

Emergency Response and Restoration Contractors: “Avoiding Frivolous Lawsuits”

Issue – Already this year several local restoration contractors face “frivolous lawsuits.” (A frivolous lawsuit is one where the claims against the restoration contractor’s work or actions is absurd and have no merit.) Yet, when a frivolous lawsuit comes your way, you must immediately seek legal counsel to defend against each allegation.

- **Attorney’s tell me** – It is not in your best interest to respond to a subpoena that asks for documents, attend a deposition, arbitration meeting or a hearing without having legal representation.
- In order to defend your rights and workmanship, the restoration contractor’s attorney may hire independent experts (such as our company) to review the allegations and determine if there is factual merit to the claims made against you.
- In other cases, experts are hired to review documents and then complete a site assessment where they recreate “in their mind” (sometimes referred to as Monday-night Quarterbacking) the water, fire, mold situation; situations that may have exposed occupants to chemicals or microbial contaminants including pollutants such as asbestos and lead-based paint; understanding why certain tasks were completed in the order they were or they were not completed or were missed for some reason.
- The goal of your independent expert is to determine through meetings, inspection, and sometimes testing and analysis, the factual merits of the allegations and develop an approach on how they will defend you in arbitration or court.

Prevention – There are several ways you can avoid experiencing a frivolous lawsuit:

1. Train and certify employees in each work task (in some instances, certification can be an internal process where the company documents employees have been trained by you or by a qualified outside professional);
2. Have up-to-date contracts (contracts and change order forms designed and approved by your attorney after 2006), standard jobsite forms that include documentation;
3. Teach employees about “red-flags,” what are they and how to document each known or is likely occur red-flag situation.
 - a. Have in the job folder “Caution: Possible Red-Flag” forms that “must be filled out” for any situation that could result in a jobsite complication or conflict and report this information immediately back to the supervisor or office.
 - b. A jobsite complication may be tenants that will not leave your work area; water, fire, sewage or mold damage that is found behind a cabinet that must be removed; asbestos tiles are found under the carpet; you need to remove tile walls and flooring to get to hidden building damage; sheer walls are present and must be removed; the building is older than 1978 and you are not given permission to test for asbestos and lead-based paint in water/fire damaged

areas; electrical hazards exist and you need to shutdown a portion of the building.

4. Keep the building owner, property manager and insurance adjuster **informed about “each known or likely to occur jobsite complication and what must be done to safely eliminate or control them;”**
5. Get in the habit of having building owners, property managers and adjusters **“pre-approve change orders”** that are signed onsite (or authorized by phone or fax) before beginning additional work.
 - a. Having **change orders signed** “before starting additional work” (work that is not covered in the contract requires a signed change order form under California law);
6. Each employee (or at least each supervisor) is expected to have a **digital camera** that **documents building damage, red-flags, and jobsite complications.**
 - a. Teach employees how to photo-document a job and what is expected of them to return photos and the **“Photo Identifier Log.”**
 - i. General documentation includes taking outside pictures and inside pictures of both **affected and non-affected building materials**, contents and the overall layout.
 - ii. Jobsite damage includes **identifying existing conditions** before beginning the job, any time employees find **hidden damage**, and at completion of work or a task.”
 - b. The digital camera memory card – along with the filled-out Photo Identifier Log, is given back to the office at the end of the job or at least once each week. A replacement camera or an empty memory card is issued for the next job.
 - c. Make sure to check to see if the digital camera has the **“date stamp”** feature in the “on” position.

Shifting Your Jobsite Liability Onto Other Professionals – There are a growing number of **qualified environmental professionals** that **reduce your liability** through their **professional errors and omission insurance** coverage. They are licensed B1 contractors that are certified in water, sewage, fire and mold remediation, microbial testing and asbestos and lead-based paint testing. Independent experts should be able to respond in a reasonable time that your company responds to a disaster:

- **Inspect and document** building damage
- **Maintain constant open communication** between all parties
- Provide **OSHA compliance** directives
- Write your **emergency cleanup scope of work** and provide **project oversight**
- When necessary, provide asbestos, lead-based paint, chemical and microbial **testing and analysis**
- **Moisture mapping** including **thermal imaging**
- **Document existing damage** from **pre-existing issues**
- Provide you, your customer and adjuster with **jobsite completion certification** and **environmental certification**

Looking At A Real Frivolous Lawsuit Case – What I believe was a frivolous lawsuit filed in 2009, “but was won only recently (June 2010) by the contractor” can be found at http://www.edcross.com/newsletter_june_statefarm.html In this case State Farm Insurance Company alleged the restoration contractor:

- **Performed unnecessary demolition** during an emergency response to a sewage flood in a three-story house;
- Treated the water damage claim as a **black water loss** instead of a **clean water loss**;
- Was **negligent in their duties**;
- Fell below the **industry standards of care**.
- Based on these allegations State Farm filed a **subrogation lawsuit** against the restoration contractor for the repair costs.
- All said and done: After spending thousands of dollars defending them self and having many sleepless nights, **the contractor won the frivolous lawsuit!**

Conclusion – Attorney’s tell me: “It is only a matter of time before all restoration contractors will get sued.” In other words, “it is not if you will get sued, but when will it occur?” “Your contracts, documentation and quality workmanship are your main defense, but they will not always protect you from a frivolous lawsuit.” “Hiring independent experts that provide project oversight and other services are expected to reduce the restorer’s jobsite liability.”

- When you take on large or complicated jobs and even small jobs that have “potential red flags,” hire an independent expert to oversee or test that portion of work.
 - Make sure your expert(s) have **general and pollution insurance including professional errors and omissions coverage**.
 - When you give repeat business to an independent expert, make sure you are named as “**additional insured**” on their insurance policy.
 - **Interview** more than one **construction or environmental expert** to ensure they have the qualifications you expect from them to **write the scope of work, oversee work in progress, and clearance test** your cleanup and remediation jobs.
 - When necessary, have them provide you with **OSHA and industry training classes** that leads to **worker certification**.
 - Have them **certify the completion of your work** and copy your customer and adjuster with the certification.
 - When required, have them provide you, the building owner and insurance company with an **environmental clearance testing certification**.

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