



Best Intentions -- SB800 Will Help, But Not As Much As It Seems

By: Kelly G. Richardson

The boom in construction defect litigation in California has for many years been a crisis in the construction and real estate industries. Insurance carriers are generally refusing to insure, and banks are generally refusing to finance, contractors who build residences for sale. Attached housing, while more complicated to build, also is more risky to sell. While the demand for new housing grows, it seems that developers continue to withdraw from residential housing, particularly with respect to attached housing.

One response to this crisis was the California Supreme Court's ruling in December 2000 in *Aas vs. Superior Court*, in which a divided court stated that a construction error was not an actionable defect in tort or strict liability unless and until someone was injured or something was damaged.

In 2002, the Legislature enacted SB800, a bill which, it was stated, was intended to help heal the residential construction defect litigation problem. The law adds Section 43.99 and Sections 895 through 945.5 to the Civil Code. However, the new law primarily focuses upon the resolution of defect claims, and not upon the prevention of defects giving rise to those claims.

As the reader may already be aware, the new law:

- Establishes immunity for persons hired to review the design documents or the work in process for compliance to the design documents.
- Creates statutory definitions of construction defect for each system in a residence.

- Shortens statutes of limitations for many defect claims from the ten year statute which seemed to pre-dominate most defect claims.
- Requires a one year warranty on "fit and finish" items.
- Establishes an elaborate pre-litigation process, giving builders substantial opportunities for information about the complaints and an opportunity to offer to repair.
- Changes the measure of damages for detached homes to cost of repair or diminution, which ever is less
- Establishes an exclusive list of affirmative defenses for builders, including "unforeseen acts of nature."

The law brings a sweeping change to the handling of construction defect disputes, but space does not permit a detailed recitation of the new law. Suffice to say the new law is sufficiently complex that the prudent builder, contractor or homeowner should consult counsel experienced in construction law for advice and explanation. This article is intended to discuss certain points of the statute, examining the manner in which they will carry out in actual business practice. Some of the salient aspects of SB800 may not prove to be as helpful as apparently intended.

Qualified Inspector Immunity.

Proponents of the new law argue that this grant of immunity to qualified private plan checkers and private building inspectors is an important step forward in improving the quality of construction in California. This is the one part of the new law which at first seems to be a positive step forward in pure

quality control, and thus a very good thing for all concerned. However, the qualifications required for immunity may not be easy to achieve: the individual must either be: 1) ICBO-certified as a building inspector; or 2) have five years experience in the area of involvement and be a licensed engineer, architect or general contractor. The individual must also carry \$2,000,000 of errors and omissions coverage.

While many people may meet the experience/certification requirements, the insurance requirement may well keep many out of this line of work. Errors and omissions coverage continues to be expensive, and often hard to find. Many engineers and consultants now deliberately do not wish to carry such insurance, because of the cost and also the belief that going "bare" may discourage suits against them.

For those that qualify and carry the appropriate insurance, there is a very important exception to that immunity. While the homeowner cannot sue, the builder can sue the inspector for negligence. So, in the event of a homeowner suit against the builder, it is quite likely that an inspector thought to be immune would be in turn sued by the builder.

The Pre-litigation Process.

Strict time lines. Builders selling new homes now can benefit from a very involved interaction with the complaining homeowner prior to any lawsuit -- if the builder strictly follows the time lines and procedures. Any departure from the time lines and requirements, and the benefits are gone.

Within fourteen days of receiving a written complaint, a builder must acknowledge receipt of the claim and complete inspection and testing of the alleged problem areas. No later than three days after that inspection, the builder may demand a second inspection and testing session, which must be complete no later than forty days after the initial inspection and testing. This requirement puts a builder squarely at odds with the realities of insurance claims handling and coverage. It is not at all unusual for an insurance company to take weeks or even months to respond to an alleged construction

defect claim, and even longer to retain the appropriate experts. However, if the insured builder proceeds to incur such an expense without permission of the carrier, the carrier may dispute its responsibility to reimburse the builder. So, does the builder lose the benefit of the process or does it hire its own lawyers and team of experts, knowing it might not be reimbursed for the expense?

Records retention. If the builder has met the aforementioned deadline, there are still other traps for the unprepared homeowner. A builder must within thirty days of the homeowner's complaint make available to the homeowner all plans, specifications, soils reports, and even engineering calculations. Many builders will need to improve their post-completion records retention in order to be prepared on every project to have these records available for ten years.

Offers to repair. Under the new law, a builder may offer to repair the problem. The owner cannot be forced to accept the repairs, but the homeowner's failure to accept the offer to repair is not protected from admissibility and may be told to the jury. No later than thirty days of the inspection and testing, a builder may offer in writing to repair the problem. However, the homeowner can demand the builder nominate three other contractors to make the repairs. The homeowner can pick any of the contractors. The builder cannot demand a release in exchange for this repair work.

This "right to repair" is a misnomer, because the homeowner may not accept the repair offer. In the event of litigation, does the builder introduce this as evidence, to show the homeowner was unreasonable? Such a strategy begins essentially with an admission of defect, and the jury is left to decide the amount of damages. Moreover, the builder's insurance company almost certainly will not be in a position to authorize such an offer in such a short time after opening the claim file on the matter. Will the builders be willing to advance the cost, knowing they might not receive any reimbursement from their insurer? Finally, will builders be willing to spend all the money and effort on repairs, knowing that they cannot insist upon a release? In the end, this portion of the

statute will be far less useful than originally intended.

Diminution of value or cost of repair.

For years builders have unsuccessfully battled the high cost of major reconstruction damages claims by seeking to show that the diminution in the value of the property is less than the cost of repair. The new Civil Code Section 942(b) appears at first to open that argument to builders, at least with regard to detached single family homes. Detached single family home claimants are limited to the cost of repair or diminution in value, whichever is less. There is an exception, in cases of personal use, as per common law (translate: appellate court rulings). However, the exception to this rule largely swallows up the rule. Since at least 1990, confirmed in the case of *Orndorff v. Christiana Community Builders*, the common law rule is that that, if the homeowner has a personal reason to stay in the home, the cost of repair is the measure of damages, even if it is more than the amount of diminution on the value of the property. The new Civil Code 942(b) appears to reinforce this rule, and therefore does not seem to present any change affecting builder liability. Don't most detached single family homeowners buy for the purpose of remaining in their home, and since a California homeowner must disclose known material problems with a home prior to sale, can the diminution in value ever be less than repair cost? This section largely codifies existing law, and does little to change builder or homeowner rights.

The statutes of limitation - the ten year limit still lives. New Civil Code Section 896 adds a number of shorter statutes of limitations. However, it does not provide shorter limits for all issues, and the ten year latent defect statute of limitations therefore still applies to many major defects.

Does the New Law Serve the Industry in the Long Term? Unfortunately, the new law, while sweeping in its impact, does little to improve the quality of construction. The law in the main does not prevent defects, but deals with the situation after the proverbial horses have left the barn. The pre-litigation provisions, while laudable in their intent, may generally not be helpful to most

builders. The builders who will benefit most from the pre-litigation process and right to offer repair will generally be only those builders who are extremely well organized in their response to post-completion complaints, and who are willing and able to step out ahead of their insurance carriers.

The best prevention to construction defect problems is quality control. An over-emphasis upon claims control brings too much focus upon the symptom, and distracts from the cause of this industry ill. Complete and well-conceived design documents, designer involvement during construction, strong project management and subcontractor supervision are far more important to successful post-completion economics than legislative action and legal maneuvering. But... that is for another discussion.

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