



Potential Liabilities For Contractors Installing Building Communications Cables That Violate National Electrical Code Requirements

The Communications Cable and Connectivity Association (“CCCA”) has found that certain imported communications cable does not comply with National Electrical Code (“NEC”) standards. Contractors that install this noncompliant cable, whether known to the contractor or not, may be exposed to liability for violating applicable building codes and in civil lawsuits for damages caused by the installation of noncompliant cable. Background about this issue and an overview of potential liability are provided herein.

Introduction

The CCCA has tested communications plenum cables (“CMP”) and communications riser cables (“CMR”) from lesser-known offshore manufacturers that import to the United States. Many of those tested fail to comply with the minimum requirements for fire safety established by the NEC, published by the National Fire Protection Association (“NFPA”). Some were found to catastrophically fail the required standards, and cables from these same manufacturers have the potential of flooding the U.S. market. These cable products are typically sold by certain U.S. distributors online or through “brick and mortar” facilities.

Potentially hazardous communications cables generally are made from lower fire performance materials and variable manufacturing processes, often making them highly combustible when exposed to fire, particularly when installed in building plenum spaces or in vertical floor-to-floor riser shafts. This can cause fires to rapidly spread and dense smoke to be distributed throughout a building, making evacuation and rescue of occupants more difficult. Many of these cables are falsely rated as CMP and CMR and may be deceptively marked as complying with NEC fire safety codes and NFPA approved test methods. In some cases, cable markings and packages may display unauthorized or counterfeit listing references to independent testing agencies.

The current fire safety test and requirements for CMP and CMR cable are defined in NFPA 70, the *National Electrical Code*,¹ and NFPA 262: Standard Method of Test for Flame Travel and Smoke of Wires and Cables for Use in Air-Handling Spaces.² These requirements were set after studies examined several tragic and large property loss building fires and the fire risk presented by combustible cable in plenum spaces. The NEC standards, including NFPA 262, have been codified as mandatory by many local and state governments in the U.S.³

¹ NFPA 70, *National Electrical Code*, at 90.2, 725.179 (2011 ed.).

² NFPA 262, Standard Method of Test for Flame Travel and Smoke of Wires and Cables for Use in Air-Handling Spaces, *Origin and Development of NFPA 262*, at 262-1 (2011 ed.).

³ See NEMA website, NEC Adoption Chart, at

<http://www.nema.org/stds/fieldreps/NECAdoption/upload/Combined-NEC-Adoption-Report-No-IRC.pdf>.

Thus, cable that fails to meet NEC standards violates building codes in many jurisdictions. This presents legal exposure and potential liabilities to installation contractors.

At the request of CCCA, Crowell & Moring LLP has prepared this white paper to provide an overview of the potential liability that contractors and other entities may face upon installation of noncompliant CMP and CMR cables. This paper notes important issues which should be carefully considered in the context of the requirements and circumstances applicable to the particular situation. The discussion in this paper should not be understood as changing, supplementing, or substituting for any applicable legal or professional requirements for companies and individuals in the cable industry, nor does it relieve any company or individual from any applicable requirements. This paper is not a legal opinion and does not provide legal advice. Companies and individuals should consult their own lawyers based on their specific facts and circumstances for legal advice.

In summary, contractors and other entities that install CMR or CMP cable may face liability based on violations of building codes across the country. In the event that a contractor installs noncompliant cable that causes damage – such as in the event of a fire – contractors may also be held liable in civil lawsuits. These potential exposures are set forth below.

Liability for Building Code Violations

Contractors that install noncompliant cable in buildings located in jurisdictions that have adopted the NEC may face liability for violating the building codes in those places. Here, we examine liability in three states to illustrate how different jurisdictions address those violations: Connecticut, Florida, and Virginia.

While the specific liability in each of these states is slightly different, it demonstrates that contractors may face serious consequences for installing noncompliant product into buildings in these and other jurisdictions that have adopted the NEC. None of the states examined here require that contractors have actual knowledge that the cable poses a potential danger. Any installed cable that fails to meet the NEC standards, whether known, apparent, or not, opens a contractor up to penalties for those failures.

Connecticut

Connecticut has incorporated the NEC into its building code,⁴ which applies to “the design, construction and use of buildings or structures to be erected and the alteration of buildings or structures already erected.”⁵ Connecticut Building Code violations are criminal acts. The penalties are fines between \$200 and \$1,000 and/or a maximum six months imprisonment.⁶

⁴ See Connecticut Department of Public Safety, Office of State Building Inspector website, referencing the National Electrical Code, at <http://www.ct.gov/dps/cwp/view.asp?q=305412&a=2148>.

⁵ Conn. Gen. Stat. Ann. § 29-252(a).

⁶ Conn. Gen. Stat. Ann. § 29-254a.

Florida

Florida has also incorporated the NEC into its building code,⁷ which is administered by the Florida Building Commission.⁸ The Florida Building Code applies to “the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities.”⁹ Two different enforcement mechanisms are provided for the Florida Building Code. First, the government may go to court to stop the “sale, delivery, use, occupancy, erection, alteration, or installation of any building” that does not comply with the Florida Building Code.¹⁰

Second, parties that have been damaged by a Florida Building Code violation may bring an action in court “against the person or party that committed the violation.”¹¹ Thus, if the installation of noncompliant cable causes harm to anyone in Florida, a contractor who was responsible for the installation of that cable may be sued for that violation. The statute also sets forth a potential defense for contractors: where the required building permits have been obtained, the building plans have been approved, the building passes inspection, and there has been “no personal injury or damage to property other than the property that is the subject of the permits,” there is no liability unless the contractor “knew or should have known that the violation existed.”¹²

Virginia

The Virginia Uniform Statewide Building Code incorporates the NEC.¹³ Violation of the Virginia building code is also a crime, a misdemeanor punishable by a maximum \$2,500 fine.¹⁴ After a conviction, each day that the violation continues is considered a separate crime, punishable by a maximum \$2,500 fine per day.¹⁵ Multiple convictions carry increased fines: between \$1,000 and \$2,500 for a second offense committed less than five years after the first offense; between \$500 and \$2,500 for a second offense committed within five to 10 years following a first offense; and between \$2,500 and \$5,000 and up to 10 days in jail for any subsequent offenses committed within a 10 year period.¹⁶ Local authorities in Virginia are authorized to issue fines for unabated violations of the building code, once the offending party has received notice of a building code violation.¹⁷

⁷ Fla. Admin. Code Rule 60D-7.005(3)(a).

⁸ See Florida Building Commission website, at <http://www.dca.state.fl.us/FBC/index.htm>.

⁹ Fla. Stat. Ann. § 553.73(1)(a).

¹⁰ Fla. Stat. Ann. § 553.83.

¹¹ Fla. Stat. Ann. § 553.84.

¹² *Id.*

¹³ See Virginia Building Code Officials Association, “Current Codes in Virginia,” listing the 2008 National Electrical Code, available online at <http://www.vbcoa.org/11.html>.

¹⁴ Va. Code Ann. § 36-106(A).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Va. Code Ann. § 36-106(C).

A party that violates the Virginia Uniform Statewide Building Code may be ordered to fix the noncompliant condition where the “violation concerns a nonresidential building or structure,” such as where CMP or CMR is installed.¹⁸ In other words, a contractor in Virginia may be required to remove noncompliant cable and replace it with product that meets the NEC standards.

Liability for Damages in Civil Lawsuits

Beyond liability for state building code violations, contractors may face civil liability for damages caused by noncompliant cable. Based on a review of case law from courts across the country, contractors may be held liable for damages stemming from negligence, fraud, and breach of warranty.

Negligence

Claimants may assert negligence claims against contractors that install noncompliant CMR and CMP cable into a building.¹⁹ To establish negligence, a plaintiff must show that the contractor owed a duty to the plaintiff, that the contractor breached that duty, and that plaintiff was damaged as a result.²⁰ To prevail on a negligence claim, a plaintiff must show that it sustained some damage beyond just the installation of noncompliant cable – the cable must proximately cause personal injury or damage to property (other than to the product itself), such as in the event of a fire.²¹

A contractor need not have actual knowledge that cable is noncompliant to be found negligent. Evidence of collective industry knowledge about the dangers and prevalence of noncompliant cable, such as information published by the CCCA,²² may be introduced to show that a contractor breached a duty of care by failing to confirm that the cable complied with the applicable standards.

The duty required to plead negligence is established where there is a law that has been enacted to protect a class of persons, the claimant is a member of that class, and the injury the claimant incurred is the type covered by the statute.²³ This is often referred to as negligence *per*

¹⁸ *Id.*

¹⁹ See, e.g., *Shisler v. Cathedral Props., Inc.*, No. C046819, 2005 WL 2864541, at *8 (Cal. Ct. App. Nov. 2, 2005) (acknowledging that contractors and developers may both be held liable on theories of negligence, among others).

²⁰ See, e.g., *Van Elslander v. Thomas Sebold & Assocs., Inc.*, No. 272396, 2008 WL 5077011, at*8 (Mich. Ct. App. Dec. 2, 2008) (“It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages.”).

²¹ *Kaltman v. All Am. Pest Control, Inc.*, 706 S.E.2d 864, 870 (Va. 2011).

²² CCCA, “Serious Fire Safety Concerns with Many Communications Cables from Offshore Manufacturers . . . and What You Should Know,” available online at <http://www.cccassoc.org/blog/ccca-issues-summary-to-aid-users-and-distributors/>; CCCA BICSI Orlando 2011 Presentation, available online at <http://www.cccassoc.org/pdf/BICSI%20Orlando%202011%20CCCA%20Presentation%20FINAL.pdf>.

²³ See, e.g., *Parker Bldg. Servs. Co., Inc. v. Lightsey*, 925 So. 2d 927, 931 (Ala. 2005); *Wilbur v. Suter*, 730 A.2d 693, 697-98 (Md. Ct. Spec. App. 1999); *Kaltman*, 706 S.E.2d at 872.

se. Some courts have recognized the viability of this theory in cases where a defendant has breached the applicable building code.²⁴ For example, in *Virginia Electric and Power Co. v. Savoy Construction Co.*, after an explosion and fire had occurred, a Virginia court concluded that a contractor's failure to plug and seal cable conduit after cable had been installed violated the NEC, incorporated in the Virginia building code, was negligence *per se*.²⁵ Negligence *per se* establishes a breach of a duty; a plaintiff must still be able to show that the breach caused it damages.²⁶

Fraud

Contractors may also find themselves defending against fraud claims based on the installation of noncompliant cable. A fraud claim typically requires a claimant to demonstrate that a defendant made a false representation of fact to induce the claimant to act and that the defendant *knew* that the representation was false.²⁷ For instance, if a contractor had actual knowledge that it installed noncompliant CMR or CMP cable but represented to a customer that the cable complied with the NEC or applicable building code, that could be enough to show fraud.²⁸ Fraud liability carries with it the possibility of additional damages in many jurisdictions, including punitive damages and plaintiff's attorneys' fees and costs.²⁹

Breach of Contract and Warranty

Breach of contract or breach of warranty claims may be asserted against contractors that install noncompliant cable as well. Warranties may either be express (where a contractor makes specific promises about the quality of its work) or implied (where a warranty automatically attaches to an agreement between parties, such as an implied warranty that work will be completed in a workmanlike manner, depending on the law of the jurisdiction).³⁰ At least one

²⁴ See *Brown v. S. Broward Hosp. Dist.*, 402 So. 2d 58, 60 (Fla. Dist. Ct. App. 1981); *Kaltman*, 706 S.E.2d at 873 (citing *Va. Elec. & Power Co. v. Savoy*, 294 S.E.2d 811, 817 (Va. 1982)). But see *Parker Bldg. Servs. Co.*, 925 So. 2d at 931-33 (concluding that a specific provision of the building code was only designed to protect the general public and was thus not enforceable as negligence *per se*).

²⁵ 294 S.E.2d 811, 817 (Va. 1982).

²⁶ See *Parker Bldg. Servs. Co.*, 925 So. 2d at 931; *Lynn v. Overlook Dev.*, 403 S.E.2d 469, 473 (N.C. 1991) (recognizing that negligence *per se* "is actionable only if it is the proximate cause of injury to the plaintiff").

²⁷ *Zedlitz*, 2011 WL 1469769, at *5.

²⁸ See *Ehresmann v. Muth*, 757 N.W.2d 402, 406 (S.D. 2008) (concluding that a contractor's statement that siding was "maintenance free" was an "attempt[] to conceal the siding's defects" sufficient to establish fraud).

²⁹ See *Thorsen v. Durkin Dev.*, 20 A.3d 707, 713-14 (Conn. App. 2011).

³⁰ See *Gibbons v. Whalen*, No. 2008-02-133, 2009 WL 3014325, at *2 (Del. Ct. Comm. Pls. Aug. 11, 2009) ("Delaware law recognizes an implied builder's warranty of good quality and workmanship."); *T.R. Bulger, Inc. v. Ind. Ins. Co.*, 901 N.E.2d 1110, 1114-15 (Ind. Ct. App. 2009) ("When the contractor's work is faulty, either express or implied warranties are breached . . ."); *Holly Woods Assoc. of Residence Owners v. Hiller*, 708 S.E.2d 787, 798 (S.C. Ct. App. 2011) (discussing the breach of implied warranty of workmanlike service); *Ehresmann*, 757 N.W.2d at 406 ("Claims of negligent construction and breach of implied warranty exist where a builder-vendor fails to construct in a reasonably good and workmanlike

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court has concluded that every construction contract includes a warranty that the structure will meet building code requirements.³¹

The outcome of breach of contract and warranty cases largely depends on the agreement between the parties.³² For instance, if there is a term in a contract or any other agreement between the parties that a contractor will install a specific type of cable or will install cable that complies with the building code, then the contractor may be liable for damages stemming from breach of contract or breach of warranty. A contractor may seek to limit its exposure by including certain terms in its contracts but will not likely be able to disclaim its duty to comply with state building codes.³³ Therefore, a contractor may be found liable for damages for breach of contract or breach of warranty if it installs noncompliant cable.

Unlike tort claims, such as negligence and fraud, breach of contract and warranty claims do not require a claimant to be independently damaged – all that is needed is evidence that noncompliant cable has been installed that violates the terms of a valid contract or warranty.³⁴ Damages are typically measured by the cost of the repair to the property or the diminution in the property value because of the installation of the noncompliant cable.³⁵

Summary

Contractors may face exposure to legal liability based on the installation of dangerous, noncompliant CMP or CMR cable, whether based on a violation of building codes or a lawsuit stemming from damage caused by the cable. It is therefore important that contractors take action to minimize the risk of liability and harm to others by carefully selecting, purchasing, and installing cable that complies with the NEC standards. Further information on noncompliant cables and best practices for specifying or purchasing compliant CMP or CMR cables is set forth on the CCCA website at <http://cccassoc.org>.

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manner.”); *Elite Door & Trim, Inc. v. Tapia*, No. 05-10-00635-CV, 2011 WL 3570508, at *6 (Tex. Ct. App. Aug. 16, 2011) (setting forth elements for breach of implied service warranty).

³¹ *Bonvillain Builders, LLC v. Gentile*, 29 So. 3d 625, 632 (La. Ct. App. 2009).

³² *See Zedlitz v. Tekzn Home Improvements, LLC*, No. TTDCV106001049S, 2011 WL 1469769, at *2-3 (Ct. Super. Ct. Mar. 28, 2011).

³³ *See Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760-61 (Fla. 5th DCA 2008).

³⁴ *See, e.g., Kaltman*, 706 S.E.2d at 870 (Va. 2011).

³⁵ *See John Thurmond & Assocs., Inc. v. Kennedy*, 668 S.E.2d 666, 668 (Ga. 2008); *see also Louisburg Bldg. & Dev. Co. v. Albright*, 252 P.3d 597, 638-39 (Kan. Ct. App. 2011) (discussing expectation damages, which are “determined by taking the difference in value between the performance contracted for and the defective performance that was given.”).