

Tricks and Traps in Real Estate and Construction Litigation

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COURSE OBJECTIVE

To provide a general overview of tricks and traps in real estate and construction litigation for civil litigation lawyers that normally don't practice in this area

Written Contracts and Change Orders Now Required for Residential Construction

- **326B.801 SCOPE.**

Except as otherwise provided by law, the provisions of sections 326B.801 to 326B.825 apply to residential contractors, residential remodelers, residential roofers, and manufactured home installers.

History: *2007 c 140 art 8 s 24*

Written Contracts and Change Orders Now Required for Residential Construction

– **326B.809 WRITTEN CONTRACT REQUIRED.**

(a) All agreements including proposals, estimates, bids, quotations, contracts, purchase orders, and change orders between a licensee and a customer for the performance of a licensee's

services must be in writing and must contain the following:

(1) a detailed summary of the services to be performed;

(2) a description of the specific materials to be used or a list of standard features to be included; and

(3) the total contract price or a description of the basis on which the price will be calculated.

(b) All agreements shall be signed and dated by the licensee and customer.

(c) The licensee shall provide to the customer, at no charge, a signed and dated document at the time that the licensee and customer sign and date the document. Documents include agreements and mechanic's lien waivers.

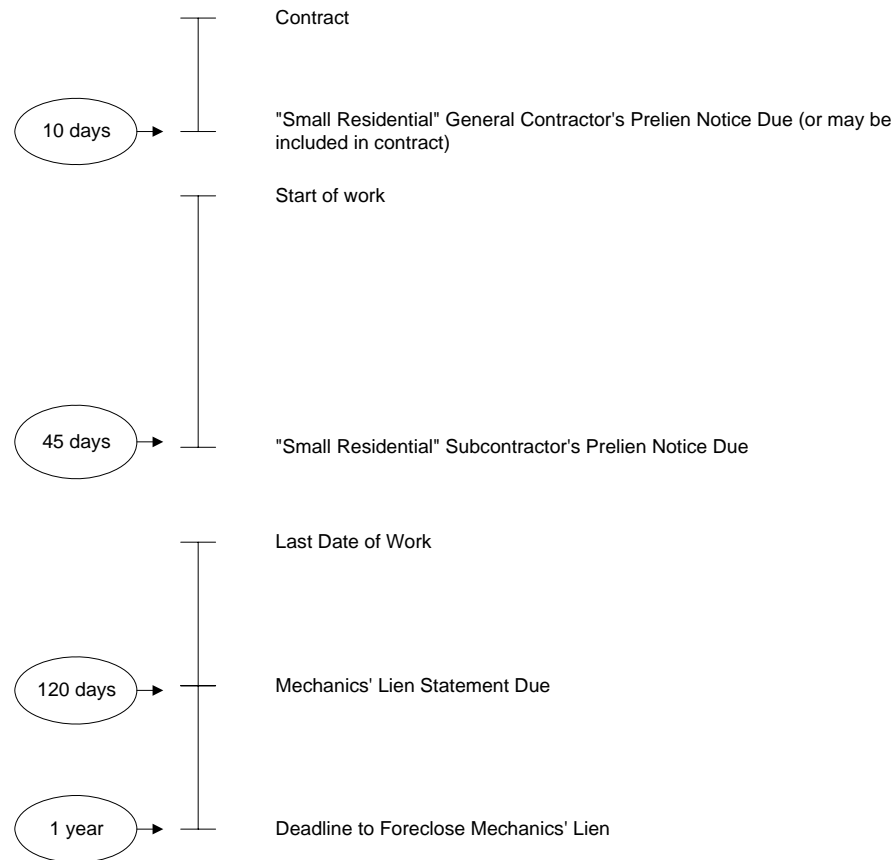
History: 2007 c 140 art 8 s 25

Mechanics' Liens

Mechanics' Liens secure payment for labor or materials used to improve property.

MECHANICS' LIENS

Timeline of Mechanic's Lien Deadlines



MECHANICS' LIENS

- Exceptions to Pre-Lien Notice Requirements:
- Minn. Stat. 514.011 Subd. 4a. **Exceptions; same ownership.** The notice required by this section shall not be required to be given where the contractor is managed or controlled by substantially the same persons who manage or control the owner of the improved real estate.

Subd. 4b. **Exceptions; multiple dwelling.** The notice required by this section shall not be required to be given in connection with an improvement to real property consisting of or providing more than four family units when the improvement is wholly residential in character.

MECHANICS' LIENS

- Subd. 4c. **Exceptions; nonagricultural and nonresidential real estate.** The notice required by this section shall not be required to be given in connection with an improvement to real property which is not in agricultural use and which is wholly or partially nonresidential in use if the work or improvement:
 - (a) is to provide or add more than 5,000 total usable square feet of floor space; or
 - (b) is an improvement to real property where the existing property contains more than 5,000 total usable square feet of floor space; or
 - (c) is an improvement to real property which contains more than 5,000 square feet and does not involve the construction of a new building or an addition to or the improvement of an existing building.

MECHANICS' LIENS

General Contractor Pre-Lien Notice required: Every contractor that enters into a contract with the owner for the improvement of real property and who has contracted or will contract with any subcontractors or material suppliers to provide labor, skill or material for the improvement must provide the required notice. The notice can be included in any written contract between the contractor and owner.

If no written contract is entered into, the notice must be prepared separately and delivered personally or by certified mail to the owner within 10 days after the work is agreed upon.

General Contractor's Prelien Notice

To: _____

From: _____

Personally delivered or sent by Certified Mail on _____

As required under Minnesota Statute Section 514.011, _____ provides notice as follows:

GENERAL CONTRACTOR PRELIEN NOTICE

“(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.”

Mechanic's Liens

Subcontractor Requirements

1. Notice required: Every subcontractor who contributes to the improvement of real property, except a party under direct contract with the owner, must give a pre-lien notice in the proper form.
2. How to do it: Notice must be personally delivered or mailed by certified mail to the owner no later than 45 days after the subcontractor has first provided labor, skill, or materials to the improvement.

Effect of failure to provide notice: the lien rights are lost if the subcontractor completely fails to provide notice. The lien rights are not lost if the subcontractor makes a good faith effort to provide the notice, unless the owner or another lien claimant proves damage as a direct result of the failure to comply.

Subcontractor Prelien Notice

To: _____

From: _____

Personally delivered or sent by Certified Mail on _____

As required under Minnesota Statute Section 514.011, _____ provides notice 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 _____

_____ TO PROVIDE _____
(NAME OF YOUR CONTRACTOR)

_____ OR _____ FOR THIS
(TYPE OF SERVICE) (MATERIAL)

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.

The Mechanic's Lien Statement

Deadline for Service and Filing

1. The Mechanic's Lien Statement must be served personally or by certified mail and filed within 120 days after doing the last item of work, or furnishing the last item of skill, material, or machinery. The lien expires and cannot be enforced unless the Mechanic's Lien Statement is served and filed within this period.
2. If you perform separate contracts that are not related to one continuous improvement, you must file separate lien statements within 120 days from the last date of performance of each contract.
3. The "screen door" doctrine: A lien claimant may not extend the time for filing the lien by performing minor work or providing small quantities of material for the purpose of extending the time to file the lien. On the other hand, "touch up" work or delivering additional materials may extend the time to file the lien if performed within the ordinary course of construction.

Foreclosure of the Lien

One-Year Deadline

1. The lien expires unless an action to foreclose the lien is commenced within one year of the last date of work as stated on the Lien Statement.
2. If you are served with a foreclosure action commenced by another lien claimant, you must answer or appear in the action within the one-year period for the lien to remain valid.
3. A court has discretion to award attorneys' fees and costs to the lien claimant.

CAUTION: MECHANICS LIEN REQUIREMENTS ARE VERY TECHNICAL, AND THE FAILURE TO MEET ALL REQUIREMENTS MAY INVALIDATE YOUR LIEN. IF YOU HAVE ANY QUESTIONS, YOU SHOULD CONSULT YOUR ATTORNEY.

Construction Warranties

Commercial: Matter of Contract

- Under AIA Contracts, generally one year from date of “Substantial Completion” defined as when the improvements may be used for their intended purpose. Usually when a certificate of occupancy is issued.

Construction Warranties

Residential Warranties governed by Minn. Stat. 327A

- **1-Year Warranty.**
- The dwelling or home improvement shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards. Minn. Stat. § 327A.02, Subds. 1(a), 3(a)(1), 3(c).
“Building standards” means the materials and installation standards of the State Building Code in effect at the time of the construction or remodeling. Minn. Stat. § 327A.01, Subd. 2.

Residential Warranties

2-Year Warranty.

- The dwelling or home improvement (if the home improvement work involves the installation of plumbing, electrical, or cooling systems) shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems due to noncompliance with building standards. Minn. Stat. § 327A.02, Subds. 1(b), 3(b).

Residential Warranties

- **10-Year Warranty.**
- The dwelling or home improvement (if the home improvement work involves major structural changes or additions to a residential building) shall be free from major construction defects due to noncompliance with building standards. Minn. Stat. § 327A.02, Subds. 1(c), 3(a)(2). “Major construction defect” means “actual damage to the load-bearing portion of the dwelling or home improvement, including damage due to subsidence, expansion or lateral movement of the soil, which affects the load-bearing function and which vitally affects or is imminently likely to vitally affect use of the dwelling or home improvement for residential purposes” but does not include damage caused by natural disasters. Minn. Stat. § 327A.01, Subd. 5

Statute of Limitations for Claims Relating to Injury to Property

541.051 LIMITATION OF ACTION FOR DAMAGES BASED ON SERVICES OR CONSTRUCTION TO IMPROVE REAL PROPERTY.

Subdivision 1. **Limitation; service or construction of real property; improvements.** (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be 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.

Statute of Limitations for Claims Relating to Injury to Property

(b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).

(c) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury; provided, however, that in the case of an action for contribution or indemnity under paragraph (b), a cause of action accrues upon the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition....

Statute of Limitations for Claims Relating to Injury to Property

Subd. 2. **Action allowed; limitation.** Notwithstanding the provisions of subdivision 1, paragraph (a), in the case of a cause of action which accrues during the ninth or tenth year after substantial completion of the construction, an action to recover damages may be brought within two years after the date on which the cause of action accrued, but in no event may such an action be brought more than 12 years after substantial completion of the construction. Nothing in this subdivision shall limit the time for bringing an action for contribution or indemnity.

Subd. 3. **Not construed.** Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

Statute of Limitations for Claims Relating to Injury to Property

Subd. 4. **Applicability.** For the purposes of actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, such actions shall be brought within two years of the discovery of the breach. In the case of an action under section 327A.05, which accrues during the ninth or tenth year after the warranty date, as defined in section 327A.01, subdivision 8, an action may be brought within two years of the discovery of the breach, but in no event may an action under section 327A.05 be brought more than 12 years after the effective warranty date. An action for contribution or indemnity arising out of actions described in this subdivision may be brought no later than two years after the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the breach.

Condo/Townhouse Warranties and Disclaimers (Residential and Commercial)

- Express Warranties: Under the Minnesota Common Interest Ownership Act, Minn. Stat. Ch. 515B (“MNCIOA”), a declarant or an affiliate of a declarant may create express warranties by words or conduct if such words or conduct are “reasonably relied upon by the purchaser.” Formal words or specific intention are not necessary to create an express warranty. Minn. Stat. § 515B.4-112(a). The Act describes the ways in which such warranties may be created as follows:
 - a. Any affirmation of fact or promise which relates to:
 - the unit;
 - rights appurtenant to the unit;
 - improvements to the CIC directly benefiting the purchaser or the unit; or
 - the right to use or have the benefit of facilities which are not part of the CIC.
 - b. Models or descriptions of the physical characteristics of a unit or CIC. This express warranty may be disclaimed by a prominent notice.
 - c. Descriptions of the quantity or extent of real estate comprising the CIC, including plats or surveys. Minn. Stat. § 515B.4-112(a)(3).

Condo/Townhouse Warranties and Disclaimers

- Implied Warranties: MNCIOA provides for several implied warranties deemed given by the owner to the purchaser. Minn. Stat. § 515B.4-113.
 - a. A unit will be in as good of condition at the earlier of the time of conveyance or delivery of possession as it was at the time of contracting, with the exception of reasonable wear and tear. Minn. Stat. § 515B.4-113(a).
 - b. A unit and the common elements in the CIC are suitable for the ordinary uses of real estate of its type. Minn. Stat. § 515B.4-113(b)(1).
 - c. Improvements in which the purchaser has use rights will be free from defects and constructed according to applicable law, sound engineering and construction standards, and in a workmanlike manner. Minn. Stat. §515B.4-113(b)(2).
 - d. Residential use of a unit (applicable to units that under the declaration are available for residential use) will not violate applicable law at the earlier of the time of conveyance or delivery of possession. Minn. Stat. §515B.4-113(c).

Disclaimer of Condo Implied Warranties

- No general disclaimer of implied warranties is effective for residential units.
- With respect to residential-use units, the owner may disclaim liability for a specified defect or failure to comply with applicable law in a document separate from the purchase agreement signed by the purchaser if such defect or failure was part of the basis of the bargain.

Condo/Townhouse Statute of Limitations

- Claims for breach of warranties under MNCIOA are governed by MNCIOA's 6-year statute of limitations and not the 2-year statute of limitations set forth in Minn. Stat. § 541.051.
- Condo/Townhouse Statute of Limitations May Be Reduced to 2 Years. The parties may agree to reduce the limitations period to not less than two years by an agreement separate from the purchase agreement signed by the purchaser.