PERSPECTIVES ON THE LAW

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Update! Washington Construction Defect Cases

— *by* **Julie E. Dutton**

This office has been providing articles to the OCAA newsletter for a few years now, and when it came time to write this article, I took a look back at what information was previously provided and decided that this would be good time to update a few of our prior articles. The issues that this article discusses include what kinds of claims in construction defect cases are currently recognized by Washington courts, based on the courts' application of the Economic Loss Doctrine, and an update in the construction defect statues of limitations and repose. These issues were previously discussed in articles entitled: *CONSTRUCTION CONJUNCTION – HOW DOES INDEMNITY FUNCTION? (Indemnity in Oregon and Washington)* published in June 2003, and *THE CLOCK IS TICKING!*, published in the November 2002 issue of the OCAA Newsletter.

Construction Defect Cases

As a review, the Economic Loss Doctrine is a theory of law that stands for the proposition that a party ordinarily is not liable in tort for the purely economic losses of a stranger. Where a contract exists between parties, courts will look to the terms of the contract to define the relationship between them. Even where a contract exists, the courts may still impose tort liability against a negligent party if the nature of the relationship between the parties dictates that result. In Washington, this usually occurs where one of the parties is a "professional" of some type. A "professional" has been defined as someone who obtains a college degree in a specific area of study for the purpose of practicing a profession. For example, such relationships may arise between clients and their attorneys or, in the construction context, between a design professional and a building owner. The courts have previously determined that a general contractor is not a "professional" under this definition; and further, the courts have determined that the relationship between general contractors and their subcontractors will not give rise to tort liability. The courts look to the contract (oral or written) to define the relationship between a general contractor and the building owner and/or the general contractor and its subcontractors. In other words, Washington courts do not recognize claims for negligent construction.

If a written contract exists between a general contractor and its subcontractors, then the court will enforces the terms of that contract, including any contractual indemnity provisions. However, where there is no written contract, and the parties' relationship is based on an oral agreement, claims of implied in fact indemnity, also known as equitable indemnity, may be brought when: (a) one party provides an express warranty; or (b) the contract is governed by the Uniform Commercial Code (the UCC only governs contracts for the sale of goods and does not apply to the

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performance of services). Urban Dev. Inc. v. Evergreen Bldg. Products LLC, et al., 114 Wash. App. 639, 642, 59 P.3d 112 (2003). In May of this year, the Washington Supreme Court upheld the Court of Appeals' decision in the Urban Development case holding that while contracts governed by the UCC, and in cases where express warranties have been provided, equitable indemnity may apply; but generally, construction contracts are not governed by the UCC and warranties will not simply be implied against subcontractors. *See* Fortune View Condo. Assn. v. Fortune Star Dev. Co., et al., 151 Wash. 2d 534, 90 P.3d 1062 (2004). The court further found that advertising and sales brochures may create an express warranty on which a party may base an equitable indemnity claim. *See* Id.

In a nutshell, all this adds up to a legal backdrop where the only claims available between general contractors and their subcontractors in construction defect cases are for breach of contract, unless the contract is governed by the UCC or the subcontractor provided an express warranty either in its contract or through its advertising and sales brochures, which could form the basis for an equitable indemnity claim.

Statutes of Limitations and Repose

In November 2002, we reported that Washington applied a "two-step analysis" in applying its statutes of limitation and repose. That analysis was based on a case entitled Architechtonics Construction Mgmt, Inc. v. Khorram, 111 Wash. App. 725, 727-28, 45 P.3d 1142, 1144 (2002). *See* The Clock is Ticking, OCAA Newsletter Nov. 2002. The Architectonics case has since been overruled by statute. In July 2003, the Washington Legislature enacted RCW 4.16.326(g). That section of the statute now states:

> "In contract actions the applicable contract statue of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after termination of the services enumerated in RCW 4.16.300, whichever is later…."

In other words, Washington will no longer apply a discovery rule to breach of contract claims. Since the exceptions above will only apply to a handful of construction defect cases, this means that most construction defect cases must be filed within 6 years from the date of substantial completion of the building or the termination of the services of the subcontractor, whichever date is later. ❖

— If you have any questions, please feel free to contact the author, Julie E. Dutton by phone at (503) 768-9600, or by email at julie@lerlaw.com. All prior articles published by this firm in the Perspectives on the Law section of the OCAA Newsletter are available for review in the "publications" section of our website: www.lerlaw.com.