

To Be Or Not To Be - Defining Construction Defects

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On September 20th, Gov. Gray Davis signed Senate Bill 800 that has the potential of drastic changes in the construction defect litigation industry. SB 800 is the legislature's attempt to

Section 896(c) defines soil related issues. Section 896(d) defines fire protection issues. Section 896(e) defines plumbing and sewer issues. Section 896(f) identifies electrical system issues. Section 896(g) sets forth issues involving other areas of construction including, manufactured products, such as windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, and appliances.

address the California Supreme Court's ruling in *Aas v. Superior Court* (2000) 24 Cal.4th 627, which held that builders could not be held liable for construction defects

The California Legislature, in *Civil Code* § 896, attempted to identify every type of conceivable construction and construction related product defect for which a builder, subcontractor, material supplier, individual product supplier and design professional may have liability for not properly installing or integrating into original residential construction.

unless the defects actually caused injury or damage. Aspects of SB 800 include the following:

"Senate Bill 800 has the potential of drastic changes in the construction defect litigation industry."

Specifying Standards for the Functions and Components of the Building

Amended *Civil Code* § 896 states that builders, and in some circumstances subcontractors, material suppliers, product manufacturers and design professionals, of residential construction may be liable to a homeowner or homeowners association for damages resulting from a list of standards specifically set forth in the section. Section 896(a) identifies and defines water issues involving various building components. Section 896(b) defines structural issues that a builder, subcontractor, material supplier, individual product manufacturer or design professional may be liable for to the extent a homeowner or homeowners association may have suffered damage as a result of construction.

Some of the identified issues include a time period during which a homeowner or homeowners association may assert a claim that defects have caused damage. If the homeowner or homeowners association does not assert the claim within the specified period, they may not seek redress for the defects under *Civil Code* § 800.

Impact on *Aas v. Superior Court*

Addressed in *Civil Code* § 896(a)-(g) are issues that may not have resulted in damage to the structure. For example, section 896(g)(4) states that "Heating, if any, shall be installed so as to be capable of

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maintaining a room temperature of 70 degrees Fahrenheit at a point three feet above the floor in any living space." Section 896(g)(5) states that "Living space air conditioning, if any, shall be provided in a manner consistent with the size and efficiency design criteria specified in Title 24 of the California Code of Regulations or its successor."

These are just a few examples of the issues identified in section 896 as defects in construction of residential housing that are actionable for a homeowner against a builder. These are issues that would have been barred as a negligence cause of action under the decision in *Aas v. Superior Court* (2000) 24 Cal.4th 627, because no damage is associated with a claimed defect.

The statute does not abolish or supercede the *Aas* case, but rather allows a homeowner or homeowners association to pursue claims for defects in construction that have not caused damage if the procedures in Section 800 are followed.

Civil Code § 897 states that the standards set forth in *Civil Code* § 896 are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed, *Civil Code* § 897 states that it will be actionable only if it causes damage.

One Year Warranty for "Fit and Finish"

The new *Civil Code* sections also address "fit and finish" issues. *Civil Code* § 900 requires a builder to provide a homeowner with a minimum one-year express written limited warranty covering the fit and finish of specified building components. Those components include: cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim. To the extent that the damage to the above building components was caused by defects in other components governed by other provisions in

this section, this section shall not apply. A builder may offer greater protection or protection for a longer period of time in the express contract with the homeowner. However, a builder cannot limit the protection or lower the protections offered in *Civil Code* §§ 896 and 900 through an express contract with the homeowner. To the extent that a builder offers an enhanced protection plan, the builder must do so, in writing, prior to the close of escrow.

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Pre-Litigation Procedure

New *Civil Code* § 910 sets forth a pre-litigation procedure for alleged violations of *Civil Code* § 896. A claimant, or his or her legal representative, is required to put the builder on notice of any claim that the construction of his or her residence violates any of the standards set forth in Section 896. The notice must be served via certified mail, overnight or personal delivery. The notice served by the claimant shall include the claimant's name, address and preferred method of contact. The claimant shall also describe the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the alleged violations of Section 896. In the case of a homeowners association, the notice is to identify the claimants solely by address and other description sufficient to apprise the builder of the locations of the subject residences.

Civil Code § 912 sets forth how a builder is to respond to the Section 910 notice. One of the potential options for a builder under the new statute is to attempt to repair the alleged violations of standards. Within 14 days of receiving notice of a claim, the builder must acknowledge receipt of the claim in writing. A builder has the option to inspect the claimed violations of standards and must complete the initial inspection within 14 days

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after acknowledgement of receipt of the claim. A builder may request a second inspection, if deemed necessary, which shall be completed with 40 days of the initial inspection. If a builder intends to hold a subcontractor, design professional, product manufacturer or material supplier liable, the builder must give those parties sufficient notice of the inspections and participate in any repairs.

Within 30 days of the last inspection a builder may offer in writing, to repair the violation(s). The offer shall set forth a “detailed, specific, step-by-step statement identifying the particular violation that is being repaired, explaining the nature, scope, and location of the repair, and setting a reasonable completion date for the repair.” The claimant may request in writing, up to three additional contractors from which to select to perform the work. In lieu of filing an action, a builder may make a cash offer and perform no repair. The builder may obtain a reasonable release in exchange for a cash offer.

The offer to repair shall also be accompanied by an offer to mediate the dispute if the homeowner chooses. The mediation shall be limited to four hours and paid for by the builder. Section 926 states that a builder may NOT obtain a release or waiver of any kind in exchange for the repair work. In fact, the section states that a claimant may proceed with filing an action for violation of the applicable standard or for a claim of inadequate repair, or both.

Notice to Buyer

In order to utilize the procedures in these new statutes, *Civil Code* § 912(f)-(i) requires the builder to record on title the existence of these procedures, as well as include a copy of these new *Civil Code* provisions in original sales documentation that must be initialed and acknowledged by the buyer and

the builder's sales representative. The builder must also instruct the original buyer to provide all the documents to any subsequent purchaser. The builder's failure to include these notices relieves the buyer from the pre-litigation procedure and the buyer may immediately file a lawsuit.

Tolling of Statute of Limitations

Civil Code §§ 927 and 928 attempt to address the tolling of the statute of limitations in situations where the builder or purchaser invoke these new procedures. If the statute of limitations has expired during the process, the purchaser is given an extension of 100 days to file a complaint measured from the date the repair is completed, even if the particular violation is not being repaired. Where the builder refuses or fails to acknowledge the claim served under *Civil Code* § 913 or refuses to cooperate, the purchaser is given an additional 45 days to file a complaint after the time for responding to the notice of claim has expired. If the builder elects to utilize its

own nonadversarial procedure (rather than using the provisions in these statutes), the purchaser gets an additional 100 days to file a complaint after completion of builder's nonadversarial procedure or after the builder's procedure is deemed unenforceable, whichever is later. If mediation

is used, the statute of limitations is tolled until the next court day after mediation is completed or the 100 day period, whichever date is later.

Statutory Affirmative Defenses

Taking a clue from special master pre-trial orders, *Civil Code* § 945.5 provides a non-exclusive list of affirmative defenses to the builder including “unforeseen acts of nature,” failure to mitigate damages, failure to follow builder's or manufacturer's recommendations or common maintenance obligations, third party alterations, ordinary

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wear and tear, misuse, abuse or neglect, beyond the statutorily allowed time limits, the builder has received a valid release for a particular violation, and the builder's repair successfully corrected the particular violation. Section 945.5(h) specifically reserves all other affirmative defenses to causes of action not described in these new sections.

Applicability to All Construction Professionals

Civil Code § 936 makes these newly enacted procedures directly applicable to subcontractors, material suppliers, individual product manufacturers and design professionals, thus arguably allowing a homeowner to directly pursue a claim against a subcontractor, supplier, manufacturer and/or design professional even if there is no direct dealings or privity of contract.

Third Party Inspector Immunity

In the event a builder or construction lender retains an outside building or construction consultant to oversee or monitor the progress of construction, *Civil Code* § 43.99 was added to give immunity to such outside or

third party consultants so long as the consultant has specific qualifications and experience. The immunity granted in this new section only protects the consultant; *i.e.*, the entity that retained the consultant remains liable for any construction defects and may not introduce into evidence the fact that the builder had retained a third party consultant.

This new bill is not meant to supplant the procedures set forth in *California Civil Code* § 1375 (the "Calderon Process"), although the legislature's analysis of this bill prior to its enactment acknowledges possible uncertainty, confusion and litigation over the procedures of SB 800 and the Calderon Process.

SB 800 is believed to be the result of substantial negotiations involving the building industry, consumer attorneys, design professionals and the insurance industry. Although it is an express attempt to refine and limit the type, nature and number of construction defect lawsuits, the end result is far from clear.

SB 800 was non-urgent legislation and is anticipated to take effect on January 1, 2003.

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