

SPECIAL POINTS OF INTEREST:

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Repairing Home Damage Without Proper Notice Can Have Serious Consequences

Imagine that you just bought a new home only to discover that it is suffering from moisture intrusion and mold is probably growing in the walls. You give notice to the seller, the builder and its subcontractors. You tell them that you intend on repairing the damage and invite them to inspect your home before it undergoes repairs. After they fail to compensate you for your injury, you sue them. They claim that – by conducting repairs – you destroyed necessary evidence and, as a sanction, you should not be allowed to present evidence supporting your claims. That’s not fair, right?

Ask David Miller.

He was the home buyer in this scenario. Finding that he engaged in spoliation of evidence, the trial court prevented him from introducing expert testimony necessary to prove his case. Consequently, the Defendants obtained summary judgment. Making matters worse, the appellate court af-

firmed the trial court’s decision.

Fortunately for Mr. Miller, the Minnesota Supreme Court recently intervened on his behalf. Reversing the trial court, the high court first acknowledged that a party has a “duty to preserve evidence . . . not only after the formal commencement of litigation, but whenever a party knows or should know that litigation is reasonably foreseeable.” If a party breaches this duty, the court noted that the evidence-destroying party may be sanctioned.

Despite this general rule, however, the court noted that “the duty to preserve evidence must be tempered by allowing custodial parties to dispose of or remediate evidence when the situation reasonably requires it.”

Among those contexts was the situation faced by Miller.

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Something Happened on the Way to the Job Site

A sudden gust of wind flipped the carrier’s truck bringing the next load of pre-fab wall panels for the job. The driver is OK. Panels are toothpicks. Job is stopped. The owner has tenants waiting to move in. Who has to pay to replace the panels? What about the costs of delay to the job?

The owner and GC will look to the framing subcontractor because the obligation to supply and install the panels *on schedule* flows down to the sub through their chain of contracts. When the framing subcontractor calls the fabricator to demand replacement panels, pronto, the fabricator faxes back a quote for the price of a whole new batch of panels. The

shop points to a little term in the shop’s paperwork which says “FOB factory.”

If the parties cannot all quickly agree on a solution, that subcontractor may find itself whipsawed between the requirements of its contract on the one hand

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Something Happened on the Way to the Job Site, cont.

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and the terms of its purchase order with the fabrication shop on the other. The “FOB Factory” term the subcontractor never even noticed meant that the risk of loss shifted to the subcontractor as soon as the truck left the loading dock. Welcome to the crossroads where the Uniform Commercial Code meets the world of construction contracts.

The Uniform Commercial Code is a set of statutes which governs the sale of “goods”: moveable “things,” including building materials like the prefabricated wall panels our subcontractor ordered. Despite what the framing subcontractor may have assumed, the shop that made the panels may *not* be bound by job schedule, and the liquidated damage clause or even the warranty

provisions in the project manual.

Subcontractors need to read and understand the terms of the purchase order contracts they make for the equipment and materials they need. The “FOB factory” term is just one of many potential surprises waiting in the contract terms. If you have questions about how the Uniform Commercial Code may affect you, we can help.

Summary Judgment Overturned on Indemnity Agreement and Additional Insured Endorsement

In a recent published Minnesota Court of Appeals decision released on September 6, 2011, H&M’s Adina Bergstrom and Dave Hammargren obtained an excellent result, where the Court of Appeals ruled in favor of H & M’s client and determined that the district court had incorrectly dismissed the case. In *Engineering & Construction Innovations, Inc. v. L.H. Bolduc Co., Inc. et al*, Engineering & Construction Innovations (“ECI”) had contracted with Bolduc to perform some work on a construction project. In the contract, Bolduc agreed to reimburse (indemnify) ECI for any damage Bolduc caused at the project, and Bolduc also agreed to obtain insurance for ECI to back this obligation. Bolduc then purchased the insurance required under the contract.

During the construction project, Bolduc damaged a sewer main pipe, which ECI repaired and then asked Bolduc to reimburse it for the repair costs. ECI also sought insurance coverage under the pol-

icy that Bolduc had purchased for reimbursement of the damages. The district court found that Bolduc and the insurance company did not have any duty to reimburse ECI for the repair costs because, at trial, the jury found that Bolduc did not damage the sewer pipe in a negligent manner, which led to the dismissal of ECI’s case. The Court of Appeals disagreed, holding that the dismissal was improper and, regardless of the jury’s decision, the contract between Bolduc and ECI and the insurance policy Bolduc purchased, required Bolduc and the insurer to reimburse ECI.

The Court of Appeals then directed that the case return to the district court to determine the amount of damages that Bolduc and the insurance company owe ECI.

Developments in Residential Real Estate Transactions

Recently, we have seen some real estate agents and brokers revising their listing contracts in an attempt to shift risk and liability related to disclosure laws away from themselves and onto sellers. Therefore, it is important to read your listing agreement carefully and be mindful of provisions that require the seller to indemnify the agent and broker against claims arising from even unintentional omissions of material fact by the seller.

Under this type of provision, arguably, if an agent and seller are sued by a buyer for non-disclosure, even if the agent independently knew the information was material and was required to be disclosed, yet failed to do so, the seller could be held responsible for the agent's liability. This is just one of the many reasons why one should consider consulting with Hammargren & Meyer, P.A. while navigating the process of buying or selling a home.

Proper Notice, cont.

(Continued from page 1)

As the high court said,

Miller, the custodial party, is a homeowner and the evidence in his possession is the home in which he lives. Remediation of the moisture intrusion problem in the home may be necessary, even essential, to address immediate health concerns.

Had Miller not conducted repairs, the court noted that the health of Miller and his children could have been compromised. “[A] party with a legitimate need to destroy evidence may, under certain limited circumstances, do so.”

Following are the elements necessary to qualify for this exception from the general spoliation rule:

- (1) The party must have a legitimate need to destroy evidence.
- (2) The party must give “the other side” notice of a potential claim and a “full and fair opportunity to inspect relevant evidence.”

In discussing these elements, the court expressly rejected a rigid requirement whereby a custodial party must always provide “actual notice of the nature and timing of any action that could lead to destruction of

evidence.” The court concluded that such an absolute requirement is unreasonable because (1) it might be unfair to a party who has already given sufficient notice and (2) it might unnecessarily lead to litigation regarding the sufficiency of the timing of such notice.

Rather than adopting a bright-line rule, the court noted that courts considering spoliation motions should consider the “totality of the circumstances” when assessing the sufficiency of a custodial party’s notice. An “important factor” regarding the sufficiency of such notice is “whether the noncustodial parties had sufficient knowledge to protect themselves.” If they have sufficient notice yet do nothing, “sanctions for spoliation may not be appropriate.”

“A . . . letter indicating the time and nature of any action likely to lead to destruction of the evidence, and offering a full and fair opportunity to inspect will usually be sufficient to satisfy our notice rule,” the court held. Even in the absence of such specific notice of each evidence-destroying event, if “noncustodial parties had sufficient knowledge to protect their interests, but nonetheless failed to inspect important evidence, failure of the custodial party to provide further notice of destruction in and of itself should not deprive the custodial party of an otherwise valid claim or defense.”

Given the paramount importance of crafting proper written notice, homeowners who are considering repairs of moisture damage should first contact Hammargren & Meyer, P.A.

Hammargren & Meyer News

Welcome Jim!



We are pleased to announce the addition of Jim Sander to our practice. Mr. Sander has been in practice 35 years serving clients with an emphasis on mechanic's liens, construction law and creditor's remedies. Jim is a

1976 graduate of the University of Minnesota Law School. He is licensed to practice in the courts in both Minnesota and Wisconsin. Jim also has experience as a mediator and arbitrator in construction cases.

Jim has been the author of several articles on liens and collection tools for the construction industry over the years. He has been a frequent speaker on a variety of topics to industry groups and lawyers through a number of organizations, including the Minnesota CLE. Jim is a member and past chairperson of the Construction Law Section of the Minnesota State Bar Association.

Paul Meyer's application for admission to the State Bar of North Dakota has been approved by the State Board of Law Examiners. Paul will participate in the admission ceremony in Bismarck, North Dakota, in October. Hammargren & Meyer's clients have an increased presence in North Dakota, and Paul's admission to the North Dakota Bar will enable the firm to better serve its clients in this state.

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Dave Hammargren and Tim Cook were included in this year's *Minnesota Super Lawyers*® list.

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Jennifer Thompson and Adina Bergstrom were selected for inclusion on this year's *Minnesota Rising Stars*® list.



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The information contained herein is by necessity general and broad in scope. Legal problems and issues are always act specific and fact dependent. Always consult a competent construction attorney to address your specific issues and problems.

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