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LAWYERS CAN TAKE CUES FROM THE INTERNATIONAL MARKET WHEN FACED WITH INCREASINGLY COMPLICATED U.S. INFRASTRUCTURE CONTRACTS. P. 26

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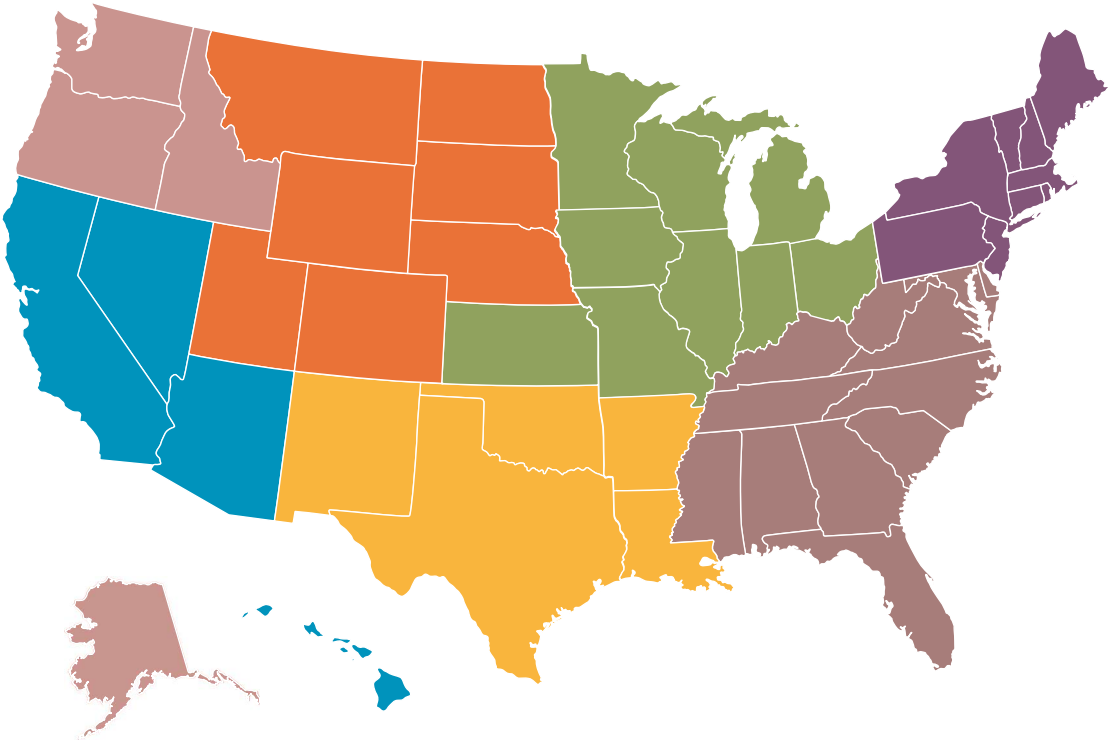


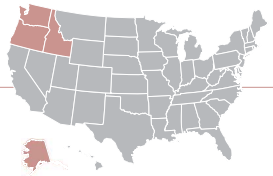

Attorneys Fee Tort Claim Trap

Subcontractors and insurers need to be aware of creative uses of Oregon Revised Statute 20.080.

By Megan Ferris

Recently, attorneys representing property owners in construction disputes have been attempting to add "value" to claims against lower-tier subcontractors (HVAC, gutters, flatwork) by leveraging Oregon Revised Statute (ORS) 20.080, which could expose the subcontractor to attorneys fees for claims under $10,000. This creates a trap because most of these claims otherwise would have no fee component (and therefore have significantly less value). Another problem created by the use of the statute against subcontractor claims is that it leaves unresolved the issue of third-party practice claims by a general contractor for the same claims at a later date. This trend is certainly unwelcome and a source of considerable frustration for subcontractor insurers and subcontractor defense attorneys. Quick action and creative negotiation may ease some of the pitfalls associated with this problem.

Megan Ferris

ORS 20.080 applies to personal injury claims and property damage claims for claimed damages up to $10,000. If the settlement demand, with existing supporting documentation, is sent 30 days before suit is filed by the property owner against the subcontractor, the plaintiff may recover attorneys fees unless the plaintiff's ultimate recovery is less than the pre-suit offer. For example, if no response to the pre-suit demand is tendered, the plaintiff need only recover a nominal amount against the subcontractor in order to also recover fees. If an amount less than the demand is tendered pre-suit, the plaintiff must beat that number in order to recover fees at trial.

As a threshold matter, lack of privity of the property owner with the subcontractor is no barrier. In Oregon, property owner claimants are able to pursue any contractor that worked on the property despite lack of direct privity by way of a contract or sales agreement. This allows property owners to issue demand directly to lower-tier subcontractors and their insurers.

Once suit is filed, attorneys fees cannot be avoided by an offer of judgment, as ruled in *Powers v. Quigley* (2008). The fee recovery is not reciprocal, so the threat of your subcontractor winning at trial (which is entirely possible) is of no consequence unless your subcontractor has a counter claim under $10,000 to assert, which is unlikely given the typical lack of relationship between property owner and subcontractor.

With respect to the mechanics of the demand, plaintiff's counsel must issue the demand to the subcontractor and on the subcontractor's insurer, if known to the plaintiff. Oregon, like many other states, lists the insurance history for licensed contractors on the Oregon Construction Contractor's Board. As a result, plaintiff's counsel can easily issue the pre-suit tender to any and all insurers listed on the web page, which typically includes more than one discrete insurer.

More often than not, the plaintiff's "demand" under ORS 20.080 will be combined in the same letter as a standard pre-suit defect notice, issued to comply with Oregon Revised Statute 701.506 et seq. Insurers should examine any pre-suit notice to determine if it also contains a pre-suit 20.080 demand, with the pre-suit 20.080 demand buried on the second or third page. Recipients of any pre-suit correspondence from property owners should know that *the demand need not necessarily reference ORS 20.080 but merely state a demand for $10,000 or less* and provide "documentation of the repair of the property, a written estimate for the repair of the property or a written

Renewal Policies Are Not Extensions of Original Policies

An Anchorage-based construction firm was denied coverage under a claims-made policy's renewal policy based on a failure to report the claim in a timely fashion. Alaska Interstate Construction received a claim from a winery during the coverage period of its initial errors and omissions policy, purchased from Crum & Forster. The construction company didn't report the claim until after it renewed the policy several months later. The carrier denied the claim under the claims-made rule, and Alaska Interstate sued, arguing the "policy period" encompassed both the initial and the renewal policies' coverage periods. The 9th U.S. Circuit Court of Appeals in San Francisco disagreed, ruling that the plain language of the policies indicated "a claim must be made and reported within a single policy period." In upholding the lower court's judgment in favor of the insurer's denial, the appellate court rejected the assertion that a renewal represents an extension of an initial policy and confirmed that renewals create new and separate coverage periods. ■

estimate of the difference in the value of the property before the damage and the value of the property after the damage," according to ORS 20.080(3).

With the 30-day clock ticking, insurers may scramble to try to establish contact with the insured, tender to other co-carriers and establish an agreed-upon time on risk, and negotiate the terms of the release. During that scramble, keep the following in mind:

- Immediately upon receipt of the tender, contact the issuing attorney and ask for an extension (to be confirmed in writing). Why not? Many times, the attorney issuing the demand will agree to a reasonable extension, which will allow more time for investigation and, at the very least, time to garner co-carrier participation.
- Document all tender amounts in writing along with any extension to the 30-day deadline.
- Ask for the documentation upon which the tender is based if it is not provided. Cite the statute back to the attorney issuing the demand.
- Attempt to negotiate the amount demanded; just because the demand was made does not mean the attorney making the demand wouldn't necessarily be responsive to a counter. But no counter extends the 30-day deadline. If your counter is not accepted or negotiations are not resolved in short order, a decision has to be made whether to tender the full amount demanded to avoid the fee hammer.
- You can tender less than the full amount demanded. That sets the bar that the plaintiff must beat at trial to recover fees.
- Inquire with the attorney issuing the demand if other insurers have been put on notice and, if so, what responses the attorney has received. However, just because there are other non-participating carriers out there doesn't mean the time for responding to the tender is extended.
- Inquire as to what other subcontractors who worked on the same home or project have been put on notice and whether the property owner intends to pursue other subcontractors, the general contractor or the developer in future litigation. This may aid in evaluating the risk versus reward of responding to the tender, given the likelihood of an additional claim against the subcontractor by another party.
- Try to negotiate a carve-out of the lower-tier subcontractor with the general contractor looped in, such that payment to the property owner's attorney would result in an agreement by the property owner not to make any claims against the general contractor for work related to your insured's work.
- Try to negotiate a hold harmless and indemnification agreement from the attorney making the demand to protect your insured from future third-party or cross claims. This may entail paying sums beyond those quoted in the initial demand but is worth it to obtain a comprehensive release. Along those lines, while it is worthwhile to undertake these efforts, the only thing your subcontractor is entitled to under the statute is a release in exchange for the tender. You cannot condition the tender on receipt of a hold harmless or other desirable outcome in exchange. If the attorney issuing the demand is unwilling to be flexible, you have to make a decision on whether to respond to the tender or roll the dice and allow suit to be filed.

If the general contractor is not part of the agreement following the property owner's acceptance of the tender, be prepared for a potential third-party practice by a general contractor against your subcontractor.

If your tender is accepted, consider the following:

- The attorney issuing the demand may try to claim a mutual release between the property owner and your subcontractor or draft a release with terms that go well beyond what the property owner is entitled to under the statute. Take a critical look at the proposed release and inquire whether the property owner is getting more than he is entitled to. But keep in mind that none of these efforts extend the time to respond to the tender.
- If the general contractor is not part of the agreement following the property owner's acceptance of the tender, be prepared for a potential third-party practice by a general contractor against your subcontractor. Unfortunately, just because you paid once doesn't mean the subcontractor is entirely out of the woods. The value and legitimacy of these claims by the general contractor against the subcontractor is unclear and may be suitable for motion practice later on. Oftentimes, however, the cost of such motion practice outweighs the possible reward, given the smaller value of the underlying claim itself. ■

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