



THE COMMERCIAL FLOORING REPORT

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FLOORING WARRANTIES, MERCHANTABILITY FOR SERVICE AND FITNESS FOR INTENDED PURPOSE OF USE

The biggest problem in the flooring industry is the wrong product specified or sold for use in the wrong place. All flooring material will not perform satisfactorily in all applications for any number of reasons. Merchantability for service and fitness for intended purpose of use is a promise, arising by operation of law, that something that is sold will be merchantable and fit for the purpose for which it is sold. An item is deemed merchantable if it is reasonably fit for the ordinary purposes for which such products are manufactured and sold. This is relative in this case to flooring material.

Manufacturers and reps don't always know enough about the products and particularly their installation because they don't always know the specific use it is going to be subjected to. This is especially true of flooring manufacturers who

produce a commercial flooring product but have no idea where and how the buyer is going to use what they produce and sell. It could be assumed the buyer is knowledgeable enough to know where to use a particular product so the manufacturer may have no complicity in a failure. That said, if the manufacturer makes a blanket statement that a particular product is "good for all large open spaces" which could mean anything and could be assumed to mean anything and a failure occurs in an airport for example because the product is incapable of performing then they have opened themselves up for liability. The product the manufacturer said was "good for all large open spaces" actually had no business being used in this application and as a result it failed. The flooring product in this case, specified by the architect/design firm and blessed by the manufacturer's rep, was not fit for the intended purpose of use. However, that being the case, this would not be a situation that would instigate a legal action as there was no intent to defraud anyone or a question of quality. This was just a case of persons thinking something was appropriate for use when it wasn't. However, if the manufacturer has the statement in writing it could be interpreted verbatim and they could then possibly be joined in an action for the failure. Decades ago commercial carpet manufacturers categorized their products into light, moderate or heavy traffic classifications so the right product got into the right place but unfortunately not anymore.



Failure of Flooring to Perform

In general, a seller or manufacturer is required by law to make products of merchantable quality; that is products that are acceptable for intended use that fit the standards and accepted practices for floor covering materials that are capable of delivering the performance expected in a particular application. In the event that the flooring does not meet with the proper standards, a suit can be brought against the seller or manufacturer by anyone who is injured (financially not physically) as a result. In more legal terms merchantable for service means a product of a high enough quality to make it fit for sale that will actually be capable of performing – that is, living up to expectations. To be merchantable an article for sale must be usable for the purpose it is made. It must be of average worth, not necessarily a custom product, in the marketplace and must not be broken, unworkable, damaged, contaminated or flawed. To be "merchantable", the goods must reasonably conform to an ordinary buyer's expectations, i.e., they are what they say they are and that they will do what is expected of them. A simple example would be flooring that looks good but has hidden defects, this flooring would violate the implied warranty of merchantability if its quality does not meet the standards for flooring "as passes ordinarily in the trade".

Implied warranties come in two general types: merchantability and fitness. An implied warranty of merchantability is an unwritten and unspoken guarantee to the buyer that goods purchased conform to ordinary standards of care and that they are of the same average grade, quality, and value as similar goods sold under similar circumstances. In other words, merchantable goods are goods fit for the ordinary purpose for which they are to be used, in this case floor covering. You expect that what is specified, purchased, represented or held out for sale as a floor covering will meet the expectations for commercial flooring material as you have known it to be in the past; the ordinary standard of care.

The Uniform Commercial Code (UCC), adopted by most states, provides that courts may imply a warranty of merchantability when (1) the seller is the merchant of such goods, and (2) the buyer uses the goods for the ordinary purposes for which such goods are sold. Thus, a buyer can sue a seller for breaching the implied warranty by selling goods unfit for their ordinary purpose. Again, you expect the flooring material to function as you've expected, anticipated and known commercial flooring material to do. If the flooring fails to perform within a short period of time or a reasonable period of time compared to what the normal performance of that type of product is then there would be cause for complaint to determine why. The seller of the flooring material may not have known the history of a particular product especially if he sold the product that was specified which may be a product that won't perform. You have to make sure any "or equal" products here are actually equal otherwise you may be exposing yourself to liability.

Relative to flooring the product must meet certain requirements. It must be



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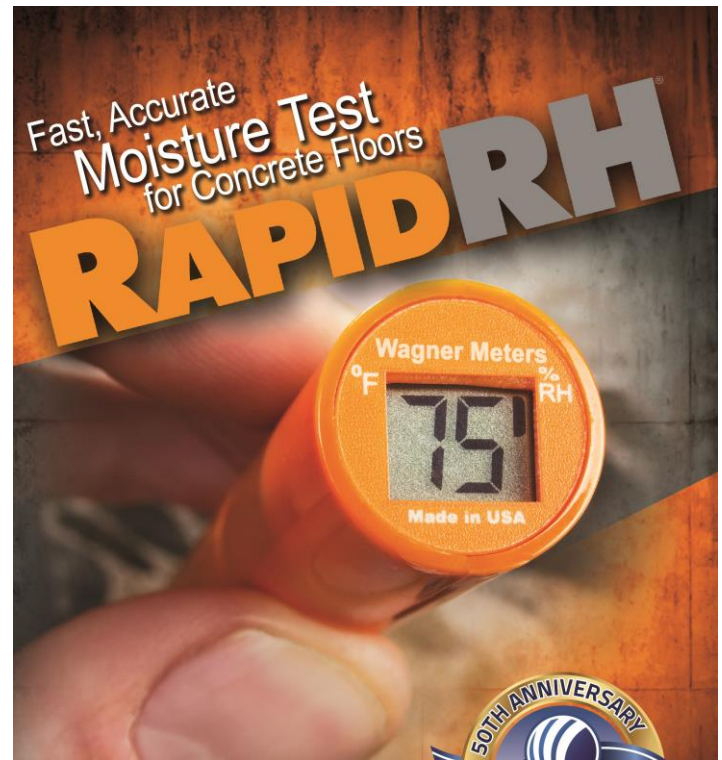
installable, be capable of being used as flooring material that will be walked on, cleaned, used, abused, be dimensionally stable, colorfast, be constructed and meet the specifications of the manufacturer, comply with the weight and density, not fall apart, have an effective wear layer, surface or integrity that will allow it to perform and, in general, live up to the expectations of the end user for the application intended. All of this must be taken into consideration when the specification is written or the product is offered for sale in a bid or sale situation. Essentially, the flooring material must be able to function as flooring material is expected to do for the application of use.

Commercial Law: Express and Implied Warranties under the Uniform Commercial Code

Realizing that uniformity and certainty would make interstate transactions easier and more profitable, the Uniform Commercial Code (U.C.C.) was drafted. The U.C.C. has now been adopted by every state except Louisiana, and its rules provide uniform treatment of most common business transactions. Article 2 of the U.C.C. deals with the sale of goods, not services. It covers such things as the offer to sell goods, the acceptance of the offer, and the terms of the sale itself. Article 2 also outlines certain warranties included as part of the sale. Because these warranties are imposed by law, it is important to know what is being warranted, as well as how to disclaim these warranties.

U.C.C. Warranties and Their Disclaimers

When people use the word "warranty," they are typically referring to a specific kind of warranty that the U.C.C. calls an "express warranty." Express warranties are affirmative promises about the quality and features of the goods being sold. Claiming a watch is "waterproof to 250 feet," that a car gets "35 mpg on the highway," or that a brand of concrete "cures rock-hard in 5 minutes, no matter what the weather" are all examples of express warranties. But express warranties under the U.C.C. include more than just affirmative statements. They also include descriptions of the goods being sold or samples shown to the buyer. If a buyer is shown a flooring sample of the kind they want to buy, this sample is an express warranty that the flooring actually sold is the same type and same quality as the sample and as the specification reads for the product on the sample.



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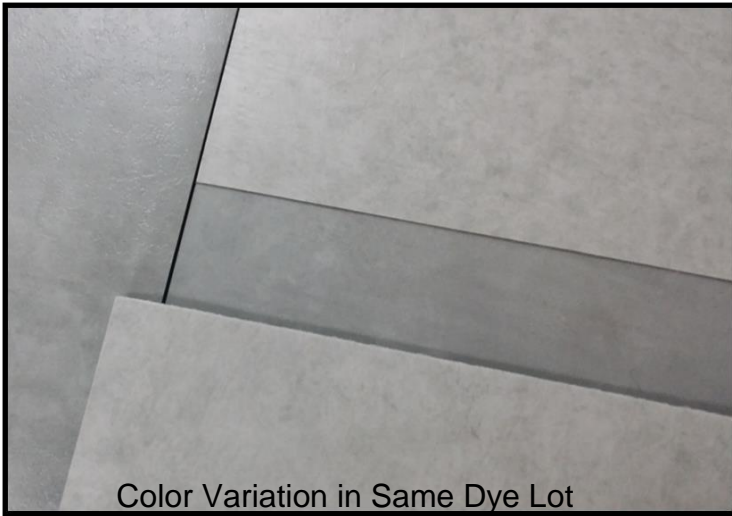
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Color Variation in Same Dye Lot

In addition to express warranties, the U.C.C. also creates a second kind of warranty, called an "implied warranty." As the name suggests, an implied warranty is made, regardless of whether or not it is specifically mentioned. The implied warranties created by the U.C.C. ended the old rule of caveat emptor-"Let the buyer beware." Implied warranties allow buyers to purchase goods and be confident that they meet certain minimum standards. The two implied warranties the U.C.C. creates are the warranty of "merchantability" of the goods being sold, and the warranty that the goods are "fit for a particular purpose." Both of these apply to the sale of flooring covering materials.

Under the U.C.C.'s definition of "merchantability," goods must be at least of average quality, properly packaged and labeled, and fit for the ordinary purposes they are intended to serve. For example, a wristwatch would have to be at least of average quality as compared to other watches in the same price range, it must tell time, and it cannot come in a box labeled "Rolex" unless it is, in fact, a "Rolex." The application of the implied warranty of merchantability is limited to a seller of "goods of that kind," meaning the kind of goods the seller usually sells in the marketplace. A seller does not make an implied warranty of merchantability when he sells goods of a kind that he does not normally sell. For example, a commercial flooring dealer impliedly warrants that the flooring materials sold are merchantable because commercial flooring materials are the kind of goods a commercial flooring dealer typically sells. On the other hand, if a flooring dealer sells to someone an extra display case it no longer needs, the display case is not subject to an implied warranty of merchantability because flooring dealers generally do not sell

LE ON A PERSONAL NOTE:
GLUE

I have a little buddy that created a really cool product and I wanted to share it with you.

Tripp Phillips is ten years old and was given a project at school and he decided to invent something. He loves playing with Lego® building blocks and any other bricks he could get his hands on. However, the pieces kept falling apart. He wanted a glue that was strong and would not ruin his blocks.

He and his dad teamed up to create Le-Glue. Kids love it! Tripp won the International Torrence Legacy Creative Award with his new invention.

Lee Phillips is a good friend of mine and I found this idea fascinating and it proves that the entrepreneurial spirit is alive in our kids.

[Click the photo to follow Tripp's Kickstarter campaign.](#)

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display cases. Of course, if the seller makes an express warranty regarding the display case, it will be held to any such warranty, but none will be implied unless the goods being sold are goods of a kind the seller normally sells. This would also be true if a retail flooring dealer sold commercial flooring he normally does not sell to a commercial end user and the dealer knows virtually nothing about the product and the product fails because it could not work but was purchased because the dealer may have been allowed to bid a project that did not disqualify any flooring dealer from bidding. A bit complicated to understand but we've had cases like this that resulted in law suits. Make sure you put in the spec exactly what you mean and want. The spec can state specifically the qualifications of the flooring material and the flooring contractor/installers.

The implied warranty of fitness for a particular purpose applies if the seller knows or has reason to know that the buyer will be using the goods he is buying for a certain purpose. If the seller knows the purpose for which the goods are to be used, the seller impliedly warrants that the goods being sold are suitable for that specific purpose. This is a very important aspect of the warranty. A commercial flooring purchaser would expect the goods being sold will be suitable for their particular use especially if the seller knows where the product will be used. If the flooring product is incapable of performing, being installed, and remaining stable or does not meet the criteria because its construction or design would prevent it in some way from doing so, then we have a breach of the implied warranty.

The rationale behind the implied warranty of fitness for a particular purpose is that buyers typically rely on the seller's skill and expertise to help them find the specific goods that meet their specific need. A buyer who goes to a commercial flooring manufacturer or dealer may know he wants commercial flooring, but he relies on the flooring salesperson to find the specific flooring material that fits the application for intended use and meets any other specific requirements the end user might have. Accordingly, it is unfair for a seller to sell something they know will not do the job and later tell the buyer it is not his or her fault it did not work. This is when the finger pointing game begins.

Because warranties typically only become an issue when a buyer is dissatisfied, a prudent seller tries to limit the scope of the warranties he makes before a problem arises. The U.C.C. specifically allows sellers to disclaim both express and implied warranties on goods they sell, within certain limits. Interestingly, the U.C.C. does not provide many specific rules regarding how warranties are disclaimed. In keeping with the idea that the purpose of the U.C.C. is to make business transactions easier, the U.C.C. provides that attempts to disclaim warranties should be construed reasonably and enforced unless doing so is unreasonable under the circumstances.

Generally, a seller who wants to disclaim U.C.C. warranties must do so specifically. A general statement that there are "no warranties, express or implied" is usually ineffective. Just how express a disclaimer needs to be depends on the kind of warranty being disclaimed. An express warranty must be expressly disclaimed. A disclaimer that disclaims the implied warranty of merchantability must specifically mention "merchantability" in the disclaimer. Finally, a seller may disclaim all implied warranties by stating that the goods are being sold "as is," "with all faults," or by stating some other phrase that makes it plain to the buyer there are no implied warranties.

All flooring material sold for commercial use should be capable of delivering the type of performance expected for the application of use. This is why you should buy from and have installed by a reputable professional commercial flooring contractor who knows the products they sell, what will work best for the commercial application, how to prep the facility for the installation of the product and how the product should be installed. In addition they should also be able to provide guidance on how the product is to be maintained. There are a multitude of different products and qualities for each type of flooring material sold for commercial application. Consider the good, better, best rule and the adage you get what you pay for. The cheaper the product the less performance you'll generally get from it. That being said, if you purchase

a solution dyed nylon because it is more colorfast and it fades markedly within a short or unreasonable time, it was not merchantable for service due to a defect that prevented it from performing as expected. If the carpet you're going to purchase, being told it is suitable for use in a tropical type environment, turns from green to yellow, it was not fit for the intended purpose of use. If the wood flooring purchased scratches and indents within days of use, it was not fit for the intended purpose of use or if the cork flooring installed curls within the first day of installation it may not have been fit for the intended purpose of use.



Another factor to consider is that if the professional commercial flooring contractor looks over the specification or, more importantly, sees the conditions of the space during the rip up of old flooring or the condition of a new substrate, they will state and advise what must be done to successfully install the flooring material. If the end user fails to heed the warning, which should be in writing and receipt noted as well as acceptance or rejection, then the end user is liable for any failures since their decisions compromise the success of the flooring or the installation. Budgets for flooring projects should always take into consideration that more floor prep is necessary than may have been expected. Flooring contractors are not clairvoyant so they can't tell what's under an old floor that is likely to need to be corrected until they see it. These types of issues may very likely void the warranties for the product and the installation.

A product not being merchantable for service or fit for the intended purpose of use could be a mistake, a defect or a result of lack of knowledge of the product and how it would perform in the use environment. Any flooring product sold into the commercial market should be tested by the manufacturer when it is being developed to determine if it is in fact suitable for the intended purpose of use. Remember, ignorance is no excuse for the law and knowingly selling an inferior product, for whatever reason could be considered fraud if the seller or their representative knew a reason why the product would not perform. If the product won't work, due to a manufacturing defect or deficiency, a manufacturer should recognize a mistake was made or a defect exists on their part and should replace the goods. If the product is oversold and would never deliver the expected performance; that falls on the person selling it or specifying it. Flooring failures can be complicated cases that often can't be determined or successfully resolved without the help of a knowledgeable expert. Flooring material quality and integrity is not something that is easily recognized by most people, often you can't tell by looking at a flooring product whether or not it will work where and how you want it to. Someone in the buying and selling process should be able to determine the appropriate product for use and make sure it gets written into the spec or purchase order. These can be complicated issues and quite involved. We can always help you in these matters we deal with them all the time and each one is different. Most every flooring problem we look at could have been avoided.

If you need help with a flooring or substrate concern, have questions or issues, contact us we can help; we have the answers on all things flooring.