STATE OF MINNESOTA CONSTRUCTION LAW COMPENDIUM

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COMPENDIUM OF MINNESOTA CONSTRUCTION LAW[1]

I. BREACH OF CONTRACT

In Minnesota, the measure of performance in a construction contract is "substantial performance." Substantial performance means performance of all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering the cost of remedying the same can be made from the contract price. Deviations or lack of performance which are either intentional or so material that the owner does not get substantially that for which he bargained are not permissible. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 18 (Minn. 1982). In situations where the contractor deviates from the plans and specifications or otherwise fails to meet the express terms of the contract, the owner cannot later claim breach of contract if he was aware of and acquiesces to those deviations. *See Northern Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 211 N.W.2d 159 (1973). Oral contracts for construction are enforced in the same manner as written contracts. *See Bierlein v. Ganon*, 96 N.W.2d 573 (Minn. 1959).

An owner has the right to expect that the contractor will perform its work in a workman-like manner using accepted standards practiced by competent workmen in the community. Even when a contract does not expressly require the work to be done in a workman-like manner, the Minnesota Supreme Court held that it is implied in the contract. *See Robertson Lumber Co. v. Stephen Farmers Co-op. Elevator Co.*, 143 N.W.2d 622 (1966).

There are exceptions to the owner's right to receive substantial performance under a construction contract. For instance, when the contract is based upon a "mutual mistake of material fact," the contractor is relieved of his duty to continue performance once the mistake is recognized and entitled to payment for performance already rendered. *See Zontelli & Sons, Inc. v. City of Nashwauk*, 373 N.W.2d 744 (Minn. 1985). A contractor is also relieved of its duty to perform when performance is "commercially impracticable" in the sense that performance would cast upon the promisor an excessive or unreasonably burdensome hardship, loss, expense, or injury. *See National Farmers Union Property & Cas. Co. v. Fuel Recovery Co., Inc.*, 432 N.W.2d 788 (Minn. Ct. App. 1988). Accordingly, under this scenario the contractual obligations of the parties may be discharged.

In addition to a typical breach of contract claim, an owner can seek damages for anticipatory breach. While a contract typically cannot be breached until the date of performance arrives, if one of the parties announces an intention not to perform his

obligations under the contract, the courts treat this as an anticipatory breach, which gives the non-breaching party an immediate cause of action. *See Dale v. Fillenworth*, 162 N.W.2d 234 (1968).

Breach of Express Warranty

Many contracts include provisions in which the contractor guarantees that his work will conform to certain plans and specifications. To enforce this warranty, the owner usually retains the right to demand correction of defective work, withhold payment equal to or in excess of the cost of remedying defective work, or correct un-remedied defective work and charge the contractor the cost of correction.

The duty to warrant performance must be expressly written in a contract; warranty cannot arise solely by implication. In other words, the duty under an express warranty is solely contractual. *See Sterling Capital Advisors, Inc. v. Herzog,* 575 N.W.2d 121 (Minn. Ct. App. 1998).Express warranties are considered terms that have been "dickered" out and go directly to essence of the bargain; and because an express warranty is basic to an agreement, a general disclaimer is ineffective. *See St. Croix Printing Equip., Inc. v. Rockwell Intern. Corp.*, 428 N.W.2d 877, 8 UCC Rep. Serv.2d 1009 (Minn. Ct. App. 1988).

Residential contractors must provide certain warranties to buyers and subsequent owners that the home will be free from defects relating to: defective materials or workmanship (1 year); faulty installation of the electrical, mechanical and plumbing systems (2 years); and "major construction defects due to non-compliance with building standards"(10 years). *See* MINN. STAT. § 327A.02 (2015). A homeowner's right to receive this written warranty cannot be waived or modified by the contract terms. *Id.* § 327A.08(e) (2015). Notwithstanding, even if the contractor fails to provide a consumer with the warranty information, it will still be implied and enforced by the courts. *Id.* § 327A.08(d),(c) (2015). In order to make a valid warranty claim, plaintiffs are required to provide the contractor with written notice of a warranty claim within 6 months of the discovery of damage, or if written notice is not provided, plaintiff must prove that the contractor had actual notice of the claim within the 6-month period. MINN. STAT. § 372A.03 (2015)

Breach of Implied Warranty

Even if the contract does not contain an express warranty, courts imply a warranty that the contractor will perform its work in a reasonably good and workman-like manner. *See Robertson Lumber Co. v. Stephen Farmers Co-op*. *Elevator Co.*, 274 Minn. 17, 143 N.W.2d 622 (1966).

A contractor is also entitled to rely on an implied warranty from the owner with respect to that the plans and specifications. An owner furnishing contract documents to prospective bidders impliedly warrants the accuracy and the suitability of the specified design, materials, and methods. An owner breaches this warranty if the representations are inaccurate or if the plans and specifications are otherwise deficient. *See Erie A. Carlstrom Constr. Co. v. Indep. Sch. Dist. No. 77*, 256 N.W.2d 479 (Minn. 1977).

Minnesota does not extend implied warranties to a subsequent purchaser; the purchaser must have privity with the builder. *See Tereault v. Palmer*, 413 N.W.2d 283 (Minn. Ct. App. 1987); *Filipiak v. Drake Contsr., Inc.*, 1997 WL 785702 (Minn. Ct. App.1997).

II. NEGLIGENCE

Negligence is a typical tort claim made in the construction defect context. However, the relationship between the owner and contractor is typically based on the terms and conditions of a contract, and therefore, contractual provisions often exist that bar the assertion of a tort claim. *See Otis Elevator Co. v. Don Stodola's Well Drilling Co Inc.*, 372 N.W.2d 77 (Minn. Ct. App. 1985). Such provisions do not prevent a contractor from asserting a tort claim against parties not in privity to the contractual relationship, such as a design professional.

Certain tort claims against design professionals may be barred by the economic loss doctrine, which provides that design professionals are not liable in negligence for purely economic damages a contractor suffers because there is no privity of contract. *See Dakota Gasification Co. v. Pascoe Bldg. Sys., a Div. of Amcord, Inc.*, 91 F.3d 1094, (8th Cir. 1996). However, Minnesota does allow the recovery of economic damages when they accompany personal injury or damage to other property. *See D & A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. Ct. App. 1984). Furthermore, where a contract between parties is predominantly for services, economic losses are recoverable under a negligence theory. *See Prichard Bros., Inc. v. Grady Co.*, 428 N.W.2d 391 (Minn. 1988).

In Minnesota, architects and engineers owe owners a duty at common law and under contract to perform their duties with reasonable care. *See City of Eveleth v. Ruble*, 302 Minn. 249, 225 N.W.2d 521 (1974). "Reasonable care" means the skill and judgment which can be reasonably expected from similarly-situated professionals. The reasonable skill and judgment expected of professionals must be rendered to those who foreseeably rely upon those professional services. *See Waldor Pump & Equipment Co. v. Orr-Schelen-Mayeron & Associates, Inc.*, 336 N.W.2d 375 (Minn. Ct. App. 1986). Minnesota requires that the party asserting a claim against a design professional consult with an expert prior to bringing its claim

and that expert must be of the opinion that the design professional failed to meet the standard of care. *See* MINN. STAT. § 544.42 *et seq*. (2015).

Minnesota also recognizes the right of third parties, particularly contractors and subcontractors, to bring claims for purely economic loss against architects and engineers for negligence in designing and administering construction projects. *See Waldor Pump & Equipment Co. v. Orr-Schelen-Mayeron & Assoc., Inc.*, 386 N.W.2d 375 (Minn. Ct. App. 1986). While the architect and engineer's duty to use reasonable care is a common-law duty, the express terms of the contract between them and the owner will frequently define the boundaries of that duty.

Violation of applicable building codes may be considered "negligence per se" if the persons harmed from that violation are within the intended protection of the code provisions at issue and the harm suffered is of the type that was meant to be prevented by the code. *See Alderman's Inc. v. Shanks*, 536 N.W.2d 4 (Minn. 1995).

III. MISREPRESENTATION AND FRAUD

On rare occasions, owners bring claims for misrepresentation and fraud against contractors for defective construction.

The required elements of a fraud action are: (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge, (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false, (3) with the intention to induce another to act in reliance thereon, (4) that the representation caused the other party to act in reliance thereon, and (5) that the party suffer pecuniary damage as a result of the reliance. *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520 (Minn. 1986).

A negligent misrepresentation is made when the person making the representation has not discovered or communicated certain information that the ordinary reasonable person in his or her position would have discovered or communicated. Proof of the subjective state of the misrepresenter's mind, whether by direct evidence or by inference, is not needed to prove negligence. Negligence is proved by measuring one's conduct against an objective standard of reasonable care or competence. *See Florenzano v. Olson*, 387 N.W.2d 168 (Minn.1986).

Both fraud and misrepresentation claims are torts based upon the duty to provide accurate and truthful information. Unlike fraud, negligent misrepresentation does not require an intention to deceive. *See L & H Airco., Inc. v. Rapistan Corp.*, 446

N.W.2d 372 (Minn. 1989). Negligent misrepresentations claims are frequently asserted against owners and consulting architects/engineers by contractors and subcontractors who receive information to provide a bid or perform work. These claims are less frequently asserted by owners against contractors. Nonetheless, misrepresentation and fraud are available theories to recover against contractors in limited circumstances.

Moreover, a contractor that asserts false claims to public bodies in Minnesota may be held liable for a cause of action. The penalties include civil as well as tremble damages. Private plaintiffs are authorized to bring this type of action on behalf of the State and then share in any recovery from the contractor. *See* MINN. STAT. §§ 15C.01-16 (2015).

IV. STRICT LIABILITY CLAIMS

Minnesota does recognize strict liability claims in construction defect cases. Under the strict liability theory, plaintiffs must show (1) that the product purchased was in a defective condition unreasonably dangerous for its use, (2) that such defective condition existed when the product left the hands of defendant, and (3) that the defect was the proximate cause of the injury.

Furthermore, Minnesota has held that buildings and homes are considered "products" for purposes of strict products liability. *See Quality Homes v. Bituminous Cas. Corp.,*355 N.W.2d 746 (Minn. Ct. App. 1984); *Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am.,* 323 N.W.2d 58 (Minn.1982); *Home Indem. Co. v. Miller,* 399 F.2d 78 (8th Cir.1968).

V. INDEMNITY CLAIMS

Express Indemnity

Contractual (or express) indemnity allows the parties to bargain for the responsibility to pay for damages before any liability arises. Contractual indemnity is used to allocate the risk of damages among the various parties involved in the project without examining which party's negligence actually caused the injury. The effectiveness of indemnification provisions is limited by many statutes which may render indemnification agreements unenforceable to the extent that they attempt to shift liability from a negligent party to a non-negligent party.

An indemnity provision protecting a contractor from its own negligence will be strictly construed, and indemnification will not be found unless the intent is clearly and unequivocally expressed. *National Hydro Systems v. M.A. Mortensen Co.*, 529 N.W.2d 690, 694 (Minn. 1995).

Generally, agreements in building and construction contracts to indemnify a party from liability caused by its own negligence are not enforceable. MINN. STAT. § 337.02 (2015). However, there are certain narrow exceptions where a party can agree to indemnify another for vicarious liability and indemnity through worker's compensation insurance and certain project specific insurance policies such as builders risk polices and contractor controlled policies. *See* MINN. STAT. § 337.05 (2015).

Implied Indemnity

In situations where the parties either have indemnity provision in their contract or do not have contractual privity, the theory of implied indemnity may apply. Equitable or common-law (or implied) indemnity is based on fairness and allows the party that may be legally required to pay for damages to shift that burden to the negligent party that actually caused the damage or injury. Indemnity is the remedy securing the right of a person to recover reimbursement from another for the discharge of a liability which, as between himself and the other, should have been discharged by the other. *Hendrickson v. Minnesota Power & Light Co.*, 104 N.W.2d 843, 846 (1960)

The right of one defendant to indemnity from another depends upon existence of a relationship between the two whereby a negligent act of the indemnitor is responsible for the liability of the indemnitee. *See Larsen v. Minneapolis Gas Co*., 163 N.W.2d 755 (1968).

VI. STATUTE OF LIMITATIONS/STATUTE OF REPOSE

If a claimant fails to commence an action within two years of discovering the injury or damage, the action is barred under Minnesota Statutes § 541.051. The two-year limitation begins to run on improvements to real property when the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered, an injury sufficient to entitle him or her to maintain a cause of action. MINN. STAT. § 541.051 (2015). Knowledge of all potential defects is not necessary, nor is it necessary for the plaintiff's final or ultimate damages to be known. *See Fiveland v. Bollig & Sons, Inc.*, 436 N.W.2d 478 (Minn. Ct. App. 1989); *Continental Grain Co. v. Fegles Const.Co.*, Inc., 480 F.2d 793 (8th Cir. 1973).

Further, there can be no cause of action more than ten years after substantial completion of the construction unless the injury is discovered in year nine or ten, and the claim is brought within two years of discovery. No claim can exist more than twelve years after substantial completion. MINN. STAT. § 541.051 (2015). Date of substantial completion is determined by the date when construction is sufficiently

completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose. *Id.*

VII. ECONOMIC LOSS DOCTRINE

In both property damage cases and cases of contractor default not involving property damages, the owner often is entitled to recover its consequential damages resulting from the contractor's breach. The Minnesota legislature codified the economic loss doctrine:

> "Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort."

MINN. STAT. § 604.10(a) (2015).

With the enactment of Minnesota Statute § 604.10, courts and litigants can no longer assume that the applicability of the U.C.C. to a contract automatically precludes recovery in tort. Indeed, the Eighth Circuit Court of Appeals has interpreted § 604.10 as not applying to hybrid contracts involving both goods and services. Furthermore, economic losses arising out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under tort theories of negligence or strict products liability. This rule also extends to economic losses resulting from a sudden and calamitous occurrence or accident. Recovery in negligence is also allowed for economic losses resulting from negligent performance of professional services. However, economic losses resulting from a "mix of goods and services" commercial transaction are not recoverable in negligence or products liability because the transaction is governed by the warranty provisions in the U.C.C. *See Valley Farmers' Elevator v. Lindsay Bros. Co*., 380 N.W.2d 874, (Minn. Ct. App. 1986).

VIII. EMOTIONAL DISTRESS CLAIMS

Although rarely pled in construction cases, a claim for emotional distress requires the plaintiff endure conduct that is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community, and is so severe that no reasonable man could be expected to endure it." *See Anderson v. Morris Excavating, Inc.,* 1995 WL 407436 (Minn. Ct. App. 1995). In addition, to prove negligent infliction of emotional distress, one must show that he or she is "within a zone of danger of physical impact, reasonably fears for his or her own person safety, and consequently suffers severe emotional distress with resultant physical injury." *Id.*

IX. RECOVERY

Direct and Consequential Damages

Under Minnesota law, the damage award for a breach of a construction contract should place the plaintiff in the position it would have been had the contract had been performed. *Johnson v. Garages, Etc., Inc.*, 367 N.W.2d 85, 86 (Minn. Ct. App. 1985). Minnesota follows the traditional *Hadley v. Baxendale* rule for consequential damages flowing from a breach of a construction contract, wherein non-breaching parties are entitled to recover damages "sustained by reason of the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach." *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983).

The owner that is damaged by a breach of contract is entitled to recover either the cost of reconstruction in accordance with the contract, if this is possible without unreasonable economic waste, or the difference in the value of the building as contracted for and the value as actually built, if reconstruction would constitute unreasonable waste. *Id*. at 102. If the owner elects the reasonable cost of repair or restoration, it can collect any difference between the original value of the property and the value after repairs. However, the owner may not receive an amount which would make the project better than what was originally promised. *See Gess v. Sill*, 251 N.W.2d 650 (1977).

Diminution in Value

The Minnesota courts have held that where there has been a substantial good-faith effort by the contractor to perform the contract for construction of a residence, but there are defects of such a nature that the contract has not been performed according to its terms and the defects can be remedied without the destruction of a substantial part of the building, the owner is entitled to recover the cost of making the work conform to the contract. *See Rands v. Forest Lake Lumber Mart, Inc.*, 402 N.W.2d 565 (Minn. App. 1987). However, where it appears that the cost of remedying the defects is grossly disproportionate to the benefits to be derived thereof, the owner is entitled to recover the difference between the value of the property as it would have been if the contract had been performed according to its terms and the value in its condition as constructed. *See H.P. Droher and Sons v. Toushin*, 85 N.W.2d 273 (1957).

Economic Waste

The owner's right to repair and replace defective work is limited by the doctrine of economic waste. An owner cannot require the removal and replacement of non-

conforming work if the work substantially complies with the specifications and its replacement would be unreasonable or economically wasteful. If the value of the completed structure is not measurably less than the structure promised, or if the removal of the structure would result in "unreasonable economic waste," the party involved may only be entitled to the equivalent of nominal damages, or minor repair, and not removal of the entire structure. *Johnson v. Garages, Etc., Inc.*, 367 N.W.2d 85, 86 (Minn. Ct. App. 1985). Moreover, where the cost of reconstruction exceeds the original cost of construction, the Minnesota Supreme Court found economic waste and held that the appropriate measure of damages was diminution in value. *See Asp v. O'Brien,* 277 N.W.2d 382 (Minn. 1979).

Delay Damages

If a contractor is delayed in completing its work due to the actions of the owner, it is entitled to recover delay damages based on the principle that every contract contains an implied condition that each party will not unjustifiably hinder the other from performing. *See Zobel & Dahl Const. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984). The party asserting a delay claim carries the burden of establishing that the delay sustained was causally related to the actions of the other party is on the party asserting it. *See Northern Petrochemical Co. v. Thorsen & Thorshov*, Inc., 211 N.W.2d 159 (1973); *McCree & Co. v. State*, 91 N.W.2d 713 (1958).

Loss of Use

Loss of use damages are allowable if the loss of use is a direct result of the breach and such damages are within the contemplation of the parties at the time they enter into the contract. *See Northern Petrochemical Co.,* 211 N.W.2d 159 (1973). An owner can also recover for partial loss of use. *See Marshall v. Marvin H. Anderson Const. Co*., 167 N.W.2d 724 (1969).

Attorney's Fees

Attorney's fees are generally not recoverable unless there is an express contract provision or statutory right to such a recovery. *Besemer v. Bd. of Cnty. Comm'rs, Brown Cnty.*, 357 N.W.2d 365, 368 (Minn. Ct. App. 1984) A trial court has the discretion to award attorney fees to a contractor that is successful in proving its mechanic's lien. *C. Kowalski, Inc. v. Davis*, 472 N.W.2d 872, 878 (Minn. Ct. App. 1991). Attorney's fees are recoverable under private attorney general statute if contractor or supplier violates one of Minnesota's consumer protection statutes. *See Eager v. Siwek Lumber & Millwork, Inc*., 392 N.W.2d 691, (Minn. Ct. App. 1986) (attorney fee recovery authorized under Minn. Stat. §§ 8.31, subd. 3(a) and 325F.69)

Expert Fees and Costs

The prevailing party in a district court action "shall" be allowed costs and reasonable disbursements. *See* MINN. STAT. §§ 549.02, 549.04 (2015). These costs and disbursements include services fees and court fees as well as statutory witness fees. The court also has the discretion to award expert witness fees, if it deems the expert's testimony necessary. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 482 (Minn. Ct. App. 2006).

X. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

The case law in the area of insurance coverage for construction claims is well developed. The purposes underlying insurance and public policy play an important role in the interpretation of policies in the context of construction claims. Insurers are presented with two duties: the duty to defend and the duty to indemnify. The duty to defend is broader than the duty to indemnify. The analysis begins with the insuring agreement.

Duty to Defend

Duty to defend case law in construction litigation, particularly with water intrusion cases, places the burden on the insurer to prove damage did not occur during the applicable policy period(s). *Donnelly Brothers Const. Co., Inc. v. State Auto Property and Cas. Ins. Co.*, 759 N.W.2d 651, 661 (Minn. Ct. App. 2009) (the court stated that for an insurer "to avoid the duty to defend, the record must clearly and convincingly establish that the on-set of insured-caused water-intrusion damage occurred outside the effective dates of [the] policy and that allocation is not appropriate"). Similarly, in *Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102 (Minn. Ct. App. 2005), the court noted:

> Here, all of the homeowners assert that due to defective construction by respondents during the time of appellant's coverage, water damage occurred. Since the faulty construction allegedly allowed water to seep into the homes, damage could have began when appellant's policies were in force. * * * Whether the damages in this case actually occurred within the policy coverage period is a question of fact that would have to be determined at trial. * * * If the appellant wants to avoid the expense of defending this action, it has the burden to show that there was no damage at the time its policy was in force.

Id. at 106-07.

Occurrence

To trigger coverage under the policy there must be an "occurrence." A complaint must therefore allege claims based upon negligence or breach of warranty. Moreover, faulty construction claims could satisfy the "occurrence" requirement if there was damage to other property. *See Bituminous Cas. Corp. v. Bartlett*240 N.W.2d 310 (1976); *Aten v. Scottsdale Ins. Co.*, 2006 WL 2990476 (D. Minn. 2006); *Ploetz v. Beaver Builders Supply, Inc.*, 1998 WL 865670 (Minn. Ct. App. 1998). Therefore, if the faulty workmanship results in damage to other property the "occurrence" requirement is satisfied. *See Ohio Cas. Ins. Co. v. Terrace Enters., Inc.*, 260 N.W.2d 450 (Minn. 1977); *Western National Mut. Ins. Co. v. Frost Paint & Oil Co.*, 1998 WL 27247 (Minn. Ct. App. 1998).

Property Damage

To the extent the policy's "occurrence" requirement is satisfied, in order to trigger coverage there must also be "property damage." Many policies will define "property damage" to include physical damage to tangible property and/or loss of use of tangible property. A determination of the whether the alleged damage falls within the policy definition is always required. Notwithstanding this determination, if the faulty construction does not damage anything other than the work itself, there is no "property damage" and thus no coverage. *See Wirig by Weir, Inc. v. Federated Mut. Ins. Co.*, 1996 WL 70037 (Minn. Ct. App. 1996). Moreover, there may also be damages that are ultimately claimed that may not meet the "property damage" requirement. *See Federated Mut. Ins. Co. v. Concrete Units, Inc.*, 363 N.W.2d 751, 756 (Minn. 1985) (holding "diminution in value" does not constitute property damage).

Timing

Even if there is a claim for "property damage" caused by an "occurrence" in order to trigger coverage, the "property damage" must occur during the policy period. To trigger a policy, "the insured must show that some damage occurred during the policy period." *Donnelly Brothers Const. Co., Inc. v. State Auto Property and Cas. Ins. Co.*, 759 N.W.2d 651, 656 (Minn. Ct. App. 2009) (*quoting Northern States Power Co. v. Fid. & Cas. Co. of N.Y., 523 N.W.2d 657, 663 (Minn. 1994)*).

Minnesota applies the "actual-injury" or "injury-in-fact" coverage-trigger rule to determine whether an occurrence activates insurance coverage. *In Re Silicone Implant Litig*., 667 N.W.2d 405, 415 (Minn. 2003). Under this rule, "the time of the occurrence is not the time the wrongful act was committed but the time the complaining party was actually damaged." *Singsaas v. Diederich*, 238 N.W.2d 878, 880 (1976). "[O]nly those policies in effect when the bodily injury or property damage occurred are triggered." *Silicone*, 667 N.W.2d at 415. Consequently, if the damage occurs outside

of the policy period, the policy does not provide coverage. *See Singsaas*, 238 N.W.2d at 880-81.

Minnesota law is currently unsettled as to whether only the policy on the risk when the damage first occurs must respond ("single trigger") or whether all the policies on the risk during any time when damage occurs must respond ("continuous trigger"). *See Kootenia Homes, Inc. v. Federated Mut. Ins. Co.*, 2006 WL 224162 (Minn. Ct. App. 2006) (f*aulty construction is a discrete identifiable event – single trigger*); *Westfield Ins. Co. v. Weis Builders, Inc.*, 2004 WL 1630871 (D. Minn. 2004); *Parr v. Gonzalez*, 669 N.W.2d 401 (Minn. Ct. App. 2003). More recently, in *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 291 (Minn. 2006) the Minnesota Supreme Court strongly implied (but did not decide) that a water intrusion claim involves a single trigger and only the policy on the risk when damage first occurs is obligated to respond.

Coverage for personal or advertising injury will rarely be implicated in the construction context. Most litigated disputes involve the coverage for property damage. Pure economic loss which is unaccompanied by any property damage is not covered.

The Business Risk Doctrine

Minnesota recognizes the business risk doctrine in determining coverage under CGL policies. In *Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am.*, 323 N.W.2d 58 (Minn.1982),the Minnesota supreme court looked at the coverage provided under the general liability policy for complete operations. Bor-Son was hired to construct an apartment complex. Bor-Son did not self-perform any work, instead it hired 15 different subcontractors to complete the construction. The court found that the damage, caused by the negligent work of a subcontractor, was within the work performed exclusion. Therefore, even though the work had actually been performed by subcontractors, the court held that Bor-Son, as general contractor, had adopted the work as its own. Thus, the risk of the subcontractors providing fauly work was a business risk assumed by Bor-Son and its insurer had no obligation to indemnify Bor-Son for the costs to repair the negligent work.
In
Knutson Const. Co. v. St. Paul Fire and Marine Ins. Co., 396 N.W.2d 229 (Minn. 1986) , the court discussed coverage for completed operation hazards. *Knutson*, like *Bor-Son*, involved a claim for coverage by a general contractor for damage caused by the faulty work of its subcontractors. Knutson argued that damage arising from the faulty work of its subcontractors should be covered because the work performed exclusion did not include the words "or on behalf of" and therefore expanded coverage. The court rejected this argument, stating that because Knutson undertook to furnish all materials and labor, it had a responsibility for all construction work—its

own as well as its subcontractors. The court held that all the work of the subcontractors merged into the general contractor's work product for which it was liable Thus, no coverage was triggered under Knutson's policies.

XI. MECHANICS' LIENS

A mechanic's lien provides special protection to contractors, subcontractors, suppliers, and others who work on a construction project. Minnesota's mechanic's lien law can be found in Minnesota Statutes Chapter 514.

One of the most important aspects of ensuring that a mechanic's lien is valid is pre-lien notice. If the pre-lien notice requirements are not met, there will be no lien. MINN STAT. § 514.011 The purpose of pre-lien notice is to protect owners from liens that were unknown to them and to give property owners fair notice of those working for the benefit of the owner because the owner has a right to pay those people directly.

Generally, a pre-lien notice is required of every contractor who enters into a direct contract with an owner for improvement to real property and has or will contract with subcontractors or material suppliers to provide labor, skill, or material for the improvement. The notice must be included in the written contract with owner or, if there is no written contract, must be given by separate notice delivered personally or by certified mail within 10 days after the work is agreed upon. The notice provided by the contractor must state as follows:

> (a) Any person or company supplying labor or materials 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 materials 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 gave you timely notice.

MINN. STAT. § 514.011 (2015).

Pre-lien notice is also required for subcontractors and material suppliers. The notice must be delivered to the owner personally or by certified mail no later than 45 days after the lien claimant has first furnished labor or materials for the project.

The notice provided by the subcontractor or material supplier must state as follows:

> This notice is to advise you of your rights under Minnesota law in connection with the improvement to your property.
>
> Any person or company supplying labor or materials for this improvement may file a lien against your property if that person or company is not paid for the contributions.
>
> We _____ (name and address of subcontractor) have been hired by your contractor _____ (name of your contractor) to provide _____ (type of service) or _____ (material) for this improvement. To the best of our knowledge, we estimate our charges will be _____ (value of service or material).
>
> If we are not paid by your contractor, we can file a claim against your property for the price of our services.
>
> You have the right to pay us directly and deduct this amount from the contract price, or withhold the amount due us from your contractor until 120 days after completion of the improvement unless your contractor gives you a lien waiver signed by me (us).
>
> We may not file a lien if you paid your contractor in full before receiving this notice.

Id.

If the property owner has been provided pre-lien notice and the lien claimant still has not been paid, the lien claimant may then commence the process of obtaining a lien on the subject property by filing and serving a mechanic's lien statement. Among other information, the mechanic's lien statement must include a property description, the name of the owner, the first and last dates of work, and the amount of the lien. *See* MINN. STAT. § 514.08 (2015).

Within 120 days from the last day of work, the mechanic's lien statement must be served personally or by certified mail on the owner. The statement also must be filed with the appropriate property records office in the county in which the property is located. Unless the lien statement is properly served and recorded as provided in the statute the lien will be invalid. *Id*. The lien will be invalid if the lien

claimant knowingly demands more in the mechanic's lien statement than is justly due. *See* MINN. STAT. § 514.74 (2015)

The lien claimant must commence its foreclosure action within one year from the date of its last item of labor, skill, or material contributed to improvement of the property. An otherwise valid mechanic's lien will expire and be unenforceable unless foreclosure is commenced within one year from the date of the lien claimant's last item of work. *See MINN. STAT*. § 514.12 (2015)