A Primer on Liability for Plumbing Professionals

Part 1: Contract Claims, Equitable Claims, and Damages

By Steven Nudelman

Abraham Lincoln once said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough."

While these words especially resonate to commercial litigation attorneys with burgeoning caseloads, they are equally important for business professionals to heed. Litigation is almost always an expensive enterprise. Ask anyone who ever has retained a defense attorney for a civil lawsuit or someone who has tried to enforce a contract against a defaulting party. While certain business circumstances may require a plumbing engineer to retain an attorney for litigation—and the purpose of this article surely is not to discourage such a practice when necessary—it is often best to follow the tenor of President Lincoln's advice and avoid litigation through compromise.

To make educated decisions regarding business disputes, plumbing professionals (who in all likelihood did not go to law school) must understand the types of claims, damages, and defenses that might arise. That is the purpose of this three-part series: to provide you with an overview of the legal liability issues facing plumbing professionals in today's business world, so you can work with your attorney in a cost-effective manner to achieve an optimal result. This article covers contract claims, equitable claims, and damages. Part 2 will cover tort (or non-contract-based) claims and damages, and Part 3 will address defenses, limitations on damages, and mechanic's liens. While this series will survey a number of legal topics, it is in no way intended to provide legal advice. If one of the legal issues discussed in these articles sounds like it may apply to you, check with your lawyer. Remember, plumbing professionals shouldn't practice law any more than lawyers should practice plumbing!

A Hypothetical

For purposes of our discussion, consider the situation of Paul Plumber. Paul was retained as a subcontractor to HAH Housebuilders Unlimited, a general contractor, to supply and install six high-powered Flusher-oo 6500 china toilets (each with 1.6-gallons-per-flush capacity and polished brass levers) for the $1.5 million custom-built home of Mary Moviestar. In its advertising literature, Flusher-oo touts the 6500 as one of the "best toilet fixtures money can buy," complete with a "no-plunger-ever-needed" guarantee and 15-year warranty. According to Paul's work order/invoice, which was signed by HAH's president, HAH was required to pay Paul $9,600 ($1,600 per toilet) net 30 days after completing the work.

Paul was one of about three dozen subcontractors and suppliers working on Mary's luxury home. Two months after completing his work, one of the toilets exploded as an unsuspecting guest attempted to flush it. As a result, bits and pieces of china flew into the air, causing numerous indentations in the bathroom's Sheetrock walls, and the bathroom was flooded. The guest, an 85-year-old woman with a chronic heart condition, suffered minor injuries from the flying china and a subsequent slip and fall on the tiled floor. While her physical injuries were few, she was mentally traumatized by the whole episode.

Insurance Issues

Before analyzing Paul's prospective legal woes, I want to offer a few remarks about insurance. Prior to undertaking any job, you must have adequate insurance. What constitutes adequate insurance is a question for your insurance broker, not an attorney. You must sit down with your broker, extensively review your business' scope, and determine the appropriate insurance coverage levels, ranging from professional liability (errors and omissions) to comprehensive general liability to excess liability. You must understand precisely what your insurance covers, as well as the specific exclusions contained in your policies.

Keep all of your insurance documents (correspondence, applications, endorsements, binders, declarations, policies, etc.) in a safe place because you will need these documents if you ever are faced with a claim. Generally speaking, a claim is a demand for money or services made upon an insured, including the commencement of an arbitration or a lawsuit. As soon as a claim is made against you, you must put your insurance carrier *and* broker on notice by certified mail, return receipt requested. You likely will hear from a claims adjuster who may request additional information from you and/or your attorney to make an insurance coverage decision.

For purposes of this hypothetical, assume that Paul timely and properly put all of his insurance carriers and brokers on notice of each of the claims asserted against him and that his insurance carriers have retained counsel to defend Paul.

Contract Claims

One of the most common claims Paul likely will face is for breach of contract. A contract is an agreement between two or more parties, which, among

other things, includes the following elements: an offer, acceptance, and consideration.

In this example, Paul has a contract with HAH: he offered to supply and install certain toilets; HAH accepted this offer (as evidenced by the signed work order/invoice; and the consideration is $9,600. This particular example is clear because the parties' contract was reduced to a signed writing in which each party's rights and obligations are spelled out in a written contract document.

While the contract in our hypothetical is short, contract documents can be quite extensive and detailed. The American Institute of Architects publishes form contracts and general conditions that often are used for large-scale, private construction projects. Plumbing subcontractors may be bound by such contracts (including, among other things, the general conditions) if they are incorporated by reference into subcontract agreements. In such cases, subcontractors should obtain copies of the general contracts for their attorneys' careful review *before* entering into subcontracts.

Ultimately, a subcontractor may have no choice: Either you accept the general contract's terms or you are not awarded the subcontract. However, you need to know precisely what you are getting into. For example, provisions in certain AIA form contracts limit your ability to sue or require you to participate in mediation or binding arbitration to resolve any disputes that you may have on the project. Other provisions limit your ability to sue for certain types of damages. You need to be aware of contractual provisions such as these and the impact they may have on you as a subcontractor on a project.

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Returning to our hypothetical case study, HAH has a claim against Paul for breach of contract. To establish a claim for breach of contract, HAH must prove the following: that it had an agreement with Paul; the respective parties' obligations under the agreement; that HAH performed its obligations; that Paul breached the agreement by failing to perform his obligations; and that HAH suffered damages as a result of the breach.

Looking at the easiest element first, if HAH paid Paul for the installation, its obligation is satisfied. Since one of the toilets did not perform properly (it exploded), causing HAH to credit Mary for it, Paul did not perform his obligations. HAH paid for the toilet, so at a minimum it suffered damages in the amount of $1,600 plus certain other damages discussed later in this article. Last but not least, the invoice/work order allows HAH to prove the agreement existed and each party's obligations under it.

While it is helpful to prove a case, a writing is not required for the formation of a contract. In *Cleveland Wrecking Co. v. Hercules Construction Corp.,* a federal district court found that a $980,000 demolition contract did not have to be in writing to be enforceable because the parties' oral agreement included all of the essential terms (price, scope of work to be performed, and time of performance) under New York law.

Notwithstanding the court's holding in *Cleveland Wrecking,* all of your contracts should be reduced to a signed writing. The facts in *Cleveland Wrecking* were somewhat unique, and, while a writing is not required to form a contract, the lack of a writing may be a defense against a contract's enforceability. This concept, known as the statute of frauds (discussed more fully in Part 3 of this series), requires certain types of contracts to be in writing if they are to be enforceable. To avoid the entire issue, ensure that *all* of your contracts are in writing and signed by the party to be charged (the party with whom you are contracting).

In addition to a breach of contract claim, HAH and Mary may have a claim against Paul for breach of express warranty.

Express warranties are governed by Section 2-213 of the Uniform Commercial Code, which the majority of jurisdictions in the United States has adopted in one form or other. The 15-year warranty is referenced in Paul's invoice/work order and also may be discussed in Flusher-oo's product literature. Unlike the breach of contract claim, the breach of warranty claim may be asserted by parties who are not in privity of contract (parties who are not a party to the underlying contract, such as Mary). Finally, the product manufacturer (Flusher-oo) also may be liable to HAH, Mary, and Paul for breach of express warranty.

Equitable Claims

Unlike contract and express warranty claims, equitable claims are not predicated on a written agreement or written warranty. These claims also are known as implied claims.

For example, suppose Paul notices that the sink in one of Mary's new bathrooms has a massive leak, and he repairs it. Mary sees Paul working on her sink and, knowing that Paul's company is only supposed to work on the toilets, says nothing in the hope of getting her leaky sink repaired for free. When finished, Paul prepares an invoice for sink repairs and addresses it directly to Mary. Is she obligated to pay Paul? Absolutely.

In this case, Paul and Mary had a contract implied in fact. Under a theory known as quantum meruit or quasi-contract, to avoid unjust enrichment Mary is obligated to pay Paul the fair value for the work he performed and the supplies he furnished. As one legal commentator explains it, the distinction between implied contracts and express contracts is unimportant: "Both are true contracts formed by a mutual manifestation of assent."

Similar to implied contracts, implied warranties are another claim about which Paul should be concerned. Two such warranties, the implied warranty of merchantability and the implied warranty of fitness for a particular purpose are governed by the UCC in Sections 2-314 and 2-315 respectively. To be merchantable under the UCC, the goods sold must, among other things, "pass without objection in the trade under the contract description," be "fit for the ordinary purposes for which such goods are used," and "conform to the promises or affirmations of fact made on the container or label if any."

In this case, Paul may be liable to Mary for breach of the implied warranty of merchantability because an exploding toilet is certainly not merchantable as required by the UCC. If Paul had reason to know of a particular purpose for which Mary needed the Flusher-oo 6500 toilets—for instance, if Mary told Paul that she needed high-powered toilets for certain parts of her house—and Paul specifically recommended the Flusher-oo 6500, Paul also may be liable to Mary for breach of the implied warranty of fitness for a particular purpose.

One other implied warranty bears mention: the implied warranty of plans and specifications. This warranty, also known as the *Spearin* Doctrine, is derived from a 1918 U.S. Supreme Court case, *United States v. Spearin*.

In *Spearin,* a contractor agreed to build a dry dock in a Navy yard in accordance with plans and specifications prepared by the federal government. In the course of construction, the contractor encountered a dam unknown to both parties. Due to heavy rain and high tide, back waters burst the new sewer and flooded the dry dock excavation, causing damage and increasing the contractor's costs. The contractor sought additional compensation from the government. The Supreme Court agreed with the contractor, noting that whereas one who agrees to perform a project for a fixed sum normally is not entitled to additional compensation due to unforeseen difficulties, "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."

The general rule in construction contracts is that an owner may recover the costs of completing promised performance or making repairs, unless doing so under the facts is impossible or the cost of completion or repairs would constitute unreasonable economic waste.

Although the *Spearin* Doctrine applies to public improvement contracts—and is not applicable in Paul's private construction project—it highlights an important issue for subcontractors on government projects to keep in mind.

Damages

Now that we have discussed the contract and equitable claims that HAH and Mary may assert against Paul, we must address damages. What is Paul's liability in dollars and cents?

One type of damages recoverable for breach of contract and breach of warranty claims is compensatory damages, which may include the costs to repair or replace the toilet and to repair the surrounding room. The general rule in construction contracts is that an owner may recover the costs of completing promised performance or making repairs, unless doing so under the facts is impossible or the cost of completion or repairs would constitute unreasonable economic waste—in which case you would look to the difference in value. For example, if the controversy is about a car battery, you do not look to the difference in value between a vehicle with a new battery and a vehicle with an old battery. You look at the cost of replacing the battery.

In *525 Main St. Corp. v. Eagle Roofing Co.,* the New Jersey Supreme Court discusses the cost of repair versus diminution in value approach. In that case, the defendant repaired a roof and gave the owner a five-year guarantee. The roof leaked within the warranty period, and the owner hired someone else to replace the roof. What are the owner's damages? The owner is entitled to the cost of repairs or a prorated portion of the contract price based on the guarantee period.

Based on these principles, Paul faces liability of $1,600 in compensatory damages for the one exploded toilet. However, he may be looking at other damages as well.

Consequential damages are damages that indirectly arise out of the breach. For example, Paul may be responsible for paying to have new Sheetrock installed in the bathroom. Also, if Paul's exploding toilet delayed construction on the house, Paul may be liable if HAH incurs additional overhead costs and expenses. Paul's liability for these damages, as well as lost profits, or delay damages, depends in large part on the terms and conditions of his agreement with HAH. In this example, Paul will not be able to recover consequential damages under his contract claims because his work order/invoice does not provide for their recovery.

Similarly, under the facts of this hypothetical, Paul likely will not be able to recover punitive damages. State statutes often provide the limited circumstances under which a party may be awarded punitive damages, which generally are not available for contract claims. Compensatory damages and consequential damages are predicated on the contract, warranty, and equitable claims previously discussed. Part 2 of this series will cover damages relating to the injuries suffered by the 85-year-old guest, as well as punitive damages.

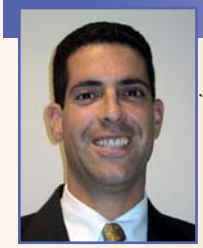
As you can see from this discussion, a simple toilet installation by a plumbing subcontractor can result in an array of claims, and the contract and equitable claims covered in this article just scratch the surface. The next part of this series will discuss an entirely different set of claims Paul faces: tort (or non-contract-based) claims, as well as the related damages. ■

Suggested Reading

Cleveland Wrecking Co. v. Hercules Construction Corp., 23 F. Supp. 2d 287 (E.D.N.Y. 1998), aff'd, 198 F.3d 233 (2d Cir. 1999).

United States v. Spearin, 248 U.S. 132 (1918).

525 Main St. Corp. v. Eagle Roofing Co., 34 N.J. 251 (1961).



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