

CHAPTER FOURTEEN

Who Can Be Liable For Damages?

When you have completed this section you will decide how to report areas inaccessible to your inspection because of a variety of impediments. You will decide when to report areas of the structure made inaccessible by finished walls, ceilings, etc. You will decide how to report findings of several signs of infestation, several areas of damage, and several species of insects thoroughly, accurately, and precisely. You will decide the best method of solving problems or avoiding caused by warranty interpretations. These ideas are in no way legal opinions or advice. You should get legal advice from authorized counsel.

CASE STUDY 1: LOCKED, INACCESSIBLE AREAS

Dave Ball asked Joe Leigh to perform a WDI inspection on his home in Oaklyn. This verbal agreement is a form of contract. When Joe got to the house, Dave's kids were the only ones home. Dave always keeps his basement workshop locked, so Joe wasn't able to inspect it. Joe did not mention this in his report. This omission by Joe Leigh is a violation of the implied contract between Leigh and Ball. Ball contracted for a complete, accurate inspection and report. Joe Leigh describes himself to the public as a professional in his field. Even though no treatment was performed; and no written warranty given, the implication is that the report is thorough and complete, thus Joe Leigh can be required to make any person who experiences a financial or other loss because of the inspection "whole" by performing treatments or reimbursing costs. Since this omission was intentional, it may be recognized as grounds for litigation involving fraud and might be cause for a court to award multiple damages.

Joe Leigh's pest control company can be required to perform under an implied contract even though no written agreement or warranty has been prepared. The NPMA-33 form helps prevent this situation. Joe Leigh should have reported the locked and obstructed areas on this report form. The opportunity for Dave Ball to open those areas and call Joe Leigh to return and perform another inspection is offered on this report form.

Largely, local custom and contract law defines the WDI inspector's relationship with other parties in a real estate transfer. Local custom is a changing factor. It is learned only by experience, working in the field. On the other hand, the law of contracts is more stable and can be learned through study.

Before jumping into an overview of a few interesting sections of contract law, here are a few key terms:

Contract - a legally enforceable agreement to do (or not to do) a certain thing.

Fraud - an act intended to deceive for the purpose of inducing another to give up something of value.

Breach of contract – a failure, without legal excuse, to perform as required by a contract.

Consideration - an act or promise given in exchange for something



Forget everything you have learned about right, wrong, and fairness. When dealing with contract law, the determining factor in decision-making is what the law says, and what laws have been interpreted to mean in the past under similar circumstances. We might live in a system where a wise person acting as judge would settle any disagreement between human beings. This judge would listen to the facts and make decisions based upon the rules of right, wrong, and fairness. This sounds better than our current system, but what do you do if the judge is your opponent's brother? What do you do when your disagreement is with someone who is of a different faith, social order, or country?

Our system of laws has evolved to remove the personalities from decision-making and give some predictability to the settlement of disputes. Businesses could not function if there was no way to predict the outcome of disputes, which arise in everyday living.

The irrationality of the law, and the seemingly senseless interpretations we hear or read about makes excellent conversation over martinis, but if we are running a business, we must learn how the legal system works, and learn how our day to day business operations fit within the system. Contracts are too easily made.



When the seller of a property calls and asks how much we charge to do a "cert" and the clerk says "\$125", when the customer says "OK", a contract now exists that can be enforceable. The telephone conversation will continue to schedule an inspection time and when & where to send a report, clarifying the agreement. We can be forced to perform, and may be liable for losses the voice on the other end of the phone might incur should we fail to perform as agreed.

HOW A CONTRACT IS CREATED

A contract may be either expressed or implied. An expressed contract occurs when the parties to a contract declare their intentions either verbally or in writing. An implied contract is created by neither words nor writing, but rather by actions of the parties indicating that they intend to create a contract. When you order a hamburger at Wendy's you imply you are going to pay when the bill is presented. In order for a contract to exist there must be several things. In order for it to be legally valid, and hence binding and enforceable, the following five requirements must be met:

1. Legally competent Parties
2. Mutual agreement
3. Lawful objective
4. Consideration or cause
5. Contract in writing when required by law

If these conditions are met, any party to the contract may, if the need arises, call upon a court of law to either enforce the contract as written, or award money damages for non-performance. The requirement of mutual agreement (also called mutual consent or mutual assent, or meeting of the minds) means that there must be agreement to the provisions of the contract by the parties involved. The words and acts of the parties, indicating that there is a valid offer and an unqualified acceptance, evidence the existence of mutual agreement. Offer and acceptance requires that one party make an offer to another party. If the offer is acceptable, the one offering must communicate an acceptance to the other party. All these things occurred during the telephone call we discussed earlier which came from a prospective customer.

Mutual agreement requires that there be no fraud, or misrepresentation in the contract if it is to be valid. A fraud is an act intended to deceive for the purpose of inducing another to part with something of value. It can be as blatant as knowingly telling a lie, or making a promise with no intention of performance. For example, you agree to treat a structure to control termites after your inspection shows an active infestation. You intentionally perform no treatment. Your customer can rescind the contract because mutual agreement was lacking. Fraud can also result from failing to disclose important information, thereby inducing someone to accept an offer. For example, the day of your inspection you see termites in a wood fence attached to the house. You know this could present a problem. If you did not make the other parties aware of the problem, this would qualify as fraud, should the parties rely on your report when

negotiating a sale. Innocent misrepresentation differs from fraud (intentional misrepresentation) in that the party providing the wrong information is not doing so to deceive another for the purpose of reaching an agreement. To illustrate, suppose that you perform your inspection in April. At the time of your visit, there were no visible signs of wood destroying insects. The day after your inspection a swarm of termites emanates from an area that was inaccessible to you while you were inspecting. Although no dishonesty is involved, the prospective buyer still has the right to rescind the agreement of sale. Because of the financial losses possibly involved in a situation like this, the inspector may be hard pressed to prove innocent misrepresentation. ***Persons holding themselves out to the public as professionals are held to a very high standard of performance.***

If the damages or losses to an innocent party can reasonably be expressed in terms of money, an innocent party can sue for money damages. For example, during your inspection you locate and report termite activity in a structure. You fail to inspect a detached structure on the property. Your report lacks a description of the inspected property specific enough to exclude the detached structure. Some time after settlement, WDI activity and damage is found in the detached structure. You may be responsible to reimburse the buyer for the repair and treatment costs to the detached structure.

As mentioned earlier, we can incur contractual obligations by implication as well as by oral or written contracts. Through this program and others, the NJPMA is constantly working to elevate the status of pest control operators to that of competent professionals in the public's mind. But as professional status is gained, there is an implied obligation to dispense professional-quality service. Thus the individual inspector is not only responsible for acting in accordance with written laws, but also will be held responsible for being competent and knowledgeable. Once recognized as a professional by the public, a pest control operator will not be able to plead ignorance.

CASE STUDY 2: INACCESSIBILITY CAUSED BY STORED ITEMS

Denise Wagner's daughter has enrolled in college this year. Mrs. Wagner needs money for tuition, books, & fees. She is refinancing her house to do this. Sam Palmerton of Palmerton Pest Control performed a careful and thorough WDI inspection on the home in Vineland as part of the refinancing process. Palmerton's report was accurately prepared and promptly presented to the customer. No wood-destroying insects were discovered. After the inspection and report were completed, her daughter moved out. Mrs. Wagner moved some items piled in the basement, which hadn't been touched in years and fixed some lights in the drop ceiling above, right near the furnace.



There she found, live worker termites in the ceiling tiles. Palmerton had lifted and checked behind several ceiling tiles, but this particular area was not checked. The NPMA-33 report form is written to clarify the complex nature of this inspection, and describes the limitations in the inspection process. Palmerton's inspection was made at the request of the mortgage company. The mortgage company wants to protect their investment in this structure. If there proves to be damage which might detract from the value of the property, the mortgage company will surely expect Palmerton to "make them whole", and to perform a treatment for the insects. Without the careful wording of the NPMA-33 report form, courts would find that there exists an implied contract between Palmerton and the mortgage company requires Palmerton to do whatever is necessary to protect the mortgage company's investment. Is Sam really in hot water? How can Sam Palmerton insure this situation does not happen again?

CASE STUDY 3: THE UNINTELLIGIBLE REPORT

Mark Kirk intended to buy a large split-level home in Moonachie. He asked Wonder Pest Control to do a WDI report on the house. Tony Choy, the inspector, along with Mark and Mary Wasco, the current owners, checked the house carefully and thoroughly. He found three types of insect damage: Powder post Beetle, Carpenter Ant, and Termite. This damage was spread throughout the structure in several areas. When Tony prepared his report, the several insects and several areas made preparing the report confusing, so confusing in fact, that one specific area where there was obvious damage was not mentioned on the

report. Mark financed the transaction with an ARM, adjustable rate mortgage, with a five- year balloon. The next year, interest rates fell; Mark was able to refinance at a savings. When the mortgage company's inspector found the additional damage and the mortgage company required the repairs be made, Mark complained to Tony. The implied contract to disclose all problem areas to the customer may be enforceable by the mortgage company should they be able to show the damage has hurt their investment in the house. The NPMA-33 report form consists of several sections, each of which should be completed thoroughly. The inspector should be prepared to use diagrams, attachment letters, entomological information about pests rarely found, and any other document he believes will convey to the buyer the information needed to make an informed decision. The inspector needs to be aware that errors and omissions insurance will not cover court judgments for punitive damages assessed by the judge because of some act found to be fraudulent. These penalties will be the personal responsibility of the inspector. If a claimant can show the inspector had knowledge and did not disclose this to the buyer, the inspector can be liable for pain, suffering (and vengeance). What can Tony Choy do to avoid this problem in the future?

INACCESSIBLE CONSTRUCTION



Gray Pest Control completed a WDI inspection and report at the home of Grace Klift in Washington. The house was built in 1728 and has had several additions and renovations. Pete Carmella, the inspector, found several inaccessible areas. All basement areas were finished. Pete found a termite problem in the structure, suggested a treatment, which was accepted by Mrs. Klift. Gray Pest Control

provided a warranty that offered to retreat the property as needed should there be future problems. Donald Ferrara bought the property, moved in, and began making improvements. In a previously inaccessible area, near the area where Pete had originally located the problem requiring treatment, Ferrara's carpenter found an active termite infestation. The written wording of the NPMA-33 report form constitutes a written contract, which should protect Gray Pest Control from the possibility that an implied contract could be enforced. What wording on the NPMA-33 will protect Pete Carmella and his company, Gray Pest Control?

CASE STUDY 4: PROPERTY PREVIOUSLY TREATED



The letter from the attorney was to the point. Ken Kramer had hired a pest management consultant who had carefully inspected his very large, very old basement home in Mine Hill. The consultant's report described long greasy marks on the ends of the unfinished joists and sill plate in the cellar. The report described many small drill holes in the painted cellar window frames and the base of the cellar door frames. The consultant's report described these as signs of a termite treatment. The report also described damage to the home as structural, extensive, and caused by termites.

Ken had purchased the home seven years previously, and had relied on the inspection report of Ed Wise, of W&W Pest Managers.

Since Ed Wise held himself out as an expert in termite inspections, he asserts he is knowledgeable about termite treatment procedures, even those used in times past. Ed Wise should be aware of any treatment techniques used in his area over the years. Federal standards are that he should report these signs to the buyer of the property.

Ed Wise, co- owner of W&W Pest Managers looked again at the WDIR he had prepared on the Kramer house. The section on treatment signs was blank. Both Ed and his partner Marty Weist have been to the Kramer house several times recently inspecting previously hidden termite damage. Kramer was asking the realtor, the previous owner, and W&W Pest Control for the consultant's fee, the cost of opening up more walls in his house, and possible needed repairs.

What more do you need to know to offer Ed help?

What should Ed do next?

What should Ed have done before writing his WDIR?

CASE STUDY 5: WARRANTY PROBLEMS



Twenty three years ago, Black's Pest Control had performed a WDI inspection on a newly built split level home in Livingston and had provided a termite warranty which guaranteed to pay for damage repairs should there be any caused by termites. The structure had changed owners twice, but each owner had continued to pay the termite renewals on the Black's warranty.

Black's had performed several re-inspections over the years, no problems were ever located. When Mike Robb got ready to buy the house, he called Marvin Koehler, the current owner of Black's Pest Control to do the WDI report. Koehler completed the inspection thoroughly and completely and submitted an accurate report. Subsequently, Mike Robb did not pay the termite warranty renewal fee when it was due. Eighteen months after moving in, Mr. Robb investigated a weak board beside the hearth near the dining room fireplace. When he found damage, he called Carl Schearer, a friend in the pest control business. Schearer found no active workers, but extensive termite damage.

The inspector needs to be fully aware of the warranty policies of his company over the years the company has been in business. As our industry has matured, and as our insurance suppliers have evolved, warranty policies have changed. Properties which have coverage from warranties which were written twenty or forty years ago may need WDI reports prepared on them which take these changes into account. Can Black's be required to perform under his lapsed warranty? Under what circumstances might he be required to perform? What circumstances might protect him from a damage claim?

QUESTIONS FOR GENERAL CLASS DISCUSSION:

1. Several factors are involved when a new buyer, or newly refinanced property owner makes a claim for damages after a WDIR is issued. List some of them and explain their importance.
2. Risk management is the duty of all company managers. How can an effective manager control the risks his company accepts when it issues WDIR's?