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2019 Minnesota Construction Law Case Update

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A surety operating under a takeover agreement may bring a claim against a subcontractor's performance bond as a "successor."

- *United States for use of Wesco Distribution, Inc. v. Liberty Mutual Ins. Co.*, 921 F.3d 744 (8th Cir. 2019).
  - Dispute arising out of a general contractor's default on a government project and a surety's (Liberty Mutual) takeover.
  - After the takeover, a subcontractor, which held a performance issued by Fidelity, defaulted on its agreement with the general contractor.
  - Eighth Circuit held that Liberty Mutual "stepped into the shoes" of the underlying principal when it took over project, and therefore acquired right to enforce the sub's performance bond.
  - Ratification agreement entered into by subcontractor did not discharge Fidelity's duties under performance bond because subcontractor's obligations did not change.

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A subcontractor cannot prevail on a prompt-payment claim if their services are in dispute.

- *Meyer Contracting, Inc. v. Fowler*, 2019 WL 2494782 (Minn. Ct. App. June 17, 2019).
  - Subcontractor agreed to supply material for first phase of airport construction project.
  - Contractor later alleged overbilling, and subcontractor responded with a prompt payment claim under Minn. Stat. § 337.10, subd. 3.
  - At trial, the jury rejected the prompt payment claim, but the trial judge overturned because the subcontractor had supplied material and it was undisputed that contractor had not fully paid the subcontractor.
  - The Court of Appeals reversed, finding that a prompt payment claim requires both undisputed services and a request to pay.
  - While it was undisputed that material had been supplied, the ongoing question of whether the subcontractor was entitled to be paid for the full amount of its claim prevented the trial judge from overturning verdict.

Claims brought prior to closing of home were not subject to arbitration clause in purchase agreement.

- *Esanbock, et al. v. Weyerhaeuser Company*, 367 F.Supp.3d 925 (D. Minn. 2019).
  - Class action suit against Weyerhaeuser relating to formaldehyde off-gassing in construction joists.
  - Some members of the class brought claims while under home purchase agreements, but before closing.
  - Purchase agreements contained arbitration clause that applied to issues arising after closing.
  - Weyerhaeuser moved for arbitration, arguing issues were "post-closing" because they would not be resolved until after closing and moved for arbitration.
  - Magistrate judge recommended motion to compel arbitration be denied because issues affected owners prior to closing and affected closing date. District Court agreed.

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Ancillary work is not covered by the statute of limitations for improvements to real property.

- *Schmaedeke v. All Serv. Plumbing, LLC*, 2019 WL 1510950 (Minn. Ct. App. Apr. 8, 2019).
  - Plumbing company replaced boiler in a Duluth home, but failed to close a valve. When system was re-filled, home flooded and was damaged.
  - Plumbing company argued that claim was time-barred under 2 year statute of limitations for property improvements under Minn. Stat. § 541.051 subd. 1(a). The District Court agreed.
  - Court of Appeals overturned, finding that the valves were not part of the boiler that was installed and did not constitute an improvement to the property.
  - The claims were not barred by the 2 year statute of limitations.

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Contractor breached implied warranty of fitness for particular purpose by failing to provide ventilation during remodel.

- *Chouanard v. Oak Lake Construction, Inc.*, 2019 WL 3293466 (Minn. Ct. App. July 22, 2019).
  - Homeowners brought claim against remodeling contractor that installed room addition and a rubber membrane between the addition and deck above it.
  - Nearly 10 years later, water damage observed from condensation in room addition.
  - District Court held that contractor breached implied warranty of fitness for particular purpose by failing to install ventilation, even though contractor was not given plans/specs calling for vents.
  - Court of Appeals affirmed as it is common practice for contractors to accommodate for moisture, and contractor held self out as competent and was thus liable for breach even though no plans were provided.

Contractual lien waiver requirements are unenforceable where prohibited by statute.

- *Homestar Property Solutions, LLC v. Safeguard Properties, LLC*, 358 F.Supp.3d 807 (D. Minn. 2019).
  - Home preservation contractor entered into agreement with subcontractor that included blanket waiver of lien rights.
  - Following non-payment, subcontractor filed liens on 49 properties in 15 states (including Minnesota and Wisconsin).
  - District of Minnesota held that lien waiver provision was unenforceable in states where lien waivers were prohibited by statute (Minnesota) but permissible in states that allowed contractual lien waivers (Wisconsin).

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Statute of repose for condo runs from certificate of occupancy of common areas. Warranty period determined on a per-unit basis.

- *Village Lofts at St. Anthony Falls Ass'n v. Housing Partners III-Lofts, LLC, et al.*, 924 N.W.2d 619 (Minn. Ct. App. 2019).
  - Two condo buildings were built by same developer in NE Minneapolis, but separate contracts and schedules. Building 1 completed in 2002, Building 2 in 2004, some units in Building 1 not sold until 2006.
  - HVAC defects discovered in Building 1 in 2014, Building 2 in 2015. Suit filed.
  - District court dismissed claims for Building 1 on statute of repose, Court of Appeals affirmed, holding statute of repose ran from certificate of occupancy of common areas for each building and rejecting notion that buildings were one project.
  - Court of Appeals held statutory warranties should apply on per unit basis.
  - Court of Appeals invalidated *Two Harbors* settlement agreement entered into between developer and condo association because conducted in secrecy and excessive.

Pre-lien notice is not required where property is not in agricultural use when lien attached.

- *Axia Contracting, LLC v. Grefsrud*, 2019 WL 2571714 (Minn. Ct. App., June 24, 2019).
  - Owners bought property previously used for farming and entered into contract with contractor to build hotel.
  - Construction started a month after last crop harvest.
  - Contractor filed lien on property, but did not provide pre-lien notice. Owners argued that the lien was invalid due to lack of proper notice.
  - Court of Appeals held that pre-lien notice was not required because the property was not actively being used for agriculture at the time the lien attached.

Contractual notice requirements upheld.

- *Lunda Construction Co. v. County of Anoka*, 2019 WL 178511 (Minn. Ct. App. Jan. 14, 2019), *review denied* (Minn. Mar. 27, 2019).
  - Dispute over highway construction project, where contract included specific notice provisions for contractor to pursue any claims.
  - Contractor submitted a claim, county responded with engineer's letter and notified of intention to bring liquidated damages while the parties discussed compromises.
  - Contractor filed suit, which was dismissed by district court because notice of claim not filed within 5 days of the "final written response."
  - Court of Appeals rejected, remanding for determination of whether the engineer's letter constituted "final written response."
  - Notice provisions upheld as valid conditions precedent.

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Pre-judgment interest in a dispute over the value of damaged property runs from the date of the demand for appraisal.

- *Dewey Hill III Townhomes Ass'n, Inc. v. Auto-Owners Ins. Co.*, 2019 WL 3000691 (Minn. Ct. App. July 1, 2019).
  - Owner of townhomes damaged by hail filed claim against insurer. After dispute over amount of claim that owner was entitled to recover, insurer demanded appraisal.
  - After insurer paid claim, owner sued insurer, seeking interest following insurer's delay in paying claim.
  - Insurer argued that owner was not entitled to pre-award interest because an appraisal was not an arbitration or "action" under Minn. Stat § 549.09.
  - Court of Appeals disagreed, as statute provides for pre-award interest on pecuniary damages not otherwise excluded by statute.
  - Court held that owner was entitled to pre-judgment interest on total amount of claim from the date the appraisal was first demanded.

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Questions?

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