



2017 CLM & Business Insurance Construction Conference
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Class Actions – A Blessing or a Curse?

To achieve class action certification, for example under Federal Rule of Civil Procedure 23, it is generally required that:

- 1) The class is so numerous that joining all members is impractical;
- 2) There are questions of law or fact common to the class;
- 3) The claims or defenses of the representative parties are typical of the claims or defense of the class; and
- 4) The representative parties will fairly and adequately protect the interest of the class.

I. Product litigation - most of the action

Particular Products

The bulk of the national construction class action litigation relate to building products. We have seen litigation involving siding, windows, roofing, plumbing and most recently concrete. There is also a breed of class action lawsuits that are local and involve developments with similar homes.

Nature of claims

Class Action claims come in many forms. Some involve interpretations of the warranty given with the product, for example, siding that weathers over time is alleged to violate the warranty. Others involve deterioration of products, or damage to adjacent building components based on the product's formulation and/or how the product is integrated with other components.

Root cause

Products are generally tested to meet building code criteria before they are released into the market. However, the testing is not always extensive and the engineering may not be complete or holistic in terms of how the product integrates with other components. Sometimes, the approved installation instructions are too vague or contradictory and lack detail on how the product is to integrate with other components to achieve a weather tight building. Challenges in the front-end development, testing and building code approval process have led to unintended consequences such as products which damage other components or products which erode over a shorter than anticipated life span.

Claims interplay with other parties

In multi-party construction defect litigation involving product related failures, whether or not the product manufacturer is in the case has great significance. When the product manufacturer's liability is settled through a class action, plaintiff's team will give greater scrutiny to technical installation defects, even when the installation issues may not result in property damage. On the other hand, the defense team(s) give greater scrutiny to the reasons behind the product failure in order shift as much of the blame to the "empty" manufacturer's chair.

II. Court trends - certification

Federal Courts

In general, the trend in federal courts is to deny class certifications in building product cases.

State Courts

In recent years, we have seen certification results going both ways in the state courts. We will examine decisions in Iowa, the Carolinas, Oregon, Connecticut, California, and Florida. A table of the latest decisions and trends will be distributed at the conference.

III. HardiePlank Fiber Cement siding class action – a case study, a new wave

A case against HardiePlank Fiber Cement Siding is pending in the United States District Court in the Minnesota, Case No. 0:17-cv-01104-MJD-LIB.

A motion for class certification and countermotion for summary judgment were heard in April 2017. Counsel for HardiePlank believes that the court will deny class certification and grant its motion for summary judgement. Plaintiff's contention is that a premature weathering failure of the product violates the 50-year warranty. The defense argument is that the effect of the warranty is a matter of contractual interpretation and that plaintiff mis-interprets the warranty. It's not that the product will not show signs of aging or weathering over 50 years, instead, the warranty promises specific recourse if the product exhibits certain characteristics within the warranty period (i.e., flaking). The court's decision should be rendered by the time of the conference.

The HardiePlank case is representative of a new wave of class action claims, different from the traditional claims of product failure such as the CertainTeed fiber cement siding class action litigation (Eastern District of Pennsylvania, MDL Docket No. 2270) in which the plaintiffs alleged that the siding was subject to shrinkage, warping, bowing, and cracking. We will examine the new wave of warranty interpretation cases using the HardiePlank litigation as a case study.

IV. Insurance Coverage

"Your Product" exclusion

For a manufacturer, does the "Your Product" exclusion in a CGL Policy apply? Could this exclusion be used against an installer?

Property Damage?

A question arises with respect to property damage. In a class action for defective plumbing parts that involve the manufacturer, distributor and the installer, does property damage exist if there is no plumbing leak? What about class actions involving defective interior molding?

Serious expenses when class is certified

The certification process itself and the fight against certification adds a significant amount of costs to litigating the claims. Depending on whether it is an "opt-in" or "opt-out" claim, there may be the addition of many plaintiffs.

Once a class is certified involving an entire home, each class member may have to be deposed and each home potential examined to determine damages and defenses.

Class action suit typically allow for plaintiff's counsel to recover fees and cost which may be in the multiple millions.

Deductible / SIR

If multiple homes are consolidated in a class action, does the deductible apply to each home in the class action or only once if the class action is considered one claim?

V. Solutions

Short term - NAHB Assessing Building Materials

When integrating building materials on a job, the National Association of Home Builders (NAHB) Assessing Building Material check list may be useful (See attached). The contractor should answer questions before integration, such as "do I understand the make-up of the Building Materials", "How will the building material be used" and "has the material been tested for compatibility with other materials or systems".

Ongoing - Adherence to details – robust quality assurance

Details, Details, Details. The details provided by the manufacturer should be understood by all involved in the installation of the product. Mock ups in the presence of the installers, supervisors and the product rep/instructor and building consultant are important. Vague instruction or questions should be addressed.

Long term - require a better mousetrap - Prescriptive codes to ensure holistic integration of materials

In his article Rainwater Intrusion in Light-Frame Building Walls (see attached) US Forest Service research scientist Charles Carll reviews the scientific literature on the reasons for rain water damage to light frame (i.e., wood framed) buildings and comments on the problem in terms of all involved parties, including building code officials, assuming that some other entity has primary responsibility to provide adequate guidance and installation details. He says: "Manufacturer's instructions and drawings are almost always incomplete because of the considerable variation in materials and architectural features with which a given product may interface." As a solution Mr. Carll proposes a holistic engineering approach to design against water-intrusion problems which involves the means to characterize the weather exposure and moisture tolerance for design purposes and the identification of a desirable level of "robustness" for light-frame buildings.