

# Construction Law



Published by the Construction Law Section of the Washington State Bar Association

Volume 32

Spring 2003

Number 1

## Statute of Limitations/Statute of Repose/Indemnity Claims (Accrual of Cause of Action)

by Larry Vance – Winston & Cashatt

In *Parkridge Assocs. v. Ledcor Industries*, 113 Wn.App. 592 (Sept. 2000), Division I of the Court of Appeals continued with its trend of making new construction contract law and opened up a new area of concern for general contractors.

In the *Ledcor* case, the project was substantially completed on December 30, 1993. There was some dispute over whether subcontractor work continued after the date of substantial completion and the nature of said work (i.e., punchlist versus warranty work).

The owner of the apartment project sued the general contractor (Ledcor) on November 29, 1999 (just short of six years after substantial completion). According to the Court, the suit alleged "product and workmanship failures and defects." Ledcor promptly (a few months later) tendered the defense of the case to one of its subcontractors (Freeman) who had subcontracted to perform the roofing, waterproofing, deck coating, and metal work. Freeman rejected the tender by Ledcor, thus forcing Ledcor to bring Freeman into the suit by third-party complaint in August 2000. Ledcor alleged numerous causes of action against Freeman including both equitable and contractual indemnity, breach of warranties and breach of contract. In December 2000, Ledcor and the owner negotiated a settlement of "well into seven figures." Claiming that Freeman was primarily responsible for these damages paid by way of settlement, Ledcor sought "contribution" and indemnity from Freeman. Freeman, however, convinced the trial court that Ledcor's third-party action was barred by the Statute of Repose.

On appeal, Division I dissected both the Statute of Repose and Statute of Limitations in connection with construction contract cases and indemnity claims. Division I first held that the Statute of Repose did not begin to run until December 5, 1994 (nearly a year after substantial completion) because some evidence indicated that subcontractor services continued until that date<sup>1</sup>. The Court seemed unconcerned with any distinction(s) between "punchlist" versus warranty work. Unfortunately, the Court went on to hold that Ledcor's indemnity claims were nevertheless barred because they did not accrue until Ledcor first paid the claimant (owner). And since Ledcor's indemnity claims (both equitable and contractual) did not accrue until after the six-year Statute of Repose had expired, these indemnity claims were barred by the Statute of Repose.

As to the breach of contract claims, the appellate court held that there was still a question of fact as to whether such claims somehow accrued prior to the Statute of Repose expiring. Applying Division I's recently developed "discovery" rule to the breach of subcontract claim was held to require a factual determination of when Ledcor discovered or should have discovered the defects (for purposes of determining the exact date of the alleged breach of contract claim accruing).

<sup>1</sup> The Statute of Repose indicates that it begins to run from either the date of "substantial completion" or "termination of the services enumerated in RCW 4.16.300," "whichever is later."

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## Mechanics' Liens/Expiration of Lien/ Re-Filing/Timeliness

In *Geo Exchange Sys. v. Cam*, 115 Wn.App. 625 (2003), Division II of the Court of Appeals dealt with the issue of re-filing a mechanic's lien after the original lien had expired due to not being foreclosed within the 8-month statutory lien foreclosure period.

The original lien in the amount of \$998,500 apparently was filed while the contractor was still working on the site (the lien recited that the claimant was continuing to perform work at the site). The 8-month limitation on commencement of the lien foreclosure expired. Over two years after the first lien expired, a second refiled lien was filed which recited that the last date of labor was only a few days prior to the second lien being recorded. It included the amount from the original lien claim (\$998,500) and added approximately another \$500,000. Shortly after the refiled lien was recorded, the defendant moved under the frivolous/excessive lien procedure to have the lien declared clearly excessive. The defendants' theory was essentially that since foreclosure proceedings were not commenced within the 8-month statutory limitation period, the amount of the second lien had to be reduced by the amount of the first lien. The trial court agreed and summarily reduced the second lien by the amount of the first lien which had previously expired.

The appellate court reviewed the trial court's decision applying a de novo standard and reversed the trial court. The appellate court determined that the expiration of the first lien did not preclude a later refiled of the lien. Further, so long as the second lien was timely filed it could include amounts which were included in the previously expired lien. The Court of Appeals was urged to follow prior case law under the Retainage Lien statute (RCW Ch. 60.28); however, the Appellate Court refused to do so.

Interesting arguments were made by the defendant (and rejected by the court) that third parties could possibly be misled by the original lien expiring.

## Mechanics' Liens/Frivolous Lien/ Suspended Work/Timeliness of Lien

by Larry Vance – Winston & Cashatt

In *Intermountain Electric v. G-A-T Construction*, 115 Wn.App. 384 (2003), Division I of the Court of Appeals interpreted the "frivolous lien" provisions of the Lien Act and also interpreted the timeliness of a lien filing where the project had been suspended and ultimately abandoned by the owner/developer.

The lien claimant (Intermountain Electric) was a subcontractor who had begun furnishing electrical work and materials to a general contractor on a large retirement community project. Intermountain Electric performed continuously from November of 1996 to July of 1999, when the

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subcontractor was told by the general contractor to suspend its work "pending further financing." Intermountain Electric continued to keep its job trailer on site and checked with the general contractor every few weeks regarding the status of the work. It was disputed as to whether the general contractor instructed Intermountain to remain "on standby," but it was undisputed that Intermountain continued to keep its job trailer on site. It was also undisputed that Intermountain continued to do some repair work on

site until June 6, 2000. On September 8, 2000 (94 days after its last active work) Intermountain filed its lien. The lien apparently recited that Intermountain "is still currently working on the project," that its work "is suspended," and that its "last active work was done on June 6, 2000." Intermountain did not remove its jobsite trailer from the site until August 2001.

Although the owner/developer was in Chapter 11 bankruptcy, Intermountain apparently initiated a separate lien foreclosure proceeding. Other parties with interests in the property were joined in the suit and Intermountain moved for Summary Judgment seeking to have its lien declared to have priority over the other interests in the property. The holder of the deeds of trust moved for show cause to have Intermountain's lien to be declared frivolous. The trial court found the lien to be untimely on its face (since the last active work on site was more than 90 days prior to the lien being recorded). The trial court also determined that since the lien was invalid on its face it was "ipso facto" frivolous under the frivolous lien statute. The trial court also awarded the holder of the deed of trust its attorney fees under the frivolous lien statute. After the trial court had made its ruling, Intermountain filed an "Amended Lien" showing August 9, 2001 the date the trailer was removed as the last date of labor. The trial court also ruled the second or amended lien was invalid and frivolous.

On appeal, the appellate court affirmed the trial court's ruling that the first lien was untimely (holding that keeping the trailer on site did not extend the lien filing period. The last date of the "incidental repair work" (June 6<sup>th</sup>) was the last date of furnishing lienable services or materials to the job. The Court of Appeals rejected the appellants' argument that its lien filing period did not begin to run until the "abandonment" of the project by the owner. However, the appellate court rejected the trial court's ruling that an invalid lien was "ipso facto" frivolous. The appellate court found that a lien could only be frivolous if it is "so devoid of merit that it has no possibility of succeeding." However, the Court of Appeals had little difficulty finding that "Amended" or second re-filed Lien to be frivolous. According to the Appellate court, once the trial court had ambiguously ruled on the validity of the first lien, the re-filing became frivolous.

## Condominiums/Condominium Act/ Arbitration of Claims/Division of Warranties

by Larry Vance – Winston & Cashatt

In *Owner's Assoc. v. Isabella Estates*, 109 Wn.App. 230 (Nov. 2001), Division I of the Court of Appeals held that the Condominium Act prohibited parties from waiving their right to judicial relief. Based on this holding, the Court of Appeals reasoned that an arbitration clause in the contract

could not be enforced. Secondly, the Court held that the implied warranties under the Condominium Act could not be disclaimed through some sort of general disclaimer.

The Court, however, rejected the argument of the Owner's Association that before a defect could be disclaimed, the owner must be made known or be made aware of the defect. The Court was somewhat vague in its delineation of what exactly constituted a valid disclaimer of implied warranties, however, the Court stated that:

"Thus, it is not knowledge of existing defects that is material, but rather the awareness of the significant financial exposure the buyer faces by reason of the disclaimer."

In summary, the Court held that the right to judicial relief under the Condominium Act could not be waived and thereby prohibited the enforcement of an arbitration provision. Secondly, the implied warranties under the Condominium Act may not be generally disclaimed, but must be disclaimed by the buyer agreeing to assume the risk of specifically identified defects. However, the buyer need not know of the existence of the defect at the time of contracting in order to disclaim on implied warranty under the Condominium Act.

## Miller Act/"Paid When and If Paid" Provisions/Surety Liability

by Larry Vance – Winston & Cashatt

In *U.S. for the Use and Benefit of Walton Technology v. Westar Engineering*, 290 F.3<sup>rd</sup> 1199 (9<sup>th</sup> Cir. 2002) the Ninth Circuit Court of Appeals basically invalidated the use of "paid when and if paid" language with respect to projects covered by the Miller Act.

The claimant (Walton Technology) had a "subcontract/purchase order" to rent a fabric frame system called a "Sail System" to cover a crane apparently being repainted by the prime contractor at the Bremerton Shipyard. The project was delayed and the prime contractor (Westar) fell behind in its rental payments and "other payments" to Walton (to the extent of \$108,000). The subcontractor (Walton) filed suit claiming that the prime contractor (Westar) had breached its "Purchase Order Subcontract" by failing to make timely payment. While the parties were negotiating the Sail System was damaged in a "series of incidents." As a result, Westar submitted a claim or claims to its property insurer (St. Paul). A short time after the prime's insurance claim was submitted the prime and sub entered into a Settlement Agreement, which provided for payment of \$62,000 in full payment of all unpaid rental through the date of the settlement. The settlement agreement provided for continuation of the rental of the sail system until completion of the project and indicated that as to any future rental payments for the rental the subcontractor would only receive payment "when and if paid by the

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Nonprofit Org.  
U.S. Postage Paid  
Seattle, WA  
Permit No. 2204



Printed on recycled paper

*MILLER ACT/"PAID WHEN AND IF PAID" PROVISIONS/SURETY LIABILITY from previous page*

Navy" and only to the extent of receiving "a pro rata share" of any recovery (based upon the ratio of the prime's claim to the sub's claim).

The prime contractor (Walton) then asked Westar for copies of its rental invoices for the first four months' rental after the renewal of the rental agreement and included those four (4) months of rental in its claim to the property insurer. Walton continued to furnish the "Sail System" for nearly another year before the rental ceased. Westar settled with its insurer and Westar received payment in full for the rental it had claimed it owed Walton. Although St. Paul paid the prime for *everything* that the prime claimed it owed Westar, the prime only paid Walton, for one month of additional rental after the Settlement Agreement was entered into (claiming that it owed no money to the sub-contractor because it had received nothing from the Navy).

Walton brought suit against the prime contractor for the rest of the unpaid rental (which was basically everything that accrued after the Settlement Agreement except for the one month of rental paid by Westar after the Settlement Agreement). Walton sued Westar for unjust enrichment and conversion of the insurance proceeds and for all the unpaid rental under the Miller Act. The federal district court dismissed all claims. The Miller Act claim was dismissed because the settlement agreement restricted

payment to receipt of funds from the Government (Navy) and since no funds were received by the prime, the district court found that there were no sums "justly due" under the Miller Act.

On appeal the Ninth Circuit affirmed the trial court's dismissal of the unjust enrichment and conversion claims holding that: (1) Washington law precluded a claim of unjust enrichment when the parties had a valid express contract; and (2) the fact that Westar's recovery of proceeds from its insurer was based upon losses that it did not incur to Walton could form the basis of an insurance fraud claim by the insurer, did not mandate a recovery against the prime contractor.

The court, however, reversed the trial court's holding on the Miller Act claim indicating that the "paid when and if paid" language in the settlement agreement could not be asserted by the prime's surety.

Even though the "paid when and if paid" language was part of a settlement agreement the court held that the clause could not alter the surety's Miller Act liability. The court further held that such clause was basically tantamount to a waiver of Miller Act rights, which would only be enforced with clear and explicit language. (Implicitly the court ruled the paid "when and if paid" language was not an express waiver of Miller Act.)