Construction Law

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CHAIR'S REPORT

By Seth Millstein, Pillar Law PLLC

I wish there were a great quote, from someone (Montaigne or Melville or Shaw) that I could plug in here as an intro to my very first "Chair's Report." There probably is, but I just can't find it.

It's an honor to take over as chair of the Section this fiscal year. Bart Reed did an outstanding job moving the Section through the 2023-2024 year, and I want to thank him immensely. I have some (very) big shoes to fill. See in this issue Bart's final report looking back on the last year.

I'll keep this one brief. Here's to hoping for another great year in 2025. We've got a great Executive Committee with a lot of great ideas, and in the coming months we'll offer up another great mid-year presentation. Mark your calendars for June 13, 2025, when we'll hold the annual event. Also, if you have any questions at any time about anything related to the Section, please email me directly: seth@pillar-law.com. If nothing else, I want to make myself entirely available for anything … other than a great intro quote.

Happy New Year,
Seth

In This Issue

PAST CHAIR'S REPORT

By Bart W. Reed, Stoel Rives LLP

For my final report, I'd like to express my sincere thanks and gratitude to all who have contributed their time, energy, and efforts over the past year to make this Section such an invaluable resource for construction lawyers who tirelessly serve the construction industry and its disparate interests. In my 10 years of service on the Section Executive Committee (as an at-large member and culminating in the last year as chair), I've been honored to work with gifted and generous fellow construction lawyers, be a part of entertaining and informative programs (e.g., CLEs, webinars, socials, construction project tours), contribute to resource publications (e.g., construction contract templates, WSBA Construction Law Deskbook), and, most recently, join other Executive Committee members for the Section's first community service event (which I truly hope remains a fixture for years to come).

Our annual June CLE and webinar last year was yet another success, well-attended and well-received by many legal practitioners and esteemed members of the local judiciary. Graciously hosted by Perkins Coie and chaired by Ron English (retired general counsel, Seattle Public Schools) and Geoffrey Palachuk (Perkins Coie), the program focused on technology in the prosecution and defense of construction claims, aptly titled "Back to the Future: Leveraging Technology in Post-Covid Construction Disputes."

Hon. Beth Andrus (Ret.) of Skellenger Bender, P.S. opened the program with an informative

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2024 - 2025

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Past Chair's Report

discussion on ethical considerations in light of advancing technology (i.e., artificial intelligence) for construction cases. Thereafter, Joshua Lane of Ahlers Cressman & Sleight PLLC provided the traditional case law update. A panel consisting of Saki Yamada (Ahlers Cressman & Sleight PLLC), Noah Wick (Trial Exhibits, Inc.), and Thomas O'Toole (Sound Jury Consulting) provided some food for thought regarding virtual and in-person jury selection and use of demonstratives in construction jury trials. During the lunch hour, with food offerings kindly provided by Ankura (construction claims consultants), the judicial panel (led by Hon. Jim Rogers of King County Superior Court) provided important perspectives and considerations for construction lawyers as they approach and use different forms of technology in motion practice and at trial.

To round out the event after lunch, Colm Nelson (Stoel Rives LLP) and Geoffrey Palachuk (Perkins Coie) reflected on considerations for practitioners in approaching ADR and arbitration proceedings to resolve construction disputes. Ellie Perka (Lane Powell PC), joined by Paige Hunt and Brian Evans of Lighthouse, presented on AI's current and future impacts to e-discovery processes and protocols and shared tips on how to improve efficiencies in the discovery phase of litigation or arbitration. Afterwards, Athan Tramountanas (Ogden Murphy Wallace) reported on news from the recent legislative session, another traditional offering of the Section's annual CLE, and Ken Masters (Masters Law Group PLLC) shared his perspective on construction-specific considerations for appellate practice. The in-person attendees and presenters then adjourned to a social hour kindly hosted by HKA Global, construction claims and scheduling consultants.

A special thanks to all those who made—and continue to make—these educational programs possible and such a huge success. We appreciate the chairs, the presenters, the staff and event facilitators at Perkins Coie, and the hosts for lunch and the post-program social hour (Ankura and HKA Global, respectively).

After the CLE event, the Section enjoyed some time off in August to enjoy the remainder of the beautiful Pacific Northwest summer. In September,

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Past Chair's Report

the Section refocused their attention on the coming year, including recruiting new members, social and educational programs, and publication of the new edition of the Section's Construction Law Deskbook.

On September 21, 2024, some current and future members of the Section Executive Committee and their family members joined to perform some community service with Sound Foundations NW, a nonprofit builder of tiny homes as alternatives to tents and encampments and a transitional solution to homelessness in Seattle. The group of nine (Bart Reed and his son, Kethan; Evan Brown (Stoel Rives); Will Young (Schlemlein, Fick & Franklin); Erin Varriano (John L. Scott Real Estate); Seth Millstein (Pillar Law PLLC); John Leary (Gordon Rees) and his wife, Katie; and Cynthia Park (Ogden Murphy Wallace)) took a tour of the facility, received some much-needed instruction on safety (nail guns are fun!), building techniques, and the scope of work, and actually completed and erected four walls of a tiny home!

A special thanks to all those who made – and continue to make – these educational programs possible and such a huge success.

More information about Sound Foundations NW and the important work they accomplish in the Seattle community can be found at **www.soundfoundationsnw.org**.

We greatly appreciate Barb and her project managers for their warm welcome of our crew and for sharing their perspectives and insight into the issue of homelessness in Seattle, and for allowing us to contribute tangibly to the issue through our personal, professional, and familial connections. It was a positive and enriching experience that everyone agreed should continue on (at least) an annual basis.

And, now, I pass the torch to the Section's next chair, Seth Millstein, and the continuing and new slate of officers and at-large Executive Committee members. I have no doubt the WSBA Construction Law Section Executive Committee will continue its good work and make positive contributions for the benefit of the construction industry and legal community. ■

Executive Committee members Seth Millstein, Evan Brown, Will Young, and Erin Varriano were among those who helped build wall sections for Sound Foundation tiny houses at the Section volunteer event in September.

The WSBA Construction Law Section Executive Committee generally conducts meetings on the second Wednesday of each month.

CONSTRUCTION LAW SECTION EXECUTIVE COMMITTEE MEETING

Date: Feb 12, 2025

Time: 12:00 PM - 1:00 PM

Location:
Video Conference Only

USE THIS LINK or **CALL IN**

Call-In: 253-215-8782
or 669-444-9171

Click here to contact Seth Millstein for more details on this or upcoming meetings.

Construction Law Section Mid-Year CLE

Friday June 13, 2025

NAVIGATING CHANGE: Adapting to New Realities in Construction Law

Presentations include:

- Annual case law and legislative updates
- "View from the Bench" judicial panel
- Changes in change-order and retainage law
- Emerging risks in construction law
- Cybersecurity threats
- The future of construction claims and contracts
- The impact of artificial intelligence tools

Changes to Contractor Surety Bond and Assignment of Savings Requirements Pursuant to RCW 18.27.040

By Ivana Ogramic, Gordon Rees Scully Manskhani, LLP

The Washington Contractor Registration Act requires all construction contractors to register with the Washington State Department of Labor and Industries (the "Department") in order to perform work in Washington state. *See* RCW 18.27.005-900. To register, both general and specialty contractors must, among other things, file a surety bond or an assigned savings account with the Department. RCW 18.27.040(1) and (8). The bond is conditioned upon the contractor paying persons performing labor for the contractor, persons furnishing material or renting or supplying equipment to the contractor, amounts adjudged against the contractor for breach of contract, and taxes due to the state.

Recent changes made last year by the Washington State Legislature to RCW 18.27.040 raise the required dollar amount of surety bonds and assigned saving accounts to strengthen protections for consumers in the construction industry. Washington Final Bill Report, 2023 Reg. Sess. H.B. 1534. Since 2001, the required surety bond and assigned savings amounts were $12,000 for a general contractor and $6,000 for a specialty contractor. The amendments to RCW 18.27.040 more than doubled those amounts. Effective since July 1, 2024, the required surety bond/assigned savings amounts are now $30,000 for a general contractor and $15,000 for a specialty contractor. RCW 18.27.040(1).

A contractor whose registration expired before July 1, 2024, that renewed its registration prior to July 1, 2024, with the previously required surety bond/assignment of savings amounts ***does not*** need to increase its surety bond/assignment of savings amount until the next time the contractor must renew its registration. But a contractor renewing its registration after July 1, 2024, must obtain an Increased Rider from its bonding company or purchase a new bond for the required amounts. A contractor that maintains an assigned savings account in lieu of a surety bond must file a Re-Assignment of Savings Form (F625-011-000) with the Department.

Increases to surety bond and assignment of savings accounts will not apply to plumbing or electrical contractor licenses. All other contractors must comply with the new requirements. Failure to provide the Department with an Increased Rider or a new bond if the contractor elects to file a surety bond or a Re-Assignment of Savings Form if the contractor elects to maintain an assigned savings account will result in an expired registration. An expired registration prohibits contractors from performing work in Washington state.

Finally, new contractors, as well as contractors that must renew their registration after July 1, 2024, should carefully review new Department guidelines to ensure compliance with the registration requirements. Practitioners should review recent changes to RCW Chapter 18.27 in advising clients regarding registration, as the Legislature has made several changes throughout. ■

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MDK General Construction v. Aspen Grove

By Seth Millstein, Pillar Law PLLC

On November 25, 2024, Division I of the Washington Court of Appeals issued an unpublished opinion regarding lien foreclosure actions in Washington, *MDK General Construction, LLC v. Aspen Grove Owners et al*, No. 85704-5-I (2024). In this case, MDK General Construction, LLC ("MDK") worked as a subcontractor for the general contractor, Integrity Construction Solutions, LLC, who the condominium association (the "Association") hired as part of a multimillion-dollar remediation project on the condominium's buildings. Though unpublished, the case is notable for its guidance regarding service of lien foreclosure actions.

Integrity failed to pay MDK nearly $70,000 for exterior siding and related work MDK performed, and Integrity subsequently filed for bankruptcy protection. MDK remained unpaid for its work causing it to record a claim of lien for its unpaid work. After liening, MDK filed its foreclosure action.

MDK's suit was dismissed by the trial court, and MDK then appealed the trial court's order requiring MDK to release its lien on the Aspen Grove Condominium. The trial court ruled that MDK failed to establish that the Association was the owner of the property, a 96-unit complex. Ownership, Division I held, lies with the condominium's individual unit owners, not the Association. MDK did not serve the individual unit owners within the requisite timeframe, and as a result Division I upheld the dismissal of MDK's claim and awarded attorney fees to the Association. This case is important for several reasons:

Ownership in Condominium Law

MDK reinforces the legal principle that ownership of a condominium lies with individual unit owners, not the homeowners' association. Division I looked to Ch. 64.34 RCW—the Condominium Act—and determined that, after an allocation of ownership to the unit owners by declaration, no property interest remains to be allocated. Thus, technically speaking, the Association has no ownership interest at that point.

Implications for Contractors and Subcontractors

This case emphasizes the importance of identifying and serving all relevant parties with an "ownership interest," including all individual unit owners, in disputes involving condominium projects.

Strict Compliance

In an 18-month period where Division I has further clarified its take on notice and procedural requirements, this case is yet another example of how strict courts will be in this arena, particularly underscoring strict compliance with procedural requirements for lien enforcement under RCW 60.04.141.

Several Notes: First, one point Division I did not clarify is who has to be named as the owner on the lien itself. Obviously, best practice would be to name everyone with an interest on the face of the lien, but this case does not address this issue specifically. Second, Division I never mentioned the *Woodley v. Style Co.*, case which speaks to allocation of amounts due, ratably, to various unit owners, which is also critical in condominium cases. Still, this is a case practitioners will want to be aware of. ■

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WSBA Sections

Gardens Condominium v. Farmers Insurance Exchange

Will Young, McKinstry

Construction law practitioners are often confronted with insurance coverage and policy interpretation issues that can be very significant to the outcome of a dispute. In *Gardens Condominium v. Farmers Insurance Exchange*, 2 Wn.3d 832, 544 P.3d 499 (2024), the Washington Supreme Court clarified one such issue, confirming resulting loss exceptions in all-risk insurance policies preserve or "revive" coverage for damage resulting from faulty workmanship, even if the policy contains specific "causation language excluding damage in the sequence of events following faulty workmanship." *Id*. at 832.

In general terms, all-risk insurance policies provide coverage for any risk of direct physical loss, unless a specific exclusion applies and subject to the terms of the policy.[1] In the *Gardens Condominium* case, the property owner, Gardens Condominium ("Gardens"), purchased an all-risk insurance policy from Farmers Insurance Exchange ("Farmers"). The policy covered "any risk of direct physical loss," subject to an exclusion for "faulty, inadequate, or defective design, specifications, workmanship, repair, construction, or renovations." 2 Wn.3d at 837. The policy further stated that "if an exclusion kicks off a chain of events causing loss or damage, the policy does not provide coverage for any losses in that chain." *Id*.

However, the faulty workmanship exclusion contained a resulting loss exception, stating "'[i]f loss or damage [caused] by a Covered Cause of Loss results, we will pay for that resulting loss or damage.' In other words, as written, if faulty workmanship causes a covered peril to occur and that covered peril results in loss or damage, the loss or damage will be covered." 2 Wn.3d at 836.

In 2002, faulty design and/or construction of the condominium's roof caused water vapor to condense on the underside of the roof. 2 Wn.3d at 836. Gardens discovered the damage, and in 2003-2004 Gardens redesigned and repaired the roof, adding sleepers on top of the roof joists to increase ventilation. *Id*. at 837.

In 2019, Gardens discovered the redesigned and repaired roof had not sufficiently improved ventilation, again resulting in condensation and water vapor that damaged the newly installed sleepers along with the roof joists, sheathing, and fireboard. *Id*. Gardens sought coverage from Farmers under its all-risk policy for the cost of repairing the resulting damage to the fireboard and roof sheathing, but not for the cost of correcting the defective sleepers themselves. 2 Wn.3d at 837.

Farmers denied the claim under the policy's faulty workmanship exclusion. Farmers determined the policy did not provide any coverage "[b]ecause faulty construction 'initiated a sequence of events resulting in the loss or damage,' [therefore,] the damage was excluded under the faulty workmanship exclusion." 2 Wn.3d at 837.

Gardens then filed a declaratory judgment action, and the parties filed cross-motions for summary judgment. The trial court granted Farmer's motion, finding the policy excluded damage in the entire chain of events resulting from the faultily designed and/or installed sleepers. Gardens appealed. 2 Wn.3d at 837.

The Court of Appeals reversed, reasoning that "by including the resulting loss clause, Farmers agreed to pay for damage caused by a covered peril even when it results from faulty workmanship." 2 Wn.3d at 838. Farmers then sought review.

The Washington Supreme Court accepted review and unanimously affirmed the Court of Appeals. Harmonizing two prior cases concerning resulting loss exceptions—*Vision One, LLC v. Philadelphia Indemnity Insurance*

> **In general terms, all-risk insurance policies provide coverage for any risk of direct physical loss, unless a specific exclusion applies and subject to the terms of the policy.**

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1 *See* INSURANCE, Black's Law Dictionary (11th ed. 2019).

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Gardens Condominium v. Farmers Insurance Exchange

Co., 174 Wn.2d 501, 276 P.3d 300 (2012) and *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d 524, 276 P.3d 1270 (2012)—the Supreme Court held that resulting loss exceptions preserve coverage "whether or not the [resulting] covered peril is independent" of the excluded loss that initiated the chain of events. 2 Wn.3d at 841. Accordingly, even natural consequences of otherwise excluded events, such as the condensation and water vapor damage resulting from excluded faulty repairs, are covered under the resulting loss exception. *Id.* at 843.

This decision highlights the importance of resulting loss exceptions in situations where an excluded event causes loss or damage that would otherwise be covered by an insurance policy. The court's analysis also reaffirms the standards for proper interpretation of insurance policies. ■

2400 Elliott, LLC v. VP Elite Construction, LLC

By Evan Brown, Stoel Rives LLP

When a person or entity improving real property records a construction lien claim, the claimant has eight months from the date of recording to commence a lawsuit to foreclose on the lien. RCW 60.04.141. Failure to timely commence the foreclosure action results in a time bar and the effective expiration of the lien, barring unusual scenarios like the owner later engaging the claimant for additional work on the project. But expiration under the statute comes with no public fanfare, and the recorded lien claim remains visible in the chain of title with no indication that it is no longer enforceable. Often, lien claimants will provide a lien release document upon request by the owner or upper-tier contractor. But what if the claimant refuses? What recourse does an owner have to ensure that title examiners and others do not believe there is an enforceable lien against the property? In a recent, unpublished opinion in *2400 Elliott, LLC v. VP Elite Construction, LLC*, No. 85205-1-I, 30 Wn. App. 2d 1006, 2024 WL 913847, *review denied*, 3 Wn.3d 1015, 554 P.3d 1224 (2024), Division I of the Washington Court of Appeals provided an answer (of sorts) to this question.

When a lien claimant is paid, the lien statutes clearly require the claimant to provide a lien release upon demand. RCW 60.04.071. Unjustified delay or failure to do so gives the owner a cause of action for both damages and attorneys' fees. However, payment is not the only way to extinguish a lien or render it unenforceable. Under RCW 60.04.141, "[n]o lien created by this chapter binds the property subject to the lien" if the claimant does not commence an action to foreclose within eight months of recordation. There are many reasons a claimant might intentionally allow a lien to expire by failing to timely commence a foreclosure action—for example, the practical burdens of litigation may outweigh the benefits of pursuing a small claim, the discovery process could result in unwanted disclosure of information, or a lawsuit could jeopardize a fruitful business relationship. Some claimants also simply let their liens expire by inaction or mistake.

In any event, even though an expired lien no longer binds the property, it can create problems for a property owner wishing to sell,

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WE NEED YOUR INPUT!

The Construction Law Section newsletter works best when Section members actively participate.

We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

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2400 Elliott, LLC v. VP Elite Construction, LLC

refinance, or otherwise burden or transfer its property. Title examiners will see the lien and may, or may not, understand that it has expired. Typically, claimants will provide or sign a lien release for an expired lien upon demand from the owner in order to avoid unnecessary legal entanglements over an unenforceable lien. But the claimant in *VP Elite Construction* did not, setting up a showdown that led the owner to sue for declaratory relief, delivery of a lien release, and attorneys' fees.

The *VP Elite Construction* case did not present squarely the question of what the appropriate action or relief is when a claimant refuses to record or deliver a release for an expired lien. Initially, the defendant, VP Elite Construction, failed to appear and the trial court entered default judgment and awarded attorneys' fees to the owner. VP Elite then moved to vacate the default judgment under Civil Rule 60(b) several months after it was entered, which the trial court denied. The appellate court's principal holding in the case was that the trial court did not abuse its discretion by denying vacatur under the particular circumstances of the case.

But the more interesting part of the opinion is how the court treated the appellant's argument that it had a valid defense to the owner's claims because the lien had expired and therefore was "absolutely void." The court wrote as follows:

> Although VP Elite is correct that its lien had clearly expired under RCW 60.04.141, which imposes no obligation to provide a lien release, 2400 Elliott's lawsuit was not premised on a statutory obligation to deliver a lien release. Instead, 2400 Elliott sought equitable and declaratory relief because VP Elite's recorded lien notice remained a potential cloud on title even if the underlying lien was clearly invalid. … Far from establishing a conclusive defense, the record shows that VP Elite had *no defense*.

30 Wn. App. 2d 1006, 2024 WL 913847 at * 3. The court seemingly approved of the owner's approach here—seeking declaratory and injunctive relief to declare the lien expired and require delivery of a lien release that can be recorded in the chain of title. Notably, the Supreme Court denied a petition for review. 3 Wn.3d 1015, 554 P.3d 1224.

Potential lien claimants and owners alike (and their respective counsel) should take note. Once a lien has expired, the owner may seek a lien release and declaration in equity regardless of whether there is a clear statutory right to a release or money damages. The problem posed by an expired lien in the chain of title may constitute a cloud on title, and the owner may take action to remove the cloud. ■

2025 Construction Law Section Membership Form

January 1 – December 31, 2025

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