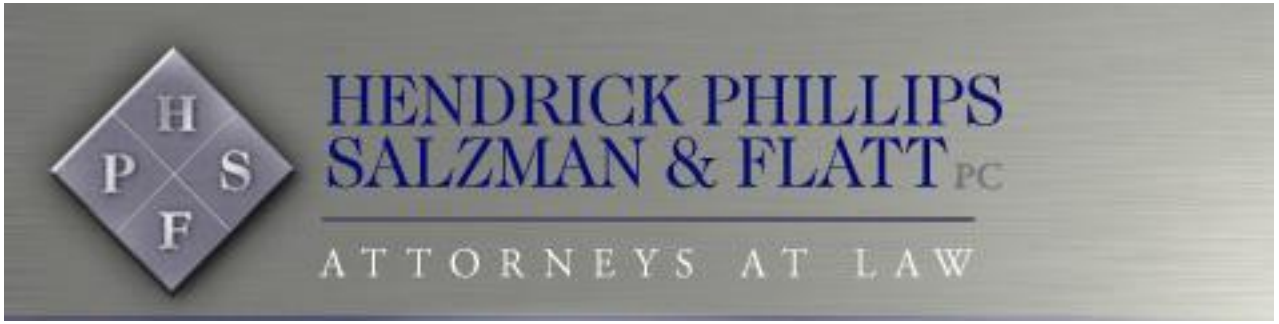
Fix it and Forget: Warranty Risks and Negotiation Strategies

Firestop Contractors International Association

May 2, 2013

Denver, Colorado



Fix it and Forget: Warranty Risks and Negotiation Strategies

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Buckle Up This Could Get Bumpy!

Potential Industry-Wide Knowledge of Defective Design

Check your copper pipes for signs of corrosion

Posted on **November 19, 2012** by **Deanna Martin**

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ASHE has learned that several health care facilities are having problems with water-based acoustical sealant corroding copper pipes–with some facilities reporting signs of corrosion in as little as two weeks.

ASHE is urging facility managers around the country to check their copper pipes for signs of corrosion. If you have experienced a sealant that corroded copper medical gas or water pipes, or if you have any other insights to offer about this issue, please contact ASHE at advocacyhighway@aha.org. Feel free to pass this information to

Potential Industry-Wide Knowledge of Defective Design

"The sealants used should be tested by the manufacturer and designated as compatible for use with copper. Many elastomeric polyurethane, silicone, butyl, polysulfide or other inorganic or rubber based sealants have shown acceptable performance. Acrylic, neoprene, and nitrile based sealants have been observed to actively corrode copper. The use of such sealants is, therefore, not recommended." [Bold emphasis added]

From the Copper Development Association Website, January 21, 2013

recommended." [Bold emphasis added]

From the Copper Development Association Website, January 21, 2013

FCIA does not have documentation to refute or support the claims in the paragraph from the Copper Development Association at this time. However, we believe it is prudent for contractor members to be aware of this issue.

Based on this information from the Copper Development Association, FCIA recommends that member contractors contact sealant manufacturer's representative(s) to ensure your company's commonly used products are not subject to these concerns.

Where Should I Look for Relevant Contractual Obligations?

This is not an exhaustive list Read the Fine Print!

- Conflicts, Errors and Omissions
- Scope of Work
- Specifications
- Warranty
- Indemnification

Conflicts, Errors or Omissions

- Generally, speaking you are not obligated to make sure the design is sound.
  - However, contracts commonly put this obligation on the subcontractor. Ex:
    - "Subcontract shall review the Contract Documents and immediately notify Contractor of any inconsistencies or omissions appear in the Contract Documents, in writing"

Conflicts, Errors or Omissions

- Response:
  - Subcontractor to have he obligation to review the Contract Documents
  - Subcontractor to have the obligation to report any known errors or inconsistencies of unlawful design.
  - Subcontractor has no obligation to discovery errors or omissions or make sure design is in compliance with all laws.

Scope of Work

- Most Contracts include a “Scope of Work” or “The Work” section or article.
  - Usually will incorporate the Project Specifications
  - May include language that itself provides a scope of work

Scope of Work Cont.

- Standard Build to Design Contract Example:
  - Contract shall include all Labor and Materials related to the _____ (description of work) for the _____ (proj. name) as appearing on the Project Architect's plans and specifications dated _____ and the drawings and plans by ___ (project engineer) ; or
- Simple Performance Based Contract Example:
  - Contractor shall provide a complete and fully functioning firestop system for all through penetrations of fire resistant assemblies or members.
- Both are fine but it may change how you approach the Project.
- Want to avoid the blended obligation for clear approach and to foreclose potential for an inherent breach where there is a conflict.

Scope of Work Cont.- Performance Specification vs. Design Specification

Example Three FCIA Spec 104 A(103) (emphasis added):

1. Firestop all penetrations passing through fire resistance rated wall and floor assemblies and other locations ***as indicated on the drawings.***

2. ***Provide and install complete penetration firestopping systems*** that have been tested and approved by third party testing agency.

3. F - Rated Through-Penetration Firestop Systems: ***Provide through-penetration firestop systems*** with F ratings indicated, as determined per ASTM E 814, but ***not less than one hour or the fire-resistance rating of the construction being penetrated.***

The *Spearin* Doctrine-The Warranty You Benefit from But Don't See

First the bad news:

- "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered."
  - *U.S. v. Spearin*, 248 U.S. 132, 136 (1918)

The *Spearin* Doctrine-The Warranty You Benefit from But Don't See

Now the Good News:

- "But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."
  - *U.S. v. Spearin*, 248 U.S. 132, 136 (1918)

- For the typical design bid build project, there is an **implied warranty to the contractor** that the plans and specifications if complied with will be adequate.
  - *U.S. v. Spearin*, 248 U.S. 132, 137 (1918)

What is a Warranty

- A warranty is not instantly breached upon the discovery of a defect within the warranty period. It is the refusal or inability to remedy the default within a reasonable time that constitutes the breach of warranty. *Booth Real Estate & Ins. Agency v. Sprague Heating & Elec.,* 74 Ohio App. 3d 439, 443, 599 N.E.2d 325, 328 (1991).

- Breach occurs after acceptance of the goods whereas a breach of contract occurs if the buyer rejects or revokes the contract due to non-conforming goods. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872, 106 S. Ct. 2295, 2303, 90 L. Ed. 2d 865 (1986)

Uniform Commercial Code Controls Suppliers/Manufacturers

UCC § 2-315. Implied Warranty: Fitness for Particular Purpose

- Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.
- This is the warranty that the goods will be appropriate for the specific use intended by the buyer.

Uniform Commercial Code Controls Suppliers/Manufacturers

UCC § 2-314. Implied Warranty: Merchantability; Usage of Trade.,

- Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Uniform Commercial Code Controls Suppliers/Manufacturers

Goods are Merchantable if they:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are use; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) **Unless excluded or modified**

- **But other implied warranties may arise from course of dealing or usage of trade.**

Uniform Commercial Code Controls Suppliers/Manufacturers

- UCC § 2-313. Express Warranties by Affirmation, Promise, Description, Sample
- (1) Express warranties by the seller are created as follows:(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

TERMS AND CONDITIONS OF SALE

PAYMENT TERMS:
Net 30 days from date of invoice. Customer agrees to pay all costs incurred by Hilti in collecting any delinquent amounts, including attorney's fees.

WARRANTY:
Hilti warrants that for a period of 12 months from the date it sels a product it will, at its sole option and discretion, refund the purchase price, repair, or replace such product if it contains a defect in material or workmanship. Absence of Hilti's receipt of notification of any such defect within this 12-month period shall constitute a waiver of all claims with regard to such product.

THE FOREGOING WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Hilti shall in no event be liable for, and Customer hereby agrees to indemnify Hilti against, all claims related to special, direct, indirect, incidental, consequential, and any other damages arising out of or related to the sale, use, or inability to use the product, including costs and attorney's fees.

ORDER ACCEPTANCE:
Acceptance is limited to the express terms contained herein, and terms are subject to change by Hilti without notice. Additional or different terms proposed by Customer are deemed material and are objected to and rejected, but such

THE FOREGOING WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Hilti shall in no event be liable for, and Customer hereby agrees to indemnify Hilti against, all claims related to special, direct, indirect, incidental, consequential, and any other damages arising out of or related to the sale, use, or inability to use the product, including costs and attorney's fees.

ORDER ACCEPTANCE:
Acceptance is limited to the express terms contained herein, and terms are subject to change by Hilti without notice. Additional or different terms proposed by Customer are deemed material and are objected to and rejected, but such

Elements of Your Warranty Up-Stream

- Fitness for intended purpose
- Merchantability
- Free from defects not inherent in the design
- Materials be new and/or of good quality
- To be of first class quality
- Term or length of time
- Notice Provisions

Elements of Your Warranty Up-Stream-Fitness for Intent

- Fitness for Intended Purpose
  - Generally, we would disclaim this by omission if we are confident that you are not governed by the UCC.
  - “There are no warranties that extend beyond those described herein.”

Elements of Your Warranty Up-Stream-Fitness for Intent

The Predominate Factor Test:

"The test for inclusion or exclusion is not whether [goods and services] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)."

- Colorado Carpet Installation, Inc. v. Palermo, 668 P.2d 1384 (1996) (*citing* Care Display, Inc. v. Didde-Glaser, Inc., 225 Kan. 232, 589 P.2d 599 (1979); Burton v. Artery Co., Inc., 279 Md. 94, 367 A.2d 935 (1977); Meyers v. Henderson Construction Co., 147 N.J.Super. 77, 370 A.2d 547 (1977). *See* generally Annot., Applicability of U.C.C. Article 2 to Mixed Contracts for Sale of Goods and Services, 5 A.L.R. 4th 501 (1981)).

Elements of Your Warranty Up-Stream-Fitness for Intent

The Predominate Factor Test:

Useful factors to consider in determining whether "goods" or "service" predominates include the following:

- the **contractual language** used by the parties,
- whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods on the one hand and labor on the other,
- the ratio that the cost of goods bears to the overall contract price, and
- the nature and reasonableness of the purchaser's contractual expectations of acquiring a property interest in goods (goods being defined as things that are movable at the time of identification to the contract
- *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384, 1388-89 (Colo. 1983) (citation omitted).

Elements of Your Warranty Up-Stream-Fitness for Intent

Colorado Carpet court found that the contract for the purchase and installation of carpet was predominately for goods. They also used the installation of a water-heater as another example of mixed transaction that

- Customer/seller language
- Price broke out material and labor and labor cost was slight
- Materials were mobile prior to installation???

Elements of Your Warranty Up-Stream-Fitness for Intent

- If you're providing a service you don't have to warrant fitness for intended purpose.
- "The statutory warranties imposed by the Uniform Sales Act do not apply here. We regard it as the better part of wisdom not to extend as a matter of law implied warranties from Sales to Service contracts. We believe it the better rule to limit liability to acts of negligence." *Samuelson v. Chutich,* 187 Colo. 155, 158, 529 P.2d 631, 633 (1974).

Elements of Your Warranty Up-Stream-Fitness for Intent

- Avoid if you have a design specification
- However, if you have a performance spec. , this might make more sense.
- Did the designer call for a sole source?
- Did the designer specify a particular firestop system or manufacturer?
- Are there known issues with the design?
- Engineering Judgment?

Fitness for Intended Purpose-related issues

DESIGN INTENT PROBLEM

You can only price and should only contract to perform what is reasonably indicated or inferable from the contract documents – not what the designer may have otherwise "intended"

Fitness for Intended Purpose-related issues

Example (emphasis added):

The term Work means all services specified, indicated, shown, ***intended, implied, or contemplated*** by the Contract Documents and the furnishing by the Contractor of all materials, equipment, labor, methods, processes, construction and manufacturing materials and equipment, tools, plants, supplies, power, water, transportation and other things necessary to provide a complete construction of such work in accordance with the Contract Documents. The ***intent*** of the Contract Documents is to include all items necessary for the proper execution and completion of the Work. Work not specifically covered in the Contract Documents shall be required, ***if it is consistent therewith, and reasonably implied*** therefrom as being necessary to produce the intended results.

Fitness for Intended Purpose-related issues

RESPONSES
(continued)

If any aspects of the project are to be designed by the Contractor to meet required performance objectives, consider using language similar to AIA A201 (2007), Paragraph 3.12.10:

> ***"The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work . . . If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy..."***

Fitness for Intended Purpose-related issues

RESPONSES
(continued)

Subcontractor is not a professional engineer or architect nor does Subcontractor have a certificate of authority to practice engineering or architectural. As previously disclosed, all design services will be subcontracted to an engineering or architectural firm where all design services shall be performed by a duly licensed and registered architect or engineer in compliance with the [State of the Project-reason to have law of project govern] licensing requirements. The design professionals shall provide the standard of care, skill, judgment, and diligence that are ordinarily exercised or expected of other design professionals under similar circumstances. All responsibilities, performance criteria and warranties of this Subcontract will be subject to the foregoing professional standard.

Elements of Your Warranty Up-Stream

The Language is Critical:

- Troubling example:
  "Subcontractor shall warrant its Work against all deficiencies and defects in its workmanship and materials for the warranty period established in the Contract Documents or applicable law, whichever is longer. Warranty shall commence at Final Completion. Subcontractor shall satisfy all warranty obligations during the warranty period within 48 hours."

Elements of Your Warranty Up-Stream

The Language is Critical:

- Warranty that Work will be free from defects not inherent in the design.
  - Obviously more effective for design specification than a performance spec.

Elements of Your Warranty Up-Stream

The Language is Critical:

- Warranty Term.
  - Used to be one year seems to be creeping
  - Don’t want to promise beyond warranty of products used.
  - Want certainty
  - If tied to Contract Documents, you need to know what they say.

Elements of Your Warranty Up-Stream

The Language is Critical:

- Warranty Term.
  - Commencement Date
    - Would like to have it tied to your last date of work.
    - If not, then substantial completion
    - Finally, could attempt to redefine Final Completion as when owner can use some or all of the project. Also could be when Subcontractor completes punchlist.

Elements of Your Warranty Up-Stream

The Language is Critical:

- Notice
  - Do not want to be like an occurrence-based insurance policy
  - Want to attempt to limit warranty obligation to claims where notice given within warranty period of time as opposed to claim occurring within warranty period.
  - Want notice in writing-may absolve, will provide evidence perfected upon receipt.

Indemnity: Broad, Broader, Broadest! (Continued)

A REASONABLE PROVISION: The AIA (AIA A 201 (2007) 3.18.1) (see also AIA A 401(2007) 4.6.1) and ConsensusDOCS 200 (2007) 10.1.1 and 750 (2007) 9.1 appropriately matched to available insurance coverage (emphasis added) :

To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees or any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, ***arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) but only to the extent caused by the negligent acts or omissions*** of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Indemnity: Broad, Broader, Broadest! (Continued)

Example One (emphasis added) :

Subcontractor shall indemnify and hold harmless, the Contractor, Owner, its designee and their directors, officers, employees, agents, attorneys and volunteers ("Indemnified Parties") from any and ***all claims, set-offs, losses, damages, liabilities, fines and expenses, including without limitation, the concurrent negligence of one or more Indemnified Parties and Contractors, the contributory negligence of Subcontractor and any third party, and any attorneys' fees, expenses or other costs associated with or incurred, based on or in any manner arising out of or related to the performance or nonperformance of this Agreement by Subcontractor or the exercise of rights granted to Subcontractor hereunder, including, but not limited to, injury to persons or property, actual damages, consequential damages, punitive damages, losses, set-offs, warranty claims, product liability claims or other damages arising out of an action for strict liability in tort***; provided however that nothing contained in this provision shall be interpreted to indemnify or hold harmless the Indemnified Parties…..

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES

A. Be aware that many states have **"anti-broad form indemnity" statutes** which may render void and unenforceable such contract clauses which would require indemnification of the very party whose sole negligence caused the injury or damage for which the indemnification is sought.

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

B. But, in many states, if the "broad form" indemnity language (which would otherwise be unenforceable under this statute) is matched to a duty to "insure" such obligation, then the "broad form" language is fully enforceable, even if you cannot actually procure insurance for the full scope of such obligation.

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

C. Such provisions generally should be reasonably limited to circumstances for which conventional insurance coverage is available. Indemnity obligations are often coupled with a corresponding insurance requirement, and you should not agree to indemnity duties broader than the insurance coverages available.

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

D. AVOID contract language that purports to require you to indemnify or hold parties harmless where**:**

1. The claim arises out of the indemnified party's sole negligence [seek to limit such duty to a "comparative" or proportionate basis by qualifying the duty to only "the extent caused by" you or others for whom you are responsible]

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

D. (continued) AVOID contract language that purports to require you to indemnify or hold parties harmless where**:**

2. Such duty goes beyond the typical CGL insurance coverages for death or personal injury or property damages [e.g. including economic or consequential damages that may flow irrespective of their insurability]

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

D. (continued) AVOID contract language that purports to require you to indemnify or hold parties harmless where**:**

3. Such duty is triggered by actions other than "negligence" since that could extend such indemnity and hold harmless obligations to "breach" or failure of performance of contract requirements - which again would fall far beyond conventional insurance coverages.

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

D. (continued) AVOID contract language that purports to require you to indemnify or hold parties harmless where**:**

4. Such duty arises even from circumstances beyond your control - such as those generally "arising" out of or simply "related to" the performance under the contract – and not due to your fault.

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

E. AVOID contract language that purports to require you to "defend", in addition to "indemnify and hold harmless".

Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

E. **Make sure to give your insurance agent or counselor a copy of any proposed indemnity language - especially if it is specified to be insured - and obtain a firm written commitment that the insurance contemplated for the project does in fact cover the obligation [or specifies what is not covered, so that you can fully assess the uninsurable risk].**

This outline and presentation briefly covers some of the legal topics concerning contract claims and liability. The laws vary from state to state and the foregoing general information is not intended to provide legal advice or render legal opinions and should not be considered as a substitute for consulting with a lawyer.

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