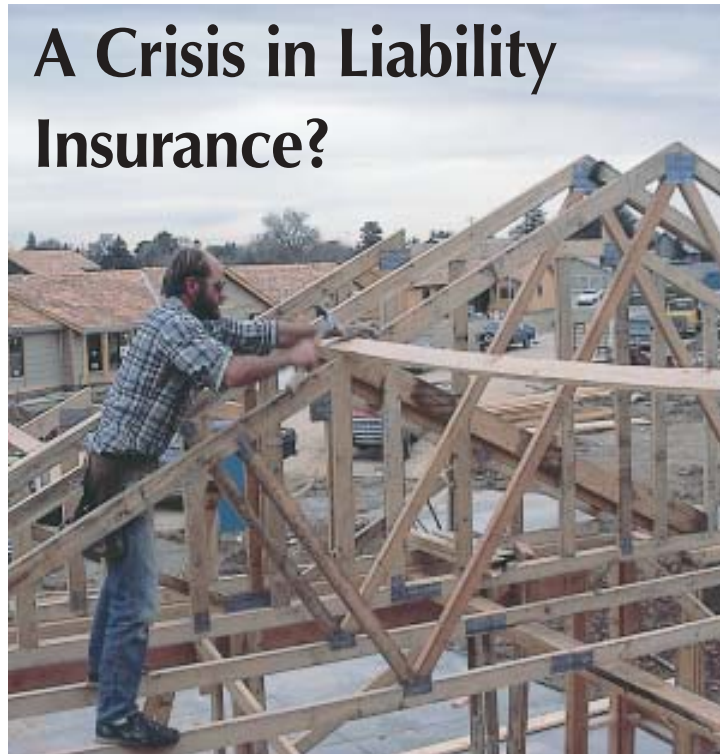


NOTEBOOK

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EDITED BY JON VARA



A Crisis in Liability Insurance?

An emerging “hard market” makes coverage more costly — if you can find it

In the past year or so, more and more builders around the country are finding themselves faced with sharp increases in their general liability and worker's comp insurance premiums. Worse, some insurers are refusing to renew existing policies, even to policyholders who have never filed a claim. “Both our general liability and worker's comp rates went up by about 40% this year,” says Diane Schaffner, office manager of Lesmeister Construction, a residential and commercial builder in San Diego. “There are builders out there who have let their coverage lapse because they just can't afford it.”

Looking for numbers. Calls to builders around the country turn up an abundance of similar

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California Court Upholds Construction Defects Arbitration

A recent ruling by a California appeals court may give the state's builders a better chance of enforcing purchase and sale contracts that require purchasers to submit to binding arbitration over any construction-defect claims. Although such contract provisions are common in California, state courts have often allowed homeowners who have signed such agreements to sue their builders anyway, holding that arbitration agreements unfairly restrict the homeowner's ability to recover damages.

In the case *Basura vs. U.S. Homes*, a group of 48 homeowners — all of whom had signed arbitration agreements — refused to arbitrate a dispute

with the builder over foundation cracks and other alleged defects in their single-family homes in Palmdale, Calif. A Los Angeles County superior court judge refused to enforce the arbitration agreement, but in June, the California Court of Appeals overturned the lower-court ruling. Even if an arbitration agreement is unenforceable under state law, the appeals court concluded, it can be enforced under the Federal Arbitration Act, passed by Congress about 80 years ago, provided that the case involves interstate commerce.

In the *Basura* case, which involved a major home builder with operations in

most U.S. states, there was obviously a strong interstate commerce effect. It's not yet clear whether a small builder operating entirely within California could also seek enforcement under the Federal Arbitration Act, but Joanna Huchting, an attorney with Cox, Castle & Nicholson, which represented U.S. Homes in the case, believes it would not be difficult to make such a case. “When you look at manufacturers, subs, and suppliers, every builder has an interstate connection,” she says.

The Federal Arbitration Act cannot be used to enforce arbitration agreements that are designed to give the builder an unfair advantage, according to Huchting. “If it's so one-sided that it takes away the homeowner's right to be compensated, that will prompt a different challenge,” she says.

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accounts, but it's not easy to find statistics that provide a clear picture of just how severe the problem is nationally. The NAHB, for example, has begun tracking the issue but has not yet compiled any statistics. At least two surveys, however, seem to show that the problem is very real.

In January of 2002, the Seattle-based Building Industry Association of Washington surveyed 6,000 of its members about problems they might be having obtaining or paying for insurance. "The survey targeted GCs and subs with 5 to 15 employees," says BIAW spokesperson and legislative liaison Tonia Neal. "Over half of the respondents reported significant rate increases, and more than a third either had their coverage cancelled or had to comply with new conditions to qualify for renewal." And a recent national survey of insurance agents performed by the Independent Insurance Agents and Brokers of America found that liability insurance rates have increased by about 30% since early summer of 2001.

Toxic torts and terrorism. Some of those rate increases can be attributed to the skyrocketing cost of construction defect claims, especially those relating to "toxic mold." Pete Moraga, spokesperson for the Insurance Information Network of California, notes that in Texas alone, the cost of settling mold claims increased by over 500% between the first six months of 2000 and the corresponding period a year later. "Today's airtight homes are basically petri dishes for mold," he says. "Most homeowners don't know that they need to ventilate their homes to prevent problems."

Another possible cause is increased

anxiety on the part of insurers over the possibility of losses stemming from future terrorist attacks. And because insurance is regulated by state law, rates can vary dramatically from one state to the next for reasons that have nothing to do with the national situation. Builder's organizations in New York, for example, continue working to roll back a century-old "scaffold law" that has had a huge impact on insurance rates and availability within the state (see "New York Builders Scramble for Liability Insurance," *Notebook*, 9/01).

Premiums and investments. According to many experts, the liability insurance crisis stems primarily from declines in the stock market over the past year or two. Insurance companies actually generate most of their profits not through the premiums they charge, but by investing those premiums in the financial markets. When investment returns are good — in a so-called soft market — insurers actually pay out more in claims than they collect in the form of premiums. According to Madelyn Flannagan, vice president of education and research for the Independent Insurance Agents and Brokers of America, until recently most insurers were paying out about \$1.08 for every dollar collected in premiums. Declining investment income, on the other hand, can signal the emergence of a "hard market," in which insurers raise rates to make up the shortfall.

"Insurance has always been cyclical," Flannagan says. "A lot of people in the business today have never seen a hard market before, but they do happen. What we're seeing now is a mid-course correction after a long period where companies had been very open with their underwriting."

Finding affordable insurance in a hard market. If that explanation is correct, builders can expect to be paying higher insurance premiums for some time to come. In the meantime, knowledgeable builders will look for savings elsewhere by shopping more carefully for insurance. Madelyn Flannagan suggests meeting with your insurance agent and reviewing your existing policies to make sure you're not already paying for more coverage than you need. "Make sure you're not still insuring equipment you no longer own," she says. "Review your policies and personnel and look for possible savings." In some cases, she says, you may be able to save by accepting additional conditions. For example, if you live in an area where EIFS-related claims have been extensive but don't use EIFS yourself, you may be able to obtain a lower general-liability rate by waiving coverage for damage associated with EIFS.

A task force appointed by the NAHB has begun looking at ways for contractors to obtain affordably priced insurance coverage. "We're trying to give our builder members a set of planning tools," says task force member Stuart E. Price, founding partner of Granor Price Homes in Horsham, Pa. "Builders need to know how to shop for insurance, and insurers need to know how to tell whether a builder is a good builder." The group hopes to issue a preliminary package of information sometime this fall.

OFFCUTS

Garage-door orientation in Farmers Grove, Texas, must be determined statistically, according to a recent city council ruling. In September of 2001, the Dallas suburb enacted an ordinance "to prohibit garage doors on the front half of the lot [from] directly facing the street where 75% or more of the existing residences on a block do not already have garage doors on the front half of the lot directly facing the street." A group of citizens had complained that neighborhood character could suffer when rear-facing garage doors were remodeled to face the street.

Arsenic in pressure-treated lumber is suspected in an arsenic-poisoning case, according to the *New York Times*. When a Mississippi homeowner became seriously ill with arsenic poisoning, her husband was investigated for attempted murder. The case fell apart when the husband proved to have even higher arsenic levels than his wife. It was then found that the couple had been working indoors with CCA-treated lumber at a vacation home and had burned some of the wood scraps. An FBI spokesperson noted that the attempted murder case had lacked a logical motive from the beginning. "She's the breadwinner," he said. "There's no big insurance policy. There's no girlfriend."

An Arizona company is manufacturing green insulation from blue jeans. Bonded Logic, Inc., in Chandler, Ariz., processes post-industrial blue jean scrap material into an environmentally friendly batt insulation. The ASTM-approved UltraTouch insulation is treated with borates to resist fire and insects. It's available in both 3 1/2- and 5 1/2-inch batts.

Home Depot has barred the U.S. government from doing business with its 1,400 stores, according to a story in the *St. Louis Post-Dispatch*. Home Depot's corporate management has reportedly instructed store managers not to take government credit cards, purchase orders, or even make cash sales to the federal government. Susan McIver, director of the Services Acquisition Center of the federal government's General Services Administration, was puzzled by the new policy. "Home Depot has not contacted us, so I've no idea what their problem is," she said.

One of the nation's largest production builders has begun using dry framing lumber in all of its houses. According to *Random Lengths*, Centex homes stopped using green framing in April as a result of customer concerns about the mold that often appears on the surface of green fir lumber during warm weather. The newsletter quoted an Oregon lumber trader who observed that in April, standard and better 2x4 dry fir sold at a \$15 premium over green fir. By mid-June, the source noted, the premium for dry fir had increased to \$60.

Roof Tile Institute Releases Updated Installation Guide

Clay and concrete tile roofs are very popular in many western states, but until recently, roofers looking for a single, authoritative handbook on best installation practices, industry standards, and relevant code requirements were out of luck. Instead, all of the various tile manufacturers put out their own installation guides, for a total of more than 50 inconsistent guides. That confusing situation was recently resolved with the release of a comprehensive new manual, *Concrete and Clay Roof Tile Installation Manual for Moderate Climate Regions* by the Roof Tile Institute (RTI) and the Western States Roofing Contractors Association (WSRCA). First issued in June of 2001, the new manual became effective in the field in January of 2002; since then, almost all North American tile manufacturers have replaced their previous manuals with the RTI/WSRCA version.

Most of the information will be familiar to most professional roofers, but the new manual does highlight four key areas:

- A minimum of 26-gauge flashing is recommended in valleys, pans, roof-to-wall flashings, and pipe flashing.
- ASTM D226 Type II (no. 30 felt) is recommended as a minimum underlayment.
- Fasteners used for securing tile must meet ASTM A641 Class 1 or equal approval, which provides a minimum weight of zinc coating per unit of uncoated nail surface.
- Weather-blocking material is required at hip, ridge, and head wall openings to keep water on the surface of the field tile. Other methods approved by local building officials are also acceptable.

The complete 73-page manual is available from RTI's member companies or can be ordered from the Western States Roofing Contractors Association, 450 Peninsula Ave., Suite B, San Mateo, CA 94401; 800/725-0333. The price is \$50 for WSRCA members, \$75 for non-members.

California Study Evaluates Fire Resistance of Outdoor Decking

What happens to outdoor decking materials in the event of a wildfire? Although none of the major building codes addresses that question, it's an important one in many western states, where fires are common and new development in wooded areas at the edges of existing suburbs is



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increasing. To answer it, researchers at the University of California Forest Products Laboratory recently performed a series of controlled burn tests of 15 commonly used decking materials, including five plastic products, eight varieties of wood-plastic composite, and redwood.

Sections of decking were exposed to two separate tests. The first, known as an under-deck flame impingement test, involved cycling an 80-kilowatt propane burner on and off beneath the deck to simulate the effect of a ground fire. In the burning-brand test, a standardized chunk of burning wood — identical to the so-called A-brand used by the ASTM for evaluating the fire resistance of roofing materials — was placed on the deck surface to simulate the effect of a burning tree branch or other piece of forest debris. Among the study's key findings:

- Deck-board shape seems to have a significant effect on fire resistance. All of the materials with a “channeled” underside (Eon, ChoiceDek, and TimberTech) showed early degradation in the under-fire tests, apparently from the increased surface area provided by the channels.
- Hollow sections proved much more vulnerable to flaming debris than solid boards: All of the hollow-section boards collapsed within the 40-minute duration of the burning-brand test.
- Three of the six thermoplastic deckings — Eon, Maxituf, and EverNew — collapsed quickly in the under-deck tests, with the first two undergoing rapid and intense runaway combustion. Two other plastic materials finished near the middle of the field, however, and one — a fiberglass-reinforced polyethylene from Bedford Industries — withstood the under-deck flame exposure for longer than any other non-wood material.
- The widely accepted practice of gapping deck boards (the boards in the test decks were spaced $\frac{3}{16}$ inch apart) may reduce rot problems by allowing water to drain, but it probably leaves a deck more susceptible to fire. In virtually every case, the researchers found, deck boards that caught fire began burning where flames penetrated the gaps between boards.
- Although the primary focus of the tests was the performance of plastic-containing deck boards, the researchers also evaluated test decks made from $\frac{8}{4}$ Construction Heart redwood, which is often used for outdoor decks in California. The redwood decking proved surprisingly fire resistant, beating out all other tested products in the under-deck flame test and coming in second in the burning-brand test.

Full test results, including before and after photos of the various test decks, are available at the University of California Forest Products Laboratory website at www.ucfpl.ucop.edu.

BUSINESS TUNE-UP

Spending Time or Wasting Time?

by Melanie Hodgdon

When business people talk about spending time, that's literally what they're doing. A person who earns \$50,000 a year and wastes 30 minutes a day looking for lost files, hidden supplies, and misplaced phone numbers costs himself \$3,074.40 a year. You can get more jobs, you can bring in more money, but you can't create additional time. The closest you can come is to make the best use of what time you have by cutting down on waste. Here are a few suggestions on how to avoid time wasters that I see all the time:

- Don't organize more than necessary to get the job done. In other words, it's fine to have your paper clips in one container, but don't start sorting them by color. Labeling file folders is vital, but you don't have to spend time printing labels on the computer.
- If your scheduling needs are minimal, you may find it faster to keep a Day-Timer or similar schedule book than to use software. I once had to wait about seven minutes for a client to boot up his computer to access his software to tell me if he had next Wednesday free. You can spend time researching software to notify you when your payroll tax deposits are due, *or* you can stick a wall calendar over your desk and draw a big red circle around the fifth of every month. Figure out what works best for you *now* and implement it *now*; you can always get something cooler next year.
- Use e-mail wisely. Don't respond to every message; some don't need a reply. Keep responses short and focused. Discourage people from sending you "amusing" jokes and cartoons. Check e-mail only at designated times: perhaps first thing in the morning, at lunch, and at the end of the day. Just be sure to allow time to reply within normal office hours.
- Keep only current files in your immediate workspace. Weed frequently to cut down on time spent pawing through irrelevant files or risking paper cuts digging into overstuffed file drawers. File last year's stuff in a secondary filing space and relegate older info to labeled file storage boxes.

- Touch paper a maximum of twice: once when you receive it and relegate it to an In box; once when you process and file it. And for heaven's sake, file right away. Once any necessary information has been entered into the computer, get the paper off your desk and out of sight.
- Have two In boxes: one for time-dependent items (important correspondence, bills, imminent seminars of interest) and the other for non-time-dependent items (bank statements, articles of interest, ads for professional development materials, offers you may want to explore). Yes, you'll have two piles instead of one, but you won't have to waste time digging through one *big* pile to see if you missed that last credit card payment. Empty your time-dependent box every day.
- Mark everything you've entered into the computer accordingly, so you don't have to wonder whether you've done it after you're interrupted for the seventh time by the phone. Keep it simple: Buy a stamp that says "Entered" or just grab an eye-catching Hi-Liter and make a check mark in the upper right corner (place of highest visibility). Don't use opaque markers that could hide important information or bleed through the paper.
- Keep nonproductive conversation to a minimum. Hang up on telemarketers, don't see salespeople without an appointment, and practice your exit lines with high-maintenance clients who believe they need a full hour of phone time with you to bounce around ideas about vanity door pulls.

If you're now working a 60-hour week and longing for a 40-hour week, you may find that you can reclaim 30 or 40 minutes a day just by tightening things up around the office. Hey, 40 minutes a day would drop you down to 56 hours and 40 minutes. It's a start. 

Melanie Hodgdon is a business systems consultant for builders in Bristol, Maine.