

that the changes were mutually agreed upon.

- **Closely Review Subsequent Employment Actions.** After an employee has engaged in any protected activity, the employee's manager should be advised to engage human resources, legal counsel and/or senior management in regards to any proposed changes affecting the employee to reduce the risk of exposure to a retaliation claim.
- **Closely Monitor Responses to Claims.** Once a claim has been filed, employers must be diligent in researching the whole story behind a claim to insure they have a correct understanding of the facts. Common issues that arise in deposition are erroneous information or details and facts that have been left out of information submitted previously. Employee attorneys will use inconsistencies in deposition testimony as proof the employer is untruthful, casting a shadow on any defenses the employer may have. Employers would be wise to engage an experienced employment law attorney in these situations, well before submitting any information to a third party.

Despite these precautions, it's probable than an employer will at some point be subject to either a BOLI claim or a complaint which alleges discrimination and retaliation. In this situation, it's important to obtain advice from experienced employment law attorney immediately, not only to have an objective third party to gather the facts, but also to insure no retaliation is ongoing. In addition to the best practices noted above, employers should obtain an employment practices insurance policy. Although deductibles are high, many insurers offer resources for the insured to help them avoid liability, such as hotlines manned by experienced employment law attorneys. Similar to general liability policies, once a claim is made,

defense counsel will be provided, although coverage for losses will be subject to the policy terms and conditions.

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### THIRD-PARTY BENEFICIARY CLAIMS ARISING OUT OF THE BREACH OF A JOINT CHECK AGREEMENT

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Joint check agreements are common in the construction industry. Joint check agreements are commonly entered into between a general contractor and subcontractor for payment to a sub-

subcontractor or supplier, or may be entered into by other parties, including between an owner and general contractor for payment to a subcontractor. The purpose of a joint check agreement is to reduce the credit risk of failure to pay the person who provided the labor, materials and equipment. See 3 *Bruner & O'Connor Construction Law* § 8:52 (2019)

Breaches of joint check agreements, as with contracts in general, come in many forms, from a joint payee forging the other payee's signature on the joint check, or otherwise negotiating the joint check without the other payee's signature, or from an owner or general contractor failing to issue a joint check. This article focuses on the liability of the owner or general contractor under a third-party beneficiary theory for breach of an agreement to issue a joint check.

## Third-Party Beneficiary Theory

As observed by the Oregon Court of Appeals, “joint check obligations are a ‘classic example of a third-party beneficiary contract.’” *Gender Machine Works, Inc. v. Eidal Intern. Sales Corp.*, 145 Or App 198, 207 (1996)(citing *T.S.I., Inc. v. Metric Constructors, Inc.*, 817 F2d 94, 96-97 (11<sup>th</sup> Cir 1987).

For the subcontractor or supplier to enforce the joint check agreement, it must be an intended beneficiary of the agreement, as opposed to an incidental beneficiary. See *Sisters of St. Joseph v. Russell*, 318 Or 370, 374-75 (1994); see also *Northwest Airlines v. Crosetti Bros.*, 258 Or 340, 346 (1971).

The *Gender Machine Works* case involved the building of an industrial shredding machine for Archers Daniel Midland Company (“ADM”) to shred scrap tires for use as fuel at a cogeneration plant at one of ADM’s manufacturing facilities. *Gender Machine*, 145 Or App at 201. Eidal International Sales Corporation (“Eidal”) performed a minor amount of work on the shredder and sold the shredder to ADM. *Id.*

Eidal and Gender Machine entered into an agreement whereby Gender Machine would receive the full \$225,000 purchase price paid by ADM for the shredding machine. Subsequently, Eidal faxed to ADM a letter stating that Gender Machine was performing a substantial amount of work on the shredder and stating that payment was to be made by ADM in both Eidal’s and Gender Machine’s names. *Id.* at 202.

ADM’s representative signed the letter and handwrote a notation on it, acknowledging that he understood that the check for the \$225,000 purchase price should be jointly payable to Eidal and Gender Machine. *Id.*

After the shredder was built and shipped to ADM, Eidal sent ADM an invoice for the \$225,000 sum,

but the invoice did not refer to Gender Machine or the joint check agreement. *Id.* Subsequently, ADM sent Eidal a check for \$225,000, made payable to Eidal only, which Eidal deposited in its account without telling Gender Machine. Eidal later made a payment from its own account to Gender Machine for only a portion of the \$225,000 sum owing to it. *Id.*

Gender Machine filed suit against Eidal and ADM alleging several claims, including a claim under a third-party beneficiary theory. *Id.* at 203.

In analyzing whether Gender Machine was entitled to enforce the joint check agreement, the Court summarized the principles set forth in the *Sisters of St. Joseph* case, *supra*, and the *Northwest Airlines* case, *supra*--intent to benefit the beneficiary; issuance of the check would have satisfied a duty from the promisee to the beneficiary; and the promisor’s performance would have benefited the beneficiary. The Court noted that, “[t]hus, in this case if (1) ADM and Eidal intended to benefit Gender by issuing a joint check; (2) ADM’s performance would have satisfied a duty of Eidal to Gender; and (3) ADM’s performance would have benefitted Gender, Gender was a third-party creditor beneficiary who was entitled to enforce the contract.” *Id.* at 206-207.

The Court held that these elements were met and that Gender Machine was an intended creditor beneficiary of ADM’s joint payment obligation, noting that the signed letter agreement identified Gender Machine as performing substantial work on the project and that payment was to be made jointly to Eidal and Gender Machine. *Id.* at 207.

## Defenses to a Third-Party Beneficiary Claim

As stated in 13 *Williston on Contracts* § 37:57 (4<sup>th</sup> ed.), “the foundation of an intended beneficiary’s rights lies in the contract between the promisor and promisee.” (*citations omitted*). Thus, in general, “any defense connected to the formation

of the contract, such as capacity, want of mutual assent, or consideration or any similar invalidating cause, may be raised by the promisor against the beneficiary.” *Id.*

Further, in general, “a third-party creditor beneficiary’s right to recover against the promisor is subject to any claim or defense arising from the beneficiary’s own conduct or agreement.” *Sisters of St. Joseph*, 318 Or at 379 (citing *Restatement (Second) of Contracts* § 309 (4) and *comment c* (1981)).

The defense of payment by the promisor to the promisee, which is a defense not related to the formation of the contract or arising out of the beneficiary’s conduct, cannot be asserted as a defense to the third-party beneficiary’s claim against the promisor. This principle was made clear in the *Gender Machine* case. There, the promisor ADM had argued that its \$225,000 payment to Eidal was a defense to the claim of third-party beneficiary Gender Machine against ADM. *Gender Machine*, 145 Or App at 210. In rejecting that argument, the Court stated that ADM “has not identified any persuasive reason why a promisor should be permitted to breach a joint payment obligation and then assert a defense of payment against the unpaid joint obligee. We perceive none.” *Id.* at 211.

The Court found persuasive the practical argument by Gender Machine that “[i]f ADM’s argument were the law, the promisor under a Joint Check Agreement would never be liable for issuing payment solely to one of the joint payees. Thus, the other payee would have no legal protection, and a promisor’s obligation would be illusory.” *Id.* at 210.

## Discussion

Proving the three elements needed for a third-party beneficiary to enforce a joint check agreement—intent to benefit the beneficiary; issuance of the check would have satisfied a duty from the

promisee to the beneficiary; and the promisor’s performance would have benefited the beneficiary—depends not only on the circumstances but also on the language used by the parties in the joint check agreement.

The element of showing intent by the promisor and promise to benefit the third-party beneficiary is critical. An incidental beneficiary, as contrasted with an intended, or creditor, beneficiary is not entitled to a claim against the promisor. *Sisters of St. Joseph v. Russell*, *supra*, 318 Or at 375 (“... if the third party has paid no value *and* there is no intention to confer a contract right on that party, then the party is an incidental beneficiary who is not entitled to an action on the contract.”).

As a practical matter, if the joint check agreement is a two-party agreement executed by the promisor and promisee, as in the *Gender Machine* case, the subcontractor or supplier should insist on review and approval of the agreement by its counsel to determine if the above elements are met, and on being provided with a fully executed copy of the agreement, before beginning its performance.

Sometimes, there will be a three-party agreement among the owner, general contractor and subcontractor for issuance of a joint check. If that is the case, the subcontractor has a direct breach of contract claim against the owner in case of breach, in addition to a third-party beneficiary claim.

In the *Gender Machine* case, *supra*, the Court did not find that Gender Machine had a “first party” contract with ADM, because the communications that formed the joint check agreement were between ADM and Eidal. *See Gender Machine*, 145 Or App at 205. Thus, Gender Machine’s claim against ADM was limited to a third-party beneficiary claim.

In sum, if the parties decide to use a joint check agreement, such an agreement can be an aid to all involved in the construction project, if properly drafted and executed, and performed. These agreements help provide assurance to the owner

and general contractor that work will continue on the project and that there will not be a bond claim filed or lien claim recorded, and help provide assurance to the subcontractor or supplier that they will be paid for the labor, materials or equipment that they have provided.

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## LOST IN TRANSLATION: MARRYING OREGON CCB LICENSING REQUIREMENTS WITH THE WORLD TRADE ORGANIZATION GOVERNMENT PROCUREMENT AGREEMENT

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With the United Nations week in September, news feeds are filled with stories about multi-national efforts to combat the world's global problems such as climate change. These multi-national efforts are often times memorialized with

grand agreements, which eventually are intended to be instituted at the state and sub-state level. However, the intended commitments of these agreements can be, and sometimes are, lost in translation.

One such agreement is the World Trade Organization Government Procurement Agreement ("GPA"). The GPA is an agreement between certain WTO member states to open government procurement to international competition based on the concept that governments benefit more from increased competition and free trade within their procurement markets than from protectionist measures.

While the Federal Government is automatically a member of the GPA, due to Article X of the U.S. Constitution, the states independently choose to join the GPA and can choose which agencies it will cover under the GPA. Oregon chose to include the Department of Administrative Services ("DAS"), which procures construction services among other goods and services. However, the Construction Contractor's Board ("CCB") licensing process is one such example of an intended commitment lost in translation as only domestic (American) entities can register.

Article V:1 of the GPA states:

With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favorable than the treatment the Party, including its procuring entities, accords to:

- (a) Domestic goods, services and suppliers; and
- (b) Goods, services and suppliers of any other Party

Essentially this means that GPA members will not discriminate against other members in any measure relating to a covered procurement. A covered procurement for construction services is a procurement valued above \$6,897,500.00.

In order to make it easier to recover child support payments, Congress enacted legislation that required states to have procedures for recording social security numbers for any individual applying for an occupational license. 42 U.S.C. § 666(a)(13). In Oregon, the CCB Licensing Application requires companies to provide the