

Building Better Outcomes

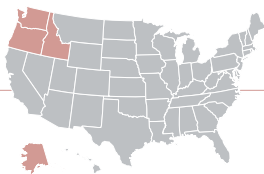
CONSTRUCTION CLAIMS

FALL 2016
VOLUME 1
ISSUE 2

Choose Your **Forum**

When going to battle for your client in a construction defect case, you always want the friendliest venue. P30

A publication of
CLM
TheCLM.org



Rulemakers

Regulatory and Legislative Actions

Seattle Passes Historic Affordable Housing Regs

The Seattle City Council has passed affordable housing regulations that require apartment and condominium developers to include an increased number of affordable units in their projects or contribute to a government fund for affordable housing development. The new regulations are slated to go into effect in the first quarter of 2017.

The council also intends to increase the limits on the number of units developers are allowed to build into their projects. Last year, the city passed a regulation requiring commercial builders to contribute between \$5 and \$17.50 per square foot of their projects (depending on location) to the affordable housing fund once unit limits on projects were increased.

Other cities are also requiring builders to contribute to the affordable housing effort. In July, for example, Portland, Ore., passed a 1% construction excise tax to fund affordable housing construction. And San Francisco in June approved Proposition C, which mandates that residential developers of 25 units or more have 25% of their projects dedicated to affordable housing, more than doubling the previous 12% requirement.

Oregon Docks Construction Defect Tail

The state's Supreme Court clipped an appellate court's ruling that granted a six-year statute of limitations period for negligent construction claims.

BY TIMOTHY REPASS AND GRAHAM MILLER

Recently, the Supreme Court of Oregon handed down a decision in *Goodwin v. Kingsmen Plastering, Inc.* with massive procedural implications for all construction defect cases. The decision clarified the often confused and misunderstood question of what statute of limitations period applies to negligence-based construction defect claims in the state of Oregon.

In *Goodwin*, the Supreme Court corrected a court of appeals decision that would have extended the statute of limitations to six years for claims of negligent construction. The Oregon Supreme Court ruled that the appropriate statute of limitations under the law was two years—not six.

Historically, under Oregon law, negligence-based construction defect lawsuits have had a two-year statute of limitations period that barred all claims filed after that deadline. For equity purposes, the clock starts running only after plaintiffs have discovered the defect. The governing statute in these situations is ORS 12.135(1)(a), which states that lawsuits arising from the “construction, alteration or repair of any improvement to real property”



TRIBE WANTS IMMUNITY FROM LANDSLIDE LIABILITY

The Stillaguamish Tribe filed a lawsuit in U.S. District Court in Seattle in June seeking protection from any liability assessed against the state for the March 2014 landslide in Oso, Wash.—the deadliest ever in the state. The tribe performed work on a crib wall to control sediment deposits in the Stillaguamish River and improve the water for salmon. The river ultimately undercut a hillside already saturated by heavy rains. The tribe says the state claims the tribe waived sovereign immunity and agreed to indemnify the state against any claims arising from the tribe's work on the wall.

The case took a bizarre twist in August when it was discovered that state expert witnesses destroyed emails they'd sent to each other. The plaintiffs' lawyers say the emails indicate inconsistent stories from the experts. The state in early September acknowledged the deletions but said they were a mistake, not fraud. The state is reconstituting as many emails as possible. The liability suit, filed in Washington's King County Superior Court, is expected to be one of the largest tort claims in state history. ■

must be commenced within “[t]he applicable period of limitation *otherwise established by law*” (emphasis added). The confusion arises when determining what is meant by “otherwise established by law.”

In *Goodwin*, the plaintiffs argued that ORS 12.080(3) provides the answer. A six-year statute of limitations is provided under that statute for all lawsuits “for interference with or injury to any interest of another in real property.” But the defendants argued that the plaintiffs’ action was not about any *interest* in real property being affected but was, rather, a claim for physical damage to the property itself. The defendants further argued that all tort claims of this nature are governed by yet another statute, ORS 12.110(1), which acts essentially as a catch-all for claims unrelated to contracts. That law requires a two-year statute of limitations unless a more specific statute applies.

In the end, the Supreme Court of Oregon provided much needed clarity to an extremely important procedural issue, ultimately ruling that negligence-based construction defect claims are given a two-year statute of limitations under ORS 12.135(1). The court further remanded the case to the trial court to determine the factual issue of when the plaintiffs actually discovered the claimed defects. Moving forward, the timing of discovery of the problem will be a critical issue in construction defect matters

Rulemakers

Regulatory and Legislative Actions

Feds Finalize Labor-Violations Disclosure Rule

The Obama administration has finalized a rule governing contractor disclosures of labor-law violations, part of the Fair Pay and Safe Workplaces executive order. The rule, which takes effect Oct. 25 and will be implemented in phases over 12 months, requires contractors bidding on federal government projects of more than \$500,000 to disclose all violations they or their subcontractors have had in the three years prior. Contractors on federal projects will have to give employees all needed information each pay period so they can verify the accuracy of their pay. Disclosure information must be updated every six months during a contract. New violations—or failure to report violations—could result in non-exercise of a contract option, termination of a contract, or other remedial actions during the course of fulfillment of a contract. The rules apply to those already under contract. The order doesn’t preclude hiring violators; it merely instructs federal contracting officers to determine if the contractor and its subs are “responsible” enough to be awarded government work. Violations are graded as “serious,” “repeated,” “willful” or “pervasive.” New “agency labor compliance advisors,” housed in the U.S. DOL, will determine the suitability of bidders’ employment history. These advisors may reject bidders based solely on compliance histories. The rule includes a new requirement that contractors winning a bid of \$1 million or more not be allowed certain kinds of arbitration. Some reportable violations must be disclosed even while discussions are ongoing and formal appeals are pending.

in light of the now-established two-year statute of limitations period.

The rule regarding the timing of the discovery of a construction defect was not altered, so the statute of limitations still does not begin to run until plaintiffs actually discover the defect. However, those in the construction industry can now rest a little easier knowing that

plaintiffs must swiftly bring their claims going forward. ■

Timothy Repass is partner in the Seattle and Portland offices of Wood Smith Henning and Berman. trepass@wshblaw.com

Graham Miller is senior counsel in the Portland office of WSHB. gmiller@wshblaw.com

CONTRACTOR CREATIVITY KEY IN SEISMIC RETROFIT

Oregon has allocated \$1 billion of a \$1.5 billion pot of money to retrofit schools and other public facilities in the state so they are better able to withstand an earthquake. A study by the Oregon Department of Geology and Mineral Industries found more than 1,000 school buildings at high or very high risk of collapse during a major earthquake. The project presents contractors with multiple complexities. For example, some of the buildings no longer have their original drawings. Additionally, contractors are finding old damage along the way that requires

design modification and repairs before the retrofit can continue. Work must largely be done while the students are on vacation, causing highly complex financial schedule sequencing. Localized foundation excavation and interior trenching bring special challenges, and some of the projects require tunneling and specialized demolition. Contractors describe interior work conditions as cramped without much access space for standard equipment. In some cases contractors have to creatively adapt equipment to handle an unexpected problem. ■