"Anatomy of a Defect: What It Is and the Rules that Apply"

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by

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<u>What Constitutes a "Defect"?</u>

<u>Definition</u>: There is no one universal definition for a construction defect. This, in part, is why there continues to be and probably always will continue to be significant litigation over whether there was a construction defect. Many contracts, including insurance contracts, refer to the word "defect," or "defects" sometimes with but often without any further definition. The federal courts within the Eighth Circuit and the Missouri courts will refer to a dictionary definition to understand a term such as "defect." Webster's defines "defect" as an irregularity in the surface or a structure that spoils the appearance or causes weakness or failure. It cites as examples fault, flaw and shortcoming. It also references deficiency and weakness.

Webster's Law Dictionary defines "defect" as: "DEFECT. The want or absence of some legal requisite; deficiency; imperfection; insufficiency. The want or absence of something necessary for completeness or perfection; a lack or absence of something essential to completeness; a deficiency in something essential to the proper use for the purpose for which a thing is to be used."

These definitions most likely comport with our own common understanding of the word "defect." But how do they relate to a construction defect?

Truly defective construction work, by whatever measure, is considered defective because it is material in some aspect to the construction project. By contrast, a superficial defect, especially in commercial projects, that does not affect overall property value or revenues to the commercial establishment, are generally considered trivial and a claim for them is often characterized as a nuisance claim. Material, significant construction defects are compensable, while insignificant, superficial construction defects often are not compensable.

Missouri's strict tort liability law states that whether a product is defective in a design case is presented to the jury as an ultimate issue without further definition. *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748 Prod. Liab. Rep. (CCH) P 18,145 (Mo. App. W.D. 2008). Thus, a Missouri jury instruction may not provide any definition for "defect." Instead, the jury gives

the word defect "content by applying their collective intelligence and experience to the broad evidentiary spectrum of facts and circumstances presented by the parties." *Id.*

While there is caselaw discussing and describing the definition of a defect in connection with a "blighted" area for condemnation purposes, there is scant law addressing what definition, if any, specifically applies to a construction defect. There is no Missouri approved jury instruction on this, it is largely up to the trier of fact (be it the judge or a jury) in Missouri to determine what is a construction defect.

Many cases talk about a "construction defect," but surprisingly few of them actually explain what they mean by a construction defect. To some degree, it is almost as if the Supreme Court's definition of "obscenity" (I know it when I see it) seems to apply to construction defect. For example, the Southern District in *Reed v. Sunset Cove Condominium Owners Assoc.*, 199 S.W.3d 875 (Mo. App. S.D. 2006), stated that the trial court's determination that the damage for which the assessment in a condominium association case was made was caused by an external force (slipping and settling due to construction defects) is supported by substantial evidence. The conclusion was stated rather matter-of-factly and without any elaboration as to what the trial court considered to be the basis for a construction defect.

Defective vs. Workmanlike

While this seminar is about defective construction, what difference, if any, is there between defective construction and construction that is not workmanlike? Caselaw dictates that all construction work must be workmanlike.

Contractors must perform their work, including the selection of materials, in a workmanlike manner even when their contract does not cover this requirement, a Missouri Court of Appeals for the Eastern District recently reaffirmed. Workmanlike means work that is "completed in a skillful manner and is non-defective." The case is *Jones & Turner, Inc. and Woody Bogler Trucking Co. v. Elmer Senevey and Eric Senevey b/d/a Elmer and Eric Senevey Construction Co.*, No. ED81853 (Mo. App. E.D.), September 16, 2003 and unpublished. So is workmanlike the opposite of defective?

Construction contracts often specify in detail the contractor's level of performance. Many contracts, however, including the one in *Jones*, do not set out the degree of skill and competence required of the contractor. The *Jones* decision reemphasizes the importance to a contractor of selecting proper materials and product to ensure that the work is indeed workmanlike.

Jones & Turner and Woody Bogler Trucking were two companies that needed a building to keep clay dry for their businesses. They described their needs to Senevey Construction, a contractor, by saying they wanted a metal building that was tall enough for trucks to fit inside, mobile so it could be moved when the clay was depleted, and sturdy enough to last about ten to twelve years.

They entered into a written contract for Senevey Construction to construct such a building for $28,500. They later increased the contract price to $29,000 with a slight change in the scope of the work to make the building a little taller and wider.

To achieve the scope of work, Senevey Construction purchased a "building kit" for the building from Moniteau Machine & Manufacturing, Inc. Senevey had never before purchased a kit from Moniteau.

The contract included specifications that required: "Pour a 5' wall 8" thick with a 2' dead man at each truss leg, setting on a 8" footing. The two end walls will be completely open. Sides will have tin 14' down from the top. On your level lot."

The building kit arrived without any plans. Representatives of Moniteau, upon inquiry, informed Senevey Construction that plans were not needed. Based upon this information, Senevey proceeded to assemble the building, without plans, in a manner it thought was correct.

In addition to no plans, the kit was missing important materials, including bolts needed to attach the trusses, angled sheeting for the side walls and trim sheeting for the roof. Senevey obtained substitute materials from various sources to complete the job. In at least one instance, Senevey deviated from the kit in order to solve a particular problem that arose during construction.

Senevey completed the building and the two businesses paid Senevey in full for its work. About four months later, on January 1, 1999, four inches of snow with some ice fell onto the building. The next day the building collapsed in the center.

The building could not be salvaged. The two businesses hired Roger Verslues, a licensed engineer, to inspect the collapsed building and determine what went wrong.

Verslues obtained a set of plans for the building from the engineering company that had originally prepared the plans. An engineer from that company testified at the trial that he discovered considerable differences

between the sizes of material called for in the plans as compared to the actual building kit provided by Moniteau.

In addition, Verslues observed two to three significant deviations from the plans that affected the structural stability of the building. He noted about ten total deviations between the plans and the building's as-built condition.

The businesses sued Senevey; Senevey sued Moniteau but then later dismissed Moniteau without prejudice from the case. The trial judge—there was no jury—found in favor of the two businesses and awarded the full contract amount of $29,000 plus costs.

Senevey argued on appeal that there is no implied warranty for a building that is attached to the land and that the trial court had specifically stated that Senevey did nothing wrong in putting the building kit together. The appellate court rejected these arguments and held that "the law imbues construction contracts with an implied warranty to perform the work in a workmanlike manner."

The court concluded that Senevey's work was not workmanlike. The building kit that Senevey chose, the court decided, was inadequate, as evidenced by a collapsed building only a few months after construction. Significantly, the appellate court focused on an inferior product rather than poor construction.

Contractors assume enormous responsibilities when they agree to build something. As this case shows, it often is the contractor's selection of materials more than its construction techniques that leads to problems.

Patent vs. Latent Defects

As there is no precise definition of a construction defect, there surely is no precise definition of a patent or latent defect or the difference between them. In essence, and by common understanding, a "patent defect" is one that appears usually very quickly and is extremely obvious. By contrast, a "latent defect" is one that is more subtle, almost always appears far later, and generally speaking, tends to be much more significant as almost a silent crippler of some component of the construction project.

As we will see later in the materials, any defect, whether patent or latent, can cause damage and support a claim for compensation. The differences between patent and latent relate more to the timeliness of the claim and the ripeness of evidence rather than the amount of compensation for the damage caused. Stated another way, a primary difference between patent and latent is simply how soon it is apparent and discovered but does not otherwise

necessarily affect its magnitude or significance and certainly does not necessarily affect the compensability of any claim relating to such defect.

Federal, State and Local Regulations Regarding Construction Defects

There are a variety of statutes, rules and regulations that may come into play in connection with a construction defect. Generally speaking, however, a claim regarding a construction defect almost always tends to involve the contract in question, including its specifications and any specific requirements for the construction project that were uniquely negotiated between the parties involved.

Magnuson-Moss Act

For example, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss Act"), 15 USC § 2301-2312 (2000) although more commonly thought to apply to disputes involving automobiles, is a federal statute that does provide relief under certain circumstances to construction disputes. The actual Act reads as follows:

→ § 2301. Definitions

For the purposes of this chapter:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who

gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term “written warranty” means--

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term “implied warranty” means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

(8) The term “service contract” means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term “reasonable and necessary maintenance” consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term “remedy” means whichever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term “replacement” means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term “refund” means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term “distributed in commerce” means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term “commerce” means trade, traffic, commerce, or transportation--

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term “State law” includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term “Federal law” excludes any State law.

§ 2302. Rules governing contents of warranties

(a) Full and conspicuous disclosure of terms and conditions; additional requirements for contents

In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items

among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty--at whose expense--and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b) Availability of terms to consumer; manner and form for presentation and display of information; duration; extension of period for written warranty or service contract

(1)(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this chapter (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(c) Prohibition on conditions for written or implied warranty; waiver by Commission

No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if--

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) Incorporation by reference of detailed substantive warranty provisions

The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) Applicability to consumer products costing more than $5

The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $5.

§ 2303. Designation of written warranties

(a) Full (statement of duration) or limited warranty

Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "limited warranty".

(b) Applicability of requirements, standards, etc., to representations or statements of customer satisfaction

This section and sections 2302 and 2304 of this title shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) Exemptions by Commission

In addition to exercising the authority pertaining to disclosure granted in section 2302 of this title, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) Applicability to consumer products costing more than $10 and not designated as full warranties

The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $10 and which are not designated "full (statement of duration) warranties".

§ 2304. Federal minimum standards for warranties

(a) Remedies under written warranty; duration of implied warranty; exclusion or limitation on consequential damages for breach of written or implied warranty; election of refund or replacement

In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty--

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case

may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b) Duties and conditions imposed on consumer by warrantor

(1) In fulfilling the duties under subsection (a) of this section respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a) of this section, that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in subsection (a) of this section and the applicability of such duties to warrantors of different categories of consumer products with “full (statement of duration)” warranties.

(4) The duties under subsection (a) of this section extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) Waiver of standards

The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) Remedy without charge

For purposes of this section and of section 2302(c) of this title, the term “without charge” means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) of this section to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) Incorporation of standards to products designated with full warranty for purposes of judicial actions

If a supplier designates a warranty applicable to a consumer product as a “full (statement of duration)” warranty, then the warranty on such product shall, for purposes of any action under section 2310(d) of this title or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

§ 2305. Full and limited warranting of a consumer product

Nothing in this chapter shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

§ 2306. Service contracts; rules for full, clear and conspicuous disclosure of terms and conditions; addition to or in lieu of written warranty

(a) The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.

(b) Nothing in this chapter shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.

§ 2307. Designation of representatives by warrantor to perform duties under written or implied warranty

Nothing in this chapter shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided*, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

§ 2308. Implied warranties

(a) Restrictions on disclaimers or modifications

No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration

For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations

A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

§ 2309. Procedures applicable to promulgation of rules by Commission

(a) Oral presentation

Any rule prescribed under this chapter shall be prescribed in accordance with section 553 of Title 5; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions.

A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 57a(e) of this title in the same manner as rules prescribed under section 57a(a)(1)(B) of this title, except that section 57a(e)(3)(B) of this title shall not apply.

(b) Warranties and warranty practices involved in sale of used motor vehicles

The Commission shall initiate within one year after January 4, 1975, a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this chapter, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this chapter, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

§ 2310. Remedies in consumer disputes

(a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures

(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If--

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) Prohibited acts

It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

(c) Injunction proceedings by Attorney General or Commission for deceptive warranty, noncompliance with requirements, or violating prohibitions; procedures; definitions

(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims

(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service

contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief--

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection--

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) Class actions; conditions; procedures applicable

No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a

warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) Warrantors subject to enforcement of remedies

For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

§ 2311. Applicability to other laws

(a) Federal Trade Commission Act and Federal Seed Act

(1) Nothing contained in this chapter shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act [15 U.S.C.A. § 41 et seq.] or any statute defined therein as an Antitrust Act.

(2) Nothing in this chapter shall be construed to repeal, invalidate, or supersede the Federal Seed Act [7 U.S.C.A. § 1551 et seq.] and nothing in this chapter shall apply to seed for planting.

(b) Rights, remedies, and liabilities

(1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c) State warranty laws

(1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement--

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

(d) Other Federal warranty laws

This chapter (other than section 2302(c) of this title) shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this chapter.

§ 2312. Effective dates

(a) Effective date of chapter

Except as provided in subsection (b) of this section, this chapter shall take effect 6 months after January 4, 1975, but shall not apply to consumer products manufactured prior to such date.

(b) Effective date of section 2302(a)

Section 2302(a) of this title shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability

of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this chapter.

(c) Promulgation of rules

The Commission shall promulgate rules for initial implementation of this chapter as soon as possible after January 4, 1975, but in no event later than one year after such date.

Under the Act, a consumer can bring a lawsuit against a party who provided a warranty in any state based upon a failure to fulfill obligations pursuant to either an express written or implied warranty.

In order to make a submissible case for breach of warranty under the Magnuson-Moss Act, a plaintiff must show that prior to filing a lawsuit, he or she provided the defendant with a reasonable opportunity to cure the alleged breach of warranty and defendant refused to cure it. *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 153 (Mo. App. W.D. 2006) and 15 U.S.C.A. § 2310(e).

St. Louis City Code on Construction Defects for Public Contracts

Here is an excerpt from an interesting Local Code from St. Louis City on Construction Defects for public contracts:

Chapter 6.12
DEFECTIVE WORK COMPLAINTS

Sections:

6.12.010 Right to complain--Examination--Decision.
6.12.020 Examination--Cost.
6.12.030 Complaint contents.
6.12.040 Cost estimate--Deposit required.
6.12.050 Consideration of complaint.
6.12.060 Notice of hearing.
6.12.070 Process for witnesses--Special deposit required.
6.12.080 Hearing--Testimony under oath.
6.12.090 Decision--Record.
6.12.100 Mayor to be given copy of decision.

City Counselor Ops.: 9779, 10304

6.12.010 Right to complain--Examination--Decision.

Any citizen and taxpayer of the city may make complaint to the Board of Public Service that any public work is being done contrary to contract, or that the work or material used is imperfect or different from what was stipulated to be furnished or done. The Board shall receive and examine the complaint, and may appoint two or more members of the Board to examine and report on the work. After the examination, or after considering the report of the Commissioners so appointed, the Board shall make the order in the premises as shall be just and reasonable and in accordance with what the public interest seems to demand. The decision of the Board shall be binding on all parties. (1948 C. Ch. 16 § 21: 1960 C. 103.010.)

Charter:

Art. III § 7: Complaints as to execution of contracts

6.12.020 Examination--Cost.

The entire cost of making the examination, under the provisions of Section 6.12.010, including the taking of testimony, when necessary, examining the work, testing the material and of replacing work disturbed in the examination shall be borne by the contractor if the complaint is decided to be well founded, or by the complainant if found to be groundless. (1948 C. Ch. 16 § 22: 1960 C. § 103.020.)

6.12.030 Complaint contents.

The complaint described in Section 6.12.010 shall be in writing, filed with the Secretary of the Board of Public Service, shall give the full name and residence and business address of the complainant, and shall specify the work complained of and general nature of the complaint and of the evidence to be offered. (1948 C. Ch. 16 § 23: 1960 C. § 103.030.)

6.12.040 Cost estimate--Deposit required.

Upon receipt of any complaint described in Section 6.12.010, the Board of Public Service shall make an estimate of the cost which would arise from consideration of the complaint, including that of replacing work injured by the examination and the taking of testimony when necessary. The complainant shall be required to deposit with the City Treasurer the sum so estimated, which sum shall be a special fund, out of which shall be paid, upon the certificate of the President of the Board, the cost incurred by

consideration of the complaint and of replacing the work if the complaint shall be found groundless. Any residue of the special fund shall be returned to the complainant or the whole sum if the complaint is well founded. If the complainant fails to make the required deposit within five days after notice of the amount required, the complaint may be dismissed by the Board. (1948 C. Ch. 16 § 24: 1960 C. § 103.040.)

6.12.050 Consideration of complaint.

When the deposit required by Section 6.12.040 shall have been made the Board of Public Service at its next meeting shall consider whether the complaint may be determined upon oral or documentary evidence, only, in which case the Board shall fix the day and hour for receiving evidence and consideration of the complaint. But if the nature of the complaint is such as to require examination of work done or material furnished, the Board shall appoint two or more of its members as Commissioners to make examinations and tests and report the facts found to the Board. When the Commissioners make a report the Board shall fix a day and hour for the consideration of the complaint. (1948 C. Ch. 16 § 25: 1960 C. § 103.050.)

6.12.060 Notice of hearing.

Notice attested by the Secretary of the Board of Public Service of the day and hour fixed for consideration of a complaint shall be served by mailing a notice of the day, hour and place of hearing such complaint and copy attested by the Secretary of the Board, of complaint to the address given by the complainant and to the business or residence address of the contractor whose work is complained of, or by delivery in person. (1948 C. Ch. 16 § 26: 1960 C. § 103.060.)

6.12.070 Process for witnesses--Special deposit required.

The President of the Board of Public Service shall have full power and authority to issue all needful process for the attendance of witnesses and the production of papers. The process shall be executed by the City Marshal. The party applying therefor shall deposit with the City Treasurer an amount equal to two dollars ($2.00) for each witness as a special fund to pay cost of service and attendance of witness. (1948 C. Ch. 16 § 27: 1960 C. § 103.070.)

6.12.080 Hearing--Testimony under oath.

The Board of Public Service shall proceed with the hearing of the complaint on the day fixed as provided in Section 6.12.070. The complainant and contractor shall be entitled to be heard by himself or by counsel. All testimony of witnesses shall be given under oath, and the president or president pro tempore of the Board is authorized to administer such oaths. (1948 C. Ch. 16 § 28: 1960 C. § 103.080.)

6.12.090 Decision--Record.

After full hearing the Board of Public Service shall render its decision as soon thereafter as practicable, which decision shall be concurred in by a majority of the members thereof present at the hearing. The decision, with the names of the members voting for or against, shall be set out in the records of the Board. (1948 C. Ch. 16 § 29: 1960 C. § 103.090.)

6.12.100 Mayor to be given copy of decision.

Immediately upon the rendition of the final decision the President of the Board of Public Service shall furnish the Mayor with a copy of the records of the Board relating to the complaint and of the final decision. (1948 C. Ch. 16 § 30: 1960 C. § 103.100.)

St. Louis City Residential Code

Part of the St. Louis City Revised Residential Code (Chapter 25.11) reads as follows:

25.11.010 Adoption.

The International Residential Code, 2003, third printing, as published by the International Code Council, Inc., three copies of which are on file in the Office of the Register of the City of Saint Louis, being marked and designated as the International Residential Code, including Appendix Chapters E, G, H, J and K, is hereby adopted as the Residential Code of the City of Saint Louis, in the State of Missouri; pursuant to the ordinance codified in this chapter and in conformity with Section 71.943 RSMo for the regulating the design, construction, quality of materials, erection, installation, alteration, repair, location, relocation, replacement, addition to, use or maintenance of one- and two-family dwellings and townhouses not more than three stories in height and providing for the issuance of permits and collection of fees therefor; and each of the regulations, provisions, conditions and terms of such control of buildings and structures as herein provided; and

that each and all of the regulations, provisions, penalties, conditions and terms of said Residential Code are hereby referred to, adopted and made a part hereto, as if fully set out in this chapter with the additions, insertions, deletions and changes prescribed in this chapter. (Ord. 66789 § 2, 2005.)

SECTION R101
TITLE, SCOPE AND PURPOSE

R101.1 Title. These regulations shall be known as the Residential Code for One- and Two-Family Dwellings of the City of Saint Louis, hereinafter referred to herein as "this code."

R101.2 Scope. The provisions of the International Residential Code for One- and Two-Family Dwellings shall apply to the grading, excavation, new construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal and demolition of detached one- and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories in height with a separate means of egress and their accessory structures.

Exception: Existing buildings undergoing repair, alteration or additions, and change of occupancy shall be permitted to comply with the International Existing Building Code.

R101.3 Intent. The purpose of this code is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide a reasonable level of safety to fire fighters and emergency responders during emergency operations.

R101.4 Referenced codes. The other codes listed in Sections 101.4.1 through 101.4.6 and referenced elsewhere in this code shall be considered part of the requirements of this code to the prescribed extent of each such reference.

R101.4.1 Electrical. The provisions of the National Electrical Code as adopted by the City of Saint Louis shall apply to the installation of electrical systems, including alterations, repairs, replacement, equipment, appliances, fixtures, fittings and appurtenances thereto.

R101.4.2 Gas. The provisions of the International Fuel Gas Code shall apply to the installation of gas piping from the point of delivery, gas appliances and related accessories as covered in this code. These requirements apply to gas piping systems extending from the point of delivery to the inlet connections of appliances and the installation and operation of residential and commercial gas appliances and related accessories.

R101.4.3 Mechanical. The provisions of the International Mechanical Code shall apply to the installation, alteration, repair, and replacement of mechanical systems, including equipment, appliances, fixtures, fittings and/or appurtenances, including ventilating, heating, cooling, air-conditioning and refrigeration systems, incinerators, and other energy-related systems.

R101.4.4 Plumbing. The provisions of the Uniform Plumbing Code as adopted by the City of Saint Louis shall apply to the installation, alteration, repair and replacement of plumbing systems, including equipment, appliances, fixtures, fittings and appurtenances, and where connected to a water or sewage system and all aspects of a medical gas system.

R101.4.5 Property maintenance. The provisions of the International Property Maintenance Code shall apply to existing structures and premises; equipment and facilities; light, ventilation, space heating, sanitation, life and fire safety, hazards; responsibility of owners, operators and occupants; and occupancy of existing premises and structures.

R101.4.6 Fire prevention. The provisions of the International Fire Code shall apply to matters affecting or relating to structures, processes and premises from the hazard of fire and explosion arising from the storage, handling or use of structures, materials or devices; from conditions hazardous to life, property of public welfare in the occupancy of structures or premises; and from the construction, extension, repair, alteration or removal of fire suppression and alarm systems or fire hazards in the structure or on the premises from occupancy or operation.

R101.5 Purpose. The purpose of this code is to provide minimum requirements to safeguard the public safety, health and general welfare, through affordability, structural strength, means of egress facilities, stability, sanitation, light and ventilation, energy conservation and safety to life and property from fire and other hazards attributed to the built environment and to provide a

reasonable level of safety to firefighters and emergency responders during emergency operations.

The entire Code is 52 single-spaced pages long. Its emphasis on preventing construction defects focuses considerably and understandably on public safety.

Right to Repair/Right to Cure Law

In any construction defect situation, the persons involved should consult all applicable authority regarding a right to repair/right to cure as the appropriate remedy. There are statutes regarding this in various jurisdictions around the country on both local and state levels. One perceived advantage of a right to cure statute is that it gives the builder an opportunity to fix the problem before the aggrieved party can take any other action. Presumably, if there is a problem, the builder can most effectively and inexpensively correct the defect. The problem occurs, however, when the owner has had significant and/or consistent problems with the builder and does not want the builder to do anything further. This creates the dilemma as to the appropriateness of a right to cure procedure. Whether there is a defect is not the primary question addressed by right to cure statutes. Rather, these statutes are designed to address the procedure and the remedy should a defect exist.

In *Cooper v. Bluff City Mobile Home Sales, Inc.*, 78 S.W.3d 157 (Mo. App. S.D. 2002), Bluff City defended plaintiff's breach of contract count on the theory that it and the mobile home manufacturer were denied the right to cure by repairing the damages. Under at least one provision of the UCC, namely § 400.2-508, sellers have the right to cure a rejection by repair or replacement. *See Bowen v. Foust*, 925 S.W.2d 211, 215-16 (Mo. App. 1996). The court noted that although § 400.2-508(1) gives a seller an unfettered right to cure "within the contract time" there also is "uncertainty in the Code and confusion in the caselaw as to the difference between a curative tender and the making of repairs." *Id.* at 164. The court further stated that there is no UCC provision that expressly gives a seller the right to cure and nonconforming delivery by repairs or adjustment. It further noted: "Consequently, there exists a plethora of caselaw, digest, treatises, and commentary that discuss what constitutes an adequate 'cure' within the meaning of the UCC when tendered goods are rejected for nonconformity." *Id.* at 164.

Missouri Statute on Construction Defect

Missouri's Residential Construction Defect Statute reads as follows:

V.A.M.S. 436.356

➡436.356. Court actions arising from construction defects, notice of alleged defect to be given, response of contractor-- dispute of claim, procedure-- mediation, where to occur

1. In every action against a contractor arising from construction or substantial remodel of a residence, a claimant shall serve the contractor with a written notice of claim of construction defects. The notice of claim shall state that the claimant asserts a construction defect claim against the contractor and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect as well as any known results of the defect.

2. Within fourteen days after service of the notice of claim, the contractor shall serve a written response on the claimant which shall:

(1) Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the contractor shall, based on the inspection, thereafter offer to remedy the defect within a specified time frame, compromise by payment, or dispute the claim; or

(2) Offer to remedy the claim without an inspection within a specified time frame; or

(3) Offer to remedy part of the claim without inspection and compromise and settle the remainder of the claim by monetary payment within a specified time frame; or

(4) Offer to compromise and settle all of a claim without inspection. A contractor's offer pursuant to this subdivision to compromise and settle a claimant's or association's claim may include, but is not limited to, an express offer to purchase the claimant's residence that is the subject of the claim; or

(5) State that the contractor disputes the claim and will neither remedy the construction defect nor compromise and settle the

claim.

3. (1) If the contractor disputes the claim pursuant to subdivision (5) of subsection 2 of this section or does not respond to the claimant's notice of claim within the time stated in subsection 2 of this section, the claimant may bring an action against the contractor for the defect described in the notice of claim without further notice.

(2) If the claimant rejects the inspection proposal or the settlement offer made by the contractor pursuant to subsection 2 of this section, the claimant shall serve written notice of the claimant's rejection on the contractor. The notice shall include the basis for claimant's rejection. After service of the rejection, the claimant and contractor may attempt to resolve the claim through mediation in accordance with section 436.362. If the claim is not resolved through mediation, the claimant may bring an action against the contractor for the construction defect claim without further notice described in the notice of claim. If the contractor has not received from the claimant within thirty days after the claimant's receipt of the contractor's response either an acceptance or rejection of the inspection proposal or settlement offer, the contractor may at any time thereafter terminate the proposal or offer by serving written notice to the claimant. If the contractor so terminates the proposal, the claimant may thereafter bring an action against the contractor for the defect described in the notice of claim without further notice.

(3) If the claimant elects to accept the offer of the contractor to remedy the claim without an inspection pursuant to subdivision (2) of subsection 2 of this section, or if the claimant elects to accept the offer of the contractor to remedy part of the claim without inspection and compromise and settle the remainder of the claim by monetary payment pursuant to subdivision (3) of subsection 2 of this section, the claimant shall provide the contractor and its contractors or other agents reasonable access to the claimant's residence during normal working hours to perform and complete the construction or work in accordance with the timetable stated in the offer. Any dispute relating to performance of the remedial construction or work by the contractor may be resolved by mediation in accordance with section 436.362. If the dispute is not resolved by mediation, the claimant may bring an action against the contractor for the defect described in the notice of claim.

4. (1) If the claimant elects to allow the contractor to inspect in accordance with the contractor's proposal pursuant to subdivision (1) of subsection 2 of this section, within fourteen days after the date of the claimant's election to allow an inspection is communicated to the contractor, the claimant and contractor shall agree on a time and date for the inspection, and such inspection shall occur within fourteen days from the date of the communication of such election for an inspection unless the claimant and contractor agree to a later date. The claimant shall provide the contractor and its subcontractors, suppliers, or other agents reasonable access to the claimant's residence during normal working hours to inspect the premises and the claimed defect. The contractor shall perform the inspection at its own cost. If destructive testing is necessary, the contractor shall repair all damage caused by the testing.

(2) Within fourteen days following completion of the inspection, the contractor shall serve a report of the scope of the inspection and the findings and results of the inspection on the claimant, and either:

(a) A written offer to remedy all of the claim at no cost to the claimant, including a description of the construction or work necessary to remedy the defect described in the claim, and a timetable for the completion of such construction or work; or

(b) A written offer to remedy part of the claim, and compromise and settle the remainder of the claim by monetary payment, within a specified time frame; or

(c) A written offer to compromise and settle all of the claim by monetary payment pursuant to subdivision (4) of subsection 2 of this section; or

(d) A written statement that the contractor will not proceed further to remedy the defect.

(3) If the contractor does not proceed further to remedy the

construction defect within the stated timetable, or if the contractor fails to comply with the provisions of subdivision (2) of this subsection, the claimant may bring an action against the contractor for the defect described in the notice of claim without further notice.

(4) If the claimant rejects the offer made by the contractor pursuant to paragraph (a), (b), or (c) of subdivision (2) of this subsection to either remedy the construction defect or remedy part of the claim and make a monetary settlement as to the remainder of the claim or to compromise and settle the claim by monetary payment, the claimant shall serve written notice of the claimant's rejection and the reasons for the rejection on the contractor. After service of the rejection notice, the claimant and contractor may attempt to resolve the dispute through mediation in accordance with section 436.362. If the dispute is not resolved through mediation, the claimant may bring an action against the contractor for the defect described in the notice of claim. If the contractor has not received from the claimant within thirty days after the claimant's receipt of the contractor's response either an acceptance or rejection of the offer made pursuant to paragraph (a), (b), or (c) of subdivision (2) of this subsection, the contractor may at any time thereafter terminate the offer by serving written notice to the claimant. If the contractor so terminates its offer, the claimant may bring an action against the contractor for the claim described in the notice of claim without further notice.

5. (1) Any claimant accepting the offer of a contractor to remedy all or part of the construction defect pursuant to paragraph (a) or (b) of subdivision (2) of subsection 4 of this section shall do so by serving the contractor with a written notice of acceptance within a reasonable time period after receipt of the offer, and no later than thirty days after receipt of the offer. The claimant shall provide the contractor and its subcontractors or other agents reasonable access to the claimant's residence during normal working hours to perform and complete the construction or work by the timetable stated in the offer. Any dispute relating to performance of the remedial construction or work by the contractor may be resolved by mediation in accordance with section 436.362. If the dispute is not resolved by mediation, the claimant may bring an action against the contractor for the defect described in the notice of claim.

(2) The claimant and contractor may, by mutual written agreement, alter the extent of construction or the timetable for completion of construction stated in the offer, including, but not limited to, repair of additional defects.

6. Any action commenced by a claimant prior to compliance with the requirements of this section shall, upon motion by a party to the action, be subject to dismissal without prejudice, and shall not be recommenced until the claimant has complied with the requirements of this section if the court finds the claimant knowingly violated the sections of said act.

7. The claimant may amend the notice of claim to include construction defects discovered after the service of the original notice of claim and shall otherwise comply with the requirements of this section for the additional claims. Claims for defects discovered after the commencement or recommencement of an action may be added to such action only after providing notice to the contractor of the defect and allowing for response under subsection 2 of this section.

8. If, during the pendency of the notice, inspection, offer, acceptance, or repair process, an applicable limitations period would otherwise expire, the claimant may file an action against the contractor, but such action shall be immediately abated pending completion of the notice of claim process described in this section. This subsection shall not be construed either to revive a statute of limitations period that has expired prior to the date on which a claimant's written notice of claim is served or extend any applicable statute of repose.

9. A written notice of claim and any written response by a contractor shall be treated as a settlement offer and shall not be admissible in an action related to a construction defect asserted therein, except as otherwise permitted by law. A written notice of claim and any written response by a contractor shall not be admissible as a prior inconsistent statement.

10. In the event that immediate action must be taken by a claimant to prevent imminent injury to persons because of alleged construction defects, including defective garage doors, that

threaten the life or safety of persons, or alleged construction defects, including defective garage doors, that if not addressed will result in significant and material additional damage to the residence, the homeowner or another person designated by the homeowner including the contractor may undertake reasonable repairs necessary to mitigate the emergency situation. Claimants may thereafter include the cost of such repairs in the written notice of claim of construction defects provided for in subsection 1 of this section. Provided, however, that other than the undertaking of immediate repairs to remedy an emergency situation, any repairs to construction defects undertaken by homeowners shall not be included in claims initiated under subsection 1 of this section, and shall not be the subject of an action.

11. Any mediation shall take place in the county where the claimant resides or in a mutually agreed to location.

Express Warranties

Any defect can be covered by express contract. Often these are seen as express warranties. For example, there may be an express warranty of performance. In a power plant, there may be a warranty as to the effectiveness of scrubbers to eliminate unwanted emissions into the air. If they do not perform at preset contract levels, damages may exist including if contractually provided, liquidated damages. In this sense, the defect is precisely contracted and easily identifiable and measurable.

A claim for defective work can exist independent of an express warranty as long as the express warranty does not state that it is the sole and exclusive remedy available to the party. *See Cognitest Corp. v. Riverside Publishing Co.*, 107 F.3d 493 (7th Cir. 1997).

Express warranties are as varied as the contracts themselves.

Implied Warranties

Implied warranties can exist at law and typically you see them in the Uniform Commercial Code as being warranties such as an implied warranty of quality and fitness.

For years contractors and homeowners have fought over the extent to which a contractor's work was covered by an implied warranty of quality and fitness. In two recent cases, Missouri's courts have extended the coverage to areas beyond the home itself, perhaps signaling that contractors can expect to

see more claims of construction problems to work they did on a typical home project. The cases are *Hershewe v. Perkins*, 102 S.W.3d 73 (Mo. App. W.D. 2003) and *Wilkinson v. Dwiggins*, 80 S.W.3d 849 (Mo. App. E.D. 2002).

Since 1972, Missouri has recognized that a new homeowner has a claim for an implied warranty of quality and fitness against the contractor. This claim only applies, however, to the first purchaser of a new home and then only if the seller of the home also was the builder.

The concept is that the purchaser of a new home should have at least as much protection as the purchaser of a new car, a gas stove, a sump pump or a ladder. In fact, the purchase of a new home may be much more problematic because the structural quality of a house, according to the *Hershewe* court, is "nearly impossible to determine by inspection after the house is built, since many of the most important elements of its construction are hidden from view." Therefore, the purchaser has to rely on the builder.

For years many thought that the implied warranty did not apply to an improvement outside the house that was not an integral part of the structure or immediately supporting the house. In 1989, a Missouri appellate court made clear that for an implied warranty to apply, it was not essential that the item in question be attached to the home or provide immediate structural support to the home.

The critical issue was whether the item in question was integral to the home's use. Therefore, the court decided in 1989 that a driveway and stairs leading to a new residence were covered under the implied warranty of quality and fitness.

The dispute in *Hershewe* was whether an implied warranty could extend to defective retaining walls. One retaining wall contained Keystone that had collapsed next to the house. Another wall was stone that could not hold back the dirt because there was no back support or small rock fill material. Rainwater ran through the walls and potentially into the house.

The court determined that retaining walls played an important role in the enjoyment of the resident's home. The implied warranty covers these walls because they are part of the items surrounding the home that are critical to its function and viability.

In all, there were five retaining walls, four of which needed the installation of a geogrid system at least six to eight feet behind the walls in accordance with Keystone's specifications. The walls also needed fill of three-quarter-inch to one-inch rock and 250 standard blocks to cover additional repairs.

Two experts testified at trial to establish a total repair cost of $30,000. One was a civil and structural engineer and the other owned a landscaping business. The appellate court upheld the judgment of $30,000 in favor of the homeowner to pay for the cost to rebuild these walls.

In *Wilkinson v. Dwiggins*, the issue was whether the implied warranty of quality and fitness applied when a contractor had installed a septic system as part of a "spec" home. Both the state and county governments had approved the design and installation of the septic system.

Within a month after moving into the new home the homeowners noticed seepage above ground from the septic system and asked the builder and its subcontractor to make repairs. In response the contractor made several repairs but effluent continued to leak above the ground.

At trial the homeowners and the contractor presented differing testimony as to the cause of the leak. In the end, the trial judge denied any award of damages that was based on a theory of implied warranty of quality and fitness.

The trial court reasoned that the state and county governments had taken away from the contractor all discretion about how to build the system. Since the governments also disclaimed any guarantee that the system would work, the contractor had no warranty, implied or otherwise, to give regarding the septic system.

The appellate court disagreed. It found instead that the contractor could be liable under a theory of implied warranty and that the government regulations did not strip the builder of all decision-making authority in building the system. In fact, on appeal, even the contractor conceded this point. The case returned to the trial court to determine whose fault it was that the system leaked.

Miller Act

The Miller Act (40 U.S.C. § 3131, *et. seq.*) is the federal version of a state mechanic's lien act in many respects. Since you cannot lien federally owned property in construction projects, a bond is put in place or as guarantee for payment should there be a claim by a contractor or subcontractor. The claim is then made against that fund of money rather than the actual building or project in question. But under the Miller Act, does a construction defect or contractor fault have to exist before there can be recovery?

The United States Court of Appeals for the Eighth Circuit recently decided that the Miller Act does not require that a subcontractor, using the total cost approach to recover damages, prove any fault by the general contractor. The case is *Lighting & Power Services, Inc. v. Roberts, d/b/a*

Robinson Quality Constructors, Inc. and United States Fidelity and Guaranty Co., 354 F.3d 817 (8th Cir. 2004).

This result expands the possibilities of recovery by subcontractors in construction projects involving the federal government.

The project was renovation work at Jefferson Barracks in St. Louis, Missouri. Roberts was the federal government's general contractor. Lighting & Power Services (LPS) was Roberts' electrical subcontractor.

The renovation work was supposed to take six months but due to delays the work took twenty-two months to complete. There was no dispute that the government caused the delays.

The Miller Act requires a general contractor to obtain a payment bond on government contracts exceeding $100,000 to secure payment to subcontractors for labor and materials they supply. A subcontractor cannot file a mechanic's lien on government projects because a lien cannot attach to federal property.

Thus, the Miller Act provides the subcontractor with a security interest similar to a mechanic's lien that could be placed on private projects. The general contractor must secure a payment bond before any contract will be awarded on a federal project.

LPS filed a lawsuit under the Miller Act, seeking to recover $110,641 in additional costs incurred due to the government's delay. LPS used the total cost approach to calculate its damages.

The trial court instructed the jury that total cost requires proof that (1) it is impracticable for LPS to prove its actual losses directly, (2) LPS's bid that was accepted by Roberts was reasonable, (3) LPS's actual costs were reasonable, (4) Roberts had some responsibility in causing LPS's actual losses, and (5) LPS incurred damages as a consequence.

A total cost approach involves taking the actual costs incurred by the subcontractor and subtracting any cost already paid to it on the contract. The difference is additional damage to the subcontractor.

The jury returned a verdict in favor of Roberts, the general contractor. The dispute was whether the trial court correctly instructed the jury that LPS had to prove that Roberts had some responsibility in causing LPS's losses.

Since Roberts and LPS agreed that the government caused the delays, it is easy to understand, given this instruction, why the jury entered its verdict for Roberts.

Roberts argued that prior case law has defined a clear requirement in total cost cases that the subcontractor prove that the general contractor had some responsibility in causing the subcontractor's loss. Without such proof, the total cost method will not allow recovery.

The Eighth Circuit examined several prior decisions where a jury did have to find some responsibility on the general's part. The court distinguished these cases, however, because they involved breach of contract where a subcontractor is required to prove its losses resulted from the general's fault. The cases did not involve the Miller Act.

By contrast, under the Miller Act, a subcontractor expressly does not have to prove any fault on the part of the general contractor. A Miller Act case requires different proof from a breach of contract case, and the recovery is different, too.

For example, the court noted that Miller Act cases do not allow recovery of lost profits when using the total cost approach. However, non-Miller Act cases generally include reasonable lost profits.

Given these differences, the court concluded that a subcontractor who uses the total cost approach in a Miller Act case will not be required to prove any fault by the general contractor. In reaching this result, the court decided that the total cost approach requires less proof in Miller Act cases than in other cases, such as breach of contract. This is a significant victory for subcontractors.

The Eighth Circuit then reversed the trial court's judgment and sent the case back to the trial court for another trial. Presumably, the next jury will not be required to find any fault on the part of Roberts.

How Does a Construction Defect Play Into Potential Liability?

The Missouri Court of Appeals for the Eastern District (St. Louis) decided on January 11, 2000, that those who tested the strength of a concrete foundation might be liable to the owners of the house. The court reached this result even though the owners were not the ones to hire the testers, they did the work without charge, and they unknowingly based the results on inaccurate information provided to them about the concrete's age.

The case is *Darrin Miller and Mary Miller v. Big River Concrete, Jefferson County Ready-Mix, Inc., John Wolf and W. R. Grace and Co.*, 14 S.W.3d 129 (Mo. App. E.D. 2000). This decision increases potential liability for anyone who supplies information for a construction project. In the future, those who supply information would be wise to include in their reports appropriate disclaimers and qualifiers. Those who are extremely (and perhaps overly) cautious may

decide not to offer any information or advice, at least in certain cases or for certain projects.

The Appeals Court, reversing a trial court, concluded that the plaintiff homeowners could proceed to trial under a theory of negligent misrepresentation against the testers, W.R. Grace and Co. and John Wolf. Wolf was a concrete salesman for Grace and a civil engineer with a degree from the University of Missouri at Rolla.

Negligent misrepresentation requires a showing that (1) defendant supplied information in the course of his business or because of some other pecuniary interest; (2) due to defendant's failure to exercise reasonable care or competence in obtaining or communicating this information, the information was false; (3) defendant intentionally provided the information for the guidance of a limited number of persons in a particular business transaction (in this case construction of the house); (4) plaintiff justifiably relied on the information; and (5) as a result of plaintiff's reliance, he suffered a pecuniary loss.

The plaintiff homeowners initially went to trial in Jefferson County against the two companies that ordered the concrete, Big River and Ready Mix, under theories of breach of implied warranties of fitness and merchantability. The jury awarded plaintiffs $50,000 against Big River but nothing against Ready Mix.

Plaintiffs also had sued Grace and Wolf, the testers, claiming they negligently supplied information about the concrete's strength based on the "Swiss Hammer Test". This test, using a spring-loaded hammer, is designed to measure in the field the strength of the concrete in a nondestructive and relatively simple way.

The problems started after plaintiffs bought a lot and decided to build a house. One of the plaintiffs, Darrin Miller, had experience in the construction field; thus, he acted as his own general contractor on the house. Plaintiffs hired ET Concrete to pour the foundation. ET ordered the concrete from Big River and Ready Mix.

During the pour, ET noticed the concrete was not of the proper consistency and it contained significant amounts of debris. Big River and Ready Mix assured ET that the concrete was correct. Based on this assurance, ET completed the foundation, but then noticed that portions of the foundation had begun to crumble and disintegrate.

Plaintiffs, Big River and Ready Mix agreed the concrete should be tested. That prompted Big River to ask Wolf, a salesman for Grace, to perform the

Swiss Hammer Test. Since Big River was a customer of Grace, Wolf did the test without any charge, as a customer service.

Wolf knew the test was for plaintiffs' foundation and that they wanted to be present. Big River informed Wolf that the foundation was ten days old, when in reality it was twenty days old. (While the case does not state, this difference probably threw off the calculation.)

Wolf told Big River that the Swiss Hammer Test was most accurate after twenty-eight days, the cure time for concrete and that this particular test was not all that accurate, no matter when used. Even plaintiff Darrin Miller, who had poured three to five foundations himself, questioned the test's accuracy.

Nevertheless, Wolf performed the test at six locations on the foundation. Plaintiffs were not present. Defendants projected the concrete's strength at twenty-eight days, which had to be at least 2500 PSI, per the BOCA and building code requirements applicable in Jefferson County. Wolf sent a letter report to Big River and Ready Mix stating that the test results projected that the concrete's strength would exceed the requirements. Apparently, the report did not contain any caution as to the test's accuracy.

After receiving the letter report and talking to Big River, plaintiffs resumed construction. They added a sub-floor, exterior walls and some interior walls. Concerned again about the concrete's strength, plaintiffs then hired another company, SCI, to retest the foundation using a more comprehensive and reliable test. The test results showed that the foundation was inadequate and below the BOCA requirements.

The trial court, concluding that Wolf and Grace were not liable as a matter of law, dismissed them without a trial. The Eastern District reversed this decision, deciding that enough evidence existed to merit trial. The appeals court stated that neither a contract nor a direct relationship with the homeowners was necessary to be liable. The court held that a company and an individual might be responsible to "third parties" for negligence in a professional opinion.

Further, the court applied the doctrine of negligent misrepresentation even though plaintiffs' losses were only "economic", meaning business and not personal injury. The appeals court stated that plaintiffs had a recognized property interest and thus the doctrine applied. Extending liability to these defendants, the court reasoned, would not subject them to "unlimited liability", as plaintiffs' injuries were foreseeable and thus fit the definition for negligent misrepresentation.

Statute of Limitations

Generally, under Missouri law, a lawsuit based upon a construction defect needs to be filed within five years of the damage being sustained and capable of ascertainment. R.S.Mo. § 516.120. Missouri also has what is commonly referred to as a statute of repose, which can extend the period of time within which to file a lawsuit up to ten years. R.S.Mo. § 516.097. There has been considerable litigation in Missouri in recent years regarding construction defect cases and the statute of limitations and repose. Consider the following:

In three important decisions since 1999, Missouri's appellate courts have expanded the time for filing construction lawsuits against contractors, engineers and architects even though the plaintiff owners in each were aware early on of certain construction problems. The cases set a clear direction in how courts will examine statute of limitations defenses and the circumstances when a lawsuit can be maintained more than five years after first learning of some type of construction defect or failure.

Business Men's Assurance Co. of America v. Graham

The first case is *Business Men's Assurance Co. of America v. Graham*, 984 S.W.2d 501 (Mo. 1999). The Missouri Supreme Court decided that architects and engineers can be responsible for defects 39 years after construction. The decision cost the architects/engineers $5,287,991 in jury-awarded damages.

In 1960, Business Men's Assurance (BMA) contracted with an architectural and engineering firm (Skidmore, Owings & Merrill) to design the BMA office tower in Kansas City, Missouri. Construction started in 1961 and ended in 1963.

The building's exterior contained more than 4.000 panels of marble that were each 1¼" thick and covered all four sides of the building's vertical columns. Metal anchors attached the marble panels to the building.

The contract provided that Skidmore would use its "best efforts" to supervise and protect the owner against defects but Skidmore did not guarantee the contractor's performance.

In 1985, one marble column panel fell from the penthouse to the tower. A month later, two horizontal panels fell seven stories to the ground.

BMA hired Black & Veatch to investigate. Black & Veatch discovered significant design problems, including a finding that at least 25 percent of the anchors were either missing or were of an incorrect type and that all of them were 1/16" thick instead of the specified 1/8".

Black & Veatch further found that the marble failed to meet industry standards for the early 1960's. Over the years, the marble warped, cracked and lost strength.

In 1986, the owners sued Skidmore and others for negligence and breach of contract, which prompted a settlement from everyone except Skidmore. During the litigation, Skidmore argued that the owner waited too long to sue, pursuant to Missouri's statute of limitations, § 516.100 R.S.Mo., a statute long disputed as to its meaning and reach.

Section 516.100 provides in part that "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

A claim for breach of contract under Missouri statutory law must be brought within five years. § 516.120. The question is within five years of "what." No Missouri case has ever clearly or precisely defined what "sustained and capable of ascertainment" means or how it is to be applied, despite hundreds of cases that have involved this phrase. *See Business Men's* at 139.

At trial, Skidmore introduced evidence that the owner knew of early problems with the marble. Apparently, the marble pieces chipped off and had to be reattached. One panel was replaced and in 1975 the entire exterior of the building was recaulked.

The Missouri Supreme Court decided that these early problems were not significant enough, legally speaking, to alert BMA that the system as a whole was defective. Such knowledge did not occur until 1985, when the panels began to fall. The Court separated damages involving less important elements of construction from later damages that involved more serious and expensive repairs.

Allen v. Kuehnle and Kuehnle Bros. Constr. Co.

The next case is *Allen v. Kuehnle and Kuehnle Bros. Constr. Co.*, 92 S.W.3d 135 (Mo. App. E.D. 2002). The Eastern District Court of Appeals decided that a homeowner could sue her contractor seven years after moving into the house. Minor punch-list items immediately after construction were not enough to trigger an earlier date.

The Court decided that Missouri's five-year statute of limitations for breach of contract did not start until the homeowner knew of serious structural defects. This case lengthens the potential exposure and liability of contractors.

The contractor was to build a new house that would occupy a quarter of the "footprint" of ground excavated by the contractor during removal of the prior house. After moving into the completed home in May 1993, the homeowner noticed various problems, prompting a punch list dated August 24, 1993.

The punch list contained 26 items including hairline cracks in the drywall, drywall tape pulling away from walls in certain places, two sections of the sidewalk that sloped, and some loose shingles. The contractor repaired or attempted to repair most of the items on the punch list.

In 1998, the homeowner began to notice "numerous new, more dramatic problems with her home," such as cracks in the foundation and exterior brick walls, a huge L-shaped crack in the family room, and drywall tape that was pulling away from the walls in nearly every room.

The homeowner decided to have her home piered, per an engineer's advice. This process generated considerable dust and debris. While cleaning the dust, the homeowner developed a sore on her foot that became infected, resulting in a hospital stay and medical costs of $3,667.

Allen sued in November 1999, claiming breach of contract and negligence and sought a rescission of the contract. The contractor defended, to a considerable degree, on the grounds that Allen had waited too long to sue.

The issue was whether the punch list created in 1993 and the homeowner's knowledge about problems before 1995 were enough to provide notice to the homeowner of the structural problems. There was contradictory evidence on this point.

The contractor had argued that the homeowner knew of structural problems more than five years before she filed the lawsuit. The trial judge agreed and granted summary judgment for the contractor.

The appellate court relied heavily on the decision in *Business Men's Assurance Co. of America v. Graham.* The court concluded that material facts were still in dispute as to when structural problems were ascertainable; thus, the trial judge erred by granting the motion for summary judgment.

In distinguishing other cases, the appellate court found the compelling difference to be that the homeowner's problems before 1998 were not problems related to settlement or faulty soil compaction. Rather, the prior problems

were typical, common issues experienced during the construction of a new home.

Loeffler v. City of O'Fallon

The third case is *Loeffler v. City of O'Fallon*, 71 S.W.3d 638 (Mo. App. E.D. 2002). The Eastern District decided that an owner could sue the City of O'Fallon more than five years after completion of a project and after first noticing construction defects. The result should prompt contractors to reconsider whether they will extend open-ended offers and agreements to remedy construction defects after completion.

Loeffler, the homeowner, had sued the City of O'Fallon for breach of contract. While the record is not precisely clear, it appears that the City was doing some construction work and needed a temporary construction easement for access to the homeowner's property.

The contract included handwritten "special conditions" that provided the City would be responsible for and promptly correct any water backup or other problems due to construction. The City's responsibilities did not expire upon completion of the project.

The City completed the project in May 1992 and thereafter the homeowner noticed grading changes and poor drainage from the fall of 1992 through the spring of 1993. In 1993, she notified the City that her yard was sinking. This was more than five years before she eventually sued.

During the next two years, Loeffler's property sustained damage due to poor drainage including wall fractures and moisture intrusion into the basement. In March 1994, she obtained and sent to the City a bid from a grading contractor to correct the drainage problem.

In August 1994, the City's insurance company sent Loeffler a response denying liability but adding that it would re-evaluate if Loeffler produced documents to support her claim. Loeffler filed her lawsuit in June 1999. This was more than five years after obtaining the bid for corrective work but less than five years from first hearing that the City through its insurance company denied liability.

The City convinced the trial court that Loeffler had waited too long to sue since Loeffler's property clearly had damage that she knew about in 1993. In reversing the trial court, the appellate court decided that the City had contractually agreed to fix any defects after construction and had not limited the period of time to do so.

Loeffler was required to offer the City an opportunity to correct any defects before filing the lawsuit. Thus, the appellate court concluded that the statute of limitations did not begin to run until the City first refused to be responsible for problems resulting from its work.

In reaching this result, the appellate court recognized a "line of cases which stand for the proposition that, in certain instances, a plaintiff need not give a defendant an opportunity to correct defects." *Id.* at 643. The court did not believe it had to follow them because they contained contract provisions different from the one between the City and Loeffler.

Other cases follow these, including:

<u>Twin Chimneys Homeowners Association v. J.E. Jones Construction Co.</u>

The Eastern District Court of Appeals decided that the Twin Chimneys Homeowners Association could keep the $987,940.00 it received from a jury verdict against J.E. Jones Construction Company and Jones Company Custom Homes, Inc., the developer of the Twin Chimneys subdivision, and one of the subdivision's trustees, Howard Chilcutt. The case is *Twin Chimneys Homeowners Association v. J.E. Jones Construction Co.*, 168 S.W.3d 488 (Mo. App. E.D. 2005).

The jury found that both the developer and Chilcutt, one of the original trustees of the subdivision, breached their fiduciary duties to the Association by not maintaining and repairing the subdivision's lakes, designated as common areas. The lakes are muddy and under-excavated, contrary to the homeowners' expectations when they purchased properties in the development.

In achieving this result, the Association overcame several difficult legal obstacles. The outcome offers considerable hope to future homeowners who face similar hurdles.

The appellate court's decision may have the greatest impact on the issue of how long a homeowner and its association can wait before suing a developer for construction-related problems.

The homeowner's advisory board notified the developer and trustee that the lakes were muddy in 1990, shortly after their completion. They waited nine years, however, until 1999 before filing their lawsuit.

Missouri's applicable statute of limitations specifies that a lawsuit of this type must be brought within five years from when the damages are first sustained and capable of ascertainment. If there is more than one item of damage, then the action must be brought within five years of the last item of

damage, "so that all resulting damage may be recovered, and full and complete relief obtained."

This statutory language has generated literally thousands of motions in trial courts over the years and hundreds of appeals over when a damage is sustained; when a damage can be determined; and what compounding of damages can extend the time period to the last item. A lawsuit's viability, as well as the economic future for the parties involved, often hangs in the balance.

How did the Association overcome early evidence of mud? The appellate court decided that even though muddy lake conditions were known to exist many years ago, the last item of damage did not occur until the Association received an expert report on March 30, 1998, stating that one of the lakes was under-excavated by up to eight feet. Thus, the lawsuit was timely.

The appellate court characterized the failure to maintain the common areas as a "continuing wrong." The court then found that each day continued or repeated the wrong and created a separate cause of action, triggering a new, daily period of five years to sue for that wrong. The court concluded that all damages sustained within five years of filing the lawsuit were recoverable.

The appellate court noted that the developer trustees continually promised through 1996 that the common areas would be remedied, and stated it was best to wait until the subdivision was complete before effecting repairs. It was not until 1996 or later that the homeowners knew that the developer trustees were not going to make the repairs. It was then that the Association's damages were "recoverably certain."

The developer also argued that the jury's verdict was too high and included damages, contrary to the jury instructions, for a period greater than the five years before the lawsuit was filed. Rejecting this position, the appellate court found that the $987,940.00 was far less than the $2,500,000.00 that one expert testified it would cost in 2003 to correct the lake problems. There also was expert testimony that excavating the lakes was the only solution to the mud problems.

The jury found Chilcutt, the only trustee left in the case as a defendant due to various legal reasons, to be personally liable for the $987,940.00. To keep him in the case, the Association had to overcome a provision in the indenture of trust that provided that the trustees cannot be held personally responsible for their own wrongful acts, "and no Trustee shall be responsible for the wrongful acts of others."

The court noted that contracts like this one that exonerate someone from future acts of negligence are to be strictly construed against that person and require clear and explicit language. The court concluded: "We do not believe

the above clause clearly and explicitly releases the trustees, including Chilcutt, from their own breaches of fiduciary duty."

The court also noted that Chilcutt admitted that as an owner and an officer of the developer, any money spent by the developer to fix the problem would have affected him personally. The court cited this as a conflict of interest that was not exonerated by the indenture of trust.

The court also rejected the developer's argument that the measure of damage should have been the diminution in the value of the lakes, since this is the general rule in Missouri. The appellate court found that the trial court correctly instructed the jury to award damages based on the cost to repair the lakes because Missouri recognizes an exception when the land (or in this case lakes) is not generally bought and sold on the open market.

The subdivision's common ground fits this description. In such a case, the cost to repair is the proper measure of damage.

<u>Randolph d/b/a Randolph Farm Equipment, et al. v. Missouri Highways and Transportation Commission</u>

Missouri's Western District Court of Appeals recently decided that homeowners who suffered flood losses due to the construction by the Missouri Highways and Transportation Commission (MHTC) of a highway bypass for Highway 65 around Carrollton waited too long to file their lawsuit for damages to their personal property. The case is *Randolph d/b/a Randolph Farm Equipment, et al. v. Missouri Highways and Transportation Commission*, 2006 WL 3589483 (Mo. App. W.D.), decided December 12, 2006 (not reported in S.W.3d).

The Randolphs, as landowners, had sued the MHTC for inverse condemnation. A claim for inverse condemnation means that a government entity (in this case MHTC) allegedly engaged in wrongful activity that created an invasion or appropriation of a valuable property right of landowner.

The Randolphs alleged that the construction around Highway 65 had materially changed and altered the flow of the surface water around the highway and Wakenda Creek which resulted in the flooding of their property in 1993 and again in 1998. The MHTC had completed the construction that caused the flooding of landowners' property in 1977.

They filed suit on May 24, 1999, more than five years after the flood of 1993 but obviously only one year after the 1998 flood. The 1993 flood was rare and one of the worst in Missouri's history.

The landowners admitted they had suffered personal property losses before 1998. The appellate court thus decided that the first flood in 1993 triggered the five-year statute of limitations and any suit for personal property damage had to be brought by 1998. A lawsuit in 1998 would have been 21 years after the construction.

During the pre-trial conference, the trial judge granted MHTC's motion to dismiss from the lawsuit the Randolphs' claim for personal property damages, based on Missouri's five-year statute of limitations. The jury returned a verdict in favor of the property owners for their real estate damages. After the jury verdict, the judge denied the landowners' request for attorney fees but did award them prejudgment interest.

On appeal, the appellate court reaffirmed that Missouri courts recognize that inverse condemnation actions derive from constitutional protections (rather than common law tort liability) afforded landowners so that their property cannot be taken without just compensation. The courts extend the time to sue for real property damages in inverse condemnation cases to ten years, the same time a public entity with power to condemn would need to obtain a prescriptive easement.

The landowners asked the court to overturn prior case law from 2001 that requires lawsuits within five years for personal property losses. The appellate court concluded that nothing has changed in the law since 2001 to prompt the court to now find that personal damages are subject to the longer period allowed for real estate damages. The property owners could not recover for personal damages caused in either flood.

While the appellate court did not specifically address this, by finding that the landowners should have sued sooner, this means that they should have brought a lawsuit before they may even have known about the second flood. It always is difficult for a jury to know how and whether to access damages for future events—like another flood—when deciding how much to award. It also means that no matter how many more floods there may be, the landowners cannot recover for their personal damages from them.

The appellate court also reaffirmed that Missouri law does not authorize the award of attorney fees in inverse condemnation cases even though the landowners had won on their claim for real property damages. Recovery of costs or fees against state agencies like the MHTC cannot occur, the court held, absent express statutory authority.

The MHTC challenged on appeal the trial court's award of prejudgment interest. The Western District noted that it had just decided this same issue on October 31, 2006, in *Collier v. City of Oak Grove*, 2007 WL 1185982 (Mo. App. W.D.) (not reported in S.W.3d) when it found that a trial court had erred

by adding prejudgment interest to a jury's verdict in an inverse condemnation action.

The Western District held that prejudgment interest could have been awarded by the jury (but not the judge) to the Randolphs for the period of time between the start of the wrongful action by the MHTC and the time of payment of the judgment.

Ironically, the parties had agreed that the judge should add prejudgment interest to the jury's verdict if in favor of the landowners, which is exactly what the trial court did after the jury's verdict. The Western District noted that this "probably is the best procedure for awarding prejudgment interest," but it is not permissible under present Missouri law in an inverse condemnation case. The court urged the Missouri legislature (as it did in *Collier*) to remedy this situation.

Thompson, et al. v. Higginbotham and Sherlock

Owner/builders now face potential additional liability for extended periods of time after selling their construction project to a buyer, according to Missouri's Western District Court of Appeals. The case is *Thompson, et al. v. Higginbotham and Sherlock*, 187 S.W.3d (Mo. App. W.D. 2006). (The Missouri Supreme Court recently declined a request to consider this appeal, so the Western District's decision is now final.)

No Missouri appellate court had previously been asked to decide whether Missouri law allows a former owner to continue to face potential litigation more than 10 years after owning the property under Missouri's statute of repose. The court decided that the claim could proceed given allegations that the former owners may have had superior knowledge of a defect in their construction.

The issue arose after a balcony collapsed at the apartment owned by the current owners, a college professor and a dentist. They, along with about 10 others, were injured and sued the O'Rileys.

The O'Rileys had conveyed the apartment by warranty deed to the current owners more than 10 years before the collapse.

Three deck screws in the balcony used to fasten the deck's outer edge to the 4x4 supports caused the balcony's collapse. It would have been difficult to determine, the court stated, whether the screws, while visible with some effort from the balcony's underside, were adequate after construction was complete to support the load.

In addition to owners and builders, the O'Rileys also were the subcontractors, designers, developers and marketers of the apartment. Ultimately, their combined roles as owners and builders proved to be decisive to the outcome.

Given an increased emphasis in today's construction market on design/build contracts where the developer designs, also owns and then sells, the court's decision is an important caution about how long a former owner may remain potentially liable for defects in the property.

The O'Rileys had argued that Missouri has an established statute of repose, Section 516.097 R.S.Mo., that requires that all lawsuits for personal injury must be brought within 10-years of completion of the improvement. The statute protects architects, engineers and builders whose "sole connection with the improvement is performing or furnishing, in whole or part, the design, planning or construction, including architectural, engineering or construction services, of the improvement."

The Act does not apply, however, to those who conceal a defect or deficiency in the design, planning or construction, where the defect or deficiency directly results in the defective or unsafe condition.

The court's decision turned on whether the O'Rileys were solely connected to the defective condition in the apartment as designers, planners and builders, or whether their additional status as former owners made them potentially liable.

The Western District considered a prior decision, *Magee v. Blue Ridge Prof. Bldg. Co.,* 821 S.W.2d 839, 842 (Mo. Banc 1991), where Missouri's Supreme Court concluded that a designer/contractor of a building who previously was an officer and shareholder of the corporation that built and owned the building was not enough to remove the 10-year limitation.

As in *Magee*, the O'Rileys' were not present but rather former owners and thus they had no possessory interest in the property at the time of the incident.

Thus, the Western District decided that to the extent plaintiffs based their argument to avoid the statute of repose on the O'Rileys' additional status as former owners, this was not enough to overcome the "sole connection" aspect of the statute of repose. But the plaintiffs had further alleged that the O'Rileys were liable for the injuries because they were builders and planners who also sold the property with superior knowledge of the defect.

The court noted that while former owners generally do not owe a duty to those later injured by a defective or unsafe condition, there is an exception contained in a section of the Restatement of Torts. It provides that someone

who sells property involving an unreasonable risk is subject to liability to the buyer and his guests for physical harm caused.

No Missouri appellate court had yet adopted this section even though many other state courts recognize it as a positive development reflecting an "increased regard for human safety and the need to improve bargaining ethics."

The court decided to adopt this section, and thereby "foster greater openness and candor in real estate transactions." The Western District recognized that its decision opened the door to potentially unlimited extensions of liability.

> "Because we believe that each case must be decided on its facts, we do not believe that this potential negative consequence outweighs the potential benefits."

The court noted that the plaintiffs alleged the O'Rileys to be sophisticated, knowledgeable and experienced builders. "They may have had reason to know that the use of three deck screws to attach the balcony floor to its support would not hold the weight of more than a few people."

The Western District sent the case back to the trial court for a trial.

Determining Standards of Care

Standard of review is typically thought of in a negligence case. There certainly are a number of negligence cases involving construction defects. *See Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 543 (Mo. App. W.D. 2008). Generally, the courts look to expert testimony when discussing a standard of care in a negligence claim. *Id.* A standard of care may also apply to a deviation from an industry established standard such as the Occupational Safety and Health Administration (OSHA) or American National Standards Institute (ANSI). Generally speaking, a standard of care involving a construction defect is not really different from standards of care in other disciplines. Probably the standard Missouri approved instruction definition of ordinary care comes most to mind when thinking about standard of care in these cases. It reads: "The phrase 'ordinary care' as used in these instructions means that degree of care that an ordinarily careful person would use under the same or similar circumstances." Again, this is appropriate for actions in negligence but not for actions in breach of contract or generally otherwise.

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