



2020 Construction Conference
September 29 – October 1

Managing Product Liability Exposure in Construction Litigation

INTRODUCTION

Invariably, during the handling of any construction-related claim, the issue of potential product liability will arise. Managing product liability exposure in construction litigation can be crucial. There are three types of product liability claims involved in construction:

- Claims involving defects in the equipment used during construction,
- Defects in building materials, and
- Construction defects causing product liability exposure.

These claims can involve tools, machinery, heavy equipment, windows, the siding, the roof tiles, fire sprinklers, or a plumbing fitting, for instance, or all of these products. However, the laws that apply regarding products liability are not the same in many respects as the laws that apply to manufacturers, builders and subcontractors. Although sometimes intertwined with faulty workmanship, product manufacturers, suppliers and distributors have unique exposure created by the strict liability, breach of warranty and negligent design and manufacturing claims that they face.

I. Initial Claims Processing

Within many of the cases involving construction damages, litigation is almost sure to arise. While you and your experts hopefully have a chance to investigate and evaluate a claim and determine the potential liability aspects, once suit is filed, or a demand for arbitration is made, you will now have the opportunity to fully investigate the claims and arguments of the Plaintiff(s), as well as the other parties involved. It is crucial from the beginning of this process that you work to establish all of the potential root causes for the failure/incident. There are many potential causes involved when a product or machine causes damage or injury.

Usually the largest focus starts with the Manufacturer's or Product Liability, where there is an allegation about a defect with the product itself or its marketing. Then there is Usage, where there is improper or misuse by the end-user. Sometimes, Installation can be an issue where there is potential liability from improper installation of the product. In other cases, unforeseen events or acts by parties outside the chain of manufacturing to use are involved in the failure. With each potential cause of failure, discovery will be intense and it will be crucial for the adjuster and expert(s) to be involved and in tune with the process.

Product Liability, sometimes called Manufacturer's Liability, is one of the most involved aspects of the claim. The theory is that the underlying issue in the case arose before the product was even put out into the market. While many argue that the focus is put on the manufacturer because of the potential for "deep pockets" for both the first party and third party claims, as well as potential subrogation, the truth is that the manufacturer is usually the most knowledgeable about the product and the potential failures, or potential causes of failure once the product is in use. Usually, the manufacturer has already researched potential issues during the design and testing phases of a product. If any potentially hazardous materials are involved, the manufacturer will have the information on the identity and component levels of the materials, and the Material Safety Data Sheets (MSDS) or Product Safety Manuals for those products. The product may have gone through several different models, with redesigns made or updated for repackaging or updated technology, but also for safety and usage failure reasons. For these reasons, and many others, you can expect that the Manufacturer will likely face the biggest amount of scrutiny from the inception of the litigation, if not before.

Product Liability cases normally have three avenues: Design defect, Manufacturing defect, and/or Advertising defect. The "and/or" is important, as in many cases these causes can be made separately or interconnected from inception, or as the case progresses. It is important for all parties to work towards making the specific allegations against the manufacturer clear.

Design defect cases, as the name implies, involve the assertion that there was/is a problem with the design and layout of the product itself. These claims will normally involve extensive discovery and depositions. Proper experts are crucial, as detailed expertise and examination are needed, as well as the ability to relate the complicated factors to a jury. Manufacturing defects allege that something went wrong in the production of the product. Early analysis is crucial in these cases to determine the location of the failure in the manufacturing and supply chain. It is also crucial to get the right experts involved early in this process. Advertising defects, despite its name, relates more to the instructions and warnings given to the end user of a product. These claims tend to be more nebulous in theory. It can be easier for a jury to understand the issues in this case, but also more scrutiny is applied. In any case involving a potential product failure, investigation into the product and manufacturer is crucial early and efficiently. Your expert needs to look at:

- a. Has there been any mass tort actions involving this product or a substantially similar one?
- b. Have there been a significant single action involving this product?
- c. What is the industry knowledge base about the product and potential failures?
- d. Were the instructions and operations clear to the user and installer?

Besides the Manufacturer, sometimes the end user can be the issue. This does not necessarily rule out manufacturer or installer liability. Proof of the change in use and/or misuse of the product is essential. Ultimately, it may be determined that the problem was not only a manufacturing or end user issue, but a problem with how the product was installed. Early and definitive identification of the proper party(s) is crucial in these cases. All applicable installation instructions and applicable permitting need to be discovered.

Two case histories will be introduced and will be used to illustrate the topics considered in this presentation. The first of these case histories concerns a building fire caused by space heater/contractor activities during the renovation of a commercial building. The second case history addresses the detachment of a building's façade caused by freeze/thaw cycles.

II. Determination of facts, timelines, and contributory parties

In any construction case, but especially one involving potential Product Liability, it is crucial to identify as early as possible what experts you will need, as well as what testing you will need. Throughout the process a clear picture of the methods and instruments used by your experts and those of all of the other parties will likely be a large issue once the case becomes postured for trial. A large part of that analysis will be the extent of the damages and, importantly, the scope of the damages applicable to your client or the alleged product defect. Depending on the level of damages, a cost-benefit approach may also be important.

Product defects are often first recognized as a result of collateral damages associated with the defect. Examples would include interior, cosmetic damage related to leakage through a window or settlement in pavement due to an underlying failure. After the initial site assessment as described earlier has been made, a more in-depth technical investigation is performed. This segment of the presentation will discuss general techniques that a technical expert would use in determining the specific cause of the failure, including on-site observations and testing, destructive testing, laboratory testing and analysis, and extrapolation of the data.

Your expert(s) will likely need to handle performing a physical examination of the site and involved products. Coordination with the other parties and their experts on issues regarding the collection, analysis, and preservation of evidence will be vital to protecting your interests and those of your insured, as well as proving your case at trial. Your expert(s) and counsel can also assist with obtaining the myriad of documents needed to support the claim, like project plans and specifications; vendor literature and technical specifications; contract/bid documents; and project schedule & project documents (e.g. RFI's, QA/QC docs).

III. Legal and insurance adjustment proceedings

The first 60 to 90 days in a product liability claim are critical from both an adjustment and legal standpoint. Specific actions, including the establishment of a team, the setting of reserves, and the reservation of rights must be addressed. The process by which these actions are initiated will be discussed, and the role of individual experts in the process will be addressed.

The insured's relationship to the product is going to greatly affect the handling of a claim from the investigation, to the liability assessments, and potentially the valuation of damages and the claim at large. The potential risk transfer from our insured to other parties and how this affects our insured's exposure on the claim, as well as potential rights for subrogation, are essential issues to address from the start of the claim, and continue to develop as the claim progresses. In the majority of claims our insureds will have other companies that touch the stream of commerce in regard to the product. Common examples of companies in the Stream of Commerce are Distributors, Retailers, Wholesalers, Manufacturers, and Component Part Manufacturers. The locations of the various other companies are going to impact how the claim is handled.

After working with our insureds to identify the other companies in the stream of commerce, we need to make sure we get fully signed copies of any contracts between our insureds and the other companies. Other times the “contract” will just be the purchase order. When getting a purchase order, frequently the terms and conditions are on the back. Once we review the contract, we may be able to tender the matter to the other company. Outside of the United States, companies often do not respond to tenders in the same manner as they do in the United States. If the tender is not responded to in a way that is advantageous to our insureds, we may have to consider bringing in these parties via a lawsuit.

IV. Determining Liability for Workmanship vs. Product Claims

Once a product defect/liability claim is established, the next step is typically to determine who is responsible for the defect. In addition to an actual manufacturing defect, other parties can be responsible for the product liability claim. Improper installation of a product by a contractor or subcontractor can lead to such a claim. Conversely, the correct installation of an inappropriately supplied/specified product (by a distributor or design professional) may occur.

V. Product Liability Overview/Defense Strategies utilized in Cases Alleging Product Liability in Construction Litigation

Defenses to construction defect product cases include those typically asserted in general construction defect actions, including but not limited to: sophisticated user, failure to notify, lack of privity, innocent seller, alteration of product, and statute of limitations. The most notable of defenses in construction defect product liability cases is the Economic Loss Rule (“ELR”).

The **Sophisticated User defense** relieves a manufacturer of the duty to warn where there is a sophisticated user of the product with knowledge of the danger. The **Innocent Seller defense** provides protections and benefits for “innocent” downstream sellers in litigation arising from allegedly defective products whose defects were unknown to the downstream sellers. The **Abnormal Use/Misuse defense** states that if a plaintiff does not establish that he was using the product in an intended manner, a judge or jury could conclude that a plaintiff has failed to prove an essential part of its cause of action. Some courts have found that the issue of misuse of a product only becomes relevant where the plaintiff’s use was either “unforeseeable or outrageous.” The **Assumption of Risk defense** is based on the notion that, by taking the chance of injury from a known risk, the plaintiff has consented to relieve the defendant of its duty towards him/her. There are four versions of assumption of the risk as outlined in the Restatement of Torts:

1. Consent Defense (rare)

- A plaintiff expressly consents to relieve a defendant of its obligation to exercise care for the protection of the plaintiff.

2. Implied Agreement to Relieve Defendant of Responsibility

- A plaintiff has voluntarily entered into some relation with the defendant which he or she knows to involve a risk where the plaintiff is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility

3. Voluntary Acceptance of Risk Created by the Defendant

- A plaintiff is aware of the risk created by the conduct of a defendant and subjectively agrees to accept the risk and to encounter it.

4. Unreasonable Acceptance of a Known Risk

- A plaintiff voluntarily encounters a known risk as a result of his own negligence.

The **Intended User defense** states manufacturers/sellers of defective products can be liable only to the “user or consumer”. An unintended user who utilized a product in a reasonably intended fashion, cannot recover. The **Alteration of Product defense** states that if there has been a substantial modification made to the product, which was not reasonably foreseen by the manufacturer, and if the modification is a superseding cause of the user’s injury, the manufacturer is relieved of liability even if there was a design defect existing at the time the product was delivered to the purchaser. The **Economic Loss Rule** is a judicially created doctrine that prohibits recovery for traditional tort claims in situations where a product defect causes damage only to itself. Most jurisdictions provide that only economic damages will be available unless defects or failures of the product have caused damage to persons or other parts of property.

VI. General Considerations regarding product liability claims

In many product liability claims, there are considerations involved that will impact the adjustment and adjudication of the claim. These considerations can include the nature of the defect, such as whether the defect was systemic or a one-off flaw, and whether or not there were contributory factors affecting the product defect. The history of the product, and expert/technical analysis of the defect are also factors that can impact the process and will be discussed.

There can also be broader defense considerations that may have direct influence on how a product liability case is handled. For manufacturers, product integrity and brand protection may have significant importance. Also important to a manufacturer is the control of sensitive information, both from a technical standpoint on how it affects proprietary design and manufacturing data and the potential impact on multiple product claims. In the case of multiple product claims, a more global approach, including the development of a product liability team, may be advantageous.