THE COMMERCIAL FLOORING REPORT

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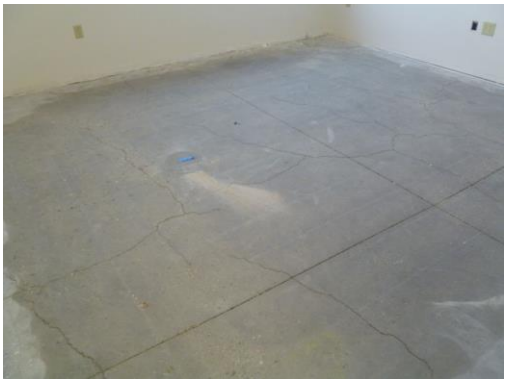
WAIVERS AND LIENS



We've had several questions asked about waivers for installation of flooring materials over questionable substrates or in questionable conditions recently. In addition questions have arisen about placing a lien on a building when payment is not made for the installation of flooring materials. We'll address both these issues in simple terms here so that it will make it easy to understand what they mean, how they are used and how or if they can help you when you have a dubious situation.

In a contract for services or in an agreement for services, in this specific case the providing of flooring material and installation, the recipient of the services has to be informed of any circumstances or conditions that may exist that could compromise the flooring or the installation and accept that a compromise may exist. The flooring contractor would want to request that the receiver of services, due to the conditions that could compromise the installation, sign a waiver or release as some may refer to it, which allows the installation to be conducted without recourse for any failure at some later date. An example would be a substrate with known moisture conditions that would likely cause a failure brought up by the flooring contractor to which the response by the receiver of services would be, "install it anyway of we'll find someone that will". A comment that does not change the compromising conditions since anyone who installs will be faced with the same influences – to think the statement changes the circumstances is ludicrous. Why anyone who owns a commercial property would not want a compromising condition corrected is beyond me but it happens as most well know and is generally motivated by tight time schedules for completion or budget constraints. To which I must comment, if you are willing to forgo the expense of correcting compromising conditions at the outset you shouldn't complain about the resulting failure and the increased cost of fixing the conditions, which will be far more costly and financially damaging, later. And you shouldn't be looking to blame the people who told you that a problem would occur if you told them to disregard any problems that might occur later.

A hold harmless agreement included within a contract grants the party providing the services, in this circumstance the flooring contractor, the right to be free from liability. That said it doesn't always mean that even if you have a signed agreement it is etched in stone. Many flooring contractors have these documents, get them signed and find they are honored but know that they can still be disputed. The hook here is that you told them they had a compromising condition which you installed over anyway knowing that manufacturers of flooring products and the flooring industry has standards governing conditions of installation. So this could be argued that installing was acceptance which shifts liability - arguable but most often it flies.

When the flooring contractor installs materials, makes repairs or does necessary maintenance and something goes wrong, the party receiving the service is going to want the right to retribution of some kind. If the party receiving the service signed a hold harmless agreement, the service provider would not be liable for poor service –maybe. It is imperative to review the hold harmless or waiver documents and determine if one is willing to give up the right to damages in the event of a problem. And, depending on the state the laws can vary. Further, just because a waiver was agreed to and signed does not mean the receiver of the services cannot file an action against the provider. (I addressed this in the previous paragraph).

It may also be possible to purchase an insurance policy that would cover a compromise in the installation, by either party, which may be a good idea if it can be done. That said, if an insurance carrier knows the chances for a failure are fairly high or even inevitable under the circumstances, they are not going to write a policy for coverage.

It is up to the party contracting for the service to determine if they are willing to forgo the right to damages or retribution in the event of an installation failure or other issue from the provision of service. You would think that reasonable people would heed the advice of flooring contractors who know the potential for a problem has a greater chance of occurring than winning the lottery but, unfortunately, that is often not the case. I've mentioned many times the "damn the torpedoes; full speed ahead" mentality but in some cases the response may be, "we had flooring in here before and it didn't fail, why should we be concerned about that now?" And why should they? Because products and conditions are much different now than they were in the past.

Environmental conditions in a building are constantly changing with the cycling of the HVAC system. This alone can have drastic effects on flooring materials and substrate conditions. Fast Track construction projects push the limits of physical reactions of materials to the site conditions. Treatments applied to substrates, the finish of a substrate, the time the substrate is allowed to cure, how it cures, if it cures, the lack of or improper placement of a moisture retarder, all have an effect on the success of a flooring installation. Flooring materials are less permeable. Wall to wall carpet could breathe. Hard surface flooring materials, recycled content backings, hard backings and non-permeable backings don't breath. Different types of backings may cause flooring materials to physically react and contribute to the failure of their ability to bond to a substrate. Many adhesives can be rendered ineffective by compromising substrate conditions and don't think it's just concrete conditions; wood sheet underlayment can cause problems as well. Substrates have to be better prepared than ever before and even when they are, if inherent conditions in or on the substrate exist that can compromise a flooring

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installation, the likelihood of a failure occurring is something you don't want to bet on. The odds are not in anyone's favor.

The best way to avoid flooring installation failures is to insure that the correct conditions exist for the products to work and the means for installing them are not compromised, which is easy enough to do. And that everyone involved is willing to do what is necessary to prevent the flooring and the installation from failing. Most of the time it just takes a decision to correct the compromising conditions or use products or materials that won't be affected; you can make things right. Gambling and expecting a waiver to absolve anyone of any liability is not a path you want to travel. The guys who make out on that deal when arguments ensue are the attorneys and us. Flooring failures, as many of you already know, aren't fun; they cost a lot and the aggravation is not worth overlooking the warning that you are likely going to be stepping in a lot of slop.

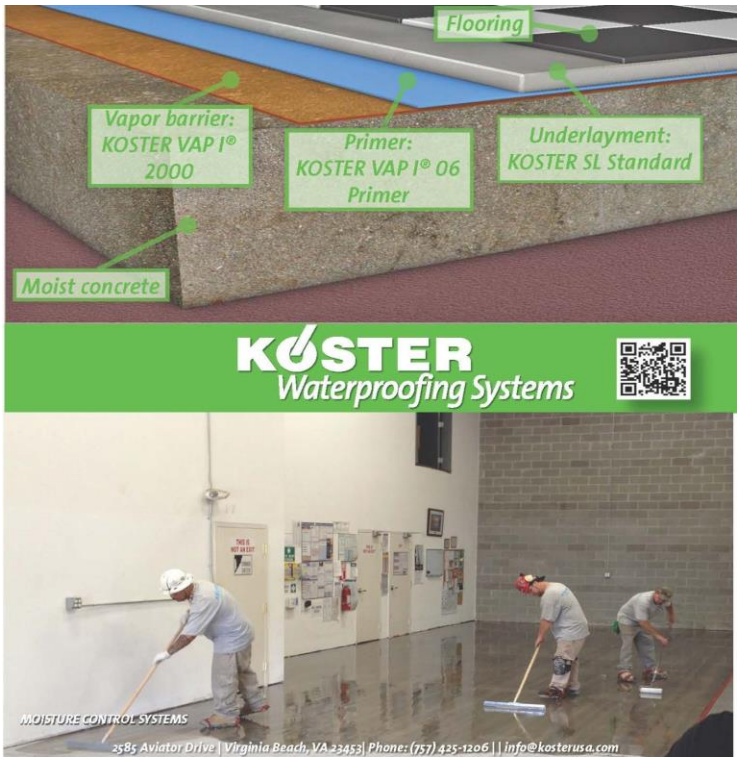
How about Liens?

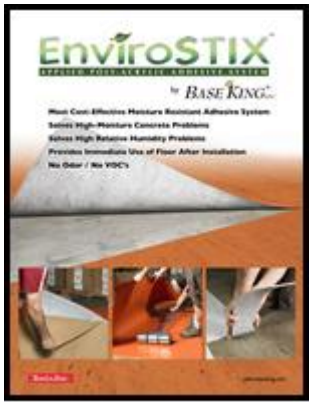
A mechanics lien is a security interest in the title to property for the benefit of those who have supplied labor or materials that improve the property. Liens exist to protect the contractor and they have existed for hundreds of years. Each state has their own laws that govern liens and a contractor must fully comply with the law and the execution of the services rendered under the contract to be eligible to file a lien. This means the flooring contractor has to do what he was supposed to do under whatever agreement they had with the receiver of services to have the right to file a lien if they are not paid for the services rendered.

Due to the economics of the construction business, contractors and subcontractors need greater remedy for non-payment for their work than merely the right to sue on their contracts. In particular, without the mechanics' lien, subcontractors providing either labor or materials may have no effective remedy if their general contractor isn't sufficiently financially responsible because their only contractual right is with that general contractor. In this conversation, and to answer the questions we alluded to before, you have to provide what you were supposed to so you

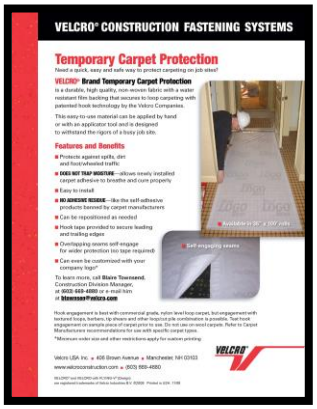
can get paid. If a complaint arises that the receiver of services argues and refuses to pay you can't just file a lien if no attempt was made to resolve the concern issue – and document everything. And, the issue has to be identified, qualified and determined as being something the flooring contractor did or didn't do and whether payment is warranted. None of these things are easy and, again, each one has to be addressed individually, in the jurisdiction governing the project and usually with legal advice. Now if the project goes belly up and everyone is left holding the bag, you can lien the project and wait in line to get paid, hopefully. Act fast in this circumstance because the further down you are on the list the less likely you'll get paid. You should never have to resort to filing a lien and you can prevent having to do so by knowing who you're doing business with. Don't be so desperate for work that you jeopardize or lose your business.

So, to answer the questions specifically; yes you can employ a hold harmless agreement if the party receiving services agrees to it and you do have recourse to file liens if all else fails. The wisest thing to do to avoid a loss or monumental problems later is to walk away or not accept the project. You can also implore that the receiver of services will listen to reason. Today there is enough information available, much of it written by us, to explain problems, what they are and how to avoid them and the ramifications of not doing so. And ask questions. We're here to help you stay out of trouble and we know lots of ways to do that.





Systems like EnviroSTIX for hard surface and hard backed flooring materials and Bentley Prince Street Contact Release for carpet are systems that will help prevent the failure of flooring installations. There is more technology coming, most of which we are involved with. We'll keep you informed to help you. In the meantime understand that moisture, temperature and humidity have a profound effect on flooring materials and the integrity of their installation.



The new Velcro Brand Carpet Protector is ready to go. This product takes the place of clear plastic coverings with pressure sensitive adhesive that have created a host of problems for the industry. The new Velcro Brand Carpet Protector is made for use on loop and cut and loop carpet; the vast majority of commercial carpet. Bentley Prince Street is the first carpet manufacturer to offer this unique product. Contact Velcro for more information and samples.