

Analysis of Potential Legal Issues Related to Firestopping

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CONSTRUCT2010

Conference: May 11-14, 2010
Pennsylvania Convention Center
Philadelphia, PA

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Introduction

Firestopping Definition (as defined by courts)

- A Firestop System as defined by the **Underwriters Laboratories**, “is a specific construction consisting of a wall or floor assembly, a penetrating item passing through an opening in the assembly, **and / or a joint**, and the materials designed to prevent the spread of fire.”
- **Courts?**

Background of Firestopping:

- Firestopping is the use of **a combination of specific firestop materials, which when tested as a system**, prevent the spread of flame, heat or hot gases through penetrations in fire-rated walls, ceilings or floors for items such as pipes, ducts, conduits or cables, **as well as joints at building perimeter, for expansion, walltops and bottom of walls.**



Background of Firestopping:

- As claims/lawsuits have increased, risk has been passed on to construction and related industry parties.
- Previously, firestopping was performed by each trade responsible for creating the through-penetration and the architect
- Now this (**design??---is it really?**) **System Selection** work is being delegated to firestop contractors
- Important to mandate-through the Contract Documents-that all **Design & Inspection** parties carry acceptable **professional liability insurance coverage for errors and omissions**
- Test standard Ratings and Code Requirements have

Firestop Product Classifications

- “F” and “T” ratings measure the time and speed of fire through a construction **element**.
- “L” Rating measures air leakage, simulating smoke
- “W” Rating measures water resistance, *of new product*

Firestop Product Classifications

- **ASTM E814, UL 1479**; testing method determines suitability of firestops where fire resistance required **for Penetrations.**
- **ASTM E 1966; UL 2079 – Joints**
- **ASTM E 2307 – Perimeter Fire Containment**
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Firestop Product Classifications

- Section **07-84-00** in **MasterFormat 04** provides step-by step guidelines for **material physical property requirements, fire and other resistance, systems selection, installation and inspection** of firestop systems.
 - **FM 4991 Approved Contractors**
 - **UL or ULC Qualified Contractors**
 - **ASTM E 2174 & ASTM E 2393 Inspection**
 - **FCIA Manual of Practice reference**

Liability Starting Points

- Any contracting entity on a construction project could potentially be liable.
- Litigation expenses can exceed costs of construction, let alone installation of firestopping system at issue.

A Court's Concerns

- Was installation required by agreement or by a building code?
- If by code, was it followed?
- If not, was violation proximate cause?
- Who was responsible for design and installation & **inspection** of system and supervision of construction?

Contractual Agreements

- In light of foregoing, contracts are the starting point.
- American Institute of Architects forms.
- Clause 3.2.2.
- Article 201.

Reported Decisions on Firestopping

- Missouri Court of Appeals recognized need to regulate firestopping for health and welfare of citizens.
- Florida Court of Appeals approved of code effectively requiring firestopping.
- Other Florida court ruled insurer had no duty to defend contractor for failure to install firestops and insulation.
- Massachusetts court awarded condominium trustees damages for inadequate firestops for breach of implied warranty of habitability even where no damages had occurred.

Economic Loss Doctrine

- Prevents plaintiffs from recovering losses in value to a product or property where such losses covered by a contract.
- In some jurisdictions, rule has been extended to where product defect caused damage to other property.
- Could result in liability placed on contractor if contractor was liable for assembly.

Contours of Economic Loss Doctrine

- California established prelitigation process whereby builder has chance to repair.
- In New Jersey house cannot be separated into component parts to defeat doctrine.
- Arizona has granted plaintiffs more room to bring tort claims for property damage.

Expert Testimony

- Crucial to determination of liability within litigation.
- Louisiana court held that liability depended on engineer and electrical inspector's analysis and evidentiary proofs.
- Texas court overturned judgment in favor of homeowner where expert testimony was insufficient to support verdict.

How to Avoid Firestop Liability

- Can arise out of contractual relationship, breach of warranty, failure to warn, or negligence theories.
- Two things to be aware of:
 - Preventive Measures
 - Defenses to Liability

Preventive Measures

- IBC Section 703 states that materials and methods of construction used to protect joints and penetrations in fire resistance rated building elements shall not reduce the required fire resistance rating...

Preventive Measures

- Documents must designate type of construction and resistance rating of all structural elements as required by code.
- Owners Architects increasingly have firestop systems installed by **approved, qualified, or single source firestop** contractors.

Preventive Measures (cont'd)

- Contractors **must select systems FIRST** with zero tolerance for error.
- Engineering judgements are used **ONLY** after all listings have been searched.
- Architects must specify firestop systems using applicable codes requirements that dictate standards usage.

Preventive Measures (cont'd)

- Firestop manufacturers must be on notice that potential plaintiff may assert strict liability claims.
- All parties should follow requirements **for Engineering Judgments** promulgated by **the Authority Having Jurisdiction, and** International Firestop Council.

Preventive Measures (cont'd)

- Building Professionals should stay aware of developments in code regulations, industry standards and legal developments.
 - MUST maintain appropriate insurance.
 - Should keep abreast of legal developments with interpretation of “hold harmless” provisions.

Preventive Measures (cont'd)

- Manufacturers/distributors **should sell based only on** “suitability of use” statements, **documentation is key.**
- Owners should require that only **specialist** firestop contractors **should** install firestop systems and require identifying tags be permanently affixed to work **for easier maintenance.**

Preventive Measures (cont'd)

- Be aware of existing firestopping systems at already constructed buildings, as they may need updating.

Defenses to Liability

- Many doctrines exist to apportion liability among construction parties.
- Generally, building professionals not liable for products themselves as they're not considered sellers.
- Building professional who receives *detailed* plans and specifications from owner generally has a right to rely on professional judgment of whoever developed them.

Defenses to Liability (cont'd)

- Building professional, however, could be liable if plans and specifications had glaring defects, so review carefully.
- Building professionals can argue they are not liable if their own design followed industry standard certified firestop contractors installed firestop system.
- **BE AWARE**, no defense to follow negligent standard or custom, use judgment regardless.

Spoliation of Evidence

- Records retention program key for preventing undeserved liability for firestopping, or any construction defect.
- Every company needs comprehensive records retention program which:
 - Distinguishes between various types of records; and
 - Defines when each record may be disposed of.

Records Retention Program

- Any record retention program must address the following points:
 - Period of time each record has value
 - Period of time records are “active”
 - Point in time records can move to secondary storage
 - Method of disposal
 - Procedures for operation and ensuring compliance with program
 - Relationship between records retention and other aspects of records management and
 - Considerations specific to construction industry, firestopping in particular.

Consequences for Failure to Maintain Records Program

- Federal court in New Jersey made company pay \$1 million for failure to verify program was being followed.
- Federal court in Florida ruled that intentional destruction of documents to prevent production in litigation merited entry of judgment on issue of liability.
- Federal court in Kentucky sanctioned company for putting forth a “sham” document retention system.

Electronic Discovery

- There are consequences in litigation for failure to maintain up to date electronic discovery policy.
- 8th Circuit has articulated three factors when determining whether adverse jury instruction is deserved:
 - Was policy reasonable?
 - Should litigant have known information was material to litigation?
 - Was policy instituted in bad faith?

Electronic Discovery (cont'd)

- In particular case, 8th Circuit held management personally responsible for failing to suspend electronic document disposal policy in litigation.
- Court found affirmative obligation among officers to preserve documents for litigation.
- Each officer was fined \$10,000.
- Court permitted inference that destroyed documents would have been harmful.

Conclusion

- Due to increase in volume of construction litigation, all industry players must be aware of potential for liability.
- Consult applicable codes regarding obligations.

Conclusion

- Firestopping should always be raised at outset of project, and decisions should be memorialized in writing.

Conclusion (cont'd)

- Follow developments in NFPA and ICC's **Code developments & ASTM / UL; ULC / CSA Standards Developments** for suitability of use of products in **specific applications**.
- Keep abreast of legal developments in construction negligence and firestopping cases.
- Maintain insurance and investigate available products, for coverage of design of these systems.

Conclusion (cont'd)

- Visit Industry Resources on Firestopping:
 - Vedder Price – vedderprice.com
 - Firestop Contractors International Association – FCIA.org
 - FCIA Member Contractors, Manufactures, Consultants, etc.
 - FM 4991 Approvals – FM.com/approvals
 - UL Qualified Firestop Contractors - Underwriters Laboratories, Inc. – UL.com
 - FREE FCIA Manual of Practice for Specifiers at FCIA.org
 - International Firestop Council – Firestop.org

Thank You for Attending! Any Questions?

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