

TOP FIVE INSURANCE ISSUES FOR 2009

By: James Hultz and Uliana Kozeychuk

This year continues to present challenges, hurdles and opportunities for builders and their risk managers. Builders who anticipate and develop strategies to handle emerging trends will be better positioned to weather the current economic conditions. This article addresses the top five insurance issues for 2009.

1. CHANGES TO INDEMNITY STATUTES

AB 2738 modified Civil Code section 2782 and added 2782.9, 2782.95, and 2782.96. The revisions apply to contracts entered into after January 1, 2009. This complex bill was heralded by some as a means to reduce builders' defense fees in construction defect actions. However, in reality, it will significantly impair risk transfer to subcontractors through contractual defense and indemnity provisions.

Among its changes, the new law provides that for projects and claims covered by wrap-up insurance policies ("Wrap Policies"), defense and indemnity agreements are no longer enforceable. This is true even if the Wrap Policy has been exhausted.

In addition, the new law requires a builder to (1) disclose if a credit or contribution to the Wrap Policy is sought; (2) state the Wrap Policy's provisions, and (3) cap the contribution amount sought at the amount the builder paid to cover the subcontractor.

However, Section 2782 provides that it does not affect the holding of *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571 (a potential for coverage as to any portion of a claim triggers the insurer's duty to defend an additional insured as to the entire claim).

In light of these changes, builders will need to revise their documents, ranging from master subcontract agreements and insurance requirement policies to Wrap Policy disclosures and allocations.

2. INCREASING ROLE OF WRAP POLICIES

Wrap Policies have gained significant popularity over the last decade and are gradually replacing traditional coverage under standard commercial general liability policies.

Builders should review their current Wrap Policies to ensure that they include all necessary coverages: commercial general liability, excess liability, workers' compensation, builder's risk, pollution liability, professional liability, errors & omissions, coverage for models and later repairs/warranty claims, extended completed operations coverage, and others coverages depending on builder's specialized needs and circumstances.

An experienced coverage attorney should routinely review all policy proposals to ensure no inappropriate endorsements or exclusions were included.

3. IMPLICATIONS OF CRAWFORD V. WEATHER SHIELD

In *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, the California Supreme Court held that if a subcontractor agreed to defend any suit or action against a developer in which the subcontractor's work is implicated, the subcontractor must provide the developer with a defense, even in the absence of negligence on the part of the subcontractor. For *Crawford* to

apply, there must be an agreement to defend, distinguishable from a mere promise to pay defense costs as part of the indemnity obligation. Importantly, *Crawford* held that this duty to defend is implied in every indemnity agreement pursuant to Civil Code section 2778. So, if parties do not intend to be liable for providing a defense before their own indemnity obligation is triggered, the contract must specifically state as much.

Crawford applies to litigation arising out of contracts entered into prior to January 1, 2009. Contracts entered after that date are governed by the changes to Civil Code previously discussed. Moreover, as further discussed in Mr. Dennis's article in this Developer Update, defense obligations under *Crawford* are independent of other obligations owed by the subcontractors such as indemnity.

4. INCREASING NUMBER OF CLAIMS UNDER THE RIGHT TO REPAIR ACT

The Right to Repair Act went into law in 2003 and builders are now starting to be hit with Right to Repair claims in significant numbers. Builders seeking to enforce their right to repair should be aware of the Act's potential pitfalls and challenges.

For instance, Civil Code section 916(e) requires builders to give notice of inspection to those it intends to hold responsible for construction defect claims, including subcontractors' insurance carriers. For projects not covered by a Wrap Policy, it is crucial that builders comply with this section to preserve their defense and indemnity rights against subcontractors and their insurers.

Additionally, when conducting repairs under the Right to Repair Act, builders should be especially mindful of Voluntary Payment Provisions common to most CGL Policies. As to non-Wrap Policies, Builders who plan to seek reimbursement for repair costs should place their insurers on notice of their intent to make repairs and make reasonable efforts to obtain the insurers' authorization prior to commencing repairs. Given that construction defect claims can be resolved through repairs at a mere fraction of litigation fees and costs, insurers should readily grant such authorization.

5. INSURANCE ISSUES UNIQUE TO "GREEN BUILDING"

Anyone "building green" should review coverage and determine whether the policy offers "green upgrade coverage." This coverage allows the insured to replace lost or damaged conventional property with "green" materials.

Moreover, builders should purchase appropriate coverage for warranty and other repairs (like HVAC re-commissioning expenses), since replacement components must also be "green" in order to maintain "green" status.

Advertising as a "green builder" may also require policy review to ensure adequate coverage for any potential claims that a home or a building is "not as green as advertised."

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