

CONSTRUCTION CLAIMS TASK FORCE
Regular Meeting Minutes
November 28, 2006

The Construction Claims Task Force met on Tuesday, November 28, 2006, in Room 260, Labor and Industry Building, 350 Winter Street NE, Salem, Oregon.

Members Present: David DeHarpport
Jon Fahr
Eric Grasberger
Steve Malany
Bill Nesmith
Laura Schauer
Tom Skaar
Jim Vavrek

Members Absent: Elsie Jones

Staff Present: Mark Long, Administrator of Building Codes Division
Richard Baumann, Building Codes Division
Chris Huntington, Building Codes Division
David Dahl, Insurance Division
Cece Newell, Insurance Division
Joel Ario, Insurance Division
Joyce Patton, Insurance Division
Rick Blackwell, Building Codes Division
Ravi Mahajan, Building Codes Division
Michael Morter, Building Codes Division
Craig P. Smith, Construction Contractors Board
Bill Boyd, Construction Contractors Board
Cathy Dixon, Construction Contractors Board
Andrea Simmons, Building Codes Division
Tamara Brickman, Building Codes Division

Guests Present:

Larry Boyd, Surplus Lines Association	Pat Dorney, CBIC
Stuart Ramsing, OBOA	Tom Dymant, CBIC
Libby Tucker, DJC	Lana Butterfield, BCS
Greg Miller, AGC	Steven Patterson, ORE Mutual
Jutta Barney, Oregon Mutual	Steve Murren, State Farm
Jeff Dean, ABC	John Powell,
Kelly Ross, CBIC	Stephen Kafoury, ORA
Larry Byers, CBIC	Brian Miller, Farmers Insurance
Brian Doherty, Miller Nash	Dave Johnson, 2-10 Home Buyers Warranty
Matt Markee, Surplus Lines Association	Jon Chandler, OHBA
Alan Seymour, ODOE	Chris Davie, SAIF Corp.
Jim Brown, Red Shield Insurance	Ed Davis, IIABO
Jack Munro, AIA/IIABO	Ken Cochran, Building Codes Division
Alan Tresidder, OTLA	

Action Items

- Submit public notice for December 8, 2006 meeting.
- Discussion of proposals.
- Review draft report

I. TASKFORCE BUSINESS**A. Call to Order:**

Chair Eric Grasberger called the meeting to order at 12:13 p.m.

B. Approval of Agenda for November 28, 2006 Meeting and Order of Business:

MOTION: Eric Grasberger moved to approve the agenda for the November 28, 2006 meeting.

VOTE: 8-0, Ayes—DeHarpport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

C. Approval of October 25, 2006 Meeting Minutes:

Chair Grasberger suggested adding a clarification to page four of the minutes, bullet three that reads: Certified envelope specialist will provide a list of each individual worker trained who worked on project.

MOTION: Eric Grasberger moved to approve the October 25, 2006, meeting minutes.

VOTE: 8-0, Ayes—Deharpport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

D. Next Meeting Date:

MOTION: Eric Grasberger moved to approve the next meeting date of December 20, 2006, 9:00 a.m. to 2:00 p.m.

VOTE: 8-0, Ayes—Deharpport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

E. Project Update:

Mark Long, Building Codes Division (BCD), (**Exhibit 1 and Exhibit 2**) reported that the November meeting will focus on the public comment on the package of 11 proposals (**Exhibit 3**); the Task Force members will have a work session on the package of 11 proposals, a discussion of items under further consideration, and review the draft report. At the conclusion of this meeting Task Force members will determine whether to hold an additional work session meeting on December 8, 2006.

Chair Grasberger discussed some confusion regarding information submitted to the task force members and what is posted on the website. Chair Grasberger clarified that

from this point forward, information forwarded to staff from task force members is intended to be posted to the website. Typical communication between task force members and staff does not need to be included.

I. PUBLIC COMMENT:

Chair Grasberger reported that speakers will be given approximately five minutes each. Since the list is not lengthy, speakers will be allowed a little more time.

- A. **Jim Varco (Exhibit B):** Chair Grasberger read an email from Mr. Varco into the record. “The actions of this task force will be recorded in history for all time. How does each of you want to be remembered? As a taskforce that was able to go against the wishes of special interest groups, including their own trade associations, and do something that was in the long-term best interest of consumers and the building industry or be remembered as merely being stooges of the trade organizations to accomplish what they want. I am encouraging Eric to read this message.”
- B. **Larry Byers, CBIC (Exhibit C):** The recovery fund is a primary concern and it places an unfair burden on small artisan contractors. There is little or no relationship between the problem identified and the proposed solution. Timing of payments to consumers is vague and undefined. Fund sources and expense assumptions are arbitrary and unsubstantiated. Benefits to consumers are potentially misleading. There is not enough funds allocated and the fund will grow over time as the demand grows for payments from the fund. Increasing the bond a small amount is a better alternative.
- C. **Stuart Ramsing, City of Eugene Building Official and Oregon Building Official Association (OBOA).** From attending the Task Force meetings as building official it has been very helpful to hear the discussions about what is inspected and what is not out in the field. Building officials would like the Task Force to make meaningful code changes that have measured outcomes. OBOA has concerns with the proposal to require third party inspection of moisture content readings due to problems it may cause in the field verifying the readings are correct. The proposal requiring moisture to be exhausted from the structure does not mention kitchens. OBOA members support requiring certificates of occupancy. There needs to be a process that clearly defines who is ultimately responsible for violation of code.

OBOA members have concerns with requiring persons preparing plans to submit envelope details for “residential” construction and with designers submitting their selected design methodology for informational purposes. These plans will not be reviewed by the local permit office and will be included with the plans that are reviewed and stamped approved. What is the objective, and is the intent of the requirement being satisfied. Also the local jurisdiction will be issuing a certificate of occupancy on the structure, and consumers may believe that the envelope detail plans were approved as well. Another concern is that detail plans may contain suggestions that are contrary to code requirements. What are the consequences to the contractor if they do not submit the required documentation? OBOA encourages an emphasis on training as an alternative to submittal of documentation.

Mr. Ramsing reported that building officials out in the field see contractors who simply do not know how to properly install components of the project and many re-inspections of the violation are performed in an effort to get the corrections made. These poor performing contractors are seen repeatedly by the building officials on every project they perform. Perhaps there should be a fine after three or four re-inspections on the same item and a reporting mechanism put in place for consumers to become aware of the poor quality of work performed.

Task force members discussed having local jurisdictions report contractors with three inspections on a single item to CCB to be placed on the license history on CCB's website. Laura Schauer stated that the problem is the general contractor often takes out the permit, not each subcontractor. She suggested developing a clear objective of what needs to be accomplished and let the legislature assign the agencies with expertise in this area the task to implement. Task Force members would like this item added to the list of additional items.

- D. **Chris Davie**, SAIF Corporation (**Exhibit D**). Regarding Phase II, Proposal 3 (a)(1), that eliminates the \$90 million minimum project value for a wrap project, it is not that simple to eliminate because its impact spreads across the system. It would complicate regulation of workers' compensation system. It can be confusing to workers and medical providers which insurance company carries the policy for the project. There could be more than one wrap policy held by a contractor for different projects. He recommends dropping the concept of elimination of the \$90 million minimum and keeping the second part of the proposal that streamlines rate filing requirements.
- E. **Ed Davis**, Independent Insurance Agents and Brokers of Oregon (IIABO) (**Exhibit E**). He reported that IIABO also opposes Phase II, Proposal 3.a.1, that eliminates the \$90 million minimum project value for a wrap project. Leave the workers' compensation insurance component out of the proposal. On some wrap policies the subcontractors may not have as much insurance coverage. We support the requirement for completed operations liability proposal. IIABO has concerns with reducing the accountability of admitted carriers to that allowed for surplus lines carriers is not a responsible option for Oregon. They agree with broadening the availability of wrap-up insurance for contractors' general liability insurance in situations where coverage is not otherwise available. IIABO opposes data reporting requirements. They do not believe there is a reason for data reporting when most contractors are insured by non-admitted carriers that would not be subject to the data reporting.
- F. **Jack Munro**, AIA (**Exhibit F and Exhibit G**). Regarding Phase II, Proposal 5, data reporting requirements, he opposes. The ultimate policy issue is whether having the data is worth the cost. Due to costs some insurance companies may choose not to participate in the market. The issue is can relevant data be obtained and can insight from the data be determined. Most contractors have non-admitted carriers and they would not be subject to the data reporting. Most insurance companies do not have common systems for tracking data. Our recommendation is not to proceed with this proposal as drafted.

G. **Stephen Kafoury**, Oregon Remodelers Association (ORA). Mr. Kafoury reported that overall ORA is pleased with the recommendations of the Task Force. Regarding the recommendations on consumer notices, the only additional information consumers need to know is to check to see if the contractor is licensed and to check the contractor's references. If consumers did those two things, they would have fewer problems. Regarding the recommendation to grant CCB criminal conviction authority we oppose. The current system is working well, where CCB refers criminal activity to Attorney General's Office. There is a difference between being stupid and being evil. With regard to a recovery fund, we have problems with the proposal. If funded by contractors, people will say the fund does not have enough money and contractors will be asked to pay more and more into the fund. ORA does not have a problem with the Homebuilders Association's concept to use the civil penalty money to fund the recovery fund. ORA opposes increasing general liability insurance coverage; it puts the burden on contractors. What about insurance companies' responsibility and accountability. Nothing proposed helps contractors with the insurance problems. The Task Force was to look at ways to do something about insurance company rate increases. He is disappointed that Task Force has not come up with solutions to the insurance crisis for contractors to get affordable insurance; instead, the Task Force is increasing insurance rates and placing more of a burden on contractors. Small specialty contractors should not be grouped with general contractors for rate setting.

H. **Additional written testimony submitted:**

- Elsie Jones (Task Force Member) (**Exhibit A**).
- Lynn Armstrong (Anchor Insurance & Surety) (**Exhibit H**).
- Bryan Irwin (Anchor Insurance & Surety) (**Exhibit I**).
- Kelly Atwood (Contractors Insurance Services) (**Exhibit J**).
- Ron Manza (Professional Insurance Agents of Ore/Idaho) (**Exhibit K**).

III. TASK FORCE WORK SESSION ON PACKAGE OF 11 PROPOSALS:

PHASE II PROPOSALS:

Joel Ario, Insurance Division, discussed the Phase II proposals to be reviewed by the Task Force members (**Exhibits 4 through 14**).

A. Proposal #2: General Liability Coverage:

Task Force members discussed whether to amend ORS 701.105 to require completed operations liability coverage. Task Force member Tom Skaar reported that this recommendation would drive the cost of liability insurance up and is contrary to the mission of the Task Force, which is to look for affordable and available liability insurance for construction contractors. Eric Grasberger stated that requiring completed operations liability coverage helps protect both the contractor and the consumer. Claims made policies were also discussed. Task Force members want to make it clear that the recommendation covers CGL or whatever policy has to cover damages for prior work.

Joel Ario, Insurance Division, reported that either type of policy (occurrence or claims made) that is purchased for a specific year and discontinued leaves holes in the coverage. However, the work is covered for the year when insurance remain in force under the continued policy contract. This recommendation helps plug a loophole.

MOTION: Eric Grasberger moved to accept the language change made to ORS 701.105 as proposed in proposal 2.

DISCUSSION: Steve Malany added the following to the motion: “to close a loophole and require completed operations liability coverage.”

VOTE: 6-2, Ayes— DeHarpport, Grasberger, Malany, Nesmith, Schauer, and Vavrek; Nays—Fahr and Skaar.

MOTION PASSED

B. Proposal #5: Data Reporting Requirements:

Joel Ario, Insurance Division, reported that the data elements to consider are: written premium, policy count, paid losses, case reserves, and reported claim count. The insurance industry will oppose no matter what. The limitations are that it is too hard to anticipate things that may be needed in the future. An alternative is to let the Insurance Division have authority to gather data needed. There are three choices: 1) no data reporting, 2) Insurance Division puts out a data call; or 3) Insurance Division dictates what is required to report.

Task Force members discussed that their goal is for the Insurance Division to have the data it needs to decide if there are problems and where. Task Force members would like to include surplus lines carriers as well. The problem is that most all the building envelope contractors have liability insurance through surplus lines and no data is received from surplus lines. The Task Force’s goal is for the Insurance Division to get the necessary data needed.

MOTION: Tom Skaar moved not to table proposal five, but to have staff significantly rewrite it in accordance with the theme we have talked about today. The new proposal should include rewriting the purpose statement and making it less prescriptive and adept and also encouraging collaborative effort with the insurance industry and stakeholders on how it might be crafted in such a manner as to not be onerously expensive and as representative and as broad a perspective of lines of insurance as can possibly get and to collaborate to the extent possible.

VOTE: 8-0, Ayes—Deharport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

C. Proposal #4: Voluntary Loss Control Discounts:

Task Force members approved the proposal and want to send a clear message to industry that this is to be encouraged.

D. Proposal #3: Wrap Project Limits:

Based on previous testimony heard at the meeting, Task Force members determined that part A of the proposal would be dropped. The goal of the Task Force is to allow

the market to dictate wraps. Task Force members discussed 3B applying to both surplus lines and admitted carriers and that both would have to use due diligence before entering into a wrap policy.

MOTION: Eric Grasberger moved to accept proposal 3B option.

VOTE: 5-3, Ayes—DeHarpport, Grasberger, Fahr, Nesmith, and Skaar; Nays—Malany, Schauer, and Vavrek.

MOTION PASSED (*note this motion was later rescinded*)

Task Force members discussed setting minimum wrap limits coverage, but believe there may be a hole in coverage, which is outside the scope of the Task Force's mission.

MOTION: Eric Grasberger moved to rescind his previous motion and the vote.

VOTE: 8-0, Ayes—Deharport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

MOTION: Eric Grasberger moved to accept phase II, proposal 3B option, have Insurance Division draft a proposal that encompasses the essence of 3B, includes admitted carriers/brokers also go through the same process as non-admitted carriers go through using due diligence.

VOTE: 8-0, Ayes—Deharport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

E. Proposal #1: First-Party Warranty:

Task Force members discussed the proposal.

- Eric Grasberger asked that staff research whether including condominiums in the definition of residential structure will conflict with the condominium warranty statutes.
- Under No. 3, warranty coverage, the one year period following warranty commencement date needs to clarify either first occupancy date or final certificate of occupancy date whichever is later or perhaps use CCB's occupancy date requirements.
- Under No. 6, warranty claim process/enforcement, the requirement to repair damage conflicts with current statutes regarding notices of defects. Owners should not be forced to allow the contractor to make repairs.
- Under No. 7, damage remedies, there was a discussion of deleting this section. Some Task Force members wanted to keep the last bullet regarding attorney fees. Also discussed was revising no. 7 to say "as allowed by contract and complies with current law" or "as allowed by contract and complies with current law and addresses attorney fees".

MOTION: Eric Grasberger moved to have staff further research and to the extent they think advisable, revise Phase II, proposal 1, first-party warranty, parts 1 and 2 and we will reconsider number 7, the three bullet points at the next meeting.

VOTE: 8-0, Ayes—Deharport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

IV. DISCUSSION OF ITEMS UNDER FURTHER CONSIDERATION:

A. Private Right of Action/Bad Faith in Insurance Litigation:

Task Force members discussed this issue and made the following motion.

MOTION: Jim Vavrek moved to table private right of action/bad faith in insurance litigation.

VOTE: 7-1, Ayes—Deharport, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek;
Nays—Grasberger

MOTION PASSED

- B.** Task Force members decided to include the additional items in the report as other issues that the Task Force recognizes as issues and believes need to be looked at further but were outside the mission of the Task Force to make recommendations on. Include a paragraph stating why each one may need further review by the legislature. Re-frame the “bad faith” issue as a relating the speed at which the matters are resolved to reduce legal costs. Focus the report on the 11 proposals.

Task Force members made the following determinations:

- Not to take any further oral testimony.
- Add item 5 of the document Clarify Oregon’s Additional Named Insured Issue will be added to Phase II, proposal 3 and staff will notice the change and accept written testimony only. Post changes on website.
- Break the additional item insurance requirements for architects, engineers and limited liability companies into two items; with limited liability companies becoming a separate item on its own.

C. Phase I, Proposal No. 7, Envelope Design Details: (Exhibit L)

Jon Fahr suggested that the proposal needs to be codified and be prescriptive on what items to be in the details as part of the building code. After further discussion of this issue the following motion was made:

MOTION: Tom Skaar moved to table the issue as a proposal and to include with the other items to be listed at the end of the report.

VOTE: 8-0, Ayes—Deharport, Grasberger, Fahr, Malany, Nesmith, Schauer, Skaar, and Vavrek.

MOTION PASSED

D. Additional Meeting Date Needed:

Task Force members determined that an additional meeting on December 8, 2006, from 1:30 to 5:00 p.m., would be necessary to allow enough time to finish their review of the proposals.

V. REVIEW OF DRAFT REPORT: (Exhibit 16)

Due to lack of time this matter was not discussed and was held over to the next meeting.

VI. ADJOURNMENT

Chair Grasberger adjourned the meeting 5:45 p.m.

Exhibits:

- 1 – Strategy/Schedule for completion (1 page) – *Agenda item I-E*
- 2 – CCTF Agenda/Timeline (1 page) – *Agenda item I-E*
- 3 – Package of proposals list (4 pages) – *Agenda item II*
- 4 – Amendments to the building code proposal (6 pages) – *Agenda item III*
- 5 – CCB enforcement & licensing proposal (8 pages) – *Agenda item III*
- 6 – Recovery fund proposal (19 pages) – *Agenda item III*
- 7 – Consumer information proposal (3 pages) – *Agenda item III*
- 8 – Residential permits proposal (4 pages) – *Agenda item III*
- 9 – Building envelope certification proposal (13 pages) – *Agenda item III*
- 10 – First party warranty proposal (4 pages) – *Agenda item III*
- 11 – General liability coverage proposal (1 page) – *Agenda item III*
- 12 – Wrap project limits proposal (1 page) – *Agenda item III*
- 13 – Voluntary loss control discounts proposal (1 page) – *Agenda item III*
- 14 – Data reporting requirements proposal (4 pages) – *Agenda item III*
- 15 – Additional items for discussion (5 pages) – *Agenda item IV*
- 16 – Draft legislative report (10 pages) – *Agenda item V*
- A – Elsie Jones comments (1 page) – *Agenda item II*
- B – Jim Varco (comment read by Chair Grasberger) (2 pages) – *Agenda item II*
- C – Larry Byers, CBIC – Oregon Recovery Fund Rebuttal (5 pages) – *Agenda item II*
- D – Chris Davie, SAIF Corporation, testimony (2 pages) – *Agenda item II*
- E – Ed Davis, Independent Insurance Agents and Brokers of Oregon (IIABO)/Accordia (2 pages) – *Agenda item II*
- F – Jack/John Munro, AIA, letter (2 pages) – *Agenda item II*
- G – Jack/John Munro, AIA, letter (1 page) – *Agenda item II*
- H – Lynn Armstrong, Workers’ Compensation letter (2 pages) – *Agenda item II*.
- I – Bryan Irwin, Workers’ Compensation, letter (1 page) – *Agenda item II*.
- J – Kelly Atwood, Contractors Insurance Services, letter (6 pages) – *Agenda item II*.
- K – Ron Manza, Professional Insurance Agents of Ore/Idaho, letter (3 pages) – *Agenda item II*.
- L – CCTF Staff, Envelope design details proposal – (2 pages) – *Agenda item IV*.