

HENDRICK PHILLIPS
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LEGAL ADVOCATES, ADVISORS & CONSULTANTS TO THE CONSTRUCTION INDUSTRY

Pinpoint Seminar:

- ◆ **Key Contract Provisions**
- ◆ **Negotiating Contracts**
- ◆ **Colorado Construction Cases**



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Today's Program

- ❖ Critical Contract Provisions and Potential Negotiating Tips.
- ❖ Colorado Case Decisions.



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Construction Law = Contract

- Construction law is contract law. The parties to the contract largely draft the “law” that will govern the project and their relationships, obligations, rights, remedies and responsibilities when they formulate the contract.
- A successful contractor is one that not only is knowledgeable and skilled in estimating, installing and managing their work, but also is knowledgeable and diligent in contract formation and negotiation.



Different Contracts

But They All Deserve Attention and Can Have Severe Consequences Affecting Liability and Profitability

- New construction subcontracts with general contractors.
- Re-roofing contracts with building owners.
- Residential Contracts.
- Subcontracts you consummate with subcontractors.
- Approved applicator agreements with roofing manufacturers.
- Purchase orders and credit agreements you execute with suppliers and distributors.
- Performance and payment bonds.



Negotiating Construction Projects

Designate a Contract Specialist in Your Organization

- ❑ If not you, designate a person within your organization to be your in-house contract expert to be a resource and negotiate contracts on your company's behalf.
- ❑ Consider utilizing a construction attorney with an understanding of the issues and problems which arise in roofing projects to review.



Negotiating Roof Construction Contracts

- **New Construction:** Undertake a careful and thorough review and propose changes to general contractor drafted subcontracts.
- **Re-Roofing Projects:** Develop your own proposal/contract form with a comprehensive set of terms and conditions geared to issues and problems that arise in roofing construction.
- **Residential Projects:** Develop your own proposal/contract form with a comprehensive set of terms and conditions geared to issues and problems that arise in residential jobs.



New Construction Projects

Include in all your proposals (other than public bids where you are bidding directly to a public owner):

“This proposal is based on execution of a standard AIA construction contract such as AIA Document A401”.



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New Construction Projects

Be Vigilant

- Look out for provisions in bid packages and project manuals that include a general contractor's standard subcontract and/or state that in submitting a proposal or bid you agree to execute the general contractor-drafted subcontract.
- Especially look out for and do not agree to execute general contractor drafted performance and payment bonds.



Performance Bonds

- Make sure all performance bonds you sign include a time limitation governing how long after completion of construction you can be sued on the performance bond.
- AIA Document A312 Performance Bond requires that any legal proceeding under the bond must be instituted within two (2) years after a declaration of Contractor Default or, within two (2) years after the contractor ceased working or within two (2) years after the Surety refuses or fails to perform its' obligation under the bond, **whichever occurs first**.
- Colorado law allows contracting parties to stipulate to a shorter period of time then prescribed by the applicable statute of limitations as long as the period is reasonable.



Payment Bonds

- Seek to limit the class of persons or entities who can make a claim on your payment bond to those with whom you have a contract and no more than one tier further down (e.g., supplier to your subcontractor).
- AIA Document 312 Payment Bond limits claimants to those who have a direct contract with the contractor or with a subcontractor of the contractor or have rightfully asserted a mechanics lien claim.
- Request written notice to you no later than 60 or 90 days after last furnishing labor or material by the claimant with whom you do not have a direct contract.



Specific Provisions

- ✓ Develop your list of key issues, principles and critical provisions that are your priorities.
- ✓ Develop your checklist of provisions that are unacceptable to you.



Critical Issues: Address These In Contract Provisions

1. Price of roofing materials during a period of price volatility, continued price increases and manufacturers stating price is the price in effect on date of shipment.
2. Liability for delay damages and liquidated damages in today's marketplace when there is uncertainty when materials will be available, and lengthy and unpredictable delays in material delivery.
3. Indemnification obligations.
4. Liability and acceptability of roof decks and adjacent surfaces.
5. Design liability.



Critical Contract Provisions

6. Risk of loss and builder's risk and installation floater insurance policies.
7. Ability to hold your subcontractors and suppliers accountable if you are damaged due to fault by them.
8. Having same rights and remedies available to you as general contractor has toward the owner.
9. Payment: right to receive, contingent payment, right to stop work if not paid.
10. Limitation on remedies; ability to recover damages, disclaimers.



Critical Contract Provisions

11. Notice requirements. Waiver of claims.
12. Right to examine your subcontractor's insurance policies, particularly CGL insurance for non-standard exclusions (e.g. open roof, torching, residential, heating of materials).
13. Dispute resolution: locale, arbitration vs. litigation, consolidation.
14. One-sided attorney's fees recovery.
15. Opportunity to cure alleged defects.



Material Price Escalation and Delays in Delivery

- ✓ Communicate early and often.
- ✓ Include provision in your proposal.



Escalation & Delays

Provision to be Included in Proposals to Owners or General Contractors

- Due to continuing increases in prices of materials, shortages and material delivery delays, the price(s) provided in this proposal is/are subject to change, and the Roofing Contractor shall be afforded additional time if material delivery is delayed.



Material Prices in Effect on the Date of Shipment

At the present time, roofing material manufacturers are unwilling to commit to firm prices or delivery dates of numerous roofing materials, including but not limited to fasteners, adhesives, polyisocyanurate insulation and TPO membrane. Roofing materials manufacturers state that the price of the materials will be the price in effect on the date of shipment. Accordingly, the parties acknowledge and agree the contract sum to be paid to Roofing Contractor will not be finally determined until the time the materials are shipped.

Roofing contractor will be entitled to an equitable adjustment for increases in the price of materials paid by roofing contractor upon documentation of the price increases above the prices stated in the attached schedule of material prices upon which our proposal/contract price is based.



Indemnification

- ❖ Limit scope of indemnification obligation.
- ❖ Insert this language in every indemnification provision:
- ❖ ...**to the extent** caused by a **negligent** act or omission of Roofing Contractor or someone for whose act's Roofing Contractor is responsible.



Negotiating Indemnification Provisions

- Propose a reciprocal indemnification provision.
- Examine indemnification provisions in the prime contract between the Owner and General Contractor.
- Repeat your limitation.
- Have fall-back provision.



Negotiating Indemnification Provisions

Reciprocal Provision

Similarly, Contractor shall indemnify and hold harmless Subcontractor from all damages, losses, or expenses, including attorney's fees, arising from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to the extent due to the negligence of Contractor or the fault of any of its agents, representatives or employees.



Negotiating Indemnification Provisions

- ❖ Subcontractor shall not be obligated to indemnify a party from their own negligence.



Negotiating Indemnification Provisions

- ❖ Subcontractor is not obligated to provide indemnification for damages, losses or claims to the extent due to the negligence of indemnitees or others for whose conduct Subcontractor is not responsible.



Additional Insureds

- ❖ Naming Contractor and Owner as additional insureds on XYZ Roofing Company's liability insurance policy is intended to apply only to the extent that a negligent act or omission by XYZ Roofing causes a claim to be asserted or a loss to be sustained by Contractor or Owner.



Additional Insureds

Naming Contractor, Owner and others as additional insureds on XYZ Roofing Company's liability insurance policy and making that coverage primary is intended to apply only to the extent that a negligent act or omission by XYZ Roofing Company's causes a claim to be asserted or a loss to be sustained by an additional insured. The additional insured endorsement is not intended and shall not be construed to cause XYZ Roofing Company's insurer to be liable either to defend or to indemnify an additional insured for claims against or losses sustained by the additional insured that are not due to the fault of XYZ Roofing Company.



Acceptance of Deck

Roofing Contractor's commencement of roof installation indicates only that Roofing Contractor has visually inspected the surface of the roof deck for visible defects. Roofing Contractor is not responsible for the structural sufficiency, quality of construction, undulations, fastening or moisture content of the roof deck or other trades' work or design and their effect on the roof and roofing materials.



Acceptance of Deck

Subcontractor's prosecution of the roof work indicates only that the surface of the deck appears satisfactory to the Subcontractor to attach roofing materials. Subcontractor is not responsible for the construction, slope, moisture content, undulations or structural sufficiency of the roof deck or other trades' work or design.



Structural Sufficiency of Deck

Customer warrants that structures on which Roofing Contractor is to work are in sound condition and capable of withstanding roof construction, equipment and operations.



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Debris and Openings in the Roof Deck

General Contractor shall provide Roofing Contractor with a roof deck that is free and clear of all debris, ready and suitable to receive roofing materials, and with any and all openings properly covered, secured and labeled in accordance with applicable OSHA standards prior to general contractor requesting roofing subcontractor to proceed with the loading of roofing materials and roofing installation.



Properly Covering Holes

Unprotected and inadequately secured covers over openings in a new roof deck or a deck under construction present potentially deadly hazards to roofing personnel and all others walking or working on the roof deck. The General Contractor will require all trades making openings in the deck to properly cover, secure and label all deck openings in accordance with OSHA regulations at the time the opening is made.



Condensation, Drainage and Ponding

Roofing Contractor is not responsible for condensation, moisture migration from the building interior or other building components, location or size of roof drains, plumbing code compliance, adequacy of drainage or ponding on the roof due to deck or structural conditions.



Moisture in Roof Decks

Customer acknowledges that Roofing Contractor has notified Customer of the potential for moisture from lightweight and/or structural concrete roof decks to cause moisture within the roofing system and failure of adhesives in the roofing system to bond to wet, damp or inadequately cured lightweight and/or structural concrete decks. Roofing Contractor is not responsible to test or assess moisture content of the deck or substrate. Roofing Contractor is not responsible for moisture from the deck or interior affecting the roofing materials.



Risk of Loss

- Do not accept full risk of loss regardless of cause.
- Provide for builder's risk or installation floater insurance.
- Limit risk of loss to causes within your control.



Insurance – Builder’s Risk

Customer shall purchase and maintain builder’s risk and property insurance, including the labor and materials furnished by Roofing Contractor, covering fire, wind storm, extended coverage, malicious mischief, vandalism and theft on the premises to protect against loss or damage to material and in-place work until the job is completed and accepted by the Owner.



Damage to Roofing

General Contractor shall coordinate the Project so that the Project proceeds in an orderly and customary manner and so as to avoid newly installed roofing being used as a surface for on-going construction work. If Roofing Contractor's work is damaged by other trades, General Contractor agrees to backcharge the trades causing the damage. General Contractor will purchase or arrange with Owner to maintain Builder's Risk insurance.



Schedule

Roofing Contractor shall have a minimum of ____ workdays with conditions suitable for roofing work after the requisite materials have been delivered to obtain substantial roof completion.



Design & Building Codes

If Roofing Contractor discovers that the prescribed Work is not in accordance with codes, Roofing Contractor will promptly notify Contractor and await direction from Contractor and Design Professional. The Design Professional is responsible to design the Work to be in compliance with applicable codes and regulations and to specify or show the work that is to be performed. Roofing Contractor is not responsible for design, including design errors or omissions.



Contingent Payment

If Roofing Contractor has performed its work but Owner does not make payment to Contractor for some reason unrelated to Roofing Contractor such as a problem or dispute with Contractor or another trade, Roofing Contractor shall be entitled to payment.



Payment

If Roofing Contractor is not paid, Roofing Contractor shall be entitled to interest at the rate of ____% per month, plus costs of collection including attorney's fees. Roofing Contractor shall not be required to continue to work and warranty shall be ineffective if Roofing Contractor is not paid in full.



Contract Rights & Remedies

Roofing Contractor shall have the benefit of all rights and remedies toward the Contractor as the Contractor has toward the Owner.



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Interior Protection

Customer acknowledges that re-roofing of an existing building may cause disturbance, dust, debris or fireproofing to fall into the interior. Customer agrees to remove or protect property directly below the roof in order to minimize potential interior damage. Roofing contractor shall not be responsible for disturbance, damage, clean-up or loss to interior property that Customer did not remove or protect prior to commencement of roofing operations. Customer shall notify tenants of re-roofing and the need to provide protection underneath areas being re-roofed. Customer agrees to hold Roofing Contractor harmless from claims of tenants who were not so notified and did not provide protection.



Residential Contracts

Interest on Late Payments / Lien: Any funds owed and unpaid for more than 30 days are subject to interest of one percent (1%) per month on the unpaid balance. If Owner fails to timely make payment, Contractor may, in accordance with applicable law, file a lien on Owner's Property for amounts due and unpaid

Right to Stop Work: The failure of Owner to make proper payment to Contractor when due shall constitute a material breach and, in addition to all other rights, Contractor shall be entitled to suspend all Work and shipments until payment of the amount owing is made. The Contract Price shall be increased by the amount of Contractor's reasonable costs of shut-down, delay, and start-up.



Residential Contracts

Changes in Contract: Owner hereby acknowledges that any changes requested by Owner and approved by Contractor pursuant to this section of this Agreement are not included in the Contract Price and shall be billed to the Owner as extra work. Any extra work or deviation from the specifications described on the face of this Proposal/Contract involving extra costs will be billed to the Owner as an extra. This includes extra or changed work necessary due to any discrepancy between the plans, specifications or other design documents and actual “as built” existing conditions. Unless otherwise noted in this Contract, the Contract Price does not include removing or replacing fascia, trim, sheathing, rafters, structural members, siding, or masonry. When removing the existing roof, conditions requiring additional work, such as rotten or deteriorated wood, are often found. Replacement of damaged or rotten roof decking is not included in the Contract Price. Damaged or rotten roof decking to be determined by Contractor, photographed, and replaced at an additional charge to Owner. Snow removal is not included in the Contract Price. Should Contractor find it necessary to remove snow in order to perform its Work, Owner shall compensate Contractor at Contractor’s customary time and material rates for the additional costs incurred in removing snow. Unless otherwise noted in this Contract, the Contract Price does not include rental equipment charges. If it is necessary for Contractor to rent equipment to perform the Work, the Contract Price shall be increased to compensate Contractor for such rental equipment charges.



Residential Contracts

Lead Paint and Asbestos: The Contract Price is based upon the Work to be performed by Contractor not involving and the Contractor not encountering lead paint, toxic, or asbestos-containing materials. In the event that such materials are encountered, Contractor shall be entitled to reasonable compensation for additional expenses due to lead paint, toxic, or asbestos-containing materials.

Gutters and Downspouts: If gutters and/or downspouts are to be removed to facilitate a re-roof, Contractor shall not be held responsible for damage caused by removal and/or re-installation of gutters and/or downspouts.

Industry Standards: All materials and work shall be furnished in accordance with normal industry tolerances for color, variation, thickness, size, weight, amount, finish, texture, and performance standards.

Color Matching: Contractor is not responsible for an exact match of a roof Owner has seen elsewhere. If Owner desires a specific brand, style or color, it is Owner's responsibility to provide such specific information to Contractor and include it in the terms of this Contract.



Residential Contracts

Tear-Off & Possible Damage: Owner acknowledges that the removal of existing roofing materials and installation of new roofing materials often is noisy and disturbs and vibrates the building and may cause dust or debris to fall into the interior. The debris and noise generated from this Work and related procedures may cause inconvenience, damage or discomfort, which is normal construction wear and tear, not negligence, and may include, but is not limited to, interior wall cracks, flaking of wall paint, debris falling into an attic, disturbance to shrubbery and lawns, small divots in the driveway from equipment such as roll-off trash containers and dump truck, and/or damage to items beneath the roof system such as vents, insulation in the attic space, and pipe connections. Also, the noise may disturb any pets that the Owner may have on the Property. As a precaution, Owner shall remove from walls and/or ceilings, items such as, but not limited to, chandeliers, paintings, and plates.

Owner shall lock away or secure other items of value in or on the Property. Also, any lawn furniture, grills, umbrellas, or outdoor items should be moved or stored as debris may fall on them and cause damage during removal of the existing roof. Owner may also want to arrange for its pets to be at another location while the roofing is ongoing to prevent the pets from becoming anxious or disturbed by the noise and vibrations. Contractor shall not be responsible for disturbance, damage, clean-up, or loss to property that was not removed or protected prior to commencement of roofing operations. Contractor shall not be responsible for nail pops or cracks to walls or ceilings of existing structures. Contractor shall not be responsible for damages that occur beneath the surface of the roof including, but not limited to, damage to items such as vents, insulation in the attic space, and pipe connections. Owner is responsible for inspecting and repairing any damage to such items beneath the roof upon completion of the Work. Contractor shall not be responsible for damages to existing landscaping, irrigation systems, trees, or shrubs. Contractor is not liable for common occurrence weather related problems such as ice dams, gutter back up, heavy snow, or Acts of God



Residential Contracts

Owner Responsibilities: Owner warrants to Contractor that he/she is the legal owner of the Property. Owner shall be available during construction for clarification of specifications, approval of additional Work, and to provide adequate access to the Property as may be required. Owner is responsible for obtaining all necessary approvals from its Homeowners' Association, if applicable.

Electricity & Water: Owner agrees to provide to Contractor, at no charge, electric power and water for construction purposes.

Access: The Contract Price was computed utilizing driveways, walkways, and/or side access yard for trucks, dumpsters, and equipment while Work is being performed. If this is not acceptable, please notify us immediately in case a price adjustment needs to be made for additional labor costs. Neither Contractor nor its suppliers will be liable for cracked driveways, as the trucks are light enough that any cracks are indicative of poor compacting or other deficiencies. The expense of any extra trips by Contractor to and from the Property as a result of the job not being ready for the Work or Owner not providing adequate access to the Property after Contractor has been notified to proceed is not included in the Contract Price and will be charged as an extra.



Residential Contracts

Sign: Placing a sign on your Property is the first step in re-roofing your home. We are proud of our work, and we appreciate your cooperation. Owner hereby grants to Contractor the right to display signs and advertise at the Property.

Service Calls: Service calls requested by the Owner shall be included in the written workmanship Limited Warranty only if the call for service is a warranted service call. On service calls where it is deemed by the Contractor to be a non-warranted item, the Owner will be charged for the service call or work performed at Contractor's established rates.

Notice of Leaks: Owner must notify Contractor promptly and not later than five (5) days after discovering any roof leak. Contractor is not responsible for indoor air quality or claims relating to allergic reactions or personal injury or property damage resulting from exposure to interior mold, mildew, and/or fungi.

Entire Agreement: This Contract constitutes the entire agreement between the Parties. No other representations or agreements, oral or written, regarding the Work to be performed under this Contract exists between the parties

No Waiver: The Contractor may accept any payments marked by Owner as "Paid in Full" without waiving any of its rights related to this Contract.



Residential Contracts

Warranty: The Contractor's 1-Year Limited Labor Warranty ("Warranty") shall become effective upon completion of the Work under this Contract; provided, however, said Warranty shall be null and void in the event Contractor is not paid in full. "Paid in full" means payment of the Contract Price plus any changes/extras. Contractor's Warranty is only effective if gutters are properly cleaned and maintained as often as necessary to prevent debris from clogging the gutters and water from backing up in the gutter system. A copy of Contractor's standard Warranty is attached or, if not, will be furnished upon request. Normal maintenance and care of Work installed is the Owner's responsibility. If damage occurs to the roof or interior of house, which is a result of clogged gutters, then any warranty stated herein is void. **THERE ARE NO WARRANTIES FROM CONTRACTOR THAT EXTEND BEYOND THE DESCRIPTION CONTAINED HEREIN OR IN CONTRACTOR'S STANDARD LIMITED WARRANTY. IF ANY WARRANTIES OTHER THAN THOSE REFERENCED HEREIN OR IN CONTRACTOR'S STANDARD LIMITED WARRANTY ARISE BY OPERATION OF LAW, THEY ARE LIMITED TO THE DURATION OF THIS WRITTEN WARRANTY. ALL OTHER WARRANTIES ARE EXPRESSLY EXCLUDED AND DISCLAIMED. CONTRACTOR SHALL NOT BE LIABLE FOR SPECIAL, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES.** In addition, for the Warranty to be effective against Contractor or any other party: (1) Owner must provide written notice, by certified mail, to Contractor within five (5) days of discovering any roof leak or defect or failure of the Work performed; and (2) the Work performed by Contractor must not have in any way been altered or repaired by Owner or any third party. Warranty of the materials shall be limited to the warranty provided by the manufacturer. Contractor does not warrant the material or labor of items such as, but not limited to, caulking materials, sealant, reflective coatings, painted surfaces, metal materials, or the possible failure of these items. The acceptance of this Proposal/Contract by the Owner signifies Owner's agreement that the Contractor's Limited Labor Warranty shall be and is the exclusive remedy against Contractor pertaining to the roofing work. **NOTWITHSTANDING THE FOREGOING, IF THE WORK CONSISTS ONLY OF REPAIRS TO OR PARTIAL REPLACEMENT OF AN EXISTING ROOF SYSTEM, CONTRACTOR CANNOT AND DOES NOT WARRANT OR PROVIDE ANY ASSURANCE THAT THE ROOF WILL NOT LEAK.**



Pricing from Manufacturer

Roofing materials manufacturer shall sell materials to Applicator in accordance with the prices quoted to and relied upon by Applicator for the job in question. Manufacturer reserves the right to change its price lists at any time, but in the event of an increase in the price applicable to orders already placed by Applicator, Manufacturer will honor the price quoted by Manufacturer to Applicator if Applicator has submitted a bid or proposal or entered into a contract based upon that price.



Liability for Defective Materials

Manufacturer warrants its material to be free from defects and to perform as represented by Manufacturer. Manufacturers shall be liable to Roofing Contractor in the event of defective materials or failure of materials to perform as represented by manufacturer for expenses and damages reasonably suffered by Contractor resulting from defective materials or the failure of materials to perform as represented, including the costs to remove and replace the defective materials.



Manufacturer Indemnification

Manufacturer shall indemnify and save Applicator harmless from all damages, losses or expenses, including reasonable attorney's fees, including any settlement of any claim (subject to Manufacturer's approval, which shall not be unreasonably withhold), to which Applicator may be subjected to resulting from Manufacturer's negligence or failing to perform its obligations under the limited warranty, defects in Manufacturer's materials or specifications or failure by Manufacturer to honor its warranty obligations or a misrepresentation by Manufacturer.



Dispute Resolution

In the event of a dispute, the parties will seek to mediate the dispute. If mediation is unsuccessful, the parties agree to arbitrate the dispute in an expeditious and economic manner. If either Applicator or Manufacturer has been named in the civil litigation or another dispute resolution proceeding, the party who has been named may include the other party in accordance with the normal rules applicable to such proceedings regardless of this agreement to arbitrate disputes between Applicator and Manufacturer. The intent of this provision is for Manufacturer and Applicator to be able to join the other party so that all claims can be resolved in one legal proceeding.



Duration of Roofing Contractor Liability

Allow Manufacturer, at Manufacturer's option, to inspect Roofing Systems at anytime during and at the expiration of the Applicator's two (2) year repair period, and cause Applicator to make repairs due to a deficiency by Applicator at Applicator's expense. At the end of the two (2) year period, Applicator shall have no further obligation to make repairs at is expense, provided Applicator has performed the repairs requested by Manufacturer at roof installation completion, during the first two years and following the two-year inspection if undertaken by Manufacturer.



Manufacturer Liability

Manufacturer warrants its materials to be free from defects and fit for their intended purpose of serving as roofing materials. Manufacturer's liability and Applicator's remedies are to cover replacement of defective material, labor costs incurred by Applicator to remove and replace defective and damaged material and damages sustained by Applicator resulting from defective material supplied by Manufacturer. If Applicator is liable for damages owed to a third party, such as its customer, because of Manufacturer's defective material, Manufacturer will be liable to Applicator for reimbursement of all such damages.



Take Aways...

- ✓ Develop your own proposal/contract forms that address situations that experience tells you may occur.
- ✓ Read all contracts you are requested to sign. If you don't have the patience to review and evaluate a contract, have someone else do so on your behalf.
- ✓ Do not agree inadvertently to the terms of a general contractor-drafted subcontract or performance and payment bonds by submitting a proposal without taking exception: state that your proposal is based on execution of a standard AIA contract.
- ✓ Don't be hesitant to negotiate contract provisions with owners, general contractors and manufacturers.
- ✓ Use contracts affirmatively to manage and limit your liability and address situations that arise in roof construction.



Colorado Statutes and Case Decisions



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COLORADO STATUTES OF LIMITATION

C.R.S.A. § 13-80-102 General Limitation of Action

Two (2) years after the cause of action accrues; includes tort actions for **negligence**, strict liability, wrongful death.



COLORADO STATUTE OF REPOSE

C.R.S.A. § 13-80-104 - Limitation of actions against architects, constructors, builders or builder vendors, engineers, inspectors and others.

- Action must be brought within time provided in § 13-80-102 after the claim for relief arises.
- But in no case more than **6 years after substantial completion** of the improvement to real property, unless the cause of action arises during the 5th or 6th year after substantial completion; then an additional 2 years after the date upon which the cause of action arises.



COLORADO STATUTES OF LIMITATION & REPOSE
DISCOVERY RULE

C.R.S.A. § 13-80-104(1)(b)I Claims for relief arises at the time the Claimant or the Claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestation of a defect in the improvement which ultimately causes the injury.



COLORADO STATUTES OF LIMITATION & REPOSE
CLAIMS FOR INDEMNIFICATION & CONTRIBUTION

C.R.S.A. § 13-80-104(1)(b)II – 90 days after the claim for indemnification or contribution arises; claim for indemnification or contribution arises at the time the third person’s claim against the claimant is settled or at the time of the final judgment; whichever comes first.

Extends 6-year statute of repose. *In re Richard Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, Superior Court of Colorado, February 27, 2017



COLORADO CONSTRUCTION DEFECT ACTION REFORM ACT
C.R.S.A. § 13-20-802, ET SEQ.

- Claimant must send a written notice of claim to construction professional at least 75 days before filing an action and at least 90 days in the case of a commercial property.
- Upon construction professional's written request, claimant shall provide reasonable access to the claimant's property during normal working hours to inspect the property and claim defect. Inspection shall be completed within 30 days of notice of claim.



COLORADO CONSTRUCTION DEFECT ACTION REFORM ACT
C.R.S.A. § 13-20-802, ET SEQ.

- Within 30 days or 45 days for a commercial property, construction professional may send an offer to settle the claim by making payment or agreeing to remedy the claimant defect.
- Claimant has 15 days to accept construction professional's offer.
- If no action is made or claimant rejects the offer, claimant can commence the action.



COLORADO CONSTRUCTION DEFECT ACTION REFORM ACT
TOLLING - C.R.S.A. § 13-20-805

If nature of claim is sent per 13-20-803, within the statutes of limitation and repose, then the statute of limitation or repose is tolled until 60 days after completion of the notice of claim process.



COLORADO CASE DECISIONS

In re Goodman v. Heritage Builders, 390 P. 3d 398, Colorado Supreme Court, 2017 – General Contractor has 90 days after settlement or judgment to bring claim for indemnification or contribution against subcontractor.



Can You Agree in a Contract to Shorten the Statutes of Limitation and Repose?

In Colorado: **Yes** - In Commercial Contracts
No - In Residential Contracts Covered Under the Homeowner Protection Act portion of Colorado's Construction Defect Reform Act §13-20-806 (7)(a).



Colorado Cases on Shortening Statutes of Limitation

“[P]arties to a contract may require that actions founded on the contract be commenced within a shorter period of time than that prescribed by the applicable statute of limitations.” *Grant Family Farms, Inc. v. Colorado Farm Bureau Mut. Ins. Co.*, 2006 WL 3094051, *2 (Colo.App.). In Colorado such a contractual limitation is enforceable, provided that the period in which the action must be brought is reasonable and that the provision has not been waived. *Hepp v. United Airlines, Inc.*, 36 Colo.App. 350 (Colo.App. 1975).



Homeowner Protection Act of 2007

13-20-806 Limitation of Damages

13-20-806. LIMITATION of Damages. (7) (a) IN ORDER TO PRESERVE COLORADO RESIDENTIAL PROPERTY OWNERS' LEGAL RIGHTS AND REMEDIES, IN ANY CIVIL ACTION OR ARBITRATION PROCEEDING DESCRIBED IN SECTION 13-20-805.5 (1), ANY EXPRESS WAIVER OF, OR LIMITATION ON, THE LEGAL RIGHTS, REMEDIES, OR DAMAGES PROVIDED BY THE "CONSTRUCTION DEFECT ACTION REFORM ACT", THIS PART 8, OR PROVIDED BY THE "COLORADO CONSUMER PROTECTION ACT", ARTICLE 1 OF TITLE 6, C.R.S., AS DESCRIBED IN THIS SECTION, OR ON THE ABILITY TO ENFORCE SUCH LEGAL RIGHTS, REMEDIES, OR DAMAGES WITHIN THE TIME PROVIDED BY APPLICABLE STATUTES OF LIMITATION OR REPOSE, ARE VOID AS AGAINST PUBLIC POLICY.



Homeowner Protection Act

(b) A WAIVER, LIMITATION, OR RELEASE CONTAINED IN A WRITTEN SETTLEMENT OF CLAIMS, AND ANY RECORDED NOTICE OF SUCH SETTLEMENT, BETWEEN A RESIDENTIAL PROPERTY OWNER AND A CONSTRUCTION PROFESSIONAL AFTER SUCH A CLAIM HAS ACCRUED SHALL NOT BE RENDERED VOID BY THIS SUBSECTION (7).



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Homeowner Protection Act

(e) NOTHING CONTAINED IN THIS SECTION SHALL BE DEEMED TO RENDER VOID ANY REQUIREMENT TO PARTICIPATE IN MEDIATION PRIOR TO FILING A SUIT OR ARBITRATION PROCEEDING.



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JBlanco Enterprises v. Soprema Roofing and Waterproofing, Inc.

**U.S. District Court, Northern District,
Ohio, Eastern Division, 2016**

Issue: Ability of Roofing Contractor to Pursue a Claim Against Roofing Material Manufacturer if Supplied with Defective Material.



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Case Deals With:

- ◆ Applicator agreement between manufacturer and roofing contractor.
- ◆ Disclaimer of warranties and limitation of remedies and the Uniform Commercial Code.
- ◆ Ability of roofing contractor to pursue a claim against roofing materials manufacturer.
- ◆ Roofing at U.S. Air Force Academy, Colorado Springs, CO.



Issue:

Can a roofing contractor or general contractor pursue a claim against a roofing materials manufacturer alleging defective roofing materials?



Facts:

- ◆ General contractor, Barlovento, LLC, contracted with the government to roof several buildings at the Air Force Academy, including the Consolidated Education Training Facility (CETF).
- ◆ JBlanco Enterprises was the roofing subcontractor. JBlanco had done \$3 million to \$9 million in business annually and employed approximately 70 employees.



Facts:

- ◆ Soprema was the roofing materials manufacturer who supplied the materials to JBlanco.
- ◆ Prior to working on this project, JBlanco had signed in 2008 the Soprema Authorized Roofing Contractor Agreement.



Facts:

- ◆ Air Force would not accept the roof because of discoloration, cracking and blistering.
- ◆ Air Force required the roof to be replaced in its entirety.
- ◆ Barlovento expended more than \$2.5 million to tear-off and replace the CETF roof.



Facts:

- ◆ JBlanco claimed the problem was due to the roofing materials supplied by Soprema.
- ◆ Air Force rejected Soprema's warranty because of a dispute regarding the date.



Lawsuit

- ◆ JBlanco files one-count suit in Colorado against Soprema for breach of express and implied warranties for the CETF project and other projects.
- ◆ Barolvento joins the suit and asserts claims against Soprema for breach of express and implied warranties and negligence.
- ◆ Soprema gets the suit transferred to federal district court in Ohio, where Soprema's headquarters office is located, presumably based on a dispute resolution provision in the applicator agreement.



Summary Judgment Motion by Soprema

- ◆ Soprema files a motion for summary judgment based on paragraph 7.1 of the Soprema Applicator Agreement with JBlanco which was signed by JBlanco's President in 2008, years before the Air Force jobs were started.



Soprema Applicator Agreement

7.1 UNLESS OTHERWISE AGREED TO BY SOPREMA IN A WRITING SIGNED BY AN OFFICER OF SOPREMA, ANY PRODUCTS SOLD BY SOPREMA TO CONTRACTOR ARE SOLD AS IS AND WHEREIS [SIC]. SOPREMA DOES NOT MAKE ANY WARRANTIES TO CONTRACTOR EXPRESS OR IMPLIED. IN NO EVENT WILL SOPREMA BE LIABLE TO CONTRACTOR, ITS EMPLOYEES, AGENTS, INDEPENDENT CONTRACTORS, OFFICERS, DIRECTORS, SHAREHOLDERS, MANAGERS, MEMBERS OR PARTNERS, AS THE CASE MAY BE, FOR ANY DAMAGES, INCLUDING ANY LOST PROFITS, LOST SAVINGS OR ANY OTHER INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE USE, SALE, OR MARKETING OF ANY PRODUCTS SOLD BY SOPREMA TO CONTRACTOR.



Soprema Applicator Agreement

7.2 Even though Soprema is not warranting any products to Contractor, Soprema reserves the right, in its discretion, to issue a warranty to any building owner relating to its products and/or any roofing application or system. In the event Soprema delivers its warranty to Contractor, Contractor shall promptly deliver that warranty to the building owner or return it to Soprema.



Soprema Applicator Agreement

Court found that Applicator Agreement clearly and unambiguously provided that Soprema made no express or implied warranties to JBlanco regarding the Soprema materials.



JBlanco's Response to Soprema's Summary Judgment Motion

Warranty disclaimer in the Applicator Agreement was unconscionable and thus unenforceable as a matter of law because Soprema's disclaimer of warranties completely abdicated any responsibility for its products and left JBlanco with no remedy or avenue for recourse if Soprema's products were defective.



Who Wins?

Should Soprema's motion for summary judgment be granted based on Soprema's disclaimer in paragraph 7.1 of its applicator agreement?



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Freedom of Contract

U.S. District Court Judge first recognizes that contracting parties in Ohio are free to agree to exclude or limit warranties if the exclusion or modification satisfies the requirements of applicable law, specifically in this case, Ohio's version of the Uniform Commercial Code (UCC) which allows contracting parties to limit or alter damages, provided that such disclaimers are conspicuous.

(The UCC is similar in all states.)



Was Disclaimer Conspicuous?

- ❖ It was in **bold** face type and all CAPITAL letters.



Unconscionability Argument

- ◆ Procedural: determination focuses on oppression and surprise; inequality of bargaining power of the contracting parties.
- ◆ Substantive: turns on reasonableness.



Burden of Proof

- ◆ Party asserting unconscionability of a contract has the burden of proving the agreement is unconscionable.
- ◆ Must prove both procedurally and substantively unconscionable.
- ◆ Finding of unconscionability in commercial setting is rare.



Procedurally Unconscionable

- ◆ Was there evidence to indicate inequality of bargaining power between JBlanco and Soprema?
- ◆ If so, did any such inequality result in the absence of meaningful choice by JBlanco?
- ◆ Were there hidden or unexpected terms in the applicator agreement?



Substantively Unconscionable

- ◆ Were the terms in the Soprema applicator agreement commercially unreasonable?
- ◆ Court looks at fairness of the terms, charge for service rendered, standard in the industry and ability to predict extent of future liability.
- ◆ Warranty disclaimer that leaves a party with no avenue of recourse against the manufacturer is unconscionable.



Substantively Unconscionable?

- ◆ JBlanco argued the roofing contractor was left without a remedy against Soprema.
- ◆ Soprema issues warranties to building owners.
- ◆ JBlanco presented no evidence that Soprema's warranties do not protect the owner with respect to Soprema's products.



Substantively Unconscionable?

- ◆ Soprema had issued a credit to JBlanco in the past for defective material.
- ◆ Court was persuaded that Soprema assumes “some responsibility” for its roofing products, though limited to the owner.



What about Barlovento's claim against Soprema?

- ◆ Barlovento had argued it was a third-party beneficiary of the applicator agreement, but warranties had been effectively disclaimed.
- ◆ Barlovento argued negligence by Soprema seeking to recover its \$2.5 million.
- ◆ No damage to property other than replacement of the roof itself.
- ◆ “Economic Loss” rule applied.



End Result

- ◆ No discussion, no findings on the cause of the roof deficiencies.
- ◆ Soprema granted summary judgment.



**Colorado Pool Systems, Inc.
v. Scottsdale Insurance Company
Colorado Court of Appeals, Division IV
October 25, 2012**

Issue: Extent of Commercial General Liability
Coverage on Policy Held by Subcontractor.



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The Facts:

- ◆ Colorado Pool Systems, Inc. agreed to build a swimming pool at Founders Village Pool and Community Center.
- ◆ Colorado Pool Systems hired subcontractors to construct the pool's concrete shell; workers poured concrete around a rebar frame that was located inside the excavation.



The Facts:

- ◆ After the shell was poured, an inspector noticed that some rebar was too close to the surface.
- ◆ Owner rejected several remedial measures proposed by Colorado Pool Systems.



More Facts:

- ◆ Owner made a claim to its general contractor, White Construction Group, and demanded the pool be removed and replaced.
- ◆ White Construction made that same demand to its subcontractor, Colorado Pool Systems, and said that if Colorado Pool did not promptly satisfy its obligations, White would have the pool replaced at Colorado Pool's expense.



Insurance Coverage

- ◆ Colorado Pool had a CGL policy with Scottsdale Insurance Company.
- ◆ Colorado Pool notified Scottsdale of the claim by the Owner and General Contractor and sought pre-approval for the cost of demolishing and replacing the pool.
- ◆ Scottsdale retained a claims adjuster who allegedly said to Colorado Pool and the General Contractor that the CGL policy would cover losses associated with demolishing and replacing the pool.



Insurance Coverage

- ◆ Colorado Pool paid for the work expecting reimbursement from Scottsdale but ran out of money prior to completion.
- ◆ White completed the project and billed its costs against Colorado Pool's account.



Insurer's Denial

- ◆ Almost six (6) weeks after being notified of the claim, Scottsdale denied the claim.
- ◆ White initiated arbitration against Colorado Pool. Colorado Pool confessed liability in the amount of \$133,500 and satisfied the judgment.



Suit by Colorado Pool Against Scottsdale Insurance

- ◆ Colorado Pool alleged that Scottsdale had a duty to defend and indemnify Colorado Pool.

- ◆ Scottsdale sought summary judgment on the grounds:
 1. No coverage because faulty workmanship is not an “occurrence” and;
 2. “Property Damage” does not include replacing defective work.



Standard CGL Policy Provisions

- ◆ Policy covers “bodily injury” and “property damage” that is caused by an “occurrence.”
- ◆ “Occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”
- ◆ Policy does not define accident.
- ◆ “Property damage” is defined as “physical injury to tangible property, including loss of use of the property” or “loss of use of tangible property that is not physically injured.”



Colorado Builders Insurance Act, Section 13-20-808, C.R.S 2012

- ◆ By statute, reversed a Colorado appellate court decision which held that faulty workmanship, standing alone, is not an “accident” ... so no “occurrence.”



Damage to Your Work Exclusion in CGL Policies

- ◆ CGL policies include a “Damage to Your Work” exclusion. This insurance does not apply to:
 - ❖ “property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”
 - ❖ This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.



- ◆ Colorado Pool Systems is seeking to recover the costs incurred to demolish and replace the defective pool.
- ◆ To demolish and replace the pool, it was necessary to tear and replace decking, sidewalk, retaining wall and electrical conduits.



Colorado Pool Systems, Inc.
v.
Scottsdale Insurance Company

Who Wins?

- ◆ Does the subcontractor’s standard CGL policy with the standard “your work” exclusion cover this claim? Is there any coverage? Was Scottsdale correct in denying coverage?
- ◆ If only some portions of the claim are covered and others are not, what is covered and what is excluded?
- ◆ Did Scottsdale have a duty to defend Colorado Pools in the arbitration brought by the General Contractor against Colorado Pool Systems?



Ruling by Colorado Court of Appeals in Colorado Pool Systems v. Scottsdale

- ◆ Replacement of the defective pool – policy does not cover replacement of defective work.
- ◆ “Rip and tear” damage to non-defective third-party work including damage to deck, sidewalk, retaining wall and electrical conduit is covered.



**Greystone Construction, Inc. v.
National Fire & Marine Insurance Company
661 F.3d 1272 (10th Cir. 2011), applying Colorado Law**

“Injuries flowing from improper or faulty workmanship constitute an “occurrence” so long as the resulting damage is to non-defective property and is caused without expectation or foresight.” This rule applies whether the resulting damage is to the insured’s work or to a third party’s work.



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Colorado Lawsuit Involving Roofing Contractors



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Montrose County School District RE-1J v. Skyline Roofing, Inc., Adam Stout, Armstrong Group Incorporated, NV5 and United Fire & Casualty

- Skyline Roofing, Inc., a Utah based roofing contractor, was awarded contract for Montrose High School, Centennial Middle School and Olathe Middle School through competitive bidding.
- Total price of all three schools was \$1,962,700.
- Re-roofing contract for several schools; tear-off to the deck.
- Addendum included “all asbestos abatement is the contractor’s responsibility. The contractor will be responsible for removal and proper disposal.”



- Performance and payment bonds were required by the bid documents and a sample AIA A312-2010 Performance Bond was included.
- Contract was AIA A 101 -2017.
- Final draft of the contract did not have attached “Exhibit A – Insurance and Bonds.”
- Armstrong Group Inc. (AGI), a New Mexico architectural firm that reportedly specialized in roofing was hired by the School District to design and administer the project for nearly \$325,000.
- UFC was Skyline's surety.



School District's Complaint Filed July 30, 2021 in District Court, Montrose County, Colorado

- Work started in July 2019. Full-time roof observer was retained by AGI.
- Work at three school substantially complete in Sept 2020.
- Final payment application submitted in December 2020 and approved by AGI and NV5.
- After construction was completed, in January 2021, an unrelated inspection by an environmental consultant in conjunction with another project discovered roofing debris in the plenum from Skyline's work at Olathe Middle School.
- Testing of samples from Olathe Middle School and Centennial Middle School indicated friable asbestos containing building material from the plenums.



What Happened Next?

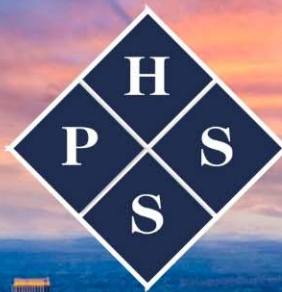
- School district shut down the school until asbestos was completely abated.
- Skyline advised the School District after looking for the performance and payment bonds that it apparently never acquired performance and payment bonds for the three school re-roofed.
- AGI advised it was unable to find Skyline's performance and payment bonds.
- Montrose County School District retained JKS Industries in March 2021 to perform asbestos abatement at the two schools. Total contract amount after execution of four change orders was \$1,149,717.00.
- School District filed suit in July 2021, including against Adam Stout, the president and principal owner of Skyline Roofing.



Resolution

Newspaper reported a settlement wherein the School District received \$815,000 from the defendants.





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Thank You For Attending!

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