

# CFR

# THE COMMERCIAL FLOORING REPORT

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## THE FRIVOLITY OF FLOORING LAWSUITS

It seems that the entire world is lawsuit happy and ready to bring legal action against anyone for anything and you can always find a lawyer to take the case. When it comes to floor covering issues, whether it's a concern for the flooring material, installation, substrate or another related or perceived related matter, there are always compromises that can be identified that caused the problem – flooring doesn't just fail. When the situation becomes contentious and none of the parties want to make any concessions or the matter escalates to finger pointing, the thoughts of suing pop into mind.

Bringing a lawsuit in a flooring matter is most often a waste of time and money and I'll explain why as we move through this article. However, if you require the services of an attorney, be you the plaintiff or defendant, you need to retain one that has the requisite experience, knowledge and ambition. Remember that the lawyer you hire is likely not a flooring expert. They will know the law but they typically don't have knowledge of flooring or flooring situations. We work with lawsuit cases regularly and most often become the consultant for not only the client but their attorney as well.

### WHAT TO DO FIRST

Identifying what the problem is as specifically as possible is the first action that should be taken. Just what is the problem as best as can be identified? Normally the first thought is the flooring material itself is the problem because that's what can be seen – it's the flooring that's visibly manifesting the problem. This is understandable because most people really don't know what's wrong and that can include everyone from the manufacturer to the property owner and anyone in between who had anything to do with the project.



You may think it's the flooring...



But it's not.

## WHAT IS THE PROBLEM, ACTUALLY

This step involves definitively determining what is wrong, what went wrong and why and who is at fault. It likely involves bringing in an expert and might also involve testing of materials or whatever else might be required. It would also involve an inquisition as to the history of the project and how you arrived at where all the parties are today.

## DAMN THE TORPEDOES; FULL SPEED AHEAD

It is not unusual to find that someone was mandated, or tried, to catch up with a schedule that was behind and took the position of telling the flooring guys to "just get it installed as fast as you can so we can get the space occupied or the business back in operation." This often causes lots of problems because physics, chemistry and science don't care what someone's words say. Have you heard the old saying, "Don't fool with Mother Nature!?" Well, you really can't fool with Mother Nature; she always wins. If natural environmental conditions or substrate issues are not controlled, you're fooling with Mother Nature.

## COULD IT HAVE BEEN AVOIDED

Sticking with the previous theme, most of the time a flooring failure could have been avoided had the proper procedures been followed. This includes, but is not limited to, complying with the manufacturer's installation specifications for the material and the condition of the space and substrate, and the mixing and matching and mis-matching of materials and adhesives, selecting the right installation firm and industry standards and common practices of flooring installation; and using a large dose of common sense, something we often find sorely lacking. As Forest Gump's said, "Stupid is as stupid does." To which the question posed is, "so what was the person thinking at the time he decided to do what he did?"

## DOCUMENT EVERYTHING

So, you've got yourself embroiled in this flooring calamity and you think you need legal involvement -- what now? You should go back and do a chronological history of everything that took place from inception of the project to finishing and then beyond. Beyond would include care and maintenance of the product, conditioned space and use and abuse of the flooring material. You should note when the problem was noticed, where, by whom and whether it has gotten worse or stayed the same? You should also



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take photos or videos. It seems today that everyone chronicles everything with photos/videos since we all carry a device with us that takes pictures and video. In addition you'll want to secure flooring material that is left over just in case it has to be tested relative to the concern condition. And all the documents that have anything to do with the flooring project should be retained and furnished when and if needed.

## THE FLOORING NEVER LIES


For years I have used this saying, "the flooring never lies; it will always tell you what's wrong if you know how to interpret what its saying." The physical condition of the flooring and the components of the installation as well as the substrate will yield a plethora of answers. Just like investigating a crime scene by CSI the evidence exhibited and exposed will lead you to the perpetrator.

## THE LAW

Figuring out whodunit and how with an abundance of proof and evidence still may not give you a clear path to resolution. How you interpret the matter and facts and how the law interprets it are two different things – a matter of fact as interpreted and evidence versus a matter of law and applicability or how you interpret it versus what the law says. There may be issues with breach of contract, breach of warranty, negligence or strict liability and who do you go after and for what. Normally a net is cast and anyone who had anything to do with the flooring is joined in the suit. This takes up a lot of time and money which leads people to believe that the attorneys are the only beneficiaries in the case. Everyone is afraid of attorney's and the mere mention of the word attorney elicits reactions that can be compared to having teeth pulled. To put you at ease, attorneys are people too and they are just doing their job; you may hate them until you need them and when that time comes you need a really good one. Despite what you may think, the law is the same for everyone and it's about being reasonable especially when it comes to disputes over flooring. It may not always seem fair but the law is the law. Nothing is cut and dry. There are portions of a complaint that are impacted by the law governing product performance and those influenced by the normal standards and practices of the industry.

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You should avoid responding to a complaint brought against you by anyone that is represented by legal counsel without being legally represented yourself, and when you are represented you want the best attorney you can get.

When you retain an attorney, which is what you would be doing to protect yourself in a flooring lawsuit, he or she will examine your case and determine whether or not you have a legal claim. The attorney will file the complaint, represent you in court and interact with the opposing attorney to help resolve the matter. Typically, things such as money damages will likely settle before you get close to a trial, as I mentioned earlier. By retaining an attorney, you, (and the individual(s) filing the suit against you), are able to consult and discuss the legal issues with counsel. Hiring an attorney can relieve a lot of stress because the attorney will be managing and litigating your case as the expert you aren't. An attorney will ask you whether you want to settle or go to trial, meaning that ultimately you are still in control of your case's direction. In most cases there will likely be some kind of settlement or the opportunity to settle. If the case does make it to trial, there would be a judgement against the parties or party found to be liable for the action that instigated the loss. The judgement would likely be for actual damages in addition to other losses claimed or found to be in addition to the physical loss. In a commercial flooring failure, the losses can be 10 times higher than what the original flooring project cost; these are losses no one wants to incur.



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## **FLOORING CASES RARELY SEE THE INSIDE OF A COURTROOM**

With all that I've said, no judge wants to clutter his court with a flooring dispute and rarely will the judge want to hear the case. They may read the case and suggest to the parties to go settle the matter like big boys and girls. But just because most matters or complaints for flooring issues that are challenged by a legal action don't get to trial, doesn't mean you won't make the trip to the steps of the courthouse. And without good legal representation, you won't be prepared for the trip.

## **WHY YOU SHOULD NEGOTIATE AND SETTLE**

Here's where we get to the frivolity part. Forget egos, matters of principal, revenge or any other spiteful act that would get you dragged into the quagmire of a legal action. After all is said and done, thousands of dollars spent, years of pain and anguish suffered and wounds licked, the resolution of a flooring failure case is likely what it would have been when it occurred had everyone just decided to hammer out their differences and come to a mutually agreeable decision to settle the matter and move on. Most of the time, if reasonable minds prevail and are convinced that the legal action sought will most likely lead to the same conclusion that could be reached now; cheaper, faster and with less hostility, a negotiated settlement can

be reached. It may also be that trying to negotiate a settlement, which may still involve legal counsel as advisors and a flooring expert to put rational perspective on the matter, can be hammered out even if everyone is not fully satisfied. The wise thing to do is identify the problem, determine what happened and why and how the matter can be resolved most easily so that everyone can move on. In a balanced negotiation no one is going to get everything they want or think they deserve -- but that puts all the parties in the same boat. And the resolution to the matter may only involve sections of a failed flooring project and not the entire project. Only the broken parts get fixed and the entire job won't get wasted, you can actually mitigate the losses if they are addressed and resolved early on.

I've been doing this type of work my entire adult life and have never seen a matter where a negotiated settlement wouldn't have been the best course of action. The truth really is that what you wind up with at the end of a lengthy lawsuit is often what you would have achieved initially by negotiating and settling and at far less expense and aggravation. Lawsuits for flooring project failures are expensive. Attorneys, just like you and I, are in business to provide a valued service for compensation. Taking care of legal matters is their job; if you don't like paying for those services, and you will pay dearly for actions taken in a flooring failure, bring the matter to a resolution as fast as you can and get back to doing business. Furthermore don't do stupid things on a project that will cause an argument over a flooring failure, which could have been prevented, to instigate a legal action. Nearly every flooring failure we see could have been avoided.

It costs less to do it right the first time than to worry about the repercussions from the folly of someone's decisions or actions not to.

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**"WHEN NO ONE ELSE HAS ANSWERS, WE DO"**