

Issues That Keep Me Up at Night

by Quenda Behler Story

I thought I'd celebrate *JLC's* 25th anniversary by writing about legal issues that have been bothering me — and probably you — for the past 25 years. Someone else might have a different list of complaints, but hey, it's my column, so here's mine.

The Crisis Du Jour

It used to be asbestos, then it was mold. Now the big issue is toxic cleanup. What these issues have in common is that politicians, government regulators, and customers all insist that they be fixed — right away — but no one wants to pay.

Contractors have been dropped into a swamp of lawsuits, regulations, and contract provisions — all aimed at determining who gets stuck with the bill.

Something else they have in common is that we didn't know they'd be problems until after the fact. As a result, contractors have been dropped into a swamp of lawsuits; obscure, confusing, and contradictory regulations; and oddly written contract provisions — all aimed at answering that ultimate question: Who gets stuck with the bill?

Take asbestos. At one time it was considered the new miracle product and was used everywhere — including inside school buildings — for a variety of purposes. It was even used for decoration, as a paint additive, because it provided an interesting texture. Only later, over a period of time, did we begin to discover how dangerous the stuff is.

So whose problem was this? The manufacturers', for one — but it also became a nightmare for the contractors, who'd installed the very products that their customers asked for, only to get pulled into lawsuits on the theory of "sue everyone in sight." The contractor could win the suit and still end up spending a lot of time and money defending himself in court.

More recently the problems have been mold and toxic waste. We weren't decorating with mold, of course — but the point is, it hasn't always been considered such a big health hazard. And toxic waste? Some of it was simply called trash 25 years ago, and no one worried too much about where it went. But now, suddenly, these are huge, expensive problems.

Money is not the only issue with these sudden crises. There's also the question of what we're supposed to do next. Once you know something's dangerous, how do you abate it? Once you know some of your waste is toxic, where do you put it? And how do you write your contract to reflect these issues?

What to do: Keep informed. When contractors turn to me with these sorts of questions, sometimes I can only mumble something along the lines of, "If you try this, I think you'll be okay, but I can't guarantee it," because some of the issues have yet to be resolved. The best advice I can offer is to stay informed. Read magazines like this one. Keep in touch with contractors associations. Attend programs and conferences where you can learn building practices that will help you avoid such problems.

And if you discover you have a problem on your hands, talk to your attorney early — but don't choose one of those attack-trained lawyers who'll get in there and rip out your opponent's throat. Not right away, anyway. You want someone who works in your field and has negotiating experience. If you're having — or expecting to have — a problem with a customer, don't forget the value of personal contact. Stay in touch and try to work it out with him before things get to the point where he's making complaints to regulatory agencies or talking to *his* attack-trained lawyer.

All of which brings me to my next complaint.

The Mess in Our Legal System

Suppose someone did what he had reason to believe was correct at the time, but then he discovered he was wrong — and this came to the attention of a regulatory agency. Since federal and state regulatory agencies are

Legal | Issues That Keep Me Up at Night

usually understaffed and underfinanced, they sometimes attempt to control what happens on the job site by finding one or two offenders and crucifying them. They make an example of them that is so horrendous, everyone thinks, “Whoa, I’m sure not going to do that!”

It doesn’t have to be the government coming down on you, either; it could be a customer. Clients can sue you for just about anything. Maybe they catch your employees smoking on the job and blowing second-hand smoke into the customer’s air — it’s impossible to predict what could lead to a suit. And you’ll have to defend yourself. Even if you have the customer from hell who is clearly wrong, wrong, wrong, you could be tied up in court for a long time and forced to spend thousands of dollars. Moreover, unless the lawsuit involves certain kinds of claims — or is absolutely baseless and malicious — you aren’t going to get that money back. Not even if you win.

But that’s not the worst news. Here’s the most frustrating part: You might be absolutely innocent, but if that lawsuit involves an area where the law is still being worked out, you could lose.

Sometimes your lawyer will have to say something that I personally just hate telling people: “If you fight this out to the bitter end, you might win, but that doesn’t matter. You had better settle it, because right or wrong, you can’t afford to be involved — and besides, you might *not* win.”

Got that? Even if you are what we in the legal trade like to call “the innocent party,” that’s not necessarily going to protect you. This can be true even in arbitration; while I prefer arbitration for a number of reasons, I do have to admit that it’s not the quick or cheap dispute-resolution system it used to be.

What to do: Document everything. Do

I have any helpful advice here for how you might avoid being a human sacrifice? Yes: Try to head off these problems before they get started. Get good legal advice from an attorney with experience in the construction industry about how to write your contracts. Create a paper trail: Save all your job contracts, receipts, and other paperwork — every single piece. Make notes about all of your contacts with your customers and subs.

Also, keep a log in your laptop or a spiral notebook. You’re not writing *War and Peace*; your log should have just brief statements in it, like “9/9/07, John Q. Customer called, said he didn’t like the paint; 9/9/07, Joe Supplier called, said trusses would be delivered and ready for work start next Monday; 9/9/07, spoke to Jim Painter, told him to talk to John Q. about a different color.”

Sounds simple, doesn’t it? So simple you may think it’s a waste of time, but trust me, it’s not. You can use your log to refresh your customer’s or your supplier’s or your sub’s memory about what actually happened or was really said. In addition, if you keep those kinds of records, your lawyer will love you for it.

Political Issues

Mold, toxic waste, and the like are health problems. But now I’m going to talk about political issues: consumer-protection, anti-drug, and hiring laws, and immigration.

These are real problems and I’m certainly not suggesting that you ignore them — but tell me the truth: Are they problems you expected to be required to solve when you set out to make your living remodeling kitchens?

Consider immigration. No matter how it gets worked out politically, this issue is going to cause problems for contractors. The most extreme proposals — to seal the border and deport anyone who

is here illegally — will make finding and hiring construction workers much more difficult.

Even if the country doesn’t go to that extreme, things could become a lot tougher for GCs. For one thing, there’s likely to be a lot of new red tape. What happens if you hire a guy who has an accent but, because he was born in southwest Texas, doesn’t have immigration papers? Is it up to you to prove that he’s a citizen? When did that get to be your job?

My fear is that someday contractors will be confronted with a new kind of inspector who can shut down the job if an employee — citizen or not — doesn’t have the right documentation. But suppose those papers are forged? Would you recognize a forged driver’s license or birth certificate? Didn’t take that criminal forensics course, did you?

Here’s another aspect of the problem that worries me: Some local municipalities are starting to pass their own laws about illegal immigrants. Does that sound like a good idea? Should contractors be required to conform to different rules depending on where the job site is? As far as I’m concerned, the building code is bad enough as it is — and it’s written by people who were trying to make it uniform.

I feel the same way about the lawsuits and various regulations that make contractors responsible for their employees’ drug and alcohol abuse. If the guy’s doing the job, shouldn’t that be good enough? Why do you need to make your employees urinate in a cup just so you won’t be a casualty in the war on drugs?

My point is that contractors build things. If they wanted to enforce laws about drug use or illegal aliens, they would have joined the police force.

What to do: Learn the rules. Do I have any real advice to offer, or am I just

Legal | Issues That Keep Me Up at Night

venting? Well, reasonable or not, you have to do what you're required to do. Which means that you have to make an effort to find out exactly what the requirements are.

Again, programs sponsored by contractors associations and magazines can be invaluable. Also, all those regulatory agencies have piles of brochures about their rules that they would be happy to give — or sell — to you.

Architects

I wouldn't want to tell you what I think of the standard AIA contracts that try to offload architectural mistakes onto contractors. Hey, if the architect didn't realize that the concept of handicapped-accessible includes a bathroom with a door wide enough to accept a wheelchair, why should it be up to the contractor to draw that fact to his attention?

What to do: Be careful what you sign. So when you read those architect-driven contracts, watch out for phrases like "due diligence" and "joint and several liability." Oh, and "indemnification" — treat that word like a flu symptom. You might think indemnification means only that you're promising to reimburse somebody for his expenses that were caused by your mistakes, but some indemnification clauses are a lot broader than that. You actually could be accepting the responsibility of paying for the damages caused by somebody else's mistakes — like the architect's.

When you see these terms — due diligence, joint and several liability, indemnification — call your lawyer and find out what you're getting into.

Insurance Companies That Won't Pay

I don't hate insurance companies when they refuse to pay claims. I'm too mature

for that. I understand that they pay claims out of a pool of money created by the premiums the insured parties pay, and that they have a fiduciary duty to protect that money from claims based on things the policy didn't cover.

What I do blame the insurance companies and their agents for is all the contractors I see who think they are adequately insured because of the way the policy was described to them, but aren't. Words like "comprehensive" and "general coverage" are tossed merrily around, and after the contractor makes out the check for the premium, he gets a 10-page policy in very small print and lots of legalese.

But then — to take just one example — when the foundation starts to crumble because the sub ordered the wrong concrete, the GC is told the damages were caused by a "defect" and his policy doesn't cover damage caused by "defects." Or a storm comes and the damage isn't covered by the flood insurance, because it allegedly was caused not by a flood but by standing water created by the excessive rain. Or toxic waste is discovered on the site and shuts down the job, and it turns out any claims created by that problem are excluded.

What to do: Think ahead. I do believe that insurance is both useful and necessary. I absolutely do not recommend going without it.

But you don't know what grief is until you try to get certain insurance companies to pay up — so here's what you need to do before you buy your insurance. Think about what kinds of things could actually go wrong on your job site. Talk to other builders in the area and in your local contractors association. Find out what kinds of claims they've had, and which insurance agents were helpful.

Let's say, for example, that you're building in the snow belt. One question you should ask your agent is what happens when an early storm drops a foot of snow before the framing is complete. If you find out you aren't covered for that, you might decide that, hey, it doesn't matter because the risk is too small to be worth paying insurance for; maybe you're starting in June and expect to finish in August. But make the decision a deliberate one — don't just assume your policy will protect you.

Also, read the exclusions; you'll find them in very small faded print somewhere around page 18 in the policy. (I'm joking, all you insurance people out there, so please don't call me.) Better yet, ask your agent to mark them all; if something's unclear and you don't understand exactly what is excluded, ask. And then keep that marked-up copy. Your lawyer will want to use it if you have to sue to collect on your claim.

Finally, remember that there are other ways to avert problems besides writing checks for insurance policies. Review your safety policies for content and check to see how rigorously those policies are actually followed on the site. Look at how your contract explains what happens to the payment terms and completion dates if disaster strikes. (I know you use the same contract over and over, and by the way, I don't think that's such a good idea.) Find out who your contract makes responsible for carrying what kind of insurance.

And make sure your standard procedures include getting proofs of that insurance coverage and that you have a system for filing and saving those proofs.

Quenda Behler Story has practiced and taught law for more than 25 years.