



When Products Go Bad

by Patricia Ayars

Without question, a contractor who performs substandard work and delivers a defective product will be held responsible for correcting the defect, and probably for any damages caused by it. Contractors have a duty to perform their work in a workmanlike manner and with ordinary and reasonable skill. The law measures a contractor's performance against that of an imaginary reasonably prudent contractor, who practices the profession with the degree of care and skill customarily found in the trade.

This seems fair enough. It also seems fair that a contractor who knowingly purchases and installs defective materials will be found liable for the costs caused by the defect. But should contractors be held responsible for a defect if they had no reason to suspect its existence, as, for example, in the case of fire-retardant (FRT) plywood?

FRT plywood was actually specified under some building codes, but some brands of the plywood warped and broke in the summer heat. The National Association of Home Builders estimates that defective FRT plywood was used in up to one million roofs in the 1980s, and that its replacement will cost over \$2 billion. Should contractors be held responsible for this type of material defect?

What is Reasonable?

The courts have determined that, under certain circumstances, a contractor can be held responsible for defective materials, even if the defect is latent or hidden. The determining factor is whether the contractor has behaved in a "reasonably prudent" manner. If the court finds the contractor has so acted in selecting and installing the materials, the contractor will probably avoid liability. If, on the other hand, the contractor has failed to act in a reasonably prudent manner, he or she will likely be held liable.

How do the courts decide if a contractor is reasonably prudent and therefore not liable? Their evaluation usually focuses on three factors:

- the contract;
- the care exercised in the specification, purchase, selection, inspection, and storage of materials; and
- the use and installation of the materials.

The Contract

The first place the courts will look is the construction contract itself, to see if you, as a contractor, have assumed express responsibility for defective materials. A contractor's assumption of liability is called an "express warranty," and can take a variety of forms. The contract may state that the contractor warrants that the completed project will be suitable for a particular use, such as for storage of supplies. If defective materials then render the project unsuitable for that purpose, the contractor may be liable for correcting the defects and paying for damages caused by the defect. Obviously, such warranties should be avoided or amended to avoid contractor liability for defects beyond your control.

Other common contract warranties resulting in contractor liability are those stating that the contractor guarantees that the materials used in a project will be "new and of good quality," or that the contractor will "correct all defects." Such sweeping provisions should be avoided or limited to those defects caused by the contractor or about which the contractor had knowledge.

Specification of Materials

If material specification is part of the contract, the court will examine whether the contractor specified brands or types of material which have a proven record of high quality. If you specified materials known to have failed or which are of low quality, the court may find that you were not reasonably prudent. Another indication of negligence would be specification of an improper type or grade of material for the intended use.

New or innovative products should be used with care. You should examine all literature concerning the material for clues that the product might be defective. For example, the product might be made of a particular material or by a particular process that has produced defective materials before.

If the customer or architect insists on the specification of unsuitable brands, types, or grades of material, the contractor should disclaim liability for the choice. You, as the prudent contractor, should also point out why the materials are not suitable. A written notice to that effect will best

preserve evidence that you raised the issue.

Whether or not you are responsible for preparing the specifications, you should not use materials other than those specified. Following specifications gives you some protection against charges of negligence. If you feel that the materials specified are not suitable, the best course is to notify (in writing) the customer or architect about the materials' deficiencies, rather than replacing them on your own, which will put you at risk.

Purchasing Materials

The court expects that a reasonably prudent contractor will buy from reputable suppliers. Purchasing from suppliers who often deal in seconds, discarded goods, or damaged materials might be considered evidence that the materials could be reasonably suspected to be defective — not something a reasonably prudent contractor would do. Even if no question of liability arises, a reputable supplier is more likely to stand behind its products, so that the contractor is never faced with the decision whether to assume responsibility for the defect.

Selecting Materials

If you choose materials from stock, you should be sensitive to their appearance and select carefully. A court may find that materials appearing not to have been properly shipped, handled, and stored should have put the contractor on notice that defects were present. Damaged packaging or signs of weathering could also be seen as evidence that you should have known the materials might be defective.

Inspecting Materials

Carefully inspecting all materials and discarding any materials that appear to be damaged or defective is a useful counter to charges of contractor negligence. If a careful inspection would have revealed a defect and you did not perform such an inspection, you may face liability. If tradespeople commonly test certain types of materials before using them, for instance, you should too. If a certain product or material is known for a particular type of defect, then you should specially inspect for that defect.

You should also double-check labels or stamps to ensure that the material being used is the one you specified and ordered. Remember to inspect not only on receipt, but just before use, especially if the material has been stored for a long time or might have been exposed to weather, tampering, or vandalism. A post-installation inspection for warping, bowing, cracking, heaving, sagging, distortion, or

other signs of material failure will provide further evidence of your due care.

Storing Materials

Even if a material was defective as delivered by the supplier, that fact can be hard to prove if the materials were subsequently damaged by weather, equipment, dust, vibration, or vandals because you improperly stored it. A court may use improper storage as evidence that you caused the defective condition. Proper storage of materials will eliminate this issue.

Use and Installation

Failing to follow manufacturer's specifications also puts you at risk if materials fail, because the manufacturer or supplier will surely argue that the failure was due not to the materials themselves but to improper use or installation. If there are no manufacturer specifications, you can best protect yourself from liability by using and installing the material in the customary manner followed by respected, experienced tradespeople. A contractor inexperienced with the material should seek assistance from the supplier, the manufacturer, or other tradespeople who are familiar with the product. Contractors using innovative techniques which have not been suggested by the manufacturer or which have not been customarily used in the trade are always taking a risk of liability for defective work.

Employee Training

A contractor is ultimately responsible for negligent acts of employees. Consequently, you should train employees on how to avoid liability for defective materials, including the guidelines outlined above, and should monitor employee performance.

If you follow the above guidelines, you can significantly reduce, if not completely eliminate, risk of liability from defects in materials. Courts are not interested in imposing penalties on innocent parties. A contractor may choose not to follow all of the guidelines all of the time. However, you should remember that a court will naturally want to compensate the innocent victim of defective materials. If a court believes that it was your negligence and lack of reasonable prudence that resulted in the use and installation of a defective material, it will look to you for that compensation. ■

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