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NWCA Lowers Contractor Dues

NEW WEBSITE “NEAR MISS NEWS” ADDRESSES SAFETY AWARENESS

The NationWide Contractors' Alliance (NWCA) announces its endorsement of “Near Miss News” – a new website that focuses on safety awareness and motivation. The Near Miss News compliments various offerings involved in the NWCA Comprehensive Employment Solution, a menu of programs and services to assist contractors with employment related costs and issues.

Near Miss News serves as an easy-to-use resource for employers to approach safety awareness a bit differently. Instead of instructing on how to be safe, stories are made available about near misses or actual accidents that highlight the circumstances involved, attitudes of those present and the resulting consequences.

Nothing brings safety to the front of everybody's mind like an accident. Fortunately, employers don't need to have their own accidents to talk about such things.

(See **Safety Awareness** on page 6)

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REDUCTION MADE IN RESPONSE INDUSTRY'S ECONOMIC CONDITIONS

In keeping with building industry efforts to assist contractors and subcontractors in improving their financial situation, the NationWide Contractors' Alliance (NWCA) has implemented a series of steps to enable more builders to take advantage of membership.

The following changes have been implemented in the membership dues structure for the organization:

- Annual dues will be calculated at one-tenth of one percent (0.1%) of gross sales for both contractors and subcontractors (that is, \$1 per \$1000 of sales).
- Minimum dues will remain at \$250 per year but the maximum will be capped at \$10,000.

The foregoing changes apply to all new contractor and subcontractor members and to all renewals, but are not retroactive. They will remain in effect until further notice. Membership dues for associate members will remain the same as before, with the calculation based on the number of employees.

“We are pleased to be able to make these changes,” said Doug DeForest, President of the NWCA. “To the best of our knowledge, our minimum dues are lower than any other major construction industry related organization and our structure compares favorably. What’s more, the new formula is even easier to calculate.”

He added that the NWCA is an independent member services organization. It is not owned in whole or in part by any of its service providers.

(See **Dues Reduction** on Page8)

Builders Fight Back

Contractor's Trust Files Lawsuit

CHARGES 14 INSURANCE COMPANIES DENIED COVERAGE, NON RESPONSIVE IN CHINESE DRYWALL CONTROVERSY

Editor's Note: In areas of the country affected by the installation of Chinese drywall, builders who unknowingly installed the product have been on the receiving end of lawsuits filed against them and other parties involved. We are indebted to David Stern of West Coast Casualty Service, who has provided us with the latest information in their publication entitled "For Immediate Release." This action may provide recourse for other builders, especially smaller ones, who have been denied insurance coverage and lack the financial resources to take legal action in response. Stern's article is quoted below.)

January 6, 2010 - COMBINED DISPATCHES - The Trustee for the WCI Chinese Drywall Trust has filed suit against 14 insurance companies in U.S. District Court, Eastern District of Louisiana, seeking indemnification for losses arising from claims for the development and sale of homes allegedly containing defective Chinese manufactured drywall.

The suit is the first insurance coverage action regarding Chinese drywall to be filed in the Chinese Wall Board Multi-District Litigation in the Eastern District of Louisiana.

The WCI Drywall Trust (WCI) was formed in July 2009, after the bankruptcy of homebuilder WCI Communities and its subsidiaries, to assume liability for claims alleging harm from Chinese drywall installed in homes built by WCI. More than 700 homeowners may seek recovery through the Trust.

WCI, its subsidiaries and subcontractors purchased insurance policies with aggregate limits of more than \$200 million during the policy periods triggered by Chinese drywall claims, which began in 2006. In response to WCI's claims, the insurance companies and subcontractor insurance companies have either denied coverage, reserved their rights, failed to reply to WCI's notice letters, or otherwise failed to acknowledge coverage.

WCI seeks a declaratory judgment finding coverage for the claims, as well as damages for breach of contract. A prompt and thorough insurance recovery is vital to enabling homeowners suffering from the

effects of defective wallboard to remediate their homes and recover their losses," said Robert M. Horkovich, lead counsel to the Trustee for the WCI Chinese Drywall Trust. WCI builds homes and residential communities in states including in Florida, New York, New Jersey, Virginia, Maryland, and Connecticut.

WCI is represented by Robert M. Horkovich of New York-based Anderson Kill & Olick, P.C., and Burton LeBlanc of Baton Rouge, LA-based Baron & Budd, P.C."

WORKERS COMP PROGRAM ENDORSED FOR NWCA MEMBERS IN CALIFORNIA

The NationWide Contractors' Alliance (NWCA) just recently endorsed a new option to potentially reduce employment costs for its California members. The stand alone "PayGo" workers compensation program, offered through licensed NWCA associate members, was made possible just before the end of 2009 by an "A" rated, admitted carrier.

Contractors avoid large down payments and audits with this new program while potentially saving money. The "pay as you go" concept is somewhat new to California and is not a professional employment organization (PEO) option. The NWCA relies solely on its associate member agents to market the program and recommend what is best for its contractor members.

Deductibles are required and are rewarded with discounts. The NWCA will help members identify education courses and other services designed to prevent or minimize accidents so the contractor can retain the discount savings. Although optional, human resources and payroll service providers are also available to help with overall employment needs.

Notably, this program can accept tough cases that may otherwise not have many choices such as roofers, solar installation, general contractors with many subs, etc. Further inquiry should be made by way of a licensed California agent who works with the NWCA-endorsed program.

Contractors wanting the name of the closest agent can contact the NWCA by email at HWeissinger@nwcalliance.com or by telephone at 866-491-9722 x 23.

So Do I Have Insurance Coverage Or Not?

ATTORNEY COVERS MISCONCEPTIONS OVER PROPERTY DAMAGE COVERAGE

by John V. O'Meara, Esq.¹

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It seems simple enough. You call your insurance broker, remind him or her that you are a contractor and that you perform that certain specialty of construction that you do and want to be protected through a good insurance policy for those annoying and baseless construction defect cases. Your broker nods his or her head with apparent understanding, takes an enormously large check from you, and you walk out the door lighter in the wallet, but with the peace of mind of knowing that your company, and family, are protected. But are you?

There is a misconception on the part of many contractors as to exactly what the traditional commercial general liability insurance ("CGL") policy covers - and what it does not. This article is intended to explain in general terms what "property damage" is covered, and what is or may not be covered depending on the wording of your insurance policy. **2**

To begin, the genesis of most commercial general liability insurance policies is a standard form prepared by the Insurance Services Office ("ISO"). Most insurers utilize ISO forms, endorsements and exclusions, so there is some uniformity across the insurance universe depending on the particular forms, endorsements and exclusions which are used on any particular policy. **3**

Most construction defect lawsuits concern allegations of property damage. While construction accidents and allegations of toxic exposure due to mold, asbestos and even vapors from Chinese drywall can lead to allegations of personal injury, this article will focus on property damage coverage.

In general, in the typical CGL policy, "property damage" is defined as:

- a. Physical injury to tangible property, including all resulting loss of use of that property.
- b. Loss of use of tangible property that is not physically injured.

Although not defined, the term "physical injury" is generally construed to pertain to losses resulting from physical contact or physical linkage to the property at issue.

The term "tangible property" is understood to mean property (such as real estate) having physical substance apparent to the senses. Intangible economic losses do not constitute "property damage" within the meaning of a CGL policy.

Where trouble starts is when a plaintiff sues a contractor and alleges a defect which may not qualify as "property damage" under the CGL policy. For example, plaintiffs in construction cases often contend that drywall and structural hardware were not correctly installed, thereby rendering the structure less fire and structurally safe. Even though there has been no damage to the structure, the costs of repair associated with repairing these problems can be staggering. However, since the drywall and structural hardware is still intact, in other words, walls have not fallen down and the structure has not burned down (thus causing damage to other property), carriers generally take the position that no "property damage" within the meaning of a CGL policy has occurred.

1. This article is not intended to provide legal advice.
2. Many policies are different. The statements herein do not apply to every policy all the time.
3. Not all insurers utilize ISO forms and some modify them. Read your own policy.

(See **Insurance Coverage** on Page 8)



Top 2009 Legal Cases

ATTORNEY PICKS CHINESE DRYWALL, RISK MANAGEMENT AS KEY SUBJECTS

Several of the legal cases selected as among the Top Ten Most Significant Insurance Coverage Decisions in 2009 could have impacts on contractors and their insurance carriers in 2010 or future years. For the ninth year in a row, Randy J. Maniloff, an attorney with a distinguished law firm in Philadelphia, has selected and published a list of the Top Ten coverage decisions.

To Maniloff, the most important consideration for selecting a case as one of the year's most significant is its potential ability to influence other courts nationally. While he employs several other criteria, Maniloff usually, but not always, selects cases from higher state courts, where decisions have been tested by appeals and hence tend to be more final

The list, of course, contains a variety of cases involving varying industries and situations and hence is tempting to repeat in its entirety (for example, one coverage case involved a Hooters franchise, but the issue was whether or not the restaurant was covered, not the employees who were actually suing for sexual harassment). However, because of space limitations, this article will focus on two situations with potential impacts on the building industry:

1. **Chinese Drywall.** As readers of this newsletter know, over 600 claims on this subject have been combined into a multi-district case under the jurisdiction of a federal judge in New Orleans who is reportedly "proceeding at a rapid clip." In addition, a multitude of other issues have been litigated in other courts with for, against and pending decisions rendered.

However, it is still too early for any concrete judicial guidance on Chinese drywall coverage issues. In many instances testing is still underway; in others it is too early to determine the total effects. One pending issue is whether the "rotten egg" smell allegedly given off by Chinese drywall constitutes a physical injury to property. This is distinct from corrosive fumes that destroy equipment or odors that cause personal health issues.

A recent court case involving odors emanating from new carpeting may provide guidance in the Chinese drywall

May Impact Builders

situation. Ultimately, the First Circuit Court of Massachusetts held "that odor can constitute physical injury to property under Massachusetts law, and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed." The potential relationship to drywall cases in this instance is obvious.

2. **Contractor's Risk Management Failures.** As everyone in the construction industry knows, construction defect cases have a way of becoming very expensive. First there is the repair or replacement of the defect and often the consequences of that defect. But then there are third party actions involving the builder and his/her subcontractors. And sometimes fourth party actions as well. This means an increasing number of insurers, their lawyers, hearings, depositions, expert witnesses and all the rest.

The costs to the contractor's insurer increase when the contractor fails to employ such basic risk management techniques as obtaining contractual indemnity from the subcontractors and additional insured rights from it subcontractors' insurers. These requirements and others are often contained in a Contractors Warranty Endorsement or similar document.

In a case entitled "North American Capacity Insurance Co. v. Claremont Liability Insurance Co.," the Court of Appeal in California specifically addresses the contractor's failure to enforce the Contractors Warranty Endorsement for eight of 13 subcontractors it had retained for the project at hand. The Appellate Court upheld the ruling by the lower court that shifted some of Claremont's liability to North American, the insurer for the general contractor.

The decision sends a clear message both to contractors and their insurers that if they need to use some form of Contractors Warranty Endorsement, then they need to enforce it. Otherwise, coverage will be forfeited or the premium cost to the insured will inevitably be higher.

*Key selection criteria –
Potential to influence other
courts nationally.*

 <p>nwc alliance standing together</p>	<p>Benefits of Membership Call Us 866-491-9722 x 15</p>
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Tips For Building Referral Business

CUSTOMER SERVICE EXPERT ADVISES STREAMLINE WARRANTY PROCESS

By Carol Smith, Customer Service Consultant

(Editor's Note: Carol Smith is the internationally recognized expert on customer service for the home building industry. With over three decades of experience as an author, speaker, and consultant, she provides a variety of services to builders from written customer materials to staff training. Reach her at 719-481-6247 or visit www.cjsmithhomeaddress.com. This article is the third in a series on providing superior customer service.)

Because it has such a powerful impact on referral sales, builders are wise to establish effective habits for managing warranty service. For a small volume builder who has limited staff, not to mention time and money, this involves an acknowledged challenge: *How can a small volume builder streamline warranty processes and earn referrals from satisfied homeowners?*

The first half of the answer to this question is to establish a simple system based on the three activities essential to warranty service excellence: managing, administrating, and repairing.

1. **Managing** includes two main functions. The first is meeting with homeowners when necessary to screen items and determine what should be fixed and who should do the fixing.

The second management role includes regular review of items going through your system. Your purposes for doing this are to identify issues that require your level of authority to resolve (such as a trade contractor who is slow to respond or a homeowner who is unreasonable about providing access). At the same time, watch for recurring items to be aware of and prevent in the next home.

2. **Administrating** involves setting up home warranty files, issuing work orders, routine tracking, report compilation, and filing. For superior support in this area, consider using the HOMsoft system which is an inexpensive, simple computer-based system with your warranty standards embedded in it and a home page with your logo. HOMsoft minimizes time spent managing the details of warranty and at the same time provides faster

service to your homeowners. The NationWide Contractors' Alliance (NWCA) endorses this system, among other options for assisting contractors in lowering their costs by operating more efficiently.

3. **Repairing** includes the physical steps taken to repair items. Consider using a printed list of behaviors you expect from all repair personnel – whether your direct employee or an employee of a trade contractor. For instance, you may want to require that an appointment be set for no longer than a morning or afternoon time slot and that personnel park in the street, clean up after work is complete and request the homeowner sign the completed work order. For a full list of over two dozen such points, visit our Web site (cjsmithhomeaddress.com) and click on “Warranty Repair Appointment Guidelines.”

The second half of the answer to the question raised at the outset of this article is the absolutely critical step for success – developing the self-discipline to include warranty as a routine item on your calendar. Scheduling time for addressing warranty matters is the area most often overlooked by builders. As organization expert Julie Morgenstern stated: Give important repetitive activities a “home” on your schedule. (If you want more hints from Morgenstern, they can be found in her book entitled *Organizing from the Inside Out*.)

Where warranty is concerned, this may take the form of targeting a certain day (or days) of the week for warranty inspections. This would of course be a guideline rather than a hard and fast rule, but it would provide you with a sense of control. You may be pleasantly surprised at the willingness of homeowners to work within your schedule when you discuss this at the beginning of your relationship and advise them of your flexibility when conditions warrant.

Finally, designate a specific day and time on your weekly schedule to review outstanding warranty work and address follow up issues. For example, you might make Wednesday morning, 8:30 to 10:30, your time slot. Having a disciplined calendar will ensure that no homeowner or item goes without attention for long. Keep in mind that it takes 21-30 days for a human being to form a habit; this disciplined approach will take a few weeks to become second nature. Once in place, you will find warranty work stays current, your homeowners stay contented, and your referral sales are likely to increase

NWCA Products...

The NationWide Contractors' Alliance (NWCA) offers a growing list of construction industry products and services that add value to membership in this organization. All of them are specifically designed to address issues raised by members who want tools to help resolve problems and improve profitability.

The NWCA continues to refine and add to its list of products and services by maintaining regular contact by telephone and email with its members.

Its current list of products and services includes the following:

NWCA Learning Center - Hour-long courses available on line and through mail correspondence. Topics include alternative dispute resolution, builder warranties, subcontractor selection, claims management, customer service, and many others.

Comprehensive Employment Solution - Tremendous savings through outsourcing some or all employee functions including payroll administration, workers compensation and unemployment insurance..

Document Management - Monetary savings, completeness of coverage and elimination of lost documents by outsourcing the collection/storage of key documents involving subcontractors.

Residential Warranty Programs – The NWCA endorses two warranty options backed by “A” rated insurers, providing customer service guarantees and elimination of open ended construction defect exposures.

NWCA Finance Center - Referrals to obtain financing for construction equipment and development projects.

Prescription Drug Savings Card - Up to 60% savings on prescriptions for employees and their dependents at no cost to the employer.

Liability Insurance Programs - The NWCA endorses two of the most high quality and innovative construction

Fleet Management - reduces potential for driving accidents by utilizing public feedback.

GPS Tracking of Company Vehicles - The GPS (Global Positioning Satellite) program helps reduce fuel

...And Services

costs and allows live vehicle tracking to assure employee efficiency and quicker customer service response.

Automated Customer Service and Contractor Response Tracking - Members get an affordable tool that saves more than it costs by reducing insurance and warranty expenses.

Workers Compensation Overcharge Recovery - FREE consultation and review of up to four years of policy claims and premium data.

Wrap Administration - High level of service and expertise with group pricing discounts.

Membership Rewards Recruiting Program - Earn rewards by referring other contractors or industry professionals.

Large Project Risk Mitigation System - Realize a 10-year zero-cost of risk management through project and subcontractor management solutions.

Risk Management Evaluation System (RMES) – Two innovative new programs that enable contractors and multi-family project managers to solve problems before they happen and potentially avoid litigation. For information on using the RMES programs, contact the NWCA Program Administrator by telephone at 866-491-9722 x 15 or by email at lunrue@nwcalliance.com.

Safety Awareness – (continued from page 1)

At www.nearmissnews.com, an NWCA associate or contractor member can join for 90 days free and access all the available stories, which are expected to number nearly a thousand within the next six months. The stories are searchable by industry, accident type or key word.

In addition, anyone – whether a subscriber or not - can participate in the Near Miss News program by submitting a story, true or fiction, following the directions contained in the website identified above. What's more, each month there is a prize for the person or entity that submits the “Story of the Month,” In January, the “Story of the Month” prize is a \$100 gift card.

WASHINGTON LAWSUITS CLARIFY STATUS ON LLC CANCELLATIONS

(Editor's Note: The following article was published in the December, 2009, issue of the construction defect newsletter published by Scheer & Zehnder, a legal firm with expertise in the subject of construction defect litigation. Scheer & Zehnder can be contacted by telephone at 206-262-1200 (Seattle) or 503-542-1200 (Portland) or by visiting their web site at www.scheerlaw.com.

The NationWide Contractors' Alliance is publishing this article in its entirety because of its specificity on the potential vulnerabilities of cancelling or dissolving LLCs).

“Case: Chadwick Owner's Ass'n v. FHC LLC et al., 166 Wash.2d 178, 207 P.3d 1251 (Wash., May 14, 2009)

Issue: Whether scope of coverage under an insurance policy is determined by the plain meaning of the policy terms? **YES**

Facts: This opinion is a consolidation of two similar cases, the Chadwick case and the Emily Lane case. In Chadwick, FHC LLC was formed for the purpose of constructing the Chadwick Farms condominiums. After the FHC ceased to pay dues and comply with statutory reporting requirements, the Secretary of State administratively dissolved the company. After its dissolution, Chadwick Farms' ownership association filed suit against FHC for alleged construction defects. In response, FHC filed third party complaints against its subcontractors but not before the Secretary of State cancelled FHC's certificate of formation under RCW 25.15.285(4), allowing the Secretary to cancel an LLC two years after an administrative dissolution. FHC moved to dismiss Chadwick's claims on the basis that it could not be sued because it ceased to exist.

In the Emily Lane case, the Emily Lane homeowners' association brought suit against the Colonial Development Association LLC for construction defects. The suit was brought five months after its members voted to dissolve the company and after cancellation of the certificate of formation. Emily Lane also filed suit against Colonial's individual members.

Issues:

1-Whether an LLC may be sued after cancellation of the LLC? NO

2 - Whether the enactment of RCW 25.15.303 allows an LLC to be sued after it dissolves? YES

3-Whether the LLC has capacity to sue after cancellation? NO

4-Whether the members of an LLC may be personally liable after cancellation? YES

Holdings: The Washington Supreme Court looked to the plain and unambiguous meaning of the relevant statutes in determining that a suit may be brought against an LLC after its dissolution but only before its certificate of formation is cancelled. Once an LLC has been dissolved, whether administratively or by its members, the LLC retains the power only to wind up its affairs, which includes prosecuting or defending claims. However, once a cancellation of the certificate of formation is filed, either administratively by the Secretary or by its members, the LLC ceases to exist and no longer has the power to sue or be sued.

The Court further held that the enactment of RCW 25.15.303 has no effect on this result. According to the Court, the statute, providing that dissolution does not impair any remedy against the company, merely clarifies the existing statutory rules. Since the newly enacted statute refers only to “dissolution” rather than “cancellation,” it does not extend an LLC's capacity to be sued beyond its cancellation. The Court reasoned that the legislature was merely protecting suits brought against a company after its dissolution from a court's interpretation holding otherwise.

Finally, the Court determined that individual members of an LLC, while protected by limited liability status, may face personal liability for improperly winding up the company's affairs. With this ruling, the Court decided that an LLC cannot fraudulently escape liability from a suit by simply cancelling a company's certificate of formation and rendering the LLC nonexistent. Rather, if members of an LLC improperly wind up a company's affairs by failing to prosecute or defend a suit, the individual members may be personally liable.

Impact: LLCs can no longer sue or be sued after cancellation. Proper care must be taken, however, when winding up an LLC because during dissolution, an LLC may still be sued. This exposure extends to the members of the LLC, who may also face personal liability while an LLC is winding up.

If you would like a copy of the Chadwick Owner's Ass'n v. FHC LLC et al. case, please contact our offices using the information in the editor's note above.

INSURANCE COVERAGE (cont. from Page 3)

Where trouble starts is when a plaintiff sues a contractor and alleges a defect which may not qualify as "property damage" under the CGL policy. For example, plaintiffs in construction cases often contend that drywall and structural hardware were not correctly installed, thereby rendering the structure less fire and structurally safe. Even though there has been no damage to the structure, the costs of repair associated with repairing these problems can be staggering. However, since the drywall and structural hardware is still intact, in other words, walls have not fallen down and the structure has not burned down (thus causing damage to other property), carriers generally take the position that no "property damage" within the meaning of a CGL policy has occurred.

Another problem is when the alleged defect has caused very little property damage (for instance, some cracked drywall), but the repair methodology includes repairing the structural components of the residence. Many carriers take the position that the cracked drywall may be a covered loss, but not the repair of the structural elements. This is due primarily to the so-called "work product" exclusion contained in many CGL insurance policies, typically at exclusion (o) or (l), depending on the form, and excludes coverage for:

Property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

In the 1986 ISO form, exclusion (l) excludes coverage for property damage to "your work" arising out of it or any part of it and included in the products completed operations hazard...this exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.
4

To quote one California court: "The effect of the policy is to make the contractor stand for its own replacement and repair losses which the insurer takes the risk of injury to the property of others." Western Employers Insurance Co. v. Arciero & Sons, Inc. (1983) 146 Cal.App.3d 1027, 1031. To quote another:

"If, for example, faulty workmanship in the framing or drywall led to rainwater leaking in and damaging a homeowner's furnishings, [the insured contractor] would be indemnified for the damage to the furnishings, but not for the cost of repairing or replacing the faulty workmanship." Blanchard v. State Farm Fire & Casualty Co. (1991) 2 Cal.App.4th 345, 349

The ugly result could be that you, the contractor, could be found to have committed negligence, but because the negligence has not led to property damage to something other than "your work", you may not be covered for the loss. **5**

Understanding what is and is not a covered peril is extremely important. No liability insurance policy covers everything. The best defense to surprise is to sit down with your insurance broker or insurance attorney so that you can be armed with the knowledge of what your CGL insurance policy really covers.

- 4.** If the work was performed by your subcontractor, this exclusion may not apply.
- 5.** Different carriers interpret these provisions differently. Also, different states interpret insurance provisions differently. Check with an expert in your state.

DUES REDUCTION (cont from Page 1)

The NWCA makes its decisions on products and services for its members based on arm's length negotiations to provide the highest value to those members in terms of both price and product features.

DeForest concluded, "The benefit of membership in an organization like ours is more than just the level of dues. It is really about value. We offer the greatest number and diversity of programs and services of any organization of our type. Take a look at the list of 15 of those programs at the end of this newsletter --- they are all designed to help our members save time, expenses and effort. That's money in the bank for our members."