

Strategies for Dealing with the Salt Shortage

By Phil Harwood, Esq.

Limited availability of salt has many contractors wondering what to tell their customers and how to better protect themselves from liability. In Michigan, the salt shortage is especially concerning from a liability perspective due to the recently overturned “open and obvious” doctrine. This article provides several strategies to consider.

Communication

Contractors are encouraged to communicate with their customers with well-drafted messages that keep their customers informed and educated. If any of these messages involves a reference to a contract, it would be wise to obtain legal advice before sending the message.

All communications should be factual. Contractors passing along information they’ve heard from unvetted sources do so at their own peril. Messages that concern the contractor’s own operation, salt supply, salt availability are best. When providing information from other sources, provide a link to the source document or website.

Customer communication is especially important when altering operational norms. For example, if a contractor always applies salt to an entire parking lot and all sidewalks, the customer should be proactively informed about a change to only salting part of the parking lot and only some of the sidewalks. These communications should not only explain the operational modification but the reason behind it.

Customers that are left in the dark are more likely to become upset and seek contractual remedies.

Contract Language

Contractors are encouraged to review the contract signed by them and the customer. In many cases, the contract that was signed was modified from its original form. Contractors should not assume that their customer signed an unmodified copy of their template. Also, many contractors sign their customer’s contract. Either way, it’s important to review the contract that was actually executed by both parties.

If the contract contains language that addresses a salt shortage, the contract language must be adhered to unless the customer agrees to not enforce the contract in this situation. This is where relationships, good messaging with accurate facts, and an appeal to reasonableness comes into play.

If the contract does not contain language that addresses a salt shortage, contractors would be wise to flag this as an opportunity for next year. In fact, we recommend that contracts be

reviewed at the end of each season for modifications. A well-drafted provision will give the contractor the ability to limit applications, apply alternative materials, and increase prices. Salt shortages don't occur every year but they do occur often enough that they should be addressed in contracts.

In addition, if the contract is silent regarding a salt shortage, other contract provisions may be helpful where customers are seeking to enforce the contract. Look for a clause that refers to an "Act of God" or "Force Majeure." These are common contract provisions that excuse performance in unanticipated or emergency circumstances. This provision may be a contractor's next best argument. Again, relationships matter. A reasonable customer may not seek to enforce the contract to begin with.

Another card to play when a breach of contract dispute arises is for the contractor to claim unconscionability. This is a defense where the contractor is arguing that it is unreasonable for the contract to be enforced. The contractor should have documentation to show that they acted reasonably in light of all facts and circumstances.

Ideally, the contractor's contract review serves as a reminder of what the contract actually says so that the contractor is in a better position to communicate with its customer. If the customer mentions the contract, the contractor will be able to have an informed conversation about it. As stated above, a reasonable customer may not seek to enforce the contract under the circumstances.

A licensed and qualified attorney may be engaged to review and counsel a contractor about their risk factors, degree of exposure, and steps to take.

Reasonable Care

Contractors and their customers both have an obligation to act with reasonable care under the circumstances. The standard of care required by the law varies by state and varies by classification of the person injured. The standard of care owed to a trespasser is generally less than that owed to a licensee or invitee.

Again, contractors are wise to document everything. If municipal roads are not clear and unsalted, there's an argument to be made that it is unreasonable to expect a private contractor to be held to a higher standard. Documentation is required, however, to show that this condition existed at the time.

One reasonable strategy is to ration salt usage by limiting the application areas. Many contractors have, as standard practice, identified priority areas on each of the properties they service. These priority areas are often referred to as "A" areas, while other non-priority areas are "B" areas. Some properties may have "C" areas or use some other labeling. The point is that this practice allows contractors to communicate more clearly with customers when discussing limiting service or applying materials only to priority areas. If the priority areas were agreed to last summer, that's a better situation than trying to clarify them during a salt shortage.

Another strategy is to ration salt usage for all applications. In a normal winter with no salt shortage, it's common to over-apply salt. We see this frequently across the industry. Salt is a relatively inexpensive commodity and many applicators apply salt liberally. However, during a salt shortage, it is reasonable to reduce application rates to allow supplies to last longer. This reduction may be less than what is typically required.

Contractors who have incorporated the use of brine into their operations are in better position than those who have not because an application of salt brine uses far less salt than an application of dry rock salt. Historically, salt shortages have triggered a massive shift in our industry toward investments in liquids. This year's salt shortage will likely result in another large step toward industry adoption.

The use of materials other than salt is another option where alternative materials are available. Municipalities often use sand to provide traction when temperatures are extremely low and to reduce reliance on salt. On private properties, sand is a nuisance, it must be cleaned up in the spring, and may clog storm water systems. As stated above, customer communication is critical when applying material that the customer is not expecting. And contractual flexibility is an industry best practice.

Know the Law

Premise liability laws vary by state. In Michigan, contractors for many years enjoyed the protection of what is commonly referred to as the "open and obvious" hazard doctrine. This 22-year precedent was overturned by the Michigan Supreme Court a couple of years ago.

The prior precedent held that a property owner is under no duty to protect an "invitee from an unreasonable risk of harm caused by a dangerous condition on the land," *if the condition is open and obvious*. This precedent meant that lawsuits were not likely to make it into court since the first element of a negligence claim (duty) was not breached. However, this is no longer the law of the land in Michigan.

In its decision to overturn the long-standing precedent, the court held that land possessors continue to have a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land, *even if the condition is open and obvious*.

The open and obvious nature of a condition is now relevant to the defendant's breach and the plaintiff's comparative fault, not to the land possessor's duty. In other words, the issue of whether the condition is an open and obvious hazard is now one for the **jury**, not the judge, to decide. The jury must decide whether the dangers known to the invitee or are so obvious that the invitee might reasonably be expected to discover them without warning.

Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual

inspection. The test is an objective one, requiring the jury to consider whether genuine issues of material fact exist as to whether a reasonable person would foresee the “particular risk at issue.”

The good news is that the abundance of previous case law that has protected snow plow contractors still exists but these persuasive cases will be argued during a trial, not used to keep a case from going to trial.

In Summary

Contractors facing salt shortages are encouraged to stay in close communication with their customers. It's wise to know what the contract provisions are but then to seek reasonable agreement with customers to avoid contractual disputes. Contractors are encouraged to act reasonably under the circumstances and to document everything. It's also wise to know the applicable law and to understand your legal exposure.

Disclaimer

This article provides general information. It is not legal advice. Contractors are encouraged to seek counsel from a licensed and qualified attorney who has been retained by you to protect your interests.

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