

Quality Systems for a Defendable Position

by Ed Caldeira, NAHB Research Center

With construction defect lawsuits all too common, home builders may be challenged to demonstrate that every reasonable effort was made to ensure construction quality. Many builders believe they have a sound quality system in place, yet few builders have proof of their efforts. Good intentions, committed employees, and competent trade contractors without a documented system cannot convince anyone that their quality practices are sound or applied consistently. However, a formal quality assurance system can meet the legal challenge.

With dozens of trade contractors using thousands of building components, documenting sound construction practices can seem like a paperwork nightmare to any builder. Records should be kept as simple as possible. A look at how attorneys use the documentation helps focus on the right information.

Often, plaintiff attorneys use state-of-the-art practices to establish a reference standard of performance. In 1987, the U.S. Department of Commerce established ISO 9000 as a national standard for quality assurance (QA) systems. In many industries, attorneys try to make the case that anything less than ISO 9000 quality practices is negligent. An opposing attorney is likely to expect documented evidence of the following:

- Well-defined specifications, including architectural drawings, materials, construction details, and workmanship tolerances;
- Detailed work procedures;
- Sound processes to qualify field personnel who carry out the work;
- Evidence of jobsite quality inspections that foresee possible problem areas, including existing conditions before work began, compliance critical work procedures, and a completion inspection that verifies compliance with job specifications;
- Qualification of field personnel who perform inspections; and
- A system to correct defects and prevents them from recurring.

These are all elements of a sound QA system that can be documented by a manual of policies and procedures. The NAHB Research Center publication, *Quality Assurance System for Wood Framing Contractors*, can serve as a model state-of-the-art QA system for residential construction. It provides guidelines for QA procedures based on ISO 9000 quality management principles. It is applicable to all types of trades, with specific guidelines for framing. A word of warning: No QA system is better than a deficient QA system. Documented weaknesses are a liability.

Having a QA system is only part of the story. Records must be produced that demonstrate that the system is being followed. Each QA procedure should have built-in record keeping requirements, e.g., inspectors use specific forms that are retained for three years.

Trade contractors with well-documented, state-of-the-art QA systems can meet all of the above requirements without builder intervention. With this in mind, the National Housing Quality (NHQ) Trade Contractor Certification Program was established by an industry

partnership of the NAHB Research Center, the U.S. Department of Housing and Urban Development, the Wood Truss Council of America, builders, and trade contractors. Independent audits and field reviews verify compliance with the QA program requirements, then certify qualified contractors.

Formal QA systems not only prevent quality defects; they also provide evidence necessary for a defensible position. Start now and be prepared for an attorney challenge.

National Association of Home Builders Legal Resources for Members

Legal Research Program

NAHB provides legal research on building industry-related issues to all members and affiliated home builder associations.

While they don't replace your local attorney, their legal team can give you valuable information and answers that will get you started on solving your problem, and save you time and money.

NAHB has a wide variety of legal research resources, including access to several nationally-recognized law libraries, as well as a computerized legal database that contains over three million court opinions, federal and state statutes, and numerous legal journals and publications.

They will research your question and provide you with a written summary of any related laws, citations to legal case precedents from appellate courts throughout the country, and a wealth of other information.

You don't need a legal background to use the Legal Research Program ... all you have to do is be a member of NAHB. Simply call 800-368-5242, ext. 317 or e-mail info@nahb.com, or write to the NAHB attorneys and give a brief overview of your problem or question.

White Papers

The following are white papers excerpts from the National Association of Home Builders' Legal Services Department. Full documents are available to NAHB members at http://www.nahb.net/legal_services, or by calling 800-368-5242 ext. 317.

Builder Liability for Construction Defects

Builders today face a growing number of potential lawsuits as state legislatures and the courts continue to increase their protection of homebuyers. This memo will outline a builder's rights and potential liability under various theories of recovery in the context of homebuyer complaints for construction defects. Cases are cited to show support for a legal or factual statement. In some instances, a short parenthetical explanation follows the case to help the reader understand how the source supports the author's assertion. The case citations found in the paper will be of interest to the builder and the builder's lawyer, who may have a particular interest in the legal aspects of the issues discussed in this paper.

Implied Warranties in the Sale of New Homes

Courts and state legislatures, responding to consumer demands to equalize the buyer and seller, began to require that builders meet certain standards in the construction of residential dwellings.

Insurance Coverage for Claims of Latent Defects: What Protection is a Builder Buying?

The home building business, like most businesses, is fraught with risk. One of the many risks faced by a home builder is that, long after substantial completion, the builder will be required to repair its homes because of a latent defect resulting from a defective product used in construction or from faulty work by the builder or by a subcontractor. One of the ways builders attempt to avoid the risk of latent defect claims by homeowners is by purchasing general liability insurance. The purpose of this paper is to help builders understand what kind of claims for latent defects are covered by their liability insurance policies and what kinds are not.

BOOK: *Contracts and Liability for Builders and Remodelers*

By: David S. Jaffee

This fourth, expanded edition helps builders and remodelers manage risks and protect against liability with well-written contracts. For the first time, it includes illustrative cases as well as sample language and guidelines for contracts between builder and buyer, remodeler and homeowner, and builder and subcontractor, and remodeler and subcontractor. This handy reference helps you and your attorney write better contracts and helps prevent litigation with newly expanded information on reducing liability for builders and remodelers, design-contracts for remodelers and custom builders, environmental liability, warranties and disclaimers, and inspections. Available from the Homebuilder Press at [www/builderbooks.com](http://www.builderbooks.com) or by calling 800-223-2665.

MAGAZINE ARTICLES:

"Common Construction Defects" by Pete Fowler

A guided tour through some of the most common errors and omissions fueling the litigation frenzy in the California building industry.

http://www.jlconline.com/jlc/archive/defects/common_defects/index.html

"Builder Time Bombs" by Martin Holladay

These oversights, omissions, and bad design details can lead to early failures.

http://www.jlconline.com/jlc/archive/defects/time_bombs

NAHB Building Product Issues Committee

This Committee has jurisdiction over matters relating to builder liability problems arising in connection with new construction and remodeling. The Committee monitors emerging and existing building product and construction defect problems and recommends appropriate Association action; studies and recommends to the Association methods of reducing builder liability from product and construction defects and; works cooperatively with manufacturers, insurers, product trade groups, and other interested parties on builder liability issues. The Committee will meet at the NAHB International Builders Show in Atlanta, date and room TBD. Contact David Jaffee for details 800-368-5252.

What is a Construction Defect?

By David L. Grenier, C-Risk Construction Defect Mitigation

There has been much controversy within the construction industry with respect to, "what is a construction defect?" Much of this controversy has proliferated because of the different viewpoints of the parties who are asking the question, and/or making the determination, e.g., builder, developer, contractor, subcontractor, material supplier, product manufacturer, homeowner, homeowners' association, etc.

There is no short answer to this question and the answer is somewhat multi-faceted, determined by many variables. However, there is a big difference between a construction defect and a nuisance claim, such as squeaking floor or conditions resulting from lack of maintenance or normal wear and tear. Construction defects could range from complex foundation and framing issues, which threaten the structural integrity of buildings, to aesthetic issues such as improperly painted surfaces and deteriorating wood trim around windows and doors.

The trial courts have recognized that construction defects are tangible and can typically be grouped into the following four major categories:

1. *Design Deficiencies* - Sometimes, design professionals, such as architects or engineers, design buildings and systems, which from a performance standpoint, do not always work as intended or specified. The motivation for the design may be form, function, aesthetics, or cost considerations, but the completed design could result and/or manifest into a defect. Problems are typically encountered with roof systems, which due to their design complexity, pitched or flat, are prone to leaks. A majority of roofing problems are a direct result of the improper specification of building materials, which can result in water penetration, intrusion or other problems, as well as poor drainage design and/or the inadequacy of structural members, which can result in cracks and deterioration of roofing component and materials.
2. *Material Deficiencies* - The use of inferior building materials can cause significant problems, such as windows that leak or fail to perform and function adequately, even when properly installed. Leaking windows are a common defect and prevention requires good workmanship. Window leaks can result from many things, including rough framing not being flush with the outside at openings, improperly flashed windows, improperly applied building paper, window frame racked during storage/moving, lack of sheet metal drip edge above window header, etc. Common manufacturer problems with building materials can include deteriorating flashing, building paper, waterproofing membranes, asphalt roofing shingles, particle board, or inferior drywall and other wall products used in wet and/or damp areas, such as bathrooms and laundry rooms.
3. *Construction Deficiencies (Poor Quality or Substandard Workmanship)* - Poor quality workmanship often manifests as water infiltration through some portion of the building structure, such as cracks in foundations, floor slabs, walls, dry rotting of wood or other building materials, termite or other pest infestations, electrical

and mechanical problems, plumbing leaks and back-ups, or lack of appropriate sound insulation and/or fire-resistive construction between adjacent housing units, etc.

4. *Subsurface / Geotechnical Problems* - California, Colorado, and other parts of the country have a significant amount of expansive soil conditions. As a result of this type of terrain, there have been many problems when housing subdivisions and/or developments are built into hills or other sloping areas where it's difficult to provide a solid and/or stable foundation. If the subsurface conditions in these subdivisions and or developments are not properly compacted and prepared for adequate drainage, problems will inevitably result. These can include vertical and horizontal settlement (subsidence), movement (expansion, slope failures, flooding, and in extremely wet/rainy climates, landslides, etc. These types of conditions typically lead to cracked foundations, floor slabs, and other damage to a building. A worst-case scenario in some instances could render a building uninhabitable, as well as uninsurable.

The courts have typically used these categories and associated standards to determine culpability for construction defect problems.