

RECENT CHANGES TO LAWS AFFECTING CONSTRUCTION CONTRACTS

By John T. Trout

Persons involved in the construction industry or with real estate in Minnesota should take note of the following legislative changes to the law, which take effect August 1, 2009.

Statutory Implied Warranties Have Become Mandatory Expressed Warranties. The statutory warranties for new construction and remodeling stated in Minnesota Statutes Chapter 327A ("Statutory Warranties") must now be included in all contracts for the construction of new homes or home improvements as expressed warranties. This amendment to the Statutory Warranties changes nothing with regard to the actual warranties that residential construction contractors must provide by law. The revision to the law does not change the warranty

period or change the nature of the work covered by the warranty. However, it does change the way the Statutory Warranties are presented to the owners. Under the new law, contractors must now communicate the terms of the Statutory Warranties to the owner in writing by including the Statutory Warranties in the contract for the work. The contractor may accomplish this either by inserting the Statutory Warranties in the contract document itself or by attaching a copy of the Statutory Warranties to the contract and making reference to the attachment in the contract and incorporating the warranty. The revised law fails to identify any specific penalties for the contractor's failure to include the Statutory Warranties in its contract. However, failure to comply with this law could subject the contractor to discipline by the Department of Labor & Industry and even jeopardize the contractor's license. For a copy of the new law regarding the Residential Warranty Statutes, see HF 420, Minnesota Session Laws, 2009, Chapter 91 at www.revisor.leg.state.mn.us/index.php.

Prompt Payment To Residential Subcontractors.

Minnesota Statute § 337.10, subd. 3 has been amended to require prime contractors to pay subcontractors and suppliers on residential projects within ten days from the prime contractor or general contractor's receipt of payment for the subcontractor's work. Prior to this amendment, prime contractors on commercial or government construction projects had to make payment to their subcontractor within 10 days of receiving payment for the subcontractor's work. However, on residential construction projects prime contractors were not required by statute to promptly pay their subcontractors or suppliers, even after they had received payment from the owner corresponding to the work materials supplied by the subcontractors and suppliers. Under the new law, all building and construction contracts shall be deemed to require that the prime


contractor make payment to its subcontractors and suppliers for all services and materials provided by the subcontractor or supplier for which the prime contractor received payment from the owner, unless the prime contractor has a reasonable basis for withholding payment. Unlike the revision to the residential warranty statute discussed in the preceding paragraph, this amendment to the prompt payment statute does not require that any new terms be included in the subcontract. But nevertheless, it is as binding as if it had been actually written into the contract. A circumstance where it might be considered reasonable for a prime contractor to withhold payment would be where the subcontractor's work is defective and the estimated cost to remedy the defects is withheld along with a modest percentage for unexpected costs. In the event the prime contractor fails without justification to make timely payment, the law further provides that the unpaid subcontractor or supplier shall be entitled to recover interest at the rate of 1-1/2 percent per month for any undisputed amounts not timely paid. Should a

subcontractor or a supplier prevail in a lawsuit against a prime contractor under the statute, the subcontractor or supplier would also be entitled to recover its attorney's fees and costs in pursuing payment. For a copy of the new law regarding prompt payment, see HF 1056, Minnesota Session Laws, 2009, Chapter 66 at www.revisor.leg.state.mn.us/index.php.

Civil Action Created Against Contractors Who Assert False Claims for Payment to Government Agencies. Minnesota Statutes Chapter 15C has been revised to enable private individuals to bring lawsuits against contractors who assert false claims for payment to government bodies in Minnesota.

The circumstances under which a contractor could be held liable are specifically stated and include fraud and other intentional wrongful acts. In the event such a lawsuit is successful, the person bringing the action may be entitled to recover its attorney's fees, costs, and other expenses incurred in pursuing the claim, as well as up to

30% of any damages recovered from the offending contractor. A contractor is not liable under the revised act merely for negligently or mistakenly asserting an inaccurate claim. The act provides that any person who commits any of the prohibited acts listed would be liable to the state for a civil penalty of between \$5,500 and \$11,000 per false claim, plus three times the amount of the damages the state suffered because of the false claim. For a copy of the new law regarding False Claims, see SF 2082, Minnesota Session Laws, 2009, Chapter 101 at www.revisor.leg.state.mn.us/index.php.

If you would like additional information regarding the above changes to the law or to discuss any other contractor related legal issues, please contact John T. Trout at (952) 746-2127. 

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"Green" Construction Builds Unknown Risks

By Sarah E. Fisher, Esq.

"Green" building has become increasingly popular as consumers look for ways to conserve resources, protect their health and, ultimately, save money. Cutting edge green building methods and products are no doubt exciting, but are too new to be used without first considering their unknown risks. Issues can arise from the performance of a particular system or product, or from a difference in the anticipated and actual return on a green build investment. A contractor who offers green build services should take care not to make representations to an owner client that could be interpreted as a warranty or a guarantee of either of these things.

A contractor should be aware that while he or she may speak of warranties in terms of a product manufacturer's warranty, that may not be what an owner hears. Instead, an owner may hear promises about the contractor's work. Contractors should be clear about this. Additionally, they should not state that a product will perform above-and-

beyond what the manufacturer warrants a product will do. Many new green products have not been around long enough to know their limits and may have limited, or even no, warranties as a result. If an owner is not comfortable taking on this risk, it would be wise to steer them toward more conventional building products and methods.

An owner often wants to invest in green building because of the related cost benefits. However, green building is still so new that there are no clear answers as to when one will see a return on the investment. Many green building approaches are designed to provide lower operating costs over the lifetime of a building, not necessarily in the first few years. Furthermore, how do you calculate a return on a green investment? Is it recouping the cost of installing the system? Of operating it? Or is it the collective benefit received from using the green building system in the context of the building as a whole? Contractors should be cautious when marketing their green building products and methods and avoid making express promises to their customers about specific costs savings. 



HELLMUTH & JOHNSON PLLC
ATTORNEYS AT LAW

10400 Viking Drive, Suite 500
Eden Prairie, Minnesota 55344

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HELLMUTH & JOHNSON PLLC

10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
T 952-941-4005 F 952-941-2337
www.hjlawfirm.com

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Please help us welcome the following attorneys:

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Michael Viola- Real Estate

You can learn more about them at www.hjlawfirm.com

APPOINTMENTS

Erik F. Hansen has been reappointed to the Minnesota Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure for a three year term. Barton C. Gernander has been reappointed to the MSBA Court Rules and Administration Committee.

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