



Flooring: Merchantability For Service and Fitness for Intended Purpose of Use

Welcome to the 200th edition of the Commercial Flooring Report. I thank all of you for the continued support over the years and salute your quest for knowledge of the industry and its products.

Our staff and associates consist of the best and brightest in the industry, most of them have backgrounds in manufacturing and all of them have decades of experience. Our passion and love for what we do here and the love of the industry and the people in it keeps the fire burning. After 54 years I have no intention of stopping or slowing down. Our responsibility is to help all of you who have questions, problems or concerns and to share our knowledge with you. Look for a lot more to come from us in the near future. We're just getting started!

Okay here we go—Merchantability for service and fitness for intended purpose of use is a promise, arising by rule of law, that something that is sold will be merchantable and fit for the purpose for which it is made. 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. 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. 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. An example is a tufted textured loop carpet installed with the double stick method in an office complex that uses no chair pads. This is an installation method that had no business being used in this application and as a result it failed. The installation system 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. We can also look at a hard surface flooring installation of a floating floor being installed in a commercial application that fails due to the engagement system breaking. This was the wrong product in the wrong place, and it was destined to fail. It was specified by the architect. However, that being the case, this would not be a situation that would instigate legal action as there was no intent to defraud anyone or a question of quality or inherent characteristics of the product not being understood. This was just a case of someone thinking something was appropriate for use when it wasn't.

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. If the flooring does not meet with the proper standards, legal action can be brought against the seller or manufacturer by anyone who is injured as a result. In more legal terms merchantable for service means a product of a high enough quality to make it fit for use that will actually be capable of performing. 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, flawed or defective. 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 a fruit that looks and smells good but has hidden defects that the seller knows about, would violate the implied warranty of merchantability if its quality does not meet the standards for such fruit "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) 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. Breach of contract, not warranty, for example would be applied if the product does not meet the specifications stated by the manufacturer – or it is not what they say it is. Relative to flooring, the product must meet certain requirements. It must be installable, be capable of being used as flooring material that will be walked on, cleaned, used in the normal course of events, 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



THE COMMERCIAL FLOORING REPORT

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perform and, in general, live up to the expectations or 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. An example would be a 20-mil wear layer in the product specification of a vinyl plank flooring that tests at a number below that. The end user did not get what they paid for or what they believed to be true.

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. This would apply to flooring that is said to be waterproof, dimensionally stable, can be installed without acclimation or is actually PVC free. But express warranties under the U.C.C. include more than just affirmative statements. They also include descriptions of the

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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 that it meets the specifications stated for that product.

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 for "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 the 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 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.

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 to 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. This section is particularly important for commercial flooring contractors who install flooring of all types and in all types of spaces and for all types of uses. Who knows better than an experienced commercial flooring contractor if a particular product will or won't perform where it is being specified? Certainly not the architect, the manufacturer, or anyone else. This is why the flooring contractor should be consulted on what they think of the specified product and if it is actually fit for the intended purpose of use.

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 carpet or hard surface 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 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 good is 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. 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 of 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 or if the vinyl tile or plank flooring shrinks, cups, curls, domes or otherwise changes its dimensional characteristic shortly after installation, it was not fit for the intended purpose of use.

A product not being merchantable for service or fit for the intended purpose of use could be a mistake or a result of lack of knowledge of the product and how it would perform in the use environment or an inherent defect. Any flooring product sold into the commercial market should be tested by the manufacturer 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, 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 if a product is found to have been "chance shipped," that is the manufacturer knew there was a problem with the product but took a chance on shipping it anyway, hoping it didn't generate a complaint. And yes, this actually happens.

These can be complicated cases that often can't be determined or successfully resolved without the help of knowledgeable firm. Flooring material quality and integrity is not something that is easily recognized by most people. 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. We can always help you in these matters.

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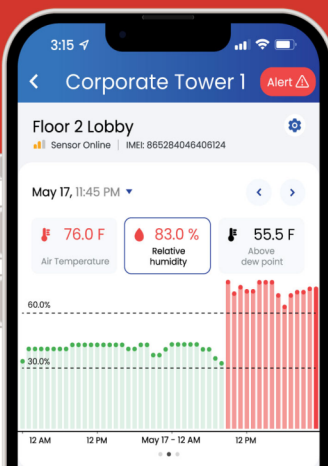
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