

DON'T WANT TO GET SUED? 😞

GET SMART. 😊

A BUILDER'S GUIDE TO AVOIDING AND DEFENDING CONSTRUCTION DEFECT LITIGATION

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I.
**BUILDING HOMES IN CALIFORNIA: SWIMMING POOLS,
MOVIE STARS, AND LAWSUITS**

If you are a builder of houses in California, you are likely to be sued by disgruntled buyers. The reason for this is that the perfect house cannot be constructed, especially within a budget that allows for a profit to be made. In addition, there are thousands of attorneys who are anxious to sue, because they need to make money. So the question is not if you will get sued, but when, for how much, and how often.

Legislation that applies to houses sold on or after January 1, 2003, creates a pre-trial process that includes a builder's right to repair an alleged defect. That's good for builders. But plaintiff's lawyers will find a way to pursue construction defect ("cd") claims notwithstanding this new legislation. Moreover, many cd lawsuits involve houses sold before 2003, that are unaffected by the new legislation.

The purpose of this article is to give you some ideas as to how a cd lawsuit can be avoided, if possible, and, if not, what you can do, during the construction and marketing process, to give yourself the best chance of prevailing if you are sued. While this article is not a substitute for legal advice from a lawyer of your choosing, it should at least give you some ideas, and possible strategies, for avoiding a construction defect lawsuit, and defending a lawsuit if and when your company is sued.

II.
WHAT IS A CONSTRUCTION DEFECT?

A simple question. A complicated answer.

2003 legislation, entitled the Homebuilder Right to Repair Act (the "2003 Act"), Civil Code Sections 895, et seq., attempts to create construction defect standards for various structural elements and components including, among other things, water intrusion, structural stability, soils, fire protection, plumbing, and electrical systems. It also includes a catch-all that applies to any "function or component of a structure [that] is not addressed by these standards." As to such unidentified components, "it shall be actionable if it causes damage."

While there is no legislative standard for construction defects for pre-2003 houses, one definition that has been frequently used is the "failure of the building or any building component to be erected in a reasonably workmanlike manner intended by the manufacturer or reasonably expected by the buyer, which proximately causes damage to the structure."

In reality, a defect is any building component that a judge or jury thinks should be fixed. A construction defect can include almost anything such as: leaks through walls, windows, plant-ons, pot shelves, roofs, or anywhere else; mold; soil subsidence; cracks in foundations or hardscape; cracks in stucco or drywall; problems with the HVAC system; electrical problems; plumbing problems; sound intrusion through pipes or walls;

lack of fire resistive construction; and whatever else a home buyer or his attorney can think of. It is the defense attorney's job to convince the trier of fact that a structure, even if not perfect, is reasonably workmanlike, and hence does not constitute a defect.

III.

HOW TO AVOID GETTING SUED IN THE FIRST PLACE

Being sued for construction defects is like drinking too much and ending up with a hangover the next day. Having experienced it once, you want to avoid it a second time.

However, unlike a hangover, that can be avoided by simply not drinking, a construction defect lawsuit is sometimes unavoidable. However, there are certain things that can be done to minimize the possibility of getting sued.

A. Repair the Defects.

The 2003 Act gives builders the opportunity to avoid being sued by repairing alleged defects claimed by the home buyer. In deciding whether to correct what the home buyer claims is a defect, the builder must weigh the cost to defend, and possible damages if it loses, against the cost to repair. The builder might also want to factor in what effect its decision could have on other homeowners or plaintiff's lawyers. If a builder is viewed as a soft touch, that could open the door to lawsuits from other homeowners with the same condition, or predatory lawyers who prey on builders who cave rather than fight. On the other hand, if the builder fights and loses, the legal fees and damages could exceed the cost of repair.

B. Don't Be Penny Wise and Pound Foolish.

There are things a builder can do that might cost a little more in the short term, but will avoid a lawsuit that will save money in the long run. Some of these preventative measures include:

(i) Provide Good Customer Service Beyond the Warranty Period.

Many construction defect lawsuits have their origins in what initially appeared to be a very small problem that the builder failed to correct. A few homeowners, whose complaints about seemingly minor leaks that were not fixed, for example, can possibly result in a "free consultation" with a plaintiff's construction defect attorney. That consultation might be free for the homeowners, but it could cost the builder a bundle after the lawyer's expert discovers what he claims are a multitude of serious construction defects.

Such problems can be avoided by providing good customer service, and taking adequate measures to resolve any problems when they arise, until such time as the homeowner complaints diminish to a trickle. While this could reduce the bottom line in

the short term, and potentially extend certain statutes of limitations on construction defect claims, it can avoid many potential lawsuits. The old adage--don't be penny wise and pound foolish--clearly applies here.

(ii) Take Photos and Videotapes During the Course of Construction, and Keep Thorough Job Notes.

Many conditions and components get covered up during the later stages of construction. As a result, plaintiff's construction defect experts usually take the position that they cannot opine upon the integrity of the construction without doing destructive testing. If, however, the job is properly documented during the course of construction, the builder may be able to demonstrate, before an action is commenced, that there is nothing hidden beneath the surface that constitutes a construction defect.

Should a lawsuit nonetheless be filed, photographs and videotapes taken during the course of construction, together with detailed job notes, can be invaluable to the defense, assuming, of course, that the job was constructed properly in the first place. One picture is worth at least a thousand words to a judge or jury in a construction defect case.

(iii) Maintain Job Files for at Least 10 Years.

Properly maintained job files can help to establish that a structure was properly constructed, and avoid a potential lawsuit. As such, it is important to maintain such files for at least 10 years, which is arguably the longest statute of limitations for commencing a construction defect lawsuit.

(iv) Prepare the Purchase Agreement with Construction Defect Lawsuits in Mind.

There are a few provisions that can be included in a purchase agreement that may possibly help insulate a builder of homes from a construction defect claim, especially homes sold prior to 2003:

First, indicate that all implied warranties are waived. Because waiver is an intentional relinquishment of a known right, the waiver provision should be highly conspicuous, in large bold type, on the front side of a page, and initialed by the buyer.

Second, in identifying a unit, do not state that it will be constructed in conformity with any model unit, as this could be construed as an express warranty.

Third, any discussion in the purchase and sale agreement, or in a public offering statement, regarding warranties, should be limited to what is required by applicable statutes.

Fourth, state that the house is being sold "as is." While an "as is" provision might not be approved by the Department of Real Estate on subdivision projects, and might

not be enforced by a court if it deems such a provision to be unconscionable, against public policy, or part of an adhesion contract, it potentially provides an added layer of insulation.

Thus, while a purchase agreement is no substitute for good construction, it can be drafted in such a manner as to give the builder the most protection it can possibly get. It is therefore important that the purchase agreement be clear, easy to understand, and written in plain English, rather than legalese. Every page should be initialed, with especially important provisions initialed separately. The combination of good construction, proper customer service, and a protective purchase agreement, gives the builder a better chance of avoiding a construction defect lawsuit.

(v) **Pre-Litigation Investigation and Attempts to Settle: The Calderon Process.**

For homes sold before 2003, and possibly even after, there is a legislative procedure, known as The Calderon Process, that a community association of 20 or more units must go through before it is entitled to bring a construction defect lawsuit against the builder. The Calderon Process provides for disclosures to be made by the homeowners' association to the builder, and the builder to the association, the right of the builder to meet with the homeowners' association board of directors, and the right of the builder to conduct testing if such testing has been conducted by the association. The Calderon Process also provides for mediation, contains provisions which get the general contractor, subcontractors, and insurance companies involved, and includes other useful provisions. The Calderon Process gives the builder an opportunity to settle a cd dispute with a homeowner's association before a lawsuit is filed.

**IV.
WHAT TO DO IF YOU ARE SUED (aka, HELLO JOHNNIE WALKER)**

Despite all of your efforts to avoid being sued, the process server hands you a summons and complaint, and says "have a nice day." After a few choice expletives, that would make an old sailor proud, you calmly say to yourself, no problem, I've got Chyten's handbook. You turn to this chapter, and then you:

A. Tender the Defense to Your Insurance Carrier If You Have One.

If the builder purchased an insurance policy, and paid all those big premiums, it is time to start getting the benefits it paid for. The builder does this by tendering the defense of a cd lawsuit to its carrier. This is accomplished by sending a letter to the insurance agent, or to the insurance company directly, with a copy of the complaint, the insurance policy number, and a letter saying that the builder is "hereby tendering the defense of this action." The builder will receive a response from its insurance carrier, saying that it either accepts the tender of the defense, rejects the tender, or accepts the tender with a reservation of rights, which means that the insurer will pay for a defense, but reserves the right to seek the money back, and to claim that it has no obligation in the event the builder is found liable.

Given the complexities of insurance policies, and the disputes that sometimes arise between insureds and insurers, it is often best to let an attorney deal with the insurance company on the builder's behalf. Which brings us to the next, all important, and critical step.

B. Hire a Good Lawyer Who Is Experienced in Construction Defect Litigation.

When a builder gets sued in a cd action, it is not the end of the world. But it is time to call in a professional. A builder builds houses. A lawyer defends lawsuits.

Whichever lawyer the builder hires, it should make sure the lawyer knows what he or she is doing, and has the wherewithal and experience to not only defend the action, but to make sure that all responsible parties--the general contractor, the subcontractors, and design professionals--are brought into the action. Why? Because they need to defend their work, and, in addition, to pay their proportionate share of the liability for any construction defects for which they are wholly or partially responsible.

Any builder who has been through a construction defect lawsuit knows that this can be like going through a war. The builder should make sure that the person in the trenches is someone it trusts, and someone it believes will protect the company, and its officers, directors, and shareholders.

C. Mediation.

Mediation presents an opportunity to avoid the time and expense, not to mention potential exposure, of litigating a cd case. There are many keys to mediation. Some of them are:

First, select a good mediator, experienced in cd actions, who has the trust and respect of the parties, counsel, and insurance company adjusters.

Second, be prepared, and have a strategy in mind, before walking into the mediation. It is difficult to settle a cd case if the builder (or its lawyer) does not have a firm grasp of the alleged defects, the cost of repair, and the potential exposure at trial.

Third, make sure everyone who has potential exposure attends the mediation with their respective adjuster. This includes the general contractor, subs and design professionals, as applicable. Everyone who attends the mediation should be educated so that they understand the case, the alleged defects, and their potential exposure. Any coverage issues will need to be addressed and resolved.

Fourth, as with any potential settlement, evaluate the numbers from a business standpoint. See, discussion in Section III A, above. Logic, not emotion, should govern.

D. Put Together a Strong Group of Experts.

In construction defect actions, it is critical to put together a group of experts as early in the case as possible. In cases involving more than one type of defect, there is generally a lead expert, usually a general contractor or architect, who coordinates and directs the work of all other experts. In addition to a general contractor and architect, other experts can include structural engineers, HVAC/mechanical engineers, plumbing, electrical, roofing, waterproofing, windows/fenestration, acoustical, landscape, industrial hygienists, environmental hygienists, and other specialties as needed. This group of experts can help build a defense, while at the same time destroying or impairing the plaintiff's case.

It is helpful to get experts involved in a case as early as possible. An expert can be better prepared to advise and testify if he or she observes and participates in inspections and testing, reviews the job files, and is kept apprised of the positions taken by the plaintiff's experts. Construction experts who understand the issues can help to identify the weaknesses in the plaintiff's case, and challenge the opinions of plaintiff's experts.

In addition to being knowledgeable, experts must have the ability to take difficult and oftentimes complicated facts and theories, and put them into simple terms that the trier of fact can understand. If an expert talks down to the trier of fact, or talks primarily in the jargon of the trade, they are likely to be tuned out or resented. Seasoned experts, with a good track record, and with proper preparation from defense counsel, will be able to explain their position in a clear, concise, and straightforward manner.

V. CONCLUSION

The goal of any business, like that of an ethical attorney, is to work hard, do good work, and make a decent living. Lawsuits do not help a developer make money; they only help lawyers make money. But like any ethical doctor who wants his or her patients to stay healthy, and wants to treat them only if they get sick in spite of following his advise, an ethical attorney wants his or her clients to avoid getting sued, and wants to represent them only if they get sued in spite of following his advise. A developer should do what it can to avoid a lawsuit, but prepare itself to win if it does get sued.

_____ Litigation is never fun, is usually expensive, and should be avoided if at all possible. A conscientious lawyer can help a business avoid construction defect litigation by eliminating conditions that can invite lawsuits. If a developer is sued, an attorney can guide his client through the litigation process, and help it decide whether to settle or go to trial. If the decision is made to go to trial, the developer should retain an attorney who has the experience, guile, intelligence, and tenacity to make sure that justice is ultimately served

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THE CONTENTS OF THIS DOCUMENT IS INTENDED TO BE FOR INFORMATIONAL PURPOSES ONLY, AND TO GIVE A VERY BRIEF SYNOPSIS OF VARIOUS PRINCIPALS RELATING TO CERTAIN ASPECTS OF CONSTRUCTION DEFECT LAW. IT IS INTENDED ONLY FOR EDUCATIONAL PURPOSES AND IS NOT MEANT TO GIVE LEGAL ADVICE OR COMMENT AS TO ANY PARTICULAR SITUATION OR SET OF FACTS. FOR SPECIFIC LEGAL ADVICE CONCERNING A PARTICULAR SITUATION, THE AUTHOR STRONGLY SUGGESTS THAT YOU CONSULT WITH AND RETAIN AN ATTORNEY.

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