When a product fails, the assignment of responsibility often comes down to the owner’s expert versus yours. The owner’s expert will argue that you could have foreseen the failure if you had conducted a rigorous investigation of the product before including it in your design.

Architects and engineers are generally expected to know the advantages and shortcomings of the building materials, systems and processes they specify, and to keep reasonably abreast of changing technologies and code requirements. Like most of their peers, they should also be able to reasonably rely on a manufacturer’s representation when specifying materials or products.

Yet some owners seek to raise that standard. Nancy Rigassio, Esq., Executive Claims Counsel and Assistant Vice President for XL Group’s Design Professional team, says, “We’re seeing white-shoe, ivory-tower experts criticize architects and engineers for failing to rigorously investigate a product before specifying it in the design.

“Some owners’ experts create a new, heightened standard of care,” she continues. “They conclude that the architect or engineer should have undertaken rigorous testing, including obtaining the manufacturer’s own test results so the specifying design professional could have verified the manufacturer’s representation.”

According to Rigassio, this higher standard exposes the design professional to products liability and warranties, both of which are specifically excluded from coverage under a professional liability policy. She explains that professional liability policies typically don’t apply to that part of any claim based upon or arising out of the sale or distribution of any product developed by the insured, or to that part of any claim based upon or arising out of express warranties and guarantees.

Rigassio and other XL Group claims staff have seen the issue come up in claims related to waterproofing membranes, roof shingles, adhesive epoxy, louvers and other building components.

In a case involving an epoxy adhesive for overhead applications, the owner’s expert testified that the engineer had failed to adequately investigate the product and should have required mechanical fastening instead. To complicate matters, Rigassio says, the specifying engineer was no longer with the firm. He’d taken no notes explaining what investigation he had undertaken regarding the product, and when he appeared for his deposition, his recollection was so sketchy that his testimony was of no help in defending against the claim.
Approving Substitutions

The issue of investigating the suitability of a product comes up during the construction phase, too. Contractor- or owner-proposed substitutions—sometimes the result of “value engineering”—require additional, unanticipated research and, if accepted, result in changes to the already-completed design documents. Often a contractor proposes a substitution for convenience: to reduce their costs, to shorten material lead-times, for ease of installation, because of their familiarity with the product or because it’s more readily available. But the traditional AIA A201 general conditions to the owner/contractor contract puts the burden on the requesting contractor to show that the substituted product’s quality is equal or superior to that of the original.

In another recent case, the owner’s expert concluded that the design professional could not rely solely on the manufacturer’s representations when agreeing to the contractor’s request for substitution of a particular roof venting system for a new school. According to Rigassio, “Even though the contractor had the contractual duty to warrant the equal or superior quality of the proposed substituted product, the owner’s expert criticized the architect for the product’s failure, blaming the architect and others for the growth of mold under the roof.”

Protecting Yourself from Specification-Related Claims

There’s not much you can do about what a plaintiff’s expert says. But defending yourself in the event of a claim—or perhaps avoiding a claim in the first place—will be easier if you have carefully explained your professional obligations. Make sure the owner understands where your duty to investigate materials and products reasonably begins…and ends.

It’s important to take a thorough, consistent approach to specifying products. You have to weigh the benefits of specifying only those products and technologies that you know will do the job, those that are time-tested and proven in a particular application, versus ruling out all new products and technologies. When specifying products, ask yourself what other reasonable consultants would do in similar circumstances.

If you specify a new product or one with which you are unfamiliar, do your research and document your efforts. Your goal is to be able to demonstrate that you made a reasonable, professional effort to explore the suitability and reliability of the product. Collect brochures, product specification sheets and warranties and guarantees from the manufacturer, share them with the owner and keep them for your records. If the information is only available at a manufacturer’s website (and thus subject to change), save a copy with the date you accessed it, and keep it with your project files. Consider offering the owner a choice of products and let the owner choose the new product, after you’ve explained the benefits and the risks.

Document your conversations with the suppliers and your client regarding the product and its application in the specific circumstance, including any reservations you might have raised. Explain to the manufacturers, suppliers and installers what you want the product to do, and require them to give you written assurances that the product is suitable for the intended application. Many design firms ask the manufacturers’ field representatives to be present during any installation to confirm that their products are installed properly and according to the manufacturers’ specifications.

Owners’ experts are creating a new standard of care that exposes design professionals to products liability and warranties.
Use a “Substitution Approval Request Form” and provide for its use by the contractor with appropriate language in the contract documents. This form requires the contractor to justify a substitution and provide the information necessary you need to properly evaluate the request. (The Construction Specifications Institute—CSI—has a form intended to be used after the bid period. XL Group’s Contract eGuide for Design Professionals also has a sample form you can adapt for use in your firm.)

Finally, address these issues in your agreement. Make sure you have provisions that spell out and limit your responsibility when it comes to specifying materials and contractor- or owner-requested substitutions. Include a clause that affirmatively defines the standard of care to which you will perform. Also, talk to your attorney about adding a clause that confirms you are making no warranties on products or their performance.

As to the efforts of owners’ experts to raise the prevailing standard, Rigassio believes they’re being short-sighted. “Many of the ‘hired guns’ who try to impose these obligations are academic spectators who don’t have first-hand experience in these situations,” she says. “This doesn’t prevent those experts from offering their opinions, but it does factor into their credibility.”