

Legal Edge

The Time to Implement Risk Management & Liability Avoidance Procedures Is NOW

by Kent J. Pagel

Implementing solid policy and procedures and following industry best practices are your best defense against claims.

The housing market collapse has many component manufacturers tooling up on training, education and developing new company processes and procedures. I've heard from many of you that you have the time and are anxious to tackle the return of housing better equipped, wiser and battle-ready. One area that manufacturers ought not overlook is improving on their best practices and liability avoidance systems and procedures. We are in the midst of a highly litigious cycle! The downturn has not deterred plaintiff lawyers filing lawsuits against component manufacturers; in fact, they seem to be looking harder at component manufacturers than in past years. We do not expect that fact to change as the housing economy returns.

DO NOT let failed risk management and liability avoidance procedures impact your company's bottom line. Learn from what other manufacturers, both large and small, have failed to do. Defined policies and procedures, if followed, will mean less loss in terms of productivity and settlement payments and legal fees. What do I mean? Here are some examples:

- A component manufacturer who either did not receive or did not retain approved truss design drawings and truss placement diagrams settled an otherwise defensible case for a mid-six figure amount.
- Not having terms either prepared or attached to a signed bid form was the reason a manufacturer was not able to collect a high five figure purchase price from an overzealous customer.
- Signing a one-sided customer subcontract form without review or negotiation was the reason one manufacturer was called on to defend a lawsuit filed by an injured worker against the component manufacturer's customer even though the injured worker did not allege wrongdoing on the part of the manufacturer.
- Not having an adequate jobsite package enabled an injured worker to testify in a truss collapse case that he did not understand the do's and don'ts of truss handling, installation and bracing.
- Not adequately preparing company executives for their depositions prompted a plaintiff's lawyer to target his case against the component manufacturer where otherwise her case was targeted against the framing contractor.
- Not managing the transportation side of the business caused one component manufacturer to pay for hauling done by a third party carrier twice. But no worries, the amount was only in the low five figures.
- Hiring an expert without adequate knowledge of truss design and manufacturing practices forced a component manufacturer to settle at mediation because the manufacturer was not prepared to refute the plaintiff expert's opinions at trial.
- Ignoring an insurance company's reservation of rights letter until after the jury returned an adverse verdict caused one unsuspecting component manufacturer to write a check for a low to middle six figure amount where the manufacturer was led to believe the lawsuit was covered by insurance.

What can you do to avoid being in situations like these? Being proactive NOW is the best advice I can give.

Start with a checklist. If each manufacturer had a crystal ball, risk management

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at a glance

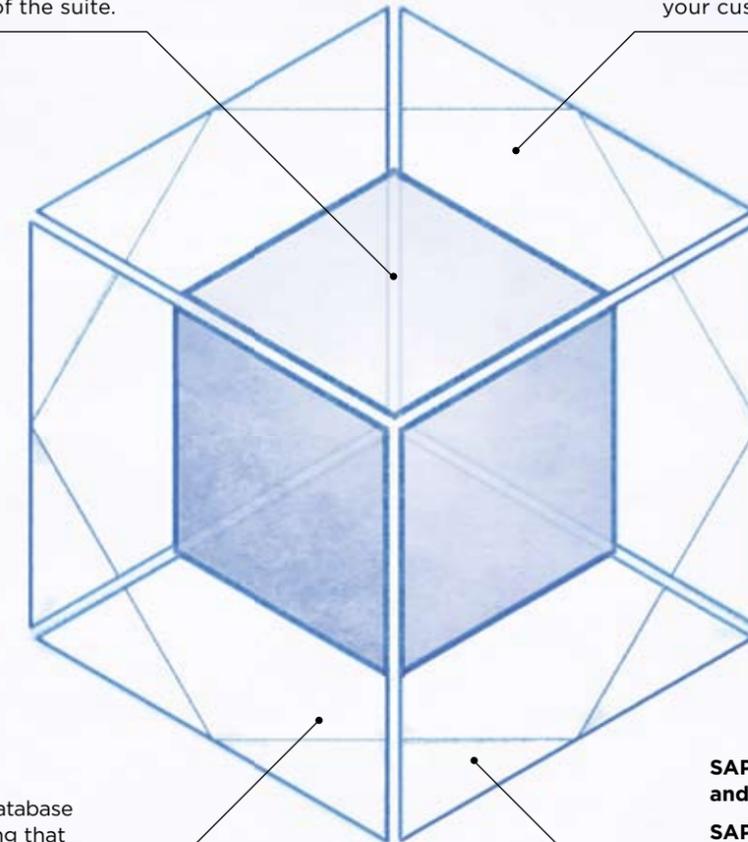
- Use a checklist to make sure you don't skip an important step in your risk management procedures.
- Don't reinvent the wheel—use the SCORE program, BCMC and ORisk as tools to develop best practices around.
- Effectively use attorneys, and be very careful when agreeing to allow an insurance company to defend you.

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and liability avoidance policies and procedures could be created to target those risks, claims and lawsuits that were approaching. UNFORTUNATELY, business will never be that easy! Instead, manufacturers should start with a comprehensive checklist. Whether preparing to fly a plane, conduct an audit or perform an intricate surgical procedure, even the most experienced professionals use checklists to make certain they don't omit an important step or detail. While mistakes in arranging an appropriate risk management and liability avoidance program won't result in disability or death, they can be financially crippling. A checklist will enable your company to identify areas of risk and what policies and procedures ought to be developed first. Ultimately, as time permits, the checklist will serve as a table of contents or index to the many risk management and liability avoidance procedures you have implemented.

Know the likely risks of your operations. Conduct an exhaustive analysis of your company and use legal counsel familiar with industry risks as well as industry best practices. There are many areas you will need to consider. Here are a few examples:

- Who are your customers—developers, large builders, custom builders, lumberyards, or framing subcontractors? This is a big factor in evaluating risk.
- Do you sell primarily residential or commercial? If you sell commercial, does this include townhomes or condominium projects?
- Do your customers ask you to sign their one-sided form customer contracts?
- What is your intended scope of work and is it accurately stated at the time of bid, signing of contract, through shop drawing approval, in your jobsite packages and in the course of litigation?
- How do you bid and what type of bidding documentation is used?
- Have you developed an appropriate set of terms and conditions of sale and do you go through a proper execution process at the time a sale closes?
- What is your policy regarding review and negotiation of customer contract forms?
- Do you install or hire installation subcontractors?
- How do you evaluate customer credit and do you comply with lien and bond notice requirements?
- Do you have a formal design policy?
- What about a manufacturing QC process?
- Are you adequately managing in-plant liabilities?
- How do you manage your transportation risks?
- What past claims and lawsuits have you been involved in and how successfully have these claims and lawsuits been handled?
- What type of insurance coverage is in place—and are you familiar with the endorsements to your policy and what alternative endorsements are available?
- Do you need professional liability insurance protection?
- What about your company's other contracts and leases that it signs?

The list goes on—but hopefully you are catching on.

Catch up—don't reinvent the wheel. Education and training is a step prior to the actual implementation of procedures. Commit to achieving one of the levels of SCORE, which includes ORisk. Consider re-reading past **Legal Edge** articles published in **SBC** (they can be found online at www.sbcmag.info/legal). Attend BCMC educational sessions that involve risk/industry best practices and don't overlook the semi-annual OOM Component Manufacturers Roundtable meetings. But if you are committed to change and improve, education and training is great, but policies and procedures need to be developed that go DEEP into your organization.

Putting it all together. Below is a listing of topics (with comments, of course) of various practices, processes or procedures that you ultimately ought to consider implementing if you truly want to improve risk management and liability avoidance for your company.

- Marketing—Review all company marketing/advertising material (this includes your website) to make sure the promises and representations being made do not go too far. The risk here is creating unnecessary liability.
- Bidding and Terms and Conditions of Sale—This is such an important topic that we devoted 19 modules in ORisk to this topic. Many companies enrolled in ORisk have gone the further step of asking our assistance in developing unique, company-specific bid and credit application forms as well as terms and conditions of sale. In some instances, we have also assisted with creating procedures that relate to preparing, negotiating and executing bids.
- Customer credit review and approval—It is surprising how few companies actually have formal policies in place with regard to credit review of new customers, credit verification of existing customers and collection practices. Guaranty agreements are ignored, joint check agreements are overlooked, and securing project information for lien and bond purposes is deemed unnecessary.
- Letters of Intent—What do you know about letters of intent and how do you instruct your employees when receiving a letter of intent from a prospective customer? Do you assume you have a contract? What if the letter of intent refers to a comprehensive customer contract form you have not received?
- Customer contract form review, negotiation and execution—Start with the **SBC** article "7 Contract Provisions to Never, Ever Overlook" at www.sbcmag.info/legal. Continue with a review of the *Risk Transfer* and *Successfully Negotiating a Customer Contract* tracks in ORisk. Repeat both steps and have your employees

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do the same. Finally sit down with legal counsel and consider how your company will do a better job reviewing and negotiating the one-sided customer contract forms you're asked to sign.

- Customer Contract insurance requirements—Again ORisk can be a fertile area for information—see the *Insurance 101* and *Risk Transfer* tracks. However, as insurance coverages and endorsements change and as customers change the requirements they impose on their suppliers and subcontractors, it is important to keep up with the changes—education and training are crucial.
- Installed Sales—For those manufacturers offering installed sales to their customers, start by reviewing “The Importance of Reviewing Customer Contracts When Selling Turnkey” (www.sbcmag.info/legal). When hiring framing subcontractors to undertake the work you have agreed to perform for your customer, these policies MUST be in place:
 - Due diligence of your subcontractor—are they competent, credit-worthy, insured, previous claims, etc.
 - Adequate subcontract forms
 - Adequate insurance for the subcontractor and any sub-subcontractors
 - Adequate supervision and policies for addressing defective or untimely work
 - A plan exists to manage the performance and claim risk that comes with the business of installed sales.
- Jobsite packages—Step #1: Read the **SBC** article: “He Who Supplies the Jobsite Package ‘Makes the Rules’ in Litigation” published in the June/July 2009 issue. Consider purchasing the SBCA JOBSITE PACKAGES and deliver a package with each product delivery. Make providing and documenting receipt of a jobsite package a policy or procedure within your company that is NEVER overlooked.

- Develop an in-plant best practices policy document that addresses delivery risk to the plant and delivery/transportation risk from the plant.
- QC—Quality Control is a very important risk management and liability avoidance process. Understand why and determine what best practices ought to be implemented by your company to manage the risks of manufacturing claims.
- Accident procedures and policies, including fall down accidents on the jobsite (claims handling in general)—In my opinion, every company ought to have a formal procedure or policy for all claims and occurrences such as truss collapses and jobsite injuries involving your products.
- Notices given to perfect liens and bond claims—Do you know what notices are required and the various deadlines to perfect lien and bond claims in those states in which you conduct business?
- Learn from past mistakes/claims—Develop procedures and policies that target mistakes of the past to make sure they never occur again.

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and lawsuits—These can be complex in nature and often overwhelming in the commitment of time and resources to fully respond. I would bet there is a 99% chance that you have handled or are handling construction defect lawsuits incorrectly!

DO NOT let failed risk management and liability avoidance procedures impact your company's bottom line.... Defined policies and procedures, if followed, will mean less loss in terms of productivity and settlement payments and legal fees.

- Customer close-out requirements, including warranties—Develop a company-wide warranty for products and services you offer and understand the reasons for the language contained in such warranties.
- Care and feeding of your insurance broker and underwriter—If you are not using an insurance broker who is enrolled in the SBCA insurance partner program, at least evaluate the best way to choose a broker and how to court your underwriters.
- What to look for in your insurance policies and why—The *Insurance 101* track in ORisk is where you can start, but you truly need to understand what types of coverages/endorsements you have in comparison to what alternative coverages/endorsements are available.
- Deal with your company's professional/design liability exposure—Each company has varying risks of being viewed as the project design professional. The **SBC** article “Design Liability: Are Component Manufacturers Adequately Protected by Insurance?” published in the June/July 2007 issue is a great place to start to understand these types of risk.
- Investigating and handling construction defect claims
- Responding to a customer complaint of mold—Do you know how first to deal with mold issues in your bid or contract? What about when you are first contacted by a customer complaining of mold—do you know what to do and what not to do?
- Review vendor contract terms and conditions and all contract or lease provisions—You must make sure to properly allocate risks in all types of contracts your company executes.
- Effectively use attorneys, including attorneys assigned to defend you by your insurance companies—If you EVER have your insurance company agree to defend you and yet reserve its rights in some fashion, you are now on a slippery slope unless you have hired your own counsel knowledgeable in your business or the industry to make sure you are not left without coverage at the time the case should settle or in the event of an adverse verdict. **SBC**

Kent Pagel, a Senior Shareholder for Pagel, Davis & Hill, a Professional Corporation, is the author of the Legal Edge series. Kent and his firm have served as national counsel for SBCA since 1994. He can be reached via email at kpagel@pdhlaw.com. Also look for him to answer your questions at the SBCA booth at BCMC 2010 in Charlotte, NC.

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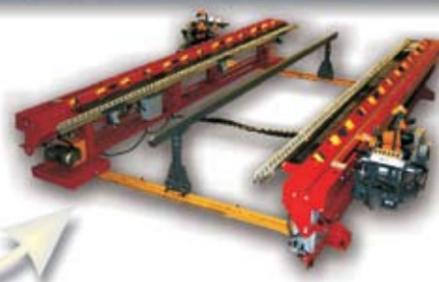
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