

MIDWEST GLASS - 2009 ISSUE 3

A MINNESOTA GLASS ASSOCIATION PUBLICATION

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Fabulous People & Weather...Another Great Golf Fundraiser

The MGA returned to Sawmill Golf Club for our Annual Golf Fundraiser on Thursday, June 25. Over 70 golfers filled the course for an afternoon of golf and later went to the Gasthaus Bavarian Restaurant in Stillwater for dinner, refreshments and prizes. The event provided a opportunity to have fun, create and maintain relationships, and the chance to win great prizes.

The outing was a success in every way because of the personal and financial support of members, suppliers and sales representatives. Please help us recognizing our sponsors:

Dakotaland Autoglass was our Tournament Sponsor; a sincere thank you goes to Daryl Anderson, Jon Anderson, Kim Stevens, and Todd Hanson. The Dakotaland team was also a Summer Event Sponsor this year which included sponsorship of the St. Paul Saints held in August.



(Continued on page 3)

Credit & Collections Seminar Series

The MGA works to promote member success in a variety of ways, we advocate on behalf of member interests and we provide education to help you with business issues. Credit decisions and collections are a never ending challenge. Approaching the issue from our education role, we have arranged for a two session Credit and Collection series for MGA members. The qualities of the programs we are building lead us to be very excited about the series.

Given the nature of business and the economy today, the Flat Glass Committee and Board saw the issue as being very timely. Credit and collections can be complex however; it involves credit policies and forms, checking references, obtaining and effectively using credit reports, filing pre-lien notices, collection calls, etc.; individuals make careers in credit and certify as professionals in the field. As important as this issue is, even some larger companies don't have the manpower to devote a person to this function; owners, office managers, customer service people etc. often do the job. These individuals need the support and tools to do this job.

There is a ton of information that we could impart and that led to breaking the subject into two sessions; the first will focus on making good credit decisions or the "prevention" segment of the program, the second segment will look at what to do when you have a problem and we refer to it

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UPCOMING EVENTS

- **October 15- Part I, Credit and Collections at Mendakota Country Club**
- **October 28- Chuck Lloyd, Supreme Court Ruling at Dakotaland**
- **November 10- Part II, Credit and Collections, Mendakota Country Club**
- **December 3- Mix & Mingle Networking**

MGA**Board of Directors****President: Jennifer Lang**

Minneapolis Glass
14600 28th Ave N,
Plymouth, MN 55447
jenniferl@minneapolisglass.com

President Elect: Myron Schapp

Red River Glazing
PO Box 5494,
Fargo, ND 58105
myrons@rrginc.net

Past President: Erica Chandler

DEsigned Glass, Inc.
1941 West Burnsville Pkwy,
Burnsville, MN 55337
erica@designedglass.com

Secretary Treas.: Kevin Foley

Auto Glass Today
2597 Cleveland Ave. N
Roseville, MN 55113
Kevin@autoglasstoday.com

Director: Jack Beckman

All Auto Glass
1221 731/2 Ave. NE
Minneapolis, MN 55432
jack@allauto.com

Director: Steve Burgess

Brin/Northwestern Glass
2300 North 2nd St.
Minneapolis, MN 55411
sburgess@bringlass.com

Director: Joyce Johnson

Johnson Sales
2422 Tamarack, Medina, MN 55356
joyce@johnsonsales.us

Director: Mike Schenian

City Auto Glass
116 South Concord Ave.
S St. Paul, MN 55075
info@cityautoglass.com

Director: Eric Solland

Indianhead Glass
141 N Washington St
St Croix Falls, WI 54024
esolland@indianheadglass.com

Minnesota Glass Association

16112 Wake Street NE, Anoka, MN 55304

Phone 763-413-0805 - Fax 763-413-1131

Email mschmaltz@mnglass.org

Visit us online at

www.mnglass.org

The Minnesota Glass Association is an alliance of flat and auto glass merchants. Together with our suppliers we act and speak as one to promote success in a free market. We support fair competition, ethical behavior, profitable operations and strongly promote consumer safety and awareness.

We can only succeed in this endeavor if you participate. We strongly encourage members to voice their opinion - on these pages and at our meetings. Contact the MGA or an MGA Board Member - let us know what you think and what you would like from your Association. If you are not a member please consider joining - individual success is more likely if we work together on shared concerns.

Supreme Court Auto Glass Victories

Auto glass companies can celebrate recent Supreme Court victories in Minnesota and in Connecticut. The decisions conclude years of court battles and resolve several important issues for the industry.

Minnesota

The Minnesota Supreme Court issued a long awaited decision in the case regarding anti-assignment clauses in auto insurance policies. The case was argued before the court in January 2009 and involved three glass companies and four insurers. They determined that anti-assignment clauses do not prevent policyholders from assigning to auto glass vendors the right to arbitrate disputes regarding auto glass claims. You can view the complete decision at www.mncourts.gov.

The four insurance companies involved were Austin Mutual, Western National, State Farm and Auto Owners. The glass companies were Auto Glass Express, Star Windshield Repair and Archer Auto Glass.

The action began with several separate arbitration hearings, the glass companies prevailed in those hearings. The hearing decisions were appealed to District Court, combined and then went to the Court of Appeals finally going to the Supreme Court. The Court of Appeals held that anti-assignment clauses in

(Continued on page 10)

New Minnesota False Claim Act

Minnesota has a new False Claims Act (MnFCA). The act was hidden in an omnibus spending bill and is similar to the Federal Civil False Claims Act. It applies to all Minnesota state and municipally funded projects. It is important that Minnesota businesses are aware of the MnFCA, as past practices may now expose a contractor to MnFCA civil penalties. The bill enacting the law was SF 2082/HF 1781; it will be codified as Minn. Stat. 15C.02 (a) (1) and take effect on July 1, 2010.

The act will make individuals who attempt to defraud the government by submitting a false claim for payment subject to civil penalties, triple damages and costs of bringing suit against the violator (identical to federal penalties under the Federal Civil False Claims Act). Conversely, attorney fees are not available to wrongly accused defendants as they might be in other frivolous suits.

While no one would oppose efforts to discourage attempts to defraud the government, this law contains provisions that should be of concern to contractors and subcontractors. It increases exposure to lawsuits, weak and false claims. The MnFCA creates a substantial risk of government abuse. For example the federal government often counterclaims with false claims charges when a contractor brings a case against the government for nonpayment of a claim under a contract. This threat often deters valid claims. In Minnesota an angry school board, municipality or other plaintiff can bring charges regardless of a claims merit and with little fear of repercussion.

The law firm of Fabyanske, Westra Hart & Thompson recommends "In order to protect against MnFCA liability, contractors should carefully prepare and review all payment claims and any other submissions the contractor must make to the government for a project." This article very briefly summarizes data from their briefing paper; the full paper is available on www.fwhtlaw.com.

Continued...MGA Golf Event

(Continued from page 1)

Silver Summer Event Sponsors: Arch Aluminum & Glass and Minneapolis Glass

Bronze Summer Event Sponsor: Coral Industries

Grand Prize Sponsors: Brin/Northwestern Glass and Sika Corporation

Hole Sponsors: Alumax, Bill Boehnlein Sales, Carlite, Johnson Sales, National Glass Association, Pilkington, Pittsburgh Glass Works, Stylmark and Viracon.

First place went to Team 11, Kreg Kapitan, Kevin Foley, Kyle Tate and David Breitbarth. *Special congratulations go to Brad Kapka, Only 1 Auto Glass, for making a Hole In One on hole #3!*

The dinner was followed by awards (trophies by Blasted Art Inc. and a prize drawing which included a \$500 Cash (won by Dan Walberg), \$200 Gas Card (Reed Vanderzee), and a \$200 Best Buy Gift Card (Brandon Kirby). The prizes were abundant and included golf clothing and equip-



(Continued on page 4)

Stylmark Appoints Architectural Products Group (APG) as new Manufacturer's Representative

Stylmark, Inc. recently announced the addition of Architectural Products Group (APG) to their sales organization. APG will promote and market Stylmark products to the glass and glazing industry in Minnesota, North Dakota, South Dakota and Western Wisconsin.

"With over 25 years in the glass business, Gary Haider & APG were a logical addition to our sales team", said Kevin Hogan, Stylmark Vice President of Sales & Marketing. "Gary has a proven track record of success & always provides excellent customer service to his customers".

In 1996, Haider retired from Harmon Contract after twenty-five years and in 1998 with several former employees started HKL Clading. After four years, Haider sold his interest in HKL Clading and started Architectural Products Group. APG represents the world's finest building manufactures for architectural trim and glazing projects.

Amber Dornfeld joined the team in 2007 after being a top independent sales representative for AdvoCare.

"APG is very excited to represent Stylmark. Their reputation and products are well known to glass & glazing architects and contractors and will be a strong addition to the list of manufactures APG represents," said Haider.

About Architectural Products Group (APG)

Architectural Products Group (APG) was founded by Gary Haider in 2003. APG represents manufactures of building materials. APG supports the owner, design team and contractor by giving them the products and services they need to complete their projects on time and on budget. For more information, visit <http://www.apgmn.com> or call 651-336-3655.

About Stylmark

Stylmark Inc. is a leading designer and manufacturer of aluminum, steel and lighting products for retail, hospitality, entertainment and other commercial environments. Product lines include showcase frames, shelving, architectural trim, fitting rooms and glass & glazing hardware. Stylmark has the industry's most expansive anodized aluminum color palette as well as a wide variety of finishes for both aluminum and steel. Stylmark products are designed to accommodate a variety of lighting options from traditional light source to new marketing trends, like LED. For more information, visit <http://www.stylmark.com> or call 800-328-2495. Contact: Carol Mendenhall, 763-574-8701, cmenden@stylmark.com

Continued...GOLF EVENT CONTINUED

(Continued from page 3)

ment, sports memorabilia, tickets for Vikings, Twins, Saints games, a goodie bag from Minnesota Wild plus much more.

Many members contributed on several levels by helping with the organization of the event, contributing prizes, running contests, acting as sponsors and then playing in the tournament. Registration helpers were Jennifer Lang and Betti Hale who also assisted with, ticket sales and with the prize drawing. Gary Jacobson was our scoring official again this year.

This event has played a major role for the MGA during the last four years. It enables us to run stronger programs and better address the needs of members and the industry. We have tried to identify many of the individuals and companies who supported us this year. Please take some time to express your appreciation and keep them in mind when you make your business decisions.

We have a winning formula; we have reserved the Sawmill and Gasthaus again on June 24, 2010 - mark your calendars now.





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GCI announces their partnering with the rep group of Cullen Case, Bob Shull, Craig Johnson, and Perry Johnson. Headquartered in Omaha, NE with divisions in Sioux Falls, SD and Des Moines, IA, GCI is a fabricator of insulating glass, tempered glass and liquid laminated glass. GCI also provides CNC cutting, polishing, distribution of glass, mirror, hollow metal doors, architectural windows, [Alumax Shower Doors](#) and Kawneer Aluminum products. For more information on GCI contact Perry Johnson at 612-859-2436 or GCI direct at 1-800-345-4248.

Fun Is Good, an Evening with the St. Paul Saints!

Over 140 MGA members participated in the first annual Family Night with the St. Paul Saints on Thursday August 6. The attendance level made this event one of biggest MGA outings in our history.

The evening started with a meal of hamburgers, hot dogs, beans, potato salad etc in the in the Hardball Café from there, members and their families walked a short distance to reserved seats in the grandstand. The weather was perfect; no rain and mild temperatures.

The Saints played and won against the Wichita Wingnuts; the final score was 2-0. I have to admit that I had to go online to find the final score - I was too busy talking with MGA members and living up to the Saints motto "Fun is Good"

This event was successful and we enjoyed such great participation due to very affordable registration rates. We could not have done that without the support of our event sponsors - **GOLD - Dakotaland Autoglass; SILVER - Arch Aluminum & Glass and Minneapolis Glass; - BRONZE - Coral Industries.** Thank you sponsors!

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Contractor Professional Liability: Are you Exposed? Are You Adequately Protected?

Patrick D Kennedy, VP, Kraus-Anderson Insurance, pkennedy@kainsurance.com

In traditional project delivery (design-bid-build), an architect or engineer provides design services while actual implementation of the design is carried out by General & Subcontractors. Under this scenario, you may expect that the potential liabilities facing the design professional and contractor would be fairly well defined. However, as the complexity of projects have increased and new construction contracts are introduced, design responsibilities are becoming more fragmented. As the lines of responsibility between design firms and contractors merge, contractors are assuming nontraditional risk that their core coverages may not address.

One of the most significant challenges faced by the project participants is identifying and managing the risks when the design and engineering responsibilities are shared and/or fragmented among many project participants.

Before we examine this issue further, it is critical to first understand the fundamental differences between a **general liability** and **professional liability policy**. Basically, **general liability policies** will cover losses caused by "ordinary construction means and methods" as long as it results in bodily injury and/or property damage arising from an occurrence. **Professional liability policies**, on the other hand, specifically exclude claims of 'bodily injury and/or property damage'. In contrast, they cover any damages that arise from the rendering or failure to render "professional services."

Contractor's General Liability versus Design Professional Policy		
	Contractors General Liability	Architects & Engineers Professional Liability
Policy Form	Occurrence	Claims Made
Coverage Trigger	Bodily Injury or Property Damage	Negligent Acts
"Pure Economic" Loss	No	Yes
Contractual Liability	Yes	No

For example, under the **general liability policy**, project delays and cost of reinforcing a faulty structure would not be covered unless there was a corresponding occurrence that resulted in bodily injury or property damage. However, this type of claim would be covered under a **professional liability policy** as long as it was caused by professional negligence. It is important to note that negligence occurs when services are not performed with the standard of care exercised by any other

design professional facing the same or similar facts and circumstances.

ALTERNATIVE SOLUTIONS FOR ACQUIRING CONTRACTORS PROFESSIONAL COVERAGE

Coverage is now available for contractor's professional risk that traditionally may have been considered business risks that are not insurable. Full professional liability insurance for a contractor can be purchased as (a) an add-on to a general or umbrella liability policy, (b) covered under a stand-alone contractor's professional policy, or (c) handled under a separate project-specific professional policy.

Endorsement to General or Umbrella Policy: True professional coverage can be added on an "occurrence" basis to an existing general liability policy. This option does offer the advantage of providing high limits at a relatively low cost. However, this coverage scope is normally more restrictive than a "stand-alone" policy and is not offered to contractors who have in-house design capabilities. In addition, there are only a few underwriters who provide this option.

Contractors Professional Liability Policy: This coverage is written on a "claims-made" basis and insures a contractor for damages arising out of negligence of the contractor or its subcontractors and/or consultant architect/engineer in performing professional services under the contract. The policy includes coverage for a wide array of professional circumstances including design errors from a contractor's:

- In-house design staff
- Design delegation under provisions of AIA A-201 General Conditions Document
- Subcontracting design under a design-build contract
- Agency and at-risk construction management
- Faulty workmanship of subcontractors when there is a construction management contract

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"EXCEEDING YOUR EXPECTATIONS"

Continued...Credit & Collections Seminar Series

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as the “remediation” segment of the series.

Finding the right presenter for the first part of the program took a little research but the work paid off. We connected with an organization called Forius. Forius is the Minnesota affiliate of the National Association of Credit Management (NACM); they help companies make smart credit decisions through shared knowledge. They provide certification for credit managers, operate a number of industry credit groups as an information exchange, support a web based credit “chat” base, web credit encyclopedias etc. Forius aligned us with Duane Schwartz, our speaker for the first segment.

Duane has spent 25 years in credit and collections; he is currently an active credit manager and is a Certified Credit Executive (CCE). Duane has served on the Forius Board of directors since July of 2000 and was Chair in 2002 - 03; he is also on the national Board of the NACM. In addition to his hands on experience, he taught Credit 101 for the Northwest Lumberman’s Association for several years and taught at North Hennepin Community College. He was recognized as the Forius Credit Executive of the year in 2002, and received two mentor of the year awards.

Duane is excited about the opportunity to work with us and looks forward to a lot of interaction with seminar participants. He is encouraging participants to bring questions and problems they have in their business. We are also working with Forius to evaluate a closer long term relationship to allow members access to the information and tools they can provide.

The second half of the program will be Attorney Curt Smith of Moss & Barnett. A experienced presenter, Curt’s qualifications are well known in the construction field. His experience and ability led to his designation as a Super Lawyer by his peers, a distinction shared by only 5% of top attorneys.

With an emphasis on the “remediation” of credit problems Curt will cover the use of liens, and lawsuits but he will also spend time on what you should be doing before submitting a bid and signing a contract to protect your rights and to ensure that you get paid.

As we discussed the program with presenters we emphasized the wide range of needs within our organization; some members may have good programs in place - for them we see this as a good opportunity to tune up their process and look at new tools. Others may feel a need to establish a good basic credit program. Regardless of your situation, we plan of providing a variety of tools you will be able to use whether you are a seasoned pro or in need of basic help.

Good business credit not only keeps your business afloat, it is key to getting funding for your business. It also can help you earn more favorable terms and lower interest rates with lenders and suppliers. It will help you gain a competitive advantage

The dates for the programs have been set so mark your calendars now for the mornings of October 15 and November 10; both sessions will be at the Mendakota Country Club and a continental breakfast will be provided. Registration forms are on our website.



TODD HANSON
Sales

**DAKOTALAND
AUTOGLASS INC.**

Phone: 651-647-4269
Toll Free: 800-715-5245
Cell: 651-442-5471
Fax: 651-647-1276
Email: todd.hanson@dakotalandautoglass.com

2077 Ellis Ave
St. Paul, MN 55114



MINNEAPOLIS GLASS COMPANY

14600 28TH AVENUE NORTH • PLYMOUTH, MINNESOTA 55447
CUSTOMER SERVICE: (763) 559-0635

PAT ROESER
SALES
EMAIL: patr@minneapolisglass.com

DIRECT LINE: 763-577-9316
FAX: 763-559-8816

Continued...Contractor Professional Liability: Are you Exposed?

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✦ **Pollution Coverage** — In addition, most insurers providing this coverage will add "Contractors Pollution" coverage to the policy that will cover pollution claims arising from job-site activities and failure to detect or quantify the presence of pollutants. More and more construction contracts are calling for the inclusion of both Professional and Pollution Liability coverage.

Project Specific Professional Coverage: For larger or more complex projects, the owner may elect to purchase a separate policy that will provide a single source of recovery for all professional liability losses related to their project. While this approach can provide significant, noncancelable limits that can be in place up to 10 years after the project is completed, the contractor should review the following policy terms and conditions carefully.

- "Who is an insured" — The contractor and subcontractors should be named.
- "Insured versus insured exclusion" — This should be deleted.
- Policy deductible — A sharing agreement should be drafted.

CONCLUSION

Even with the most basic forms of project delivery, there is an increased chance of having fragmented design responsibility. Before a project is started, all participants should be satisfied that professional risks have been adequately assessed and insured by the responsible parties. The contractor needs to have assurance that professional coverage will be in place when a design error is discovered, especially after project completion, and that the limits are adequate. The addition of a contractor's professional policy can provide broad protection for alleged errors or omissions in the delivery of design and construction management services.

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Continued...Supreme Court Auto Glass Victories

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auto policies invalidated assignments received by glass companies. Without an assignment of benefits, auto glass companies lack legal standing to pursue their claims for additional payment.

Insurance policies generally contain anti-assignment clauses; the clauses protect insurers from covering individuals and risks not covered by the policy. Insurers sought to extend this protection to post-loss assignment of benefits. Post-loss assignment is a longstanding practice in Minnesota and across the country for that matter. In arguments before the court insurers were unable to identify even one state where post-loss assignment was prohibited. The decision reads "our decision today fits squarely with the majority rule, which limits the validity of anti-assignment clauses to pre-loss assignments in insurance contracts"

In addition to the glass companies directly involved, a number of auto glass companies united to support this action. The ability to arbitrate disputes using the Minnesota no-fault arbitration mechanism was in question. This decision removes questions about the standing of auto glass companies in arbitration, reaffirms that insurance proceeds "are subject to no-fault arbitration after assignment" and that policyholders themselves do not need to be party to any arbitration.

At least one insurer has adopted policy language that specifically prohibits post-loss assignment of benefits in Minnesota. This decision invalidates that language.

Connecticut

Glass companies attained a second important victory in the Connecticut Supreme Court. The opinion held that the pricing letters from Hanover Insurance Company's third party administrator, Safelite, did not bind the glass companies to Safelite's/Hanover's prices. The decision can be seen at www.jud.state.ct.us. As in Minnesota, a number of cases were consolidated.

About twice a year Hanover/Safelite sent letters specifying the prices it would pay for repair work. The glass companies performed the work, invoiced according to their individual price schedules and were short paid. The glass companies sued, alleging breach of contract. Hanover/Safelite defended using accord and satisfaction and implied contract defenses. The glass companies lost both in trial court and Appellate Court. They appealed contending the purported unilateral contracts lacked the essential elements of offer, acceptance and consideration. Hanover argued that the letters bound the auto glass companies to accept the insurer's reimbursements as full payment based on a theory that such communications constituted offers for unilateral contracts that were accepted by the auto glass companies when they did the work.

The Connecticut Supreme Court disagreed - unanimously. In the decision, the court wrote: "Nothing in the language of the pricing letters, either expressly or impliedly, suggests that the mere performance of glass repairs on automobiles insured by the defendant was sufficient to bind the plaintiffs to the defendant's prices." The court further noted that Hanover/Safelite had still not established that the glass companies were bound by the terms contained in the letter even if they performed the work because the insurer would have to prove that the glass companies' conduct "objectively manifested acceptance of the defendant's offers."

The court's decision is significant on a national level; unilateral contract argument has seen increased use as insurers attempt to justify short payment of glass invoices. The Court also held that Hanover's policy language requiring the company to pay the amount necessary to repair or replace the damaged glass with other of like kind and quality, this means that Hanover is required to pay an amount that is reasonable in the market. This language is common in policies and requires insurance companies to pay based on what auto glass companies are charging rather than on what the companies choose to pay.

Chuck Lloyd of Livgard & Lloyd represented the glass companies in both cases. He is well known in the auto glass industry having represented many companies as they struggle for fair reimbursement. Chuck will discuss the recent victories, what they mean and what we should expect in the future in a presentation on October 28 at the Dakotaland facility in St. Paul. Mark your calendars and watch for more information.

SIGN UP FOR THE HOLIDAY GAS PROGRAM...IT'S FREE TO MEMBERS

Free MGA Membership!

The MGA continuously works to attain a variety of objectives; advocating for shared interests, education, and helping you to run a profitable operation. One program that addresses this last objective is the Holiday Gas Program.

This program has worked so well that the savings exceeds the MGA dues outlay for members. Many companies already participate in gas programs; the problem is that individually, very few dealers reach the volume needed to reach the savings level you will get in the MGA program.

Holiday Stationstores is a proud partner of the MGA. Any association member that opens a new Holiday Fleet account between now and April 30th, 2009 will receive a total of 6 cents per gallon discount for the first 90 days. That is an extra 2 cents per gallon discount. At the end of 90 days, your discount will be 4 cents per gallon discount. An excellent value in today's economy.

Don Keis - Fleet Sales Manager - Holiday Stationstores - 952-830-8889 - 800-745-7411

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Please note our new contact information



MGA Upcoming Event Lineup

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October 28– Chuck Lloyd, Supreme Court Ruling at Dakotaland

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