



## Defense Angle of Slip and Fall Accident Claims - Episode #128

Posted: Mon., May 15, 2017



**Hosted by:** John Czuba, Managing Editor

**Guest Expert:** Jerry Birnbach of [Jerry Birnbach & Associates](#)

Qualified Member in *Best's Directory of Recommended Expert Service Providers* since: 2016



**John Czuba:** Welcome to *The Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Recommended Insurance Attorneys, Including Expert Service Providers*.

We're pleased to have with us today Jerry Birnbach, fellow in the Institute of Store Planners and associate member of the American Institute of Architects from [Jerry Birnbach and Associates](#) in Somers, New York.

Jerry is one of the few retail experts in the insurance and legal fields. He has 35 years of experience on award winning store and display design, working with Fortune 500 companies. His website, [www.expertretailwitness.com](http://www.expertretailwitness.com), helps eliminate the risk in store design.

He also has served as an expert witness in no less than 70 cases. Jerry, we're very pleased to have you with us today.

**Jerry Birnbach:** It's my pleasure to be with you.

**John:** Thank you, Jerry. Today's podcast discussion is on slip and fall matters and what companies and defense attorneys need to be concerned about during the litigation process. Jerry, for today's first question, how can any government regulations or industry restrictions ensure satisfactory customer service in a store or business?

**Jerry:** Currently the regulations call for a retailer or a public assembly area to provide within itself a reasonable level of safety. It needs to be hazard free. The issue of retailers trying to put this all together winds up where their training and their manual guidelines have to address all of the various considerations that go into making a store safe.

The way that the customers achieve safety is by not having obstacles and interference placed in front of them. It's up to the store to make sure that they're patrolling the stores and especially the floors to make sure that they're safe.

Now, what constitutes "safe" is a lot of specific detail. There appears to be industry standards that the retailers follow in order to relieve themselves of the liability of being held responsible for an injury at store level.

It's an industry that's not very regulated in terms of statutes that you can turn to that say, "Aha, that's something they failed to do." It basically comes down to creating manuals and safety regulations protocol and then calling upon the store's staff and employees to follow them precisely as they're written.

**John:** Jerry, what specific type of regulations can have major bearings on or impact a case?

**Jerry:** The issue regarding regulations is, as I mentioned, there are very few that are out there that are dictated by law. You can turn to the American Disability Act, which has probably got the greatest influence when it comes to store matters and slip and fall.

I can't stress enough the fact that this is an industry where it's more about what the industry has considered the optimum level of compliance in terms of the store's requirements.

There are some characteristics that lead to the majority of these incidents and injuries. When it comes to a retail environment, most of the items are caused by either overloading the carts that move the product or abandoning the carts and leaving pallets on the floor. Liquid on the floor is certainly one of the great slip and fall matters.

The fact that retailers are trying to get every dollar out of their square foot winds up where they get innovative and start to reduce the aisle width in order to get more product in and in doing so create some big issues in terms of liability.

Proper maintenance is something that needs to be maintained at all times and actually documented so that you can show that you're being compliant and you're doing your best to keep the customer safe.

When you get to other types of public assembly like a hotel lobby, one area that gets a lot of action is where they give the coffee out. There's a lot of issues regarding that, whether it's slip and fall or burns. That is regulated and controlled.

If you can make sure that your staff is compliant in terms of making sure that everything is in its proper location and being maintained at all times. It's something that has to be entrenched in their heads - that it's something that needs to be done in the time frame in which it's dictated to be done.

Lastly, in an office lobby, that normally becomes an issue regarding floor care, lighting, and maintenance policies. All of these do need to be in place, and accurate, and well specified to avoid any questions later on.

**John:** What types of practices can you suggest that stores might be able to adhere to in order to eliminate any such risks in their particular establishments?

**Jerry:** One of the big responsibilities of a retailer is to inspect the aisles. Many retailers actually define the time frames in between inspections. It behooves the staff not to be as concerned about inventory, which they normally are, but to give attention to issues such as displays out of place or product out of place because all of those can lead to some disastrous types of injuries.

Floor inspection, as I mentioned, is probably the biggest issues and where a lot of attention needs to be spent, not only on the maintenance side but also the patrolling and making sure it's always clean and free of any kind of foreign matter.

The issue in the regulation also stipulates that it's not enough just to inspect, but you also need to be sure that if there is a spill that it's cleaned up correctly. There needs to be ways in which you can move your product throughout the store in a safe manner so that it doesn't fall on someone.

It shouldn't be abandoned because of the tendency for customers to want to try to shop items that are parked next to a display when, in fact, they're unstable. That could lead to injury.

The management of the safety is a bottom line issue. Most retailers tend to not place as much emphasis on it. It basically is where they're going to take a big hit if they're involved with a large lawsuit due to an injury and the responsibility was theirs.

**John:** Jerry, what organizations can be the most influential in slip and fall cases?

**Jerry:** I mentioned before that it's an industry that's not very regulated. It happens that the building itself falls under the building code or the local building codes. For the most part, most of America follows what's known as the International Building Code, which has taken a long time to formulate.

The good news is that it's standardized building code regulations so at least you're able to learn it, and obey it, and not have to worry municipality to municipality. That is one area that has a little bit of impact in terms of what's going on in the store and creating a safe environment.

The next one, which is a little bit more critical because the building code actually adopted it, is the American Disability Act, which was intended to regulate and protect handicapped individuals.

What most attorneys are not aware of is the fact that that is regulating America. You don't have to be handicapped in order to fall under compliance. It's expected of every retailer to be following this act.

In doing so, whether you're handicapped or not handicapped, the retailer needs to be abiding to these particular regulations which address safe dimensions, and methods of construction, and certain materials that need to be applied in slip areas.

The last one that has impact would be OSHA, which is the Occupational Safety and Health Administration. Their responsibilities are to make sure there's a safe working environment.

It's taken a long time for that to kick in but it's a very well run organization within the federal government. Their focus is to make sure that employers are providing a safe environment for the employees.

In doing so, it also affects the customers who are shopping. Some examples would be to make sure that your ladders are safe and that you're keeping mechanical equipment, or maintenance machines, or service machines off the floor because they can lead to trouble if somebody touches them or accidentally runs into them.

For the most part, they address displays such as pallets, which is the only element in the store that they do address in terms of whether it needs to be completely loaded, because of the visual issue that goes along with it in terms of liability.

People aren't normally looking down at the floor when they're shopping. The retailer's basically throwing so many elements at them at eye level that they're not expected to be looking at the floor.



An empty pallet is hard to envision or see when you're shopping so it's regulated not to be empty. Those would be some of the major elements and organizations that do impact the slip and fall in the retail area.

**John:** What's your advice to a business or their defense attorney when trying to defend in a slip and fall case or to eliminate the possibility of risk?

**Jerry:** That's a really good question. The reality of what's going on with slip and fall is that when it comes to retail or some of the public assemblies the law is asking you to not have to put a shadow behind every customer or occupant in the area.

It's asking you to make sure in a reasonable, and that's the key word, reasonable manner to maintain a safe and hazard free environment. In doing that, the major organizations, like a Walmart, Target, and Wegman's, and Kroger's.

They've all determined what they would consider reasonable and willing to fight in court against. The issue that I find, time and time again, is that the corporation is great at putting these manuals, and protocols, and procedures together but where it's falling apart is at store level or in hotel staff members.

The problem is that they're not complying with what the company's asking them to do. They're not documenting it correctly and they're not following the protocol and procedures that they're being asked to follow.

When they do that, they put the corporation in harm's way. It behooves the attorneys on the defense side to hit home the fact that they have not much to work with when you're dealing with obvious surveillance that shows all of these violations and disregard to what's being asked of them to do.

I think the major challenge and issue will be to tell them to enforce and make sure that management at store level is overseeing their stores correctly.

**John:** Jerry, thank you so much for joining us today.

**Jerry:** It's my pleasure. Thank you so much.

**John:** That was Jerry Birnbach from [Jerry Birnbach and Associates](#) in Somers, New York. His website, again, is [www.expertretailwitness.com](http://www.expertretailwitness.com). Special thanks to today's producer, Frank Vowinkle.

Thank you all for joining us for The Insurance Law Podcast. To subscribe to this audio program to go iTunes or our web page, [www.ambest.com/claimsresource](http://www.ambest.com/claimsresource). If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at [lawpodcast@ambest.com](mailto:lawpodcast@ambest.com).

I'm John Czuba, and now this message.

Transcription by CastingWords

---

To find out more about becoming a qualified member in *Best's Insurance Professionals & Claims Resource*, contact [claimsresource@ambest.com](mailto:claimsresource@ambest.com) or visit our [Learn More](#) page to start the application process.

#### BEST'S RECOMMENDED INSURANCE ATTORNEYS AND ADJUSTERS

Copyright © 2019 A.M. Best Company, Inc. and/or its affiliates ALL RIGHTS RESERVED.



No portion of this content may be reproduced, distributed, or stored in a database or retrieval system, or transmitted in any form or by any means without the prior written permission of AM Best. While the content was obtained from sources believed to be reliable, its accuracy is not guaranteed. For additional details, refer to our Terms of Use available at AM Best website: [www.ambest.com/terms](http://www.ambest.com/terms).