

the injury or damage, but what that tells us is that focusing on the cause does not favor the insured in most cases. If it did, insureds would be well-positioned under *Hoffman* to prevail on that interpretation, as well.

Ultimately, the inherent ambiguity of the “occurrence” definition makes it susceptible to varying applications, depending on the facts of a particular case and which result favors coverage for the insured.

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## OREGON LIEN LAW – TRAPS FOR THE UNWARY

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Every construction practitioner is (or should) at least be generally aware of the technical, statutory quagmire that is Oregon construction lien law, ORS Chapter 87.001, *et. seq.* Known to most are the requirements and deadlines for lien notices, the recording of a lien, and the foreclosing of a lien that must be followed in order to preserve a claimant’s right to perfect and enforce a construction lien. However, mired in the bowels of the Oregon lien law statutes are several less obvious traps for the unwary practitioner.



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The first such trap may be sprung early on in the life of a project, well before counsel is involved, and it has serious consequences to material suppliers. Generally speaking, on new construction, if a material supplier sends out a proper and timely pre-lien notice to the appropriate

parties, including any mortgagee, the material supplier’s lien will have priority over the mortgagee’s existing encumbrance as to the improvement and the “land that may be required for the convenient use and occupation of the improvement constructed on the site.” ORS 87.015(1). This is commonly referred to as “super priority.”

However, for the savvy mortgagee, there is another card to play - ORS 87.025(4). This statute provides:

A mortgagee who has received notice of delivery of materials or supplies in accordance with the provisions of subsection (3) of this section, may demand a list of those materials or supplies including a statement of the amount due by reason of delivery thereof. The list of materials or supplies shall be delivered to the mortgagee within 15 days, not including Saturdays, Sundays and other holidays as defined in ORS 187.010, of receipt of demand, as evidenced by a receipt or a receipt of delivery of a registered or certified letter containing the demand. Failure to furnish the list or the amount due by the person giving notice of delivery of the materials or supplies *shall constitute a waiver of the preference provided in subsections (1) and (2) of this section.* (Emphasis added).

With construction liens, the importance of priority over existing encumbrances cannot be overstated. A lien that has super priority, *i.e.* priority over a mortgagee’s (*i.e.* banks/lenders) Deed of Trust, provides serious leverage to the lien claimant, which generally results in the mortgagee paying the lien claimant. In most cases, the mortgagee, after performing some early due diligence, will

pay off a superior lien to avoid the lien claimant foreclosing its lien (and being awarded its attorney fees for doing so) and extinguishing the mortgagee's inferior interest. A mortgagee's early payment to a claimant with a superior lien claim is simply good business because it minimizes the mortgagee's loss and preserves its encumbrance. A lien claimant's failure to comply with ORS 87.025(4) results in a loss of the lien's super priority and, consequently, the lien is inferior to the mortgagee's pre-existing interest. As a result, the mortgagee's secured interest in the property is no longer threatened by the lien; the lien claimant loses most, if not all, of its leverage vis a vis the mortgagee; and the mortgagee generally will not satisfy the lien. Thus, it is important for counsel who represent parties that supply materials to a construction project to ensure their clients are aware of, and comply with, ORS 87.025(4). Likewise, counsel to mortgagees should advise their clients of the potential benefit of making such a request.

A second trap lies in the language of ORS 87.057. Subsection (2) of that statute provides:

Where a notice of intent to foreclose a lien has been given as provided by subsection (1) of this section, the sender of the notice upon demand of the owner shall furnish to the owner *within five days* after the demand a list of the materials and supplies with the charge therefor, or a statement of a contractual basis for the owner's obligation, for which a claim will be made in the suit to foreclose. (Emphasis added).

The kicker is in ORS 87.057(3), which requires a "plaintiff or cross-complainant seeking to foreclose a lien in a suit to foreclose shall plead and prove compliance with subsections (1) and (2) of this section. *No costs, disbursements or attorney fees otherwise allowable as provided by*

*ORS 87.060 shall be allowed to any party failing to comply with the provisions of this section.*" (Emphasis added). While this statute does not affect the priority of a lien, it does affect a very important right of a construction lien claimant – the right to recover attorney fees incurred in foreclosing the lien. After priority, the threat of attorney fees is the lien claimant's second biggest leverage point in getting its lien paid. This is especially true regarding a lien for a smaller amount where the owner/mortgagee knows it is not cost effective for the claimant to foreclose the lien absent the ability to recovery attorney fees. At the point a notice of intent to foreclose is sent, a claimant may be so frustrated with the project that it ignores or "round files" correspondence from other parties. However, it is important to counsel a lien claimant that it needs to continue to carefully review any project-related correspondence and timely comply with an ORS 87.057 request.

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## AVOIDING COVERAGE CONFUSION IN DESIGN PROFESSIONAL CONTRACT TERMS

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to perform work, but may be less familiar with hiring architects and engineers to provide professional services. These clients often base their contracts with design firms off of their latest

Often the design firm's professional liability insurance policy is its greatest, maybe sole, asset to pay to clients with valid claims. In turn, a lot of clients, from private landowners through public entities,

are familiar with hiring construction contractors