

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

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## CONTENTS

Introduction	1
I. The Claims	1
A. Background Information	
B. Theories of Liability and Defense Considerations	2
II. Joinder of Parties	11
III. Insurance Coverage	12
IV. Investigation and Discovery	13
V. Alternative Dispute Resolution	16
VI. Trial Issues	19
Appendix	
BATC Performance Standards	Exhibit A
Jury Instructions	Exhibit B
Special Verdict Form	Exhibit C

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).

Whether and to what extent liability may be imposed under either of these theories are largely fact questions and case-specific. Questions about whether liability based on a breach of warranty is covered under a builder's comprehensive general liability policy could arise.

Defense Considerations:

Again, check the specific language of any express warranty. If it is time limited, argue that the warranty has been fulfilled. If the warranty requires compliance with specified procedures, as certain "substitute" warranties purchased by some Builders in place of the statutory new home warranties (such as the 2-10 Home Warranty Program and others) make sure that strict compliance with those requirements has been observed.

Check to see whether any common law implied warranty such as imposed in the *Robertson Lumber* case may have been excluded in the written contract. And, be aware that there are no implied warranties for the sale of used realty. *Frechtel v. Burbank*, 351 N.W. 2d 403 (Minn. App. 1984), *Tereault v. Palmer*, 413 N.W.2d 283, (Minn. App. 1987), *rev. den.* (Minn. 1987).

3. Breach of Minn. Stat. Chpt. 327A New Home Warranties.

Theory of Recovery:

The Chpt. 327A New Home Warranties are a species of implied warranty. They are implied by law in every contract for the sale of a new "dwelling" by the builder (the "vendor") and for certain remodeling projects. But there are procedural requirements to be complied with, and the warranties do not cover all damages, which may flow from defective construction. For example, these statutory warranties do not apply to:

- (a) Loss or damage not reported by the vendee or the owner to the vendor or the home improvement contractor in writing within six months after the vendee or owner discovers or should have discovered the loss or damage;
- (b) Loss or damage caused by defects in the design, installation, or materials which the vendee or owner supplied, installed, or directed to be installed;
- (c) Secondary loss or damage such as personal injury or property damage;
- (d) Loss or damage from normal wear and tear;
- (e) Loss or damage from normal shrinkage caused by drying of the dwelling or the home improvement within tolerances of building standards;
- (f) Loss or damage from dampness and condensation due to insufficient ventilation after occupancy;
- (g) Loss or damage from negligence, improper maintenance or alteration of the dwelling or the home improvement by parties other than the vendor or home improvement contractor;
- (h) Loss or damage from changes in grading of the ground around the dwelling or home improvement by parties other than the vendor or the home improvement contractor;
- (i) Landscaping or insect loss or damage;
- (j) Loss or damage from failure to maintain the dwelling or the home improvement in good repair;
- (k) Loss or damage which the vendee or the owner, whenever feasible, has not taken timely action to minimize;
- (l) Loss or damage which occurs after the dwelling or the home improvement is no longer used primarily as a residence;
- (m) Accidental loss or damage usually described as acts of God, including, but not limited to: fire, explosion, smoke, water escape, windstorm, hail or lightning, falling trees, aircraft and vehicles, flood, and earthquake, except when the loss or damage is caused by failure to comply with building standards;
- (n) Loss or damage from soil movement which is compensated by legislation or covered by insurance;
- (o) Loss or damage due to soil conditions where construction is done upon lands owned by the vendee or the owner and obtained by the vendee from

a source independent of the vendor or the home improvement contractor;

- (p) In the case of home improvement work, loss or damage due to defects in the existing structure and systems not caused by the home improvement. (Minn. Stat. Sec. 327A.03)

Defense Considerations:

Include as an affirmative defense in the Answer that the statutory warranties are limited by Section 327A.03. Review the facts carefully to determine whether it can be proved that the defect(s) complained of arose during the 1, 2, or 10-year warranty period as applicable. If not, argue that the warranties expired by the passage of time. *Koes v. Advanced Design, Inc.*, 636 N.W. 2d 352 (Minn. App. 2000) *rev. den.* and *Vlahos v. R&I Construction of Bloomington, Inc.*, 626 N.W.2d 672 (Minn. 2004) notwithstanding, there must be some point in time when a warranty limited to a specific duration must be deemed to have expired.

Also, find out what “building standards” apply to the claimed defect, and find out whether or not the building standards were followed. The phrase “building standards” does not necessarily mean the applicable Building Code, which is a health and safety code not a quality code. An example of what should qualify as “building standards” under this statute may be obtained from the National Association of Home Builders ([www.nahb.org](http://www.nahb.org) under “publications”, “performance guidelines”). The Builders Association of the Twin Cities also publishes a list of minimum performance standards that may be helpful to establish building standards in specific cases. A copy of the current BATC standards is included as Exhibit A to these materials. These standards are being revised; the revised standards will be published on the BATC website ([www.paradeofhomes.org](http://www.paradeofhomes.org)).

4. Breach of MCIOA Warranties.

Theory of Recovery:

Homes that qualify as part of a common interest community under the Minnesota Common Interest Ownership Act (Minn. Stat. Chpt. 515B) are entitled to assert causes of action for violations of express warranties as set forth in Section 515.4-112 of the Act and implied warranties set forth in Section 515.4-113. The express warranties generally hold the developer to make good on promises or affirmations of fact, which relate to individual units and improvements or use rights which directly benefit the purchaser or the unit. The implied warranties create warranties of good condition, suitability for use, conformance with applicable law, and a warranty of quality under Section 515B.4-113

(b) (2) which provides that:

... any improvements subject to use rights by the purchaser, made or contracted for by the declarant, or made by any person in contemplation of the creation of the common interest community, will be (i) free from defective materials and (ii) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

Attorneys fees as well as damages are recoverable for a violation of these implied warranties (Sec. 515B.4-116).

Defense Considerations:

Defects specified in a writing separate from the purchase agreement may be disclaimed, as provided in Section 515B.4-114; check to see if the defects complained of may have been subject to such an agreement.

Section 515B.4-115 provides a six year statute of limitations for breach of the 4-112 express warranties and 4-113 implied warranties, but this period can be shortened to as little as two years by agreement of the parties as well; check to see whether such an

agreement exists. Note too that, if the 4-112 and 4-113 warranties do not explicitly extend to future performance or duration, the cause of action for breach accrues at the time of purchase or occupancy of the unit and the cause of action must be asserted within the limitations period (Sec. 515B.4-115). In effect, then, the limitations period controls the duration of the warranty.

Finally, note that under Section 515B.4-113 the implied warranties of condition, suitability for use, and conformance with law specifically extend to the “units” in the development but that the implied warranty of quality extends to “any improvements subject to use rights by the purchaser.” Since the implied warranty of quality did extend to “units” under the predecessor statute to the MCIOA and since language was added in the present statute to clarify that the new home warranties under Minn. Stat. Sec. 327A were not abrogated by the Sec. 515B warranties it may be argued that the 515B.4-113 implied warranty of quality was meant to extend only to the common elements or improvements shared by the entire common interest community rather than the individual units themselves. So far no appellate court has considered this issue.

5. Negligence.

Theory of Recovery:

The failure to use reasonable care under the circumstances; duty, breach of duty, damages, causation. This familiar tort theory of recovery is available as a theory of liability in construction defect cases. The argument that a homeowner is limited to recovery on a breach of contract theory rather than a negligence theory (damages to the home being merely a species of “economic loss”) was rejected in *Arden Hills North*

*Homes Association v. Pentom, Inc.*, 475 N.W.2d 495 (Minn. App. 1991), *mod. & aff'd*. 505 N.W.2d 50 (Minn. 1993) where our state supreme court, quoting from earlier case law stated that:

There may be a breach of contract without negligence, but there may be negligence or wrongful acts or omissions in the performance of a contract. It seems to us to make no difference whether the duty to use due care is one imposed directly by law, or exists because of the contract relation of the parties. (475 N.W.2d at 500).

This observation notwithstanding, there is a difference in the types of damages allowed for tort which might not otherwise be recoverable on a contract or warranty theory.

Defense Considerations:

The defenses normally available in any negligence action are available in this situation as well. Pay particular attention to defenses dealing with the concepts of “duty”, “standard of care”, and “causation.” Case law establishes that a general contractor has a non-delegable duty to the customer to provide what is contracted for (*See, e.g. Brach v. Wesolowsky*, 138 N.W. 2d 619 (Minn. 1965) but that really says no more than what the contractor assumes as a duty under the contract.

The duty, which entitles a plaintiff to tort damages, is subject to proof of the standard of care in the industry. This standard must take into account the various responsibilities, which a general contractor assumes. Among other things, the general is responsible to meet with the customer to provide information about land availability, site considerations, material selections, and sometimes design plans; to take out the building permit and provide the plans to the local building official; to prepare the site for

construction; to order materials; to schedule the delivery of materials and sequence the work so that the process is completed in a timely fashion; to hire the subcontractors who will carry out the actual work; to keep the job site clean and safe for the workers; and to be resource for processing change orders and handling questions or disputes between the trades. But, in the absence of a specific undertaking to the contrary, the general is not responsible to supervise or control the manner, methods, or means of the work actually carried out by the subcontractors. *Mix v. City of Minneapolis*, 18 N.W.2d 130 (Minn. 1945); *Rausch v. Julius B. Nelson and Sons, Inc.*, 149 N.W.2d 1 (Minn. 1967). In fact, most subcontractors when deposed will admit that they are experts in their respective trades and that the general is entitled to rely on them to accomplish their work in a good and workmanlike manner, in compliance with all applicable codes and trade standards, without supervision or direction from the general.

6. Deceptive Trade Practices.

Theory of Recovery:

Plaintiffs often will plead a violation of the Deceptive Trade Practices Act, alleging that advertising or other representations of the builder are actionable under Minn. Stat. Sec. 325D.44 because the existence of defects proves that the home was not of the quality, standard, or grade represented. Monetary damages and attorneys fees are requested for the violation.

Defense Considerations:

Discovery should focus on whether the plaintiffs can prove the existence of any specific representations relied upon. Further, since only injunctive relief, not monetary

damages, is awardable for violation of this section (*see*, Minn. Stat. Sec. 325D.45 and *Asides v. Brown Inst. Ltd.*, 592 N.W.2d 468 (Minn. App. 1999) if plaintiffs seek only monetary relief dismissal of this count should be sought by motion.

7. Consumer Fraud.

Theory of Recovery:

Plaintiffs will often claim that the sale of the defective home violates Minn. Stat. Sec. 325F.69, claiming that the builder was guilty of fraud, misrepresentation, misleading and deceptive practices upon which he intended his customers to rely.

Defense Considerations:

Focus discovery on whether plaintiffs can point to any proof that the builder knew that the representations or statements concerning the quality of the construction and materials were false when made. Usually plaintiffs will admit that the builder did not intend to have a shoddy product built and they will not be able to point to any proof of fraudulent intent. Once admissions to that effect have been elicited this cause of action should be subject to dismissal on motion as well.

II. JOINDER OF PARTIES

A. Design And Engineering Professionals.

If investigation discloses that damages complained of were caused by defective design or other work of a licensed architect, engineer, land surveyor, or landscape architect such a party may only be joined in the action after an affidavit of expert review as required by Minn. Stat. Sec. 544.42 has been obtained.

B. Subcontractors, Manufacturers, And Material Suppliers.

In some cases a general contractor may run its own crews to perform some aspects of the construction, such as rough carpentry to frame the structure and install windows and doors, but in many cases the general contractor will subcontract all of the actual construction work to specialty contractors. If investigation discloses that the work of the specialty contractors was defective, or that materials used in the construction were defective, consideration should be given to joining the responsible parties as third party defendants for contribution or indemnity.

Although actions for contribution and indemnity could be initiated after resolution of the homeowner's claims against the builder, considerations of judicial economy, cost to the parties, and evidence spoliation issues more often than not dictate that all responsible parties should be joined to the action so that all claims can be resolved in one proceeding.

Common law contribution and indemnity are equitable remedies, designed to insure that no party pays more than its fair share of the damages caused by its fault. For a good discussion of the modern view of contribution, which relies more on the equitable nature of the remedy than on outdated concepts of "common liability" and other vestiges of pre-comparative fault days, see Justice Simonett's instructive opinion in *City of Walker v. Short-Elliott-Hendrickson*, 475 N.W.2d 73 (Minn. 1989).

III. INSURANCE COVERAGE

At the initial meeting with the general contractor, counsel should seek to identify all potential sources of insurance coverage for the client. Most often coverage will take

the form of a Comprehensive General Liability Policy issued by an insurer licensed to do business in the state. Other speakers will address the topic of insurance coverage in more detail. For present purposes it is sufficient to note that if the damages complained of can be traced to a specific identifiable event coverage under an occurrence based CGL policy will be afforded by the policy in effect at the time of that event. *In Re Silicone Implant Ins. Coverage Litigation*, 667 N.W.2d 405 (Minn. 2003).

However, if many “occurrences” over time combined to cause the damages complained of coverage may be afforded under a “pro rata by time on the risk” theory. *Northern States Power Co. v. Fidelity & Cas. Co. of New York*, 523 N.W.2d 657 (Minn. 1994); *Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W. 2d 724 (Minn. 1997). In that situation defense counsel must identify all policies potentially on the risk during the applicable period and tender the claims to all such insurers.

#### IV. INVESTIGATION AND DISCOVERY

##### A. General Considerations.

Unquestionably, the scope of the investigation and the extent of discovery should depend upon the nature of and the amounts in controversy, and consideration should be given to whether the case warrants early settlement efforts by way of mediation or some other ADR mechanism. Discovery dollars saved for plaintiff homeowners often makes early settlement possible at a more reasonable sum.

##### B. Property Damage Claims

It is up to the plaintiff to prove the nature and extent of claimed damages. Defense counsel should retain a qualified engineer or other qualified construction expert

to observe and advise about the nature, cause, extent, and reasonable repair of the damage, but should be wary of having the retained expert accomplish too much of what it is the plaintiff's burden to prove. Thus, the defense expert should limit the investigation to inspecting and documenting damages and conditions uncovered by the plaintiff, not looking for new ones. However, this is not an immutable rule. The construction expert may have good reasons to require destructive testing which the plaintiff has not accomplished. For example, if testing by the plaintiff is not done to the proper standards the results may be subject to attack by the third party defendants. And, further testing may be required to support the general contractor's contribution claims against the subcontractors.

Additionally, the file of the local building official should be obtained and reviewed. If there are any building code violations alleged it may be necessary to retain a code expert to render opinions on whether or not a given construction technique or material was permissible under the code. ICBO evaluation reports approving the use of building materials as suitable under the code can be invaluable. Interviews with the building official are often beneficial. The local building official is the final authority on code compliance in his or her jurisdiction. The building official may agree that what is now alleged as a code violation was in fact permitted back when the project was under construction, and may agree to allow less costly repairs than claimed by the plaintiff.

Finally, a repair contractor to bid the repairs specified by the defense engineer or construction expert should be retained. For maximum credibility, the repair contractor should be prepared to do the work for the price quoted.

