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Cascadia Construction Claims: Surviving in the Wild Pacific Northwest

I. Intro to Cascadia

"Cascadia" is a term used to describe that region in the Northwestern United States that spans from the North California border to the British Columbia border and encompasses the Western regions of Washington and Oregon. Seattle and Portland are the economic hubs of this region. This region is experiencing explosive economic growth and a historic construction boom. Most of this growth is concentrated in the cities of Seattle and Portland.

For more than a year Seattle has been considered the "crane capitol" of the United States. As of summer of 2017, Seattle had nearly 50% of the currently operating construction cranes in the United States. There are nearly 70 active projects in the downtown Seattle core totaling about $4.4 billion. This is four-times more projects than in 2010. Most of the construction is residential apartments, account for about 2/3 of the current projects. The other projects are mostly office space. Much of the current growth can be attributed to one well known Seattle company – Amazon.

Portland is experiencing a similar construction boom. Roughly 45 projects are underway in the downtown core of Portland. This is the highest number of active projects recorded since records of such data began about 15 years ago. The majority of developments in Portland, like Seattle, are apartments and office space.

This roundtable presentation addresses the current state of the construction industry in Cascadia, the legal landscape of this region, common issues that arise in construction claims, and survival tips for handling claims in this region of the country.

II. Plotting Your Course in Washington

The follow is an outline of the key legal issues that arise under Washington law, and a summary of the current state of the law:

A. Construction Law Issues

a. Limitations & Repose Periods

1. **Statute of Limitations** - Construction cases can implicate different statutes of limitations depending on the legal theories being pursued. The statute of limitations for written contracts is six years. RCW 4.16.040. The statute of limitations for oral contracts and tort-based legal theories is three years. RCW 4.16.080. Condominium claims have a four year statute of limitations for breach of statutory warranties. RCW 64.34.452.

2. **Statute of Repose** - All claims or causes of action shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after termination of services, whichever is later. RCW 4.16.310. The statute of repose does not run against a state entity. Washington State Major League Baseball Stadium Public Facilities Dist. V. Huber, Hunt & Nichols-Kiewit Const. Co., 165 Wn.2d 679, 202 P.3d 924 (2009).

b. Right to Repair Laws and/or Pre-Suit Statutory Procedures - RCW 64.50 et seq governs pre-suit claims processes for construction defect claims involving residential construction. These procedures apply to new residential construction, or to remodels where the total cost exceeds 50% of the pre-remodel assessed value of the residence. This process does not apply to commercial construction or third-party claims. Notice of construction defects must be provided to a construction professional at least 45 days before filing suit. This triggers a process whereby the construction professional agrees to repair the alleged defects, agrees to a settlement, or disputes the defects. If a lawsuit is filed before the pre-litigation procedures are completed, then the lawsuit will be dismissed without prejudice and cannot be refiled until the process is completed.

c. Indemnity and Contribution

1. **Indemnity** - RCW 4.24.115 prohibits a subcontractor from indemnifying a general contractor for that general contractor's sole or partial negligence. The statute does not apply to limit coverage under insurance policies, such as agreements to provide coverage to an additional insured. See Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 313 P.3d 395 (2013).

2. **Contribution** – Washington's contributory fault statute has effectively abolished the common law rights to contribution and indemnity. RCW 4.22.040. A right of contribution now only exists between those who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm. Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement.

d. Economic Loss Doctrine - The Washington State Supreme Court replaced the "economic loss doctrine" with the "independent duty doctrine." Unlike the

"economic loss doctrine," the "independent duty doctrine" does not focus exclusively on whether the injury was an economic loss in order to determine whether the plaintiff can pursue a remedy in tort law. Rather, the "independent duty doctrine" focuses on all of the surrounding facts to determine whether a defendant owed a tort duty that was independent of the duties owed under the contract. If so, then the plaintiff has a remedy in tort law. See e.g. Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 241 P.3d 1256 (2010); Pointe at Westport Harbor Homeowners' Ass'n v. Engineers Northwest, Inc., 193 Wn. App. 695, 2016 WL 2643729 (2016); Donatelli v. DR Strong Consulting Engineers, Inc., 179 Wn.2d 84, 312 P.3d 620 (2013).

B. Coverage Issues

a. Insured's Right to Independent Counsel and Consequences of Rejecting a Defense -

1. Insured's Right to Independent Counsel - An insured is not entitled to retain independent counsel at the insurer's expense. Rather, an insurer is entitled to select counsel, but that counsel only represents the insured's interests and not the insurer's interests. Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986).

2. Consequences of Rejecting a Defense - An insurer is liable for bad faith if it unreasonably denies its duty to defend. Am. Best Foods, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 229 P.3d 693 (2010). Washington has some of the most severe bad faith penalties in the United States. The penalty for bad faith denial of a defense (or failure to settle) is "coverage by estoppel" and a presumption that the insurer's bad faith harmed the insured. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 393, 823 P.2d 499 (1992); Besel v. Viking Ins. Co., 146 Wn.2d 730, 736-37, 49 P.3d 887 (2002). This means that an insurer that has denied a defense (or failed to settle) in bad faith will not be allowed to challenge coverage for any reasonable settlement entered into by the insured, or judgment entered against the insured. Moreover, the insured is also not required to prove that they were actually harmed by the insurer's bad faith conduct. Harm is presumed. The Washington State Supreme Court has acknowledged that the presumption of harm is virtually impossible to disprove. Butler, 118 Wn.2d at 407; Mut. of Enum. Ins. Co. v. Dan Paulson Const., Inc., 161 Wn.2d 903, 169 P.3d 1 (2007). The insured is also entitled to tort damages arising from the bad faith, which is in addition to the amount of the settlement or judgment. Miller v. Kenny, 180 Wn. App. 772, 325 P.3d 278 (2014). The insured is also entitled to attorney fees and up to treble the amount of damages under Washington's Insurance Fair Conduct Act, RCW 48.30.015.

b. Targeted Tenders - Washington is a "selective tender" jurisdiction, meaning that the insured must first tender a claim before an insurer has any legal obligation to provide coverage. Mutual of Enumclaw v. USF Ins. Co., 164 Wn.2d 411, 191 P.3d 866 (2008).

c. **Pre-Tender Costs** - The Supreme Court of Washington has held that "the duty to defend arises not at the moment of tender, but upon the filing of a complaint alleging facts that could potentially require coverage. ... Accordingly, an insured can recover pretender fees and costs except where a late tender prejudiced the insurer." National Sur. Corp. v. Immunex Corp., 297 P.3d 688 (Wash. 2013).

d. **Extrinsic Evidence and the Duty to Defend** - Once the insured tenders a defense, then the duty defend is determined by the "eight corners" of the complaint and policy. Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 329 P.3d 59 (2014). Extrinsic evidence can also be considered in determining a duty to defend but only in order to trigger the duty to defend, not to deny coverage. Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007).

e. **Construction Defect as an "Occurrence"** - Unintentional construction defects generally do constitute an "occurrence" and "property damage" under Washington law, even if the damage is to the insured's own work. Diamaco, Inc. v. Aetna Cas. & Sur., 97 Wn. App. 335, 983 P.2d 707 (1999); Yakima Cement Prods. Co. v. Aetna Cas. & Sur., 93 Wn.2d 210, 608 P.2d 254 (1980). Moreover, the legal theory attached to the claim – whether it be breach of contract, negligence, etc. – is generally irrelevant. See Mid-Continent Cas. Co. v. Titan Constr. Corp., 281 Fed. Appx. 766 (9th Cir. 2008). It is the factual allegations and not the legal theories that are relevant. Id.

f. **"Ongoing Operations" Exclusions** - These are typically found at subparts j(5) and j(6) of the exclusions section to the standard ISO commercial general liability policy form. Exclusion j(5) excludes damage to real property on which the insured is performing operations. Exclusion j(6) excludes damage to that particular part of any property that must be repaired or replaced because the insured's work was incorrectly performed on it. The Washington courts have applied these exclusions to bar coverage for damage to all areas where ongoing operations are underway. See Vandivort Costr. Co. v. Seattle Tennis Club, 11 Wn. App. 303, 522 P.2d 198 (1974) (Holding that the exclusions for ongoing operations are not limited to the portion of property that was subject to the operations, but bars coverage for all damages caused while operations are underway); Atlantic Cas. Inc. Co. v. Johnny's Quality Exteriors, Inc., 131 F.Supp.3d 1077 (2015) ("This exclusionary language is designed to exclude coverage for defective workmanship by the insured building causing damage to the construction project").

g. **The "Your Work" and "Your Product" Exclusions, and "Rip and Tear" Damages** - The "Your Work" and "Your Product" exclusions are standard exclusions in the standard ISO commercial general liability policy form. These exclusions bar coverage for damage arising out of an insured's work or product. Washington courts have narrowly interpreted the "Your Work" and "Your Product" exclusions to apply just to damage to the work or product. The exclusions do not bar coverage for damage to third-party property that is not the insured's work or product. See e.g. Mut. Enumclaw Ins. Co. v. T&G Constr., Inc., 165 Wn.2d 255, 273, 199 P.3d 376 (2008) (Damage to the insured's defective siding was excluded, but not resulting

damage caused to other property caused by the defective siding); See also Mutual of Enumclaw Ins. Co. v. Patrick Archer Const., Inc., 123 Wn. App. 728, 97 P.3d 751 (2004) (Holding that there was no coverage because all of the damages were limited to the insured's work-product). A related question is whether damages caused by the repair process are excluded by the "Your Work" and "Your Product" exclusions. These types of damages are usually referred to by the courts as "Rip and Tear" damages. Washington courts have held that there is coverage for the cost to "rip and tear" into the insured's work or product if that is necessary to correct resultant damage caused by the insured's work or product. Mut. of Enumclaw v. T&G Construction, Inc., 165 Wn.2d 255, 199 P.3d 376 (2008). Similarly, there is coverage for "rip and tear" to other contractor's non-defective work if it is necessary to correct the insured's defective work. See e.g. Indian Harbor Ins. Co. v. Transform LLC, 2010 WL 3584412 (W.D.Wash., 2010). An example of the latter type of "rip and tear" is if the insured installed defective plumbing into a building. The cost to "rip and tear" out defective drywall to make repairs to the defective plumbing would be covered "rip and tear" damage.

h. Choice of Law (Forum Selection Clauses) - RCW 48.18.200 prohibits forum selection and choice of law clauses in insurance policies delivered or issued for delivery in Washington and covering subjects in the state. Forum selection and choice of law provisions are void as a matter of law. See e.g. Jorgenson Forge Corp. v. Illinois Union Ins. Co., 2014 WL 12103362 (W.D. Wash. 2014) (voiding a Ney York forum selection clause); Cedar Grove Composting, Inc. v. Ironshore Specialty Ins. Co., 2015 WL 3473465, fn. 1 (W.D. Wash. 2015) (commenting in dicta that statute would void a New York choice of law clause). Arbitration provisions in insurance policies have also been struck down under the statute because the Washington State Supreme Court concluded that arbitration provisions are essentially forum selections clauses that deprive the Washington courts of jurisdiction. Washington Dep't of Trasp. v. James River Ins. Co., 176 Wn.2d 390, 292 P.3 118 (2013). Washington courts refer to the Restatement (Second) Conflict of Laws § 188 to determine what law applies to an insurance policy. The Restatement directs the court to determine what state has the "most significant relationship" to the policy and the parties. The factors a court will consider in determining what state has the "most significant relationship" include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. These factors are to be evaluated according to their relative importance with respect to the particular issue.

i. Consent Judgments - Washington permits consent judgments (referred to as "covenant judgments"), even in the absence of bad faith conduct by the insurer. A covenant judgment that is declared reasonable by a court establishes the presumptive damages incurred by the insured. Mut. of Enumclaw Ins. Co. v. T&G Constr. Co., 165 Wn.2d 255, 199 P.3d 376 (2008). If there is no bad faith conduct by the insurer, then the insurer is only liable to pay that portion of the covenant judgment that is actually covered under its policy. Id. But if there is bad faith conduct by the insurer in failing to settle or mishandling the defense, then the

insurer is liable for the entire amount of the covenant judgment, plus tort damages, and up to treble the amount of damages under Washington's Insurance Fair Conduct Act. See e.g. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 393, 823 P.2d 499 (1992); Besel v. Viking Ins. Co., 146 Wn.2d 730, 736-37, 49 P.3d 887 (2002); Miller v. Kenny, 180 Wn. App. 772, 325 P.3d 278 (2014).

III. Plotting Your Course in Oregon

The follow is an outline of the key legal issues that arise under Oregon law, and a summary of the current state of the law:

A. Construction Law Issues

a. Limitations & Repose Periods

1. **Statute of Limitations -** Construction cases can implicate different statutes of limitations depending on the legal theories being pursued. The statute of limitations for construction contracts is six years. ORS 12.080(1). The statute of limitations begins when the breach occurred, even if the breach was not discovered until a later date. Waxman v. Waxman & Associates, Inc., 224 Or. App. 499 (2008). The statute of limitations for negligence is two years. ORS 12.110(1). Claims under Oregon's Unlawful Trade Practices Act have a one year statute of limitations. ORS 646.638(6). Claims against architects and engineers to recover damages for injury to person, property, or other interest in property must be brought in two years. ORS 12.135.

2. **Statute of Repose -** Oregon has a ten year statute of repose for the construction, alteration, or repair of a residence or small commercial structure. ORS 12.135. The statute applies to construction contracts and begins to run from the date of substantial completion. Shell v. Schollander Constr., 358 Or 552 (2016). If there is no construction contract, then the statute of repose runs from the date of the act or omission complained of, which can be earlier than the date of substantial completion. Id.; ORS 12.115. A six year statute of repose applies to the construction, alteration or repair of a large commercial structure. Id. The ten year statute of limitations, however, applies to large commercial structures owned or maintained by a homeowner's association. Id.

b. Right to Repair Laws and/or Pre-Suit Statutory Procedures - ORS 701.565 governs pre-suit claims processes for construction defect claims involving the construction, alteration, or repair of a residence. The owner must provide written notice of defects to all contractors, subcontractors, or suppliers who they intend to pursue direct claims against. Id. A party receiving such a notice has a right to request a visual examination or inspection of the residence, but the request must be made within fourteen days of receiving the notice. ORS 701.570. The party must send the owner a written response within ninety days of the notice addressing the alleged defects and either denying responsibility, agree to remediate the problem, or pay

for it. Id. The owner then has thirty days to accept the offer, and if the owner does not respond, then the offer is deemed rejected. ORS 701.580.

c. Indemnity and Contribution

1. **Indemnity** - ORS 30.140 prohibits a subcontractor from indemnifying a general contractor for that general contractor's sole or partial negligence. The statute also prohibits additional insured coverage for the additional insured's sole or partial negligence. Walsh Construction Co. v. Mutual of Enumclaw, 388 Or 1 (2005); Cont'l Cas. Ins. Co. v. Zurich Am. Ins. Co., 2009 WL 231462 (D. Or.).

2. **Contribution** - Oregon's contributory fault statute has effectively abolished the common law rights to contribution and indemnity. ORS 31.610. Claims for common law indemnity and contribution is not available in cases where the court allocates fault to the defendants under Oregon's contributory fault statute. Electric Investment, LLC v. Patterson, 357 Or. 25 (2015).

d. Economic Loss Doctrine - Oregon follows the Economic Loss Doctrine, and prohibits a plaintiff from recovering in tort for claims that constitute a pure economic loss. Personal injury or property damage are not economic losses. See e.g. Harris v. Suniga, 344 Or. 301 (2008) (Holding that damage to a building because of defective construction was not an economic loss); Russell v. Ford Motor Co., 575 P.2d 1383 (Or. 1978) (Holding that purely defective work absent damage to person and property is an economic loss).

B. Coverage Issues

a. Insureds Right to Independent Counsel and Consequences of Rejecting a Defense -

1. **Insured's Right to Independent Counsel** - There is no direct legal authority requiring an insurer to pay for independent counsel for its insured in instances where a conflict of interest arises between the insured and insurer.

2. **Consequences of Rejecting a Defense** - A denial of a defense is a breach of contract and does not give rise to bad faith liability. Farris v. United States Fidelity & Guaranty Co., 284 Or. 453 (1978). An insurer's obligations of good faith and fair dealing only give rise in the duty to defend context once an insurer has agreed to undertake the defense of the insured. Strader v. Grange Ins. Co., 179 Or. App. 329 (2002).

b. Targeted Tenders - Oregon courts have not addressed whether an insured can make a "targeted tender."

c. Pre-Tender Costs - Oregon courts have held that the legal obligation to provide a defense does not arise until tender, and hence, there is no duty to reimburse the insured for pre-tender defense cots. Oregon Ins. Guar. Ass'n v. Thompson, 760 P.2d 890, 893 (Or. Ct. App. 1988).

d. Extrinsic Evidence and the Duty to Defend - Once an insurer receives notice, the duty to defend is determined by looking at the allegations in the complaint in comparison with the policy. Ledford v. Gutoski, 319 Or. 397, 877 P2d 80 (1994). Unlike Washington law, extrinsic evidence is generally not considered when determining a duty to defend. Bresee Homes, Inc. v. Farmers Ins. Exch., 353 Or. 112, 293 P.3d 1036 (2012).

e. Construction Defect as an "Occurrence" - There is no "occurrence" where construction defects are merely the result of a breach of contract. Oak Crest Const. Co. v. Austin Mut. Ins. Co., 329 Or. 620, 998 P.2d 1254 (Or. 2000). But negligent construction that causes damage generally does constitute an "occurrence" and "property damage" under Oregon law. Willmar Development, LLC v. Illinois Union Ins. Co., 464 Fed. Appx. 594, 595 (9th Cir. 2011).

f. "Ongoing Operations" Exclusions - These are typically found at subparts j(5) and j(6) of the exclusions section to the standard ISO commercial general liability policy form. Exclusion j(5) excludes damage to real property on which the insured is performing operations. Exclusion j(6) excludes damage to that particular part of any property that must be repaired or replaced because the insured's work was incorrectly performed on it. The Oregon courts have applied these exclusions to bar coverage for damage to all areas where ongoing operations are underway. See e.g. Ohio Cas. Ins. Co. v. Ferrell Developments, LLC, 2011 WL 5358620 (D.Or.).

g. The "Your Work" and "Your Product" Exclusions, and "Rip and Tear" Damages - The "Your Work" and "Your Product" exclusions are standard exclusions in the standard ISO commercial general liability policy form. These exclusions bar coverage for damage arising out of an insured's work or product. Oregon courts have narrowly interpreted the "Your Work" and "Your Product" exclusions to apply just to damage to the work or product. Fred Sherer & Sons, Inc. v. Gemini Ins. Co., 237 Or. App. 468 (2010). The exclusions do not bar coverage for damage to third-party property that is not the insured's work or product. Id. (Holding that there would be coverage to the extent that there was "damage to the house" beneath the insured's work); MW Builders, Inc. v. Safeco Ins. Co. of Am., 267 Fed. Appx. 552 (9th Cir. 2008) (Holding that damage to the insured's defective siding was not covered but that there was coverage for resultant damage to other property). The Oregon Supreme Court has also held that there is coverage for "rip and tear" to other contractor's non-defective work or products if that damage it is necessary to correct the insured's defective work. Wyoming Sawmills, Inc. v. Transportation Ins. Co., 282 Or. 401, 578 P.2d 1253, 1257 (1978).

h. Choice of Law (Forum Selection Clauses) - ORS 742.018 provides: "No policy of insurance shall contain any condition, stipulation or agreement requiring such policy to be construed according to the laws of any other state or country. Any such condition, stipulation or agreement shall be invalid." This statute means that parties to an insurance contract cannot choose what law governs the contract. However, the statute leaves open the question of what state's law applies to the

contract based on Oregon's choice of law statute. Oregon's choice of law statute is ORS 81.130. The statute is a modified-version of the most-significant-relationship test set forth in Restatement (Second) Conflict of Laws §188 (1971).

i. **Consent Judgments** - The case Brownstone Homes Condo Assn. v. Brownstone Forest Hts., 358 Or. 223 (2015) and ORS 31.825 set out when an insured may agree to a consent judgment (aka a "covenant judgment") and assign its rights. In the Brownstone case, the Court commented that by passing ORS 31.825 that the legislature: "intended to allow insured defendants to assign a specific type of claim against their insurer – claims that the insurer's negligent or bad faith failure to settle within the policy limits had resulted in an 'excess judgment' – to the plaintiff, in exchange for a covenant not to execute against the defendant, without extinguishing the underlying liability. And it intended to permit that outcome only when the excess judgment is in place before the assignment is given."

IV. Survival Tips

We will cover survival tips for scenarios such as the following:

Scenario	Survival Tips
The plaintiff seeks tort damages even though there is no damage to other property beyond the work itself	WA = Economic loss rules may preclude a recovery in tort, and damages may be limited to contract OR = Economic loss rules may preclude a recovery in tort, and damages may be limited to contract
The additional insured seeks coverage for its own negligence, sole or partial, which it would not be permitted to seek under the indemnity agreement with the named insured because of anti-indemnity statutes	WA = An additional insured is entitled to seek coverage for their own negligence even they cannot seek indemnity for their own negligence because of anti-indemnity statutes OR = Prohibits additional insureds from seeking coverage for their own negligence
Insurer receives notice from plaintiff about a claim but does not receive notice from the insured	WA = Selective tender state, so tender is required to trigger coverage OR = Not a selective tender state, and so notice from any source may be sufficient to trigger coverage
The insured has been defending themselves, or receiving a defense from another insurer before tendering	WA = Pretender costs are covered so long as there is no prejudice OR = Insurer only owes costs post-tender
The complaint is ambiguous and potentially triggers coverage, but extrinsic evidence clearly establishes no coverage	WA = Cannot deny a defense based on extrinsic evidence OR = Cannot deny a defense based on extrinsic evidence
Insured demands that insurer pay for independent counsel in addition to the insurance defense counsel retained by the	WA = No right to independent counsel OR = No right to independent counsel

insurer	
A complaint alleges construction defects and asserts a cause of action for breach of contract only	WA = Defective construction can constitute an "occurrence" even if the damage is limited to the insured's work OR = Breach of contract standing alone is not an "occurrence"
Insured's work needs to be "ripped and torn" out to make repairs to other non-defective work	WA = "Rip and tear" damage is covered OR = "Rip and tear" damage is covered
Insured mistakenly denies a defense	WA = If the denial was unreasonable, then the insurer may be liable for bad faith denial of a defense OR = A mistaken denial of defense, even if unreasonable, is a breach of contract and not bad faith
Insured enters into a consent judgment and assigns their insurance policy to a plaintiff	WA = Consent judgments are enforceable OR = Consent judgments are enforceable