

Our Legal Reality



Complacency with Respect to Quality Adds to Risk by Kent J. Pagel

At a risk management seminar hosted earlier this year by the California Engineered Components Association (CALESCA), one attendee asked whether implementing the various risk management and liability avoidance techniques that I was discussing “mattered all that much.” In other words, is it possible to end further instances where his builder customers would include his company in their construction defect lawsuits without apparent regard to whether his company was responsible in some specific way (through cross complaints, a term which is easily understood by fabricators in the West)? Like so many others, this component manufacturer was quite frustrated and in search of a “silver bullet” to enable him to navigate his business during a time of seemingly exponential growth in construction defect litigation.

Until builders and contractors realize the one way they can effectively cut off the risk and expense of construction defect litigation is to improve the quality of what they build and sell, they will continue to find ways to slough off the liabilities they face to their subcontractors and suppliers. C-Risk, Inc., a risk management consulting firm, reports that 95 percent of the construction defect claims filed against builders relate to issues of workmanship and not products or materials. Yet now more than ever, builders faced with a construction defect lawsuit will join or add to the lawsuits filed against them as many of their suppliers as possible, including component manufacturers.

So where does this leave the component manufacturer? For now, it appears that for many it will be common for them to be added to the construction defect lawsuits filed against their builder customers. Thus, it has become more important than ever for the component manufacturer to be vigilant in the area of risk management and liability avoidance. Vigilance must be exercised on many fronts. Customer contracts must be carefully reviewed and negotiated. The component manufacturer must review project specifications and carefully define his scope of work. A truss design submittal and jobsite delivery package must be assembled to accommodate the particular customer.

Of course, many other risk management and liability avoidance techniques are also available. One effective tool that should not be overlooked, and which may very well enable the component manufacturer to successfully extricate itself from a construction defect suit is to demonstrate through a quality control program strict adherence to the quality standard that exists with respect to components.

CASE EXAMPLE

Assume for a moment that you learn one of your builder customers has been sued for construction defects on a condominium project in which you supplied the roof and floor trusses. The damages sought exceed \$1.0 million and include the anticipated costs of repair and diminution of value (e.g. that even after the many defects are repaired, the condominium units will have less value).

Assume further that at the time you contracted with the builder on this project you were vigilant. You effectively limited the indemnification and insurance requirement provisions set out in the builder customer's form customer contract. Rather than agree to broad indemnity and naming the builder customer as an additional insured under a broad form endorsement, you were able to strike out the indemnification provision and provide an additional insured endorsement you know is limited based on recommendations received from your insurance agent and lawyer.

Without having done this, it may not matter whether you can ultimately prove that your trusses were well designed and manufactured. Through a broad indemnity provision and through issuance of the type of additional insured endorsement that builders routinely request, you may end up defending and holding your builder customer harmless for conduct and activities well beyond your scope of work. This may include handling, installation, bracing or product misuse.

Your builder customer, because it has hired smart risk managers and lawyers, nevertheless joins your company to the litigation. Your company is one of twenty other suppliers and subcontractors added to the litigation. The goal of your builder customer at this stage is to involve as many trades and suppliers as possible to see if a pool of settlement funds can be generated to buy off the condominium homeowners who commenced the lawsuit.

Once you have fully digested the pages of complaints and requests that seem to routinely accompany construction defect lawsuits, you will need to develop a strategy. Not only will you need to work on developing a defense to the case, you may also need to juggle the difficult issue of how to continue to sell to the same builder customer who initiated the lawsuit against you. Remember, for the builder, this is business and emotion should not enter into equation.

Should quality become an issue raised in this type of litigation, the component manufacturer will want to be able to demonstrate compliance through some kind of quality control program based on at least the industry quality standard that exists. As we know a wood truss design assumes a truss manufactured to the specified dimensions, with lumber and plates as specified or better, with accurate placement of the plates at all joints, and with acceptable tight-fitting joints. The quality standard specifies the minimum quality criteria that must exist. Quality control, in turn, is the link between a design and performance. With confidence that your trusses meet the quality standard because of an effective quality control program that you have implemented,

you are in a far better position to take an aggressive stance in defending your position in the construction defect lawsuit.

In the absence of a sound quality control program, where quality is a litigated issue, the manufacturer is left with little to respond to criticism and the outcome could very well be ugly. The lawyers opposing you will most certainly use technical consultants to determine what could have been done during the manufacturing process to fabricate a better quality product. These consultants become good at articulating that, for example, "Any Town Truss Company, Inc. FAILED TO ENSURE that its manufactured products were built to the existing quality standard of the industry (as either no quality control program existed or the existing one was deficient) and that such failure proximately caused the damages sustained by the plaintiff homeowners."

In the many articles from this month's issue of SBC Magazine, you cannot help but note some common themes. The new quality standard under ANSI/TPI 1-2002 makes quality control that is carried out in the component manufacturer's plant to be faster, more efficient, more affordable and more comprehensive than ever before. Yet the new standard remains equally reliable. The new quality standard with an in-plant quality control program in place to ensure the standard is being met, enables the component manufacturer to more effectively manage risks and provides a solid tool for the component manufacturer to use in defending itself in lawsuits, including construction defect lawsuits. The more data you have, the easier your defense will be. The In-Plant WTCA QC program used in conjunction with a third party inspection service (that also uses WTCA QC) to monitor the in-plant process is one way to monitor your plant's quality and to collect this important data.

CASE EXAMPLE FOLLOW-UP

The allegations of the condominium homeowners against the builder include, as is typical in these kinds of cases, many broad claims of defective workmanship including grading, foundation, roofs, floors, wall systems, plumbing and electrical. The specific claims that appear to implicate the component manufacturer include references to damaged chords and webs, plates pulling or peeling out, and plates not pressed in completely.

The component manufacturer may choose to place blame on those handling and installing the trusses and may even choose to articulate (perhaps with the assistance of a retained expert witness) that the problems noted do not impair the structural integrity of the trusses.

However, if the allegations of the condominium homeowners included claims of insufficient species or grade of lumber, joints with plates missing and joints where plates were positioned incorrectly, it becomes quite difficult to pass the blame onto others. All of these complaints would most likely be resolved during manufacturing with an effective quality control program and with data to back this up.

Altogether defending this type of claim would be far easier and less risky if at the

same time the component manufacturer is able to identify who may have caused the problems experienced by the condominium homeowners he could also demonstrate diligence with respect to the quality control program he uses. The component manufacturer may then even be able to suggest that the claims asserted against it are frivolous as quality is essentially guaranteed as a result of the quality control program in place and thus no liability seems to exist and the component manufacturer should be dismissed from the litigation. This is when a solid quality control program that provides easily accessible data has more than paid for itself.

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WTCA and STCA have developed fact sheets on mold that have been published as part of WTCA's Truss Technology in Building series and STCA's Steel Components in Construction series. For more information, visit the products sections of the web sites for these organizations: www.woodtruss.com and www.steeltruss.org.

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