VILLAGE LOFTS *ENSURED REPOSE FOR CONDO CONTRACTORS, AND CLARIFIED THE LAW GOVERNING* TWO HARBORS *SETTLEMENTS. HERE'S HOW.*

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The authors of this article had the privilege of representing Kraus-Anderson Construction Company ("KA") through the five-year *Village Lofts* litigation (2015-2020), which recently concluded with a decisive win for the construction industry at the Minnesota Supreme Court. The lawsuit arose from alleged defects in the heating, ventilation, and air-conditioning ("HVAC") systems in condominium buildings. The resulting district court, Minnesota Court of Appeals, and Minnesota Supreme Court decisions provide guidance and clarity both for contractors performing work in Minnesota and for construction litigators. These decisions offer valuable insight into how the 10-year "improvement to real property" statute of repose, Minn. Stat. § 541.051, subd. 1(a), applies to common-law claims, and claims alleging breach of the warranties in Minn. Stat. § 327A.02, subd. 1 ("327A claims"), in the context of condo-defect claims. Moreover, and more broadly applicable, the Court of Appeals (affirming the district court) gave rare published insight into the law governing "*Two Harbors* settlements". This article will analyze and parse out the key points from *Village Lofts*.

BACKGROUND

The case involved multi-party construction defect litigation associated with the Village Lofts at St. Anthony Falls ("Village Lofts"), which is a two-building condominium complex located in northeast Minneapolis. Housing Partners III-Lofts, LLC ("HP") served as developer for Village Lofts. KA was general contractor. Additionally, a number of subcontractors were involved. The alleged defects related to the heating, ventilation, and air-conditioning ("HVAC") systems.

The plaintiff Village Lofts at St. Anthony Falls Association ("the Association") allegedly discovered a leak traced to the HVAC system in one of the buildings ("Building A"), and

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believed similar defects existed in the HVAC systems in both Building A and the other building ("Building B"). The Association sued HP, KA, and others for negligence and breach of contract. The Association also sued HP and KA for breach of the Minn. Stat. § 327A.02, subd. 1 warranties. The cross-claims asserted between the parties importantly included HP's indemnity and contribution claims against its co-defendants.

The defendants' central defense to the Association's claims was the 10-year statute of repose in Minn. Stat. § 541.051, subd. 1(a), applicable to claims that arise from an "improvement to real property." Faced with a potential bar of all claims, the Association chose to enter into a *Two Harbors* settlement with HP as—in the Association's words—an "end around" the 10-year statute of repose. Because HP's indemnity-and-contribution claims were subject to a more favorable 12-year statute of repose, the Association arguably would be able to pursue its claims against KA and the subcontractors, despite the Association's direct claims being barred. *See* Minn. Stat. § 541.051, subds. 2, 4 (two-year extension for contribution-and-indemnity claims). The Association essentially tried to buy HP's contribution and indemnity claims for $10,000 and a $665,000 promissory note payable only out of proceeds from HP's claims against KA and the subcontractors. *See Vill. Lofts at St. Anthony Falls Ass'n v. Hous. Partners III-Lofts LLC*, 924 N.W.2d 619, 625 (Minn. App. 2019) (*Village Lofts I*). In exchange, HP would obtain a release from the Association's claims against HP. *Id.*

Well into the *Two Harbors* negotiations, KA and the subcontractors moved for summary judgment based on the statute of repose. HP did not. The day after the Association and HP finalized the settlement, the district court—the Honorable Judge Laurie Miller—entered summary judgment for all defendants, HP included. The Association asked the court to correct "a clerical error" by removing HP from the summary-judgment order. The court did so. *Village Lofts at St. Anthony Falls Ass'n v Housing Partners III-Lofts, LLC*, No. 27-CV-15-19425, 2016 WL 11591501, at *1 (Minn.Dist.Ct. Oct. 05, 2016). Only after that did the Association disclose the settlement, and ask the court to approve it.

The district court permitted discovery into the *Two Harbors* settlement "[b]ecause *Two Harbors* settlement agreements may be invalidated for a variety of rationales, including *Miller-Shugart*, *Moberg*, and *Mary Carter* issues, and showings of collusion or unreasonableness." *Vill. Lofts at St. Anthony Falls Ass'n v Housing Partners III-Lofts LLC*, No. 27-CV-15-19425, 2017 WL 11112443, at *9 (Minn.Dist.Ct. Apr. 14, 2017). Meanwhile, KA and a subcontractor moved for summary judgment on HP's behalf.

The district court declined to approve the settlement because it was "unreasonable, collusive, was not timely disclosed to the non-settling Defendants." *Vill. Lofts at St. Anthony Falls Ass'n v Housing Partners III-Lofts, LLC*, No. 27-CV-15-19425, 2017 WL 11112441, at *1 (Minn.Dist. Ct. Sep. 05, 2017). The parties disputed whether KA and the subcontractor had standing to move for summary judgment on HP's behalf. The court did not address that issue, but ordered summary judgment to HP "*sua sponte*." *Id.* at *14.

The parties jointly moved the court to certify a partial final judgment under Minn. R. Civ. P. 54.02, as to the repose and *Two Harbors* issues. The court granted that motion.

The Minnesota Court of Appeals (1) affirmed the rejection of the *Two Harbors* settlement, (2) affirmed summary judgment on the common-law claims, but (3) reversed summary judgment on the 327A claims. *Village Lofts I*, 924 N.W.2d at 638.

The Minnesota Supreme Court (1) declined to review the *Two Harbors* decision, (2) affirmed summary judgment on the common-law claims, and (3) reinstated summary judgment on the 327A claims. *Vill. Lofts at St. Anthony Falls Ass'n v. Housing Partners III-Lofts, LLC, et al.*, 937 N.W.2d 430 (Minn. Jan. 15, 2020) ("*Village Lofts II*).

MEANINGFUL REPOSE FROM COMMON-LAW AND 327A LIABILITY

This *Village Lofts* condo-defect litigation addressed how the 10-year statute of repose applies to common-law and 327A claims. For common-law claims, the trigger of the repose period is "substantial completion of the construction." Minn. Stat. § 541.051, subd. 1(a). For 327A claims, the trigger is by "the warranty date," *Village Lofts II*, 937 N.W.2d at 436-37 (citing Minn. Stat. § 541.051, subds. 1, 4; *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 326 & n.6 (Minn. 2010)); *see also Gomez v. David A. Williams Realty & Constr., Inc.*, 740 N.W.2d 775, 781 (Minn. App. 2007); *Vill. Lofts at St. Anthony Falls Ass'n v Housing Partners III-Lofts, LLC*, No. 27-CV-15-19425, 2017 WL 11112441, at *20 (Minn. Dist.Ct. Sep. 05, 2017) (thoughtful district court analysis).

Although the triggering events are different, the purpose of the statute of repose in both contexts is the same:

> The statutory limitation period is designed to eliminate suits against architects, designers and contractors who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it. The statute helps avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed.

Village Lofts II, 937 N.W.2d at 439-440 (quotation omitted).

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Common-Law Claims

A core problem for the Association's common-law claims was that, if Buildings A and B were treated as separate "improvement[s]," there was no question that the statute of repose barred all claims for each of them independently. *Village Lofts II*, 937 N.W.2d at 443. To the Court of Appeals, the Association argued that Building A was not substantially completed until the last two units' certificates of occupancy were issued, even though certificates of occupancy were issued for 37 other units and for the common areas. *Village Lofts I*, 924 N.W.2d at 629-30. But, as the Court of Appeals concluded, "[t]he concept of 'substantial completion' necessarily is different from the concept of perfect completion; substantial completion requires only that the construction be 'sufficiently completed.'" *Id.* (quoting Minn. Stat. § 541.051, subd. 1(a)). The Association did not make this argument to the Supreme Court.

To avoid this problem, the Association argued that Buildings A and B were a single improvement, with a single statute of repose. Under that single-improvement theory, the Association's common-law claims would not be time barred because Building B's substantial-completion date was less than 10 years after alleged discovery of the alleged HVAC defect in Building A.

The Supreme Court rejected that theory, based on the well-established *Pacific Indemnity* factors, with a twist. A Section 541.051 "improvement" is "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Village Lofts II*, 937 N.W.2d at 443 (quoting *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977)). The Court concluded that each condominium building "unquestionably" satisfied that definition. *Id.* So did the Court of Appeals. *Village Lofts I*, 924 N.W.2d at 627-28.

The Supreme Court took the analysis one step further. It concluded further analysis was required because the factors would likewise be satisfied if the Buildings were treated as a single improvement. *Village Lofts II*, 937 N.W.2d at 443. To resolve the issue, it looked to the repose statute's purpose: "to avoid litigation and stale claims that could occur many years after those involved in constructing improvements have turned the improvement over to the person or entity who hired them." *Id* at 444 (quotation omitted). "The Legislature intended that the statute of repose starts running when the contractor can turn a building or project over to the person who hired the contractor to use for the purposes for which the building or project was constructed." *Id*.

The Court distilled that conclusion down to a two-part holding:

> In summary, we hold that a building or project is a separate improvement that triggers the repose period under section 541.051 when the building or project (1) satisfies our case law definition of "improvement" and (2) may be turned over to the person who hired the entities doing the construction for the purpose for which it was intended.

Village Lofts II, 937 N.W.2d at 445.

Applying that holding, the Court affirmed summary judgment on the common-law claims. Besides the fact that Buildings A and B each satisfied the *Pacific Indemnity* factors, "[t]he construction of Buildings A and B proceeded under separate and independent contracts between [HP] and [KA]." *Village Lofts II*, 937 N.W.2d at 445-46. "[KA] turned over Building A to [HP] for the purpose for which it was intended before Building B was completed." *Id.* Indeed, by November 2003, the City of Minneapolis had issued a certificate of occupancy for Building A, HP had sold at least 40 Building A units, and, "critically," that was even though "construction of Building B was only in the beginning phases under a separate contract and it would be nearly another year before it was completed." *Id.* at 446.

The Association argued that this focus on the construction was misplaced, and that the courts should, instead, focus on "the understanding and expectations among [HP] . . .and the purchasers of each condominium unit." *Village Lofts II*, 937 N.W.2d at 444-45. It pointed to evidence that HP marketed and sold the units "as part of a unified development in which owners of units in Building A would have access to amenities in Building B and vice versa." *Id.* at 445 n.11. "To support its argument for a different focus, [the Association] lean[ed] heavily on the consumer-protection purpose of the MCIOA," the Minnesota Common Interest Ownership Act. *Id.* at 445. However, the Association did not sue for a breach of any MCIOA warranty. *Id.*The Supreme Court noted, "The purpose of the MCIOA is precisely to establish the legal duties between condominium developers and purchasers of condominium units; section 541.051 does not share that purpose. "*Village Lofts II*, 937 N.W.2d at 445. "MCIOA claims are not subject to the limitations period set forth in section 541.051." *Id.* And, the Court continued:

> Moreover, [the Association]'s focus on protecting condominium purchasers ignores that section 541.051 is not limited to claims arising out of the construction of condominiums, but governs a broad range of claims arising out of improvements to any type of real property. Accordingly, it makes little sense to impose MCIOA consumer-protection principles on a general statute like section 541.051.*Id.*

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As a side note to practitioners: you might be thinking that the Court's one-improvement-or-two issue also arises in the mechanic's lien context, which has its own case law for sorting out whether two things are "separate construction phases of the same overall construction project constitute one continuous improvement." *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 407 (Minn. App. 1991). But the Supreme Court made clear in *Village Lofts II* that these two worlds do not cross-pollinate: "our analysis for determining what constitutes an improvement under section 541.051 should have no bearing on our mechanic's lien case law." *Village Lofts II*¸ 937 N.W.2d at 444 n.10. The text of the statutes differs, as do their purposes (one is to give contractors repose, and the other is to help them "get paid"). *Id.* "So we can envision a situation where a multi-building development may be multiple separate improvements under section 541.051, yet be one continuous improvement under the mechanic's lien law." *Id.*

327A Claims

With respect to the remaining 327A claims, the parties' dispute centered on the meaning of "warranty date."

The term "warranty date" serves two important purposes for Chapter 327A. First, it is the trigger for one-, two-, and 10-year statutory warranties in Minnesota Statutes Section 327A.02, Subdivision 1. Second, it is the trigger for the 10-year statute of repose as applied to 327A claims. Minn. Stat. § 541.051, subd. 4; *Village Lofts II*, 937 N.W.2d at 436-37. Chapter 327A defines "warranty date," along with two other terms used in that definition: "initial vendee" and "dwelling." It defines "warranty date" as earlier of "(a) *the date of the initial vendee's* first occupancy of *the dwelling*; or (b) the date on which *the initial vendee* takes legal or equitable title in *the dwelling*." Minn. Stat. § 327A.01, subd. 8 (emphasis added). It defines "initial vendee" as "a person who first contracts to *purchase a dwelling* from a vendor for the purpose of habitation and not for resale in the ordinary course of trade." *Id.*, subd. 3 (emphasis added). And it defines "dwelling": "*a new building*, not previously occupied, constructed for the purpose of habitation," subject to listed exclusions. *Id.*, subd. 4 (emphasis added).

The Supreme Court concluded that the parties presented "two reasonable interpretations of when the 'warranty date' begins to run on a condominium." *Village Lofts II*, 937 N.W.2d at 438. First (KA's and HP's interpretation), "the warranty date for the whole building begins to run when the first condominium unit owner occupies or takes title to his unit." *Id.* Second (the Association's interpretation), "a new warranty date arises for each unit when the owner of that unit occupies or takes title to the unit." *Id.* Although KA and HP argued that their interpretation was the unambiguous meaning of the 327A definitions, the Supreme Court disagreed. It reasoned that "purchasing an undivided interest in parts of a building is different than purchasing the building." *Id.* However, the Court ultimately sided with KA and HP; reversed the Court of Appeals on this issue; and held that, "[u]nder Minn. Stat. § 327A.01, subd. 8 (2018), the warranty date for a condominium building is the date on which the first buyer occupies or takes legal or equitable title to any unit in the building." *Village Lofts II*, 937 N.W.2d at 432, 441. The Court did so for two primary reasons: the text of the 327A definitions, and a 2004 amendment that expressly extended the 541.051 statute of repose to 327A claims.

As to the text, the Court reasoned that the Legislature's use of the word "building" to define "dwelling" was "a stronger indicator of the Legislature's intent (that a dwelling is the entire building and not individual parts of a building) than Village Loft's focus on the textual confusion sown by the ill-fit between the statute's definition of 'initial vendee' and its application to condominium units." *Village Lofts II*, 937 N.W.2d at 438.

As to the 2004 amendment, the Legislature enacted it "with the specific, narrow, and clear purpose to save builders from facing ongoing liability years after they completed work on the building." *Village Lofts II*, 937 N.W.2d at 440. Citing recordings from the legislative hearings, the Court observed that "[l]egislators supported the 2004 amendment because they were concerned that failing to amend section 541.051 would leave builders vulnerable to open-ended liability that could last 20, 30, even 50 years." *Id.* "[A]n interpretation of section 541.051 that applies a different warranty date for each unit would create the kind of uncertainty about the length of a builder's exposure to liability for statutory warranty claims that the 2004 amendment was designed to limit." *Id.*

The Court recognized that 327A reflects a "general consumer-protection focus." *Village Lofts II*, 937 N.W.2d at 439. But that focus did not resolve the issue, "particularly because it does not appear that the Legislature considered the application of that definition to condominiums." *Id.* Moreover, "[t]he purpose of the statute of repose . . . provides a strong counterbalance to the broad consumer protection offered by chapter 327A." *Id.* at 440.

It further recognized that, "if the warranty date is determined by the first buyer to occupy or take title to any unit in the building, future unit buyers may lose the 1-year and 2-year warranties provided for in section 327A.02." *Village Lofts II*, 937 N.W.2d at 441. Although "not indifferent to that result," the Court explained that "chapter 327A is not the only source of protections for condominium owners." *Id.* "MCIOA provides a host of implied and express warranties exclusively for condominium buyers." *Id.* (citing Minn. Stat. §§ 515B.4-112–.4-115). And, "[m]any defects covered by the 1-year and 2-year statutory warranties in section 327A.02, subdivision 1(a)–(b), may also be covered by MCIOA warranties." *Id.* "The MCIOA statute of limitations provisions also demonstrate that the Legislature knows

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how to explicitly establish limitations rules for warranty claims related to units." *Id.* (citing Minn. Stat. § 515B.4-115(c)). "That it did not make such distinctions in chapter 327A is a clue that the Legislature did not intend to create unit-specific warranties under chapter 327A." *Id.*

From there, the Court's analysis for affirmance was straightforward. The Association's 327A claims accrued in May 2015, when the Association notified HP and KA of allegedly poor HVAC piping. *Village Lofts II*, 937 N.W.2d at 437. The warranty date for each building was more than 10 years earlier, when the first unit of each Building was occupied by the unit buyer. *See id.* "Because the first warranty deed for a unit in each building was issued before 2005, the statutory claims are time-barred." *See id.*

As a note to practitioners, although *Village Lofts II* gave us clarity on how to apply the statute of repose to 327A claims in the condo context, it also leaves some uncertainty as to whether the 327A warranties apply to condos at all. The Supreme Court "not[ed] that the language of [327A] does not fit comfortably with condominium developments." 937 N.W.2d at 436. "Chapter 327A . . . does not appear to contemplate a residential condominium's mix of individual and common-property ownership." *Id.* The Court "assume[d]," for the purpose of the appeal, that 327A applied to condos, but only because the parties did not raise the issue below. *Id.* And it noted, "Of course, the Legislature has full power to make changes to chapter 327A to clarify how the law applies to condominiums." *Id.* at 436 n.2.

Courts, like the *Village Lofts* courts, have *applied* the 327A warranties in the condo context. But none has ever held, with analysis, that 327A applies to condos.

CLARITY FOR *TWO HARBORS* SETTLEMENTS

Not to be missed in the *Village Lofts* litigation is what it had to say about *Two Harbors* settlements. The district court rejected the *Two Harbors* settlement between the Association and HP. And the Court of Appeals affirmed, in a rare piece of published guidance on dos and do nots when it comes to *Two Harbors* settlements, relying heavily on instructive Supreme Court cases. (The Supreme Court declined to review the issue.)

The essential—or, at least, typical—elements of a *Two Harbors* settlement are as follows. You begin with three-sided litigation, in which Plaintiff sues Defendant and Defendant sues at least one Third Party for indemnity and/or contribution. Then, in a settlement, Plaintiff releases its claims against Defendant in exchange for three things: (1) money, (2) a promissory note for money, and (3) a right to control and fund the prosecution of Defendant's indemnity or contribution claims against Third Party.

Before *Village Lofts*, parties who wanted to cite law governing such *Two Harbors* settlements needed to piece together a hodgepodge of Court of Appeals case law regarding *Two Harbors* settlements with Supreme Court case law regarding the enforceability of other types of settlements, including: *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 549 N.W.2d 96 (Minn. App. 1996) (*Two Harbors I*), *review denied (Minn. Aug. 20, 1996); Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, No. C6-97-1596, 1998 WL 148082 (Minn. App. 1998) (*Two Harbors II*), *review denied (Minn. May 28, 1998); Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 616 N.W.2d 288 (Minn. App. 2000) (*Two Harbors III*), *review denied (Minn. Oct. 26, 2000)*. The *Two Harbors* trilogy, in various ways, relied on *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982); *Johnson v. Moberg*, 334 N.W.2d 411 (Minn. 1983); and *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977) (citing *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Dist. Ct. App. 1967)).

Village Lofts I provides a better way. It is the first appellate decision to synthesize the *Two Harbors* trilogy and distill it down to a single case providing precedential guidance. It holds definitively that the "*Two Harbors* trilogy recognizes 'that the *Miller-Shugart*, *Moberg*, and *Mary Carter* lines of cases all provide possible bases on which to attack the validity of a *Two Harbors*-type settlement.'" *Village Lofts I*, 924 N.W.2d at 636. Moreover, although not binding, the district court's affirmed *Two Harbors* order is publicly available, and thoughtfully reasoned. *Vill. Lofts at St. Anthony Falls Ass'n v Housing Partners III-Lofts, LLC*, No. 27-CV-15-19425, 2017 WL 11112441 (Minn.Dist.Ct. Sep. 05, 2017).

The Court of Appeals affirmed the rejection of the *Two Harbors* settlement between the Association and HP, and the district court's three reasons for rejecting it: (1) "it was negotiated in secrecy," (2) it "was the product of collusion," and (3) it was "not reasonable and prudent." The Background of this article sets forth the underlying circumstances and facts. We will focus this section on the way in which the Court of Appeals clarified the law on these grounds for attacking the validity of a *Two Harbors* settlement.

As to secrecy, the Court cited to *Pacific Indemnity. Village Lofts I*, 924 N.W.2d at 637. There, speaking to *Mary Carter* settlements, the Supreme Court noted, "We have also voiced our displeasure at secret settlements and the unfairness they promote." 260 N.W.2d at 557 (quotation omitted). The *Village Lofts I* Court rejected the argument that "the so-called *Mary Carter* case law does not apply." *Village Lofts I*, 924 N.W.2d at 636. "The indemnification obligation in that case . . . arose—as in this case—from common-law duties among alleged tortfeasors in a case concerning damage to real property." *Id.* Moreover, the authors note, the no-secret-settlements rule is well established in case law, *see Barlage v. The Place*, 277 N.W.2d 193, 194-95 (Minn. 1979) (disclosure of

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settlements required whenever needed to "preserv[e] . . . the adversary system" for non-settling parties); *Faber v. Roelofs*, 212 N.W.2d 856, 861 (Minn. 1973) (similar), and Minn. R. Gen. Prac. 121 (requiring "immediate[]" notification to court of settlement).

As to collusion and unreasonableness, the Court observed that *Miller-Shugart* considered "whether the settlement was obtained by fraud or collusion" and whether it was "reasonable and prudent." *Village Lofts I*, 924 N.W.2d at 636 (quoting *Miller*, 316 N.W.2d at 734-35). The Association argued that "*Miller-Shugart* should be confined to cases involving indemnification obligations arising from insurance policies." *Id.* at 736. In disagreeing, the Court of Appeals noted that *Miller-Shugart* based the reasonableness prong on "case law from outside the insurance context, which it described as 'somewhat analogous,'" *id.* (quoting *Miller*, 316 N.W.2d at 35), and that the district court's rejection of the settlement agreement here "was based primarily on" that reasonableness prong. *Id.* Apparently as to the collusion prong, the Court stated, without further analysis,

> In *Two Harbors II*, we considered and rejected a similar argument that the district court had "extend[ed] *Miller-Shugart* beyond the insurance context and into non-insurance cases." 1998 WL 148082, at *3. We reject the association's argument in this case for essentially the same reasons.

Id. That appears to be a reference to this statement from *Two Harbors II*: "Mere referencing of prior Minnesota case law with rationales similar to Rice Lake's does not constitute an extension of the *Miller-Shugart* doctrine." 1998 WL 148082, at *3.

"A *Miller-Shugart* settlement agreement"—and, by implication, a *Two Harbors* settlement agreement—"is collusive if there was 'a lack of opposition between a plaintiff and an insured that otherwise would assure that the settlement is the result of hard bargaining.'" *Village Lofts I*, 924 N.W.2d at 636-37 (quoting *Independent Sch. Dist. No. 197 v. Accident & Cas. Ins. Co.*, 525 N.W.2d 600, 607 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995)). "The test as to whether the settlement is reasonable and prudent is what a reasonably prudent person in the position of the defendant would have settled for on the merits of plaintiff's claim." *Id.* at 636 (quoting *Miller*, 316 N.W.2d at 735). "This involves a consideration of the facts bearing on the liability and damage aspects of plaintiff's claim, as well as the risks of going to trial." *Id.* (quoting *Miller*, 316 N.W.2d at 735).

Applying the law to the facts, the Court of Appeals affirmed the district court's rejection of the settlement agreement, citing HP's not retaining an expert; HP not moving for summary judgment, even after the district court granted the other defendants' summary-judgment motions. The Court also noted that HP "did not attempt to negotiate a lower cap on its co-defendants' liability after the association proposed an amount that was approximately 80 percent of its out-of-pocket expenditures." *Village Lofts I*, 924 N.W.2d at 637. Moreover, "this settlement agreement created more litigation because it revived claims that were, in substantial part, without merit." *Id.* As a consequence, it did not serve one of the chief functions of a valid—or, at least, typical—*Two Harbors* settlement: "serve judicial efficiency by turning three-sided disputes into two-sided conflicts." *Two Harbors III*¸ 616 N.W.2d at 292.

KEY POINTS

In short, *Village Lofts* gives us three core take-home messages:

1. For condo-defect litigation involving common-law claims and multi-building condo complexes, when identifying whether the buildings are one or multiple "improvement[s]" for the purpose of the 541.051 statute of repose, it is not enough to determine that each building independently satisfies the *Pacific Indemnity* factors. You must now also ask whether each building, independent of the other building(s), could be "turned over to the person who hired the entities doing the construction for the purpose for which it was intended." Only if the answer to that question is yes are the buildings separate improvements, subject to independent 10-year repose periods.

2. For condo-defect litigation involving 327A claims, the "warranty date" triggering the 327A warranties and the 541.051 statute of repose is "the date on which the first buyer occupies or takes legal or equitable title to any unit in the building." But note, *Village Lofts* highlights uncertainty as to whether 327A applies to condos, which arguably are subject to only the condo-specific MCIOA warranties.

3. The next time you have a *Two Harbors* question, turn to *Village Lofts I* for the governing law and proceed accordingly.