

Legislature, construction industry miss opportunities

The failure to enact a task force's proposals is a setback for builders, consumers

For the construction industry, the 2007 Oregon legislative session was a missed opportunity. It was significant more for the bills that did not pass than for those that did.

Everyone in the building industry, particularly those who work in residential construction, is well aware of our defect litigation and insurance crisis. In the last 15 years, construction defect litigation has exploded, and liability insurance premiums for some contractors have skyrocketed. Many homeowners face huge repair costs, and some contractors have been forced out of business by claims and their inability to procure insurance.

The first significant attempt to address this problem through legislation occurred during the 2005 legislative session. The construction industry, primarily through the efforts of the Associated General Contractors, proposed legislation that would have shortened from 10 years to six years the statute of ultimate repose for construction defect claims.

Although that legislation failed, the 2005 Legislature set up a construction claims task force, which was charged with studying the defect and insurance crisis so it could report back to the 74th Legislature in 2007. The task force comprised nine members: four from the construction industry, two from the insurance industry, one employed in residential design, one employed by the Oregon Department of Energy and one attorney representing consumers.

The task force met 16 times, received more than 400 written submissions, took testimony from 30 experts and held five public comment sessions. The result was a nearly 100-page report that evaluated more than 80 possible recommendations and proposed the adoption of 11 specific recommendations, eight of which would have required formal legislative action. The House Committee on Consumer Protection sponsored bills to enact those eight recommendations.

The most significant recommendation was contained in House Bill 2656, which would have required individuals working on any aspect of a building envelope to seek a minimum level of training and be certified in building envelope work. And it would have required each construction project to employ a certified building envelope specialist responsible for inspecting and certifying the work. The task force approved this recommendation unanimously, and some task force members said this proposal had the best chance of reducing construction defect claims in Oregon.



CONSTRUCTIVE ADVICE

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Other task force recommendations that were proposed as legislation included expanding the Construction Contractor Board's enforcement powers (HB 2659), creating a limited consumer assistance fund (HB 2658), requiring improved consumer protection information (HB 2657), changing the permitting process for residential construction to clarify who is responsible for work under a permit (HB 2657), requiring a three-tiered warranty procedure for certain construction components (HB 2657), requiring contractors to carry completed operations coverage as part of their general liability insurance (HB 2654), promoting the creation of "wrap-up" owner- and contractor-controlled insurance programs (HB 2751), and increasing reporting requirements upon insurance carriers (HB 2781).

Of the House bills that contained the task force's recommendations, only two passed: HB 2654, requiring contractors to carry completed operations coverage, and HB 2751, promoting wrap-up insurance policies.

The most significant recommendation – that individuals and contractors working on a building envelope receive training and be certified – was defeated, largely through the efforts of the Oregon Home Builders Association.

Other special-interest legislation was proposed in the 2007 legislative session that would have affected the construction industry.

HB 2099, which was advocated primarily by the Associated General Contractors, proposed to shorten from 10 years to six the statute of ultimate repose for a large class of structures, and HB 2909, which was advocated primarily by the Oregon Trial Lawyers Association, proposed to extend the statute of ultimate repose for product liability claims – a type of claim that is of marginal significance in most construction litigation – from a fixed period of eight years to a flexible period tied to the product's useful life. Both of these bills failed to pass.

Although it's unlikely the various competing interests would

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agree on the specific causes of the defect and insurance crisis, most would agree these causes are numerous and complex. The solutions must therefore also be.

The work of the task force was the most meaningful approach to the crisis for a number of reasons. The task force included representatives from every group with a stake in the issue (contractors, owners and insurance representatives), it engaged in an extensive fact-finding and evaluation process, it received input from numerous experts, it sifted through more than 80 possible recommendations before agreeing upon 11, and it proposed a comprehensive solution. Of its 11 recommendations, nearly all were approved unanimously by task force members. In the end, the proposals of the task force were defeated by the lobbying efforts of special-interest groups that were, ironically, well repre-

sented on the task force.

If the efforts of the task force are to come to naught, attempts to find solutions to the defect and insurance crisis will suffer a serious setback. The most likely next step will be further special-interest legislative proposals favoring one party at the expense of another. Not only will this lead to contentious legislation, it will also likely result in simple and narrow proposals being advanced to solve a very complex problem.

The only reasonable approach to the construction defect and insurance crisis is to begin with the recommendations of the task force, find compromises that will work for all sides and then move forward with appropriate and comprehensive legislation consistent with those recommendations.

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