

CONSTRUCTION DEFECTS LITIGATION:  
HOT TOPICS 2009

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**A. PRELITIGATION PROCEDURE**

1. Calderon statute (Civil Code §1375) – applicable to actions brought by homeowners’ associations for construction defects in common interest developments (CIDs)
  - a. Requires notice to “builder” before filing suit; notice tolls all applicable statutes of limitation for 180 days and triggers meet and confer procedures designed to resolve dispute
  - b. Statute mandatory as to all suits filed on or after July 1, 2002; becomes inoperative July 1, 2010
  - c. Written tolling agreement (*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401; *El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337 [applicable to subcontractor not party to tolling agreement])
2. Civil Code §1368.5 – requires written notice by HOA to members before filing suit for construction defects
3. Right to Repair Act, Civil Code §§895 *et seq* (SB 800) – applicable to all residential construction “located on a lot or within a common area” sold after January 1, 2003
  - a. Creates new substantive and procedural law applicable to defective construction
  - b. Provides developers with right to repair
    - 1) Feasibility of statutory time limits: 30 days to produce documents; inspection and testing within 14 days; mediation within 2 weeks of request by parties
    - 2) Evidentiary admissibility
    - 3) Subcontractor issues: (a) notice of inspections; (b) any input into nature and scope of repair? If not, are developer payments “voluntary”?
    - 4) Insurance coverage issues: property damage; definition of “claim”; feasibility – sufficient time for tender and response?
  - c. Impacts of SB 800 are addressed where applicable below
4. Action for defects in CID sold after January 1, 2003
  - a. Which statute applies, Calderon or SB 800?
  - b. Civil Code §935: To the extent that provisions of this chapter are enforced and those provisions are substantially similar to provisions in Section

1375 of the Civil Code, but an action is subsequently commenced under Section 1375 of the Civil Code, the parties are excused from performing the substantially similar requirements under Section 1375 of the Civil Code.

5. Clause in home purchase contracts requiring dissatisfied homebuyers to submit to judicial reference or arbitration
  - a. Conflict with Calderon or SB 800?
  - b. Enforceability
    - 1) Reference provision was not unconscionable, but only enforceable against original purchasers in privity with seller notwithstanding multiplicity of actions (*Greenbriar v. Superior Court* (2004) 117 Cal.App.4th 337)
    - 2) Reference agreement not unconscionable (*Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950)
    - 3) Reference agreement not prohibited predispute waiver of right to jury trial (*Woodside Homes of California v. Superior Court* (2006) 142 Cal.App.4th 99)
    - 4) Arbitration provision was adhesive and, even if enforceable, could not be severed (*Thompson v. Toll Dublin* (2008) 165 Cal.App.4th 1360; *Bruni v. Didion* (2008) 160 Cal.App.4th 1272; *Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563; *Baker v. Osborne Development* (2008) 159 Cal.App.4th 884)
6. Referees and mediators
  - a. Statutory regulation
    - 1) CCP §638 – appointment of referee by agreement of parties
    - 2) CCP §639 – appointment of referee by court order
    - 3) CRC 3.900 *et seq* (adopted effective 1/1/07, replacing former CRC 244.1 & 244.2)
    - 4) CCP §128 – court’s inherent power to control proceedings
    - 5) CCP §187 – court’s power to accept suitable methods of practice
  - b. Mediators vs. referees (*Lu v. Superior Court* (1997) 55 Cal.App.4th 1264)
  - c. Court’s authority to order mediation; settlement conferences vs. mediations (*Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536)
  - d. Admissibility of communications made during mediation; arbitration clause in settlement agreement (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189)

- e. Other recent decisions: *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351; *Woodside Homes v. Superior Court* (2003) 107 Cal.App.4th 723; *Rojas v. Superior Court* (2002) 102 Cal.App.4th 1062; *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081; *Villa Milano HOA v. Il Davorge* (2000) 84 Cal.App.4th 819; *Foxgate Homeowners Association v. Bramalea California* (2000) 78 Cal.App.4th 65

## B. PLAINTIFF'S STANDING

1. Class actions (*Hicks v. Kaufman and Broad* (2001) 89 Cal.App.4th 908)
2. Homeowners' associations
  - a. Civil Code §1368.3 (formerly CCP §383) – express statutory standing; areas of damage that association is obligated to maintain or repair (*Windham at Carmel Mountain Ranch Association v. Superior Court* (2003) 109 Cal.App.4th 1162)
  - b. CCP §382 – representative standing; areas of damage that association is *not* obligated to maintain or repair (*Raven's Cove Townhomes v. Knuppe Development* (1981) 114 Cal.App.3d 783)
3. Sale of defectively constructed property by original owner to new owner – who owns cause of action vs. builder?
  - a. Owner who discovers damage retains cause of action; claim for cost to repair becomes claim for loss on sale at reduced value (*Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144)
  - b. Assignment necessary to transfer cause of action to new owner (*Siegel v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994; *Krusi v. S.J. Amoroso Construction Co., Inc.* (2000) 81 Cal.App.4th 995; *Keru Investments v. Cube Company* (1998) 63 Cal.App.4th 1412)
  - c. Transfer of damaged property by developer to HOA – assignment not required (*The Standard Fire Insurance Company v. The Spectrum Community Association* (2006) 141 Cal.App.4th 1117)

## C. PARTY ISSUES

1. Contractors – licensing issues
  - a. Business and Professions Code §7031
  - b. Recent decisions: *Goldstein v. Barak Const.* (2008) 164 Cal.App.4th 845; *Great West Contractors v. WSS Indus. Const.* (2008) 162 Cal.App.4th 581; *Opp v. St. Paul Fire & Marine Ins.* (2007) 154 Cal.App.4th 71; *Performanc Plastering v. Richmond American Homes* (2007) 153 Cal.App.4th 659; *Banis Restaurant Design v. Serrano* (2005) 134

Cal.App.4th 1035; *M.W. Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.* (2004) 115 Cal.App.4th 512; *Slatkin v. White* (2002) 102 Cal.App.4th 963; *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254; *Ranchwood Communities Ltd. Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397

- c. Code of Civil Procedure §1029.8 – treble damages for injury caused by unlicensed persons
2. Construction managers (*Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595)
3. Suspended corporations
  - a. Revenue and Taxation Code §§19719 and 23301
  - b. Corporate plaintiff – statutes of limitation continue to run
  - c. Corporate defendant
    - 1) Special appearance/motion to intervene by insurer (*Garamendi v. Golden Eagle* (2004) 116 Cal.App.4th 694)
    - 2) Insurer required to intervene (*Kaufman & Broad v Performance Plastering* (2006) 136 Cal.App.4th 212)
    - 3) Insurer authorized to appear on behalf of suspended corporate contractor (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337)
  - d. Substantial compliance (*Sade Shoe Co., Inc. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509)
4. Shareholders of corporate defendants (*Michaelis v. Benavides* (1998) 61 Cal.App.4th 681 (review denied))

#### **D. ECONOMIC LOSS RULE**

1. RULE: The plaintiff in a construction defect suit may not recover the cost to repair, or the diminished value attributable to construction defects that have not caused property damage (*Aas v. Superior Court* (2000) 24 Cal.4th 627)
2. Supreme Court applied rule to negligence in *Aas*, then extended it to strict liability in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473
3. Recent pre-*Aas* decisions: *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611; *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204; *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357

4. ISSUE: Does rule establish a substantive element of the cause of action or is it a rule of damages?
  - a. Early post-*Aas* debate
    - 1) Defense view – the rule determines what damages are recoverable, establishing a recovery filter; only physical injuries are recoverable in negligence and strict liability actions, not associated economic loss
    - 2) Plaintiffs’ view – the rule establishes a threshold for recovery; upon proving physical injury, the plaintiff is entitled to recover both physical injuries and associated economic loss
  - b. Subsequent decisions support plaintiffs’ view
    - 1) The economic loss rule is not a defense to a cause of action; rather, the existence of damages, other than purely economic loss, is an element of a plaintiff’s cause of action (*Greystone Homes v Midtec* (2008) 168 Cal.App.4th 1194, 1215; *Rosen v State Farm General Ins.* (2003) 30 Cal.4th 1070, 1079)
    - 2) Damages recoverable once elements of cause of action established
      - a) Civil Code §3333 – “all the detriment sustained” (***Raven’s Cove Townhomes v. Knuppe Development*** (1981) 114 Cal.App.3d 783)
      - b) Economic loss allowed (*Collins Development Co v. DJ Plastering Inc* (2000) 81 Cal.App.4th 771; *Transwestern Pipeline Co v. Monsanto Co* (1996) 46 Cal.App.4th 502)
5. Post-*Aas* issues
  - a. Component part analysis – only property damage is to the defective work itself
    - 1) Published decisions: *KB Home v. Superior Court* (2003) 112 Cal.App.4th 1076; *Jimenez v. Superior Court* (2002) 29 Cal.4th 473; *Carrau v. Marvin Lumber and Cedar Co.* (2001) 93 Cal.App.4th 281; ***Aas v. Superior Court*** (2000) 24 Cal.4th 627; ***Stearman v. Centex Homes*** (2000) 78 Cal.App.4th 611
    - 2) Depublished decisions: *Mesa Vista South Townhome Assn. v. California Portland Cement Co.* (2004) 118 Cal.App.4th 308; *Nash v. MacDonald* (2001) 92 Cal.App.4th 847
  - b. Does *Aas* preclude recovery for cost of repair of a defect that causes consequential damage? *i.e.* is recovery limited to the consequential

- damage or does it include the defect that caused the damage? (*Collins Development Co v. DJ Plastering Inc* (2000) 81 Cal.App.4th 771)
  - c. Does *Aas* preclude recovery for access repairs? (*F&H Construction v. ITT Hartford Insurance Company of the Midwest* (2004) 118 Cal.App.4th 364)
  - d. What degree of damage is required? *E.g.* improper construction of structural components causing crack in sheetrock
6. SB 800 – §942: physical injury not required

## E. CAUSES OF ACTION

1. Negligence
  - a. Contractor's duty of care (*Sabella v. Wisler* (1963) 59 Cal.2d 21; *Stewart v. Cox* (1961) 55 Cal.2d 857)
  - b. "Completed and accepted" doctrine (*Jones v. P.S. Development Co.* (2008) 166 Cal.App.4th 707)
  - c. Contractor's standard of care (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337; *Stonegate Homeowners Assoc. v. Staben* (2006) 144 Cal.App.4th 740)
  - d. Negligence per se – violation of building code (*Huang v. Garner* (1984) 157 Cal.App.3d 404 [disapproved on other grounds])
2. Strict/products liability
  - a. Products liability law extended to sale of mass produced homes (*Kriegler v. Eichler Homes* (1969) 269 Cal.App.2d 224)
  - b. Defendants
    - 1) Developers – mass producer vs. occasional builder (*Fleck v. Bollinger Home Corp.* (1997) 54 Cal.App.4th 926; *Oliver v. Superior Court* (1989) 211 Cal.App.3d 86)
    - 2) Subcontractors (*La Jolla Village Homeowners Association, Inc. v. Superior Court* (1989) 212 Cal.App.3d 1131)
    - 3) Manufacturers and suppliers (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625; *Jimenez v. Superior Court* (2002) 29 Cal.4th 473; *Monte Vista v. Superior Court* (1991) 226 Cal.App.3d 1681)
    - 4) Marketing activities (*Bay Summit Community Assoc. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762)
  - c. Liability of subsequent owner/converter who acquires completed project and sells units

- 1) Stream of commerce/retail liability (*Kriegler v. Eichler Homes* (1969) 269 Cal.App.2d 224; *Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57)
  - 2) Timing and method of acquisition: (i) middle of chain of title vs. sale to public; (ii) property obtained by foreclosure vs. arm's length purchase
  - 3) Civil Code §1134 – apartment conversions; detailed disclosure requirements; “actual damages suffered by buyer”
- d. Commercial developer (*Gentry Construction Co. v. Superior Court* (1989) 212 Cal.App.3d 177)
- e. Trivial defect doctrine (*Kasparian v. Avalonbay* (2007) 156 Cal.App.4th 11 [recessed drain in walkway; trip and fall injury])
3. Breach of warranty
- a. Application of warranty law to sales of homes/condos (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625; *Pollard v. Saxe and Yolles Development Co* (1974) 12 C3d 374)
  - b. Recovery for economic loss (*Hicks v. Kaufman and Broad* (2001) 89 Cal.App.4th 908)
  - c. New construction – condominium conversions? (*East Hilton Drive HOA v. Western Real Estate Exchange* (1982) 136 Cal.App.3d 630)
  - d. Privity requirement
    - 1) Breach of express warranty (*Evraets v. Intermedics Intraocular* (1994) 29 Cal.App.4th 766)
    - 2) Breach of implied warranty (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625; *All West Electronics, Inc. v. M-B-W, Inc.* (1998) 64 Cal.App.4th 717; *Huang v. Garner* (1984) 157 Cal.App.3d 404)
    - 3) HOA privity (*Windham at Carmel Mountain Ranch Association v. Superior Court* (2003) 109 Cal.App.4th 1162)
    - 4) SB 800 – privity not required; successor owners may sue
  - e. Notice requirement (*Fieldstone Co. v. Briggs Plumbing* (1997) 54 Cal.App.4th 357; *Pollard v. Saxe and Yolles Development Co* (1974) 12 C3d 374; *Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57)
  - f. Does express warranty preclude implied warranty claims? (*Hicks v. Superior Court* (2004) 115 Cal.App.4th 77 [review granted then dismissed when parties settled])

- g. Future performance/statute of limitations (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625; *Carrau v. Marvin Lumber and Cedar Co.* (2001) 93 Cal.App.4th 281)
  - h. Magnuson-Moss Act (*Atkinson v. Elk Corp of Texas* (2006) 142 Cal.App.4th 212)
  - i. SB 800 – express warranty (§§900 – 906)
4. Breach of contract
- a. Economic loss recoverable for breach of contract (*Aas v. Superior Court* (2000) 24 Cal.4th 627)
  - b. Plaintiff as third party beneficiary of construction contracts
    - 1) Homeowner was entitled to attorney fees as TPB of subcontract with cabinet contractor (*Loduca v. Polyzos* (2007) 153 Cal.App.4th 334)
    - 2) HOA was not TPB of subcontract with flooring contractor (*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401)
    - 3) Earlier decisions: *Gilbert Financial Corp v. Steel Form Contracting Company* (1978) 82 Cal.App.3d 65; *Shell v. Schmidt* (1954) 126 Cal.App.2d 279
  - c. Do code violations constitute breach of contract? Applicable law (Business and Professions Code §§7109 and 7110) incorporated in contract (*Mulder v. Casho* (1964) 61 Cal.2d 633)
  - d. Tort liability for breach of contract (*Erlich v. Menezes* (1999) 21 Cal.4th 543)
5. Fraud and deceit
- a. Economic loss recoverable in fraud action (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979; *Aas v. Superior Court* (2000) 24 Cal.4th 627)
  - b. Types of fraud: Intentional and affirmative misrepresentations, negligent misrepresentations, false promises, affirmative acts in concealing or covering up the matter complained of, or nondisclosure between parties not in a confidential relationship (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 734, 8 ALR 3d 537)
  - c. Reliance requirement
    - 1) Restatement (Second) of Torts, §§310 and 311

- 2) Recent decisions: *Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341; *Randi W. v. Muroc Joint Unified School District* (1997) 14 Cal.4th 1066
- 3) Not applicable to concealment or nondisclosure claims (*Lovejoy v. AT&T Corporation* (2001) 92 CA4th 85)
- d. Civil Code §3294 – “conscious disregard”
- e. Negligent misrepresentation and nondisclosure (*Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756; *Newhall Land & Farming v. Superior Court* (1993) 19 Cal.App.4th 334)
6. Breach of fiduciary duty (*Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756; ***Raven’s Cove Townhomes v. Knuppe Development*** (1981) 114 Cal.App.3d 783)
7. Nuisance (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337)
8. Statutory causes of action – not subject to economic loss rule
  - a. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §2301 (*Atkinson v. Elk Corporation* (2006) 142 Cal.App.4th 212 [roof shingles are “consumer products” under Act])
  - b. Song Beverly Consumer Warranty Act, CC §§1790 (*Atkinson v. Elk Corporation* (2003) 109 Cal.App.4th 739; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625)
  - c. Consumers Legal Remedies Act, Civil Code §§1750 *et seq*
  - d. Unfair Business Practices Act, B & P Code §§17200 *et seq*
9. Right to Repair Act (SB 800) – creates new substantive law for defective construction
  - a. Section 942 – Exclusiveness of title
    - 1) Limits substantive claims to those stated in Chapter 2; *i.e.* replaces negligence, strict liability and implied warranty claims with new statutory claims
    - 2) Exceptions – existing law applies to causes of action for breach of contract, fraud, violation of statute and personal injury
  - b. Chapter 2 – Functionality standards
    - 1) Section 896 – itemization of actionable defects; consequential damage not required
    - 2) Section 897 – catchall category for other defects; consequential

damage required

- 3) Standard of proof – strict liability? (“shall not cause water to pass through” vs “shall be designed and constructed so as not to permit water to pass through”)

c. Decisions interpreting Act

- 1) Abrogates economic loss rule in SB 800 actions (*Windham at Carmel Mountain Ranch Association v. Superior Court* (2003) 109 Cal.App.4th 1162)
- 2) Action by builder against manufacturer of defective plumbing component for cost to replace components in completed project (*Greystone Homes v Midtec* (2008) 168 Cal.App.4th 1194)

**F. JOINT AND SEVERAL LIABILITY**

1. Parties subject to joint and several liability
  - a. Architects (*Bobrow/Thomas & Associates v. Superior Court* (1996) 50 Cal.App.4th 1654; *Alexander v. Hammarberg* (1951) 103 Cal.App.2d 872)
  - b. Successor developers (*Gem Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419; *Gentry Construction v. Superior Court* (1989) 212 Cal.App.3d 177)
  - c. Post-construction repair contractors (*Newhall Land and Farming Co. v. McCarthy Construction* (2001) 88 Cal.App.4th 769)
2. Joint and several liability not applicable in indemnity actions (*Expressions at Rancho Niguel Association v. Ahmanson Developments, Inc.* (2001) 86 Cal.App.4th 1135)
3. Predicate tort claim required (*BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848)
4. Derivative vs. active negligence (*Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396 [auto accident case])

**G. DAMAGES**

1. Diminution in value vs. cost of repair
  - a. General rule – cases involving injury to real property: Cost of repair or diminution of value, whichever is less (*Rovetti v. City and County of San Francisco* (1982) 131 Cal.App.3d 973; *Ferrero v. Southern California Gas* (1980) 102 Cal.App.3d 33)

- b. Personal reason exception (*Orndorff v. Christiania Community Builders* (1990) 217 Cal.App.3d 683; *Heninger v. Dunn* (1980) 101 Cal.App.3d 858; CACI 3039F)
- c. Exception not applicable where cost of repair “vastly exceeds” harm done (*Housley v. City of Poway* (1993) 20 Cal.App.4th 801)
- d. CACI 3903F – stating general rule and personal reason exception
2. Loss of use – CACI 3039G: Reasonable cost to rent similar property during relevant period
3. Emotional distress not recoverable (*Erlich v. Menezes* (1999) 21 Cal.4th 543)
4. Collateral source rule applies in construction defect actions, including assigned indemnity claims (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337)
5. Expert fees for investigation of claims
  - a. Investigation costs recoverable (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337; ***Stearman v. Centex Homes*** (2000) 78 Cal.App.4th 611; *Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685)
  - b. Proof requirement – must be pleaded and proved; not recoverable as costs (*Carwash of America v. Windswept Ventures* (2002) 97 Cal.App.4th 540)
6. Punitive damages (*State Farm v. Campbell* (2003) 538 U.S. 408)
7. Prejudgment interest
  - a. Civil Code §3287(a) – recoverable where damages are certain, or capable of being made certain by calculation
  - b. Repair cost estimates by experts (*Leff v. Gunter* (1983) 33 Cal.3d 508; *Levy-Zentner Co. v. Southern Pacific* (1977) 74 Cal.App.3d 762)
8. Attorney fees
  - a. Contractual rights
    - 1) Reciprocal under Civil Code §1717
    - 2) Claims arising under contract (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337; ***Xuereb v. Marcus & Millichap*** (1992) 3 Cal.App.4th 1338)
    - 3) Determining prevailing party (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963; *M. Perez Company, Inc. v. Base Camp Condominiums Association No. One* (2003) 111 Cal.App.4th 456)

- 4) Effect of CCP §998 settlement offer on contractual rights to attorney fees (*Goodman v. Lozano* (2008) 159 Cal.App.4th 1313 (rev granted); *Vick v. DaCorsi* (2003) 110 Cal.App.4th 206; *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103)
- b. Recovery of fees as third party beneficiary – homeowner recovery of fees from subcontractor as TPB of contract with general contractor (*Loduca v. Polyzos* (2007) 153 Cal.App.4th 334)
- c. Can HOA recover attorney fees when representing members with attorney fees provisions in their purchase agreements?
- d. CCP §1021.6 – recovery of attorney fees on implied indemnity claim
- e. Civil Code §1354 – action to enforce governing documents of HOA

## H. EXPERTS

1. Kelly-Frye test (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (DC Cir 1923) 293 Fed. 1013)
2. Toxic mold tests not generally accepted in relevant scientific community (*Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298)
3. Expert testimony on subcontractor's standard of care (*Stonegate Homeowners Assoc. v. Staben* (2006) 144 Cal.App.4th 740)
4. Recent decisions: *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579

## I. INDEMNITY

1. Fundamental principles
  - a. Object of indemnity provision interpretation is to further the manifest intentions of the parties to the contract; what did the parties bargain for? (*Rossmoor Sanitation, Inc. v. Pylon Inc.* (1975) 13 Cal.3d 622)
  - b. Indemnity should always be afforded when to do so furthers the manifest intent of the parties and where the loss sustained would not have occurred without the indemnitor's negligence (*Morton Thiokol, Inc. v. Metal Building Alteration Co.* (1987) 193 Cal.App.3d 1025)
  - c. The indemnity clause will be strictly construed against the party seeking indemnity (*Goldman v. Ecco-Phoenix Electric Corporation* (1964) 62 Cal.2d 40, 41)
  - d. Indemnity clause must be clear and explicit to provide indemnity for indemnitee's negligence (*MacDonald & Kruse, Inc. v. San Jose Steel Co., Inc.* (1972) 29 Cal.App.3d 413)

2. Civil Code §2782
  - a. Indemnity clause invalid if it provides indemnification for sole negligence or willful misconduct of indemnitee
  - b. 2008 amendments (AB 2738)
    - 1) Applies to construction contracts entered into after 1/1/09
    - 2) Subcontractor has right to defend with counsel of its choice, or pay not more than a reasonable allocated share of the general contractor's fees and costs
    - 3) Wrap policies – disclosure of premium calculations
  - c. 2005 amendments (AB 758)
    - 1) Applies to construction contracts entered into after 1/1/06
    - 2) Does not prohibit joint defense agreements
    - 3) Does not affect obligations of liability insurer under *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571
3. Contractual indemnity vs. equitable indemnity (*Regional Steel Corp. v. Superior Court* (1994) 25 Cal.App.4th 525; *People ex rel. Dept. of Public Works v. Daly City Scavenger Co.* (1971) 19 Cal.App.3d 277)
4. Comparative contractual indemnity (*Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791)
5. Contractual duty to defend (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541)
6. Characterization of conduct by indemnitor and indemnitee
  - a. Type I, Type II and Type III provisions (*McCrary Construction Company v Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528; *Hepler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265)
  - b. Is the active/passive distinction still valid? (*Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856)
  - c. Is finding of fault by indemnitee required? Distinction between commercial and residential contexts?
    - 1) *Continental Heller Corporation v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500
    - 2) *Building Maintenance Service Company v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014

- 3) *Heppler v. J.M. Peters Company, Inc.* (1999) 73 Cal.App.4th 1265
- 4) *Centex Golden Construction Company v. Dale Tile Company* (2000) 78 Cal.App.4th 992
7. Indemnity for economic loss under SB 800 – builder may seek equitable indemnity from product manufacturer for cost to replace defective components (*Greystone Homes v Midtec* (2008) 168 Cal.App.4th 1194)
8. Equitable Contribution (*Hartford Casualty Insurance Company v. Mt. Hawley Insurance Company* (2004) 123 Cal.App.4th 278)
9. Recovery of repair costs on non-plaintiff homes (*Barratt American, Inc. v. Transcontinental Insurance Company* (2002) 102 Cal.App.4th 848)
10. Recovery of attorney fees in indemnity action (*Pacific Custom Pools v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254; *Jacobus v. Krambo Corp.* (2000) 78 Cal.App.4th 1096; *Continental Heller Corporation v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500; *Otis Elevator Co. v. Toda Construction* (1994) 27 Cal.App.4th 559)
11. Assignment of indemnity claim
  - a. Requirement that assignor make payment (*Fleck v. Bollinger Home Corp.* (1997) 54 Cal.App.4th 926)
  - b. Must assignee substitute in assigned cross complaint (*Casey v. Overhead Door Corp.* (1999) 74 Cal.App.4th 112)
  - c. Recovery of attorney fees (*Bramalea California v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265)
  - d. Collateral source rule (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337)
12. Tender necessary? (*City of Watsonville v. Corrigan* (2007) 149 Cal.App.4th 1542)

## J. STATUTE OF LIMITATIONS

1. CCP §§337 & 338 – run from *discovery* of claim
  - a. Interplay with §§337.1 & 337.15 (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625; *Regents of University of California v. Hartford Accident and Indemnity Co.* (1978) 21 Cal.3d 624)
  - b. Delayed discovery (*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401; *El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337; *Lyles v. State* (2007) 153 Cal.App.4th 281;

- Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625; *Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398)
- c. Different statute of limitations for different areas of damage (*Winston Square HOA v. Centex West* (1989) 213 Cal.App.3d 282)
2. CCP §337.1 – patent defects (4 years from *completion* of improvement)
    - a. Is there such thing as a patent defect in the property damage context? (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625; *Winston Square Homeowners Association v. Centex West* (1989) 213 Cal.App.3d 282)
    - b. Recent decisions: *Nash v. MacDonald* (2001) 92 Cal.App.4th 847 [ordered not to be published]; *Tomko Woll Group Architects, Inc. v. Superior Court* (1996) 46 Cal.App.4th 1326
  3. CCP §337.15 – latent defects (10 years from *completion* of improvement)
    - a. “Improvement” broadly interpreted – land fill (*San Diego Unified School District v. County of San Diego* (2009) 170 Cal.App.4th 288; *Gaggero v. County of San Diego* (2004) 124 Cal.App.4th 609)
    - b. Not limited to tort claims; applies to contract causes of action (*Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 362)
    - c. Exceptions:
      - 1) Subdivision (e) – defendant in possession “at the time any deficiency in the improvement constitutes the proximate cause” of damage (*Gundogdu v. King Mai, Inc* (2009) 171 Cal.App.4th 310; *Gaggero v. County of San Diego* (2004) 124 Cal.App.4th 609)
      - 2) Subdivision (f) – willful misconduct or fraudulent concealment (*Pine Terrace Apartments v. Windscape* (2009) 170 Cal.App.4th 1; *Acosta v. Glenfed Development* (2005) 128 Cal.App.4th 1278; *Felburg v. Don Wilson Builders* (1983) 142 Cal.App.3d 383)
      - 3) Statute inapplicable to manufacturers and suppliers of component parts who do not perform on site services (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625)
      - 4) Liability in capacity other than builder; e.g., liability for breach of fiduciary duty as initial incorporator/director of HOA
  4. Equitable doctrines to defeat statute
    - a. Equitable tolling
      - 1) Sections 337 & 338 – tolling allowed (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625)

- 2) Section 337.15 – no tolling (*Inco Development v. Superior Court* (2005) 131 Cal.App.4th 1014 [bankruptcy]; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363 [repairs by defendant])
- 3) SB 800 – §941(e): existing law on tolling applies, except as to repairs performed pursuant to Chapter 4
- b. Estoppel and waiver (*Gundogdu v. King Mai, Inc* (2009) 171 Cal.App.4th 310; *Doheny Park Terrace HOA v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625)
5. Separate trial of statute defense – is separate trial possible in construction defects suit without duplication of evidence on the merits?
6. SB 800 – statute of limitations (§941)
  - a. Revised version of 10-year statute
  - b. Applicability of discovery statutes?
  - c. Not applicable to exempted causes of action and damages (see Causes of Action, above)
  - d. Warranties - extended protection agreements

#### **K. SETTLEMENT**

1. CCP §664.7 – attorney’s authority to settle
2. Right to trial on settlement issues? (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337; *Collins Development Co. v. D.J. Plastering, Inc.* (2000) 81 Cal.App.4th 771)
3. Good faith settlements
  - a. Allocations (*El Escorial Owners Assoc. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337; *Franklin Mint v Superior Court* (2005) 130 Cal.App.4th 1550; *L.C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742; *Regan Roofing v. Superior Court* (1994) 21 Cal.App.4th 1685)
  - b. Is one-sided allocation collusive? (*Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264)
  - c. Appeal of good faith order (*Wilshire Insurance Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627; *Maryland Casualty Co. v. Andreini & Company of Southern California* (2000) 81 Cal.App.4th 1413)

- d. Good faith finding was abuse of discretion (*TSI Seismic Tenant Space v. Superior Court* (2007) 149 Cal.App.4th 159)
4. Application of credits for pre-trial settlements
  - a. CCP §998 implications where judgment is reduced to zero based on credit for pre-trial settlement (*Guerrero v. Rodan Termite Control* (2008) 163 Cal.App.4th 1435)
  - b. Damage offsets applied before settlement credits (*Brawley v. J.C. Interiors* (2008) 161 Cal.App.4th 1126)
5. Contractor's settlement did not preclude indemnity claim (*Willdan v. Sialic Contractors* (2007) 158 Cal.App.4th 47)
6. Voluntary payment without tender to carrier (*Barratt American, Inc. v. Transcontinental Insurance Company* (2002) 102 Cal.App.4th 848; *Truck Insurance Exchange v. Unigard Insurance Co.* (2000) 79 Cal.App.4th 966; *Jamestown Builders v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341)
7. Misrepresentation of policy limits (*Home Insurance Co. v. Zurich Insurance Co.* (2002) 96 Cal.App.4th 17)
8. Payment of judgment (*Rancho Solano Master Association v. Amos & Andrews, Inc.* (2002) 97 Cal.App.4th 681)
9. Stipulated judgments (*Valentine v. Membrila Ins. Services, Inc.* (2004) 118 Cal.App.4th 462)
10. Enforceability of settlement agreement (*Elnekave v. Via Dolce HOA* (2006) 142 Cal.App.4th 1193)

## L. INSURANCE COVERAGE

1. Duty to defend vs. duty to indemnify (*Scottsdale Insurance Co. v. MV Transportation* (2005) 36 Cal.4th 643; *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571; *Centennial Insurance Co. v. United States Fire Insurance Co.* (2001) 88 Cal.App.4th 105; *Golden Eagle Refinery Co., Inc. v. Associated International Insurance Company* (2001) 85 Cal.App.4th 1300; *Maryland Casualty Co. v. Nationwide Insurance Co.* (1998) 65 Cal.App.4th 21)
2. Coverage issues
  - a. Work performed and products exclusions (*Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961)
  - b. Occurrence
    - 1) Defined: continuous and progressively deteriorating property damage over successive policy periods is continuous injury (or

- multiple) trigger of coverage (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645)
- 2) Multiple Occurrences (*Safeco Insurance Company of America v. Fireman's Fund Insurance Company* (2007) 148 Cal.App.4th 620)
- c. Property damage / loss of use (*F&H Construction v. ITT Hartford Insurance Company of the Midwest* (2004) 118 Cal.App.4th 364; *Baroco West Inc. v. Scottsdale Insurance Co.* (2003) 110 Cal.App.4th 96)
- d. Repair costs on non-plaintiff homes (*Barratt American v. Transcontinental Insurance Co.* (2002) 102 Cal.App.4th 848)
- e. Contractual liability
  - 1) Coverage for contract claims (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815)
  - 2) Coverage for contractual indemnity claims (*Golden Eagle Insurance Co. v. Insurance Company of the West* (2002) 99 Cal.App.4th 837; *Insurance Company of North America v. National American Insurance Company* (1995) 37 Cal.App.4th 195)
- f. Ownership of property at time of damage (*The Standard Fire Insurance Company v. The Spectrum Community Association* (2006) 141 Cal.App.4th 1117; *Century Indemnity v. Hearrean* (2002) 98 Cal.App.4th 734; *Garriott Crop Dusting Co. v. Superior Court* (1990) 221 Cal.App.3d 783)
- g. Stacking policies (*State v. Continental Ins. Co.* (2009) 88 Cal.Rptr.3d 288 (rev granted); *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132)
- h. Settlement as damages? (*Aerojet-General Corporation v. Commercial Union Ins. Co.* (2007) 155 Cal.App.4th 132)
- 3. Defense issues
  - a. Conflicts of interest
    - 1) Rule of Professional Conduct 3-310
    - 2) Cumis decisions: *James 3 Corp. v. Truck Insurance Exchange* (2001) 91 Cal.App.4th 1093; *State Farm Mutual Automobile Assoc. v. Federal Insurance Co.* (1999) 72 Cal.App.4th 1422; *Dynamic Concepts, Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999
    - 3) Defense of insured by insurer's in-house counsel (*Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388)

- b. Withdrawal of defense and reimbursement
  - 1) Ultimate finding that insurer never owed duty to defend did not preclude recovery of defense costs, where insurer had reserved right to seek reimbursement (*Scottsdale Insurance Company v. MV Transportation* (2005) 36 Cal.4th 643)
  - 2) Other recent decisions: *Blue Ridge Insurance Company v. Jacobsen* (2001) 25 Cal.4th 489; *CD Investment Co. v. California Insurance Guarantee Assn.* (2000) 84 Cal.App.4th 1410; *Ringler Associates, Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165; *Tamrac, Inc. v. California Insurance Guarantee Assn.* (1998) 63 Cal.App.4th 751; *Buss v. Superior Court* (1997) 16 Cal.4th 35
- c. Pre-tender defense fees (*Low v. Golden Eagle Insurance Co.* (2003) 110 Cal.App.4th 1532; *Insua v. Scottsdale Insurance Co.* (2002) 104 Cal.App.4th 737)
4. Stipulated judgment vs. insured (*Executive Risk v Jones* (2009) 171 Cal.App.4th 319; *Hamilton v. Maryland Casualty* (2002) 27 Cal.4th 718)
5. Primary vs. excess coverage (*Padilla Construction Company, Inc. v. Transportation Insurance Company* (2007) 150 Cal.App.4th 984; *Transcontinental Insurance Company v. Insurance Company of State of Pennsylvania* (2007) 148 Cal.App.4th 1296; *RLI Insurance Company v. CAN Casualty of California* (2006) 141 Cal.App.4th 75)
6. Contribution (*Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874; *Fortman v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1374)
7. Attorney fees – proving coverage (*Essex Insurance Company v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252; *Brandt v. Superior Court* (1985) 37 Cal.3d 813)
8. CIGA issues (*Stonelight Tile, Inc. v. CIGA* (2007) 150 Cal.App.4th 19; *Parkwoods Community Association v. CIGA* (2006) 141 Cal. App.4th 1362; *Black Diamond Asphalt, Inc. v. Superior Court* (2003) 114 Cal.App.4th 109)
9. Additional insured endorsements
  - a. Failure to obtain additional insured endorsement
    - 1) Leading cases: *Roger H. Provlx and Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182; *Ramsey v. Marutamaya Ogatsu Fireworks Co.* (1977) 72 Cal.App.3d 516; *Hollywood Turf Club v. Montgomery Elevator Co.* (1976) 58 Cal.App.3d 580; *Patent Scaffolding Co. v. William Simpson Construction Co.* (1967) 256 Cal.App.2d 506

- 2) Duty of care to third party (*Business to Business Markets, Inc. v. Zurich Specialties* (2006) 135 Cal.App.4th 165; *Harper v. Wausau Ins. Co.* (1997) 56 Cal.App.4th 1079; *Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717)
- b. Blanket vs. project-specific endorsements (*Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340)
- c. Multiple endorsements obtained by multiple subcontractors (***Presley Homes v. American States Insurance Co.*** (2001) 90 Cal.App.4th 571)
- d. Damage “arising out of” subcontractor’s work; is causation required? (*Monticello Insurance v. Essex Insurance* (2008) 162 Cal.App.4th 1376; *St. Paul Fire & Marine Insurance Co. v. America Dynasty Surplus Lines* (2002) 101 Cal.App.4th 1038; *Fireman’s Fund Insurance Companies v. Atlantic Richfield Company* (2001) 94 Cal.App.4th 842; *Acceptance Insurance Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321)
- e. Is additional insurance primary to developer’s primary and/or excess insurance?
  - 1) *Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063
  - 2) *Maryland Casualty Co. v. Nationwide Mutual Insurance Co.* (2000) 81 Cal.App.4th 1082
  - 3) *Travelers Casualty & Surety Company v. American Equity Insurance Company* (2001) 93 Cal.App.4th 1142
  - 4) *Scottsdale Insurance Company v. Essex Insurance Company* (2002) 98 Cal.App.4th 86
  - 5) *Century Surety Co. v. United Pacific Insurance Co.* (2003) 109 Cal.App.4th 1246
  - 6) *Hartford Casualty Ins. Co. v. Mt. Hawley Ins. Co.* (2004) 123 Cal.App.4th 278
  - 7) *Carmel Development Company v. RLI Insurance Company* (2005) 126 Cal.App.4th 502
  - 8) *Edmondson Property Management v. Kwock* (2007) 156 Cal.App.4th 197
- f. Potential effect of additional insured endorsement on coverage exclusions (e.g., work of the named insured, owned premises exclusion, etc.)
- g. Duty to defend additional insured (*Maryland Casualty Co. v. Nationwide Insurance Co.* (1998) 65 Cal.App.4th 21)

10. Multiple deductibles
11. Wrap Policies
  - a. OCIPS
  - b. CCIPS
  - c. Rolling wraps
  - d. Conversion wraps
12. SB 800 – Insurance coverage
  - a. Property damage
  - b. “Claim”
  - c. Feasibility - sufficient time for tender and response?