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ATTORNEYS

Pacific Northwest Construction Law News

Washington Oregon Alaska Idaho

MAY 2007

Skellenger Bender Construction Attorneys

- **Beth M. Andrus**
- **William J. Bender**
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- **Terence J. Scanlan**

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Scanlan and Pflugrath author chapter in ABA publication, *Design Professional and Construction Manager Law*. *See* www.abanet.org.

Andrus co-authored chapter in ABA publication, *Forms & Substance: Specialized Agreements for the Construction Project*. *See* www.abanet.org.

Andrus and Masters co-authored Employment Law in Washington chapter in Washington Health Law Manual—available free online at www.wsha.org.

Scanlan spoke at April 2007 ASFE Conference on "Top Ten Ways to Get Your Design Firm Sued." Presentation available upon request.

New Design-Build Legislation Passed in Olympia

In April 2007, the Washington State Legislation passed new laws vastly expanding the availability of design/build for public works construction projects in this state. *See SSHB 1506*, available on the web at http://apps.leg.wa.gov/billinfo/. The legislation significantly changes RCW chapter 39.10 relating to alternative public works delivery systems. Design-Build may now be used on any public works project in excess of $10 million when the public entity has obtained state certification to use Design-Build procurement procedures. Design-Build is statutorily allowed in three circumstances: (1) when design and construction activities are highly specialized; (2) when the design is repetitive in nature; or (3) when interaction with the facility users and operators during design is not critical to facility design. Design-Build is also allowed for parking garages, pre-engineered metal buildings, and prefabricated modular buildings, regardless of cost.

Public entities using Design-Build must have agreements that provide for reasonable budget contingencies of no less than 5 percent of the contract value, retain experienced staff or consultants to manage projects of the size and complexity, and include ADR as a dispute resolution procedure in any contract.

Design-Build contracts will be awarded based on competitive bidding, with honorarium paid to finalists submitting proposals that are not awarded the contract. The level of honoraria depends on level of effort required to meet selection criteria set out in the statute.

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Electronic Signatures and Stamps or Seals

In 2000, Congress passed the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. § 7001. Under the E-SIGN Act, a signature, a contract or any other "record" relating to a transaction in or affecting interstate commerce will not be denied legal effect simply because it exists only in electronic format. The E-SIGN act does not require signatures to be encrypted to be valid.

The E-SIGN Act pre-empts or trumps state laws that are in conflict with it, except under limited circumstances.

The E-SIGN Act also allows commercial entities to retain documents in electronic format as long as the electronic version accurately reflects the information contained in the paper document, and the electronic document is accessible to people with a right to see the document and is in a form that can be reproduced later.

Washington engineering licensing regulations, however, still require either a "wet" signature on reports, plans and specifications, or a digital signature that has been encrypted to ensure that it can-

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Economic Loss Doctrine Remains Alive in Washington

In *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), the Washington Supreme Court recently reaffirmed the viability of the economic loss doctrine in this state. In *Berschauer/Phillips v. Seattle*, 124 Wn.2d 816, 881 P.2d 986 (1994), the court held that a contractor could not sue an architect or engineer for alleged negligence for purely economic losses given that there was no contract between these parties. The court in *Alejandre* held that the doctrine applies even to parties with a contractual relationship and applies whether or not the specific risk was expressly allocated in the contract. It also held that the doctrine will bar tort claims for economic loss even when the parties are arguably "unsophisticated" as long as the contracting parties are on roughly equal foot.

The *Alejandre* case thus reaffirms the primacy of contractual remedies in construction defect cases. A party to a construction contract will be unable to sue a design professional in tort if the only damages being sought are "economic losses." Economic losses include costs to repair defects that decrease a structure's or facility's value or usefulness. In contrast, defects that cause physical injury to a person or to property other than the property being constructed are not economic losses.

Not all state courts agree on this definition of "economic loss." In two recent Oregon court of appeals cases, *Harris v. Suniga*, 209 Or. App. 410, 149 P.3d 224 (2006) and *Bunnell v. Dalton Construction, Inc.*, 210 Or. App. 138, 149 P.3d 1240 (2006), the Oregon Court of Appeals addressed the situation of alleged construction defects in an apartment building (the *Suniga* case) and a single family residence (the *Dalton* case). In both cases, the owners of the structures sued the builder who had no contractual privity with them. The damages sought were repair costs associated with deterioration of the building itself caused by allegedly negligent installation of siding, flashings, wall caps, and trim. In both cases, the builders contended that the damages were "economic loss," the recovery of which was foreclosed under tort theories.

The Oregon court held that "buildings are not 'products' for product liability purposes," and that "deterioration to the physical structure of a building because of defective construction is property damage and not 'economic loss.'"

The developers have filed a petition for review to the Oregon Supreme Court, based on the fact that the court of appeals decision was a matter of first impression in that state.

Court Rejects Doctrine of Completion and Acceptance

In *Davis v. Baugh Industrial Contractors*, 159 Wn.2d 413, 150 P.3d 545 (2007), the Washington Supreme Court rejected a contractor's defense to liability based on the doctrine of completion and acceptance. This doctrine previously shielded contractors from liability for defects discovered after the work was completed and accepted by the owner. The court found the doctrine to be "outdated" and stated that contractors must be held responsible for their negligence in order to deter injuries and deaths.

Electronic Signatures and Stamps in Washington

not be improperly copied or misused. *See* WAC 196-23-070. While this regulation appears to conflict with the E-SIGN Act. The Board of Registration for Professional Engineers and Land Surveyors believes that its requirements of stamp and signature encryption do not violate the E-SIGN Act. Given the potential conflict between the E-SIGN Act and state stamping regulations, we offer these guidelines:

1. Be careful in using an electronic image of your professional engineer's stamp. The Board contends that stamps should be safeguarded as you would your debit card. If you affix an electronic image of your seal on a report, drawing or specification, then find a way to encrypt that image to make sure it cannot be copied, altered or misused by third parties.

2. If electronically disseminating plans, drawings or other documents that you would normally stamp and sign, and you cannot encrypt the stamp and signature, then leave the electronic version unsigned and unstamped and attach a note indicating that only the paper copy will contain the requisite stamp, signature and date.

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