

Welcome – Review Seminar Agenda

Dan Ducommun
President & CEO

MC Consultants, Inc.

Seminar Agenda

3:30 – 3:40pm Welcome / Opening Remarks

3:40 – 4:40pm

Session 1: Oregon Industry Trends and Case Law Review

4:40 – 4:50pm: 10 Minute Break

4:50 – 6:00pm:

Session 2: Washington Industry Trends and Case Law Review

6:00 - 7:00pm: Cocktail Reception

Oregon Industry Trends and Case Law Review

Moderator:

Eric A. Kekel, Esq., Dunn, Carney, Higgins & Tongue LLP

Panelists:

Allen E. Eraut, Esq., Rizzo Mattingly Bosworth PC

Michael J. Scott, Esq., Scott Hookland, LLP

Daniel Zimmeroff, Esq., Barker Martin, P.S.

DISCLAIMER

The opinions expressed and discussion points in this presentation are only those of the panel members and not to be assumed as those of the organizations of which they are affiliated. No legal or claims handling advice is intended to be relied upon by the audience.

Discussion Topics

- Statute of Limitations/Repose Issues
- Resolution/Settlement Issues
- Emerging & Developing Defects – Saying “Farewell” to Reverse-Wrapped WRB
- Insurance and Conflict Issues



Statute of Limitations (“SOL”)/Repose Issues

Discussion Topics

- Breach of Contract Claims
- Tort Claims (Negligence and Negligence *Per Se*)
- Claims Against Design Professionals
- Accrual of the SOL and Repose



Statute of Limitations (“SOL”)/Repose Issues

- Most Common Claims in Construction Defect Cases are:
 - Breach of Contract
 - Negligence
 - Negligence *Per Se*

- If a Condominium, Additional Claims May Include:
 - Breach of Statutory Warranty
 - Breach of Fiduciary Duty
 - Failure to Disclose



Statute of Limitations (“SOL”)/Repose Issues

- SOL – Sets the time limit for a plaintiff to commence an action after the claim has accrued. If not commenced within the time limit, the claim is barred.
- Repose – Sets the maximum time to commence an action regardless of when the claim is discovered or otherwise accrues.



Statute of Limitations (“SOL”)/Repose Issues Breach of Contract

- ORS 12.080(1) – “An action upon a contract *** shall be commenced within six years.”
- *Waxman v. Waxman & Associates, Inc.*, 224 Or. App. 499 (2008)
 - Court held that notwithstanding ORS 12.135 which applies to construction claims, the six-year period under ORS 12.080(1) applies to breach of contract claims.
 - ORS 12.080(1) is not subject to a discovery rule. The six years begins to run from the date of breach.



Statute of Limitations (“SOL”)/Repose Issues

Tort Claims – Negligence and Negligence *Per Se*

- Unlike Washington, Oregon recognizes negligent construction claims.
 - *Harris v. Suniga*, 344 Or. 301 (2008) – physical damage to property caused by alleged negligent construction is not purely economic loss
- SOL depends on the County and Possibly which judge.
- Washington County applies a 2-year SOL from the date of discovery.
- Multnomah County applies a 6-year SOL. Whether the discovery rule applies may depend on the judge.
- Clackamas County ???



Statute of Limitations (“SOL”)/Repose Issues

Tort Claims – Negligence and Negligence *Per Se*

- Basis for a 2-year SOL is ORS 12.110 and the infamous footnote #3 in *Abraham v. T. Henry Construction, Inc.*, 350 Or. 29 (2011).
 - ORS 12.110 is basically a 2-year catch-all SOL for action not based on a contract and for which a SOL is not otherwise provided.
 - Under ORS 12.110, the SOL for negligence begins to run from the date of discovery.
 - In *Abraham v. T. Henry Construction, Inc.*, the Oregon Supreme Court stated in a footnote that ORS 12.110 is the applicable SOL for a negligent construction claim.

Statute of Limitations (“SOL”)/Repose Issues Tort Claims – Negligence and Negligence *Per Se*

- In Washington County, Judges Charles Bailey and Thomas Kohl have ruled that the applicable SOL for tort claims is 2 years from the date of discovery of the defect/damage.
- Both Judges relied on the Oregon Supreme Court’s statement in footnote #3.



Statute of Limitations (“SOL”)/Repose Issues

Tort Claims – Negligence and Negligence *Per Se*

- Basis for a 6-year SOL is ORS 12.080(3) which provides:

“(3) An action for waste or trespass upon or for interference with or injury to any interest of another in real property *** shall be commenced in six years.”
- In *Waxman v. Waxman & Assoc., Inc.*, the Court ruled that ORS 12.080(1) is the proper SOL for breach of contract claims and there is no discovery rule.
 - Issue is whether a discovery rule applies to ORS 12.080(3).



Statute of Limitations (“SOL”)/Repose Issues

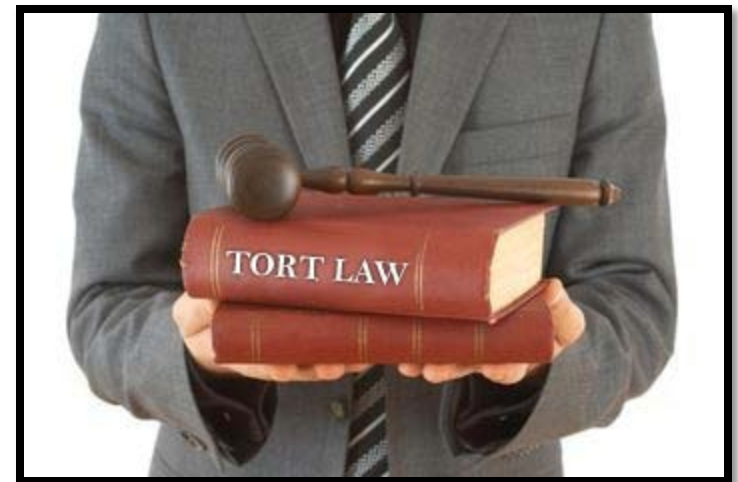
Tort Claims – Negligence and Negligence *Per Se*

- Tax Court/Motion Judge Henry Breithaupt sitting in Multnomah County has ruled that ORS 12.080(3) is the applicable SOL for negligence claims.
 - Like ORS 12.080(1), a discovery rule does not apply to ORS 12.080(3)
 - The SOL is 6 years from when the claim “accrues.”
- In two separate decisions Judge Breithaupt took judicial notice of the following:
 - Negligence claim accrued more than 6 years from filing based on plaintiff’s allegations that property damage occurred upon unit purchase.
 - Significant rainfall resulting in damage occurred between unit purchase dates and expiration of six years.

Statute of Limitations (“SOL”)/Repose Issues

Tort Claims – Negligence and Negligence *Per Se*

- Judge Judith Matarazzo in Multnomah County agrees that 6 years under ORS 12.080(3) is the applicable SOL for negligence claims but:
 - A discovery rule does apply to ORS 12.080(3)
 - So, the 6 years begins to run from the date of discovery of the defect/damage.



Statute of Limitations (“SOL”)/Repose Issues Design Professionals – ORS 12.135(3)

- ORS 12.135(3) sets the SOL for design professionals— architects, landscape architects and engineers.
 - Arising out of the construction, alteration or repair of any improvement to real property.
 - Damages for injury to persons, property, any interest in property, including delay, damages or economic loss.
 - Regardless of the legal theory, SOL is 2 years from date the injury or damage is first discovered or should have been discovered.



Statute of Limitations (“SOL”)/Repose Issues

Statute of Ultimate Repose

- ORS 12.135 sets the ultimate repose for claims involving construction and design effects.
 - 10 years after substantial completion or abandonment of the construction.
 - 6 years after substantial completion or abandonment if a large commercial structure.
- NOTE: The 6 years for large commercial structures did not apply to design professionals until SB 46 which became effective January 1, 2014.
 - SB 46 amends ORS 12.135(3) and applies to causes of action “arising” on or after January 1, 2014.

Statute of Limitations (“SOL”)/Repose Issues

Statute of Ultimate Repose

- Running of the repose period under ORS 12.135 begins upon “substantial completion” or “abandonment.”
- “Abandonment” is governed by ORS 87.045
 - 75th day after construction ceases; or
 - When owner or mortgagee posts and records a notice of abandonment.
- “Substantial Completion” is defined as date the “contractee accepts in writing” the construction or portion therefore as having reached the point where “it may be used or occupied for its intended purposes.”
- If no written acceptance, substantial completion is “the date of acceptance of the completed construction.”



Statute of Limitations (“SOL”)/Repose Issues

SOL Accrual Cases

- *Sunset Presbyterian Church v. Brockamp & Jaeger Inc.*, 254 Or. App. 24 (2012)
 - Plaintiff Church (“Owner”) filed negligence and negligence *per se* claims against GC. Owner and GC used an AIA contract which provides that claims accrue no later than “substantial completion” (paragraph 13.7.1.1).
 - Paragraph 9.8.2 of the AIA contract provides that the date of substantial completion is established by the architect’s “Certificate of Substantial Completion.”
 - Relying on the accrual provision, GC agreed Owner’s claims were filed too late. Owner argued that because there was no Certificate of Substantial Completion, GC could not establish date of substantial completion. The Court agreed with the Owner.
- Note: If using an AIA contract, Contractors need to make sure a Certificate of Substantial Completion signed by the architect is issued.



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Statute of Limitations (“SOL”)/Repose Issues

SOL Accrual Cases

- *Doughton v. Morrow*, 255 Or. App. 422 (2013)
 - Plaintiff sued developer for negligence alleging their cul-de-sac did not conform to the legal description and was of poor quality – failed to meet county standards – in several respects.
 - Developer argued the claims were not timely filed because plaintiffs knew or should have known of the alleged negligence much earlier so the claims were filed after the SOL ran.
 - SOL begins to run when the plaintiff “knew” or “should have known” facts of a substantial possibility of the existence of “harm, causation, and tortious conduct” (i.e. discovery rule).
 - The discovery rule has a “duty to inquire” element. If duty to inquire, SOL starts when “after inquiry” facts reasonably disclose an actionable injury.



Statute of Limitations (“SOL”)/Repose Issues

SOL Accrual Cases

- *Wood Park Terrace Apartments v. Tri-Vest, LLC*, 254 Or. App. 690 (2013)
 - Plaintiff sued the GC for negligence and negligence *per se* alleging multiple construction defects. Plaintiff and GC used an AIA contract which under paragraph 13.7.1.1 provides that claims accrue no later than substantial completion.
 - Certificate of Substantial Completion was signed by the architect and GC argued based on the certified date of substantial completion, plaintiff’s claims were filed too late.
 - Plaintiff argued that the “remedy-reservation clause” at paragraph 13.4.1 of the AIA contract makes the accrual clause only applicable to breach of contract claims.
 - Court disagreed holding paragraph 13.7.1.1 applies to negligence claims and the remedy-reservation clause only applies to rights not governed by the contract.



Statute of Limitations (“SOL”)/Repose Issues

SOL Accrual Cases

- ORS 12.080 has four subsections: Subsection (1) applied to contract claims; Subsection (2) applies to statutory claims; Subsection (3) applies to real property claims; Subsection (4) applies to personal property claims. All provide for a 6-year SOL.
- In *Waxman v. Waxman*, 224 Or. App. 499 (2008) the Court held no discovery rule under ORS 12.080(1) for breach of contract claims.
- *Rice v. Rabb*, ___ Or. ___ (2014), Argued September 16, 2013, Opinion filed January 30, 2014.
 - Court addressed ORS 12.080(4) in a claim for wrongful taking of personal property.
 - Relying on ORS 12.010 and its decision in *Berry v. Branner*, 245 Or. 307 (1966) the Court held the discovery rule applies to ORS 12.080(4).
 - *Waxman* case not mentioned in the Court’s opinion.
- Note: Issue is whether a discovery rule applied to each subsection of ORS 12.080. ORS 12.010 appears to apply to each subsection. What is the effect on the *Waxman* decision?

Statute of Limitations (“SOL”)/Repose Issues

Repose Accrual Cases

- *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or. App. 24 (2012).
 - The subcontractors were also sued by the owner. Subcontractors argued owner’s claims were filed beyond the 10-repose period under ORS 12.135 and ORS 12.115.
 - Court first addressed which repose statute applied and held that ORS 12.135 is the proper reposed statute for construction defect claims.
 - Next issue was when “substantial completion”, as defined in ORS 12.135, occurred.
 - “Contractee” under ORS 12.135 refers to the owner, not the GC.
 - If no written acceptance establishing substantial completion, then substantial completion for repose purposes is when owner accepts the completed construction.
 - Owner accepts completed construction when owner takes responsibility for the maintenance, alteration, and repair – no shared responsibility for those tasks.
- Note: Again, GCs need to get written acceptance from the owner that the project is substantially complete.
- Note: What is the effect of a warranty obligation???

Statute of Limitations (“SOL”)/Repose Issues

Repose Accrual Cases

- *PIH Beaverton, LLC v. Super One, Inc.*, 254 Or. App. 486 (2012).
 - Filing of a “Notice of Completion” by the owner under ORS 87.045, does not equal written acceptance by the owner to establish the date of substantial completion.
 - Question of fact remained as to the date owner accepted the construction as “complete” – responsibility for maintenance, alteration, and repair.
 - GC asserted indemnity claims against the subcontractors. GC conceded its indemnity claims were filed more than 10 years after substantial completion but argued ORS 12.135 does not apply to indemnity claims relying on *Huff v. Shiomi*, 73 Or. App. 605 (1985).
 - Court held ORS 12.135 governs the repose period for indemnity claims because such claims “arise” out of the construction activities.
- Note: Developers and GCs need to file indemnity claims within 10 years of substantial completion.

Resolution / Settlement Issues Assigns and Judgment

- Settlement That Includes Assignment and Judgment
 - *Stubblefield* and ORS 31.825
- Effect on Third-Party Claims
- Scope of the Release and its Effect

Resolution / Settlement Issues Assigns and Judgment

- The *Stubblefield* / ORS 31.825 Scenario:
 - Plaintiff sues defendant
 - Parties enter into a settlement agreement including:
 - Judgment against defendant
 - Often entered last
 - Covenant not to execute against defendant
 - Defendant assignments any possible claims against insurer (or insurance agent)

Resolution / Settlement Issues Assigns and Judgment

- *Stubblefield v. St. Paul Fire & Marine*
 - 267 Or. 397, 517 P.2d 262 (1973)
 - Judgment was entered after assignment of claims and covenant not to sue
 - Court held that the assignment of claims, by its terms, did not assign any rights to the plaintiff

Resolution / Settlement Issues Assigns and Judgment

- *Lancaster v. Royal Ins. Co. of America*
 - 302 Or. 62, 67, 726 P.2d 371 (1986)
 - The key to *Stubblefield* is in the language of the documents (not the timing)

Resolution / Settlement Issues Assignment and Judgment

- *Oregon Mutual Ins. Co v. Gibson*
 - 88 Or. App. 574, 578, 746 P.2d 245 (1987)
 - Upheld *Stubblefield* and applied it to a claim against insurance agents (not an indemnity claim)
 - The terms of the agreement “unambiguously” and “unconditionally” insulated and released the insured from liability
 - The court held that this is invalid under *Stubblefield*

Resolution / Settlement Issues

Assigns and Judgment

ORS 31.825* - Assignment of Cause of Action Against Insurer (After Judgment)

- A defendant in a tort action against whom a judgment has been rendered may assign any cause of action that defendant has against the defendants insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered.
- That assignment and any release or covenant given for the assignment shall not extinguish the cause of action against the insurer unless the assignment specifically so provides.

*previously ORS 17.100

Resolution / Settlement Issues Assigns and Judgment

- *Walthers v. Traveler's Casualty & Surety Co.*
 - D. Oregon, 1999 (Unpublished)
 - States that ORS 31.825 appears to be directly aimed at overruling *Stubblefield*

Resolution / Settlement Issues Assigns and Judgment

- *Holloway v. Republic*
 - 341 Or. 642, 649–50, 147 P.3d 329 (2006)(reversed on other grounds)
 - *Stubblefield* only applies to assignments of the duty to indemnify
 - The court didn't decide whether ORS 31.825 overrules *Stubblefield*
 - However, even assuming *Stubblefield* is good law, it can be distinguished
 - The assignment and covenant did not unconditionally isolate the insured from liability

Resolution / Settlement Issues Assigns and Judgment

- *Terrain Tamers Chip Hauling, Inc. v. Insurance Marketing Corp. of Oregon*
 - 210 Or. App. 534, 152 P3d 915 (2007)
 - Stopped just short of overruling *Oregon Mutual*
 - “It is debatable whether *Oregon Mutual* correctly states the law.”
 - Then, the court found that the assignment and covenant were enforceable under the language of the settlement agreement

Resolution / Settlement Issues Assigns and Judgment

- *Portland Public School Dist. No. 1J v. Great American Insurance*
 - 241 Or. App. 161, 249 P3d 148 (2011)
 - *Stubblefield* is inapplicable in light of ORS 31.825

Resolution / Settlement Issues Assigns and Judgment

- *Brownstone Homes Condo. Assoc. v. Brownstone Forest Heights, LLC*
 - 255 Or. App. 390 (2013) (awaiting Oregon Supreme Court opinion)
 - “[T]he order of events in this case does not conform to the statutorily prescribed sequence.”
 - The court distinguished *Portland School*, where the assignment of claims was conditioned on the filing of a tort action and entry of judgment.

Resolution / Settlement Issues Assigns and Judgment

- *Marton v. Ater Construction Co.*, 256 OR App 554 (2013)



- Discharging obligation owed to another means extinguishing all liability from active party to settled party
- Practical application
-- ORCP 22(C)(1)

Settlement Agreements Issues Scope of the Release (The Devil in the Details)

- Additional Insured
- Tenders
- How to Allocate
- Defense and Indemnity
- Purchase/Maintain Insurance



Emerging & Developing Defects

Saying “Farewell” to Reverse-Lapped WRB

Discussion Topics

- Changing Nature of Alleged Defects
 - High Rise Defects
- Product Liability Claims
 - Yellow Brass
 - CPVC

Emerging & Developing Defects

Saying “Farewell” to Reverse-Lapped WRB

Changing Nature of Alleged Defects

- Leaky subterranean parking garages
- Fire resistance-rated construction
- Post-tensioned anchor corrosion
- Plumbing
- “Maintenance” costs
- Air barriers
- Metal-clad self-adhered membrane







Emerging & Developing Defects

Saying “Farewell” to Reverse-Lapped WRB

Changing Nature of Alleged Defects

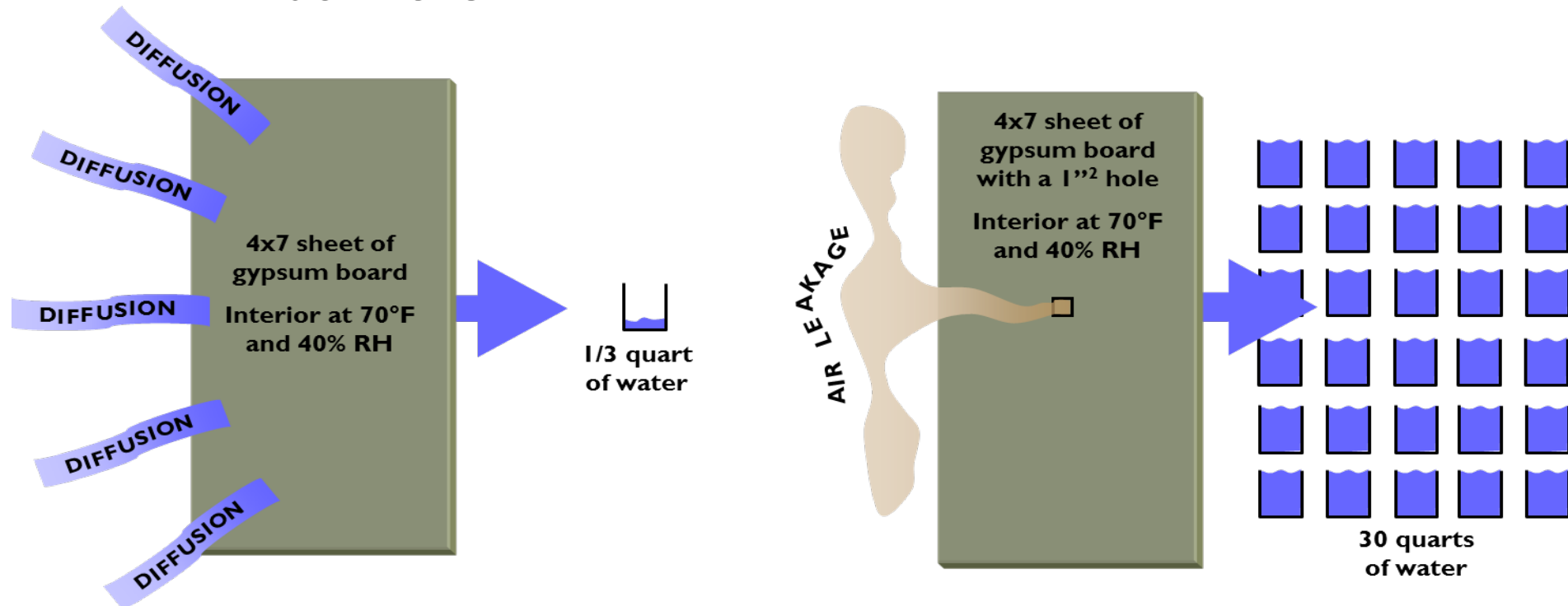
- Air barriers
- 2006 Seattle Building Code, 502.4.3.a:
Exterior joints around windows and door frames, openings between walls and foundation, between walls and roof and wall panels; openings at penetrations of utility services through walls, floors and roofs; and all other openings in the building envelope and all other openings in between units shall be sealed, caulked, gasketed or weatherstripped to *limit* air leakage. Other exterior joints and seams shall be similarly treated, or taped, or covered with moisture vapor permeable house wrap.

Emerging & Developing Defects

Saying “Farewell” to Reverse-Lapped WRB

Changing Nature of Alleged Defects

- Air barriers



Material spotlight: metal-clad self-adhered membrane, panacea or nostrum?



Emerging & Developing Defects Saying “Farewell” to Reverse-Lapped WRB Product Liability Claims

- Yellow brass
- Uponor/Wirsbo
- PEX
- Cast iron
- HVAC
- Declarant/Manufacturer

Yellow Brass



Sample ASTM F1960 Yellow Brass Fittings

The left fitting shows corrosion resulting from dezincification. The right fitting is still in good condition. Both came from the same unit.

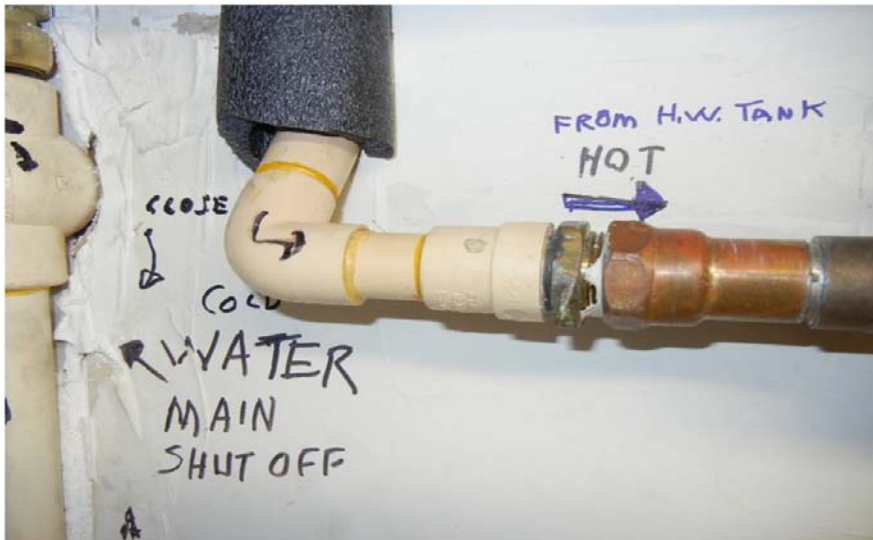
CPVC

CPVC = Chlorinated Polyvinyl Chloride



What is CPVC?

- Chlorinated Polyvinyl Chloride, or “CPVC” is a rigid plastic pipe used for potable water including supplying hot water.



What is the problem with CPVC?

- Embrittlement
- Discoloration
- Knit Line Fractures

Insurance and Conflict Issues Discussion Topics

- Contractual indemnity provisions
- What law applies?
 - Coverage issues/construction issues
- ORS 701 Notice of Defect / Tenders

Insurance and Conflict Issues

The Latest on ORS 30.140

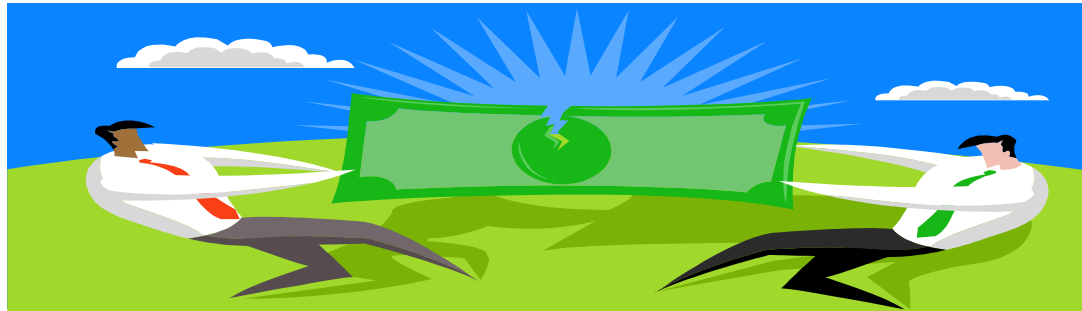
Montara Owners Ass'n v. La Noue Dev., LLC

- Indemnity agreement enforceable even if the indemnitee (GC, usually) is partially at fault
- Other Issues
 - Economic waste
 - Attorney fees as consequential damages
 - No set-offs for settlements to other parties
 - Unless: damages “duplicative”
 - Unless: if GC insurer paid on policy that pre-dated subs work

Insurance and Conflict Issues

Whose Law Is It Anyway?

Choice of Law for CD



- For Construction Claims:

- Not per se place of contract
- Project location

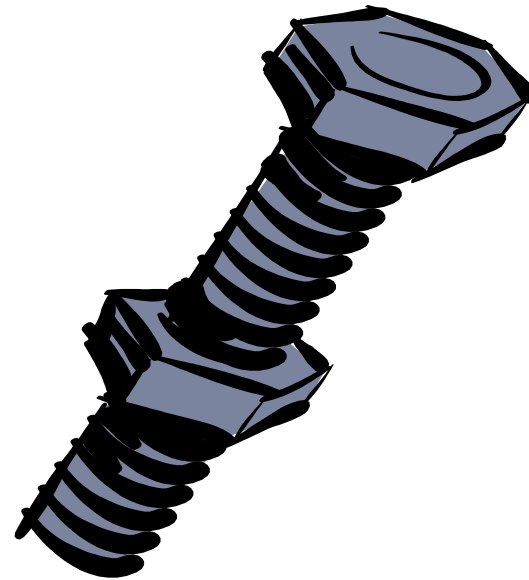
- For Coverage Claims:

- Most significant contacts
- No choice of law provision (ORS 742.018)

Insurance and Conflict Issues

Nuts and Bolts

- ORS Chapter 701 Notices of Defect
- Tenders
- Attorney Fees





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Thank You!

5th Annual Pacific Northwest Construction Defect Law Seminar

10 Minute Break