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HAMMARGREN & MEYER, P.A.

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Home Inspectors Are Not Created Equal

Most real estate transactions involve the service of a residential home inspection company to analyze the condition of the home for the buyer or to attempt to pre-empt a seller's independent obligation to disclose the condition of their property. Contrary to popular belief, there is no required education, background, training, testing, licensure or regulation for anyone who decides to call themselves a "home inspector". Unlike the majority of states, Minnesota does not require a "home inspector" to possess any qualifications at all, provides no regulation for the industry and does not require any bonding or insurance. In essence, anyone with a tape measure can call him/herself a home inspector.

Also, most inspection companies limit their liability in their contract to the amount paid for the inspection services. As many of our clients know, a \$300 refund from a negligent inspector does not go a long way towards repairing an undiscovered construction defect.

Another potential landmine exists when the buyer allows the seller or the seller's agent to hire the inspector. A clear conflict of interest exists in that situation. Buyers would be well-advised to consult their own independent professional. Additionally, most inspection companies limit their services to what is visually

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Remember That Project You Worked On in The 1960s?

Appellate Court Upholds Indemnity Claim Against Original Designer of 35W Bridge

Litigation resulting from the collapse of the 35W Bridge has resulted in a confusing pair of court decisions regarding the liability of the original bridge designer. Although the entire scope of the ramifications of the decisions is presently unclear, it is possible that – unless the law is changed – there is no time bar to claims for contribution and indemnity arising from construction projects.

In one case, the party that inspected the bridge in 2003 sought contribution for its damages from the company that designed the bridge in 1967. Rejecting that claim, the Min-

nesota Court of Appeals held that the 10-year statute of repose found in Minn. Stat. § 541.051 blocked any such claim.

In a related case decided on the same day by the same judges, the State of Minnesota, which paid more than \$36 million to victims of the bridge collapse, sought indemnity from the original bridge designer. Included in the designer's original contract with the State was a promise to indemnify the State for claims arising out of its performance of its work. Curiously, despite its ruling in the above-referenced case, the

court noted that the 10-year repose provision found in Minn. Stat. § 541.051 "does not apply to actions for contribution or indemnity." Consequently, the appellate court held that the State's claims for contribution and indemnity were valid.

Confused? You're not alone. The Minnesota Supreme Court is expected to hear arguments on each of these cases sometime this Spring. Hopefully the high court will clarify these seemingly inconsistent holdings.

The Bidding Season

A harbinger of spring is the letting of state and local road and public building construction projects. The public bidding process is mandated by statute and related regulations to ensure that taxpayers receive the advantages of the lowest responsive responsible bid. Material deviations from the project specifications and other bidding irregularities can result in bid challenges where the apparent low bid is rejected in favor of an award to the actual low responsive responsible bidder. In these days of increasing competi-

tion for public contracts, bidders must fairly familiarize themselves with the public procurement process to ensure that their bids are properly prepared and timely submitted, and so that they are reasonably aware of those situations where the opportunity for a potentially successful challenge exists.

Hammargren & Meyer attorneys have many years of experience in the public bidding and contracting arenas, including cases under federal

and state law alike, both inside and outside Minnesota. We can assist you on any questions you may have regarding the process and possible challenges you may have.

Corporate Principal Avoids Civil Liability for Theft of Contract Proceeds

A provision of the Minnesota Mechanics' Lien Statute, Minn. Stat. §514.02, requires that a person contributing to an improvement to real estate must hold contract proceeds "in trust" for payment to downstream subcontractors and suppliers that contributed to the improvement. If a person receives contract proceeds and does not pay its downstream subs and suppliers, it may be *criminally* liable for *theft of proceeds*. If the improvement involves **residential** property, then any shareholder, officer, director or agent of the guilty corporation who is responsible for the theft shall also be guilty of theft of proceeds.

The statute also permits a damaged party to bring a *civil action* against the guilty corporation and, if the improvement involves residential property, against a shareholder, officer, director or agent of the corporation who know-

ingly received part of the proceeds as a salary, dividend or otherwise.

In the recent case of Amcon Block & Precast, Inc. v. Suess, an injured party attempted to pursue a civil action against a corporate principal for theft of proceeds where the improvement involved commercial property. The Minnesota Court of Appeals rejected the plaintiff's argument and concluded that an unpaid supplier, Amcon, could not pursue a civil claim against an individual principal of the guilty corporation because the project was commercial. A corporate principal can only be pursued in a civil action for theft of proceeds when the project involves the improvement of residential real property.

Hire Non-Attorney Lien Filing Company At Your Own Risk

A recent decision by the Minnesota Court of Appeals illustrates why it is risky to utilize the services of a non-attorney lien-filing company to serve and file your mechanics' lien statements and pre-lien notices. In *Northern Sunrooms & Additions, LLC v. Dorstad, Construction*, a subcontractor sued its lien filing company for failing to file a mechanics' lien statement. The Court dismissed the claim because the subcontractor's contract with the lien filing company contained an "exculpatory clause" that relieved the lien filing company from

any liability unless the subcontractor could prove the company acted in "bad faith" or was guilty of "willful misconduct." The Court of Appeals held that this clause essentially absolves the lien-filing company of any liability for failing to properly file a lien. Proving only negligence or a breach of contract was not enough to hold the lien-filing company responsible for its mistakes, according to the Court. Interestingly, even if the lien-filing company had been held liable, the contract limited its liability to the \$375 fee it had been paid.

Contracts with most lien filing companies will contain similar provisions, giving lien claimants little or no compensation when the lien filing company makes a mistake, misses a deadline or otherwise screws up your mechanics' lien filing. BUYER BEWARE! Use a non-attorney lien-filing company at your own risk.

The Minnesota False Claims Act

The Minnesota False Claims Act, found at Minnesota Statutes Chapter 15C, went into effect on July 1, 2010. Any person or business that contracts with state or local governments must be aware of and understand how the Act works. The Act provides state and local governments with a powerful tool to police contract practices and encourages individuals with inside knowledge to "blow the whistle" on false claims.

In general, the Act prohibits people who do business with state and local governments from obtaining money that they are not entitled to receive. The law applies to "knowing" misconduct.

The consequences of submitting a false claim are severe. Violators may be liable for civil penalties of \$5,500.00 to \$11,000.00 per claim, plus the three times

damages, attorneys' fees, and litigation costs. Qualifying "whistleblowers" may be entitled to 15 to 30% of the proceeds of a successful suit, plus attorneys' fees and costs.

Any person or business confronted with a false claim allegation should contact an attorney immediately.

Home Inspectors Are Not Created Equal

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apparent. In many situations a buyer should insist upon invasive testing or a more detailed analysis by an engineering firm than what is covered by a typical home inspection service.

Until Minnesota decides to regulate the home inspection industry, an inspector's qualifications should be well

-researched to include an analysis of membership in organizations which have standards of practice and codes of ethics for their members such as the American Society of Home Inspectors, the National Association of Home Inspectors or the Minnesota Society of Home Inspectors. In addition to this type of membership, credentialing from The National Fire Protection Association or the Interna-

tional Code Council would speak to the inspector's attempt to be cognizant of building codes and standards. Insurance should be thoroughly researched and the contract for services modified to remove any attempt to limit an inspector's liability to the inspection price.

Hammargren & Meyer News



Patrick Lee-O'Halloran

Patrick Lee-O'Halloran has been elected a Firm shareholder. Patrick has more than a decade of experience in commercial contracting, construction claims, mechanic's liens, bonds, and alternative dispute resolution. He is a Past President and remains an active member of the Minnesota Construction Association. He has also served on the Minnesota Department of Labor and Industry's Home Warranty Task Force.

Patrick is also a Qualified Neutral under Rule 114 of the Minnesota General Rules of Practice for both mediation and arbitration.

Dave Hammargren, one of the founders of Hammargren & Meyer, P.A., was elected to a three-year term on the Board of Directors of the Associated General Contractors of Minnesota. AGC has over 440 members in Minnesota and represents the interests of general contractors, trade contractors and others engaged in the business of general building and highway/heavy construction.

Mr. Hammargren also moderated the third-annual Panel Discussion for the CMAA on the 2011 Outlook For The Local Construction Market.

Jennifer Thompson was appointed by Minneapolis Mayor R.T. Rybak as a Commissioner to the Minneapolis Civil Rights Commission for a three year term beginning January 1, 2011. The Minneapolis Civil Rights Commission was established in 1975 and implements Minneapolis's civil rights policies.

Tim Cook is in his thirteenth year as an adjunct professor of law at the William Mitchell College of Law where he teaches first year law students legal writing, research, advice, and persuasion.



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