THE FRANKENSTATUTE: ORS 12.135

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Like the monster in "Frankenstein," Oregon's statute of ultimate repose ("SUR") applicable to certain construction defect claims is composed of different body parts that are roughly stitched together: Only ORS 12.135(1) uses terms and concepts borrowed from other bodies of construction law. As a result of such borrowing, the application of ORS 12.135 to a given set of circumstances may be surprisingly complex.

The Statute of Ultimate Repose. A statute of ultimate repose, in contrast to a statute of limitation, generally provides a maximum time period for asserting a claim without regard to the injured party's knowledge of the harm or claim. The SUR found in ORS 12.135(1), which applies to claims by non-public plaintiffs, is no different.[2] This statute generally applies to claims arising from the "construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from the person having furnished design, planning, surveying, architectural or engineering services for the improvement." The SUR period under ORS 12.135(1) is determined by the type of "structure:"

[2] The original 1971 bill that became ORS 12.135 "began with the objective of fixing a starting date for applying the statutory time limits to actions against construction contractors in contract, tort, or otherwise, while maintaining the existing differences in the limitation periods." *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Or. 243, 250 (1980).

Ten (10) years for a "small commercial structure," a "residential structure" or, if owned or maintained by a homeowner's or unit owner's association, a "large commercial structure;" or

Six (6) years for a "large commercial structure" that is NOT owned or maintained by a homeowner's or unit owner's association.

ORS 12.135(1). The event that triggers or commences the SUR period is based upon the acceptance by the "contractee" of the construction, alteration or repair (a paraphrasing of the definition of "substantial completion" found in ORS 12.135(4)(b))[3] – or "abandonment" of the construction, alteration or repair of the improvement by the person providing labor, material or equipment. ORS 12.135(5).

Borrowing Words and Phrases from Different Bodies (Of Law). The ORS 12.135 SUR explicitly incorporates definitions from both the amendments to the Oregon Contractors Licensing Act (ORS 701.002 *et seq.*) and Oregon's Construction Lien Law (ORS 87.001 to 87.060 and 87.075 to 87.093).

The definitions of the types of "structures" that determine whether a six year or ten year SUR applies are borrowed from ORS Chapter 701.005. In Chapter 701, these definitions provide the basis for describing contractor license endorsement requirements (residential or commercial) and the Oregon Construction Contractors Board ("CCB") dispute resolution jurisdiction for complaints against those contractor surety bonds. These "structure" definitions were added to ORS 12.135 by the 2009 legislature and apply to claims arising on or after January 1, 2010. 2009 Or Law Ch. 715, Section 3.

[3] "Substantial completion" means "the date when the contractee accepts in writing the of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such written acceptance, the date of acceptance of the completed construction, alteration or repair of such improvement by the contractee." ORS 12.135(4)(b).

The simplest of the three definitions is "large commercial structure." It means a structure (or appurtenance thereto) that does not meet the definitions of "residential structure" or "small commercial structure." ORS 701.005(11). Determination of what structure (or appurtenance thereto) is "residential" (ORS 701.005(15)) or "small commercial" (ORS 701.005(17)) requires careful comparison of each statutory definition and the actual structure and circumstances.

ORS 12.135 also provides that an "improvement" is considered "abandoned" for SUR purposes using the same definition that the Oregon Lien Law uses to fix the commencement of the 75 day deadline for some lien claimants to record a valid lien against an improvement. See ORS 12.125(5) (incorporating the ORS 87.045 definition of "abandonment" by reference).

Unintended Complexity? Against this background of borrowing definitions significant complexity is born. Some potential results not yet revealed by reported case law (to this author's knowledge) may include:

a. Different Potential SUR Periods For Construction on an 11,000 SF Ground Area Leasehold (Maybe 6 Years) vs. 11,000 SF Ground Area Building (10 Years). A project involving 11,000 square feet in ground area may be subject to a six year (if small commercial) or ten year (if large commercial) SUR period. ORS 12.135(1). For contractor licensing purposes, if a contractor renovates an 11,000 square foot office building for the building owner, the structure may be considered a "*large* commercial structure" (to qualify as a small commercial building, the building must have a ground area of 10,000 square feet or less, along with other requirements). See ORS 701.005(17)(a). But if the contractor renovates an 11,000 square foot leasehold space in a larger office building, then the leasehold space may be considered a "*small* commercial structure." See ORS 701.005(17)(b). For licensing purposes, a contractor easily sidesteps the need to consider these complexities by simply obtaining the license endorsements to work on both small and large commercial structure projects. There is no such

opportunity to side step the analysis for SUR purposes.[4]

b. "Construction, Alteration or Repair" to a Building of Any Size for Less Than $250,000 May Be a 10 Year SUR. A structure that meets the definition of a "small commercial structure" includes: "*A nonresidential structure of any size* for which the contract price of all construction contractor work to be performed on the structure as part of a construction project does not total more than $250,000." ORS 701.005(17)(c). Accordingly, a reroof of a twelve-story commercial office building that involves less than $250,000 in total cost may be subject to a ten (10) year SUR, whereas building the office building new may be subject to a six (6) year SUR if it otherwise does not meet any of the other potential definitions of a "small commercial structure" under ORS 701.005(17).

c. Certain "Improvements" (Like Cell Towers, Docks and Bridges) Built for Non-Public Owners May Not be Subject to the Six Year SUR under ORS 12.135. The SUR applies to "improvements" that meet one of the ORS 701.005 "structure" definitions. By the plain terms of these definitions, there must be a "structure" or "unit" (or an appurtenance to such a structure or unit) – which strongly implies the structure or unit can be occupied for use. By contrast, the Lien Law definition of "improvement" is much broader and includes "wharf, bridge, ditch, flume, reservoir, well, tunnel, fence, street, sidewalk, machinery, aqueduct or other structure or superstructure." ORS 87.005(5).[5] This observation raises the question: Did the 2009 amendments tying the 10 and 6 year SUR to the construction or repair of a "structure" have the effect of now *excluding* other "improvements" such as a cell tower, dock or bridge that are not "appurtenant to" a "commercial" or "residential" structure that apparently fits within an ORS 701.005 definition?[6] If a project does not fall within the description of ORS 12.135(1), then a private litigant's negligence claims related to these improvements may be subject to a general 10 year SUR under ORS 12.115 that may begin to run from an earlier date (the time of the negligent "act or omission") as was the case is *Shell v. Schollander*, No. A150509 (Or App Sept. 24, 2014) (Plaintiff did not fall within scope of ORS 12.135(1) and (4)(b), so an SUR that accrued from an earlier date under ORS 12.115 applied).

d. *Shell v. Schollander Development* Opinion Suggests Contracts Incidentally Related to Construction May be Subject to ORS 12.135's SUR. In the recent case of *Shell v. Schollander Development*, the Court of Appeals highlighted that ORS 12.135 only applies to those plaintiffs who are a "contractee" of the specific construction work that gave rise to the defective construction. Under the Court's analysis,

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[4] The example provided here has in fact been simplified. The definition of "small commercial structure" also includes vertical requirements: "a height of not more than 20 feet from the top surface of the lowest flooring to the highest interior overhead finish of the structure." See ORS 701.005(17).

[5] One could argue that the express incorporation of the Lien Law concept "abandonment of an improvement" in ORS 12.135(5) means that the Lien Law's broad definition of "improvement" similarly applies when the term "improvement" is used in ORS 12.135(1). However, accepting this argument is not necessary to the point made – an "improvement to real property" is a much broader concept than the "structure" definitions provided in ORS 701.005.

[6] This is not to suggest that a contractor that builds cell towers, tunnels or bridges that are unrelated to a "commercial structure" or "residential structure" need not carry a contractor's license. The licensure requirement is not tied to any type of structure. See ORS 701.021(1) (any person who "undertakes, offers to undertake or submits a bid to do work as a contractor must have a current license"...). While arguably a contractor that only builds tunnels might argue it is unnecessary to obtain a license endorsement, as a practical matter, this is simply not an option as a license requires a bond, and the licensing scheme requires obtaining the bond in connection with a license endorsement. See ORS 701.021(2-4) (identifying types of endorsements); 701.068(1) (requirement of license is bond) and (2)(bond is required for each endorsement type held).

however, agreements that are not traditionally thought of as "construction agreements" may be included within ORS 12.135.

In *Shell*, the Court held that ORS 12.135's SUR did not apply to a "general contractor" who sold a home to a buyer under a "Real Estate Sale Agreement" ("Sale Agreement"). *See Shell*, p. 3. The Court's reasoning is that "substantial completion" under ORS 12.135 requires acceptance of the construction work by plaintiff in the capacity of a "contractee" to a contract for construction work. Because the plaintiff-homebuyer purchased a nearly completed home – where the work complained of had been completed prior to entry of the Sale Agreement – ORS 12.135 did not apply. The Court reasoned that it was not enough that an addendum to the Sale Agreement contained the general contractor's promise to provide some unrelated construction services (generally work related to finishes, interior improvements, and a post-completion inspection). The Court reiterated its holding as follows:

> Put another way, plaintiff's complaint does not allege negligence with respect to inspections, remediation, or any of the other activities that, in the addenda, defendant promised to perform.

See Shell, p. 12. By the above-quoted dicta, the *Shell* court seems to suggest that if a claim arose out of the construction work described in the Sale Agreement addendum, then that claim might still be timely under ORS 12.135(1). If so, it would seem that other agreements which only incidentally contain construction work may also be subject to the ORS 12.135 SUR. In addition to a Sale Agreement addendum, such examples might include a lease that includes tenant improvements; easements for well, septic or surface water systems; or option to purchase agreements.[7]

Conclusion. Superficially, using definitions from other areas of construction law has appeal. Terms used in different areas of law may be continually refined through court decisions. However, when examining these terms and the associated case law more carefully, the statute perhaps provides more pitfalls and false security than originally intended. For all parties who are concerned about whether work performed on a construction project remains subject to a construction defect claim, trying to predict whether the ORS 12.135 SUR or some other statute of ultimate repose applies could be scary.

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[7] **Caution:** The *Shell* case did not discuss the potential impact of ORS 12.135(6)(b), which provides the statute "does not apply to actions against any person in actual possession and control of the improvement, as owner, tenant or otherwise, at the time such cause of action accrues."