HELLMUTH & JOHNSON PLLC
ATTORNEYS AT LAW

THE AUTHORITY
SPRING 2011 NEWSLETTER

CONSTRUCTION

Contract Updates

By: Blake R. Nelson, Esq.

Recent laws that became effective on August 1, 2010 and January 1, 2011 require new provisions and disclosures be incorporated into residential construction contracts. Below is a survey of the new required provisions, followed by a list of additional recommended contractual provisions. Please contact attorney Blake Nelson with any questions or to discuss revisions to your contracts.

NEW REQUIRED PROVISIONS

As of January 1, 2011, the following must be contained or incorporated into a general contractor's agreement with its customers:

1. Performance Guidelines:

a. Minn. Stat. §326B.809 (b) requires that effective January 1, 2011, residential construction contracts must contain "performance guidelines" that apply to the work to be performed. However, the statute does not specify what those guidelines must be.

b. There are a number of published construction guidelines that could be used. One option is the document currently published by the Builders Association of Minnesota.

2. Warranty Statute:

a. Minn. Stat. §327A.08 requires that the customer be provided with a complete copy of Minnesota Statutes Chapter 327A, the law that covers mandatory warranties that the contractor owes to the customer on residential projects. It is not enough to refer to the warranty law in the contract – a complete copy of the law must be provided as part of the contract.

3. Dispute Resolution:

a. Minn. Stat. §327A.051 became effective on January 1, 2011. It requires that a general contractor and a homeowner participate in mandatory pre-litigation dispute resolution over warranty claims.

    i. A warranty claim would be something that comes up after the construction project is completed. The contractor must warrant its work as described in Chapter 327A.

    ii. If a customer asserts a warranty claim in the future and the parties cannot resolve it, the new provisions of §327A.051 require the parties to mediate the dispute through a neutral appointed through the Minnesota Department of Labor of Industry ("DOLI").

b. However, the new law states that the parties may "opt out" of using the DOLI for the dispute resolution process and may use their own agreed upon mediation process.

c. If a contractor "opts out" it will need to insert its own prelitigation dispute resolution clause in its contract.

4. Notice of Cancellation (applicable only to roofing jobs covered by insurance proceeds):

a. Minn. Stat. §326B.811 became effective August 1, 2010, and applies only to contractors that are providing roofing work related to an insurance claim.

b. If the contract relates to a roofing job potentially covered by an insurance claim, the contractor must provide the homeowner with two copies of a “Notice of Cancellation” form. The form advises the homeowner that if the insurance claim is denied, the homeowner has 72 hours to cancel the contract.
c. A statutory provision must also be inserted in the contract in at least 10-point and bold type referring to the Notice of Cancellation right and forms.
d. Even if your contract already states that it is null and void if the insurance claim is denied, you still must comply with this new law and provide the required language in your contract and two copies of the Notice of Cancellation form.

5. Lead Paint Disclosures:

a. Recent Environmental Protection Agency (“EPA”) guidelines require any contractor working on homes built before 1978 to be certified to deal with remediation, removal and disposal of materials covered by, containing, or affected by lead paint.
b. As part of any contract for work on a pre-1978 home, the property owner must acknowledge receipt of information regarding the EPA rules, the hazards of lead paint, etc. While this requirement can be cancelled by inserting a clause in the contract, it is recommended that the customer also sign a separate acknowledgement. A standard document called the Lead Hazard Pre-Renovation Disclosure Acknowledgement (“LHPDA”) can be referenced in the contract and attached as an exhibit.

RECOMMENDED PROVISIONS

The following provisions are recommended to be included in the contract, but are not specifically required under the recent law changes:

1. Attorneys Fees/Costs of Collection:

Minnesota law states that a party may recover its attorneys’ fees and costs incurred in pursuing collection of an account or otherwise enforcing a contract only if:

a. A statute provides for recovery of such attorneys’ fees and costs. Only the following statutes allow for this:
  i. Lien or Bond Claim: Minn. Stat. Chapter 514 regarding mechanic’s liens (private jobs) and Chapter 574 regarding bond claims (public jobs) allow for recovery of attorneys’ in connection with enforcing a mechanic’s lien, but any such recovery is entirely within the discretion of the court.
  ii. Prompt Payment: Minn. Stat. §337.10 requires a general contractor to pay undisputed amounts to subcontractors and suppliers with 10 days after the general contractor receives payment from its customer. The subcontractor or supplier may recover attorneys’ fees and interest if they prevail in a civil action against the general contractor.
b. The contract between the parties allows for such recovery.
c. Absent a statute or contract authorizing recovery of attorneys’ fee and costs, all parties must pay their own expenses. Therefore, all contracts should contain an attorneys’ fees and collection cost clause.

2. Pre Lien Notice:

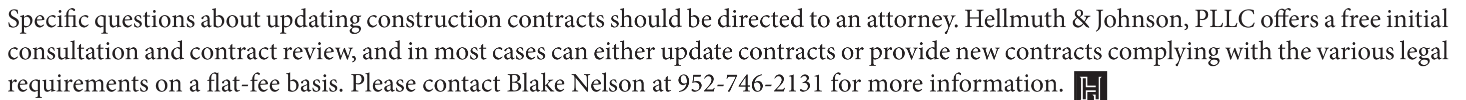
d. Minn. Stat. §514.011 requires a notice be given to the residential property owner advising them that the general contractor, subcontractors or suppliers could file mechanic’s liens if the owner does not pay for the work.
e. The notice must be contained in the written contract.
  i. There is a provision in the statute that contemplates sending the pre-lien notice by certified mail or personally serving it within 10 days after reaching a verbal agreement with the property owner.
  ii. However, a licensed general contractor is required by Minnesota law to have a written contract with its customers, so there should never be a situation where a licensed contractor is mailing a pre-lien notice when it is in direct contract with a homeowner.
  iii. In most cases, if you have a written contract and do not include the pre-lien notice language, then you may not later enforce a mechanic’s lien against the property if the customer fails to pay in full.
f. Statutory Provision: The text must be verbatim per the statute and cannot be altered, and must appear in the contract in at least 10-point and bold type:
(A) Any person or company supplying labor or material for this improvement to your property may file a lien against your property if that person or company is not paid for the contributions;
(B) Under Minnesota law, you have the right to pay persons who supplied labor or material for this improvement directly and deduct this amount from our contract price, or withhold the amounts due them from us until 120 days after completion of the improvement unless we give you a lien waiver signed by persons who supplied any labor or material for the improvement and who give you timely notice.

3. Recommended Disclaimers

a. Hazardous Materials and Other Hidden Conditions
b. Formaldehyde
c. Mold
d. Soil
e. Level and Plumb Conditions
f. Customer’s Personal Property
g. Delays
h. Customer-directed work

4. Miscellaneous

a. Terms applying to insurance related work
b. Liquidated Damages/Limits on Damages
c. Use of toilet, electricity, etc.
d. Defining "Substantial Completion"



Specific questions about updating construction contracts should be directed to an attorney. Hellmuth & Johnson, PLLC offers a free initial consultation and contract review, and in most cases can either update contracts or provide new contracts complying with the various legal requirements on a flat-fee basis. Please contact Blake Nelson at 952-746-2131 for more information.

H&J Adds New Attorneys

Hellmuth & Johnson, PLLC is pleased to announce that Katheryn Andresen, Edward Beckmann, and Michael McNamara have joined the firm.

Kate Andresen joins the firm as Partner and has over 15 years of experience in the areas of information technology, eCommerce, intellectual property and general corporate law.

Ed Beckmann has represented parties involved in disputes arising from several industries, including aviation, construction, energy, reinsurance and others. He is also uniquely qualified to represent individuals and businesses whose reputations have been tarnished by libel, slander, or exposure of private information.

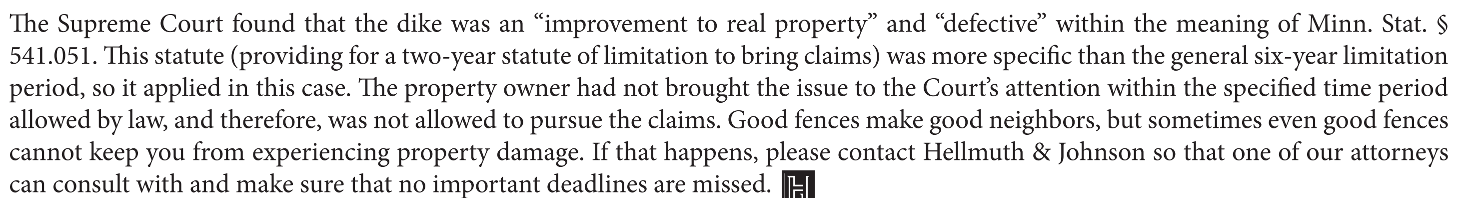
Michael McNamara practices in the firm's litigation and insurance practice groups. Michael received his law degree from William Mitchell College of Law and is licensed to practice in the State of Minnesota.

To learn more about our new attorneys, please view their biographies on our website at **www.hjlawfirm.com**.

When It's Not Such A Beautiful Day In The Neighborhood

By: Jillian K. Duffy, Esq.

In his poem "Mending Wall" the American Poet Robert Frost pens the phrase "Good fences make good neighbors." This sentiment - that proper boundaries keep relationships between neighbors healthy - may be true, but there are many instances when those boundaries are crossed and issues arise that neighbors need to address with one another quickly and directly. A recent ruling by the Minnesota Supreme Court in Minch Family LLP v. Estate of Norby, 2010 WL 189301 (D. Minn. 2010) underscores the importance of dealing with property issues between neighbors sooner rather than later. In this case, a neighbor built a dike which caused flooding to the property owner's property. The flooding went on for several years before the property owner sued the neighbor. The property owner asserted various claims including trespass, nuisance, and negligence based on the flooding. The neighbor brought a motion before the court to dispose of this case in its entirety arguing that the property owner's claims were time-barred by either the two-year statute of limitations for defective improvements to property or by the six-year statute of limitation for trespass and nuisance.



The Supreme Court found that the dike was an "improvement to real property" and "defective" within the meaning of Minn. Stat. § 541.051. This statute (providing for a two-year statute of limitation to bring claims) was more specific than the general six-year limitation period, so it applied in this case. The property owner had not brought the issue to the Court's attention within the specified time period allowed by law, and therefore, was not allowed to pursue the claims. Good fences make good neighbors, but sometimes even good fences cannot keep you from experiencing property damage. If that happens, please contact Hellmuth & Johnson so that one of our attorneys can consult with and make sure that no important deadlines are missed.

This newsletter provides general information on legal matters, and should not be relied upon as legal advice. A qualified attorney must analyze the relevant facts and apply the applicable law to provide specific legal advice. If you require legal advice or want additional information regarding the services we offer, please contact David Hellmuth at 952-941-4005 or dhellmuth@hjlawfirm.com.

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