

**RESIDENTIAL CONSTRUCTION DEFECT CLAIMS:  
DEFENDANT'S PERSPECTIVE**

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What follows is intended to be an overview of the process and issues involved in defending a general contractor against claims for damages due to defective design, materials, and workmanship in residential construction.

## I. THE CLAIMS

### A. Background Information.

The Complaint is often defense counsel's first notice of the claim. But if the builder is insured and an adjustment process has been instituted before the matter was placed in suit there may be much more information available for review and counsel should obtain the insurance file as soon as possible. Be on the lookout for inspection reports, photographs, initial repair estimates, and recorded statements that can provide information useful in developing defense theories.

The construction file from the builder should also be obtained and reviewed as soon as possible, preferably before the Answer is due. Consider requesting an extension of time within which to submit the Answer to allow this to be accomplished, because the sales contract and construction specifications will contain important information that needs to be considered before developing defense theories. Especially to be considered are whether and to what extent contractual warranties beyond those contained in Minn. Stat. Chpt. 327A may have been extended, whether substitute warranties for the Chpt. 327A warranties may have been provided, identity of subcontractors and material suppliers, whether written contracts exist between the builder and subcontractors and material suppliers for the project, and whether a record of punchlist items and other warranty work after closing was maintained by the builder. A visit with the builder at

this stage of the investigation is also necessary to develop additional information about the claimants, the claims, any history of problems and complaints concerning the project, statements the claimants may have made in the nature of admissions, and other information that the paper files do not contain.

B. Theories Of Liability And Defense Considerations.

Most residential construction defect claims are set forth in Complaints with multiple counts including one or more (and sometimes all) of the following theories of recovery:

1. Breach of Contract.

Theory of Recovery:

Where the plaintiff is the original owner of the home and contracted with the Builder, this count will basically allege that because of the damages caused by the construction defects the plaintiffs did not receive the full benefit of their bargain and are therefore entitled to damages for the costs of repair or, where repairs are impractical or would constitute economic waste, to the diminution in value of the home. Less often but occasionally seen is a claim that a subsequent owner of the home is a “third party beneficiary” of the original contract and entitled to the same rights thereunder as the original homeowner.

As a theory of liability a breach of contract count has a certain appeal, but as a theory of recovery this appeal may be more limited because damages for breach of contract are more limited. The contract measure of damages is designed to give the non-breaching party the benefit of the bargain, and consequential damages are more limited.

*Lesmeister v. Dilly*, 330 N.W. 2d 95, (Minn. 1983). Also, damages for contractual breaches may not be covered under policies of general liability insurance that might otherwise be available to cover claims against the general contractor.

Defense Considerations:

Check the terms of the contract and the specifications. Determine the scope of the Builder's undertaking. A contractor which undertakes contractual duties may not agree to perform all of the responsibilities of a general contractor. *See, e.g., Oreck v. Harvey Homes*, 602 N.W.2d 424 (Minn. App. 1999) *rev. den.* (Minn. 1-25-2000). Certain aspects of the work and materials may have been reserved to the homeowner-buyer (for example, landscaping, deck, gutters and downspouts, security systems), which fall outside of the contractual undertaking. Remodeling and other work accomplished or contracted by the owner after taking possession may have caused or contributed to the claimed damages.

2. Breach of Express and Implied Warranties.

Theory of Recovery:

If the contract between the homeowner and the builder contains an express warranty of performance a breach of such a warranty could form a basis of liability to both the original homeowner and perhaps successors in interest on a third party beneficiary theory. And there is case law for the proposition that the construction and sale of a building carries with it an implied warranty of fitness for the purpose intended (at least where the plans and specifications are furnished by the builder) *Robertson Lumber Co. v. Stephen Farmers Coop Elevator Co.*, 143 N.W.2d 623 (Minn. 1996).

