PROFESSIONAL LIABILITY UPDATE

A LOSS PREVENTION NEWSLETTER FOR THE DESIGN PROFESSION

MSP PL 03/2009 'Finding Condo Coverage' March, 2009

Finding Condo Coverage

Article courtesy of Professional Liability Agents Network (PLAN)

Any design firm that has taken on a condominium project or considered designing such projects knows the difficulty such work presents when looking for professional liability coverage. Insurance companies have suffered substantial losses from claims associated with residential condominium projects and will likely raise a design firm's insurance rates when such projects show up on the insurance application.

Why are condos so risky? Consider these factors:

- Condominium projects are often highly leveraged financially. When margins are thin, developers are very interested in controlling costs. They may scrimp on quality of materials, hire contractors on a low-bid basis and forego "optional" design services such as construction observation. Also, design fees are typically low because the developer can replicate a single design to produce multiple units.
- Because the same design can be executed over and over on a large condominium project, a simple design error or omission, or faulty

Condo Coverage *(continued on page 2)*

In This Issue ...

Published by

Cavignac & Associates

INSURANCE BROKERS

License No. OA99520

450 B Street, Suite 1800, San Diego, CA 92101-8005

Phone 619-234-6848 ✧ Facsimile 619-234-8601

Web Site www.cavignac.com

Condo Coverage *(continued from page 1)*

construction means and methods, can also be replicated over and over. A single design or construction flaw that results in a leaky roof, wall or window can easily turn into a large class action suit.

- Condominium buyers are often unsophisticated when it comes to multi-unit ownership issues. They have no relationship with the designer and typically have little knowledge of the construction process. Homeowner associations in charge of upkeep and maintenance are often reluctant to pay for the full range of services needed to maintain the shared exteriors, roofs, utilities and common grounds. And when something goes wrong with their home, they often act emotionally to protect their substantial investment.
- Attorneys are well aware of these first three bullet points. Unfortunately, some lawyers recognize condominiums as litigation goldmines. They actively solicit homeowner associations as potential clients and urge these associations to provide a very critical review of the complex in a search for defects. If the developer scrimped on quality, it probably won't take long to find a reason to file a demand.
- Once a complaint or lawsuit is filed, the developer may be nowhere to be found. It is not uncommon for a condo developer to be a shell corporation set up solely to build and sell a single project. Once the last unit sells, the corporation dissolves. Similarly, a low-bid contractor may not have substantial assets or insurance. So the only deep pockets remaining are those of the design team and their insurance companies.

Condo Coverage *(continued on page 3)*

Cavignac & Associates

2009 Risk Management Seminars

2009 Risk Management Series

- **Workers Compensation 101**
  Thursday, May 21st
  Registration: 8:00 am
  Program: 8:30 am - 10:30 am

2009 Risk Management Series

- **Victims, Villains and Heroes**
  CPE and HRCI credits are available for this seminar
  Friday, March 27th
  Registration: 8:00 am
  Program: 8:30 am - 10:30 am
- **HR that Works Overview / Introduction to Clients**
  Thursday, April 16, 2009
  Registration: 8:00 am
  Program: 8:30 am - 10:30 am
- **10 Legal Traps for the Unwary**
  CPE and HRCI credits are available for this seminar.
  Friday, April 24th
  Registration: 8:00 am
  Program: 8:30 am - 10:30 am

2009 Loss Control & Claims Series

- **OSHA Inspections**
  Friday, March 20th
  Registration: 8:00 am
  Program: 8:30 - 10:30 am
- **Benchmarking for Safety Success**
  Friday, April 17th
  Registration: 8:00 am
  Program: 8:30 am - 2:30 pm
- **Defensive Driver Training**
  Friday, May 15th
  Registration: 8:00 am
  Program: 8:30 am - 2:30 pm

All training sessions available to our clients
Reserve early / seating is limited! *

Register for upcoming seminars

Contact Darcee Nichols at dnichols@cavignac.com or call 619-744-0596

* NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

Condo Coverage *(continued from page 2)*

Certainly, not all condominium developers are shady. There are many highly reputable firms that build quality projects. But from an insurance company's standpoint, condos have a very checkered history. Insurers see condos as multi-million-dollar claims waiting to happen and they have yet to find a profitable way to underwrite them. Some may exclude condo work from coverage. Others cap the amount of condo work a design firm can have – e.g., no more than 10% - 20% of total projects. Some insurers have found that this cap only limits coverage to firms that "dabble" in condos and exclude those design firms most experienced in condo design. They are now insuring clients who do more substantial condo work but require a near pristine claims record for both the designer and the developer.

Design firms with an opportunity to work on a lucrative condominium project have to enter the waters knowing the dangers and take the steps necessary to minimize risk. As a specialist insurance agency, we can often help in getting your condo work insured at a reasonable rate.

Project and Client Selection

When considering a condominium project, choose your partners carefully. This is the most important step to avoiding potential problems.

Look for clients with long track records of producing quality condominium projects. Ask a potential client about its litigation history. Get a list of references from designers who have worked with this client. Contact them and ask about the client's experience, reputation and commitment to quality, and any project disputes or litigation. Learn as much as possible about any past claims. Try to gauge the developer's cooperative spirit in resolving disputes.

Ask to examine the client's financials. There's nothing wrong with checking credit histories, asking for financial statements and the like. However, be ready to reciprocate if you receive a similar request from the client.

Determine whether a contractor has been selected for the project. If so, meet with the principals and review their condo history. Ask whether they would be willing to provide a "constructability" review of your design. If a contractor has not been selected, ask to be made part of the review process. Consider making your involvement with the project contingent on your acceptance of the contractor.

Learn as much as you can about the project itself. Are there unusual design requirements? Does the geography present unique challenges? Are there other condominiums in the area and do they have any history of disputes and litigations? Is the project a new high-rise condominium (moderate risk) or a low-rise wood-framed project (higher risk)?

Consider how your skills and experience match the project. If you've never gone solo with a condo project, you may need to retain the services of subcontractors with more condo experience. Those selections will be crucial. Make sure your subconsultants are well versed in the project and well covered with PL insurance of their own.

Finally, get us involved in your condo decision. Share what you've found about the client, contractor and project. We can give you an idea of what coverage is available in the current market and a ballpark as to the rates being charged. We'll help examine any "owner controlled" or "wrap" policies your client may have and see whether it offers you any protection. We'll help you determine whether project-specific

Condo Coverage *(continued on page 4)*

Condo Coverage *(continued from page 3)*

insurance is available and, if so, how to sell the advantages of this owner-financed coverage to your client.

Condo Contracts

Let's say your condo project checks out and you decide to go further with the potential project. You'll want to pull out all the stops when it comes to securing protective contractual language. In fact, you may want to make some key contract clauses mandatory. If you can't negotiate sufficient protection into your contract, it might be best to walk away. A knowledgeable client will understand your concerns and should be willing to provide reasonable liability protection. Any unwillingness to draft an equitable contract will also tell you something about your potential project partner.

Negotiate for a limitation of liability clause that caps your risk to a specific dollar amount, whether your project fee or your available insurance limits. In most cases, the developer has a significant profit potential from a condominium project. It is only right that they be willing to take on a significant portion of the risk.

Make construction observation a required service. You'll want to observe the jobsite and ensure that the contractor adheres to your design documents. This gives you the opportunity to spot potential trouble spots early and work with the developer and contractor to take corrective actions in a timely and cost-efficient manner -- before a claim situation develops. Pay particular attention to substitution requests from the contractor or developer. Don't accept inferior or untested materials or systems.

You'll want to ensure that the client maintains an adequate contingency fund to handle unanticipated expenses. It's also important to maintain ownership of your instruments of service so that the developer can't take your design and replicate it at other project sites. Negotiate the right to terminate your services should the developer fail to live up to financial or contractual agreements.

1. Indemnification – Have your client acknowledge in writing the special risks inherent in condominium projects and the disparity between your fee and potential liability. Have the client agree to indemnify you and hold you harmless against all damages, liabilities or costs (including legal fees) arising out of the services you perform under the contract, except for those costs that result from your sole negligence or willful misconduct.
2. Waiver – Again, recognizing the special risks of condo projects, have the client agree to make no claim and waive any claim or cause of action of any nature against you which may arise out of the project or the performance of your services under the contract.
3. Maintenance – Have your client agree that the bylaws of the homeowner's association will require that the association performs, as recommended in the maintenance manual, all routine maintenance, maintenance inspections and any other necessary repairs and maintenance called for as a result of these maintenance inspections. The bylaws should also contain an appropriate waiver and indemnity in favor of you, your client and the contractor if the recommended maintenance services contained in the manual are not performed.

Consider negotiating to have the development of the maintenance manual part of your scope of services. Then have the appropriate consultants working on the project develop written maintenance recommendations for plumbing lighting, HVAC, roofing, decking, exterior walls, sidewalks, ponds and so on.

Risky Business

Even with good contractual protection, condos can be risky business. That's why it's important to ensure your fee is adequate enough to offset the added liability.

Call upon our services when considering a project and when you and your attorney are drafting your contract with the client. That way, we'll be knowledgeable about the project, client and contractor, understand the contractual and other protections you have obtained, and best be able to negotiate on your behalf to obtain needed coverage at an acceptable price.

Disclaimer: *This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

Workers Compensation Proposed Rate Increase ALERT!

WCIRB Recommends 24.4% Workers Compensation Rate Increase

The 24.4% rate increase recommendation is being driven by two main components:

1. Increased medical costs (17.6%)
2. Recent Workers Compensation Appeals Board decisions that undermine Governor Schwarzenegger's 2004 reforms (5.8%)

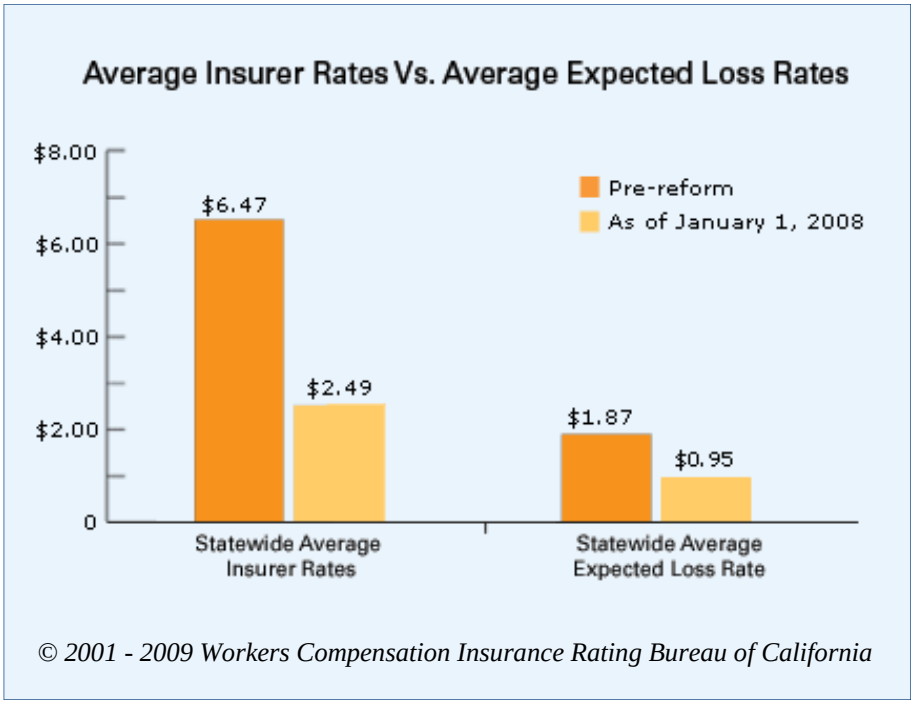
It is important to note that while the Bureau recommended a 16% rate increase to take effect on January 1st of this year, the California Insurance Commissioner lowered that figure to 5%.

Whatever rates the Commissioner ultimately recommends, these rates are ***advisory only***. Insurance companies will select rates for each classification that they think are appropriate.

Generally speaking, most insurance companies follow fairly closely to what is advised. The Insurance Commissioner's decision regarding any potential rate increase will be released at the end of April. (See https://wcirbonline.org/wcirb/wcirb_wire/2009/2009_01.html for the WCIRB announcement.)

While the increase is shocking, it is also important to add some perspective on the current state of workers compensation rates. Even if the full 24.4% increase is approved by the Commissioner, the July 1st 2009 pure premium rates will still be, on average, ***54% lower*** than the approved pure premium rates from July 2003.

This news underscores the importance of implementing a ***proactive Risk Management Program*** that focuses on ***reducing or eliminating the underlying losses*** that drive workers compensation costs.



2009 TAX NEWS

New Law Affects Required Minimum Distributions for 2009

Information courtesy of the Employee Benefits Department

On December 23, 2008, the President signed the Worker, Retiree, and Employer Recovery Act of 2008 (the Act) into law. Section 201 of the Act waives any required minimum distribution (RMD) for 2009 from retirement plans that hold each participant's benefit in an individual account, such as 401(k) plans and 403(b) plans, and certain 457 (b) plans. The Act also waives any RMDs for 2009 from an Individual Retirement Arrangement (IRA).

This means that most participants and beneficiaries otherwise required to take minimum distributions from these types of accounts are not required to withdraw any amount in 2009. If they do make a withdrawal in 2009 (that is not a RMD for 2008), they might be able to roll over the withdrawn amount into other eligible retirement plans. Of course, they must still include any previously untaxed portion of the withdrawal that they do not roll over in their gross income. See *Individual **Retirement Arrangements (IRAs)***, Publication 590, and ***Pension and Annuity Income***, Publication 575, for additional information on rollovers and on calculating the taxable portion of a withdrawal or distribution.

The Act does not waive any 2008 RMDs, even for individuals who were eligible and chose to delay taking their 2008 RMD until April 1, 2009 (*e.g.*, retired employees and IRA owners who turned 70½ in 2008). These individuals must still take their full 2008 RMD by April 1, 2009, or they might face a 50% excise tax on the amount not withdrawn. The 2009 RMD waiver under the Act does apply to individuals who may be eligible to postpone taking their 2009 RMD until April 1, 2010 (generally, retired employees and IRA owners who attain age 70½ in 2009). However, the Act does not waive any RMDs for 2010.

If a beneficiary is receiving distributions over a 5-year period, he or she can now waive the distribution for 2009, effectively taking distributions over a 6-year rather than a 5-year period.

IRA Reporting

The IRS issued Notice 2009-9 on January 9, 2009, which states that issuers of the 2008, *IRA Contribution Information*, Form 5498 should not put a check in Box 11. However, in recognition of the short amount of time to make programming changes, if a financial institution issues a 2008 Form 5498 with a check in Box 11, the IRS will not consider such form issued incorrectly solely because of the check in Box 11, as long as the financial institution notifies the recipient by March 31, 2009 that no RMD is required for 2009.

— Source: IRS.gov

DID YOU KNOW?

Lilly Ledbetter* was a former supervisor for an Alabama Goodyear Tire & Rubber Company who left Goodyear in 1998. She sued the company after receiving an anonymous note informing her that she made 15% - 40% less than her male counterparts.

The Supreme Court had ruled that she should have complained after the first discriminatory paycheck she received, even though she had no way of knowing that she was not receiving equal pay.

* See Lilly Ledbetter Fair Play Act article on Page 7

BenefitsBuzz

Benefits and HR tips brought to you by the insurance specialists at Cavignac & Associates

Lilly Ledbetter Fair Play Act Signed

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act. The Ledbetter Act takes effect as if it was enacted on May 28, 2007. The key provision of the Act is as follows:

> The 180-day statute of limitations for pay discrimination starts to run from the most recent date on which the employee was affected by a discriminatory act (i.e. the receipt of a paycheck), thereby overturning a U.S. Supreme Court decision holding that the statute of limitations for filing an equal-pay lawsuit began on the date the allegedly discriminatory act started. This change allows lawsuits by plaintiffs who allege ongoing pay discrimination but who do not discover it until years after the discrimination began.

What Does This Mean for Employers?

- Employers should review their pay practices – including wage scales and policies – related to wage increases. Identify similarly employed individuals along with material differences in pay.
- To reduce the risk of liability, correct pay differences that are not supported by legitimate business factors.
- Train supervisors to ensure that future pay increases are based on legitimate business factors.
- Consult legal counsel when faced with a pay discrimination charge, and create strategies to reduce claims in the future.

Action Required to Implement Stimulus Act Changes to COBRA Coverage

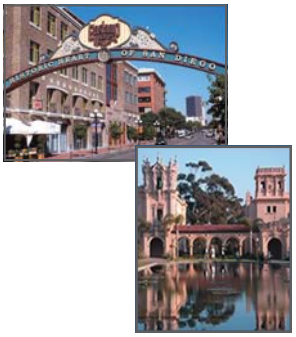
The new COBRA provisions established by The American Recovery and Reinvestment Act of 2009 (ARRA) require employers and plan administrators to take prompt action to implement the new COBRA procedures. Generally, plan administrators and employers should take the following action now:

1. Review records to identify ***all*** employees who became entitled to elect COBRA, including those who voluntarily resigned or were involuntarily terminated from employment since September 1, 2008;
2. Update COBRA materials to comply with the new requirements;
3. Determine whether to permit individuals to elect a different health plan option when electing COBRA coverage;
4. Review severance policies to revisit the issue of any employer COBRA premium contributions;
5. Notify the appropriate individuals of their new rights and responsibilities under ARRA (e.g., additional notification to all individuals whose employment terminated since September 1, 2008, extended election period to eligible individuals);
6. Develop processes and procedures for the administration of the COBRA subsidy; and
7. Keep informed about the status of the soon to be released model forms and regulations.

Community Bulletin Board

"Neighbors helping neighbors in San Diego"

SAN DIEGO ARCHITECTURAL FOUNDATION



- Web Site
- Community Vision Award
- Questions? E-mail **info@SDArchitecture.org**

Society for Design Administration
An affiliate of The American Institute of Architects

- Canstruction
- Web Site
- For more information, e-mail **vicepresident@sdasandiego.com**

Monarch Schools

- Programs
- Web Site

San Diego Humane Society and SPCA

- "Mardi Paws" Walk for Animals
- Web Site

DOWNTOWN YMCA
500 West Broadway, Ste. B, San Diego 92101 619-232-7451

- Web Site
- Good Friday Breakfast
- Questions?

  Contact **Alicia Gettys** by phone at **619-232-7451** or e-mail **agettys@ymca.org**

Senior Community Centers

Mission:
To provide quality and compassionate services for the survival, health and independence of seniors living in poverty

- Press Room
- Web Site