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NWCA Supplier Has Money To Lend

CA APPELLATE COURT RULES ON IMPORTANT SIR COVERAGE ISSUE

On the surface, the case of *Clarendon America Insurance Co. v. North American Capacity Insurance Co.* looked like just another example of two insurance companies “duking it out in court.” But behind that façade, the Fourth District California Court of Appeals made an important ruling on the extent of coverage in certain Self-Insured Retention (SIR) cases. The Court ruled that in the absence of any policy language clearly defining the extent of coverage in a development with multiple homes and a policy that only specified \$25,000 per claim, all of the homes would be treated as a single group with a single claim (and a single SIR).

As reported by Dave Stern of West Coast Casualty Service, the case involved Tanamera Homes and Resort Communities LLC, which built a residential development. In 2006, homeowners in the development sued Tanamera, alleging that 43 homes had construction defects. Tanamera then tendered the defense of the action to its insurers, Clarendon America Insurance Co. and North American Capacity Insurance Co. (NAC). As it turned out, only eight of the homes involved in the lawsuit were finished after Nov. 30, 2003, and hence covered by NAC's policy

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NWCA MEMBER EXCLUSIVE PROVIDES FUNDS FOR CONSTRUCTION PROJECTS

The NationWide Contractors' Alliance (NWCA) took a major step in its on-going quest to provide programs to solve contractor problems, when it recently entered into an agreement with Developer's Financial Solutions (DFS), a California-based company that specializes in providing project funding – and related products and services – to both residential and commercial builders and developers.

“This is obviously an important milestone for us,” said Doug DeForest, President of NWCA, “because it addresses one of, if not THE, major issues facing many companies in the construction industry today. DFS is a quality organization with high customer service standards. For those who qualify, it is definitely an answer to a huge problem. That answer is provided by an organization that knows and understands the construction industry.”

In addition, DeForest went on to cite a number of significant advantages to members that influenced NWCA's decision to select DFS. These include: the experience and expertise provided by DFS; the breadth of projects considered including tracts, multi-family and speculative development; DFS' flexibility in both financing and equity driven solutions; competitive terms for deserving members; well defined processes and excellent service.

The NWCA/DFS agreement is the result of extensive discussions between Doug Shipman, CEO of DFS, and Tracy Duerfeldt, Strategic Development Specialist for the NWCA.

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PANEL ON NEW INSURANCE PRODUCTS AT WEST COAST CASUALTY SEMINAR ANSWERS BUILDING DEFECT ISSUES

Treacy Duerfeldt, NWCA Strategic Development, served as a panelist during the 17th annual Construction Defect Seminar put on by West Coast Casualty. The two-day seminar in May boasted high attendance and very positive feedback on the information presented and its relevance to the construction defect community.

The seminar in which Duerfeldt was a panel member, “Construction Defect and Insurance: What New Products are Needed to Fill the Voids?.” was well attended and produced some key conclusions:

- 1) SB800 in California can complicate what triggers a claim and may leave coverage gaps
- 2) WRAP policies still suffer from low limits, especially in cases with a rolling wrap covering too many units and/or with defense costs inside the limit (eroding limits)
- 3) WRAP policies can sometimes cause conflict between the subcontractors, builder and developer – especially with the possibility of multiple SIRs (Self Insured Retentions) and situations where blame and allocation of the SIRs are problematic
- 4) Complications arise with the “takeover” of defunct, partially-completed projects

Of course, some new products were mentioned as well, including the Nuway large project solution that the NWCA endorses (and which specifically addresses each of the above problems).

Duerfeldt expressed his appreciation that he and the NWCA had the opportunity to participate and be a part of the construction defect community. “All participants are trying to solve construction defect problems from their area of expertise and strength, whether as an attorney, insurer, agent/broker, association, architect/engineer or builder/contractor,” he said.

WANT MORE INFO ON NUWAY?

Discussion of the NuWay wrap program generated considerable interest and discussion both during the panel discussion and after its conclusion. Readers of this newsletter who want more background information or still have questions may obtain further information by visiting the NuWay website at nuwayinsuranceconsulting.com or telephoning 866-610-0626 X 108.



Four of the eight members of the panel listen to a question from the audience. They are (from left): Treacy Duerfeldt from NationWide Contractors’ Alliance; Scott Whiteside of Gallagher Construction Services; Wendy Wilcox of Jampol Zimet Skane & Wilcox LLP; and Bruce Wick from the California Professional Association of Specialty Contractors.

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The NWCA/DFS agreement will enable the NWCA to market the program through a network of agents that have a special consulting contract with terms available only to NWCA members. To assist those agents in marketing the program, NWCA is working with DFS to provide a tutorial program in electronic format to instruct builders and developers on the different requirements involved in working with a private equity firm and the advantages to agents and their customers in working with a private equity firm.

Formal launch date of the program has been set for later in July. Work is being completed on the tutorial program and other administrative arrangements. The NWCA welcomes inquiries from potential agents for the program, as well as builders and developers.

Interested parties should contact Duerfeldt by phone at 866-491-9722 X 17 or by email at tduerfeldt@nwcalliance.com

SIR RULING (cont. from Page 1)

Thus, NAC refused Tanamera's tender, asserting that it had no duty to defend unless Tanamera paid a \$25,000 self-insured retention (SIR) per claim for each home completed after Nov. 30, 2003. In 2007, Clarendon settled with the homeowners and sued NAC for equitable contribution and indemnity.

The trial court granted NAC summary judgment. Clarendon argued that the \$25,000 SIR applied to the lawsuit as a whole, rather than to each of the eight homes.

The Court of Appeal reversed and remanded, finding that as the moving party on its summary judgment motion, NAC needed to show that no potential for coverage existed under the terms of its policy or that its duty to defend never arose because the SIR terms were never met. The Court of Appeal found if terms in a policy are ambiguous, ambiguity is resolved by interpreting the terms in the sense the insured understood them at formation. In this case, NAC relied solely on the terms of its \$25,000 SIR to support its summary judgment motion and claim that the SIR would apply to each of the eight homes. However, Tanamera may have had an objectively reasonable expectation at formation that the SIR would apply once to the action as a whole. Further, the court found that NAC did not show that Tanamera had no such reasonable expectation. Thus, the Court of Appeal held that NAC's motion was erroneously granted.

The bottom line is that if an insurance contract is ambiguous and the insurance carrier cannot prove to the contrary, a SIR may only apply once. Many contractors should re-evaluate their claims when multiple claims may be denied them coverage.

A copy of the Court's decision can be found on the Internet at:

<http://www.courtinfo.ca.gov/opinions/documents/E048176.DOC>.



JURY INDICTS BOTH MANUFACTURER, U.S. DISTRIBUTOR IN DRYWALL CASE

A Miami jury has awarded a total of \$2.5 million in damages and expenses (plus legal fees) to be paid primarily by the U.S. distributor and the Chinese manufacturer in a case that could set extensive precedents throughout the country, according to information supplied by Dave Stern of West Coast Casualty Services in West Lake Village, California.

In the case of *Armin G. Seifert and Lisa M. Gore-Seifert et. al. v Knuaf Gips K G et. al.*, the plaintiffs sued Banner Supply Company of Miami, the United States distributor of the product, for selling drywall provided by Knuaf that corroded copper pipes and fixtures, ruined their air conditioner and other appliances and made their home smell. Both those charges and the jury's decision were similar to the findings and rulings in a federal class action lawsuit reported extensively in the May issue of this newsletter.

Evidence presented during the trial showed that Banner knew of the problems with Chinese drywall but did not make any public announcement and only replaced the product for selected builders and installers who complained about the smell.

In this case, the jury assigned 55% of the fault to Banner, 35% to Knuaf and 5% each to the importer and exporter involved in the case.

While this case, the first jury trial in this country, established the basic precedent for future cases, there are major issues that may need to be examined on a case-by-case basis. These include the apportionment of blame as discussed above, amount of remediation per square foot, "loss of enjoyment" damages, cost of temporary housing and loss of value of the home because of the stigma that it could carry.

Counsel for Banner has indicated that he will appeal both this decision and a prior ruling on the Economic Loss Rule. If that Rule is reversed, it could dramatically reduce the amount of damages that could be claimed by plaintiffs against suppliers of Chinese drywall.

Obviously, there is still a lot more to come on Chinese drywall. *The Cornerstone* will continue its program of providing readers with the most complete coverage available to anyone in the construction industry on this issue.