

## Do Your Materials Meet Code?

by Quenda Behler Story

**A**client, Ed, is starting a company that will use recycled plastic to manufacture building products, which we'll hereafter refer to as "stuff." A builder looking at Ed's display in a product show asked if his stuff meets code.

Ed called me and asked, "Well, does it?" "Hey, you're the engineer," I said. However, I went on to explain what "meeting code" requires and why the builder was concerned.

The builder is on the front line on code issues. He's the one who deals with the code enforcement officer. He also, whether he realizes it or not, gives his customer an implied warranty that the building materials he chooses are "fit for their purpose," which means that those materials meet the requirements of the building code.

### Fitness of Purpose

Meeting code is part of the fitness-of-purpose warranty because "fitness" means that you can use the end product — the building — as intended. If the customer can't get an occupancy permit, he can't use the building: It isn't fit for its intended purpose. (In some states this warranty is called an implied warranty of merchantability.)

Does that mean that because Ed's stuff is not specifically mentioned in the building code, a builder who uses it can't get an occupancy permit?

No. Modern building codes don't usually talk about types of materials so much as they talk about building functions. For example, instead of "Your stairs must be constructed from wood," the codes say things like "Your stairs must be constructed from fire-resistant material" or "must be able to carry a load of x pounds."

Code officers who have doubts about the materials used have the right to ask for evidence that they meet the code standards. That evi-

dence could consist of things like engineering reports or fire certification tests. A well-advised builder would ask the manufacturer if that sort of information is available before he uses a new material.

Suppose a builder installs the stuff and it doesn't meet code. In that case, the builder's customer could recover the costs of replacement and lots of other damages from the builder. It's not especially relevant how the builder's warranties or disclaimers were written. A building that can't be used isn't worth anything to the builder's customer. It would be an exceptional disclaimer that could evade that problem.

If the builder has to reimburse his customer in some way, could he recover those costs from Ed? Yes, he could. The manufacturer also gives the builder an implied warranty of fitness-of-purpose. If the customer can recover his damages from the builder, the builder can usually recover those costs from the manufacturer.

### After the Occupancy Permit

So far, we've just talked about meeting code requirements. What about after the occupancy permit has been obtained? Even though, as we've said, you give your customers an implied warranty of fitness-of-purpose on the materials you use, most contractors don't want to be in the business of guaranteeing their materials indefinitely. By giving your customers an actual warranty of your own (preferably written with the advice of an attorney), you can include a disclaimer that limits the customer's recourse to the manufacturers' warranties after the occupancy permit has been issued and the job has been accepted.

The language of the disclaimer could go like this: "After acceptance of

the builder's work, the customer is limited to the manufacturers' warranties. The builder warrants that he will preserve all such warranties." So if the plastic wood product bubbles in the summer sun, the customer should get in touch with the manufacturer instead of chasing down the builder.

In order to make this kind of disclaimer work, however, the builder must do everything necessary to preserve the manufacturers' warranties. He can't make his customer go to the manufacturer if he has lost or voided those warranties.

### Preserving the Warranties

To preserve the manufacturers' warranties, you must install their stuff the way they say to install it. If you know a better way, *don't use it*. You could jeopardize the warranties. Also, you must use the stuff for the purpose intended. If it's supposed to be interior decking only, don't use it for a patio out in the sun. Finally, if there's paperwork involved — if you have to mail in forms with the customer's name and so forth — you must do that. Otherwise, when the stuff curls or melts or comes apart, it's your problem.

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