

"Construction Defects: Protect Yourself Before You End Up in Court" by Susan Harrelson

Lawsuits referred to by many as "Construction Defects" are on the rise in many areas of the country. More and more, truss manufacturers are finding themselves named in these types of cases. The usual plaintiffs are homeowners seeking damages for actual or perceived flaws in the workmanship of their homes, and the usual defendants are developers, general contractors, sub-contractors and material suppliers. Although these claims often come from residents of condominiums or other multi-family projects, they are increasingly likely to be raised by homeowners in single-family developments. The illusion of immunity, because they "don't do apartments," is likely to lead some truss plant owners and managers to a rude awakening . . . in court. And though the trend seems to have started in California, Construction Defects litigation is becoming common elsewhere. Fed by the emotions of fear and greed, it can flourish anywhere there are people who buy homes and companies that help build them. Some people are even predicting that, by the year 2005, every company that supplies services or materials for residential construction will have been a defendant in this type of litigation at least once.

That's the bad news. The good news is that there are a number of steps you can take now to protect yourself in the future. Some are just common sense and good business practice. Others may require a little more effort to educate yourself and your employees, but help is available in the form of resources from WTCA and many construction industry organizations. Here are a few suggestions for preparing your company for the business environment of the 21st century:

Have a quality control procedure and stick to it. You know you build a quality truss. Now think about how you would prove it if challenged. You've heard the commandment, "Document, document, and then document some more," in other contexts such as safety training and employee discipline. It's just as important to document your quality control process in a way that would convince an outsider that your company cares about the quality of the product it is putting into people's houses. It doesn't matter what system of quality assurance you use: it could be the *WTCA QC* Program, a process-based system derived from TQM principles, or a set of procedures you wrote yourself out of experience in the business. The important thing is that it exists, that it's followed and that the records that are kept are easy to find and use. (Editor's note: *WTCA QC* is a simple way to provide excellent documentation through a database that you can use to show easy-to-understand charts and graphs to anyone, even lay people on juries.)

Don't assume someone else's risks. Have a well-written contract, purchase order, or other document that you use when you make a truss sale. Try to avoid signing contracts or purchase orders written by other parties and read every document carefully before signing it. Don't make an agreement that requires you to indemnify another company against harm. Remember that insurance companies indemnify against risk; truss companies build trusses. Contrary to what you may believe, most companies that have indemnity clauses in their agreements are willing to negotiate the removal or revision of terms you find unacceptable.

Watch your warranties. Avoid making representations in advertising, sales documents, and even sales presentations to customers, that could be construed as making an express warranty. Even an innocent-seeming remark such as, "If anything isn't right, we'll make it right," could come back to haunt you. Someone could testify that you promised to warrant your product against any defect, for any length of time. Stick to factual statements regarding your products and services, and avoid exaggeration. Make sure your salespeople understand this too.

Cover your assets. Review your business insurance policies regularly, to make sure that you are covered for the costs of defending a Construction Defects suit, and that you have adequate limits of liability. Keep expired insurance policies, and know where they're stored: claims can take several years to surface. Unfortunately, many insurers are refusing to write policies for construction-related businesses, or have raised their rates for such coverage. In fact, problems with liability insurance may be the first indication that Construction Defects litigation has become a concern in your area, so establish and maintain good communications with your insurer or broker.

Educate your customers. Most truss manufacturers are aware of the fact that damage and degradation of quality usually happens during storage, handling, erection, installation and bracing, after control has passed to the customer. Fewer understand that it is still the truss manufacturer's duty to guard against the foreseeable consequences of product mistreatment. Be prepared to show that you included adequate warnings and instructions

Tip: Any written procedure you have, whether it's used for safety, quality, employee relations or anything else, should accurately describe what really happens in your daily activities. A plan that looks good on paper, but isn't practiced, is a waste of effort, and can actually hurt you in court. It can be used as proof that you knew what to do but failed to do it.

Tip: If you aren't sure what to look for where contracts are concerned, WTCA's seminar on Risk Management can help you spot potential

with all deliveries. WTCA's Job Site Warning Posters (with the final approved layout printed on the back), Truss Technology for Builders fact sheets, Bracing and Erecting video, HIB-91 and other materials can be included in engineering and sales packages and can provide documentation of your efforts. When every truss arrives at the jobsite in good condition, accompanied by instructions for proper handling and installation, any defects discovered in the future will be much less likely to land on your doorstep.

Working with your local chapter and WTCA staff to provide one or more of the 13 WTCA Truss Technology Workshops that are available is also a great way to show your commitment to providing good customer education. There are great industry and individual benefits to being involved with these types of programs.

Be an attractive defendant. Many people are dissatisfied with the way their insurance carriers handle Construction Defects lawsuits. They are opposed to settlements in cases where they truly feel they have done no wrong, and they are bitter because the insurer chose a quick settlement over vindication for the insured. The truth is that many insurers have no alternative to settlement in cases involving truss manufacturers, because there are no records of the quality control procedures used on the job, no written agreements between the truss manufacturer and the customer, no evidence of instructions for the product's use, no insurance files and little documentary evidence of any kind. Our industry has a long tradition of doing business on a handshake, not a warning label, and many owners and managers find the process of documenting every transaction tedious and of doubtful utility. However, an insurance company, faced with a client who has inadequate records, has a duty to its shareholders to avoid the risk of a judgment. If you want a different result, have your documentary ducks in a row, educate yourself on basic insurance concepts and take responsibility for educating your customers, your elected officials and the public about the proper use of your product. If we sharpen our industry's image and present our insurers with cases they can win, we will get our day in court on the issue of Construction Defects.

ADDITIONAL ACTIONS

Besides taking action now to protect yourself and your company, you can work toward the passage of laws that treat both homeowners and builders equitably. Make a point to support organizations such as WTCA, which can serve as your voice in Washington and in your state capital. Lobbying efforts, at any level, are resource-intensive, so the more resources the truss industry can gather, the more our viewpoint will be represented in the legislative process. Consider forming issue-based coalitions with such groups as the Associated General Contractors, Associated Builders and Contractors, and National Association of Home Builders, whose members have interests that often overlap our own. Construction Defects litigation is a cutting-edge issue, on which much of the law has not yet been written, so you have an opportunity to make a difference by supporting candidates and legislation that comport with the values of the truss manufacturing community.

time bombs in business documents, and can suggest strategies for dealing with them. Contact WTCA to find out when the next seminar is or help WTCA to set one up in your area. They'd be happy to help anyone do this.

Tip: Make sure that the companies you do business with are not classifying you incorrectly as a subcontractor, and that any agreements reflect your status as a material supplier.

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