

INSURANCE CRISIS AFFECTS INDUSTRY

Mediation and/or arbitration is one solution to combat raising insurance costs. **By Peter Merrill, CKD**

As every builder and remodeler knows, the market for general liability insurance has taken a disastrous turn over the past two years. Builders and remodelers in every part of the country are experiencing dramatic increases in premiums and big changes in deductibles and exclusions. In some states, coverage may not be available at any price. Without business insurance, you're basically out of business. If your insurance is too costly, you can't be competitive.

In discussions with general liability insurance carriers, the main reason for their actions is the high cost of litigation relating to claims by homeowners against general contractors. In past years, insurance companies invested your premiums in the stock market or in other investments and realized a profit. Even when there were high litigation costs, an overall profit was still being made off the construction industry.

Now, even with higher premiums and expanded exclusions, insurance companies are finding it difficult to make a profit on this industry; hence, the need to drop the construction insurance market from their potential profit centers.

The National Association of Home Builders (NAHB) has recognized this "general liability insurance crisis" as the biggest problem facing the residential construction industry today. As a result, NAHB is promoting different suggestions for contractors to help lessen the effect of the insurance crisis and to help mitigate future claims and keep the cost of construction litigation to a minimum.

First, the NAHB has begun a cooperative initiative with Marsh, a global insurance consulting firm, to develop a range of GLI coverage options for builders, remodelers and subcontractors that would be available to contractors in every state at a more reasonable price.

Second, the NAHB has developed a model "Right-to-Repair" legislation to be

adopted in every state. This legislation basically stipulates a homeowner must give a contractor the right to correct any construction defects or other construction irregularity before the homeowner can begin litigation against the contrac-



tor. Many states also require mandatory mediation or arbitration as an alternate dispute resolution mechanism to civil litigation. As of my writing, 24 states have already adopted some form of "Right-to-Cure" or "Right-to-Repair" legislation and seven states are working on legislation to introduce to their state legislatures for adoption.

Third, the NAHB has developed a set of "Residential Construction Performance Guidelines" (RCPG) that address non-code, mostly cosmetic issues in building or remodeling. If you reference the RCPG in your construction contract as the first step if a dispute develops, very often the guidelines will settle the disputed item as to what is "acceptable" construction standards and you will not need to proceed with other dispute resolution procedures.

According to the construction contract, either the homeowner will have to accept the guidelines as the acceptable construction standards or the contractor will have to bring the work performed up to the standards specified in the RCPG. It is important to recognize the guidelines were not developed to

protect just the contractor, but also to protect the homeowner from sub-standard construction.

Several contractors related numerous examples of how, by referencing the RCPG in their contracts, they are settling many minor disputes without further litigation or alternative dispute resolution.

Fourth, it is recommended contractors stipulate mediation and/or arbitration in their construction contracts that will preclude the homeowner from pursuing civil litigation, which generally costs more and is more time consuming than mediation or arbitration. Because more than 90 percent of court cases are settled by mediation before they actually go to trial, this type of facilitated negotiation is recognized as the most successful alternate dispute resolution process. Many judges are ordering mediation after a construction case has been filed within their jurisdiction, prior to actual court proceedings.

Solving the insurance crisis is critical to every member of NKBA. Be aware of the steps you should take to protect yourself from this terrible predicament. Each of us must do our part to lessen the construction litigation problems we face today.

Peter Merrill, CKD, is president of Construction Dispute Resolution Services, a company that specializes in mediation and arbitration for the construction industry. He is a member of the NKBA Legislative Committee, and serves as a National Director of the National Association of Home Builders and is a member of the NAHB Construction, Codes and Standards Committee and several Construction & Codes Subcommittees. For more information in mediation or arbitration, visit www.mediate.com/cdrsnm.