Liability for Specified Products

by Sid Hymes

Most contractors who install products called out in the drawings and specifications assume that they are not responsible if a specified item fails. This assumption has its roots in a 1918 U.S. Supreme Court case known as the *Spearin* doctrine which, simply stated, determined that in most cases a contractor's agreement provides an implied warranty only for the contractor's own work; manufacturers' warranties are assigned to the owner upon completion of the project. If there is a problem with an item, the owner contacts the manufacturer for service. While this may create some PR problems for the contractor, it frees him from responsibility for repair or replacement of an item he didn't build.

A recent federal appellate decision decided under Pennsylvania law addresses another aspect of this doctrine which, while not universally binding, provides additional insight into warranty problems.

But I Followed the Specs

The facts of the case are simple enough: A general contractor hired a subcontractor to furnish and install a particular type and style of glass, specifying an exclusive list of manufacturers from whom the glass could be obtained. When the glass failed, the contractor sued. At trial, the installer successfully argued that the contractor's specific requirements overrode the sub's own specific warranty of providing work and materials "free from faults and defects." The essence of the subcontractor's contention was that by requiring the particular materials, the general contractor had created an implied warranty that the glass was adequate for the intended use.

Typically, this type of implied warranty permits a court to allocate the risks associated with an inadequate specification, generally to the detriment of the party drafting the specifications — in this case, the GC. Upon appeal, however, the court noted that the general rule of absolving a contractor for liability when he or she complies with the plans and specs does not overcome any express warranty language. (An express warranty is one which explicitly addresses one or more specific issues.) The appellate court ruled in favor of the GC, noting that when the sub specifically (expressly) warranted (promised) that it would remove and replace any faulty or defective materials at its own cost, that promise became binding on the sub and negated the implied warranty of the specifications. In other words, whether or not the glass was appropriate for the application, and whether or not it was defective, the subcontractor was obligated to correct the problem with his own money and labor. Of course, the sub may still seek reimbursement from some other party — the building's designer, for example, or the glass manufacturer, or both.

Lessons Learned

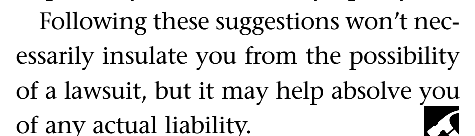
It's not difficult to avoid this type of problem. First, be sure that you follow the plans and specs, and use the required materials. But also read any contract language about warranties and repairs, and make sure you understand your obligations. If you are unsure of the meaning of the contract language, ask your lawyer. Don't rely on the statements of the architect, engineer, or owner (or the owner's lawyer) unless those representations are in writing; come lawsuit time, those people will have very selective memories.

In your own contracts, use language that says what you want it to say. If you are installing somebody else's products, then you should disclaim liability for any failure of the product. If the product has a manufacturer's warranty, assign the warranty to the owner and insist that the owner look solely to the manufacturer, and not to you, for any claims.

Also include language stating that if you use a product or a method or means of installation specified by another person, then the owner can look only to that other person if there is a problem. You may run into resistance from architects and engineers who want to be in charge, but who don't want any of the responsibility that goes with it. This is especially true if you are working with AIA standard-form agreements, which incorporate language in the "General Conditions" that is quite similar to that which trapped the subcontractor in the case just discussed.

Finally, if you are a subcontractor, you need to be sure that the general contractor's agreement with the owner does not impose any indirect liability upon you.

Following these suggestions won't necessarily insulate you from the possibility of a lawsuit, but it may help absolve you of any actual liability.



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