projects, i.e. those who contract directly with a residential owner.

2. Timing

A contractor claiming a construction lien must file its Claim of Lien within 75 days after that contractor has stopped providing labor, equipment, or materials on the project, or 75 days after substantial completion of the project, whichever comes first.[8]

Generally speaking, a contractor has stopped providing labor, materials, or equipment when that contractor's contract is substantially complete.[9] Performance of additional work not originally contemplated in the initial contract extends the 75 day period until the completion of the additional requested work.[10] Trifling work, or the repairing of a contractor's substandard work, does not act to extend the 75-day deadline.[11]

In determining when the contractor's work is substantially completed, factors such as when the owner pays, and when a contractor removes tools from a construction site may be indicative.[12]

A construction project is complete when one of three things occurs: (1) the improvement is substantially complete; (2) a valid completion notice is posted and recorded as provided by ORS 87.045; or (3) the improvement is abandoned.[13]

3. Content

The Claim of Lien must contain a "true statement of demand" after deducting all just credits and offsets.[14] It must also contain the name of the owner, the name of the party who hired the contractor, and a description of the property to be charged with the lien.[15] Each lien claim must also be "verified by the oath of the person filing or some other person having knowledge of the facts, subject to the criminal penalties for false swearing…."[16]

C. Enforcement and Foreclosure

A suit to foreclose on a construction lien must be brought within 120 days after lien filing.[17] Prior to initiating a suit to foreclose a construction lien, a lien claimant must deliver to all owners and mortgagees[18] a ten-day notice of intent to foreclose on the construction lien.[19] Assuming a contractor complies with all relevant statutory requirements in perfecting its lien and initiating its lien foreclosure suit, it will be entitled to recover its reasonable attorney fees if it prevails in the foreclosure suit.[20]

D. Ability to Waive

A lien waiver must be "reasonably clear" about what rights the supplier of materials or labor intended to waive.[21] In making this determination, evidence about the surrounding circumstances is admissible to put the judge in the position of the parties to the contract.[22]

II. PUBLIC PROJECT CLAIMS

The law relating to public construction contracts in Oregon is a mixture of common-law principles and unique statutory laws and regulations applicable only to public contracts. Unless modified by statute or regulation, the rules applicable to construction contracts in general are equally applicable to government construction contracts.

Oregon's laws relating to public contracting are, for the most part, codified in ORS chapters 279A-279C (the "Public Contracting Code" or "PCC"). The following is a brief summary of some notable provisions from that code.

The PCC establishes the public policy applicable to public improvement contracts to emphasize the importance of competitive bidding. The Oregon legislature requires that each public agency base its procurement methods on competitive bidding, while still allowing for creative procurement methods to achieve that agency's goals. Although the Oregon legislative policy allows, and even encourages, contracting techniques other than the low bid, the PCC is based on the requirement that unless public contracts (including construction contracts) are exempted from the competitive bidding process, "all public contracts shall be based upon competitive bids[.]"[23] A public agency may include affirmative action provisions within its procurement process and contract provisions for minorities, women, disabled veterans, and emerging small businesses.[24]

A bidder or proposer may not discriminate against a business enterprise owned by these individuals.[25]

Three other contracting preferences may apply: (1) a preference for goods and services manufactured or produced in Oregon;[26] (2) a preference for goods manufactured from recycled materials;[27] and (3) a preference for agricultural products produced and transported within Oregon.[28] The latter preference is for goods that are fabricated or processed, or services that are performed, entirely within Oregon if the goods or services cost not more than ten percent more than goods that are not fabricated or processed, or services that are not performed, entirely within Oregon.

Certain clauses must be included in the bid or contract documents or both for public improvements and public works contracts.[29] These mandatory provisions include clauses requiring a contractor to do the following, among other requirements:

- Make payment promptly, when due, to all persons supplying the contractor with labor or materials for the performance of the work provided for in the contract.[30]
- Pay all contributions due to the industrial accident fund.[31]
- Not permit any lien or claim to be filed or prosecuted against the public agency on account of any labor or material furnished.[32]
- Not employ any person for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it.[33]

For a list of required and optional clauses please refer to the PCC.

Unique to public improvement contracts in Oregon are several special statutory limitations. For example, a contract for demolition requires salvage or recycling if feasible and cost-effective.[34] Additionally, green-energy technology must be included in the construction of any new public buildings or the reconstruction or major renovation of such buildings when the cost of renovation or reconstruction exceeds 50% of the value of the building.[35] This green-energy technology must include solar electric or solar thermal systems and passive solar if the passive solar energy system will achieve a reduction in energy usage of at least 20%. A public improvement contract cannot specify brand names unless the Department of Administrative Services or the local contract review board makes findings justifying the use of products or classes of products by brand name.[36]

Although a public agency is generally free to include clauses it deems necessary or in its best interests that do not directly conflict with statutorily required clauses, under ORS 279C.315(1) a public agency should not include a clause that "purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in

performing the contract, if the delay is caused by acts or omissions of the contracting agency or persons acting therefor." This statute is not intended to void contract provisions that (1) require notice of delay, (2) provide for arbitration or other procedures to settle disputes, or (3) provide for reasonable liquidated damages. [37]

The law commonly referred to as Oregon's Prompt Payment Act is set forth in ORS 279C.570–279C.580. These statutes require contracting agencies to make monthly progress payments on public improvement projects. The progress payments are based on estimates of work completed. Progress payments are not acceptance or approval of the work or a waiver of any defective work covered by the payment. Interest on a progress payment begins to accrue 30 days after the invoice is received from the contractor or 15 days after the agency approves payment, whichever occurs first. The rate of interest is specified in the statute.[38]

III. STATUTES OF LIMITATION AND REPOSE

A. Breach of Contract – Statute of Limitations

ORS 12.080(1) states that a breach of contract claim must be filed within six years. Although the case law is unsettled, the most natural reading is that plaintiffs are entitled to the benefit of the discovery rule, meaning that the limitations period begins to run when the breach is discovered.

The Court of Appeals held in 2008 that the statute of limitations in ORS 12.080(1) does not include the discovery rule.[39] The Supreme Court has since considered, in *Rice v. Rabb*, a dispute under ORS 12.080(4), which applies to conversion claims.[40] In *Rice*, the court held that in light of the legislature's use of the word "accrued" in ORS 12.010, it had intended to incorporate a discovery rule for limitations in ORS ch. 12, unless a different intent appeared in the statutory text.[41] After the decision in *Rice*, the Court of Appeals held that the discovery rule also governs the period of limitations stated in ORS 12.080(3) for an action for waste or trespass, for interference with or for injury to any interest in real property.[42] In so holding, the court of appeals recognized that the reasoning in *Rice* applies equally to ORS 12.080(3).[43] In light of *Rice* its progeny, if faced with this issue in the future, the Court of Appeals would likely conclude that the period of limitations in ORS 12.080(1) is governed by a discovery rule.

B. Negligence (Property Damage) – Statute of Limitations

The statute of limitations for tort actions arising out of construction defect related property damage is two years, and the period of limitations begins to run from the discovery of the alleged defects. *Goodwin v. Kingsmen Plastering, Inc.*, 359 Or 694 (2016).

Riverview provides important gloss to the discovery rule. The rule asks "how a reasonable person of ordinary prudence would have acted in the same or a similar situation."[44] The court added that "[o]rdinarily, the application of [the discovery rule] presents a factual

question for the jury[.]"[45] The question is "susceptible to judgment as a matter of law if the only conclusion a reasonable jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter."[46] The practical effect of *Riverview* is that actual notice of a defect in some places may not constitute constructive notice of the same defect in other places in the same project. Further, actual notice of a defect may not constitute notice that the contractors supervising the project are liable for failing to discover or concealing defects.

Also, in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, the Oregon Supreme Court recently stated that where a contract (such as the standard AIA form) states the applicable statute of limitations runs from "substantial completion," as "certified by the Architect," a tort claim accrues only if and when the architect issues a certificate of substantial completion, even if the project owner has already occupied and used the property for its intended purposes.[47]

C. Design Professionals – Statute of Limitations

ORS 12.135(3) provides a two-year statute of limitations for specialized actions against design professionals. [48] The action must be commenced within two years "from the date the injury or damage is first discovered or in the exercise of reasonable care should have been discovered."[49] This statute of limitations applies to claims of any nature, including claims for breach of contract.[50]

Note that any claim against a design professional requires ORS 31.300 certification that plaintiff's attorney has "consulted a design professional with similar credentials who is qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional."[51] If the statute of limitations against a design professional is about to expire the statute alternatively allows for a specific affidavit.[52]

D. Statute of Ultimate Repose

The statute of ultimate repose applicable to actions for damages from construction, alteration or repairs to real property was amended in 2009. Many residential structures, including those that are four stories or less above grade, are still subject to a ten-year period following substantial completion. However, the statute has been reduced to six-years from substantial completion for large commercial structures.[53] And the legislature further amended the statute in 2013 to clarify that the same six-year statute of repose period for large commercial structures applies to design professionals.[54] Therefore, for causes of action arising in 2010 and later, each of the definitions should be investigated and considered.

For residential structures and small commercial structures, ORS 12.135 provides a ten year statute of ultimate repose for construction claims, whether in contract, tort or otherwise. The definition of "residential structure" includes those that contain one or more dwelling units and are four stories or less above grade.[55] In general, a "small commercial structure" includes non-

residential structures that are 10,000 square feet or less, but there are a number of other possibilities, including some non-residential rental units that are part of a larger structure.[56] Large commercial structures are subject to a six-year statute of limitations under ORS 12.135. A "large commercial structure" is defined, by exclusion, as a "structure that is not a residential structure or small commercial structure."[57]

Recently, in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.,* the Oregon Supreme Court clarified when the statute of repose period begins to run.[58] Specifically, the period begins to run on the date on which the contractee accepts the construction as fully complete, as opposed to accepting the construction as sufficiently complete for its intended use or occupancy.[59] In other words, evidence of mere occupancy is not enough. There has to be an affirmation of full completion by the contractee. In a companion case, *PIH Beaverton, LLC v. Super One, Inc.,* the Oregon Supreme Court interpreted the rule in *Sunset Presbyterian* and held that a completion notice pursuant to ORS 87.045 (construction lien) is insufficient to trigger the running of the 10-year statute of repose.[60] The court stated there must be evidence that, when considered in its entirety, demonstrates written consent or assent to construction as sufficiently complete for its intended use or occupancy.[61]

The Oregon Court of Appeals has ruled that the statute of repose in ORS 12.135 applies only when a contractor enters into a construction contract with a customer.[62] ORS 12.135 does not apply when a new residence or other building is sold to a buyer, unless the buyer contracted with the builder to have the structure built. Where a new residence is sold to a buyer, the 10-year statute of repose in ORS 12.115 applies. Here, the repose period begins to run from the time of "the act or omission complained of," not the date of substantial completion of the entire structure.[63]

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

A. Pre-Suit Notice

An owner cannot file a lawsuit or initiate arbitration against a contractor, subcontractor or supplier regarding residential construction defects without sending the contractor, subcontractor or supplier a written notice of the defects by registered mail, return receipt requested.[64] If the owner does not give proper notice, the contractor, subcontractor or supplier can have the lawsuit or arbitration dismissed without prejudice.[65] The owner must then provide proper notice before re-filing.[66]

1. Required Content

An owner's pre-suit notice must include:

- The name and mailing address of owner or the owner's legal representative;
- A statement that the owner may file lawsuit or compel arbitration;

- The address and location of the residence affected by the defect;
- A description of:
    - Each defect;
    - The remediation the owner believes is necessary; and
    - Any incidental damage that cannot be remediated; and
- Any report or other document evidencing the existence of the defects and any incidental damage.[67]

2. Secondary Notices

After receiving a notice of defect, a contractor, subcontractor, or supplier has 14 days to send by registered mail, return receipt requested, a secondary notice to any other known contractor, subcontractor, or material supplier who may be responsible for the defects.[68] This secondary notice must include a copy of the owner's notice and a statement that describes why the person/entity may be responsible for some or all of the defects.[69]

3. Right of Visual Examination / Right of Inspection

If a contractor, subcontractor or supplier wants to visually examine the residence, he must request as much in writing within 14 days of receiving the notice of defect or secondary notice.[70] The request must state the estimated time required for the visual examination and the owner must make his residence available during normal business hours within 20 days after receiving the written request.[71]

Under ORS 701.570, if a contractor, subcontractor or supplier wants to inspect the residence, he must request as much in writing within 14 days of receiving the notice of defect or secondary notice. The request must state the nature and scope of the inspection, the testing to be performed, the estimated time required for the inspection, and the identity of those attending the inspection.[72] The owner must make his residence available during normal business hours or at a time that is mutually agreeable to the owner and the requester.[73] The party requesting the inspection must coordinate the inspection with any parties he intends to hold secondarily liable and must provide them with copies of the notice sent to the owner.[74]

B. Response and Remediation

1. Timing

Unless otherwise agreed to by the owner, a contractor, subcontractor or supplier that receives a notice of defect or secondary notice must send a written response to the owner not later than 90 days after receipt.[75]

2. Content

The response must be in writing and sent by registered mail, return receipt requested.[76] For each defect listed in the notice of defect, secondary notice or observed during visual examination or inspection, the response must either:

- Acknowledge the defect's existence, nature and extent without regard to responsibility;
- Describe the existence of a defect different in nature or extent from the defect described in the notice without regard to responsibility; or
- Deny the defect exists.[77]

The response must also include copies of reports detailing the results of the inspection and any defects discovered and an offer to perform remediation within a specified time frame, an offer to pay monetary compensation, or a denial of responsibility for some or all of the defects and incidental damage.[78]

An owner has 30 days to accept an offer to remediate or pay.[79] While the statute provides that any claim by an owner shall be dismissed if the notice provisions have not been complied with, it is silent on the consequence for a general contractor failing to send the secondary notice.

If an owner sends a notice before the applicable statute of limitations has expired, the statute is extended for 120 days after the contractor denies responsibility, 120 days after the owner rejects the contractor's offer, or 30 days after the contractor fails to perform the agreed repair or pay agreed damages.[80]

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. Commercial General Liability (CGL) Policies

In general, coverage will exist under a CGL policy for "occurrences" that cause "bodily injury" or "property damage," which occur within the policy period, subject to exclusions contained in the policy.

1. The Insured

The definition of "insured" depends on how the named insured is shown on the policy's declarations.

2. Occurrences

Where, as typical, occurrence is defined as an "accident" the meaning is well established under Oregon case law. An injury is accidental unless the insured acted both intentionally and

with an intent to cause harm. As explained in *Drake v. Mutual of Enumclaw Ins. Co*., a case in which our office represented the insurer, the "occurrence" requirement is satisfied unless the insured acted both deliberately and maliciously—meaning, the insured intended to commit the injury-producing act and also intended to inflict the injury.[81]

Oregon appellate courts have held that although negligent performance of a contract might cause damage by "accident," there is no tort and no "accident" when the damage results solely from the complete failure of timely performance of a contract, generally actionable only as a breach of contract.[82] Thus, a breach of contract or a warranty is not an "occurrence."

3. Property Damage

Under typical policy definitions, property damage does not include consequential or intentional damage, nor does it include the insured's product when the policy excludes coverage for damage to the insured's product. Further, defective workmanship and materials, standing alone, does not qualify as "property damage."[83]

4. Bodily Injury

The Oregon Court of Appeals has held that "bodily injury" coverage applies where there is an allegation of physical harm, however slight. For example, in *McLeod v. Tecorp International, Ltd*., a case involving sexual harassment in the workplace, the court said that "nausea" – a physical ailment – and "pain" – presumably physical pain – constituted "bodily injury."[84]

5. Duty to Defend

Under Oregon law, an insurer's duty to defend depends entirely on the terms of the policy and the allegations of the complaint against the insured.[85] The insurer must defend if the complaint, without amendment, alleges "facts" that reasonably can be read to state a legally cognizable claim covered by the policy.[86] With limited exception,[87] it does not matter that the alleged "facts" are known to be untrue, based on the insurer's investigation.

B. Completed Operations Coverage

Insurance coverage for construction defect claims is generally predicated on the completed operations provision, as most construction defect damages occur after the project is completed. As a general rule, the operation is deemed complete when the work is finished.[88]

C. Allocation

Oregon Courts have addressed allocation issues differently depending on whether the insurance is concurrent or consecutive. For concurrent insurance, that is, multiple overlapping policies coverage for the same period of time, Oregon allocates the loss under the *Lamb-Weston* analysis, where each insurer is liable for a prorated amount of the damage not to exceed their

policy limits, unless the various "other insurance" clauses of the do not conflict. *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.,* 219 Or. 110, 128, 341 P.2d 110, 119 (1959).

For consecutive insurance, that is, policies covering different policy periods the typical method of allocation for consecutive-loss cases nationally is "time on the risk," allocating the loss pro rata based on the number of days during which the damage took place. No published Oregon opinion has ever squarely addressed the question, however.

VI. CONTRACTUAL INDEMNIFICATION AND CONTRIBUTION

G. Contractual Indemnification

If the general contractor, in the construction contract, requires the subcontractor to indemnify the general contractor to the extent it incurs liability as a result of the subcontractor's performance, the general contractor has an enforceable indemnity agreement. If an indemnity clause requires a subcontractor to indemnify a contractor for the contractor's own negligence, it is void;[89] however, a court will still enforce such a provision, but only to the extent of the subcontractor's own negligence.[90] The subcontractor may also be liable for a portion of the general contractor's attorney fees, but only to the extent the general contractor can prove that the fees were incurred defending claims caused by the subcontractors' negligence.[91] There is currently an open question under Oregon law regarding the method for allocation of attorney fees in a multi-party case, where multiple subcontractors owe attorney fees to a general contractor under contractual indemnity agreements.

Oregon law allows claims for negligent construction. Where there is no indemnification agreement between tortfeasors, the Oregon Supreme Court has held under Oregon's comparative negligence statute, where fault is allocated based on each tortfeasor's liability and is several only[92], common law indemnity is not allowed.[93] The court noted that common law indemnity was "developed before comparative responsibility and is inconsistent with its framework."[94] This approach is consistent with the approach taken by a number of other states.[95]

B. Contribution

In *Lasley v. Combined Transport, Inc.*, the Oregon Supreme Court held that in a comparative negligence case, a defendant that seeks to rely on a specification of negligence not alleged by the plaintiff to establish a co-defendant's proportional share of fault must affirmatively plead that specification of negligence.[96] And to allocate the fault of a co-defendant in circumstances where no judgment is being sought by the defendant against the co-defendant, an affirmative defense, as opposed to a cross-claim, is the appropriate procedural vehicle for achieving allocation. [97] If the defendant is seeking a judgment against a co-defendant (by contribution, indemnity, or otherwise), a cross-claim appears to be the appropriate procedural vehicle.

In *Marton v. Ater Construction Co.*, the Oregon Court of Appeals held that a defendant's contribution claim against a co-defendant arising out of money it owed the plaintiff is subject to the economic loss doctrine.[98] However, the Court stated it was possible for a defendant to bring a claim against a co-defendant alleging it is liable instead to the plaintiff.[99]

VII. CONTINGENT PAYMENT AGREEMENTS

G. Pay-if-Paid

If the language of a pay-if-paid clause is definite and unambiguous, Oregon courts generally uphold the clause.[100] However, it should be noted, Oregon courts do not favor these provisions and the "clear and unambiguous" standard is usually difficult to satisfy.

B. Pay-when-Paid

Pay when paid clauses are generally enforceable. Pay-when-paid clauses require that payment be made within a reasonable time.[101]

VIII. SCOPE OF DAMAGE RECOVERY

G. Attorney Fees Shifting and Limitations on Recovery

As a general rule, attorney fees are not recoverable absent a statute or contractual agreement authorizing the award.[102] An exception exists however, when a party's breach of contract involves the non-breaching party in litigation with a third party.[103] In such a case, the non-breaching party may recover attorney fees incurred in the separate action involving the third party, as consequential damages.[104]

B. Consequential Damages

Consequential damages are recoverable only if the injured party proves that the damages were actually contemplated by the parties at the time of contracting.[105] Remote or speculative damages are not recoverable.[106]

C. Delay and Disruption Damages

An owner can recover only for the period of delay that the owner proves was due solely to the contractor's fault.[107]

For a residential project, the proper measure of damages for delay is the rental value of the home, even if the owner did not intend to rent the property to others.[108] For a commercial project, where an owner that can demonstrate with reasonable certainty that the project would have been completed and usable absent the defendant's delay, the owner can recover either (1) the reasonable rental value of the completed project or (2) the anticipated profits lost due to the breach.[109]

D. Economic Loss Doctrine

Oregon courts adhere to the rule that "a negligence claim for the recovery of economic losses caused by another must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm."[110] Stated another way, "one ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property."[111] Some source of a duty outside the common law of negligence is required.[112] A duty outside the common law of negligence is found when the actor and the injured party are in a "special relationship" which is a relationship in which one party undertakes to protect the economic well-being of the other. Common examples include the relationship between professionals, such as lawyers, engineers, and architects, and their clients.

In *Jones v. Emerald Pacific Homes, Inc*., it appeared the Oregon Court of Appeals held that the relationship between homebuilder and homeowner was not special and thus would not support a negligence claim.[113] There, a homeowner sued a contractor because of allegedly poor workmanship for breach of contract and negligence. The trial court dismissed the negligence claim and the Court of Appeals affirmed the dismissal in an opinion that appeared to rely on the economic loss doctrine.

However, the economic loss doctrine did not apply where a secondary purchaser sued a builder for negligently causing damage to the property during its initial construction.[114] In *Harris v. Suniga*, plaintiffs purchased an apartment complex several years after it had been constructed under a contract between the defendant builder and the initial owner. Shortly after the purchase, plaintiffs allegedly discovered construction defects and damages attributable to defendants' work. Prior to trial, summary judgment was granted in favor of defendants, who argued that plaintiffs' negligence claim was barred by the economic loss doctrine; that is, because the damage to the apartment building was purely economic loss, a claim for negligence would not lie in the absence of a special relationship.

The Oregon Court of Appeals reversed the trial court's decision, relying primarily on the facts and holding in *Newman v. Tualatin Development Co. Inc*.[115] The court stated:

> In both cases, the defendants are builders of housing complexes. In both cases, the plaintiffs were not original purchasers directly from the defendants, but rather owners who purchased the homes from those who were. In both cases, the plaintiffs assert claims against the original builder for negligent construction, based on the deterioration of the physical structure of the buildings because of water damage. It seems to us necessarily to follow that the cases should be treated in similar fashion. In *Newman*, the court held that there was no impediment to the claim. The court did not explicitly refer to the economic loss doctrine, but we understand the necessary implication of its decision to be that the damage at issue was not economic loss. We do not understand why this case should be treated differently.[116]

The court also distinguished *Jones*, *supra*, explaining that *Jones* only dealt with the issue of whether a breach of contract could give rise to tort liability.

The Oregon Supreme Court upheld the Court of Appeals' decision upon review, and went on to state that the concerns underlying the economic loss doctrine were not implicated when the focus of the claimed negligence is on physical damage to property.

Harris means that subsequent purchasers can sue builders and developers, and do not need to rely on a "special relationship" to maintain a claim that the builder or developer negligently caused foreseeable damages to the property. It does not matter whether the builder or developer had any contact with the plaintiff. In fact, as the Court of Appeals noted, a subsequent purchaser has greater rights against the builder/developer than does the original purchaser/client.

As noted above, if pled incorrectly, a defendant can be subject to the economic loss doctrine when alleging contribution of a co-defendant.[117]

E. Interest

If a contract provision specifies a mechanism for award of prejudgment interest then the contract controls. If the contract is silent, then historically prejudgment interest has not been recoverable unless the amount due was either easily ascertained or readily ascertainable by simple computation.[118]

F. Punitive Damages

By statute, punitive damages are recoverable in a civil action if a party can prove by clear and convincing evidence that "the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."[119] Punitive damages generally are not recoverable in an action on a contract.[120]

G. Liquidated Damages

Private contracts may include a stipulation that liquidated damages cover less than all actual damages. For example, a liquidated damages provision may cover damages resulting from delay, but not damages incurred as a result of failure to fully perform the contract.

IX. CASE LAW AND LEGISLATION UPDATE

[1] Oregon Revised Statutes (ORS) 87.021.
[2] ORS 87.021(1).
[3] ORS 87.025.
[4] ORS 87.093.
[5] ORS 87.093(2)(b).
[6] ORS 87.093(4).
[7] ORS 701.305(1).
[8] ORS 87.035.
[9] *Consolidated Electric Distributors, Inc. v. Jetson Electric Contracting, Inc.*, 272 Or 384, 387, 537 P2d 83 (1975).
[10] *Farrell v. Lacey/Basic Builders, Inc.*, 264 Or 505, 511–12, 507 P2d 31 (1973).
[11] *See Fox & Co. v. Roman Catholic Bishop*, 107 Or 557, 215 P 178 (1923).
[12] *See Schade v. Alton*, 61 Or 187, 189, 121 P 898 (1912); *Dallas Lumber & Supply Co. v. Phillips*, 249 Or 58, 60, 436 P2d 739 (1968).
[13] ORS 87.045(1).
[14] ORS 87.035(3)(a).
[15] ORS 87.035(3)(d).
[16] ORS 87.035(4).
[17] ORS 87.055.
[18] The term "mortgagee" as used in the construction lien statutes is defined to include only those mortgagees who appear as mortgagees, beneficiaries, or assignees on certain trust deeds of record. *See* ORS 87.005(6); ORS 87.018(2).
[19] ORS 87.057(1).
[20] ORS 87.060(5).
[21] *Nelson v. Cohen*, 160 Or 336, 338, 84 P2d 658 (1938).
[22] *P & C Const. Co. v. American Diversified/Wells Park II*, 101 Or App 51, 56, 789 P2d 688 (1990). *See also Harding Mechanical Contract v. Fairfield Erectors*, 278 Or 613, 616, 564 P2d 1356 (1977) (The scope and effect of a lien release "is to be determined from the language of the document, the sequence of events and the surrounding circumstances").
[23] ORS 279C.335(1).
[24] ORS 279A.100 to 279A.105.
[25] ORS 279A.110.
[26] ORS 279A.120.
[27] ORS 279A.125.
[28] ORS 279A.128.
[29] ORS 279C.500 to 279C.670.
[30] ORS 279C.505(1)(a).
[31] ORS 279C.505(1)(b).
[32] ORS 279C.505(1)(c).
[33] ORS 279C.520(1).
[34] ORS 279C.510(1).
[35] ORS 279C.527(2).
[36] ORS 279C.345.
[37] ORS 279C.315(2).
[38] *See* ORS 279C.570(2).
[39] *Waxman v. Waxman & Associates, Inc.*, 224 Or App 499, 504, 198 P3d 445 (2008).
[40] *Rice v. Rebb*, 354 Or 721, 320 P3d 554 (2014).
[41] *Id.* at 728.
[42] *See Riverview Condo. Assn. v. Cypress Ventures*, 266 Or App 574, 600, 339 P3d 447 (2014); *Tavtigian-Coburn v. All Star Custom Homes, LLC*, 266 Or App 220, 337 P3d 925 (2014).
[43] *Tavtigian-Coburn*, 266 Or App at 221.
[44] *Riverview*, 266 Or App at 601.
[45] *Id.*
[46] *Id.* (internal quotation omitted).
[47] 355 Or 286, 293–94, 325 P3d 730 (2014).

[48] This includes architects as defined under ORS 671.010 to 671.220, landscape architects as defined in ORS 671.310 to 671.459 and engineers as defined under ORS 672.002 to 672.325.
[49] ORS 12.135(3)(a)(A).
[50] *Waxman*, 224 Or App at 509 (in these cases, the limitations period is determined by the identity of the defendant, not the nature of claim).
[51] ORS 31.300(2).
[52] ORS 31.300(3).
[53] ORS 12.135(1)(c) (applies to causes of action arising after January 1, 2010).
[54] ORS 12.135(1) (applies to causes of action arising after January 1, 2014).
[55] *See* ORS 701.005(15).
[56] *See* ORS 701.005(17).
[57] ORS 701.005(11).
[58] 355 Or 286, 325 P3d 730 (2016).
[59] *Id.* at 296.
[60] 355 Or 267, 280, 323 P3d 961 (2014).
[61] *Id.* at 284.
[62] *Shell v. Schollander Companies, Inc.*, 265 Or App 624, 633, 336 P3d 569 (2014).
[63] *See also id.* at 634 (where plaintiff's allegations of defect involved the exterior envelope, and the work on the envelope finished by June 22, 2000, the statute of repose began to run on that date).
[64] ORS 701.565.
[65] ORS 701.595.
[66] *Id.*
[67] ORS 701.565.
[68] ORS 701.570(1).
[69] *Id.*
[70] ORS 701.570(2).
[71] *Id.*; ORS 701.575.
[72] ORS 701.570(2).
[73] ORS 701.575(2).
[74] ORS 701.570(4).
[75] ORS 701.570(5).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] ORS 701.580(1).
[80] ORS 701.585.
[81] 167 Or App 475, 481, 1 P3d 1065 (2000).
[82] *Oak Crest Construction Co. v. Austin Mutual Ins. Co.*, 329 Or 620, 998 P2d 1254 (2000); *Kisle v. St. Paul Fire & Marine Ins.*, 262 Or 1, 495 P2d 1198 (1972).
[83] *See Wyoming Sawmills v. Transportation Ins. Co.*, 282 Or 401, 578 P2d 1253 (1978) (holding that the cost to remove and replace bad lumber used by a framer was not covered, but the cost of repairing other contractors' work which was damaged in the process of removing the bad lumber was covered).
[84] 117 Or App 499, 502, 844 P2d 925 (1992), *modified* 199 Or App 442, 850 P2d 1161, *rev'd on other grounds* 318 Or 208 (1993).
[85] *See, e.g. West Hills Development Company v. Chartis Claims, Inc. Oregon Automobile Insurance Company*, 360 Or 650, 653, 385 P3d 1053 (2016). *See also, PIH Beaverton v. Red Shield,* 289 Or App 788, 412 P3d 234 (2018); *Security National v. Sunset Presbyterian,* 289 Or App 193, 408 P3d 233 (2017).
[86] *Marleau v. Truck Ins. Exchange*, 333 Or 82, 91, 37 P3d 148 (2001); Ledford v. Gutoski, 319 Or 397, 400–01, 877 P2d 80 (1994).
[87] *See, e.g. Casey v. Nw. Sec. Ins. Co.*, 260 Or 485, 492, 491 P2d 208 (1971) (holding that where a prior judgment establishes that the insured acted with the intent to cause harm, the insurer may rely on that extrinsic evidence, *i.e.*, on the judgment, to deny coverage. This is so even if the complaint alleges that the insured did not act intentionally or with harmful intent.)
[88] *Boyer Metal Fab v. Maryland Casualty Co.*, 90 Or App 103, 107, 750 P2d 1195, rev. den. 305 Or 672, 757 P2d 422 (1988).

[89] ORS 30.140.
[90] *Montara Owners Ass'n v. La Noue Dev., LLC*, 357 Or 333, 338-339 P3d 563 (2015).
[91] *Sunset Presbyterian Church v. Andersen Const. Co.,* 268 Or. App. 309, 322, 341 P.3d 192, 200 (2014).
[92] Uncollectible amounts can be reallocated, pro rata, to a tortfeasor with more than 25% fault. ORS 31.610.

[93] *Eclectic Inv., Inc. v. Patterson*, 357 Or 25, 38 (2015), *adhered to as modified on reconsideration* 357 Or 327 (2015).
[94] *Id.*
[95] *Id.* at 37 (citing cases from Wisconsin, Texas, and Kansas).
[96] 351 Or 1, 14, 261 P3d 1216 (2011).
[97] Id.
[98] 256 Or App 554, 564–65, 302 P3d 1198 (2013).
[99] *Id.* at 565, n. 8 ("[T]he language of the comparative fault statute, ORS 31.600, demonstrates that the legislature anticipated that a defendant could file a third-party complaint against a tortfeasor who would not be liable to the defendant but who could, instead, be liable to the plaintiff." (internal quotation omitted)).
[100] *See Mignot v. Parkhill*, 237 Or 450, 458, 391 P2d 755 (1964) ("clear and unambiguous language . . . expressing the intention that the happening of a contingency over which the [subcontractor] has no control shall be a condition precedent to payment . . . must be found in the contract.").
[101] *See id.* at 457–59.
[102] *Brookshire v. Johnson*, 274 Or 19, 21, 544 P2d 164 (1976).
[103] *Raymond v. Feldmann*, 124 Or App 543, 546, 863 P2d 1269 (1993).
[104] *Id.*
[105] *Siegner v. Interstate Production Credit Ass'n*, 109 Or App 417, 820 P2d 20 (1991).
[106] *See Id*; *Harold Schnitzer Properties v. Tradewell Group, Inc.*, 104 Or App 19, 799 P2d 180 (1990); *Senior Estates, Inc. v. Bauman Homes, Inc.*, 272 Or 577, 539 P2d 142 (1975).
[107] *See Valley Inland Pac. Constructors v. Clack. Water Dist.*, 43 Or App 527, 537, 603 P2d 1381 (1979).
[108] *Gregory v. Weber*, 51 Or App 547, 552, 626 P2d 392 (1981).
[109] *Stubblefield v. Montgomery Ward & Co.*, 163 Or 432, 96 P2d 774 (1939).
[110] *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or 149, 159, 843 P2d 890 (1992).
[111] *Hale v. Groce*, 304 Or 281, 284, 744 P2d 1289 (1987).
[112] *Id.*
[113] 188 Or App 471, 71 P3d 574 (2003).
[114] *Harris v. Suniga*, 209 Or App 410, 149 P3d 224 (2006), aff'd 344 Or 301, 180 P3d 12 (2008).
[115] 287 Or 47, 597 P2d 800 (1979).
[116] *Harris*, 209 Or App at 419–20.
[117] *Marton*, 256 Or App at 565 n. 8.
[118] *See Wilson v. Smurfit Newsprint Corp.*, 197 Or App 648, 673, 107 P3d 61 (2005).
[119] ORS 31.730(1). *But see Eastwood v. American Family Mut. Ins. Co.*, 2006 WL 2934260 (D. Or. Oct. 12, 2006) (noting that ORS 31.730(1) is preempted in some circumstances).
[120] *Express Creditcorp v. Oregon Bank*, 95 Or App 121, 124, 767 P2d 493 (1989).