

Construction Claims: An Overview

▼ By Warren Lutz, Esq.

Disagreements can and do arise in construction. When negotiation fails to resolve the dispute, arbitration or litigation typically follows.

Claims can arise in a variety of contexts. For example, a general contractor may challenge the extent to which a subcontractor performed its obligations under contract. Alternatively, a contractor may contest the quality of material the GC has purchased for installation on a job. Or, a building owner may contend that a defect in a building's design or construction caused injury. In each of these instances, a multitude of differing legal claims exist. This article provides a brief overview of such claims.

Breach of contract

Breach of contract is the most prevalent claim to arise in construction-related disputes. Even where an injured party may be able to prove not only breach of contract but also negligence or fraud, courts tend to structure a case and analyze it under the rubric of breach of contract.

Typically, the obligations of parties to a construction project are set forth in written contracts, although oral contracts are equally valid, but generally more difficult to prove. Standard-form contracts, such as those published by the AIA, are used in many projects, sometimes with the parties modifying the standard form provisions to accommodate their specific needs.

The party asserting the breach of contract claim has the obligation to prove the terms of the contract, showing that all parties agreed to specific terms. Even where a contract is written, debate may arise over significant terms that are ambiguous. The greater the ambiguity, the greater the likelihood that the party asserting breach may encounter difficulty proving its claim. For this reason, great

care should be exercised in drafting clear and precise contract provisions.

One fairly unique aspect of contract-based claims is that the person or firm alleging the breach is usually limited to asserting claims only against those persons with whom they have a contract. Thus, a building owner may encounter difficulty asserting a contract claim directly against a subcontractor, and instead, must pursue its claim against the general contractor, with whom it has a contract. This is known as the doctrine of "privity of contract."

An exception exists where an injured or aggrieved party can show that they are a "third-party beneficiary" of another party's contract. In essence, this requires showing that the contract was intended to benefit another party (i.e. the third-party beneficiary).

Once a breach of contract is proven, the legal relief is generally limited to money damages, proven with "reasonable certainty" and measured as the difference between what was promised and what was delivered—otherwise known as "consequential damages." Unless the contract contains a provision for the recovery of attorney's fees, such fees are not recoverable from the losing party. In virtually no instance are punitive damages recoverable for breach of contract.

Breach of warranty

A claim similar to breach of contract concerns breach of warranty. Most states have adopted the Uniform Commercial Code (UCC) governing, in part, the sale of goods. Where goods fail to perform as promised or expected, a claim may arise for breach of the express warranty or breach of the implied warranty of merchantability. Many general contract principles govern these warranty claims.

Negligence claims differ considerably from **contract** and most **warranty claims**.

In the context of construction contracts, breach of expressed and implied warranty claims occur, for example, where a manufacturer makes a specific representation as to how its product (i.e. goods) will perform. An implied warranty also arises that goods will perform as ordinarily expected. For example, if it is ordinarily expected that caulk will have a life expectancy of at least three years, and the caulk fails in only one year, a claim may arise for breach of the implied warranty of merchantability.

Two principal defenses arise where a UCC warranty claim is asserted in the construction context. First, where a construction contract calls for the provision of services and goods (e.g. installation of roofing materials), and the cost of the labor predominates over the cost of the goods, the UCC generally does not apply, as the Commercial Code is limited to the sale of goods. Second, where the goods are incorporated into and become a part of a building (e.g. where brick veneer is installed to form the exterior sides of a new house), many courts hold that the UCC does not apply either because the homeowner purchased realty, not goods (i.e. bricks).

Negligence

Negligence claims differ considerably from contract and most warranty claims. Here, the claimant alleges that the defendant had a duty to exercise reasonable care, yet breached that duty causing damage.

For example, an architect has an obligation to exercise reasonable care in

the preparation of plans and specifications. If the architect fails in preparing the plans and the resulting failure is a structural collapse, the injured persons may assert a negligence claim against the architect, even where the injured party had no contract with the architect.

Privity of contract is not required in a negligence claim, as the duty to exercise reasonable care extends not only to those with whom an individual contracts, but also to those persons for whom injury is reasonably foreseeable. Increasingly, however, when disputing parties have a contract between them, courts are resolving the dispute by reference to the contract terms, and declining to litigate the negligence claim.

Unlike most contract claims, however, negligence claims generally require expert testimony to establish the "standard of care" applicable to the defendant. Thus, in the architect example above, the plaintiff typically would have to present expert testimony to establish the obligations of an architect and demonstrate that, in this particular case, the architect breached that duty in a specific manner causing injury.

Negligence per se

Where a defendant violates a statute, code or regulation, a claim for "negligence per se" may arise. Where such violations occur, a plaintiff is generally relieved of the burden of providing expert testimony as to the standard of care and the defendant may be deemed negligent if the injured person is the type of individual intended to be protected by the statute, code or regulation. In short, this is an easier claim to prove than the general negligence claim discussed above. As applied to the construction industry, negligence per se may arise where a contractor or architect violates a building code and injury or damage occurs.

Fraud

Fraud-related claims also arise in construction-related disputes, but the quantity and quality of proof is far more demanding than for a contract or negligence claim. Typically, fraud requires proof that one party possessed an intent to


defraud another person, and that the injured party relied to his or her own detriment upon the fraudulent statement. Many courts disfavor fraud claims and impose rigorous pleading and evidentiary requirements at trial. In essence, a person claiming fraud must allege and prove greater detail as to the "who, what, where, when and how" of the fraud claim.

A related but less difficult claim to prove is negligent misrepresentation. Again, the claim requires proof that the defendant had a duty to disclose some important information, yet failed to do so, causing injury or damage.

For example, an engineering firm that fails to conduct standard tests to determine the subsurface conditions of a construction site, may be liable for negligent misrepresentation to the extent it fails to reveal its lack of testing, and the subsurface later cannot support the loads suggested by the engineer's report.


Unfair trade

In recent years, a growing number of states have adopted statutes to protect consumers and businesses from certain unfair trade practices. These statutes cover a broad spectrum of dealings and transactions and are liberally construed by many courts. Unlike contract and negligence claims, however, the damages recoverable in some states can be double or triple the actual loss. In addition, the winner often gets to recover attorney's fees. Recently, a Virginia jury awarded a homeowner over \$1.2 million where the builder allegedly sold a \$500,000 house, advertising that the building was clad in stucco, when in fact the exterior was EIFS.

Not every claim outlined here can be asserted in every dispute. Much depends on the nature of the parties to the dispute, and whether or not their conflict arises by virtue of a contractual dispute. In the end, the facts and applicable law will determine the success of the claim. 

Warren Lutz, Esq., is a director with the Washington, D.C., law firm of Jackson & Campbell, P.C. He specializes in product liability, toxic torts, and construction litigation. He may be reached at wLutz@jacksncamp.com.

THE "POST" SPEED LEAD



- Quick set up.
- Quick take down.
- Fewer parts.
- One bracket assembly.
- Ideal for all applications of brick veneering.
- Inside, outside, quion, and angled corners.
- Invented and patented by a bricklayer.

For information write or just call
(800) 525-8287

Marv Post Enterprises Inc.
9858 Sibley Hills Drive Eagan, MN 55121

WITTHAUT

GERMANY

GERMAN QUALITY AT AN AFFORDABLE PRICE!



Member of the German
DIAMOND TOOL
Manufacturers Association

Toll Free: 888-434-2832
Sierra Nevada Diamond Inc.
Web Site : <http://www.witthaut-diamond.com>
Looking for Manufacturers Reps
Seeking Experienced Sales Personnel