

Business Lawyers First

DEFENDING PRODUCT CLAIMS, CONSTRUCTION DEFECT LITIGATION AND TRUSS COLLAPSE AND PRODUCT PERFORMANCE INVESTIGATIONS

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CLAIM COVERAGE—IMPORTANT CONSIDERATIONS FOR DEFENDING PRODUCT CLAIMS

Do you have a Quality Control program in place?

- Today's Component Manufacturer has the duty to address product safety.
- Plaintiff lawyers will use experts to potentially determine what could have been done during the manufacturing process to prevent the incident.
- Without some kind of quality control program in place, the manufacturer is left with little to respond to any criticism.
- **RESULT:** Jury finding that *Any Town Truss Company, Inc.* FAILED TO ENSURE that its manufactured products were reasonably safe for its intended uses and also foreseeable misuses = Loss by Component Manufacture

CLAIM COVERAGE— DEFENDING PRODUCT CLAIMS

Did you provide an adequate Job Site Package and can you prove it?

- Assume allegations asserting job-site injury assert the injury-causing incident was a direct result of improper manufacturing:
 - advise of the proper manner of handling, erecting, and bracing the trusses;
 - advise of the necessity of having an engineer or architect specify the manner in which the trusses should be handled, erected, and braced;
 - provide the erector and/or general contractor with industry guidelines regarding handling, installing, and bracing; and
 - warn of the hazards associated with the trusses.
- **MISPERCEPTION:** Lawsuit should be easily defended if you could prove the direct cause of the accident was either improper installation or bracing for instance.
- **REALITY:** Perhaps impossible to defend without demonstrating sending and receipt of installation and bracing instructions.

CLAIM COVERAGE— DEFENDING PRODUCT CLAIMS

Litigation Management.

Handle cases early on. Settlement may be easier early on in the case.

DO NOT think for a minute that the actions, testimonies and meetings do not have a significant impact on the case.

Require an assessment from the attorney at the time of assignment addressing recommendations and strategy for handling the case.

Control all activities and require approval of all discovery, depositions, retention of experts, travel, etc.

Require monthly statements of costs and activities with clear itemized billings

Agree on fees and costs at the time of assignment. Consider budgets or at least an estimate to handle a case or a particular phase/task within a case.

Set a standard for attorney reporting on depositions, meetings, case updates, etc.

CLAIM COVERAGE— DEFENDING PRODUCT CLAIMS

Litigation Management. [Continued]

Manage legal costs aggressively:

- Control reporting and billing for it;
- Have attorneys distill written documentation and reporting to the essentials—emphasize you do not need lengthy reports of every case development;
- Periodically audit legal bills; and
- Carefully monitor expenses.

LITIGATION IS EXPENSIVE—legal fees, expert fees, filing fees, court reporter transcription charges, company personnel downtime . . .

LITIGATION is inefficient.

LITIGATION is uncertain -The following adage should at least be considered: *Nobody with any sense will trust their money to a jury and court system.*

CLAIM COVERAGE— DEFENDING PRODUCT CLAIMS

Arbitration and Mediation—Understand both and the differences.

- An ARBITRATION provision provides for a specific and exclusive means for resolving disputes between the parties and avoids the courthouse and possibly even lawyers.
- ARBITRATION may be the preferred venue for a construction dispute.
- Absent a contract requirement for ARBITRATION, plaintiff lawyers are likely to resist to consent to ARBITRATION.
- ARBITRATION is a more informal method of dispute resolution.
- ARBITRATION is usually more expeditious than the judicial system and less expensive.
- The decision of the arbitrator in an ARBITRATION proceeding is final and binding on the parties.

CLAIM COVERAGE—DEFENDING PRODUCT CLAIMS

Arbitration and Mediation—Understand both and the differences. [Continued]

- ARBITRATION does have some drawbacks:
 - Increasingly becoming more formal and can drag on for years;
 - Many construction attorneys are selected as arbitrators—more likely to allow extensive discovery and presentation of evidence; and
 - ARBITRATION does not permit appeal generally, and as such, an unfair or incompetent determination may be final and binding.
- MEDIATION is a process whereby parties meet voluntarily to negotiate a private and mutually satisfactory agreement aided by a neutral third party.
- MEDIATION is a focus on settlement assisted by a third party mediator.

CLAIM COVERAGE— DEFENDING PRODUCT CLAIMS

Retention of Experts.

- Generally the right expert can be helpful to persuade the other side/jury/judge and to help explain the position of the Component Manufacturer.
- Experts can be very helpful in investigating and testifying with respect to job-site collapses and incident investigations.
- Expert testimony adds objectivity to the side of the Component Manufacturer.
- In a case defended by your insurance company the right expert can be helpful in educating the insurance defense counsel defending your Company.
- Your expert can also assist witnesses in preparation for a deposition. For instance, your truss designer or draftsman may have an excellent technical background, but may lack the composure or ability to communicate his knowledge to the lay person. An expert who has been through it all before can help in this regard.
- Keep your expert fully informed providing them with a broad base of information.

CLAIM COVERAGE— IMPORTANT CONSIDERATIONS FOR DEFENDING PRODUCT CLAIMS

What if you Lose?

- No one can predict the outcome of any lawsuit with certainty. No matter the cause, you might lose.
- If you lose in court and not through arbitration, you can appeal, but there is no guaranty that you will overturn an adverse decision.

- You may think you can afford to lose because of your insurance policy. However, what if you find out that you are not as protected by insurance as you may have thought:
 - Your insurance policy may not cover the full amount of the verdict;
 - Your insurance policy has a limitation of dollars, and if the judgment returned against you exceeds the limits of your insurance policy, and if you do not have umbrella insurance, your company is responsible for the difference; and
 - Also, the insurance policy may not cover claims that are in particular excluded as set forth in the policy.

- A judgment against your Company allows the other side to levy against Company assets.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

Causes for the Growth of Construction Defect Claims and Litigation:

- The growing expectation of perfection in every single detail of construction from the foundation slab to the roof, including installed products.
- Awareness of the average homebuyer regarding construction defect claims, thanks to high-profile attorneys and highly publicized court battles.
- A lack of legislation and judicial clarity in the area of construction defect litigation.

Short History of Construction Defect Litigation:

- Began to appear in the early '80's and gained momentum later in that decade and the '90's.
- Booming economy in the late '80's and '90's resulted in increased demand for home ownership, including condominiums. This demand was profound in Southern California.
- Boom led to mass production of buildings and construction undertaken by inexperienced contractors.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

Short History of Construction Defect Litigation. [Continued]

- Boom followed by a deep downturn in the economy causing homeowners to lose income as well as seeing their homes and condo units losing value in a falling real estate market.
- At the same time, such homeowners viewed the workmanship of their homes to be at a lower quality than they had anticipated.
- Coinciding with the downturn in the economy, plaintiff lawyers began to increase publicity for homeowner lawsuits to recover for loss of market value. Homeowners asserted diminution in value for alleged defects.
- AND, with respect to condominiums, there was the threat to Boards of Directors for Homeowners' Associations that failing to bring suit would subject them and their errors and omissions insurance to liability for failing to satisfy their fiduciary duty to their homeowners.
- Leading to homeowner representatives serving on existing homeowner associations, out of fear that they may be sued personally, feel compelled to proactively investigate construction problems to protect themselves.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

The Early Construction Defect Cases.

- Early cases were chaotic:
 - Great number of parties and insurers unsure of coverage;
 - Written discovery among all parties;
 - Depositions of many persons; and
 - Complicated messy suits—led to large settlements.
- Chaos restored to some extent with case management orders—but no real legislative relief until the late '90's.

Factors That Seem to Determine Whether Construction Defect Litigation will be Prevalent in a Particular Area.

- Recent history of rapid housing growth.
- Shortages of qualified construction laborers.
- Poor soil conditions.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

Factors That Seem to Determine Whether Construction Defect Litigation will be Prevalent in a Particular Area. [Continued]

- Presence of water intrusion.
- A litigious environment with an active plaintiffs' lawyer bar.
- A political and judicial environment supportive of tort law expansion.
- While a great deal of construction defect litigation is initially asserted over the foundation of the building or water penetration which has caused rotting and deterioration, it is quite common for those trades supplying or installing materials for wall, floor and roof systems to be joined as defendants in a construction defect lawsuit.
- One risk consultant who publishes statistics, categorized construction defects into a "Top 10" list and found floor, wall and roof structural systems as number one on the list and roofing problems as number two on the list.
- Litigating over walls, floors and the roof, as they comprise the structural integrity of a building, quickly increase the amount of damages that can be asserted and the settlement that can be obtained by plaintiff lawyers.
- Mold Has Become a Catalyst for Litigation.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

Factors That Seem to Determine Whether Construction Defect Litigation will be Prevalent in a Particular Area. [Continued]

- Mold litigation to date primarily involves straight construction defect claims and the allegation that in addition to repairing the construction defect itself, costly mold remediation is also necessary.
- Add that to the straight personal injury claims that are asserted arising out of mold exposure.
- Even without the allegations of personal injuries, can significantly increase the cost of defending these matters and potential settlement and verdict value.

Growth of Construction Defect Litigation Fueled by Plaintiffs Lawyer Bar.

- Networking and advertising done by plaintiff lawyers through the Internet—advertising past successes.
- Lawyers routinely pose a question and answer page on how to file a construction defect case.
- Lawyers offer to analyze a case for free; offer to provide in-house seminars to disgruntled homeowners and their friends.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

Current National Trends in Construction Defect Litigation.

- Development of a standard(s) by which constructed homes may be judged to determine whether a defect exists at all.
- Minimize the burden on the judicial system and afford builders the opportunity to avoid having to constantly defend themselves in court.
- Establish limitations and repose periods for asserting complaints and lawsuits based on claimed defects.

Right to Repair/Cure Laws.

- Many states have passed some version of a “right to repair” or “notice and opportunity” law—including Alaska, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Montana, Nevada, South Carolina and West Virginia. They join Arizona, California, Michigan and Washington. Other states currently considering include Ohio, Oregon, and Pennsylvania.
- Texas and Nevada have passed new legislation that calls for a panel of experts to promulgate a set of construction codes and to set forth a method for litigating construction defect cases.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

State of California's S.B. 800 Law.

- Most prominent and ambitious attempt to date to take control of construction defect litigation.
- Viewed as a comprehensive approach to construction defect standards, litigation and dispute resolution.
- Requires homeowners to allow builders the right to repair a home or to waive this right, before the homeowners are allowed to file a lawsuit for construction defects.
- Applies to all homes sold on or after 01/01/2003.
- Contains what is referred to as a "Bill of Rights" so to speak that sets forth actionable defects.
- Creates particular statutes of limitations for original homeowners and successors in interest.
- Before filing a lawsuit, a potential plaintiff must satisfy a series of pre-litigation procedures...including a notification and an initial document exchange. If the builder intends to hold any subcontractor liable for the defect, must notify them and allow them to attend an inspection.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

State of California's S.B. 800 Law. [Continued]

- Effect is to allow the builder to engage in a repair that would hopefully eliminate the impetus for the homeowner to sue the builder for money to engage in repairs.
- Seems to eliminate the possibility of class action lawsuits or lawsuits involving multiple plaintiffs from the same development.

Are Component Manufacturer construction defect claims covered by the CGL Policy?

- Many areas of disagreement between policyholders and insurance companies regarding whether construction defect claims are covered.
- Insurance companies assert at times:
 - Construction defect claims are not the kinds of claims that are intended to be covered by CGL policies as they do not arise out of an accidental "occurrence" or involve "property damage";
 - Reliance on exclusions in the CGL policy; and
 - Raising late notice and known loss defenses.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

Are Component Manufacturer construction defect claims covered by the CGL Policy? [Continued]

- Policyholders reply:
 - Construction defect claims are “occurrences” because by their very nature they are unintentional;
 - The claims do in fact involve “property damage” as defined in the policy if the defects cause “physical injury” to or “loss of use” of tangible property; and
 - “We will not let our insurance carrier unfairly deprive us of the insurance coverage we have paid good money for.”
- Unfortunately there is not a lot of help from the courts as they have provided very little guidance.
- The importance of a defense by an insurance company in a construction defect claim is valuable. Industry statistics show the cost to defend is 50% of the average insurance claim and 77% on complex commercial cases—which must include construction defect cases as no more case is likely to be more complex.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

Are Component Manufacturer construction defect claims covered by the CGL Policy? [Continued]

- Discussion on progressive damage claims where loss progresses or continues over numerous policy years.
- Important things to consider:
 - Notification requirements;
 - Allocation or sharing of defense costs—while an insurance company owes a full duty to defend, there may be agreements in place for the sharing of defense costs—possibly on a percentage basis.
- What is the strongest product defense?
- Mindset of the CGL insurance company
- Construction defect litigation adds to the problems of renewing CGL insurance at an affordable rate

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

The Additional Insured Endorsement Response of “Big Builder”.

- Raising CGL rates and the fact that many builders are now self insured has caused builders to opt to shift responsibility by requiring their subcontractors and suppliers to name them “additional insured” on insurance policies.
- The requests have gotten quite specific as the builder is looking for the broadest possible additional insured endorsement from as many subcontractors and suppliers as possible.
- Many builders intend for such endorsements to protect them for their own liability as well.
- By agreeing to a broad indemnity provision or unlimited additional insured endorsements in their customer contracts, Component Manufacturers and their liability insurance carriers may be forced to defend claims that go well beyond their scope of work (e.g. the design, manufacturing and delivery of structural components).
- Thus, virtually every construction defect case will present some version of an additional insured issue, usually builder vs. subcontractor or supplier.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

The Additional Insured Endorsement Response of “Big Builder”. [Continued]

- The nature and extent of an additional insured endorsement is oftentimes contested—primarily because there are several types of additional insured endorsements.
- Look out for the request for the Form 2010 endorsement, the “your work” endorsement or the “ongoing and completed operations” endorsement.
- The 2010 comes in two primary forms which vary extremely in the range of coverage:
 - The 1985 version covering the builder with respect to liability **arising out of the subcontractor’s or supplier’s work**; or
 - A later 1993 or 1997 version which applies only to liability **arising out of the subcontractor’s or supplier’s ongoing operations performed for the builder**.
- The manuscripted endorsements prepared by the insurance companies that take on various forms.

CLAIM COVERAGE—TACKLING THE CONSTRUCTION DEFECT LITIGATION ISSUE

The Additional Insured Endorsement Response of “Big Builder”. [Continued]

- Additional insured endorsements versus certificates of insurance.
- Until recently many builders were only asking for certificates and not actual copies of the additional insured endorsements.
- The certificate of insurance is only a form issued by a broker to confirm the amounts and types of insurance.
- As the terms of the insurance contract control over the language of a certificate, the builders have been asking for the specific additional insured endorsements.
- This has also caused a great number of Component Manufacturers to begin looking closely at what additional insured endorsements they have with their policies.

CLAIMS MANAGEMENT—COLLAPSE AND INCIDENT INVESTIGATIONS

Why Investigate?

- Construction accidents are high-profile events, especially when there are fatalities involved.
- The minutes and hours immediately following an accident are crucial to the investigation of and final allocation of responsibility for the accident.
- If crucial steps are overlooked, Component Manufacturers and their insurance companies may find their ability to mount a defense against subsequent lawsuits has been compromised.

Purpose of Investigation.

- Directs the Company into a structured process for learning.
- Enables the Company to gather factual data to support a successful outcome.

Goal of Investigation.

- DETERMINE what happened and when did it occur.
- DETERMINE who was involved.
- DETERMINE how did it happen.
- DETERMINE why did it happen how can it be prevented in the future.

CLAIMS MANAGEMENT—COLLAPSE AND INCIDENT INVESTIGATIONS

Investigation—Fundamental Principles.

- An investigation allows you to “Document, Document, Document...”
 - Document where claimant was at the time of the incident and condition of where the claimant was working.
 - Photos tell a story to the person who will never see in person what you have seen.
 - DO NOT photograph blood, police, EMS, fire, or claimant with these parties—will be enlarged later to get sympathy from the jury.
- The more you are convinced you have no liability in an incident, the better your investigation should be.
- Juries like construction claimants! Why:
 - Often times a hard worker all his/her life
 - Often times a family man/woman
 - Often times still has children under age 18
 - Usually has no other employment training, so their trade career could be over.

CLAIMS MANAGEMENT—COLLAPSE AND INCIDENT INVESTIGATIONS

Trial Considerations.

- Jury members relate more to the plaintiff than they do to: plaintiff lawyer, the defense lawyer, or the corporation defendant.
- Two Converging Factors that Favor Plaintiffs at Trial:
 - Jury members are naturally sympathetic for the injured
 - Plaintiff lawyers are skilled at finding a deep pocket to blame.
- Think Like a Plaintiff Lawyer:
 - You know your company is not liable, but it's a jury you must convince.
 - Spend less time defending and being right, and spend more time looking for other parties that caused the incident.
 - Step and think, if I was the plaintiff lawyer, what theory of liability would I be creating.

CLAIMS MANAGEMENT—COLLAPSE AND INCIDENT INVESTIGATIONS

The Incident Investigation Process.

- DO: Handle a truss collapse or product performance complaint early and professionally.
- COMMENT:
 - Will lessen the chance of subsequent litigation and will certainly improve the company's chances if there is litigation.
 - Remember, most likely your customer is in a bind—speed in investigating if necessary and providing replacement product may produce a loyalty that otherwise may not have been developed and may even prevent legal action in some cases.

Component Manufacturer Truss Collapse and Product Incident Investigation Program.

Consider distinguishing between “Fall-Down Accidents” and “Product-Performance Investigations” which may include complaints resulting from missed loads, drifting snow loads, unanticipated conditions, and other product complaint related claims.

Below I have set forth a policy that contains many suggestions that the Component Manufacturer may want to consider adopting.

TRUSS COLLAPSE AND PRODUCT PERFORMANCE COMPLAINT POLICY

[SAMPLE POLICY]

STEPS REQUIRED FOR ALL CLAIMS:

All truss collapses or job-site claims (if product touches the ground or in the event of any property damage or bodily injury claim on a customer’s job-site and will be defined as a “Claim”). All Claims should be immediately reported to the supervisor/responsible general manager. The person reporting and the supervisor/general manager should contact Company Legal Counsel and should immediately retrieve a copy of the customer contract and job-site package provided.

When you receive the call, get as much information over the phone as possible.

Find out when the incident occurred and if there was a personal injury.

Determine the weather conditions at the time of the incident.

Ascertain whether any blame or cause is being presupposed.

If property damage only—find out the extent of the property damage.

Determine the specific truss designs involved.

Determine who the general contractor and erection contractor are.

Request that the jobsite be left undisturbed—stress the importance of this with your contact and with anyone else at the site that has any kind of control over clean-up. The physical evidence at the site will usually tell the story as to what happened and why. Any investigation will have an infinitely better chance of being productive if the site is left undisturbed.

Depending on the severity of the situation—if [Truss Company] is any way implicated or if there is any personal injuries, as the chances are very good there will be legal action—an investigation should be conducted. This is the case even though it may appear that the trusses were not the cause of the accident. Further, if there is a significant economic loss, an investigation should be conducted.

In the event of an investigation, the objective is to try to recreate the accident. Start with seeing if the bracing was installed. Look at the jobsite to see if the [Truss Company’s] Job-Site Package documents are at the jobsite itself and if so, photograph. Consider interviewing witnesses with the help of an independent engineer, Company’s Legal Counsel, and a company insurance company representative.

An investigation enables the cause to more easily be determined. An investigation requires detailed observations and record-keeping. An experienced person needs to be the one responsible for the investigation. At times a third party engineer will need to be retained by [Truss Company].

FALL DOWN ACCIDENT REPORT CHECKLIST:

[Determine the conditions when a report should be prepared in consultation with the Company’s Legal Counsel to enjoy the protection of attorney client and work product privileges.]

Date: _____

Project name: _____

How information reported: _____

Name and address of any injured person(s): _____

Name and address of the truss erection crews and the project contractor: _____

Define the jobsite conditions (including the weather conditions) at the time of the accident:

Type of property damage to the Component Manufacturer's manufactured products and to the structure (this includes a description of the truss type, the truss material etc.):

If a truss collapse, an inspection of bracing, truss to truss and truss to beam or wall connections, are trusses that are still standing plumb and unaffected by the collapse, were the trusses laid out per the placement plan and the structural framing drawings:

Type of injury: _____

Description of how the injury occurred (describe what the employee was doing at the time of the injury): _____

Specify the activity that directly caused the injury: _____

Describe what medical treatment was sought for the injured person: _____

Was the employee unable to work after the accident: _____

List the names and addresses of witnesses: _____

Describe any unsafe acts or conditions that contributed to the accident: _____

Explain the contractor or truss crews experience with the size and type of structure:

Explain the corrective action taken: _____

Provide a log of all conversations, inspections and related actions: _____

Take many pictures and provide a log of all photographs.

PRODUCT PERFORMANCE REPORT CHECKLIST:

Complete a form—note the project, the date of the inspection, and other jobsite or subcontractor representatives present. Note what findings were made: _____

Will a repair design be required by or requested of Component Manufacturer; what about a request that the Component Manufacturer physically repair a manufactured product? Assess whether a back charge is possible: _____