

Construction Defect Claims: What Homeowners Need To Know Before Pursuing Defect Claims Under The Current Statutory Scheme

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In the fall of 2002, the passage of SB 800 reverberated through the construction defect industry as a response to the California Supreme Court decision in *Aas v. Superior Court*. *Aas* held that the home-owners association could not recover in tort (i.e., negligence, strict liability) for construction defect claims that have not yet caused property damage. The impact of this decision was that absent any actual damage, a claim for negligence or strict liability could not be made, and any remedy for purely economic loss could be pursued only as breach of contract and/or a breach of express and implied warranty claim.

The *Aas* decision created a serious problem for community associations trying to recover funds to repair obvious defects that had not yet caused damage. As a result, support grew to create a law that would reverse the impact of the *Aas* decision. Although it was loosely billed as the plaintiff attorneys' response to the *Aas* decision, the law was viewed by many as a victory for developers. It redefined the term "defect" and established a scheme of new statutes of limitation for categories of building defects that apply to residential units sold on and after January 1, 2003.

SB 800 (now codified in Civil Code Sections 895 through 945.5) changed significantly the way in which homeowners and common interest developments must address construction defects. This bill 1) provides for detailed and specific liability standards for newly constructed housing; 2) identifies specific types of defects that will give rise to claims regardless of whether the defect caused damage to other property; 3) creates a pre-trial process that includes a builder's right to repair an alleged defect; and, 4) provides third-party inspectors with immunity from liability. The standards apply to subcontractors, material suppliers, individual product manufacturers and design professionals to the extent that they cause, in whole or in part, a violation of a particular standard as a result of their negligent acts or omissions, or breach of contract.

STATUTES OF LIMITATION

This law leaves intact the 10-year Statute of Repose. No claims can be brought more than 10 years after substantial completion of the property. In addition, new Civil Code § 896 establish the following statutes of limitation for individual defect categories:

One Year – Homeowners must bring irrigation and drainage claims within one year of escrow closing. Noise transmission claims must be brought within one year of the initial occupancy of an adjacent unit.

Two Years – Homeowners must pursue claims for dryer duct installation deficiencies, landscaping claims and for decay of untreated wood posts within two years of the close of escrow.

Four Years – Plumbing, sewer and electrical defect claims must be pursued within four years of escrow closing. Claims for hardscape displacement and untreated steel frame corrosion carry a four-year statute of limitation, as well.

All other defect claims not specified above must be brought within three years of discovery, but in no event later than 10 years of substantial completion.

DEFECT STANDARDS

Among the more significant aspects of this legislation is that in response to the *Aas* decision, the law established so-called standards of construction, which if violated, are actionable regardless of resulting damage. These standards are set out in very obvious, reasonably easy-to-understand terms. The standards are divided into major construction areas or building components identified under broad building industry categories. The language of these standards seems more an aid to homeowners in recognizing when a building component is defective rather than as a construction guide for the building industry.

WATER INTRUSION STANDARDS

- Windows and doors must not permit entry of water around, through or under. This includes the framing, flashing and trim that serves as part of the window or door system. In addition, windows and doors must not allow what is termed "excessive condensation", which is undefined.
- Decks, stairs and balconies must not permit water into the deck or balcony framing and flashing or into adjacent areas.
- Foundations and slabs must keep moisture from entering the home or damaging flooring material.
- All hardscape must not allow water intrusion into the structure and must not cause soil erosion. Retaining walls must also prevent unintended water from passing through and causing damage.
- Stucco and exterior walls must not permit water to enter the structure or any moisture protecting barriers.

- Roofing systems must not allow water to enter the building structure.
- Plumbing systems must not leak or corrode. Showers and tubs must not leak or allow water intrusion into walls, floors or other interior components. Ceramic tile must prevent water from enter floors and walls.

STRUCTURAL STANDARDS

- Significant cracks must not appear in foundation, load bearing slabs or other components. "Significant" is not defined and is therefore left to interpretation.
- Foundations, slabs and other load bearing walls must not be structurally unsafe. "Structurally unsafe" is not defined.
- All structures must comply with earthquake and wind design standards in effect at the time of original construction.

SOILS STANDARDS

- Retaining walls and soils must not render a structure unsafe. "Unsafe" is not defined in the statute.
- Soils must not cause land to become unstable or the structures built upon the land to be unusable as intended.

FIRE SAFETY STANDARDS

- Fireplaces, chimneys and chimney caps must not cause an unreasonable risk of fire. The structure containing these items must comply with all applicable fire-related codes in effect at the time of original construction of the structure.
- Electrical and mechanical components must not cause unreasonable risk of fire.

PLUMBING AND ELECTRICAL ISSUES

- Plumbing and sewer systems must operate properly.
- Electrical components must operate properly and not impair the use of the structure.

PRE-LITIGATION CLAIMS PROCEDURE

Another significant provision of this law is its detailed and extensive pre-filing claims procedure. The statute implements a mandatory procedure prior to the filing of a construction defect lawsuit that includes inspections, exchange of construction documents under certain circumstances and mediation at various points, at various timeframes. These are designed to eliminate defect litigation. Of course, the bill contains an opt-out clause that if the builder fails to follow any of the procedures, the homeowner is entitled to proceed with the filing of a civil action.

Although the express legislative intent of this construction defect statutory overhaul was to improve standards and procedures for the administration of civil justice and early resolution of construction defects, it is too soon to judge the effect of this sweeping Construction Defect legislation. The inherent uncertainty, lack of defined terms and potential disputes presented by the statutory procedure could very well lead to more litigation before we gain a clear and concise understanding of its impact on construction defect litigation. Indeed, disputes are likely to continue over proper scope of repair; cost of repair; what is or is not defective; and, who among the developer, general contractor and subcontractors are responsible and to what extent. Instead, we are likely to see construction defect litigation remain constant if not increase as owners and developers alike struggle to interpret and apply this complex statute.

Not until the homes sold on or after January 2003 have experienced noticeable deficiencies will the law truly be tested. Until then, homeowners must be mindful of the various statutes of limitations and be diligent in inspecting their property for the slightest sign of a defect.

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