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MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

2005 LEGISLATION ALERTS

This issue of *In Brief* focuses on some of the significant changes made by the 2005 Oregon Legislature.

The new legislation takes effect on January 1, 2006, unless otherwise noted.

RESOURCES

The advance sheets for *Oregon Laws 2005* are now available from the Legislative Counsel Distribution Center. The hardbound set, *Oregon Laws 2005*, will be available in January. The softbound *2005 Oregon Revised Statutes* will be available in March. If you would like to order any of these materials, visit www.lc.state.or.us or call 503-986-1243.

To view legislation online, visit www.leg.state.or.us.

2005 Oregon Legislation Highlights, published by the Oregon State Bar, is a comprehensive discussion of the new legislation. It can be purchased from the OSB Order Desk for \$65. Visit the online bookstore, www.osbar.org, or call 1-800-452-8260 ext 413 or 503-684-7413.

CIVIL PROCEDURE JUDGMENTS 2005 Or Laws Ch 568 (HB 2359)

HB 2359 is comprised of further revisions to the judgment laws to correct and clarify issues raised by the changes made in 2003. An extended report on the provisions of the bill is available on the Oregon Law Commission's

Website: www.willamette.edu/wucl/oregonlawcommission/home_work_groups.htm.

Section 2 of HB 2359 provides a short, exclusive list of requirements that are jurisdictional for purposes of appeal. Sections 12 and 13 of HB 2359 clarify existing law by specifying that the only conditions for creating a lien are that the judgment must contain the required separate section and that the clerk of the court must enter information from that section in the register. Section 21 of HB 2359 rewrites ORS 18.165, which establishes the priority between an unrecorded conveyance of real property and the lien created by the entry of a judgment.

CIVIL PROCEDURE JUDGMENTS (CCP 2004) – ORCP 67

ORCP 67 was amended to eliminate the distinctions between default judgments and contested money judgments and between money judgments and judgments affording other forms of relief. The amended provision prohibits a judgment for relief different in kind from or exceeding the amount prayed for in the pleadings, unless due process is provided.

CIVIL PROCEDURE PROPOSED ORDERS OR JUDGMENTS UTCR 5.100

Amended UTCR 5.100 requires prevailing parties to serve the Crime Victims' Assistance Section of the Department of Justice with any proposed judgment containing a punitive damages award not less than three days before submission to

DISCLAIMER

THIS NEWSLETTER INCLUDES CLAIM PREVENTION TECHNIQUES THAT ARE DESIGNED TO MINIMIZE THE LIKELIHOOD OF BEING SUED FOR LEGAL MALPRACTICE. THE MATERIAL PRESENTED DOES NOT ESTABLISH, REPORT, OR CREATE THE STANDARD OF CARE FOR ATTORNEYS. THE ARTICLES DO NOT REPRESENT A COMPLETE ANALYSIS OF THE TOPICS PRESENTED, AND READERS SHOULD CONDUCT THEIR OWN APPROPRIATE LEGAL RESEARCH.

WHERE TO FIND CIVIL PROCEDURE CHANGES

Most of the changes to civil procedure rules promulgated by the Council on Court Procedures (CCP) and submitted to the 2005 Legislative Assembly (ORCP 9, 46, 54, 59, 67, 83) take effect January 1, 2006, and can be found in the *2005 Oregon Appellate Courts Advance Sheets* No. 3 (January 31, 2005).

Changes to ORCP 68 C, 79 A, and 83 F take effect January 1, 2006, as a result of HB 2261 and HB 2359.

Changes to civil procedure rules made by the 2005 Legislature can be found in the advance sheets for *Oregon Laws 2005*, published by the Oregon Legislative Assembly.

Changes to the Uniform Trial Court Rules (UTCRRs) took effect August 1, 2005, and can be found in *2005 Oregon Appellate Courts Advance Sheets* No. 13 (June 20, 2005).

the court. For the form of notice required by ORS 31.735(3), see new UTCR 5.120.

Effective: August 1, 2005

CIVIL PROCEDURE **SERVICE AND FILING OF PLEADINGS** (CCP 2004) – ORCP 9 F

Amended ORCP 9 F states that the effective date of service by fax is three days after transmission, the same as service by mail.

CIVIL PROCEDURE **FAILURE TO MAKE DISCOVERY** (CCP 2004) – ORCP 46 A

Amended ORCP 46 A(2) requires the beginning of a motion to compel production for inspection and copying to specify the document or items sought.

CIVIL PROCEDURE **OFFER OF COMPROMISE** (CCP 2004) – ORCP 54 E

Amended ORCP 54 E provides that if an offer of compromise does not expressly include costs and disbursements or attorney fees, the party asserting the claim shall submit a claim for costs and disbursements or attorney fees to the court, as provided by Rule 68.

CIVIL PROCEDURE **INSTRUCTIONS TO JURY** (CCP 2004) – ORCP 59 H

The amendments to ORCP 59 H require attorneys who object to the trial court's instructions to the jury to state "with particularity any point of exception." The exception may be made orally or in writing, but it must be on the record and made immediately after the court instructs the jury.

CIVIL PROCEDURE **AFFIDAVITS** **UTCR 2.120 and Forms**

This new rule provides that where the UTCR requires an affidavit, the affidavit does not have to be notarized unless required by statute. However, it must be signed by the affiant and must prominently include a declaration under penalty of perjury. The following forms were amended to conform to this rule: 2.100.4a, 2.100.4c, 2.100.8, 5.080, 8.010.5, 9.160, 15.010.1a, 15.010.1b, and 15.010.1c.

Effective: August 1, 2005

CIVIL PROCEDURE **PERSONAL INFORMATION IN COURT FILES** **UTCR 2.110**

Amended UTCR 2.110 provides a mechanism to allow protection of personal information contained in a court file. This rule applies only to information already in a document that has become part of a court case file.

Effective: August 1, 2005

CIVIL PROCEDURE
DEATH OF ATTORNEY
2005 Or Laws Ch 457 (SB 284)

SB 284 enacts a new law that extends the limitations period for up to 180 days for any claim if an attorney has agreed in writing to represent the plaintiff but dies (without having commenced the action) before the normal expiration of the applicable limitations period.

The bill applies to all causes of action, whether arising before, on, or after the effective date, January 1, 2006. However, it does not apply to any action in which the attorney dies before January 1, 2006.

DOMESTIC RELATIONS
CHILD SUPPORT JUDGMENTS
ORS 18.052, 25.020
2005 Or Laws Ch 561 (HB 2212)

HB 2212 adds two pieces of information – the names and dates of birth of the parties’ joint children – to the list of required data in child support judgments. The bill also modifies ORS 18.052(1) to prohibit a judge from signing a proposed judgment that does not include the information required by ORS 25.020(8).

DOMESTIC RELATIONS
CHILD ATTENDING SCHOOL – ORS 107.108
2005 Or Laws Ch 591 (SB 1050)

SB 1050 substantially revises ORS 107.108, which provides for support for children between the ages of 18 and 21 who are attending school.

The bill adds a new definitions section. Regardless of child-attending-school status, any unmarried child between the ages of 18 and 21 is now a necessary party to a judicial proceeding under ORS 107.085, 107.135, 107.431, 108.110, 109.103, or 109.165 in which the child’s parents are parties, and the court has authority to order or modify support for a child attending school. The child is required to provide written consent that allows each parent ordered to pay support to obtain information directly from the school relating to enrollment, standing, grades, and course load. The Department of Justice, Division of Child Support, may reinstate suspended support without a court order upon a showing by

the child that he or she is attending school. The bill also allows a court to order the payment of child support in accordance with a higher education savings plan as an alternative to child support.

The amendments apply to all child support orders that currently contain provisions for a child attending school, whether entered before, on, or after the effective date, September 1, 2005.

DOMESTIC RELATIONS
REVOCAION OF BENEFICIARY DESIGNATIONS
2005 Or Laws Ch 285 (HB 2978)

HB 2978 enacts a new law to allow a final judgment of dissolution, legal separation, or annulment to revoke a beneficiary designation in favor of a spouse or a relative of a spouse on the entry of the judgment. Such a provision may be included in the judgment only if the principal is permitted by law or the terms of the instrument to cancel or change the beneficiary.

The bill treats the revocation of designations for named assets (including employee pension benefit plans, public retirement systems, deferred compensation plans, IRAs, life insurance policies, annuities, mutual funds, and bank accounts) as if the spouse had predeceased the principal. The revocation becomes effective on entry of the judgment.

A person or entity is not liable for having made a payment to a beneficiary designated in a governing instrument, or for having taken any other action in good-faith reliance on the governing instrument, unless the person or entity has received written notice of the revocation of designation of a beneficiary.

The amendments apply to judgments entered on or after the effective date, January 1, 2006.

Practice Tip: The party seeking to benefit from the termination must still notify the proper authority to negate the “spouse” beneficiary.

DOMESTIC RELATIONS
CUSTODY DETERMINATIONS IN FAPA
PROCEEDINGS
2005 Or Laws Ch 536 (SB 424)

SB 424 modifies the Family Abuse Prevention Act (FAPA) and allows the court to defer an award of custody after a finding of abuse if it finds that “exceptional circumstances exist that affect the custody of a

child.” The court must then hold a hearing within 14 days after issuing the restraining order (or within 5 days at the respondent’s request) to determine temporary custody. Pending the hearing, the court can make any temporary orders regarding the child’s residence and contact with the parties that the court finds appropriate for the child’s welfare and the parties’ safety. SB 424 also allows for five-day extensions of time of the hearing for a party to seek legal representation. The bill restricts how long the custody provisions of the FAPA order remain in effect.

DOMESTIC RELATIONS
PARENTING TIME – ORS 107.135
2005 Or Laws Ch 708 (SB 907)

Section 6 of SB 907 amends ORS 107.135 to allow the court to suspend or terminate parenting time if the court finds that a parent has abused a controlled substance and that continued parenting time is not in the child’s best interests. The court then may not grant that parent future parenting time until he or she demonstrates that the reasons for the suspension or termination are resolved and that reinstating parenting time is in the child’s best interests.

Effective: August 16, 2005

DOMESTIC RELATIONS
CUSTODY/MILITARY SERVICE – ORS 107.169
2005 Or Laws Ch 79 (HB 2135)

Section 3 of HB 2135 modifies the joint custody statute, ORS 107.169, to provide that the temporary absence (not exceeding 30 months) of a parent due to military service is not a change of circumstances sufficient to modify a joint custody order.

Effective: May 25, 2005

DOMESTIC RELATIONS
DISESTABLISHMENT OF PATERNITY
2005 Or Laws Ch 160 (SB 234)

Section 9 of SB 234 enacts legislation that permits a legal parent to petition the court to reopen the issue of paternity if blood tests show a “zero percent probability” that the legal father is the biological father of a child. The bill applies only to cases in which paternity was originally established under ORS 109.070(1) without the use of blood tests as de-

finied in ORS 109.251. Section 9 of SB 234 contains a sunset clause and is repealed in January 2008. SB 234 substantially modifies current law. Lawyers who have clients who are seeking to disestablish paternity should scrutinize the bill carefully.

DOMESTIC RELATIONS
ADOPTION – NONCONSENTING PARENT
ORS 109.330
2005 Or Laws Ch 369 (SB 921)

SB 921 significantly amends ORS 109.330 to replace the former citation process with a summons process in adoption cases based on ORS 109.314 (consent when custody of child has been awarded in divorce proceedings), 109.322 (consent when parent is mentally ill, mentally deficient, or imprisoned), and 109.324 (consent when parent has deserted or neglected a child). The bill primarily affects and substantially changes the procedures used in stepparent adoptions.

The amendments apply to petitions filed and proceedings initiated on or after the effective date, January 1, 2006.

DOMESTIC RELATIONS
ADOPTION – NOTICE – ORS 109.309
2005 Or Laws Ch 475 (SB 973)

SB 973 amends ORS 109.309(6) to require that a petition for adoption include additional information. It also amends ORS 109.309(7)(c) to require notice to the parents of a deceased or incapacitated parent, if known or readily ascertained by the petitioner.

The amendments apply to petitions filed on or after the effective date, January 1, 2006.

DOMESTIC RELATIONS
ADDRESS CONFIDENTIALITY
2005 Or Laws Ch 821 (SB 850)

SB 850 establishes an Address Confidentiality Program in the Department of Justice to protect victims of domestic violence, sexual offenses, and stalking, and to prevent assailants from finding victims through public records. A victim must apply to participate in the program and must provide evidence of abuse, reside at a location not known to the assailant, and agree not to disclose that location to the assailant. Applicants who qualify are provided with a substitute address.

Effective: January 1, 2007

DOMESTIC RELATIONS/TORTS
CUSTODIAL INTERFERENCE
2005 Or Laws Ch 841 (SB 1041)

SB 1041 provides a civil cause of action for damages to certain persons for custodial interference: (1) persons 18 years of age or older who have been a victim of behavior that violates ORS 163.257(1)(a) (custodial interference in the first degree); or (2) persons who have suffered interference with their custodial rights. The latter must demonstrate either that they reported a person missing to a police agency or that the defendant has been charged with a violation of ORS 163.257(1)(a).

The bill applies to causes of action arising on or after the effective date, September 2, 2005.

DOMESTIC RELATIONS
LIABILITY FOR EXPENSES OF MINOR CHILD
2005 Or Laws Ch 732 (HB 2306)

HB 2306 modifies ORS Chapter 109, making unmarried parents of a minor child liable for the expenses and education of that child. Collection action is permitted against the parents jointly or separately.

DOMESTIC RELATIONS/TAXATION
JOINT TAX REFUND – ORS 314.415
2005 Or Laws Ch 210 (HB 2449)

HB 2449 amends ORS 314.415(6) to allow the Department of Revenue to make apportioned tax refunds on joint returns at the request of either spouse. The refunds will be apportioned based on

the percentage of the total adjusted gross income that each party contributed, or as otherwise determined by the department.

The amendments apply to requests for apportionment made on or after the effective date, November 4, 2005.

TORTS
STRUCTURED SETTLEMENTS
2005 Or Laws Ch 173 (SB 645)

SB 645 creates a new statutory framework for the transfer of “structured settlement agreements,” which is defined as an agreement, judgment, stipulation, or release for the periodic payment of damages for personal injuries or sickness in a tort or workers’ compensation claim. The bill sets out the requirements for a valid “transfer agreement” by which a payee agrees to transfer the right to receive payments under a structured settlement agreement. The bill is based on the Model State Structured Settlement Act.

The bill applies to transfer agreements entered into on or after the effective date, January 1, 2006.

TORTS
IMMUNITY – ORS 30.907
2005 Or Laws Ch 740 (HB 3159)

Amending ORS 30.907, HB 3159 prohibits products liability actions seeking recovery for damages from asbestos-related disease against construction contractors who only install products containing asbestos consistent with project plans. To come within the protection of the bill, the contractor may not manufacture or distribute asbestos-bearing products or supply the products to the project “independent of the provision of labor.” As a further condition for immunity from liability, the contractor must not have substituted the asbestos-bearing product without the project owner’s express direction or consent.

The amendments apply to all causes of action for damages resulting from asbestos-related disease, whether arising before, on, or after the effective date, January 1, 2006. However, the amendments do not apply to any action commenced before the effective date.

TORTS
INVASION OF PERSONAL PRIVACY
2005 Or Laws Ch 544 (SB 965)

SB 965 creates a new cause of action for invasion of personal privacy and allows recovery of compensatory damages and attorney fees. In particular, the bill establishes liability in four specific circumstances.

The bill applies to conduct occurring on or after the effective date, July 15, 2005.

Practice Tip: It appears that a plaintiff can now assert the common law tort of intrusion upon seclusion and seek punitive damages but not attorney fees and also assert this new statutory tort of invasion of personal privacy and seek attorney fees but not punitive damages.

TORTS
STRICT LIABILITY – DANGEROUS DOGS
2005 Or Laws Ch 840 (SB 844)

SB 844 provides that if a court has determined under ORS 609.990 that a dog is a “potentially dangerous dog,” and the dog then causes physical injury to a person or damage to real or personal property, the dog’s keeper is strictly liable for any resulting economic damages. Strict liability may not be asserted by an injured party who provoked the dog, assaulted the dog’s keeper, or trespassed on the keeper’s premises.

TORTS
OBESITY CLAIMS
2005 Or Laws Ch 658 (HB 2591)

HB 2591 prohibits claims against persons involved in the selling of food, as described in ORS 616.210, for injuries or death caused by weight gain, obesity, any health condition associated with weight gain or obesity, or any other condition resulting from the long-term consumption of food.

The bill does not apply to any cause of action commenced before the effective date, January 1, 2006.

CONSUMER PROTECTION
UNLAWFUL TRADE PRACTICES – ORS 646.608
2005 Or Laws Ch 42 (HB 2219)

ORS 646.648, enacted in 2001, provides that a manufactured dwelling dealer commits an unlawful trade practice when it makes certain types of misrepresentations to a buyer. HB 2219 amends the Unlawful Trade Practices Act, adding ORS 646.648 to the list of prohibited conduct in ORS 646.608. As the result of the amendment, the attorney general, a district attorney, or a private party may commence an action for a violation.

CONSUMER PROTECTION
DEBT CONSOLIDATION AGENCIES
ORS 697.692
2005 Or Laws Ch 309 (SB 327)

ORS 697.692 was amended to reflect the new role that credit counseling agencies will play in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. SB 327 amends ORS 697.692(1) to provide that a debt consolidation agency may not receive any amount from a client until the first installment under the contract with the client is paid to any creditor of the client.

SB 327 also adds a new section to ORS 697.602 through 697.842, providing that a debt consolidation agency may not charge or receive any fee under ORS 697.692 before the agency makes certain written disclosures to the client, including the maximum amount the agency may charge for services performed for the client and the fact that the client is responsible for payment of the amount charged. SB 327 adds a new subsection (i) to ORS 697.662, providing that a violation of the foregoing is an improper debt consolidating practice.

The amendments apply to credit counseling and other services rendered on or after the effective date, January 1, 2006.

DEBTOR-CREDITOR
PERSONAL EXEMPTIONS
ORS 18.345, 18.395
2005 Or Laws Ch 456 (SB 273)

SB 273 amends ORS 18.345(1) by increasing the motor vehicle exemption from \$1,700 to \$2,150. It also amends ORS 18.395(1) by increasing the homestead exemption for a judgment debtor from \$25,000 to \$30,000, and from \$33,000 to \$39,600 for a combined exemption when two or more members of a household are debtors. SB 273 also amends ORS 18.402, 18.412, 18.512, and 18.845 to reflect the exemption increases.

The amendments apply to executions issued on or after the effective date, January 1, 2006.

DEBTOR-CREDITOR
MOTOR VEHICLE SECURITY INTERESTS
ORS 803.100, 803.136
2005 Or Laws Ch 261 (HB 2017)

HB 2017 modifies ORS 803.100 and 803.136, which govern the period in which a security interest in a vehicle can be perfected, with relation back to the date that the interest was created. The amendment changes the period from 20 days to 30 days. This bill conforms the time period under Oregon law to the recent amendments to the Bankruptcy Code at 11 USC §547(c)(3).

Effective: October 17, 2005

DEBTOR-CREDITOR
NOTICE OF BANKRUPTCY – ORS 93.770
2005 Or Laws Ch 85 (HB 2287)

HB 2287 modifies ORS 93.770 (with a conforming amendment to ORS 205.246) to permit a debtor, a trustee, or their lawyers to record a notice of bankruptcy in the appropriate real property records. The new procedure is analogous to lis pendens under ORS 93.740. The bill also provides a procedure for releasing the notice of bankruptcy.

DEBTOR-CREDITOR
POSSESSORY LIEN FORECLOSURE
ORS 87.196, 87.202, 87.206
2005 Or Laws Ch 86 (HB 2288)

HB 2288 modifies ORS 87.196, 87.202, and 87.206 and conforms the possessory lien foreclosure practice to personal property foreclosures under the UCC. The bill requires that excess proceeds from the foreclosure sale be distributed to junior lienholders before any residual proceeds go to the county or the debtor. Junior lienholders must give the foreclosing creditor a request for proceeds before the day of sale and must provide reasonable proof of the subordinate interest, if requested.

DEBTOR-CREDITOR
JUDGMENTS
2005 Or Laws Ch 568 (HB 2359)

HB 2359 addresses a few “cleanups” left over from the 2003 session’s overhaul of the judgment statutes. Of particular importance are the new priority scheme for judgment liens and the form and content of the money award section of the judgment.

DEBTOR-CREDITOR
EXECUTION AND JUDICIAL SALES
ORS 18.465-18.598
2005 Or Laws Ch 542 (SB 920)

SB 920 substantially revises ORS 18.465 to 18.598 and creates new provisions relating to execution of judgments under a writ of execution and judicial sales. Practitioners should review the statutory language and the Oregon Law Commission’s summary of the bill at www.willamette.edu/wucl/oregonlawcommission/home/work_groups.htm.

DEBTOR-CREDITOR
DELIVERY OF WRIT – ORS 18.655
2005 Or Laws Ch 269 (HB 2305)

HB 2305 modifies ORS 18.655 to permit a sole proprietor to designate a person to accept service of writs of garnishment. This change should eliminate the need to follow the “office service” procedures if delivery is made on either the proprietor or the designated person. The bill also allows “office service” on a general partnership; limited partnerships still require delivery to a general partner or a designated person.

**DEBTOR-CREDITOR
GARNISHMENTS
ORS 18.618, 18.750, 18.685, 18.835
2005 Or Laws Ch 542 (SB 920)**

Sections 63 and 64 of SB 920 amend ORS 18.618 and 18.750 to exclude from garnishable property the stream of payments under a land sale contract that becomes due more than 45 days after service of the writ. Sections 65 and 66 of SB 920 amend ORS 18.685 and 18.835 to change the beginning of the 45-day period to the date that the writ is delivered to the garnishee.

**DEBTOR-CREDITOR
ARBITRATION – ORS 36.400-36.425
2005 Or Laws Ch 274 (HB 2548)**

Court-mandated arbitration under ORS 36.400 through 36.425 will now apply to matters in which the claim is \$50,000 or less. HB 2548 eliminates the county option to set the threshold amount at \$25,000.

The amendments apply to actions initially filed on or after the effective date, January 1, 2006.

**DEBTOR-CREDITOR
MILITARY SERVICE – ORS 399.238, 399.240
2005 Or Laws Ch 79 (HB 2135)**

HB 2135 amends ORS 399.238 and 399.240, which grant relief to state service members regarding payment of obligations and rates of interest. The bill extends the relief to members of the Oregon National Guard called into active federal service.

Effective: May 25, 2005

**REAL PROPERTY
MEASURE 37 DISCLOSURES – ORS 93.040
2005 Or Laws Ch 311 (SB 353)**

SB 353 amends ORS 93.040 by modifying the disclosure statement required in instruments transferring title to real property to inform the seller and purchaser 1) of the potential that land use regulations may trigger claims for compensation and 2) that governments may modify or not apply land use regulations that benefit the subject property or neighboring properties to avoid such compensation claims.

Note: On October 14, 2005, the Marion County Circuit Court ruled in *McPherson v. Department of Administrative Services* that Measure 37 is unconstitutional. It is unclear how, if at all, the ruling affects SB 353.

**REAL PROPERTY
CONSTRUCTION LICENSE
2005 Or Laws Ch 432 (HB 2200)**

HB 2200 defines “responsible managing individual” and requires each licensed business to have at least one such trained and tested individual. Section 9 of the bill requires additional information on the license application, including history with other licensed companies and adjudicated construction debt still owing. Section 14 of HB 2200 requires training and testing before restoring or reissuing a revoked or suspended license, and Section 11 of the bill provides for a pocket-sized certificate of licensure to be issued by the board.

The amendments apply to applications filed on or after the effective date, January 1, 2006.

Practice Tip: Clients should be advised to carry these cards as evidence of licensure.

**REAL PROPERTY
WARRANTY AGREEMENT
2005 Or Laws Ch 169 (SB 574)**

SB 574 enacts legislation authorizing a contractor who builds a new structure to present for recording a written warranty agreement between the contractor and the original owner to facilitate handling of construction defects and express warranties. The bill specifies the content of the filing, including any express warranties, legal description of the property, and the names and signatures of the contractor and original owner. The bill also provides that the warranties in recorded agreements apply to subsequent owners of the structure and cease to affect the title 10 years after the warranty is recorded.

Practice Tip: Although the warranty agreement is between the contractor and the original owner, it benefits and burdens the subsequent owners as well, if it is recorded under this statute. A recorded warranty agreement will show as an exception for a 10-year period. Before attempting to resolve defect disputes, check to see whether a warranty is of record.

REAL PROPERTY
TRUST DEEDS – ORS 86.740
2005 Or Laws Ch 129 (HB 2980)

HB 2980 amends ORS 86.740 and specifies that notice of a foreclosure sale involving a trust deed is effective when mailed.

LANDLORD-TENANT
DENIAL AND TERMINATION OF TENANCY
2005 Or Laws Ch 391 (HB 2524)

HB 2524 modifies landlord-tenant law. Specifically, it provides that a security deposit or prepaid rent held by a residential landlord is not garnishable property. The bill modifies the allowable reasons for denial of tenancy and requires a landlord who charges an application fee to provide a written statement of the reasons for denial. It also sets forth new regulations for landlord termination of tenancy.

The amendments do not affect the validity of any notice given by a landlord (or any action based on the notice) before the effective date, January 1, 2006.

ESTATE PLANNING AND
ADMINISTRATION
SMALL ESTATE AFFIDAVITS
ORS 114.515, 114.540
2005 Or Laws Ch 122 (HB 2289)

HB 2289 amends ORS 114.515 to allow the filing of an amended small estate affidavit within four months of the original affidavit. HB 2289 also amends ORS 114.540 to allow the filing of a supplemental affidavit under certain circumstances.

The new authority to file amended and supplemental affidavits applies to small estate affidavits filed before, on, or after the effective date, January 1, 2006.

ESTATE PLANNING AND
ADMINISTRATION
ACCOUNTINGS – ORS 116.083, 125.475
2005 Or Laws Ch 123 (HB 2290)

HB 2290 amends ORS 116.083 and ORS 125.475, increasing the time allowed for filing an accounting in an estate and in a protective proceeding from 30 to 60 days.

The amendments do not apply to any accounting due before the effective date, January 1, 2006, as calculated under the old version of the statutes.

ESTATE PLANNING AND
ADMINISTRATION
ELDER ABUSE – ORS 124.100
2005 Or Laws Ch 87 (HB 2291)

HB 2291 amends ORS 124.100 to include trustees in the list of those who may bring an action for abuse of the elderly or disabled.

The amendment applies to actions for injury, damage, or death occurring before, on, or after the effective date, January 1, 2006.

ESTATE PLANNING AND
ADMINISTRATION
SMALL ESTATES – ORS 114.515
2005 Or Laws Ch 273 (HB 2547)

HB 2547 amends ORS 114.515 to increase the limits on small estates to personal property valued at no more than \$50,000 and real property valued at no more than \$150,000, for a total aggregate estate value of no more than \$200,000.

The amendments apply to decedents who die on or after the effective date, January 1, 2006.

ESTATE PLANNING AND
ADMINISTRATION
DISCLOSURES BY COURT-APPOINTED TRUSTEES
2005 Or Laws Ch 472 (SB 881)

SB 881 enacts a new law that specifies the written disclosures required by the court before a person will be appointed as trustee. The bill imposes an ongoing duty to notify the court of any changes to the disclosed information. Trust companies, bank trust departments, and their employees are exempt from the disclosure requirement.

SB 881 contains a sunset provision that repeals the statute on January 2, 2010.

**ESTATE PLANNING AND
ADMINISTRATION**
UNIFORM TRANSFERS TO MINORS ACT
2005 Or Laws Ch 349 (SB 277)

SB 277 amends ORS 126.872 and clarifies that a transferor can make a transfer that is delayed until age 25 for a beneficiary who is already 21 but is not yet 25. Before 2001, the transferor could delay the transfer until the beneficiary reached age 21. The Legislature enacted ORS 126.872 in 2001, permitting transferors to delay the transfers to beneficiaries until age 25. Section 16 clarifies that this extension applies to beneficiaries who are already 21 when their custodianships are established. The bill also substitutes the word “beneficiary” for the word “minor” where appropriate throughout the statute.

The amendments apply to all transfers of property occurring before, on, or after the effective date, January 1, 2006.

**ESTATE PLANNING AND
ADMINISTRATION**
CHARITABLE GIFT ANNUITIES
ORS 731.704-731.724
2005 Or Laws Ch 31 (HB 2092)

HB 2092 streamlines the regulation of charitable gift annuities (CGAs) in Oregon. It repeals ORS 731.704 to 731.724 and exempts the issuance of CGAs by charitable organizations from regulation under the Insurance Code if the charities meet minimum financial and organization requirements. Exempt charities that sell CGAs must disclose in writing to donors that the annuities are not issued by an insurance company, are not regulated by the state of Oregon, and are not protected by an insurance guaranty association. The bill also exempts educational institutions and nonprofit corporations from regulation under the Insurance Code if they issued CGAs using a certificate issued under the prior law. These grandfathered entities must also keep on file financial statements audited by an independent CPA.

ESTATE PLANNING/TAXATION
OREGON INHERITANCE TAX
OREGON SPECIAL MARITAL ELECTION
2005 Or Laws Ch 124 (HB 2469)

HB 2469 enacts new law that is made part of ORS 118.005 to 118.840. The bill permits the executor of a

married decedent to elect to qualify certain non-marital trusts for the marital deduction solely for purposes of the Oregon inheritance tax, even though those trusts would not so qualify for purposes of the federal estate tax.

Under the new law, a trust that allows discretionary distributions of income and principal (rather than mandatory income distributions) only to the surviving spouse is eligible for an Oregon special marital property election. In addition, a trust that permits distributions to the surviving spouse, and to children of the decedent, may qualify for the special marital property election if the adult children, and the guardians of any minor children, elect to forgo their right to any distributions from the trust during the lifetime of the surviving spouse.

HB 2469 permits executors to elect to qualify these non-marital trusts for the Oregon marital deduction through a postmortem election filed with the Department of Revenue. By making the election, interested parties waive payments to non-spouse beneficiaries during the surviving spouse’s lifetime.

Effective: November 4, 2005. However, HB 2469 authorizes retroactive elections and amendment of inheritance tax returns for decedents who died on or after January 1, 2002.

Practice Tip: It is important that practitioners recognize that although we now have a simplified mechanism for children to disclaim their right to distributions from the Oregon special marital property trust during the surviving spouse’s lifetime, this may not be the best approach for all estates. The recently enacted ORS 130.110 (UTC 303, §18 – SB 275) authorizes a parent to represent the parent’s minor and unborn children, if a conservator for the child has not been appointed. However, if there is a conflict of interest between the parent and the minor or unborn child, the election would not prevent a minor child from later claiming that he or she was wrongfully denied an interest in the trust. Therefore, attorneys should consider whether it would be better to have the trust reformed by the courts, with a guardian ad litem representing the minor children.

Practitioners should also consider whether they may amend a prior return on which inheritance tax was paid. In general, no estate taxes should have to be paid at the death of the first spouse, unless the surviving spouse elects to do so.

For more detail about the recent legislative history of the Oregon inheritance tax and planning strategies, see Jeffrey Cheyne, *Oregon Inheritance Tax Disconnect Continued*, in HOT TOPICS IN ESTATE PLANNING ch 4 (OSB CLE 2005), and Patrick Green & Stephen Kantor, *The New Oregon Inheritance Tax a/k/a What's a Little More Chaos?*, in ESTATE PLANNING COUNCIL OF OREGON ANNUAL SEMINAR (2005).

ESTATE PLANNING AND ADMINISTRATION

OREGON UNIFORM TRUST CODE **2005 Or Laws Ch 348 (SB 275)**

SB 275 enacts a Trust Code for Oregon that codifies existing Oregon trust law, both common law and statutory law, and makes a number of changes to current law. The Trust Code permits new types of trusts; sets forth the methods for creating, modifying, and terminating a trust; details when a creditor of the settler or of a beneficiary can reach trust assets; delineates the trustee's rights and responsibilities; and provides for beneficiaries' rights and remedies.

Practitioners can find links to the bill's comments and legislative history on the OSB Estate Planning and Administration Section's Web site at www.osbar.org/sections/estate/Pages/links.html.

EMPLOYMENT LAW/TAXATION

INDEPENDENT CONTRACTOR – ORS 670.600 **2005 Or Laws Ch 533 (SB 323)**

Sections 1 and 2 of SB 323 amend ORS 670.600, simplifying a multiple-factor test for determining whether a person is an employee or an independent contractor for purposes of ORS chapter 316 (income tax), ORS chapter 657 (unemployment insurance), ORS chapter 671 (architects, landscape architects, and landscape contractors), and ORS chapter 701 (construction contractors). Section 5 repeals ORS 314.013, which was a product of the 2003 Legislature and created a separate independent contractor test for the state revenue code. Sections 8 and 9 of the bill also create an additional exclusion to the definition of "employment."

The amendments apply to services provided on or after the effective date, January 1, 2006. The repeal of ORS 314.013 applies to tax years and reporting periods beginning on or after January 1, 2006.

Note: On its face, SB 323 purports to change the definition of an independent contractor for purposes of ORS chapter 656 (workers' compensation). However, nothing in the bill amends any language in ORS chapter 656 itself. Accordingly, existing case law will likely continue to control whether a business is an independent contractor for purposes of workers' compensation law.

Practice Tip: Keep in mind that the new definition of an independent contractor differs from the 20-factor test used by the IRS.

EMPLOYMENT LAW

PAYMENT ON TERMINATION **ORS 652.140, ORS 652.150** **2005 Or Laws Ch 664 (HB 3319)**

HB 3319 amends ORS 652.140 and 652.150, altering the final-paycheck obligations and corresponding civil penalties when an employee has not given 48 hours' notice and the employee is responsible for maintaining time records. Within five days after the employee has quit, the employer must pay the employee the wages that the employer estimates are due and payable. Within five days after the employee has submitted time records, all wages earned and unpaid become due and payable. No civil penalty is available for any estimated payments that may be less than the amount actually owed, as long as the employer pays all wages earned within five days after the employee submits the time records.

The amendments apply to employment that terminates on or after the effective date, January 1, 2006.

EMPLOYMENT LAW

STATUTE OF LIMITATIONS – ORS 654.062 **2005 Or Laws Ch 198 (SB 237)**

SB 237 amends ORS 654.062 to clarify that a one-year statute of limitations applies in a civil suit filed by an employee or prospective employee for discrimination based on the exercise of workplace safety rights under ORS Chapter 654, unless an administrative complaint has been filed under ORS 659A.820. The bill does not change the existing 30-day timeline for filing a complaint with the Bureau of Labor and Industries (BOLI) or the 90-day timeline for BOLI to issue its determination. If an administrative complaint is filed, the employee has

90 days from the issuance of a right-to-sue letter to file a civil suit.

The amendments apply to conduct giving rise to a cause of action that occurs on or after the effective date, June 9, 2005.

**WORKERS' COMPENSATION
PTD – ORS 656.206
2005 Or Laws Ch 461 (SB 386)**

SB 386 modifies several aspects of the permanent total disability (PTD) statute, ORS 656.206, including the standards for an award of PTD and for the termination of a PTD award. The bill amends the definition of “gainful occupation” and adds a definition for “regularly performing work.” A new subsection ORS 656.206(9) states that if a worker who has been awarded PTD benefits suffers a new injury, the worker’s compensation is limited to medical benefits and a permanent partial disability award for impairment.

The amendments apply to all claims for which a notice of closure is issued on or after the effective date, January 1, 2006.

**WORKERS' COMPENSATION
POSTPONEMENTS – ORS 656.283
2005 Or Laws Ch 624 (HB 2717)**

HB 2717 amends ORS 656.283 and provides that, except for limited circumstances described in section (b), hearings may not be postponed except in “extraordinary circumstances,” and must be reset no more than 120 days after the date of the postponed hearing. The effect is that most hearings must be set within 90 days of receiving the request for hearing. The bill also provides that the Workers’ Compensation Board (WCB) must give at least 60 days’ notice when setting a hearing. Cases that require expedited hearings are exempt from that 60-day notice. The parties may also waive the 60-day notice in other hearings if the waiver of notice will result in an earlier hearing date.

The amendments apply to requests for hearing made on or after the effective date, January 1, 2006.

**WORKERS' COMPENSATION
REVIEW OF DCBS – ORS 656.704
2005 Or Laws Ch 26 (HB 2091)**

HB 2091 amends ORS 656.704 and changes the procedure for review of decisions by the director of the Department of Consumer and Business Services (DCBS). Section 15 of the bill provides that if a party requests a hearing, the director will refer the request to the WCB, and the WCB will set a hearing before one of its administrative law judges (ALJs). The director will then review that order and issue a final order. In effect, the board’s ALJs will replace hearings officers.

Certain sections of the bill apply to hearings held on or after January 2, 2006; others apply to hearings held on or after January 2, 2008.

Practice Tip: Practitioners should remember that even though a WCB ALJ is issuing the order, the appeals process is not through the WCB. Appeal must be either to the director or to the court of appeals.

**WORKERS' COMPENSATION
OWN-MOTION
ORS 656.267, 656.278, 656.298
2005 Or Laws Ch 188 (HB 2294)**

HB 2294 amends ORS 656.267, 656.278, and 656.298 and changes the procedure for own-motion orders in several ways. First, it makes clear that the initial responsibility to accept or deny the condition for which the worker is seeking treatment and/or reopening rests with the insurer. Second, HB 2294 changes the right of appeal for all parties. The bill allows any party to request the court of appeals to review the WCB’s decision in an own-motion claim.

None of the changes affect the amount of benefits a worker would receive or extend the time period for receiving those benefits.

The amendments apply to all claims existing or arising on or after the effective date, January 1, 2006. However, they do not apply to any matter for which an order has become final before January 1, 2006.

WORKERS' COMPENSATION
INDEPENDENT MEDICAL EXAMINATIONS
2005 Or Laws Ch 675 (SB 311)

SB 311 mandates that specific rules and processes relating to independent medical examinations (IMEs) be adopted.

Some portions of the bill are effective January 1, 2006; other portions are effective July 1, 2006.

BUSINESS LAW
STAGGERED BOARDS OF DIRECTORS
ORS 60.317
2005 Or Laws Ch 92 (HB 2439)

HB 2439 amends ORS 60.317 to reverse a change made effective January 1, 2004, and permits Oregon business corporations to provide for staggered (or "classified") boards of directors in their bylaws, as well as in their articles of incorporation. The bill reinstates the effectiveness of staggered board bylaw provisions that were in effect as of January 1, 2004, and remained unamended through May 25, 2005. However, bylaws with staggered board provisions that existed on January 1, 2004, but were amended or repealed before May 25, 2005, are not reinstated. Corporations with such bylaws must adopt new bylaws effective on or after May 25, 2005, and hold new elections to reinstate their staggered boards.

Effective: May 25, 2005

TAXATION
NONPROFIT LIMITED LIABILITY COMPANY
2005 Or Laws Ch 688 (SB 283)

SB 283 enacts a new provision that allows a non-profit entity to hold real property in a limited liability company and still qualify for property tax exemptions that would otherwise be available to the nonprofit.

Effective: November 4, 2005. The bill applies to tax years beginning on or after July 1, 2006.

TAXATION
COMPOSITE RETURNS
2005 Or Laws Ch 387 (HB 2452)

HB 2452 enacts a new law authorizing pass-through entities to file composite tax returns on

behalf of nonresident individuals, corporations, or trusts. The bill requires tax withholdings at the highest marginal tax bracket for the taxpayer, based on the taxpayer's share of the taxable income of the pass-through entity.

The bill applies to tax years beginning on or after the effective date, January 1, 2006.

Practice Tip: Consider whether these rules should be addressed in your clients' shareholder agreements or operating agreements.

TAXATION
FEDERAL RECONNECT AND APPORTIONMENT
2005 Or Laws Ch 832 (SB 31)

SB 31 connects Oregon to the definition of "taxable income" as defined by the Internal Revenue Code (IRC) as of December 31, 2004, with a few exceptions. Oregon did not connect to the qualified production activities subtraction permitted under IRC §199, nor does it tie to the tax exemption for federal subsidies of employers' prescription drug plans. In addition, net operating losses continue to have their own set of rules under Oregon law. Furthermore, if a taxpayer elects to deduct sales taxes on the federal return, the deduction is an "add-back" item on the Oregon return. SB 31 provides for an ongoing "rolling reconnect" that allows for an automatic reconnect in future years to the IRC definition of "income tax."

The corporate apportionment factor for businesses operating in multiple states will change to 100 percent of sales for tax years beginning on or after July 1, 2005.

Effective: November 4, 2005

TAXATION

PASS-THROUGH ENTITIES – ORS 316.119 2005 Or Laws Ch 55 (HB 2454)

HB 2454 amends ORS 316.119 and prescribes a new allocation formula that applies to part-year resident and nonresident taxpayers who own an interest in a pass-through entity. Adjusted gross income of a part-year resident will now be allocated pro rata based on the number of days the individual was a resident or nonresident.

Effective: November 4, 2005. HB 2454 applies to tax years beginning on or after January 1, 2002, and other tax years for which returns are subject to appeal or to audit or adjustment by the Department of Revenue, or for which a claim of refund may be made.

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