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Beware the legal theory of construction defect

LANDSCAPE FIRMS THAT WORK FOR HOME BUILDERS SHOULD SIGN CONTRACTS CAREFULLY.

SINCE THE RECESSION, insurance companies are seeing a greater volume of claims from property owners, including construction defect claims. The little things a homeowner may have once ignored are now bringing on lawsuits. A construction defect claim is when a property owner makes a claim that there's something faulty in the construction. Landscapers can easily be brought into these claims, so we asked Hortica's casualty claim manager, Jud Ankrom, to break down what they mean.

While construction defect claims can be made anywhere, Ankrom says Hortica sees most of them in California, Arizona, and Nevada, possibly because court decisions may be more liberal in these states. Whatever the reason, it's a type of claim that can be devastating to a landscape business owner.

For example, say a homeowner contracts with a builder for a new home and the builder subcontracts a number of people to do the work, including a landscape contractor.

"In our experience, the landscape contractor may do only a small bit of work—maybe \$1,200 to install

some shrubs and do some finish grading," Ankrom says. "But the general contractor has made the landscaper sign a contract that says he will hold the general contractor harmless, pay any loss or defend the general contractor against any claims arising out of faulty work."

If the homeowners get into the home and realize it leaks, they will file a suit against the general contractor, who may turn to all the subs to get them on the hook, too. It could cost hundreds of thousands in defense costs, Ankrom says.

"When you're talking about multiplying the lawsuit by 300 or 400 homes—that's huge," Ankrom says. "As a result, we're finding that landscape contractors who do much of their work with national home builders are in a big dilemma. While they like the steady work, they can really be on the hook in construction defect lawsuits. As a result, I've seen these accounts finding it increasingly difficult to get insurance based on the problem of dealing with today's gigantic homebuilders and the growing number of lawsuits in the industry."

Words of wisdom

Ankrom has a few pieces of advice for landscapers:



1 Use the help of your legal counsel when it comes to signing contracts. "I know a lot of landscape contractors scoff at spending \$300 or \$500 an hour for an attorney to review their contracts, but when it comes to the cost of what a potential construction defect claim could be, that's peanuts," Ankrom urges. "You need to go into these contracts with your eyes wide open, and having a professional with your best interest in mind review the contract is critical."

Once the contract is reviewed and you know what you're getting into, Ankrom advises asking for your own protections and for cross agreements. "Everyone should bear his or her own responsibility," he says. "I do understand that with the advent of these 'hold harmless' clauses in contracts, that can be hard. But you need to be bold enough to ask for some protection of your own."

2 Landscape contractors also should be prepared to have their own subcontractors sign contracts. "I understand that with the way things are right now, landscape contractors often have to

sign a contract with a 'hold harmless' clause and they don't have a lot of ability to negotiate," says Ankrom. "But I'm astounded how many of those same contractors don't then lock their own subs into agreements where they're held harmless. Say you have an electrician do some outdoor wiring for your landscape project and a fire starts. If you didn't have that electrician sign a contract that holds you harmless from their faulty work, that's now your responsibility. While there may be a common law right of subrogation, you've made your life that much more difficult."

3 Be prepared to walk away when the risk is too big, Ankrom adds. "Some jobs just aren't worth taking," he says. "I do realize that in this economy it's hard to walk away from work. But if you're not confident you can fully perform the job or there is looking like a lot of risk involved, you're better off just walking away."

Casey Payton is a freelance writer who has covered the landscape industry for seven years.