

Potential Liability for Contractors Installing or Manufacturers Marketing Falsely Labeled Copper Clad Aluminum Cable

The Communications Cable and Connectivity Association (“CCCA”) has discovered that certain four pair unshielded twisted pair communications cables made with copper clad aluminum conductors (“4 pr. UTP copper clad aluminum cable”) are being improperly labeled and marketed.¹ These cables are being sold as “category” cable and fire safety-rated but, by definition, do not meet the codes and standards required for those labels. As a result, contractors who install or manufacturers that improperly label and sell 4 pr. UTP copper clad aluminum cable, in certain instances, may be exposed to liability. A background and overview of some of those potential liabilities are set forth below.²

Background

Both safety and electrical transmission performance standards have been developed for communications cables. Those standards dictate, among other things, how those cables are to be constructed, labeled, and marketed.

In order for communications cable to be sold as fire safety-rated and be labeled communications plenum cable (“CMP”), communications riser cable (“CMR”), or communications general purpose (“CM”), it must comply with the National Electrical Code (“NEC”) and be listed by a recognized independent testing laboratory. The National Fire Protection Association (“NFPA”) develops the communications cable fire safety standards contained in the NEC, which has been adopted by and codified as mandatory by many local and state jurisdictions in the U.S.³

The NEC mandates that “[c]onductors in communications cables, other than in a coaxial cable, shall be copper.”⁴ Authorized independent testing agency, UL, similarly requires that conductors in communications cable “be solid or stranded, annealed, bare or metal-coated copper.”⁵ Cable with a copper clad aluminum conductor by definition does not meet the NEC standard, cannot be listed, and does not qualify as CMP, CMR, or CM fire safety-rated cable.

To be designated as “category” cable, communications cable must meet the Telecommunications Industry Association (“TIA”) electrical performance standards. TIA

¹ This paper does not apply to copper clad aluminum cable designs that are properly marked and sold for use in the appropriate applications; this paper only addresses 4 pr. UTP copper clad aluminum cables that are improperly labeled and sold as “category” and fire safety-rated.

² This paper explores selected legal concepts and does not include a discussion of all potential liability for entities that sell or install improperly labeled 4 pr. UTP copper clad aluminum cable.

³ See National Electrical Manufacturers Association website, NEC Adoption Chart, at <http://www.nema.org/Technical/FieldReps/Pages/National-Electrical-Code.aspx>.

⁴ NEC 800.179.

⁵ UL 444, Standard for Communications Cable (Section 5.1.1).

requires that “*solid conductors shall consist of commercially pure, annealed, bare copper.*”⁶ 4 pr. UTP copper clad aluminum cable does not conform to that norm and therefore may not be properly marketed as category cable.

While some cables may be clearly identified as having copper clad aluminum conductors, the potential legal liability arises when the cable is falsely labeled as category and fire safety-rated. Those improper marks may mislead customers by representing that these cables comply with TIA’s performance standards and NEC’s fire safety standards (as well as building codes that mandate compliance to the NEC) when, in fact, they do not.

Contractors who install 4 pr. UTP copper clad aluminum cable may be liable for violations of applicable building codes or for breach of contract or warranty. Manufacturers that improperly market and sell 4 pr. UTP copper clad aluminum cable may also face liability for such false and potentially misleading advertising. More information about these potential exposures is provided herein.

At the request of CCCA, Crowell & Moring LLP has prepared this paper to provide an overview of the potential liability arising from the marketing and installation of improperly labeled 4 pr. UTP copper clad aluminum cable. 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.

Potential Liability for Contractors Installing 4 pr. UTP Copper Clad Aluminum Cable

1. Building Code Violations

Contractors who install 4 pr. UTP copper clad aluminum cable in buildings located in jurisdictions that have adopted the NEC may face liability for violating the building codes in those places. The laws of the three states examined here – Connecticut, Florida, and Virginia – illustrate how different jurisdictions address those violations. While the specific liability in each of these states is different, it demonstrates that serious consequences may result from installing 4 pr. UTP copper clad aluminum cable that does not comply with the NEC.

Connecticut, Florida, and Virginia, like many other jurisdictions, have adopted the NEC as applicable and enforceable building codes.⁷ In two of these three states, violations of the

⁶ TIA 586C.2 (referencing ANSI/ICEA S-90-661-2006 and ANSI/ICEA-S-1020732).

⁷ See Fla. Stat. Ann. § 553.73(7)(a); Connecticut Department of Public Safety, Office of State Building Inspector website, referencing the National Electrical Code, at <http://www.ct.gov/dcs/cwp/view.asp?a=4218&Q=294180&dcsNavPage=%7C>; Virginia Building Code

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building codes are criminal offenses. In Connecticut, the criminal penalties may be fines between \$200 and \$1,000 and/or a maximum six months imprisonment.⁸ A violation of the Virginia building code is a misdemeanor punishable by a maximum \$2,500 fine.⁹ After a conviction in Virginia, each day that the violation continues is considered a separate crime, punishable by a maximum \$2,500 fine per day.¹⁰ Local authorities in Virginia are also authorized to issue fines for unabated violations of the building code, once the offending party has received notice of a building code violation.¹¹

Some localities may enforce the building codes by ordering compliance to the codes. In Florida, the government may seek to stop the “sale, delivery, use, occupancy, erection, alteration, or installation of any building” that does not comply with the Florida Building Code.¹² Anyone who violates the Virginia Uniform Statewide Building Code may be required to fix the noncompliant condition where the “violation concerns a nonresidential building or structure,” such as where CMP, CMR, or CM is installed.¹³ In other words, a contractor in Virginia may be required to remove installed cable and replace it with product that meets the NEC standards.

A private right of action for building code violations is available in Florida, authorizing parties that have been damaged by a Florida Building Code violation to sue “the person or party that committed the violation.”¹⁴ The statute, however, 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.”¹⁵

Because the NEC mandates that only communications cable with a copper conductor may be installed in structures, contractors should consider paying close attention to the type of communications cables they select for installation. 4 pr. UTP communications cable labeled as copper clad aluminum does not, by definition, meet the most current NEC standards, which contractors should contemplate in evaluating their risk of liability.

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

⁸ Conn. Gen. Stat. Ann. § 29-254a.

⁹ Va. Code Ann. § 36-106(A).

¹⁰ *Id.* 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. *Id.*

¹¹ Va. Code Ann. § 36-106(C).

¹² Fla. Stat. Ann. § 553.83.

¹³ Va. Code Ann. § 36-106(C).

¹⁴ Fla. Stat. Ann. § 553.84.

¹⁵ *Id.*

2. Breach of Contract and Warranty

Contractors may be liable for breach of contract or warranty based on the installation of 4 pr. UTP copper clad aluminum cable that does not comply with applicable building codes as well. This could arise when a building cabling contract specifies the type of communications cable to be installed or states that the work will comply with the building code or all applicable laws (which would include the NEC in many jurisdictions). Noncompliant 4 pr. UTP copper clad aluminum cable does not meet NEC standards and thus installation of that cable could be considered a breach of those terms in a contract.

A contractor may also be liable for breach of implied warranty for installing 4 pr. UTP copper clad aluminum cable, such as an implied warranty that services will be completed in a workmanlike manner,¹⁶ or that work will comply with the applicable building code.¹⁷ Applicable implied warranties may vary depending on the law of a specific jurisdiction. While contractors may disclaim some implied warranties, disclaimers typically cannot limit a contractor's duty to comply with the law.¹⁸

Expectation damages are generally recoverable for breach of contract or warranty, typically measured by the cost of the repair to the property or the diminution in the property value because of the installation of the 4 pr. UTP copper clad aluminum cable,¹⁹ though the parties may seek to limit damages in the event of a breach through the terms of the contract.

Contractors should be familiar with the terms of their contracts with customers as well as any implied warranties that may attach to work done in a particular jurisdiction in order to understand and evaluate potential liability for installing 4 pr. UTP copper clad aluminum cable that does not meet NEC standards.

Potential Liability for Manufacturers Marketing Falsely Labeled Cable

In addition, manufacturers that improperly label and sell 4 pr. UTP copper clad aluminum cable as category or fire safety-rated may face legal action based on federal false advertising law, state consumer protection statutes, and common law misrepresentation.²⁰

¹⁶ See *Gibbons v. Whalen*, No. 2008-02-133, 2009 WL 3014325, at *2 (Del. Ct. Comm. Pls. Aug. 11, 2009); *T.R. Bulger, Inc. v. Ind. Ins. Co.*, 901 N.E.2d 1110, 1114-15 (Ind. Ct. App. 2009); *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 v. Muth*, 757 N.W.2d 402, 406 (S.D. 2008); *Elite Door & Trim, Inc. v. Tapia*, 355 S.W.3d 757, 766 (Tex. Ct. App. 2011).

¹⁷ *Bonvillain Builders, LLC v. Gentile*, 29 So. 3d 625, 632 (La. Ct. App. 2009).

¹⁸ See, e.g., *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760-61 (Fla. 5th DCA 2008).

¹⁹ 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).

²⁰ Note that the cable product at issue has also been *properly* labeled as copper clad aluminum – at the same time as being *improperly* labeled as category and CMP, CMR, or CM rated cable. Customers,

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1. Lanham Act – False Advertising

Labeling and marketing 4 pr. UTP copper clad aluminum cable as category or CMP, CMR, or CM may violate the Lanham Act, a federal statute.²¹ That law prohibits false statements or representations in commercial promotions or advertising that are likely to deceive consumers and cause injury to a competitor.²²

Only competitors are authorized to bring Lanham Act claims; courts have held that consumers have no standing to bring this type of claim in court.²³ Courts, however, do not agree on whether a plaintiff must be in direct competition or only in competition with the defendant generally to supply the same product or service to bring a Lanham Act claim.²⁴ A potential claimant should understand the law of the jurisdiction in which it seeks to bring a claim to determine whether it can fulfill competition requirements.

Remedies available to plaintiffs under the Lanham Act include injunctive relief, damages (which may include recovery of the defendant's profits), corrective advertising, and attorneys' fees.²⁵

2. State Consumer Protection Acts

Manufacturers that make false or misleading statements in labeling or advertising and in the sale of 4 pr. UTP copper clad aluminum cable may be liable under state legislation that outlaws unfair and deceptive acts or practices and are similar to Section 5 of the Federal Trade Commission Act. Under these laws, anyone may bring suit, including consumers, competitors (even if not in direct competition), and the state itself.

Here, the laws in two different states are discussed to illustrate the differences between these types of claims. The constant between these and other states is that manufacturers that

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including contractors, may be able to determine whether cable complies with the NEC and other standards by carefully reviewing the label for such inconsistencies.

²¹ 15 U.S.C. § 1125 (a).

²² *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 120 (4th Cir. 2011) (citing 15 U.S.C. § 1125 (a)(1)(B)).

²³ See, e.g., *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001); *Natural Answers, Inc. v. SmithKline Beecham Corp.*, 529 F.3d 1325, 1330 (11th Cir. 2008).

²⁴ Compare *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561 (7th Cir. 1993); *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995); *Sports Unlimited, Inc. v. Lankford Enter., Inc.*, 275 F.3d 996, 1004-05 (10th Cir. 2002) with *Famous Horse Inc. v. 5th Ave. Photo, Inc.*, 624 F.3d 106, 121 (2d Cir. 2010) (dissenting judge applying the standard for standing used by the Third Circuit in *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998) and first articulated by *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)).

²⁵ See 15 U.S.C. §§ 1116 (injunctive relief); 1117 (monetary relief).

improperly label and market 4 pr. UTP copper clad aluminum cable risk being sued under those statutes.

Florida

The Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) protects consumers from “unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.”²⁶ Since Florida’s statute defines a consumer to be an individual as well as a business or commercial entity, consumers, contractors, and others may bring a claim.²⁷ A deceptive act is “a material representation, omission or practice that is likely to mislead consumers acting reasonably under the circumstances.”²⁸

Significantly, in order for a plaintiff to bring a claim, it must prove actual losses stemming from the false advertisement.²⁹ Available remedies include injunctive relief, actual damages, attorneys’ fees, and court costs.³⁰ If there is a willful violation, where the “person know[s] or should have known that his or her conduct was unfair or deceptive,” then a maximum \$10,000 civil penalty per violation may be imposed.³¹

Florida’s Attorney General may bring an enforcement action against a contractor who improperly labels and sells 4 pr. UTP copper clad aluminum cable to consumers.³² The state may recover the same remedies as a private plaintiff in an enforcement action.

Illinois

Illinois has enacted two statutes that prohibit unfair or deceptive advertising.

The Illinois Uniform Deceptive Trade Practices Act (UDTPA) provides recourse where one competitor may be harmed by the unfair trade practices of another. A deceptive practice is one that causes confusion or misunderstanding as to the certification of goods or represents that goods have approval they do not have.³³ A plaintiff need not prove actual confusion or misunderstanding.³⁴ If the plaintiff is likely to be damaged by the deceptive act, injunctive relief may be granted, and proof of monetary damage or loss of profits is not required.³⁵

The Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) prohibits similar violations as UDTPA but allows for the state and private consumers to bring claims. A

²⁶ *Schauer v. Gen. Motors Acceptance Corp.*, 819 So. 2d 809, 812 (Fla. 4th DCA 2002) (quoting Fla. Stat. § 501.202(2)).

²⁷ Fla. Stat. § 501.203.

²⁸ *See e.g., F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir.1994).

²⁹ *Macias v. HBC of Fla.*, 694 So. 2d 88, 90 (Fla. 3d DCA 1997).

³⁰ Fla. Stat. §§ 501.211(1), 501.211(2).

³¹ Fla. Stat. § 501.2075.

³² Fla. Stat. §§501.205 - 501.2101

³³ Illinois Uniform Deceptive Trade Practices Act, Sec. 2, s815 ILCS 510/2(a)(2),(5).

³⁴ 815 ILCS 510/2(b).

³⁵ 815 ILCS 510/3.

person that makes a false advertisement in Illinois can be sued by consumers and may be investigated by the Illinois Attorney General under the ICFA.³⁶ To prevail on this claim, a consumer must establish that the defendant made a false advertisement, the consumer was deceived or misled by the misinformation, and he sustained actual damages.³⁷ Punitive damages and attorneys' fees and costs may be recovered by the prevailing party in a ICFA action.³⁸

The Illinois Attorney General may order an investigation of any alleged violations of the ICFA, conduct discovery, hold hearings, and issue cease and desist orders.³⁹ The Attorney General may further seek temporary and permanent injunctive relief, revocations of licenses, dissolution or suspension of corporations, restitution, civil penalties (maximum \$50,000 per violation), and in some cases obtain punitive damages for outrageous misconduct.⁴⁰

3. Misrepresentation

Manufacturers that improperly label and market 4 pr. UTP copper clad aluminum cable may further be held liable for negligent or intentional misrepresentation. These claims require a false statement of fact made by the defendant, the plaintiff's reliance on that false statement, and resulting damages to the plaintiff.⁴¹ Reliance on the false statement must be reasonable or justifiable.⁴² Reliance has been found to be unreasonable where a plaintiff could have known a statement was false based on other available information.⁴³

Negligent misrepresentation additionally requires a showing that the person making the statement did not exercise reasonable care in obtaining the truth of the matter.⁴⁴ Some jurisdictions also require that there be some relationship between the parties⁴⁵ or that the

³⁶ See 815 ILCS 505/10(a)(a); 815 ILCS 505/1(e); 815 ILCS 505/3-6.

³⁷ *Tandy v. Marti*, 213 F. Supp. 2d 935, 937 (S.D. Ill. 2002).

³⁸ 815 ILCS 505/10a. See, e.g., *S. Indus., Inc. v. Diamond Multimedia Sys., Inc.*, 17 F. Supp. 2d 775, 777 (N.D. Ill. 1998).

³⁹ See 815 ILCS 505/3-6.

⁴⁰ 815 ILCS 505/7(a)-(c); *Martin v. Heinold Commodities*, 163 Ill. 2d 33 (Ill. 1994); *Malooley v. Alice*, 251 Ill. App. 3d 51, 57 (Ill. App. Ct. 1993).

⁴¹ See *Desrosiers v. Diageo N. Am., Inc.*, 137 Conn. App. 446, 457 (Conn. App. 2012) (quoting *Rafalko v. University of New Haven*, 129 Conn. App. 44, 52, 19 A.3d 215 (2011)); *Blumstein v. Sports Immortals, Inc.*, 67 So. 3d 437, 440 (Fla. 4th DCA 2011); *Jane Doe-3 v. McLean Cnty. Unit Distr. No. 5 Bd. of Dirs.*, Nos. 112479, 112501, 2012 WL 3222632, at *5 (Ill. Aug. 9, 2012); *Fentress Families Trust v. Va. Elec. & Power Co.*, Nos. CL09-710, CL09-1914, 2010 WL 7765113, at *11 (Va. Cir. Ct. July 29, 2010).

⁴² *Id.*

⁴³ *Gomez-Jimenez v. N.Y. Law School*, 943 N.Y.S.2d 834, 854 (N.Y. Sup. Ct. 2012) (dismissing negligent misrepresentation claims of law school graduates suing law school based on alleged misrepresentation of employment statistics, because "plaintiffs cannot have reasonably relied upon the statements alleged to be misrepresentation here, especially given the other information readily available to them.").

⁴⁴ *Id.*

⁴⁵ See *Blumstein*, 67 So. 3d at 440.

statement be made in the course of the declarant's business or profession.⁴⁶ A plaintiff is entitled to recover damages caused by the reliance on the misrepresentation.⁴⁷

For intentional or fraudulent misrepresentation, the declarant must actually know the statement is false and intend to mislead in making the statement.⁴⁸ In many jurisdictions, fraud is subjected to a higher pleading standard and carries with it the possibility of additional recovery, including punitive damages and plaintiff's attorneys' fees and costs.⁴⁹

Courts have recognized that negligent and fraudulent misrepresentation may be asserted against those responsible for false statements made in marketing.⁵⁰ Whether a misrepresentation about 4 pr. UTP copper clad aluminum cable is fraudulent or negligent depends on the defendant's knowledge of falsity of those statements, but both may be actionable.

Further, a plaintiff must show that it has reasonably relied on the inaccurate labeling in purchasing the cable to prevail on a misrepresentation claim. In the case of 4 pr. UTP copper clad aluminum cable, it may be difficult to show reasonable reliance where a product is clearly marked as *both* copper clad aluminum *and* category and fire-safety rated, since, by definition, the cable cannot be both. These issues should be considered in evaluating the viability of a misrepresentation claim.

Summary

Manufacturers marketing and selling falsely labeled 4 pr. UTP copper clad aluminum cable may be liable for misrepresenting the cable as category and fire safety-rated (CMP, CMR or CM). Contractors installing 4 pr. UTP copper clad aluminum cable may also be at risk of liability for failing to comply with the NEC or for breach of contract and warranties. Paying careful attention to product labels and the cable itself, particularly when cable is labeled as both copper clad aluminum communications cable and category or fire safety-rated, should enable contractors and others to minimize their risk of liability. For further information about how to identify, spot and avoid copper clad aluminum communications cable visit the CCA website at <http://ccassoc.org>.

⁴⁶ See *Desrosiers*, 2012 WL 3193540, at *5; *Blumstein*, 67 So. 3d at 440;

⁴⁷ See *Moskow v. K. Hovnanian at Jackson, LLC*, No. L-256-11, 2012 WL 3140241, at *10 (N.J. Super. Ct. Aug. 3, 2012); *Zaire v. Roshan-Far*, No. M2011-00012, 2012 WL 1965606, at *5 (Tenn. Ct. App. May 31, 2012).

⁴⁸ See *Powers v. Prudential Realty*, No. CV116011043, 2012 WL 3104599, at *2 (Conn. Super. July 5, 2012); *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So. 3d 306, 310 (Fla. 1st DCA 2011); *Jane Doe-3 v. McLean Cnty. Unit Distr. No. 5 Bd. of Dirs.*, Nos. 112479, 112501, 2012 WL 3222632, at *5 (Ill. Aug. 9, 2012); *Cohn v. Knowledge Connections, Inc.*, 585 S.E.2d 578, 581 (Va. 2003).

⁴⁹ See *Thorsen v. Durkin Dev.*, 20 A.3d 707, 713-14 (Conn. App. 2011).

⁵⁰ See *Merck & Co., Inc. v. Ratliff*, No. 2011-CA0234, 2012 WL 413522, at *7 (Ky. Ct. App. Feb. 10, 2012); *GFS Trust v. Bristol Compressors Int'l*, No. 12-134-BLS1, 2012 WL 3205613, at *2 (Mass. May 24, 2012).