S229762

IN THE SUPREME COURT OF CALIFORNIA

MCMILLIN ALBANY LLC et al.,
Petitioners,

v.

THE SUPERIOR COURT OF KERN COUNTY,
Respondent;

CARL VAN TASSELL et al.,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH APPELLATE DISTRICT
CASE NO. F069370

MOTION FOR JUDICIAL NOTICE FILED CONCURRENTLY WITH AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST; DECLARATION OF DANIEL J. GONZALEZ; EXHIBIT

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ATTORNEYS FOR AMICUS CURIAE MWI, INC.

IN THE SUPREME COURT OF CALIFORNIA

MCMILLIN ALBANY LLC et al.,
Petitioners,

v.

THE SUPERIOR COURT OF KERN COUNTY,
Respondent;

CARL VAN TASSELL et al.,
Real Parties in Interest.

MOTION FOR JUDICIAL NOTICE FILED CONCURRENTLY WITH AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

Amicus Curiae MWI, Inc. hereby moves, pursuant to Evidence Code sections 452, subdivision (c), 453, and 459, and California Rules of Court, rule 8.252, for judicial notice of the one-volume legislative history of Assembly Bill No. 903 (2002-2003 Reg. Sess.) (AB 903), which amended Civil Code sections 895 et seq. (otherwise known as "SB 800" and the "Right to Repair Act"). (See *Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73 [granting request for judicial notice of Code of Civil Procedure section 340.9's

legislative history]; *Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, 1058, fn. 5 [same]; see also *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 218, fn. 9; *Post v. Prati* (1979) 90 Cal.App.3d 626, 634 [judicial notice properly taken under Evidence Code section 452, subdivision (c), of legislative committee reports, final legislative history of act, excerpts of testimony at public legislative hearings, and correspondence with the Governor's office regarding proposed legislation]; Gov. Code, § 9080.)

The legislative history accompanying this motion is the entire legislative history provided to us by Jan Raymond, Legislative History & Intent Services. For ease of reference, we have consecutively paginated the materials we received and inserted footers to reference the bills to which they pertain.

For reasons explained in greater detail in MWI's Amicus Curiae Brief, judicial notice of the legislative history of AB 903 is important to an understanding of the statutes pertinent to the preemption issue before this Court. In particular, the legislative history of the bill is important to a correct understanding of the phrase "claims for which strict liability would apply" in the last

sentence of Civil Code section 936, which is significant to the question of preemption.

For the forgoing reasons and those stated in MWI's brief, this Court should grant this motion to take judicial notice of the legislative history of AB 903.

August 12, 2016

HORVITZ & LEVY LLP
H. THOMAS WATSON
DANIEL J. GONZALEZ

By: _____
Daniel J. Gonzalez
Attorneys for Amicus Curiae **MWI, INC.**

DECLARATION OF DANIEL J. GONZALEZ

I, Daniel J. Gonzalez, declare as follows:

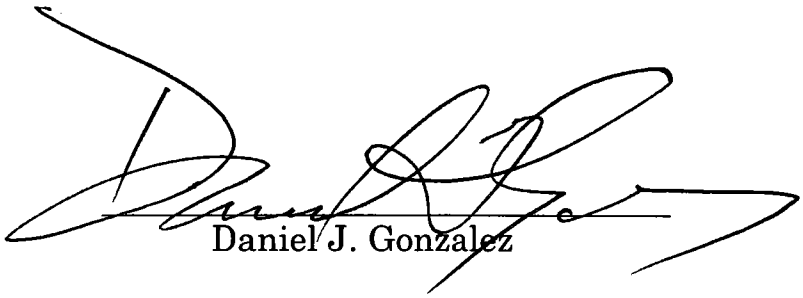
I am an attorney duly admitted to practice before this court and a partner in Horvitz & Levy LLP. We are attorneys of record for defendant and appellant MWI, Inc. in *Acqua Vista Homeowners Association v. MWI, Inc.* (Court of Appeal case number D068406).

In December 2014, my firm retained Jan Raymond at the Legislative History & Intent service in Berkeley, California, to provide the complete legislative history of Assembly Bill No. 903 (2002-2003 Reg. Sess.) (AB 903), which amended Civil Code sections 895 et seq.

Legislative History & Intent provided us with the legislative history that accompanies this declaration as Exhibit A. Exhibit A is the entirety of the legislative history for AB 903 that we received.

The only alterations we have made to what we received are to consecutively paginate the legislative history for AB 903, for ease of reference in MWI's brief, and to insert a footer to identify the material to be judicially noticed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 12, 2016, at Burbank, California.



Daniel J. Gonzalez

LEGISLATIVE HISTORY
ASSEMBLY BILL NO. 903

EXHIBIT A

COMPLETE BILL HISTORY

BILL NUMBER : A.B. No. 903
AUTHOR : Steinberg
TOPIC : Construction defect cases.

TYPE OF BILL :
Inactive
Non-Urgency
Non-Appropriations
Majority Vote Required
Non-State-Mandated Local Program
Non-Fiscal
Non-Tax Levy

BILL HISTORY
2003
Oct. 11 Chaptered by Secretary of State - Chapter 762, Statutes of 2003.
Oct. 10 Approved by the Governor.
Sept. 24 Enrolled and to the Governor at 2 p.m.
Sept. 13 Senate amendments concurred in. To enrollment. (Ayes 78. Noes 0. Page 3949.)
Sept. 10 In Assembly. Concurrence in Senate amendments pending. Ordered to Special Consent Calendar.
Sept. 9 Read third time, passed, and to Assembly. (Ayes 40. Noes 0. Page 2427.)
Sept. 8 Read second time. To third reading.
Sept. 4 Action rescinded whereby the bill was read third time, passed, and to Assembly. Read third time, amended. To second reading.
July 21 In Senate. Held at Desk.
July 21 Ordered returned to Senate.
July 17 In Assembly. Concurrence in Senate amendments pending. May be considered on or after July 19 pursuant to Assembly Rule 77.
July 17 Read third time, passed, and to Assembly. (Ayes 40. Noes 0. Page 1876.)
July 15 Read second time, amended, and to Consent Calendar.
July 14 From committee: Amend, and do pass as amended. To Consent Calendar.
May 29 Referred to Com. on JUD.
May 15 In Senate. Read first time. To Com. on RLS. for assignment.
May 15 Read third time, passed, and to Senate. (Ayes 76. Noes 0. Page 1709.)
May 8 Read second time. To Consent Calendar.
May 7 From committee: Do pass. To Consent Calendar. (May 6).
May 6 Re-referred to Com. on JUD.
May 5 From committee chair, with author's amendments: Amend, and re-refer to Com. on JUD. Read second time and amended.
Apr. 30 Re-referred to Com. on JUD.
Apr. 29 From committee chair, with author's amendments: Amend, and re-refer to Com. on JUD. Read second time and amended.
Mar. 3 Referred to Com. on JUD.
Feb. 21 From printer. May be heard in committee March 23.
Feb. 20 Read first time. To print.

ASSEMBLY BILL No. 903

Introduced by Assembly Member Steinberg

February 20, 2003

An act relating to construction defects.

LEGISLATIVE COUNSEL'S DIGEST

AB 903, as introduced, Steinberg. Construction defect cases.

Existing law specifies the rights and requirements of a homeowner to bring an action for construction defects.

This bill would require the California Law Revision Commission to conduct a study to determine if the goals of achieving a more fair and prompt resolution process in construction defects cases has resulted from a specified recent legislative enactment. The bill would require the commission to report its findings by March 1, 2004. The bill would also make a specified statement of Legislative intent regarding construction defects cases.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares, as follows:

(a) It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects cases.

(b) In an effort to ensure that the intent of the Legislature has been accomplished with the enactment of Chapter 722 of the

Statutes of 2002, the California Law Revision Commission shall conduct a study to determine if the goals of achieving a more fair and prompt resolution process has resulted from the enactment of Chapter 722 of the Statutes of 2002. The California Law Revision Commission shall provide its findings to the Chief Clerk of the Assembly and the Secretary of the Senate on or before March 1, 2004.

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JOHN GARAMENDI
Insurance Commissioner

April 1, 2003

The Honorable Darrell Steinberg
The State Assembly
State Capitol
Sacramento, CA 95814

Dear Darrell:

In January 2003, SB 800, the "right to repair" legislation became law. This law is intended to give homebuilders the opportunity to repair construction defects. The immediate implementation of this law is important to the housing industry in California. In an effort to compress the normal time for the building industry and the insurance industry to adjust to the new law, I am forming a Working Group that will serve as a starting point to review the recently enacted Construction Defects Law (SB 800, Chapter 722, 2003, Burton/Wesson).

You, or your representative, are invited to join with leaders from labor, the insurance, construction and real estate industries, consumer representatives, my staff, and me to take part in this meeting where we will address the questions and concerns regarding the known and unknown effects of the Construction Defects Law.

Date:	Wednesday, April 2, 2003
Time:	1 p.m. – 4 p.m.
Location:	Department of Insurance 300 Capitol Mall, 13th Floor Conference Room Sacramento, CA 95814

Please RSVP by Tuesday, April 1, 2003 to Jane Crawford, Director of Consumer & Industry Outreach, Office of External Affairs, by email: crawfordj@insurance.ca.gov, phone: 916-492-3617 or fax: 916-445-5280.

Your participation is important, and I look forward to seeing you on April 2nd!

Sincerely,

JOHN GARAMENDI

300 CAPITOL MALL, SUITE 1700
SACRAMENTO, CALIFORNIA 95814
PHONE (916) 492-3500 • FACSIMILE: (916) 445-5280

4126

PUBLIC POLICY ADVOCATES LLC

April 23, 2003

TO: The Honorable Darrell Steinberg, Member of the Assembly
The Honorable Ellen Corbett, Chair Assembly Judiciary Committee
Members, Assembly Judiciary Committee

FROM: Russell Noack and John Caldwell, Public Policy Advocates

RE: , AB 903 (Steinberg) - SUPPORT
Set for hearing May 6, 2003

On behalf of our client, the American Insurance Association, a national trade association representing more than 424 insurers who write more than $103 billion in insurance premiums nationwide, we are pleased to inform you that we support AB 903. AIA members provide construction dispute insurance to developers, general contractors and subcontractors in California

AB 903 would provide a clarifying definition of the term "builder" to mean "any entity or individual who, at the time of sale, was in the business of selling residential units to the public and applies to the sale of new residential units entered into contract on or after January 1, 2003, including a developer, builder or original seller." AIA views AB 903 as a clarifying amendment on the definition of what a "builder" is. This amendment is within the spirit of the agreement reached in SB 800 (Burton/Wesson) of last session.

For the reasons stated above, AIA supports AB 903. We are committed to continue to work with all parties to further expand new reforms in this area to provide affordable insurance to both general contractors and subcontractors and affordable housing to California consumers.

AMENDED IN ASSEMBLY APRIL 29, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL No. 903

Introduced by Assembly Member Steinberg

February 20, 2003

An act *to amend Sections 911, 916, and 941 of, and to amend, renumber, and add Section 942 to, the Civil Code,* relating to construction defects.

LEGISLATIVE COUNSEL'S DIGEST

AB 903, as amended, Steinberg. Construction defect cases.

Existing law specifies the rights and requirements of a homeowner to bring an action for construction defects.

This bill would ~~require the California Law Revision Commission to conduct a study to determine if the goals of achieving a more fair and prompt resolution process in construction defects cases has resulted from a specified recent legislative enactment. The bill would require the commission to report its findings by March 1, 2004. The bill would also make a specified statement of Legislative intent regarding construction defects cases~~ *revise the definition of builder, as that term is used in provisions regarding construction defect actions. The bill would also recast and reorganize related provisions.*

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~ *no.* State-mandated local program: no.

The people of the State of California do enact as follows:

~~SECTION 1. The Legislature finds and declares, as follows:~~

SECTION 1. Section 911 of the Civil Code is amended to read:

911. For purposes of this title, "builder" means ~~a builder, developer, or original seller~~ *any entity or individual, including a developer, builder, or original seller, who, at the time of sale, was in the business of selling residential units to the public,* and applies to the sale of new residential units on ~~and~~ *or* after January 1, 2003.

SEC. 2. Section 916 of the Civil Code is amended to read:

916. (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon request, allow the inspections to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative.

(b) Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a ~~spoilation~~ *spoliation* defense by any potential party in any subsequent litigation.

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision shall not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability under an action brought by a claimant.

SEC. 3. Section 941 of the Civil Code is amended to read:

941. (a) Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion.

(b) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this title, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 of the Code of Civil Procedure in an action which has been brought within the time period set forth in subdivision (a).

(c) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action.

(d) Sections 337.15 and 337.1 of the Code of Civil Procedure shall not apply to actions under this title.

(e) Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title, except that repairs made pursuant to Chapter 4 (commencing with Section 910), with

the exception of the tolling provision contained in Section 927, do not extend the period for filing an action, or restart the time limitations contained in subdivisions (a) or (b) if 7091 of the Business and Professions Code. If a builder arranges for a contractor to perform a repair pursuant to Chapter 4 (commencing with Section 910), as to the builder the time period for calculating the statute of limitation in subdivisions (a) or (b) if Section 7091 of the Business and Professions Code shall pertain to the substantial completion of the original construction and not to the date of repairs under this title. The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section. ~~In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction.~~

SEC. 4. Section 942 of the Civil Code is amended and renumbered to read:

~~942.~~

943. (a) Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title.

(b) As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever

is less, subject to the personal use exception as developed under common law.

SEC. 5. Section 942 is added to the Civil Code, to read:

942. In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction.

~~(a) It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects cases.~~

~~(b) In an effort to ensure that the intent of the Legislature has been accomplished with the enactment of Chapter 722 of the Statutes of 2002, the California Law Revision Commission shall conduct a study to determine if the goals of achieving a more fair and prompt resolution process has resulted from the enactment of Chapter 722 of the Statutes of 2002. The California Law Revision Commission shall provide its findings to the Chief Clerk of the Assembly and the Secretary of the Senate on or before March 1, 2004.~~

O

ASSEMBLY JUDICIARY COMMITTEE
MANDATORY INFORMATION WORKSHEET

APR 29

*******IMPORTANT NOTE*******

THIS FORM MUST BE FULLY COMPLETED AND HAND-DELIVERED TO THE COMMITTEE NO LATER THAN SEVEN (7) CALENDAR DAYS AFTER IT IS INITIALLY DELIVERED TO THE AUTHOR'S OFFICE. IF THE BILL HAS BEEN SET FOR HEARING, IT SHALL CONSTITUTE AN AUTHOR'S RESET IF A SATISFACTORY WORKSHEET OR OTHER REQUESTED INFORMATION HAS NOT BEEN TIMELY RECEIVED BY THE COMMITTEE.

ALL SUBSTANTIVE AUTHOR'S AMENDMENTS MUST BE HAND-DELIVERED TO THE COMMITTEE IN LEGISLATIVE COUNSEL FORM (ORIGINAL AND SIX COPIES) WITHIN SEVEN (7) CALENDAR DAYS PRIOR TO THE HEARING. FAILURE TO DO SO MAY RESULT IN AN AUTHOR'S RESET.

THE COMMITTEE RECORDS THE DATE THIS WORKSHEET IS DELIVERED, THE DATE IT IS RETURNED, AND THE DATE THE COMMITTEE RECEIVES AMENDMENTS.

PLEASE RETURN COMPLETED WORKSHEETS TO THE COMMITTEE BY EMAIL TO VANESSA.CISNEROS@ASM.CA.GOV. PLEASE ALSO HAND-DELIVER TWO (2) COPIES OF THIS WORKSHEET AND ANY SUPPORTING DOCUMENTS TO THE COMMITTEE.

ASSEMBLY JUDICIARY COMMITTEE, 1020 N Street (LOB), Room 104

Bill Number: AB 903 (Steinberg) Author: Steinberg

Author's staff person: Frances Fort phone: 319-2449 e-mail: frances.fort@asm.ca.gov

1. What do you see as the key issue(s) raised by the bill.

   Whether the definition of "builder" found in Civil Code section 911 should be amended to reflect original intent of the drafters limiting the definition to those individuals and entities who at the time of sale of residential units was in the business of selling residential units to the public.

2. Please provide a statement of the author's purpose for the bill, which may be used in the Committee's analysis, including *in detail* the problem or deficiency in the current law that the bill seeks to remedy, and how the bill resolves the problem.

   SB 800, drafted at the end of the legislative session last year specifies the rights and requirements of a homeowner to bring an action for construction defects. Specifically, the bill

   - *defines construction defects to ensure performance with specified functionality standards,*
   - *sets out an extensive pre-litigation process requiring homeowners to provide notice to builders regarding alleged violations and giving builders the absolute right to repair alleged defects before a homeowner can sue; and*
   - *preserves the right of homeowners to sue if the repair is not made or is inadequate.*

In laying out the pre-litigation procedure, SB 800 defined "builder" as "a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003." (Civil Code section 911.) This definition swept into the category of "builder", general contractors who worked for developers and were not in the business of selling the residential units and thus had no control over the sale of the units. All parties agree that this was not the intent of the drafters.

AB 903 clarifies the definition of "builder" – expressly limiting the application of the pre-litigation process established by SB 800 to those individuals or entities who are in the business of selling residential units to the public.

AB 903 also makes several technical clean-up changes to the language of SB 800 from last year.

3. Who is the sponsor of the bill? If there is no sponsor, what person or entity requested that the bill be introduced? Please provide the name and telephone number of any sponsor or other person who may be contacted by the Committee for information regarding the bill.

The idea for this bill came out of a meeting hosted by Insurance Commissioner John Garamendi related to the implementation of SB 800 wherein certain builders asserted that the definition of "builder" needed to be clarified.

4. Please show the results of an Inquiry search regarding each similar and/or related bill (for example, same key words and/or code section) that has been introduced in this legislative session, or in any prior legislative session covered by the Inquiry system. (When using the Bill Search function in Inquiry, be sure to check the "all versions" button in the dialog box that appears after you choose the "word" search criterion.) Please include the bill number and year, a summary of the bill's contents, and the disposition of each bill.

SB 523 (Escutia) cleaning up SB 800 *pending*
AB 752 (Plescia) related to additional insureds. *pending*

5. Please identify and summarize all similar or related pending federal legislation (see http://thomas.loc.gov/home/thomas2.html) and any bills or existing laws you are aware of in other states.

None known

6. Please summarize and show the results (by citation) of a computer search regarding all existing California statutes (http://www.leginfo.ca.gov/calaw.html) and all existing federal statutes (http://www4.law.cornell.edu/uscode/) relevant to this bill. Please also indicate any relevant court decisions.

Look at AB 1700 (Steinberg) statutes of 2001 and SB 800 (Burton, Wesson) statutes of 2002.

7. Have there been any informational hearings on the subject matter of the bill? If so, when? Please attach all information distributed by the Committee that held the hearing.

No

8. Please describe all amendments the author currently wishes to make before this bill is heard in Committee. (Please recall that amendments must be hand-delivered to the Committee in Leg Counsel form at least 7 calendar days before the bill is to be heard.)

None.

9. Please summarize any studies, reports, statistics or other evidence showing that the problem exists and that the bill will properly address the problem. Please also attach copies of all such evidence and/or state where such material is available for reference by Committee counsel.

None known.

10. Please list all groups, agencies or persons that have contacted you in support or in opposition to the bill. Please attach copies of all letters of support and opposition.

Our office has talked with the California Building Industry Association, the Consumer Attorneys of California, the Personal Insurance Federation and the AIA as well as Jerry Zanelli representing builders affected by the bill. All have indicated that they are supportive of the change.

11. Please describe any concerns that you anticipate may be raised in opposition to your bill, and state your response to those concerns.

No opposition expected.

12. Please list the name, organization and telephone number of all witnesses that you anticipate will testify in support or opposition to the bill. (Please note that the Committee limits the number of testifying witnesses to 2 per side. Additional witnesses may identify themselves for the record.)

Probably witnesses from organizations cited in response to your question 10.

PLEASE REMEMBER TO EMAIL THIS COMPLETED WORKSHEET, AND ALSO DROP OFF 2 HARD COPIES TO THE COMMITTEE. TYPE AS DETAILED RESPONSES AS POSSIBLE. THANK YOU VERY MUCH FOR YOUR ASSISTANCE.

Personal Insurance Federation of California

California's Personal Lines Trade Association
REPRESENTING THE LEADING AUTOMOBILE AND HOMEOWNERS INSURERS
Progressive • State Farm • Farmers • 21st Century Insurance Group • SAFECO

MEMORANDUM

Date: April 30, 2003

To: The Honorable Ellen Corbett, Chair
Members, Assembly Judiciary Committee

From: Dan C. Dunmoyer, President
G. Diane Colborn, Vice President of Legislative and Regulatory Affairs
Michael A. Gunning, Senior Legislative Advocate

RE: AB 903 (Steinberg): Construction Dispute Resolution
Assembly Judiciary Committee Hearing: May 6, 2003
PIFC Position: Support

STAFF
Dan Dunmoyer
President
Diane Colborn
Vice President of Legislative & Regulatory Affairs
Michael Gunning
Senior Legislative Advocate
Jerry Davies
Director of Communications

The Personal Insurance Federation of California (PIFC), which represents insurers who provide construction dispute resolution insurance to subcontractors throughout the state of California, **supports AB 903** by Assemblymember Steinberg.

AB 903 would provide a clarifying definition of the term "builder" to mean "any entity or individual who, at the time of sale, was in the business of selling residential units to the public and applies to the sale of new residential units entered into contract on or after January 1, 2003, including a developer, builder or original seller." PIFC views AB 903 as a clarifying amendment on the definition of what a "builder" is. This amendment is within the spirit of the agreement reached in SB 800 (Burton/Wesson) of last session.

For the reasons stated above, PIFC supports AB 903. We are committed to continue to work with all parties to further expand new reforms in this area to provide affordable insurance to subcontractors and affordable housing to California consumers. If you have any questions regarding our position, please contact Dan Dunmoyer at (916) 442-6646.

cc: Assemblymember Steinberg, Author
Ann Richardson, Office of the Governor
Kevin Baker, Assembly Judiciary Committee
Mark Redmond, Assembly Republican Caucus
Frances Fort, Office of Assemblymember Steinberg

980 NINTH STREET • SUITE 2030 • SACRAMENTO, CA 95814 • PHONE (916) 442 • 6646 • FAX (916) 446 • 9548
E-MAIL: info@pifc.org • WEBSITE: www.pifc.org

AB 903 (STEINBERG)
CONSTRUCTION DEFECT CASES.

Version: 4/29/03 Last Amended
Vote: Majority
Support

Vice-Chair: Tom Harman
Tax or Fee Increase: No

Clarifies the definition of who is considered a builder subject to the prelitigation procedure of construction defect reform legislation enacted last year.

Policy Question

Should the definition of "builder" found in Civil Code section 911 be amended to reflect original intent of the drafters limiting the definition to those individuals and entities who at the time of sale of residential units were in the business of selling residential units to the public?

Summary

This bill would revise the definition of "builder" for purposes of the construction defect reform legislation enacted last year pertaining to the prelitigation procedure that homeowners must follow. For purposes of such procedure, a builder would be defined as any entity or individual, including a developer, builder, or original seller, who at the time of sale, was in the business of selling residential units on or after January 1, 2003. This bill would also make other technical changes in the provisions of the pre-litigation procedure.

Support

California Building Industry Association (Not verified); and Personal Insurance Federation of California (PIF).

Assembly Republican Judiciary Votes (0-0) 5/06/03
Ayes: None
Noes: None
Abs. / NV: None

Assembly Republican **Votes** (0-0) 1/1/03
Ayes: None
Noes: None
Abs. / NV: None

Assembly Republican **Votes** (0-0) 1/1/03
Ayes: None
Noes: None
Abs. / NV: None

Assembly Republican **Votes** (0-0) 1/1/03
Ayes: None
Noes: None
Abs. / NV: None

Opposition

None on file.

Arguments In Support of the Bill

1. **The author's office states:** "In laying out the pre-litigation procedure, SB 800 [of last year, chaptered as Chapter 722 of 2002 Statutes] defined 'a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003.' (Civil Code Section 911.) This definition swept into the category of 'builder', general contractors who worked for developers and were not in the business of selling the residential units and thus had no control over the sale of the units. All parties agree that this was not the intent of the drafters." The author's office adds that "AB 903 clarifies the definition of 'builder' – expressly limiting the application of the pre-litigation process established by SB 800 to those individuals or entities who are in the business of selling residential units to the public."
2. **Personal Insurance Federation of California** "...views AB 903 as a clarifying amendment on the definition of what a 'builder' is. This amendment is within the spirit of the agreement reached in SB 800 (Burton/Wesson) of last session."

Arguments In Opposition to the Bill

No significant argument raised in opposition.

Fiscal Effect

Unknown.

Comments

1. **Background.** SB 800 (Burton) of 2001-2002, Chapter 722 of 2002 Statutes specified the rights and obligations of a homeowner in bringing an action for construction defect. SB 800 revision of construction defect law included: (1) Defining construction defects to ensure performance with specified functionality standards; (2) Setting out an extensive pre-litigation process requiring homeowners to provide notice to builders regarding alleged violations and giving the builders the right to repair alleged defects before a homeowner

could otherwise sue; and (3) Preserving the right of homeowners to sue if the repair is not made or is inadequate.

2. The author's office states that it has talked with the California Building Industry Association (CBIA), the Consumer Attorneys of California; Personal Insurance Federation, the American Insurance Association (AIA) and other builder representatives who accordingly indicated their endorsement of this revision.

Policy Consultant: Mark Redmond 4/30/03
Fiscal Consultant:

AMENDED IN ASSEMBLY MAY 5, 2003

AMENDED IN ASSEMBLY APRIL 29, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL No. 903

Introduced by Assembly Member Steinberg

February 20, 2003

An act to amend Sections 911, 916, and 941 of, and to amend, renumber, and add Section 942 to, the Civil Code, relating to construction defects.

LEGISLATIVE COUNSEL'S DIGEST

AB 903, as amended, Steinberg. Construction defect cases.

Existing law specifies the rights and requirements of a homeowner to bring an action for construction defects.

This bill would revise the definition of builder, as that term is used in provisions regarding construction defect actions. The bill would also recast and reorganize related provisions.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 911 of the Civil Code is amended to read:

911. For purposes of this title, "builder" means any entity or individual, including a developer, builder, or original seller, who, at the time of sale, was in the business of selling residential units

to the public, and applies to the sale of new residential units *entered into contract* on or after January 1, 2003.

SEC. 2. Section 916 of the Civil Code is amended to read:

916. (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon request, allow the inspections to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative.

(b) Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet

standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision shall not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability under an action brought by a claimant.

SEC. 3. Section 941 of the Civil Code is amended to read:

941. (a) Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion.

(b) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this title, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 of the Code of Civil Procedure in an action which has been brought within the time period set forth in subdivision (a).

(c) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action.

(d) Sections 337.15 and 337.1 of the Code of Civil Procedure shall not apply to actions under this title.

(e) Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title, except that repairs made pursuant to Chapter 4 (commencing with Section 910), with the exception of the tolling provision contained in Section 927, do not extend the period for filing an action, or restart the time limitations contained in subdivisions (a) or (b) if 7091 of the Business and Professions Code. If a builder arranges for a

contractor to perform a repair pursuant to Chapter 4 (commencing with Section 910), as to the builder the time period for calculating the statute of limitation in subdivisions (a) or (b) if Section 7091 of the Business and Professions Code shall pertain to the substantial completion of the original construction and not to the date of repairs under this title. The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section.

SEC. 4. Section 942 of the Civil Code is amended and renumbered to read:

943. (a) Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title.

(b) As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law.

SEC. 5. Section 942 is added to the Civil Code, to read:

942. In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction.

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AB 903 (STEINBERG)
CONSTRUCTION DEFECT CASES.

Version: 5/5/03 Last Amended
Vote: Majority
Support

Vice-Chair: Tom Harman
Tax or Fee Increase: No

Clarifies the definition of who is considered a builder subject to the prelitigation procedure of construction defect reform legislation enacted last year.

Policy Question

Should the definition of "builder" found in Civil Code section 911 be amended to reflect original intent of the drafters limiting the definition to those individuals and entities who at the time of sale of residential units were in the business of selling residential units to the public?

Summary

This bill would revise the definition of "builder" for purposes of the construction defect reform legislation enacted last year pertaining to the prelitigation procedure that homeowners must follow. For purposes of such procedure, a builder would be defined as any entity or individual, including a developer, builder, or original seller, who at the time of sale, was in the business of selling residential units on or after January 1, 2003. This bill would also make other technical changes in the provisions of the pre-litigation procedure.

Support

California Building Industry Association (Not verified); and Personal Insurance Federation of California (PIF).

Assembly Republican Judiciary Votes (14-0) 5/06/03
Ayes: Harman, Bates, Pacheco, Spitzer
Noes: None
Abs. / NV: None

Assembly Republican **Votes** (0-0) 1/1/03
Ayes: None
Noes: None
Abs. / NV: None

Assembly Republican **Votes** (0-0) 1/1/03
Ayes: None
Noes: None
Abs. / NV: None

Assembly Republican **Votes** (0-0) 1/1/03
Ayes: None
Noes: None
Abs. / NV: None

Opposition

None on file.

Arguments In Support of the Bill

1. **The author's office states:** "In laying out the pre-litigation procedure, SB 800 [of last year, chaptered as Chapter 722 of 2002 Statutes] defined 'a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003.' (Civil Code Section 911.) This definition swept into the category of 'builder', general contractors who worked for developers and were not in the business of selling the residential units and thus had no control over the sale of the units. All parties agree that this was not the intent of the drafters." The author's office adds that "AB 903 clarifies the definition of 'builder' – expressly limiting the application of the pre-litigation process established by SB 800 to those individuals or entities who are in the business of selling residential units to the public."
2. **Personal Insurance Federation of California** "...views AB 903 as a clarifying amendment on the definition of what a 'builder' is. This amendment is within the spirit of the agreement reached in SB 800 (Burton/Wesson) of last session."

Arguments In Opposition to the Bill

No significant argument raised in opposition.

Fiscal Effect

Unknown.

Comments

1. **Background.** SB 800 (Burton) of 2001-2002, Chapter 722 of 2002 Statutes specified the rights and obligations of a homeowner in bringing an action for construction defect. SB 800 revision of construction defect law included: (1) Defining construction defects to ensure performance with specified functionality standards; (2) Setting out an extensive pre-litigation process requiring homeowners to provide notice to builders regarding alleged violations and giving the builders the right to

repair alleged defects before a homeowner could otherwise sue; and (3) Preserving the right of homeowners to sue if the repair is not made or is inadequate.

2. The author's office states that it has talked with the California Building Industry Association (CBIA), the Consumer Attorneys of California; Personal Insurance Federation, the American Insurance Association (AIA) and other builder representatives who accordingly indicated their endorsement of this revision.

Policy Consultant: Mark Redmond 5/8/03
Fiscal Consultant:

Date of Hearing: May 6, 2003

ASSEMBLY COMMITTEE ON JUDICIARY
Ellen M. Corbett, Chair
AB 903 (Steinberg) – As Amended: May 6, 2003

PROPOSED CONSENT

SUBJECT: CONSTRUCTION DEFECTS

KEY ISSUE: SHOULD TECHNICAL AND CLARIFYING AMENDMENTS BE MADE TO LAST YEAR'S SB 800 IN ORDER TO AID IN UNDERSTANDING OF THE ACT?

SYNOPSIS

This non-controversial bill makes minor changes to last year's historic measure, SB 800 (Burton), which substantially revised the law regarding construction defect disputes. It clarifies the definition of "builder," and corrects typographical errors in that bill.

SUMMARY: Amends the law regarding construction defect disputes. Specifically, this bill clarifies that the term "builder" means persons engaged in the sale of residential units, and corrects typographical errors in the statute.

EXISTING LAW provides construction defect liability standards for newly constructed housing and a process for the resolution of construction defect disputes. (Civil Code section 895 *et seq.*)

FISCAL EFFECT: As currently in print, this bill is keyed non-fiscal.

COMMENTS: The author states that last year's SB 800 (Burton) enacted sweeping reforms in the area of construction defect disputes. This bill clarifies that the definition of "builder" means persons who sell residential units, in order to correct the possible misimpression that inclusion of "developer" within the definition might include general contractors who work for an owner but do not have the capacity to sell the affected property. The bill also corrects two typographical errors in the printing of last year's bill.

Prior Related Legislation. SB 800 (Burton), Ch. 722, Stats 2002, substantially revised construction defect liability and dispute resolution mechanisms.

REGISTERED SUPPORT / OPPOSITION:

Support

Personal Insurance Federation of California

Opposition

None on file

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334

AB 903 (Steinberg) – Construction Defects
Suggested Statement Judiciary Committee
May 6, 2003, 8 a.m. Room 4202

Statement

Madam Chair and Members:

- AB 903 is a simple bill that makes just one substantive change in the law – and makes several very technical changes

- Last year, we enacted SB 800 which among other things, set forth an extensive *pre-litigation process* requiring homeowners to provide notice to builders regarding alleged construction defects and giving builders the absolute right to repair alleged defects before a homeowner can sue.

- As part of SB 800, we defined "builder" as "a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003."

- This definition swept general contractors who work for developers but are not in the business of selling residential units and thus have no control over the sale of the units into the category of "builder".

- This isn't what we intended.

- AB 903 clarifies the definition of "builder" – expressly limiting the application of the pre-litigation process established by SB 800 to those individuals or entities who are in the business of selling residential units to the public.

- This is a non-controversial change

- I urge your AYE vote.

Support
Personal Insurance Federation
Anticipated support: consumer attorneys and CBIA

Opposition
None known/none anticipated.

AB 903 (Steinberg) – Construction Defects
Suggested Floor Statement
Monday, May 12, 2003

Madam Speaker and Members:

- I rise to present to you AB 903

- AB 903 is a simple bill that changes the definition of "builder" for purposes of an extensive pre-litigation process in construction defect cases established last year in SB 800.

- AB 903 also makes several technical changes to the language of SB 800.

- Under SB 800's pre-litigation process, homeowners must provide notice to builders regarding alleged construction defects and builders have an absolute right to repair alleged defects before a homeowner can sue.

- As part of SB 800, we defined "builder" as "a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003."

- This definition swept general contractors who work for developers but are not in the business of selling residential units and thus have no control over the sale of the units into the category of "builder".

- This isn't what we intended.

- AB 903 clarifies the definition of "builder" – expressly limiting the application of the pre-litigation process established by SB 800 to those individuals or entities who are in the business of selling residential units to the public.

- This is a non-controversial change – negotiated with representatives of the building industry and the consumer attorneys as well as insurers.

- I urge your AYE vote.

Support
Personal Insurance Federation
Anticipated support: Consumer attorneys and CBIA

Opposition
None known/none anticipated.

Personal Insurance Federation of California

California's Personal Lines Trade Association
REPRESENTING THE LEADING AUTOMOBILE AND HOMEOWNERS INSURERS
Progressive • State Farm • Farmers • 21st Century Insurance Group • SAFECO

STAFF
Dan Dunmoyer
President
Diane Colborn
Vice President of Legislative & Regulatory Affairs
Michael Gunning
Senior Legislative Advocate
Dan Chick
Senior Legislative Advocate
Jerry Davies
Director of Communications

MEMORANDUM

Date: July 7, 2003

To: The Honorable Martha Escutia, Chair
Members, Senate Judiciary Committee

From: Dan C. Dunmoyer, President
G. Diane Colborn, Vice President of Legislative and Regulatory Affairs
Michael A. Gunning, Senior Legislative Advocate
Dan Chick, Senior Legislative Advocate

RE: AB 903 (Steinberg): Construction Dispute Resolution
Senate Judiciary Committee Hearing: July 8, 2003
PIFC Position: Support

The Personal Insurance Federation of California (PIFC), which represents insurers who provide construction dispute resolution insurance to subcontractors throughout the state of California, **supports AB 903** by Assembly Member Steinberg.

AB 903 would provide a clarifying definition of the term "builder" to mean "any entity or individual who, at the time of sale, was in the business of selling residential units to the public and applies to the sale of new residential units entered into contract on or after January 1, 2003, including a developer, builder or original seller." PIFC views AB 903 as a clarifying amendment on the definition of what a "builder" is. This amendment is within the spirit of the agreement reached in SB 800 (Burton/Wesson) of last session.

For the reasons stated above, PIFC supports AB 903. We are committed to continue to work with all parties to further expand new reforms in this area to provide affordable insurance to subcontractors and affordable housing to California consumers. If you have any questions regarding our position, please contact Dan Dunmoyer or Dan Chick at (916) 442-6646.

cc: Assembly Member Steinberg, Author
Ann Richardson, Office of the Governor
Richard Figueroa, Office of the Governor
Gene Wong, Senate Judiciary Committee
Mike Petersen, Senate Republican Caucus
Frances Fort, Office of Assembly Member Steinberg
Senate Floor Analyses

AB 903 (Steinberg) – Construction Defects
Suggested Statement Senate Judiciary Committee
July 8, 2003, 1:30 p.m. Room 4203

Madam Chair and Members:

- Last year, we enacted SB 800 which among other things, set forth an extensive *pre-litigation process* requiring homeowners to provide notice to builders regarding alleged construction defects and giving builders the absolute right to repair alleged defects before a homeowner can sue.

- As part of SB 800, we defined "builder" as "a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003."

- As currently in print, AB 903 amends the definition of "builder" to try to clarify the legislative intent as it relates to general contractors.

- As the analysis indicates, we will take an author's amendment deleting the changes to the definition of builder.

- That makes AB 903 an even simpler bill. As amended, the bill makes some clarifying changes to the language of SB 800 and makes several technical changes.

- These are non-controversial changes.

- I urge your AYE vote.

AMENDED IN SENATE JULY 15, 2003

AMENDED IN ASSEMBLY MAY 5, 2003

AMENDED IN ASSEMBLY APRIL 29, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL No. 903

Introduced by Assembly Member Steinberg

February 20, 2003

An act to amend Sections ~~911, 916,~~ *916* and 941 of, and to amend, renumber, and add Section 942 to, the Civil Code, relating to construction defects.

LEGISLATIVE COUNSEL'S DIGEST

AB 903, as amended, Steinberg. Construction defect cases.

Existing law specifies the rights and requirements of a homeowner to bring an action for construction defects.

This bill would revise ~~the definition of builder, as that term is used in~~ *and recast various* provisions ~~regarding~~ *governing home* construction defect actions *that relate to a builder's election to inspect, the applicable statute of limitations, and the exclusivity of these provisions.* ~~The bill would also recast and reorganize related provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

~~SECTION 1. Section 911 of the Civil Code is amended to read:~~

~~911. For purposes of this title, "builder" means any entity or individual, including a developer, builder, or original seller, who, at the time of sale, was in the business of selling residential units to the public, and applies to the sale of new residential units entered into contract on or after January 1, 2003.~~

~~SEC. 2.~~

SECTION 1. Section 916 of the Civil Code is amended to read:

916. (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon request, allow the inspections to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative.

(b) Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However,

the standards set forth in the other chapters of this title shall continue to apply to the action.

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision ~~shall~~ *does* not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability under an action brought by a claimant.

~~SEC. 3.~~

SEC. 2. Section 941 of the Civil Code is amended to read:

941. (a) Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion.

(b) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this title, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 of the Code of Civil Procedure in an action which has been brought within the time period set forth in subdivision (a).

(c) The limitation prescribed by this section ~~shall~~ *may* not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action.

(d) Sections 337.15 and 337.1 of the Code of Civil Procedure ~~shall~~ *do* not apply to actions under this title.

(e) Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title, except that repairs made pursuant to Chapter 4 (commencing with Section 910), with the exception of the tolling provision contained in Section 927, do not extend the period for filing an action, or restart the time limitations contained in ~~subdivisions~~ *subdivision* (a) or (b) ~~if~~ *of Section* 7091 of the Business and Professions Code. If a builder arranges for a contractor to perform a repair pursuant to Chapter 4 (commencing with Section 910), as to the builder the time period for calculating the statute of limitation in ~~subdivisions~~ *subdivision* (a) or (b) ~~if~~ *of* Section 7091 of the Business and Professions Code shall pertain to the substantial completion of the original construction and not to the date of repairs under this title. The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section.

~~SEC. 4.~~

SEC. 3. Section 942 of the Civil Code is amended and renumbered to read:

943. (a) Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title.

(b) As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law.

~~SEC. 5.~~

SEC. 4. Section 942 is added to the Civil Code, to read:

942. In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner

need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction.

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SENATE JUDICIARY COMMITTEE
BACKGROUND

Bill Number: AB 903 (Steinberg) **Author: Steinberg**

Author's staff person: Frances Fort phone: 319-2449 e-mail: frances.fort@asm.ca.gov

1. What do you see as the key issue(s) raised by the bill.

   Whether the definition of "builder" found in Civil Code section 911 should be amended to reflect original intent of the drafters limiting the definition to those individuals and entities who at the time of sale of residential units was in the business of selling residential units to the public.

2. Please provide a statement of the author's purpose for the bill, which may be used in the Committee's analysis, including *in detail* the problem or deficiency in the current law that the bill seeks to remedy, and how the bill resolves the problem.

   SB 800, drafted at the end of the legislative session last year specifies the rights and requirements of a homeowner to bring an action for construction defects. Specifically, the bill
   - *defines construction defects to ensure performance with specified functionality standards,*
   - *sets out an extensive pre-litigation process requiring homeowners to provide notice to builders regarding alleged violations and giving builders the absolute right to repair alleged defects before a homeowner can sue; and*
   - *preserves the right of homeowners to sue if the repair is not made or is inadequate.*

   In laying out the pre-litigation procedure, SB 800 defined "builder" as "a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003." (Civil Code section 911.) This definition swept into the category of "builder", general contractors who worked for developers and were not in the business of selling the residential units and thus had no control over the sale of the units. All parties agree that this was not the intent of the drafters.

   AB 903 clarifies the definition of "builder" – expressly limiting the application of the pre-litigation process established by SB 800 to those individuals or entities who are in the business of selling residential units to the public.

   AB 903 also makes several technical clean-up changes to the language of SB 800 from last year.

3. Who is the sponsor of the bill? If there is no sponsor, what person or entity requested that the bill be introduced? Please provide the name and telephone number of any sponsor or other person who may be contacted by the Committee for information regarding the bill.

   The idea for this bill came out of a meeting hosted by Insurance Commissioner John Garamendi related to the implementation of SB 800 wherein certain builders asserted that the definition of "builder" needed to be clarified.

4. Please show the results of an Inquiry search regarding each similar and/or related bill (for example, same key words and/or code section) that has been introduced in this legislative session, or in any prior legislative session covered by the Inquiry system. (When using the Bill Search function in Inquiry, be sure to check the "all versions" button in the dialog box that appears after you choose the "word" search criterion.) Please include the bill

number and year, a summary of the bill's contents, and the disposition of each bill.

SB 523 (Escutia) cleaning up SB 800
SB 458 (Burton) cleaning up SB 800

5. Please identify and summarize all similar or related pending federal legislation (see http://thomas.loc.gov/home/thomas2.html) and any bills or existing laws you are aware of in other states.

None known

6. Please summarize and show the results (by citation) of a computer search regarding all existing California statutes (http://www.leginfo.ca.gov/calaw.html) and all existing federal statutes (http://www4.law.cornell.edu/uscode/) relevant to this bill. Please also indicate any relevant court decisions.

Look at AB 1700 (Steinberg) statutes of 2001 and SB 800 (Burton, Wesson) statutes of 2002.

7. Have there been any informational hearings on the subject matter of the bill? If so, when? Please attach all information distributed by the Committee that held the hearing.

No

8. Please describe all amendments the author currently wishes to make before this bill is heard in Committee. (Please recall that amendments must be hand-delivered to the Committee in Leg Counsel form at least 7 calendar days before the bill is to be heard.)

None.

9. Please summarize any studies, reports, statistics or other evidence showing that the problem exists and that the bill will properly address the problem. Please also attach copies of all such evidence and/or state where such material is available for reference by Committee counsel.

None known.

10. Please list all groups, agencies or persons that have contacted you in support or in opposition to the bill. Please attach copies of all letters of support and opposition.

Our office has talked with the California Building Industry Association, the Consumer Attorneys of California, the Personal Insurance Federation and the AIA as well as Jerry Zanelli representing builders affected by the bill. All have indicated that they are supportive of the change.

11. Please describe any concerns that you anticipate may be raised in opposition to your bill, and state your response to those concerns.

No opposition expected.

12. Please list the name, organization and telephone number of all witnesses that you anticipate will testify in support or opposition to the bill. (Please note that the Committee limits the number of testifying witnesses to 2 per side. Additional witnesses may identify themselves for the record.)

Probably witnesses from organizations cited in response to your question 10.

SENATE JUDICIARY COMMITTEE
Martha M. Escutia, Chair
2003-2004 Regular Session

AB 903	A
Assembly Member Steinberg	B
As Amended May 5, 2003	
Hearing Date: July 8, 2003	9
Civil Code	0
MTY:rm	3

SUBJECT

Construction Defects

DESCRIPTION

This bill would correct and/or clarify various technical errors and issues in the construction defect laws passed last year by the Legislature.

BACKGROUND

Last year, the Legislature enacted SB 800 (Burton), Ch. 722, Statutes of 2002, which made sweeping changes to the state's construction defect liability system. Among other things, SB 800 of 2002 established functionality standards for homes that serve as liability standards, and provided builders with a right to attempt a repair of an alleged defect prior to litigation. This bill contains various technical corrections and clarifications to that legislation.

[This analysis reflects author's amendments to be offered in Committee.]

CHANGES TO EXISTING LAW

Existing law provides construction defect liability standards for newly constructed housing and a process for the resolution of construction defect disputes. [Civil Code Section 895 et seq.]

Existing law provides that "builder" means a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003.

This bill would define a "builder" as any entity or individual, including a developer, builder, general contractor, contractor, or original seller who was in the business of selling residential units to the public or in the business of building, developing or constructing residential units for public purchase and

applies to the sale of new residential units entered into contract on or after January 1, 2003.

COMMENT

1. Need for the bill

This bill contains technical cleanup to SB 800 of last year. The bill makes the following technical changes:

- provides additional specificity in the definition of builders to whom the law applies, and a clarification of when a home is sold for purposes of the effective date of the law;
- reorganizes and renumbers certain provisions to provide for clarity and ease of understanding; and
- corrects a spelling error

2. Author's amendment to delete clarification of definition of "builder"

The bill currently contains a clarification of the term "builder." This clarification aims to implement the intent of the Legislature in passing SB 800 last year that the builder's obligations fall on the entity that sells the new homes to homeowners. However, in discussions with interested parties, concerns have been expressed by developer representatives over the current bill language. As a result, the author has agreed to remove the provisions in question. If discussions result in a subsequent agreement, the author may amend the bill, and depending on the substance of those amendments, the Committee reserves the right to call the bill back for further hearings.

Support: None Known

Opposition: None Known

HISTORY

Source: Author

Related Pending Legislation: SB 523 (Escutia) would also make needed technical cleanup changes to SB 800 of 2002.

SB 458 (Burton) would amend one of the sections amended by this bill. Amendments may be needed in the future to prevent chaptering-out problems.

Prior Legislation: SB 800 (Burton), Ch. 722, Statutes of 2002, enacted wholesale changes to the state's construction defect liability laws.

Prior Vote: Assembly Judiciary Cmte. (14-0); Assembly Floor (76-0)

****

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

AB 903

CONSENT

Bill No: AB 903
Author: Steinberg (D)
Amended: 7/15/03 in Senate
Vote: 21

SENATE JUDICIARY COMMITTEE: 6-0, 7/8/03
AYES: Escutia, Ackerman, Cedillo, Ducheny, Kuehl, Sher
ABSENT/NO VOTE RECORDED: Morrow

ASSEMBLY FLOOR: 76-0, 5/15/03 (Passed on Consent) - See last page for vote

SUBJECT: Construction defects

SOURCE: Author

DIGEST: This bill corrects and/or clarifies various technical errors and issues in the construction defect laws passed last year by the Legislature.

ANALYSIS: Existing law provides construction defect liability standards for newly constructed housing and a process for the resolution of construction defect disputes. [Civil Code Section 895 et seq.]

This bill contains technical cleanup to SB 800 of last year. The bill makes the following technical changes:

1. Provides additional specificity in the definition of builders to whom the law applies, and a clarification of when a home is sold for purposes of the effective date of the law.

2. Reorganizes and renumbers certain provisions to provide for clarity and ease of understanding.

3. Corrects a spelling error.

Last year, the Legislature enacted SB 800 (Burton), Chapter 722, Statutes of 2002, which made sweeping changes to the state's construction defect liability system. Among other things, SB 800 of 2002 established functionality standards for homes that serve as liability standards, and provided builders with a right to attempt a repair of an alleged defect prior to litigation. This bill contains various technical corrections and clarifications to that legislation.

Prior legislation

SB 800 (Burton), Chapter 722, Statutes of 2002, passed the Senate Floor on 8/31/02, 33-0, enacted wholesale changes to the state's construction defect liability laws.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

ASSEMBLY FLOOR:
AYES: Aghazarian, Bates, Benoit, Berg, Bermudez, Bogh, Calderon, Canciamilla, Chan, Chavez, Chu, Cogdill, Cohn, Corbett, Correa, Cox, Diaz, Dutra, Dutton, Dymally, Firebaugh, Frommer, Garcia, Goldberg, Hancock, Harman, Haynes, Jerome Horton, Shirley Horton, Houston, Jackson, Keene, Kehoe, Koretz, La Malfa, La Suer, Laird, Leno, Leslie, Levine, Lieber, Liu, Longville, Lowenthal, Maddox, Maldonado, Matthews, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nation, Negrete McLeod, Nunez, Oropeza, Pacheco, Parra, Pavley, Plescia, Reyes, Richman, Ridley-Thomas, Runner, Salinas, Samuelian, Simitian, Spitzer, Steinberg, Strickland, Vargas, Wiggins, Wolk, Wyland, Yee

RJG:nl 7/15/03 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

****** END ******

CONCURRENCE IN SENATE AMENDMENTS
AB 903 (Steinberg)
As Amended July 15, 2003
Majority vote

ASSEMBLY: 76-0 (May 15, 2003) SENATE: 40-0 (July 17, 2003)

Original Committee Reference: JUD.

SUMMARY: Amends the law regarding construction defect disputes. Specifically, this bill revises and recasts various provisions governing home construction defect actions that relate to a builder's election to inspect, the applicable statute of limitations, and the exclusivity of these provisions.

The Senate amendments delete provisions that modify the current definition of the term builder.

EXISTING LAW provides construction defect liability standards for newly constructed housing and a process for the resolution of construction defect disputes.

AS PASSED BY THE ASSEMBLY, this bill was substantially similar to the version passed by the Senate.

FISCAL EFFECT: None

COMMENTS: The author states that SB 800 (Burton), Chapter 722, Statutes of 2002, enacted sweeping reforms in the area of construction defect disputes. This bill corrects typographical errors in the printing of SB 800, and revises and recasts various provisions from SB 800.

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334

FN: 0002400

DRAFT OF LEGISLATION REGARDING JOINT COST-SHARING AND INDEMNIFICATION ADR OPTION

Definitions

Case Preliminary Resolution ("CPR") – a joint cost sharing and indemnification agreement between building, subcontractor, design professionals and material suppliers.

CPR Process – the process set forth hereunder.

In any action seeking recovery for construction defects, either a) in conjunction with or in response to a claim made under Civil Code Section 1375; b) in conjunction with or in response to a claim made under Civil Code Section 910; or, c) in conjunction with the filing of a Complaint in any Court, a representative for either the claimant or the builder may provide written notice of an offer to attempt resolution of the construction defect dispute by participation in this Case Preliminary Resolution process ("CPR process"). If not already issued and if the claimant either initiates the CPR offer or initially desires to pursue an offer made by the respondent, counsel for the claimant shall issue an initial list of alleged deficiencies in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed defect or violation. Election of CPR by the respondent, if accepted by the claimant and regardless of whether a resolution of the dispute is reached under this Section, terminates all requirements of Civil Code Sections 1375 and of Chapter 4 of the Civil Code, if applicable.

1. Within 30 days of receipt of a request for participation in this CPR process, the responding party shall send a written notice to the party requesting implementation of this CPR process either accepting or rejecting participation in this CPR process.

2. If an agreement is reached between the builder and the claimant to participate in this CPR process, within 30 days of reaching the agreement to implement the CPR process, the builder and the claimant shall agree on a mediator. If they cannot agree, each shall pick one mediator and the two mediators shall act as co-mediators.

3. If an agreement is reached between the builder and the claimant to participate in this CPR process, within 30 days of reaching the agreement to implement the CPR process, the builder shall tender a request for defense and indemnification to all of the builders' insurers, subcontractors, design professionals and material

suppliers, whose work or material is implicated by the claimant's initial defect list, and also to all of their insurers.

4. Whether from the builder directly or from another insurer, a tender of defense and indemnification to the builder insurers and/or the subcontractor insurers shall be treated for insurance purposes as the tender of a lawsuit against the builder, subcontractor, design professional and/or material supplier named as an insured on the policy. The intention of this provision is to eliminate as a defense to any subsequent indemnity, subrogation, or other coverage action that a lawsuit was not tendered to the insurer on behalf of its named or additional insured. Furthermore, the obligation of any insurer to whom the tender of defense and indemnification has been made, shall be construed to arise out of the indemnification provisions in the contract between the builder and subcontractor, design professional and/or material supplier or the applicable indemnification clause in contracts between subcontractor, design professional and/or material supplier and other subcontractors, design professionals and/or material supplier and other subcontractors, design professionals and/or materials suppliers. An insurer's obligation to defend and indemnify shall not be determined by the existence of lack of any form of additional insured endorsement. However, if there is no contract with an indemnification clause and an applicable additional insured endorsement would obligate an insurer to defend the builder, subcontractor, design professional and/or material supplier, the full force and effect of the additional insured endorsement shall remain in effect in that instance.

5. Within 45 days of the tender by the builder to the builder and subcontractor insurers, counsel for the builder shall conduct a meeting with the builder and subcontractor insurers. All participants shall have the option of participating on a telephonic basis and counsel for the builder shall bear the responsibility of communicating a telephone call in number. All insurance representatives shall be given at least 10 days notice of this meeting. The meeting shall be attended by representatives from each of the builder's insurers as well as each of the subcontractor insurers on the risk during the time frame of the alleged damage. It is intended that all subcontractor insurers potentially on the risk shall attend and participate whether or not they issued an additional insured endorsement naming the builder as an additional insured. At this meeting, a Liaison committee will be established that includes representatives from the builder and subcontractors' insurers. The Liaison committee will assist in facilitating the process as needed and prepare a complete list identifying each insurer participating in the CPR process. The purpose of the meeting shall be to formulate an agreed upon CPR Agreement, which shall address the following issues:

   A. The appointment of an agreed upon counsel and single set of experts to respond on behalf of the builder to the claims asserted by the claimants;

   B. Establishing a percentage split of the defense responsibility first between the builder insurers and the subcontractor insurers and then as between the

subcontractors insurers, with a mechanism in place to reapportion defense responsibility if a participating insurer opts out of the Agreement or for any reason fails to satisfy its obligations under the Agreement;

C. A provision that if an agreement is reached between counsel for the builder and counsel for the claimant regarding an overall targeted settlement amount, the defense group shall confirm or reject funding of the agreed upon targeted overall settlement amount within 30 days. The method for confirmation may include utilization of a liaison committee of insurance representatives to approve or reject the overall targeted settlement figure or a mechanism for communication to the entire defense group that allows for confirmation or rejection of the overall targeted settlement amount within 14 days of the date that the targeted settlement figure is agreed upon;

D. If the defense group approves the targeted settlement amount, the defense group will be obligated to fund the overall targeted settlement amount. The defense group shall then attempt to agree upon the break down of indemnification responsibility among the defense group participants, or, if no agreement can be reached, the Agreement shall contain a fallback indemnification formula that will determine the indemnification obligation of each participating member of the defense group. The fallback indemnification mechanism shall be based upon an expert assessment of the proper apportionment of responsibility among the participants in the defense group and provide for the right of any participant to proceed to further mediation, and, if necessary, binding arbitration, for resolution of any disagreements regarding the apportionment of the funding of the overall settlement payment;

E. The participants in the defense group shall have a right to opt out of the Agreement; however, the last day to opt out shall be 30 days from the date of publication of the defense cost of repair and proposed apportionment of responsibility amongst the participating defense group;

F. Any participant in the defense group shall have the right, at its own expense, to retain separate counsel and/or experts to monitor the process and request information from defense counsel and/or the experts selected by the defense group;

G. A provision that if no liability is apportioned to a particular defense group participant by the defense experts, then that participant will have no further obligation to pay defense costs beyond the date of issuance of the expert analysis and will have no obligation to participate in potential settlement of the claim;

H. The CPR Agreement shall be completed and executed within 60 days of the initial meeting date and within 5 business days of such execution, counsel for the builder shall advise counsel for the claimant of the completed execution of such Agreement.

6. Within 20 days of completion of the initial defense group meeting of insurers, the builder shall provide written notice to counsel for the claimant either confirming completion of the CPR or notifying counsel for the claimant that an agreement could not be reached and the CPR process is terminated. In the event that a court action is pending, mutual acceptance of the CPR process shall immediately stay any such action.

7. If counsel for the builder advises counsel for the claimant that a CPR Agreement has been reached, within 30 days of the issuance of the notice, counsel for the builder and the claimant shall participate in a scheduling conference and establish a timeframe for completion of the following tasks, which shall be set forth in a CPR Order signed by the mediator(s):

A. Site inspections and testing, which shall be completed within 60 days of the scheduling meeting;

B. Issuance by the claimant of a detailed cost of repair that shall contain a description of the nature, scope and cost of repair for all alleged deficiencies in construction. If the claim involves single-family homes, a separate cost of repair shall be issued for each home. Claimant's cost of repair shall be served within 30 days of the completion of the inspections and testing;

C. A date for the builder to issue a responsive detailed cost of repair responding to the line items set forth in the claimant's cost of repair. The builder's cost of repair shall be issued within 30 days of service of the claimant's cost of repair;

D. The selection of a mediator to assist, if necessary, in the potential resolution of the claim between the claimant and builder;

E. The date for counsel for the builder and the claimant to mediate the dispute;

F. The investigation and mediation of the dispute shall be completed within 120 days of the scheduling meeting.

8. At the meeting or mediation between the builder and the claimant to discuss potential resolution of the claim, counsel for the builder and the claimant shall attempt to reach an overall settlement figure for the claim. If an agreement is reached on the overall targeted settlement amount for the claim, both counsel for

the builder and the claimant shall confer with their client and confirm or reject the overall settlement figure with 14 days. The settlement shall be funded within 60 days of settlement unless otherwise agreed to between counsel for the claimant and builder.

9. Any participating party may, at any time, petition or move the superior court which is hearing the action or if no complaint has been filed, the superior court in the county where the project is located, for any of the following:

   A. To set a status conference or settlement conference to assist the parties in complying with the provisions of this Section;

   B. To seek a determination that a settlement is a good faith settlement pursuant to Section 877.6 of the Code of Civil Procedure and all related authorities. The page limitations and meet and confer requirements specified in this section shall not apply to these motions, which may be made on shortened notice. Instead, these motions shall be subject to other applicable state law, rules of court and local rules. A determination of good faith made under this Section shall shift the burden to any party opposing or not participating in the settlement to show that the settlement amounts and allocations, if any, set forth in the motion are unreasonable and therefore non-binding at the time of any subsequent trial, except that the burden shall not shift as to any party which was not given a timely opportunity to participate in the CPR process.

   C. For a stay under subsection 6.

   D. For any other relief appropriate to the enforcement of the provisions of this section.

10. Any offers of settlement made during this CPR process shall not be admissible in any litigation and shall be protected from disclosure by Evidence Code §1151. Further, the initial defect list and the cost of repair estimates exchanged between the claimant and builder shall also be inadmissible in any subsequent litigation and shall be protected from disclosure by Evidence Code §1115, et seq. However, any experts participating in the process will be allowed to utilize and rely upon the data and observations from any inspections or testing completed during participation in this CPR process.

11. Any statute of limitations applicable to the claimant's claims and to any potential cross-claims by the builder, subcontractors, design professionals and/or material suppliers shall be tolled for a period of time equal to the period from the date of service of the initial request for participation in this CPR process and continuing until 30 days following the completion or termination of this CPR process.

12. All dates, deadlines and timelines herein shall be strictly construed and may be extended only by mutual agreement.

CONSTRUCTION DEFECTS LEGISLATIVE IDEAS
AS DISCUSSED IN MEETING AUGUST 4, 2003

(1) The following applies to all actions filed on or after January 1, 2004, seeking recovery for construction defects pursuant to Civil Code sections 910 or 1375.

(2) Participating Subcontractors: For subcontractors, design professionals, material suppliers and their insurers (hereinafter collectively "subcontractors") who come to the table and participate in resolution of the case either through Case Preliminary Resolution (similar to the CPR Process defined in attached separate document) OR through a Joint Defense Agreement (to be defined) – hereinafter "CPR/JDA Process", the following would apply:

(a) Indemnity Agreements.	(b) Additional Insured Endorsements.
Relief from Express Indemnity Agreements – participating subcontractors only responsible for liability arising out of the scope of their work. A comparative fault system would apply.	Additional Insured Endorsements would be limited to scope of subcontractor's work. No duty to defend 100% of construction defect case (*Presley* relief).

(3) Non-participating Subcontractors: For subcontractors who refuse to participate in a CPR/JDA Process, the following would apply:

(a) Indemnity Agreements.	(b) Additional Insured Endorsements.
(i) Non-participating subcontractors would be bound by terms of any express indemnity contract with builder/developer. Non-participating subcontractor could be held liable for damages arising out of his or her work without ability to contest. No showing of negligence required. OR (ii) Express indemnity provision would be implied into the contract between non-participating subcontractor and developer/builder. Even without an express indemnity agreement, non-participating sub could be held liable for damages arising out of his/her work without ability to contest. No showing of negligence required.	Additional Insured Endorsements would be limited to scope of subcontractor's work. No duty to defend 100% of construction defect case (*Presley* relief).

(4) Non-participating Builder/Developer: **Even if the Builder/Developer does not want to participate in CPR/JDA Process, if a subcontractor is willing to participate, the subcontractor will be considered a "participating subcontractor" and the provisions of paragraph (2) above would apply.**

(5) Attorneys' Fees if you have to chase non-participating Subcontractor: **If, after resolution of the construction defect action, the builder/developer is forced to seek contribution from non-participating subcontractors who have been determined to be responsible for some portion of the settlement or judgment, the builder/developer may be awarded attorneys' fees incurred in collecting that contribution.**

(6) Notice of Defect by Homeowner: **As discussed at the August 4th meeting, there are different notice of defect provisions in the CPR proposal, in current law (SB 800 and the Calderon Process), and in the CBIA/HOAF/PASC proposal.**

(a) The CPR process (attached as a separate document) provides for two different types of notice from the homeowner, depending on the stage of the resolution of the process.

i) The first occurs if the homeowner initiates an offer for CPR and provides as follows:

"§945.3(b) If a claimant in a construction defect action either initiates an offer to the respondent to participate in CPR, or if a claimant desires to pursue an offer made by the respondent, the counsel for the claimant shall issue an initial list of alleged deficiencies in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed defect or violation."

ii) The second notice of defect by homeowner occurs if the builder/developer advises the homeowner's counsel that a CPR agreement has been reached and is done in conjunction with the builder's site inspections and testing. This requirement on plaintiff provides as follows:

"§945.5(b)(2) Issuance by the claimant of an itemized, detailed cost-of-repair estimate that contains a description of the nature, scope, and actual cost of the repairs for all alleged deficiencies in the construction. If the claim involves single-family homes, a separate cost-of-repair estimate shall be issued for each home. The claimant's cost-of-repair estimate shall be served within 30 days of the completion of the inspections and testing."

(b) 800's notice of defect provision is as follows:

"§910(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896) [the so-called "functionality standards"]. That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder and shall describe the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and effect as a notice of commencement of a legal proceeding."

(c) The notice of defect by the homeowners association in the Calderon Process for attached housing is, like the CPR proposal, two tiered.

First, Civil Code § 1375 provides that the initial "Notice of Commencement of Legal Proceeding" must include all of the following:

(1) The name and location of the project.
(2) An initial list of defects sufficient to apprise the respondent of the general nature of the defects at issue.
(3) A description of the results of the defects, if known.
(4) A summary of the results of a survey or questionnaire distributed to homeowners to determine the nature and extent of defects, if a survey has been conducted or a questionnaire has been distributed.
(5) Either a summary of the results of testing conducted to determine the nature and extent of defects or the actual test results, if that testing has been conducted.

Second, Civil Code §1375(h)(2) provides that as part of the case management meeting with the dispute resolution facilitator, the homeowners' association must provide:

"a more detailed list of defects . . . after the association completes a visual inspection of the project. This list of defects shall provide sufficient detail for the respondent to ensure that all potentially responsible subcontractors and design professionals are provided with notice of the dispute resolution process. If not already completed prior to the case management meeting, the Notice of Commencement of Legal Proceeding shall be served by the respondent on all additional subcontractors and design professionals whose potential responsibility appears on the face of

the more detailed list of defects within seven days of receipt of the more detailed list. The respondent shall serve a copy of the case management statement including the name, address, and telephone number of the dispute resolution facilitators, to all the potentially responsible subcontractors and design professionals at the same time."

(d) The CBIA/HOAF/PASC proposal for a pre-litigation procedure - Joint Cost Sharing Agreement provides for homeowner notice of defect identical to that in SB 800 cited above but adds the following additional requirement:

"Section 945.7(c) The notice shall include an opinion from at least one architect, professional engineer, general contractor or land surveyor who is licensed to practice and has practiced in this state in the residential construction discipline continuously for at least five years. The opinion shall represent the independent judgment of the licensee who may not be affiliated with the claimant, or the claimant's attorney. The opinion shall state each specific defect that exists for each claimant's unit and the specific damages resulting from each defect. If the claimant is represented by an attorney, the attorney shall include a statement that, on the basis of his or her review and consultation, that there is reasonable and meritorious cause for the claim."

California Building Industry Association
1215 K Street, Suite 1200 • Sacramento, CA 95814 • (916) 443-7933 • fax (916) 443-1960

August 18, 2003

Frances Fort
Principal Consultant
Office of Assemblymember Darrell Steinberg
California State Capitol, Room 2114
Sacramento, CA 95814

Re: Comments on CPR Proposal and Ideas Discussed at August 4 meeting

Dear Frances:

We have circulated the documents you distributed after our August 4th meeting and have received the comments that are summarized below. As a general matter, the CPR proposal was not well received for several practical reasons which are highlighted as follows:

1. Subcontractors are excluded from most of the process and are only looked to as a potential source of funding for settlements;
2. Those responsible for funding are likely to avoid the process altogether or opt-out resulting in wasted time or increasing the likelihood that the builder will either pay and chase the various parties or assign those claims to the plaintiff – all of which will increase defense costs;
3. Insurance policies and their exclusions (*Montrose, Presley,* etc.) will be ignored, both retroactively and prospectively. We believe this will put a freeze on new insurers who might be thinking of coming into the market because they will not be able to write exclusions, especially for liability that arises prior to the effective date of future policies;
4. Other than the builder, insureds do not participate in either the CPR Process or the CPR Agreement regardless of whether or not the claim is covered by insurance;
5. The proposal does not require the claimant to contact the builder prior to initiating the process to see if the deficiency can be repaired.
6. Peripheral parties with little or no responsibility will be required to participate in the CPR Agreement due to a failure to require a detailed notice of deficiencies upfront;
7. Carriers are required to commit to fund a settlement and an allocation of costs prior to any member of the defense team visiting the site for inspection and testing;
8. The CPR Process eliminates the right to repair policy established in last year's SB 800 and the meet and confer process established the previous year by AB 1700;

These represent the fundamental concerns with the approach taken by the CPR proposal and are explained in greater detail below. There are a number of areas which were unclear to us and therefore, we are seeking clarification. Additionally, there appear to be areas in which modification is necessary, assuming the fundamental objections could be resolved. Finally, a

section dealing with ideas discussed on August 4th is included at the end as well as a timeline we put together as a visual aid to the CPR process.

I. EXPLANATION OF FUNDAMENTAL CONCERNS

Participation By Subcontractors, Design Professionals and Material Suppliers.
The CPR Process does not contemplate any participation by subcontractors, other than perhaps to fund a settlement. Subcontractors are not offered an opportunity for a site inspection, testing, an opportunity to repair, prepare a cost estimate, or participate in reaching a targeted settlement amount. The only option offered subcontractors (and their carriers) is to fund the settlement or opt-out. Yet the builder must pursue this process and hope that, at the end, the subcontractors, design professionals, material suppliers will be willing to participate in funding. The builder would be placed in the position of engaging in a 380 day process that may reach a targeted settlement agreement but which leaves the builder in a position of paying the plaintiff and then chasing all of the other potentially responsible parties and their carriers. The problems outlined by the *Presley* decision, i.e., paying and chasing to seek contribution, are thereby merely shifted from the subcontractor's carrier to the builder and the builder's carrier. In the view of some, this is the reason why the CPR process, already in existence, has met with such limited success.

Elimination of Right to Repair and Meet & Confer
Section 945.2(b) refers to section 910 or 1375. These sections are part of the right to repair (SB 800) and the Steinberg/Calderon process (AB 1700), respectively from the last two years. Both of these measures were hard-fought, ensure important benefits for homeowners as well as builders, and by an overwhelming majority represent the public policy of California. The CPR process proposes to bypass these litigation avoidance methods and, rather than repair deficiencies, a homebuilder, subcontractors, design professionals, material suppliers and their various insurers could only pay off the plaintiff. The heart of CPR is the payment of money rather than fixing legitimate problems. The elimination - even as an option – of such an important public policy for California is a non-starter. Moreover, what makes sense in bringing back insurance to California is to apply a notice, inspection, repair, mediation procedure requirement prior to filing any action after December 31, 2003. Accordingly the references to those sections in Section 945.3(b) and the tolling provisions contained in section 945.8(a) are unnecessary. Additionally, the reference in Section 945.6 to "if no complaint has been filed," must be deleted.

Prelitigation Investigation
The CPR proposal acknowledges that a detailed notice provision is not achievable until after the parties have had the opportunity for a site inspection and testing. Compare sections 945.3(b) and 945.5(b)(2). Moreover, the defense expert cannot allocate responsibility or eliminate peripheral subcontractors without first visiting the site, inspecting and testing the site. These activities are appropriate prior to litigation.

A. Initial List of Defects. Section 945.3(b) does not specify when the initial list of alleged deficiencies must be submitted to the builder. The initial list should not only be required at the start, but it should contain more information than details of the nature and location "to the extent known."

B. Peripheral Parties. Section 945.3(e) provides that the builder tender defense to all parties (and their insurers) whose work or material is implicated by the initial list of defects. The initial list will contain so little information that it is not likely to keep out parties who are eventually determined to have no liability. This limiting language

points to one of the fundamental flaws in the existing system and is not a practice that builders or subcontractors are willing to proliferate. The plaintiff should only initiate an action once he/she knows they have a real problem. The initial list should also contain resultant damage, if there is any.

Freezing Future Insurers

Section 945.4(a) provides that the defense and indemnification responsibilities of any insured shall be based upon the agreement between the builder, subcontractor, design professional and material supplier rather than language contained in the insurance policy or an additional insured endorsement. This would trigger coverage notwithstanding a *Presley, Montrose* or any other exclusion. While this may grant some relief to carriers who do not have these exclusions, it would increase liability for those carriers who have exclusions. Builders believe that this will make insurance more scarce in the future because insurers will be unable to exclude liability for tail coverage when they write new policies after this bill becomes effective. Builders also question whether the insurance community would support this concept.

Exclusion of Insureds

Section 945.4 subdivisions (b), (c) and (d) outline a process for the participation of defense parties in establishing a liaison committee and a CPR agreement which is used primarily to allocate funding responsibilities for a settlement. However, these provisions refer only to insurers. Is it the intent to make insurers solely responsible for funding the costs associated with CPR and not the insureds? Subdivision (d)(2) does not specify that responsibility may be allocated to design professionals and material suppliers. The only allocation is to builder and subcontractor insurers. Is an allocation to other parties or their insurers permitted?

Time to Opt-Out.

The time to opt-out is 30 days from both the publication of the defense group's cost-of-repair estimate and the proposed apportionment of responsibility. (Section 945.4(d)(5)). There are a variety of ways that the triggering events may be read:

A. Publication of Defense Group's Cost-of-Repair Estimate. As noted below, there is no definition or requirement for publication of the defense group's cost of repair. Section 945.5(b)(3) calls for a cost-of-repair estimate prepared by the builder. If the builder's cost of repair date is intended as the trigger date for opting-out, then the last day to opt-out will be the same date as the date by which the defense group may confirm the settlement amount but prior to efforts by the defense group to agree on an allocation of responsibility. See Section 945.4(d)(4). When parties are faced with having to agree to fund a settlement but the ultimate allocation of costs to each party is not completed, it is highly likely that the parties will opt-out at this point (350 days into the process), making the process unworkable and delaying resolution for the homeowner.

B. Fallback Indemnification Formula. If the fallback indemnification (allocation) formula must be part of the CPR agreement (pursuant to Section 945.4(d)) and the CPR agreement must be executed within 60 days of the initial meeting of all insurers (Section 945.4(d)(8)), then the fallback allocation must take place before the site investigation and testing (Section 945.5(b)). Therefore, the fallback allocation (which is the most likely allocation) will have to take place without the benefit of a site inspection and testing. How realistic can an expert's allocation be with no more information than that contained in the initial list of defects? This will make it highly likely that members of the defense group will opt-out and the process will fall apart.

C. Targeted Settlement Agreement. If Section 945.4(d)(5)'s reference to proposed apportionment of responsibility is a reference to the predetermined fallback allocation that is included in the executed CPR agreement, then the last day to opt-out will also occur before an overall targeted settlement agreement is reached, again making it unlikely that a party will want to commit to fund an undetermined amount. Also, is there enough time within the 60-day period for the defense group to execute a CPR agreement to establish a fallback allocation and if necessary, a mediation and binding arbitration?

D. Allocation by Agreement. If the proposed apportionment of responsibility is the date when all the parties agree pursuant to Section 945.4(d)(4), then it is possible to opt-out after the last day to fund the settlement. What are the consequences of such an action?

II. CLARIFICATIONS

Section 945.3(a).
This section refers to a process by which parties "agree to *attempt* to reach a settlement" and the agreement "is binding upon those parties." These provisions appear to be contradictory to each other as well as the right to opt-out in Section 945.4(d)(5).

Section 945.3(d).
Who will pay for comediators (or a single mediator) and how costly is this process? Who will pay for experts and attorneys fees?

Section 945.4(d)(3).
This Section refers to a "defense group" that is not defined. Who is considered part of the defense group? Why are there 2 different time periods for confirming the targeted settlement amount? Why is the shorter period (14 days) applicable if the entire defense group confirms the settlement while the longer period (30 days) applies to a smaller group, i.e., the liaison committee?

Section 945.5(d)(5).
This Section refers to a date of publication of the defense group's cost-of-repair. What is meant by "publication." When does the defense group publish a cost-of-repair? Section 945.5(b)(3) refers to the builder issuing a cost-of-repair estimate but not the defense group.

Section 945.4(d)(7).
This Section relieves a party of any further liability for defense costs based upon the expert's allocation. Since the expert will be acting without the benefit of a site inspection and testing, will there be an ability to reinstate liability for that party if, upon further investigation, liability properly rests with that party? If not, how will all the other parties be protected from liability arising out of the actions of the dismissed party?

Section 945.5(b).
This Section calls for a CPR order signed by the mediator or comediator who is selected by the process outlined in the same order that the mediator is required to sign (Section 945.5(b)(4)).

Section 945.5(c).
What happens if the builder and claimant fail to agree to a settlement as provided in Section 945.5(c)?

The proposal does not deal with subsequently amended defect lists/complaints – how will they be treated?

What is the consequence if the deadlines are missed?

III. MODIFICATIONS

Section 945.3(e).
It appears to be the builder's obligation to tender defense to all of the insurers for all of the following parties: subcontractors, design professionals, and material suppliers. To the extent that the builder has received a certificate of insurance or an additional insured endorsement, this may be appropriate, but otherwise, the builder does not know all of the insurers who are potentially on the risk.

Section 945.2(a).
This Section creates the impression that a joint cost-sharing and indemnification agreement can only be used with the CPR process. Joint cost-sharing and indemnification agreements must be permitted whether or not they are part of a CPR process and whether or not the CPR process is successful.

Section 945.5(c) & Section 945.4(d)(4).
These Sections requires that a settlement be funded within 60 days of the claimant and the builder reaching agreement. During that time, the defense group has 30 days to confirm the settlement. In the remaining time, the defense group must agree to an allocation of responsibility (Section 945.4(d)(4)) and failing to agree, members of the defense group are subject to mediation & binding arbitration. There does not appear to be enough time to conduct these activities prior to the deadline for funding.

Section 945.5(a).
This Section seems to indicate that the CPR Process and **agreement** must be reached within 20 days of the initial defense group meeting. This appears to be a mistake as an agreement would need to be reached so early in the process.

Section 945.6(b).
Good faith settlements pursuant to Section 877.6 create the possibility that the remaining parties will be exposed to additional liability at the final resolution of the case unless an issue release is obtained by the remaining parties. Accordingly, good faith settlement should not be permitted without an issue release.

IV. AUGUST 4TH MEETING NOTES

Paragraph (1): The reference to Sections 910 & 1375 should be removed.

Paragraph (2): "Participation" in CPR/JDA must mean timely performance of whatever terms are agreed to. There is a similar reference in Paragraph (3).

With respect to the incentives and disincentives, they appear to be the same for subcontractor carriers, regardless of whether or not they participate. This doesn't provide an incentive to participate or a disincentive for those who don't. Shouldn't the insurance obligations track the status of the indemnity agreement whether express or implied?

Paragraph (3): For non-participating subcontractors, does the prohibition on ability to contest mean only the ability to contest attorneys fees and other costs such as experts or does it include the total indemnification/liability obligation and the allocation to the non-participating subcontractor?

Paragraph (5): Are attorneys fees only available "after resolution of the construction defect action," i.e., does the performing party have to wait until the action has been completed before being able to pursue (with attorneys fees paid) the non-participating party?

A notice is only as useful as the detail of information given. The purpose of the notice is to provide information to the builder so that the builder may limit the number of potentially responsible parties to formulate a response. This can only be done after a site inspection and testing so that the builder can determine which trades may be responsible to either repair the problem or to contribute to a settlement. The only meaningful notice provided in CPR comes 290 days into the process and 90 days before a settlement must be funded. Accordingly, it is our strong belief that a homeowner not be precluded from having a problem fixed before incurring the cost and delay of CPR and that the builder and potentially responsible parties be allowed to conduct a site inspection, testing and offer a repair, prior to initiation of the CPR process. No part of the CPR Process permits a resolution of a claim by a repair.

Thank you for taking the time to work through these issues.

Sincerely,

Nick Cammarota
California Building Industry Association

Claimant/Builder requests CPR Process – 945.3(b)

30

Respondent accepts/rejects offer – 945.3(c)

30

Builder & Claimant agree on mediator/comediators – 945.3(d): Defense tendered – 945.3(e)

45 Notice of meeting – 945.4(b)

10

Initial meeting of all defense insurers – 945.4(b)

20

Notify Claimant that CPR Process is complete/**agreement** could not be reached and Process is terminated – 945.5(a)

CPR Agreement:

1. Agree upon counsel & experts
2. Apportion responsibility for costs & reapportion for opt-outs/fail to perform
3. Time period for defense group to confirm settlement
4. Obligation to fund settlement; procedure to agree on allocation; fallback allocation based upon expert determination; mediation;

60 binding arbitration

5. Right to opt-out
6. Right to separate counsel, experts, party pays
7. Party released from defense costs and settlement if expert apportions no liability

CPR Agreement Executed – 945.4(d)(8)

5

Notify Claimant of CPR Agreement – 945.4(d)(8)

30

Claimant & builder hold scheduling conference – 945.5(b)

60

Site inspection & testing – 945.5(b)(1)

30

Claimant issues cost-of-repair estimate – 945.5(b)(2)

30

Builder issues cost-of-repair estimate – 945.5(b)(3); Investigation & Mediation complete – 945.5(b)(6); Targeted settlement reached – 945.5(c)

14

30

60

Claimant, Builder, defense group confirm/reject settlement – 945.4(d)(3); 945.5(c)

Liaison Committee confirms/rejects settlement – 945.4(d)(3)

Settlement funded – 945.5(c)

Red indicates subcontractor, design professional, material supplier carriers involvement.

IRMI Insights

Construction Defect Crisis Produces Coverage-Restricting Endorsem
August 2003

by **Ann Rudd Hickman, CPCU, ARM**
International Risk Management Institute, Inc.

An onslaught of construction defect litigation over the past 2 decades has the construction insurance industry. Contractors must rely primarily on th insurance programs for protection against construction defect claims. Unfo in some states the impact of construction defect claims on coverage availa affordability has reached crisis status. Subcontractors, in particular, have experienced a drying up of insurance markets, because much of the risk fr construction defects falls in their laps. California, Nevada, Arizona, Texas, and Colorado have the most significant construction defect problems, but states are experiencing increased litigation in this area as well.

Insurers have undertaken a number of strategies for dealing with the grow construction defect claims. General and umbrella liability insurers alike ha an underwriting philosophy of avoiding altogether certain classes of contra types of construction, or problematic regions. For example, some insurers stopped writing coverage for residential developers, general contractors p residential construction, and any contractor directly or indirectly involved installation of synthetic stucco (commonly known in construction and insu circles as exterior insulation and finish systems, or EIFS).

Alternatively, insurers may decline to write contractors with more than a c percentage of their work in problematic areas, such as residential construc EIFS installation. Some insurers have completely withdrawn from construc insurance markets in problematic regions, primarily California.

In addition to the underwriting restrictions described above, insurers will l a combination of coverage restricting endorsements. Many insurers attach to contractors' and subcontractors' policies that target common types of c defects claims, such as mold and damages attributable to the use of EIFS building. The precise combination of endorsements will vary by class of co type of construction, and by state.

Many insurers have also begun using restrictive additional insured endors which may leave a contractor in noncompliance with respect to their addit insureds, and with less coverage than expected with respect to coverage t as additional insureds on subcontractors' policies. This article discusses so more common exclusionary endorsements currently being used on contrac liability policies and highlights key variations in these endorsements that significant impact on coverage. The changing scope of additional insured c also examined.

COMMON EXCLUSIONARY ENDORSEMENTS

Known or Continuous Injury or Damage	Prevents policies from being triggered w to losses of which the insured is aware p the policy inception date.
EIFS Exclusion	Removes coverage for injury or damage connected in any way to the presence o on the building.
Mold Exclusion	Removes virtually all coverage for claim out of exposure to or inhalation of fungi includes all varieties of mold and bacter
Earth Movement Exclusion	Removes coverage for injury or damage wholly or partially caused by virtually al earth or land movement.
Residential Construction Exclusion	Removes coverage with respect to any o in connection with property intended for habitation. Some of these endorsements only to multifamily housing, such as apa town homes, and condominiums.
Damage to Work Performed by Subcontractors on Your Behalf (CG 22 94 and CG 22 95)	Eliminates coverage for damage to "you arising out of subcontractors' work, and to the named insured's work that is cau subcontractor's work.
Contractors Limitation Endorsement	Adds a combination of the above exclus well as others not related to constructio to the umbrella policy.

Known Loss Provisions

Construction defects often produce property damage that takes place over time. For example, moisture caused by faulty installation of windows or se cause ongoing deterioration of wood and other materials. It is possible, th a contractor to be aware of defects that are likely to give rise to claims we the claims actually surface.

Most insurance professionals would agree that losses, or potential losses, the insured is already aware when an insurance policy is purchased are no by the policy. However, the California Supreme Court ruled otherwise. In *Chemical Corp. v Admiral Insurance Co.*, 913 P2d 878 (1995), the court ru prior to the determination of an insured's actual liability for the injury or d loss is neither certain nor fully "known." Consequently, knowledge of a po claim at the time the policy becomes effective does not negate coverage (that jurisdiction) as long as there is uncertainty regarding the insured's ac of liability.

To counter the impact of the *Montrose* decision, many insurers developed injury or damage" endorsements that specifically exclude coverage for los potential losses of which the insured was aware prior to the policy period. Insurance Services Office, Inc. (ISO), incorporated a known loss provision standard commercial general liability (CGL) insurance policy insuring agre which states that the policy does not apply to injury or damage that is a c of damage known to the insured at the inception of the policy period.

The effect of the ISO known loss provision is to make the policy in effect w insured becomes aware of the damage the *last* policy that will be triggere claim. It does not, however, prevent multiple policies in effect during the of damage from being triggered as long as the insured was not aware of t prior to the inception of each of these policies.

Some insurers still use their own "known loss" exclusions, many of which than the ISO provision. For example, some known loss endorsements limi to a single policy by requiring that the insured *first* become aware of the i damage during the policy period to be covered. This will be restrictive in s allow a continuous coverage trigger on progressive damage claims.

Alternatively, some insurers attach endorsements in which all property da "deemed" to have occurred at a specific moment in time. For example, the endorsement may provide that all covered property damage is deemed to occurred at the moment damage first began, regardless of when it was dis Under these types of endorsements, informally referred to by some as "de insured's knowledge of a claim is not relevant to which policy is triggered. the "first knowledge" endorsement described above, only one policy can b by a given loss (assuming all the affected policies have this type of provis the actual policy that is triggered could be different under these two appro

EIFS Exclusions

Exterior insulation and finish systems (EIFS) are multilayered exterior wal that are designed to provide high energy efficiency. (Synthetic stucco, a p building material in many regions, falls into this category.) EIFS have bee core of a significant amount of construction defect litigation, particularly in climates such as Southern California, Florida, Texas, and Nevada. Typicall claims alleged faulty installation or some other product defect that allowe penetrate the walls, where it became trapped. Wood rot and mold were so problems commonly encountered by the owners of the properties.

In light of the tremendous losses suffered by the insurance industry relate insulation systems, EIFS exclusions began to appear on the liability policie installation subcontractors, as well as virtually any other contractor whose conceivably be tied to the infiltration of moisture (e.g., roofers, HVAC, win garage door installation contractors, and plumbing contractors). Although construction has been harder hit by EIFS claims than commercial building because damages are greatest on wood frame construction), EIFS exclusio widespread use for both residential and commercial construction contracto

As of yet, there are no standard EIFS exclusions, but most insurers writing contractors have developed their own endorsements that exclude this exp While many contractors will not be able to avoid an EIFS exclusion, they s examine the scope of the exclusion carefully. In their attempts to draft sw exclusions for all EIFS-related losses, some of these endorsements, perha unintentionally, go far beyond the actual EIFS exposure.

For example, one insurer's EIFS exclusion removes coverage for virtually a associated with a contractor's work on an exterior fixture of the building if included on any portion of the structure. That is, the exclusion does not ju damages caused by the presence of an EIFS or by the contractor's installa other involvement with an EIFS system, but to all losses related to the con

work on any exterior fixture of any project that contains an EIFS. This exc be appropriate if the insured is an EIFS manufacturer or EIFS installation since virtually all of their work involves the use of EIFS, but attached to ot of construction contractors' policies it goes well beyond most contractors' insurance professionals' expectations for an EIFS exclusion.

Mold Exclusions

In recent years, the construction and insurance industries have seen a dra increase in the number of claims alleging bodily injury and property dama by mold. Experts disagree on the prevalence of toxic molds and their long impact on people who are exposed to them, but clearly mold can produce property damage. Molds tend to form where there is a combination of moi poor ventilation, therefore any construction activity that has the propensit water infiltration or restricted ventilation presents a mold risk. Unfortunat includes a wide spectrum of contractors, such as roofers, plumbers, windo sheetrock or siding installers, HVAC contractors, and anyone performing g landscaping, or foundation work on the property.

Most insurers have attached mold exclusions to a broad cross section of co liability policies. Some insurers attach mold exclusions to all contractors' p regardless of the risk assessment. The standard ISO "fungi or bacteria exc endorsement is very broad, removing coverage for all injury or damage th not have occurred "but for" exposure to any fungi (e.g., mold) or bacteria any costs incurred in cleaning up the fungi or bacteria.

Mold exclusions are currently in wide use on contractors' general liability p most insurers are not open to negotiating on this issue. For a while, contr carried pollution liability insurance could find protection for mold claims u policies. Today, most contractors pollution liability insurers routinely exclu coverage for claims alleging damage caused by mold, but will add the cov for an additional premium. The "buy back" may be limited in terms of cov damages or a separate sublimit.

Earth Movement Exclusion

Contractors whose work involves the foundation of a building, or any form grading, or compaction of land or dirt on the construction site may see an movement" or "subsidence" exclusion on their general and umbrella liabili (Where the term "subsidence" is used, it is typically defined to include virt form of earth movement, including landslide, mudflow, collapse, or movem earthquake, and virtually any form of earth rising, sinking, setting, erodin settling.) Some insurers attach these exclusions only with respect to resid construction, or construction in certain areas prone to earth movement, m California.

Residential Construction Exclusion

Much of the construction defect battle has been waged in the residential c arena, particularly multifamily housing such as townhomes and condomin insurers have withdrawn from residential construction markets altogether, certain problem regions.

For contractors who perform primarily commercial construction but do som residential work, insurers may carve out the residential exposure by attac residential construction exclusion. (These endorsements are not standard,

carry a variety of titles.)

The scope of the exclusions can vary significantly based the type of constr which they apply—single versus multifamily housing and new construction renovation work, for example. The inclusion of a residential construction e a subcontractor's liability policy would also eliminate any coverage the con may have had as an additional insured on that policy.

Subcontractor Exclusion Endorsements

The CGL policy's "Damage to Your Work" exclusion, frequently referred to "workmanship" exclusion, eliminates coverage for damage to the insured completed work that arises out of the contractor's work. This prevents the from acting as a warranty on the insured's work. Although the definition o work" includes work performed by subcontractors, by exception, the exclu not apply to damage *to* a subcontractors' work nor to damage *caused by* a subcontractor's work. In other words, the insured contractor's CGL will res of the following.

- Damage to the insured contractor's work that arises out of the work subcontractor
- Damage to a subcontractor's work that arises from that subcontract
- Damage to a subcontractor's work arising out of the insured contrac
- Damage to a subcontractor's work arising out of another contractor' subcontractor's work

In 2001, ISO introduced two optional endorsements that remove the cove the subcontractor exception leaves intact. One of these endorsements elim coverage for damage to "your work" that is, or is caused by, a subcontrac The other eliminates this coverage only with respect to scheduled sites or

Thus far, the subcontractor exclusion endorsements do not appear to be in widespread use, but contractors and their insurance representatives shoul lookout for them. Contractors engaged in residential work are particularly encounter these exclusions. For contractors who subcontract a significant their work, the reduction in coverage is significant.

Contractors Limitation Endorsements

With respect to construction defect exposures, most umbrella insurers hav combine various industry-specific exclusions into one endorsement comm referred to as a contractors limitation endorsement. In recent years, many insurers have added a number of construction defect-related exclusions to contractors limitation endorsements. For the most part, these exclusions m CGL counterparts. Mold, EIFS, subsidence, and residential construction are potential exclusions on the contractors limitation endorsement. Contractor ensure that any such exclusions do not apply if the same damages would by the underlying the CGL policy. That is, the umbrella should provide "fo form" coverage with respect to these types of claims.

Additional Insured Endorsements

Construction contracts frequently require contractors to add other parties owner or other contractors) as additional insureds on their liability policies speaking, the additional insured wants broad protection for any claim it m with respect to the construction activity. In reality, their coverage may be narrow than they expected.

The two key issues with regard to an additional insured's coverage are wh coverage applies to completed operations, and whether there is coverage respect to losses caused by the additional insured's own negligence.

Prior to 1993, additional insureds enjoyed broad coverage for losses "arisi the named insured contractor's work. This language was broad enough to ongoing and completed operations, and claims arising out of the additiona own negligence, including its sole negligence. (Compelling arguments hav made both for and against the "fairness" of providing coverage for an add insured's sole negligence.)

In 1993, the standard additional insured endorsements were modified to e coverage to additional insureds only with respect to the contractor's "ongo operations for the additional insured, thus eliminating completed operatio for the additional insured. For several years, insurers continued to offer th versions of the endorsement in recognition of the fact that contractors nee coverage to comply with their contractual requirements. As construction d litigation snowballed, and the insurance market in general began to harde and more insurers stopped this practice. Most insurers now offer only the versions of the endorsement, which do not include coverage for completed

Many insurers have drafted their own additional insured endorsements tha remove completed operations coverage, but also narrow the scope of cove claims that can be tied to the additional insured's own negligence. Some a insured endorsements eliminate coverage only with respect to the addition insured's sole negligence, while others eliminate all coverage with respect additional insured's own negligence. (Note that coverage for the insured c contractual indemnification obligations are not affected by the language o additional insured endorsement. Consequently, as long as the contractor's such claims can be tied to a legally enforceable indemnity agreement, the would pay claims involving indemnification of an additional insured for its sole, negligence, but perhaps on less favorable terms.)

Conclusion

Until the tide of construction defect claims is stemmed, insurers will contin for ways to limit their exposure in this area. Unfortunately, some insurers completely forthcoming about changes in their policies that reduce contra coverage, and, as a result, the restrictions may not be discovered until a c denied. Agents and brokers serving the construction market, particularly t residential construction market, must be diligent to examine CGL policy fo endorsements for irregularities in the language that could impact coverag

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SENATE FLOOR AMENDMENTS COMMITTEE ANALYSIS

Bill No: AB 903
Author: Steinberg
RN: 0318898
Set: 1
Submitted by: Escutia

SUBJECT OF BILL: Construction defects

Subject of Amendments: Clean-up to SB 800 of 2002

Amendments are: Technical / Substantive / Re-write Bill / New Bill

Were these amendments discussed in committee? No
If yes, were they defeated?

Likely opposition to amendments? None Known
If yes, from whom?

Purpose of Amendments: Additional clean-up language to SB 800 of 2002

ANALYSIS: Last year, the Legislature enacted SB 800, which made sweeping changes to the state's construction defect liability laws. This bill contains technical clean-up language to SB 800. The amendments have been reviewed by interested parties, and there is no opposition to the bill.

The technical amendments correct erroneous references, clarify the definition of certain covered entities, and provide greater clarity as to when certain timelines and/or responsibilities are triggered.

By: Michael Yang, Judiciary
Date: September 3, 2003

**** END ****

AMENDED IN SENATE SEPTEMBER 4, 2003

AMENDED IN SENATE JULY 15, 2003

AMENDED IN ASSEMBLY MAY 5, 2003

AMENDED IN ASSEMBLY APRIL 29, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL No. 903

Introduced by Assembly Member Steinberg

February 20, 2003

An act to amend Sections ~~916 and 941~~ *896, 911, 912, 916, 936, 938, 941, and 945.5* of, and to amend, renumber, and add Section 942 to, the Civil Code, relating to construction defects.

LEGISLATIVE COUNSEL'S DIGEST

AB 903, as amended, Steinberg. Construction defect cases.

Existing law specifies the rights and requirements of a homeowner to bring an action for construction defects.

This bill would revise and recast various provisions governing home construction defect actions ~~that relate~~. *The bill would, among other things, revise the definition of builder and would specify the application of certain provisions to general contractors. The bill would make a technical changes relating* to a builder's election to inspect *and the application of certain affirmative defenses, and would recast provisions relating to* the applicable statute of limitations, and the exclusivity of these provisions. *The bill would specify that the provisions governing home construction defect actions apply to new residential units where the purchase agreement was signed by the seller on and after January*

1, 2003. The bill would also make a statement of legislative intent regarding a specified study.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. *Section 896 of the Civil Code is amended to read:*

896. In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a *general contractor,* subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law.

(a) With respect to water issues:

(1) A door shall not allow unintended water to pass beyond, around, or through the door or its designed or actual moisture barriers, if any.

(2) Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers, including, without limitation, internal barriers within the systems themselves. For purposes of this paragraph, "systems" include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(3) Windows, patio doors, deck doors, and their systems shall not allow excessive condensation to enter the structure and cause damage to another component. For purposes of this paragraph, "systems" include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(4) Roofs, roofing systems, chimney caps, and ventilation components shall not allow water to enter the structure or to pass

beyond, around, or through the designed or actual moisture barriers, including, without limitation, internal barriers located within the systems themselves. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, and sheathing, if any.

(5) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow water to pass into the adjacent structure. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashing, and sheathing, if any.

(6) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow unintended water to pass within the systems themselves and cause damage to the systems. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashing, and sheathing, if any.

(7) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to cause damage to another building component.

(8) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to limit the installation of the type of flooring materials typically used for the particular application.

(9) Hardscape, including paths and patios, irrigation systems, landscaping systems, and drainage systems, that are installed as part of the original construction, shall not be installed in such a way as to cause water or soil erosion to enter into or come in contact with the structure so as to cause damage to another building component.

(10) Stucco, exterior siding, exterior walls, including, without limitation, exterior framing, and other exterior wall finishes and fixtures and the systems of those components and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall be installed in such a way so as not to allow unintended water to pass into the structure or to pass beyond, around, or through the designed or actual moisture barriers of the system, including any internal barriers located within the system itself. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(11) Stucco, exterior siding, and exterior walls shall not allow excessive condensation to enter the structure and cause damage to

another component. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(12) Retaining and site walls and their associated drainage systems shall not allow unintended water to pass beyond, around, or through its designed or actual moisture barriers including, without limitation, any internal barriers, so as to cause damage. This standard does not apply to those portions of any wall or drainage system that are designed to have water flow beyond, around, or through them.

(13) Retaining walls and site walls, and their associated drainage systems, shall only allow water to flow beyond, around, or through the areas designated by design.

(14) The lines and components of the plumbing system, sewer system, and utility systems shall not leak.

(15) Plumbing lines, sewer lines, and utility lines shall not corrode so as to impede the useful life of the systems.

(16) Sewer systems shall be installed in such a way as to allow the designated amount of sewage to flow through the system.

(17) Shower and bath enclosures shall not leak water into the interior of walls, flooring systems, or the interior of other components.

(18) Ceramic tile and tile countertops shall not allow water into the interior of walls, flooring systems, or other components so as to cause damage.

(b) With respect to structural issues:

(1) Foundations, load bearing components, and slabs, shall not contain significant cracks or significant vertical displacement.

(2) Foundations, load bearing components, and slabs shall not cause the structure, in whole or in part, to be structurally unsafe.

(3) Foundations, load bearing components, and slabs, and underlying soils shall be constructed so as to materially comply with the design criteria set by applicable government building codes, regulations, and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction.

(4) A structure shall be constructed so as to materially comply with the design criteria for earthquake and wind load resistance, as set forth in the applicable government building codes, regulations, and ordinances in effect at the time of original construction.

(c) With respect to soil issues:

(1) Soils and engineered retaining walls shall not cause, in whole or in part, damage to the structure built upon the soil or engineered retaining wall.

(2) Soils and engineered retaining walls shall not cause, in whole or in part, the structure to be structurally unsafe.

(3) Soils shall not cause, in whole or in part, the land upon which no structure is built to become unusable for the purpose represented at the time of original sale by the builder or for the purpose for which that land is commonly used.

(d) With respect to fire protection issues:

(1) A structure shall be constructed so as to materially comply with the design criteria of the applicable government building codes, regulations, and ordinances for fire protection of the occupants in effect at the time of the original construction.

(2) Fireplaces, chimneys, chimney structures, and chimney termination caps shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire outside the fireplace enclosure or chimney.

(3) Electrical and mechanical systems shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire.

(e) With respect to plumbing and sewer issues:

Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action may be brought for a violation of this subdivision more than four years after close of escrow.

(f) With respect to electrical system issues:

Electrical systems shall operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action shall be brought pursuant to this subdivision more than four years from close of escrow.

(g) With respect to issues regarding other areas of construction:

(1) Exterior pathways, driveways, hardscape, sidewalks, sidewalks, and patios installed by the original builder shall not contain cracks that display significant vertical displacement or that are excessive. However, no action shall be brought upon a violation of this paragraph more than four years from close of escrow.

(2) Stucco, exterior siding, and other exterior wall finishes and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall not contain significant cracks or separations.

(3) (A) To the extent not otherwise covered by these standards, manufactured products, including, but not limited to, windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, and appliances shall be installed so as not to interfere with the products' useful life, if any.

(B) For purposes of this paragraph, "useful life" means a representation of how long a product is warranted or represented, through its limited warranty or any written representations, to last by its manufacturer, including recommended or required maintenance. If there is no representation by a manufacturer, a builder shall install manufactured products so as not to interfere with the product's utility.

(C) For purposes of this paragraph, "manufactured product" means a product that is completely manufactured offsite.

(D) If no useful life representation is made, or if the representation is less than one year, the period shall be no less than one year. If a manufactured product is damaged as a result of a violation of these standards, damage to the product is a recoverable element of damages. This subparagraph does not limit recovery if there has been damage to another building component caused by a manufactured product during the manufactured product's useful life.

(E) This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure.

(4) Heating, if any, shall be installed so as to be capable of maintaining a room temperature of 70 degrees Fahrenheit at a point three feet above the floor in any living space.

(5) 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.

(6) Attached structures shall be constructed to comply with interunit noise transmission standards set by the applicable government building codes, ordinances, or regulations in effect at

the time of the original construction. If there is no applicable code, ordinance, or regulation, this paragraph does not apply. However, no action shall be brought pursuant to this paragraph more than one year from the original occupancy of the adjacent unit.

(7) Irrigation systems and drainage shall operate properly so as not to damage landscaping or other external improvements. However, no action shall be brought pursuant to this paragraph more than one year from close of escrow.

(8) Untreated wood posts shall not be installed in contact with soil so as to cause unreasonable decay to the wood based upon the finish grade at the time of original construction. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(9) Untreated steel fences and adjacent components shall be installed so as to prevent unreasonable corrosion. However, no action shall be brought pursuant to this paragraph more than four years from close of escrow.

(10) Paint and stains shall be applied in such a manner so as not to cause deterioration of the building surfaces for the length of time specified by the paint or stain manufacturers' representations, if any. However, no action shall be brought pursuant to this paragraph more than five years from close of escrow.

(11) Roofing materials shall be installed so as to avoid materials falling from the roof.

(12) The landscaping systems shall be installed in such a manner so as to survive for not less than one year. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(13) Ceramic tile and tile backing shall be installed in such a manner that the tile does not detach.

(14) Dryer ducts shall be installed and terminated pursuant to manufacturer installation requirements. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(15) Structures shall be constructed in such a manner so as not to impair the occupants' safety because they contain public health hazards as determined by a duly authorized public health official, health agency, or governmental entity having jurisdiction. This paragraph does not limit recovery for any damages caused by a

violation of any other paragraph of this section on the grounds that the damages do not constitute a health hazard.

SEC. 2. Section 911 of the Civil Code is amended to read:

911. *(a)* For purposes of this title, *except as provided in subdivision (b),* "builder" means ~~a~~ *any entity or individual, including, but not limited to a* builder, developer, *general contractor, contractor,* or original seller ~~and applies to the sale of new residential units on and after January 1, 2003~~, *who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim.*

(b) For the purposes of this title, 'builder' does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. For purposes of this title, these nonaffiliated general contractors and nonaffiliated contractors shall be treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals.

SEC. 3. Section 912 of the Civil Code is amended to read:

912. A builder shall do all of the following:

(a) Within 30 days of a written request by a homeowner or his or her legal representative, the builder shall provide copies of all relevant plans, specifications, mass or rough grading plans, final soils reports, Department of Real Estate public reports, and available engineering calculations, that pertain to a homeowner's residence specifically or as part of a larger development tract. The request shall be honored if it states that it is made relative to structural, fire safety, or soils provisions of this title. However, a builder is not obligated to provide a copying service, and reasonable copying costs shall be borne by the requesting party. A builder may require that the documents be copied onsite by the requesting party, except that the homeowner may, at his or her option, use his or her own copying service, which may include an offsite copy facility that is bonded and insured. If a builder can show that the builder maintained the documents, but that they later became unavailable due to loss or destruction that was not the fault

of the builder, the builder may be excused from the requirements of this subdivision, in which case the builder shall act with reasonable diligence to assist the homeowner in obtaining those documents from any applicable government authority or from the source that generated the document. However, in that case, the time limits specified by this section do not apply.

(b) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, the builder shall provide to the homeowner or his or her legal representative copies of all maintenance and preventative maintenance recommendations that pertain to his or her residence within 30 days of service of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(c) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all manufactured products maintenance, preventive maintenance, and limited warranty information within 30 days of a written request for those documents. These documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(d) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all of the builder's limited contractual warranties in accordance with this part in effect at the time of the original sale of the residence within 30 days of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(e) A builder shall maintain the name and address of an agent for notice pursuant to this chapter with the Secretary of State or, alternatively, elect to use a third party for that notice if the builder has notified the homeowner in writing of the third party's name and address, to whom claims and requests for information under this section may be mailed. The name and address of the agent for notice or third party shall be included with the original sales documentation and shall be initialed and acknowledged by the purchaser and the builder's sales representative.

This subdivision applies to instances in which a builder contracts with a third party to accept claims and act on the builder's behalf. A builder shall give actual notice to the homeowner that the builder has made such an election, and shall include the name and address of the third party.

(f) A builder shall record on title a notice of the existence of these procedures and a notice that these procedures impact the legal rights of the homeowner. This information shall also be included with the original sales documentation and shall be initialed and acknowledged by the purchaser and the builder's sales representative.

(g) A builder shall provide, with the original sales documentation, a written copy of this ~~part~~ *title,* which shall be initialed and acknowledged by the purchaser and the builder's sales representative.

(h) As to any documents provided in conjunction with the original sale, the builder shall instruct the original purchaser to provide those documents to any subsequent purchaser.

(i) Any builder who fails to comply with any of these requirements within the time specified is not entitled to the protection of this chapter, and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action, in which case the remaining chapters of this part shall continue to apply to the action.

SEC. 4. Section 916 of the Civil Code is amended to read:

916. (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon request, allow the inspections to be observed and electronically

recorded, videotaped, or photographed by the claimant or his or her legal representative.

(b) Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision does not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability under an action brought by a claimant.

~~SEC. 2.~~

SEC. 5. Section 936 of the Civil Code is amended to read:

936. Each and every provision of the other chapters of this title apply to *general contractors,* subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that the *general contractors,*

subcontractors, material suppliers, individual product manufacturers, and design professionals caused, in whole or in part, a violation of a particular standard as the result of a negligent act or omission or a breach of contract. In addition to the affirmative defenses set forth in Section 945.5, a *general contractor,* subcontractor, material supplier, design professional, individual product manufacturer, or other entity may also offer common law and contractual defenses as applicable to any claimed violation of a standard. All actions by a claimant or builder to enforce an express contract, or any provision thereof, against a *general contractor,* subcontractor, material supplier, individual product manufacturer, or design professional is preserved. Nothing in this title modifies the law pertaining to joint and several liability for *builders, general contractors,* subcontractors, material suppliers, individual product manufacturer, and design professionals that contribute to any specific violation of this title. However, *the negligence standard in* this section does not apply to any *general contractor,* subcontractor, material supplier, individual product manufacturer, or design professional *with respect* to *claims for* which strict liability would apply.

SEC. 6. Section 938 of the Civil Code is amended to read:

938. This title applies only to ~~residences originally sold~~ *new residential units where the purchase agreement with the buyer was signed by the seller* on or after January 1, 2003.

SEC. 7. Section 941 of the Civil Code is amended to read:

941. (a) Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion.

(b) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this title, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 of the Code of Civil Procedure in an action which has been brought within the time period set forth in subdivision (a).

(c) The limitation prescribed by this section may not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement

constitutes the proximate cause for which it is proposed to make a claim or bring an action.

(d) Sections 337.15 and 337.1 of the Code of Civil Procedure do not apply to actions under this title.

(e) Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title, except that repairs made pursuant to Chapter 4 (commencing with Section 910), with the exception of the tolling provision contained in Section 927, do not extend the period for filing an action, or restart the time limitations contained in subdivision (a) or (b) of Section 7091 of the Business and Professions Code. If a builder arranges for a contractor to perform a repair pursuant to Chapter 4 (commencing with Section 910), as to the builder the time period for calculating the statute of limitation in subdivision (a) or (b) of Section 7091 of the Business and Professions Code shall pertain to the substantial completion of the original construction and not to the date of repairs under this title. The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section.

~~SEC. 3.~~

SEC. 8. Section 942 of the Civil Code is amended and renumbered to read:

943. (a) Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title.

(b) As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law.

~~SEC. 4.~~

SEC. 9. Section 942 is added to the Civil Code, to read:

942. In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction.

SEC. 10. Section 945.5 of the Civil Code is amended to read:

945.5. A builder, *general contractor, subcontractor, material supplier, individual product manufacturer, or design professional,* under the principles of comparative fault pertaining to affirmative defenses, may be excused, in whole or in part, from any obligation, damage, loss, or liability if the builder, *general contractor, subcontractor, material supplier, individual product manufacturer, or design professional,* can demonstrate any of the following affirmative defenses in response to a claimed violation:

(a) To the extent it is caused by an unforeseen act of nature which caused the structure not to meet the standard. For purposes of this section an "unforeseen act of nature" means a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction.

(b) To the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this title. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim.

(c) To the extent it is caused by the homeowner or his or her agent, employee, *general contractor,* subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations. In order to rely

upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of these schedules and recommendations and that the recommendations and schedules were reasonable at the time they were issued.

(d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose.

(e) To the extent that the time period for filing actions bars the claimed violation.

(f) As to a particular violation for which the builder has obtained a valid release.

(g) To the extent that the builder's repair was successful in correcting the particular violation of the applicable standard.

(h) As to any causes of action to which this statute does not apply, all applicable affirmative defenses are preserved.

SEC. 11. It is the intent of the Legislature that the Department of Insurance conduct a study in consultation with the representatives of the labor, insurance, and building industries, to determine whether lower rates are justified for comprehensive general liability insurance policies with respect to construction defect claims arising out of projects built with apprentices enrolled in an apprenticeship program approved by the California Apprenticeship Council.

O

AB 903 (STEINBERG)
CONSTRUCTION DEFECT CASES

Version: 9/4/03 Last Amended
Vote: Majority
Concur

Vice-Chair: Tom Harman
Tax or Fee Increase: No

Makes technical clarifications and renumbers provisions governing home construction defects.

Policy Question

Should technical cleanup changes be made to clarify certain provisions of recent construction defect reform legislation?

Summary

This bill would make technical changes and recast provisions governing home construction defect actions that relate to a builder's election to inspect, the applicable statute of limitations, and the exclusivity of these provisions.

Senate amendments: **(1)** Revise the definition of builder; **(2)** Specify that certain provisions governing home construction defect apply to general contractors; **(3)** Specify that provisions governing home construction defect actions apply to new residential units where the purchase agreement was signed by the seller on and after January 1, 2003; and **(4)** States the intent of the Legislature that the Department of Insurance conduct a study in consultation with the representatives of the labor, insurance, and building industries, to determine whether lower rates are justified for comprehensive general liability insurance policies with respect to construction defect claims arising out of projects built with apprentices enrolled in an apprenticeship program approved by the California Apprenticeship Council.

Assembly Republican Judiciary Votes (14-0) 5/06/03
Ayes: Harman, Bates, Pacheco, Spitzer
Noes: None
Abs. / NV: None

Assembly Republican Floor Votes (76-0) 5/15/03
Ayes: All Republicans Except
Noes: None
Abs. / NV: Campbell, Daucher

Senate Republican Floor Votes (40-0) 7/17/03
Ayes: All Republicans
Noes: None
Abs. / NV: None

Assembly Republican Votes (0-0) 1/1/03
Ayes: None
Noes: None
Abs. / NV: None

Support

None on file.

Opposition

None on file.

Arguments In Support of the Bill

This bill makes technical clarifying changes to the recent construction defect reform legislation enacted last year.

Arguments In Opposition to the Bill

No significant argument raised in opposition.

Fiscal Effect

Unknown.

Comments

1. **Background.** SB 800 (Burton) of 2001-2002, Chapter 722 of 2002 Statutes specified the rights and obligations of a homeowner in bringing an action for construction defect. SB 800 revision of construction defect law included: (1) Defining construction defects to ensure performance with specified functionality standards; (2) Setting out an extensive pre-litigation process requiring homeowners to provide notice to builders regarding alleged violations and giving the builders the right to repair alleged defects before a homeowner could otherwise sue; and (3) Preserving the right of homeowners to sue if the repair is not made or is inadequate.
2. Developer and insurer groups originally sought to revise the definition of a builder in the above-mentioned legislation. However, due to a lack of consensus among interested parties, the initially proposed definition in this bill was deleted in Senate Judiciary Committee.

Policy Consultant: Mark Redmond 9/9/03
Fiscal Consultant:

AB 903 (Steinberg) **Support**
File Item #
Assembly Floor: 76-0 (5/15/03)
(AYE: All Republicans except, ABS: Campbell, Daucher)
Senate Judiciary: 6-0 (7/8/03)
(AYE: Ackerman, ABS: Morrow)
Vote requirement: 21
Version Date: 9/4/03

Quick Summary

Clarifies and makes technical changes to the construction defect reform legislation enacted last year.

Digest

Makes technical changes in the provisions of the construction defect reform legislation enacted last year.

Revises the definition of builder; specifies that certain provisions apply to general contractors.

Makes other technical changes to a builder's election to inspect and to the application of certain affirmative defenses.

Specifies that the provisions governing home construction defect actions apply to new residential units sold after January 1, 2003.

States the Legislature's intent that the Department of Insurance conduct a study, in conjunction with labor and industry representatives, to determine if lower rates are justified for construction liability policies as to projects involving apprentices.

Background

SB 800 (Burton) 2002 Cal. Stat., ch. 722 specified the rights and obligations of a homeowner in bringing an action for construction defect. That bill revised construction defect law by, inter alia: 1) Defining construction defects to ensure performance with specified functionality standards; 2) Setting out an extensive pre-litigation process requiring homeowners to provide notice to builders regarding alleged violations and giving the builders the right to repair alleged defects before a homeowner could otherwise sue and 3) Preserving the right of homeowners to sue if the repair is not made or is inadequate.

Analysis

According to the author, "In laying out the pre-litigation procedure, SB 800 [of last year, chaptered as Chapter 722 of 2002 Statutes] defined 'a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003.'

The provisions remaining are merely technical.

Support & Opposition Received

Support: Personal Insurance Federation [prior version].

Opposition: None.

Senate Republican Office of Policy/ *Mike Petersen*

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
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AB 903

THIRD READING

Bill No: AB 903
Author: Steinberg (D)
Amended: 9/4/03 in Senate
Vote: 21

SENATE JUDICIARY COMMITTEE: 6-0, 7/8/03
AYES: Escutia, Ackerman, Cedillo, Ducheny, Kuehl, Sher
NO VOTE RECORDED: Morrow

ASSEMBLY FLOOR: 76-0, 5/15/03 (Passed on Consent) - See last page for vote

SUBJECT: Construction defects

SOURCE: Author

DIGEST: This bill corrects and/or clarifies various technical errors and issues in the construction defect laws passed last year by the Legislature.

Senate Floor Amendments of 9/4/03 adds additional technical clarifying changes.

ANALYSIS: Existing law provides construction defect liability standards for newly constructed housing and a process for the resolution of construction defect disputes. [Civil Code Section 895 et seq.]

This bill contains technical cleanup to SB 800 of last year. The bill makes the following technical changes:

1. Provides additional specificity in the definition of builders to whom the law applies, and a clarification of when a home is sold for purposes of the effective date of the law.

2. Reorganizes and renumbers certain provisions to provide for clarity and ease of understanding.

3. Corrects a spelling error.

Last year, the Legislature enacted SB 800 (Burton), Chapter 722, Statutes of 2002, which made sweeping changes to the state's construction defect liability system. Among other things, SB 800 of 2002 established functionality standards for homes that serve as liability standards, and provided builders with a right to attempt a repair of an alleged defect prior to litigation. This bill contains various technical corrections and clarifications to that legislation.

Prior legislation

SB 800 (Burton), Chapter 722, Statutes of 2002, passed the Senate Floor on 8/31/02, 33-0, enacted wholesale changes to the state's construction defect liability laws.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

ASSEMBLY FLOOR:
AYES: Aghazarian, Bates, Benoit, Berg, Bermudez, Bogh, Calderon, Canciamilla, Chan, Chavez, Chu, Cogdill, Cohn, Corbett, Correa, Cox, Diaz, Dutra, Dutton, Dymally, Firebaugh, Frommer, Garcia, Goldberg, Hancock, Harman, Haynes, Jerome Horton, Shirley Horton, Houston, Jackson, Keene, Kehoe, Koretz, La Malfa, La Suer, Laird, Leno, Leslie, Levine, Lieber, Liu, Longville, Lowenthal, Maddox, Maldonado, Matthews, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nation, Negrete McLeod, Nunez, Oropeza, Pacheco, Parra, Pavley,

Plescia, Reyes, Richman, Ridley-Thomas, Runner, Salinas, Samuelian, Simitian, Spitzer, Steinberg, Strickland, Vargas, Wiggins, Wolk, Wyland, Yee

RJG:nl 9/4/03 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

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Assembly
California Legislature

DARRELL STEINBERG
ASSEMBLYMEMBER, NINTH DISTRICT
ASSEMBLY COMMITTEE ON APPROPRIATIONS, CHAIR

COMMITTEES
• HOUSING & COMMUNITY DEVELOPMENT
• JUDICIARY
• LOCAL GOVERNMENT

SELECT COMMITTEE
• CHAIR, LOW-PERFORMING SCHOOLS

September 16, 2003

The Honorable Gray Davis
Governor, State of California
State Capitol
Sacramento, CA 95814

RE: AB 903 (Steinberg) Construction Defects Clean-up Legislation

Dear Governor Davis:

I write to respectfully request your signature on Assembly Bill 903, a non-controversial bill that amends provisions of SB 800 (Burton), Chapter 722, Statutes of 2002, clarifying the intent of the legislation and making various technical changes.

SB 800, signed by you last year, made sweeping changes to the state's construction defect liability system. Among other things, SB 800 established functionality standards for homes that serve as liability standards. It also set forth an extensive pre-litigation process requiring homeowners to provide notice to builders regarding alleged violations of the functionality standards and giving builders the absolute right to attempt a repair of an alleged defect before a homeowner can sue.

As part of SB 800, we defined "builder" as "a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003." (Civil Code § 911.) This definition swept into the category of "builder" general contractors who work for developers, but are not in the business of selling residential units and thus have no control over the sale of the units. This is not what was intended.

AB 903 clarifies the definition of "builder" – expressly limiting the application of the pre-litigation process established by SB 800 to those individuals or entities who are in the business of selling residential units to the public or who are affiliated with a "builder", as for example, through a partnership. This is a non-controversial change that merely reflects the intent of the original bill. The changes to Civil Code § 911 found in AB 903 were negotiated with

representatives from the California Building Industry Association, the Consumer Attorneys of California and the Construction Employers' Association.

Other provisions of AB 903 do the following:

- Make it explicit that the liability standards established in SB 800 not only apply to builders and subcontractors, but also to general contractors. (Civil Code § 896.)
- Correct spelling errors, make grammatical changes and renumber code sections thereby providing increased clarity and ease of understanding of provisions of SB 800. (Civil Code §§ 916, 941, 942, 943.)
- Clarify that SB 800 did not change the law regarding joint and several liability or strict liability – even for builders and general contractors – and that existing common law affirmative defenses are available to general contractors as well as subcontractors and material suppliers. (Civil Code § 936.)
- Clarifies that with regard to the operative date of the bill, "originally sold" means the date the purchase agreement was signed. (Civil Code § 938.)
- Clarifies that certain listed affirmative defenses are available to general contractors, subcontractors and material suppliers in addition to builders. (Civil Code § 945.5.)
- Corrects the erroneous reference to "part" and replaces it with "title" in the section requiring builders to provide homebuyers with a written copy of the statutory "part" that contains the provisions of SB 800. (Civil Code § 912.)
- Provides uncodified intent language regarding a study by the Department of Insurance to "determine whether lower rates are justified for comprehensive general liability insurance policies with respect to construction defect claims arising out of projects built with apprentices enrolled in an apprenticeship program approved by the California Apprenticeship Council."

The provisions of AB 903 were suggested by building industry representatives, the consumer attorneys, legislative counsel and Assembly and Senate staff familiar with SB 800. All of the changes are non-controversial, consensus changes. AB 903 passed out of both houses on consent.

Thank you in advance for your consideration of this important clean-up legislation and please don't hesitate to contact me should you have any questions.

Sincerely,

DARRELL S. STEINBERG
Assemblymember

Cc: Ann Richardson, Chief Deputy Legislative Secretary

California
Building
Industry
Association

1215 K Street
Suite 1200
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916/443-7933
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www.cbia.org

September 16, 2003

The Honorable Gray Davis
Governor, State of California
State Capitol
Sacramento, California 95814

Subject: Requested Signature of AB 903 (Steinberg)

Dear Governor Davis:

The California Building Industry Association ("CBIA") respectfully requests your signature AB 903 (Steinberg). This legislation arises out of discussions with a broad range of stakeholders and represents a consensus among all of the groups.

AB 903 amends last year's SB 800 (Burton), Chapter 722, Statutes of 2002, which made sweeping changes to the state's construction defect liability system. Among other things, SB 800 of 2002 established functionality standards for homes that serve as liability standards, and provided builders with a right to attempt a repair of an alleged defect prior to litigation. AB 903 does the following:

- Amends the definition of builder to exclude general contractors who are not also landowners;
- Clarifies that SB 800 only applies to sales agreements signed after January 1, 2003;
- Specifies that homebuilders need only provide copies of SB 800 to homebuyers, rather than irrelevant parts of the Civil Code; and
- Makes explicit that SB 800's affirmative defenses also apply to general contractors, subcontractors, material suppliers and design professionals.

California's homebuilders requests you sign into law the necessary clarifications and technical changes contained in AB 903 to ensure SB 800 is applied according to its original intent.

Sincerely,

Nick Cammarota
General Counsel

CC: Assemblymember Darrell Steinberg
Pam Oto

GOVERNMENTAL
ADVOCATES, INC.
Legislative Advocacy/Governmental Affairs

September 16, 2003

The Honorable Gray Davis
Governor, State of California
State Capitol
Sacramento, CA 95814

Re: AB 903 (Steinberg) - Support

Dear Governor Davis:

On behalf of the Construction Employers' Association (CEA), which is comprised of over 100 of the largest unionized commercial and industrial general contractors in California, I am writing to respectfully request that you sign AB 903 (Steinberg) into law.

This measure clarifies several aspects of last year's SB 800 (Burton) concerning construction defects. In particular, the bill clarifies the definition of builders to whom the law applies to avoid any ambiguity in statute since CEA members are general contractors not developers.

It is for the reasons mentioned above that we respectfully request that you sign this measure into law.

Sincerely,

Scott Govenar

Cc: Assembly Member Darrell Steinberg 2114

1127 - 11th Street, Suite 400 • Sacramento, CA 95814
(916) 448-8240 • FAX: (916) 448-0816

Personal Insurance Federation of California

California's Personal Lines Trade Association
REPRESENTING THE LEADING AUTOMOBILE AND HOMEOWNERS INSURERS
Progressive • State Farm • Farmers • 21st Century Insurance Group • SAFECO

September 16, 2003

The Honorable Gray Davis
Governor, State of California
State Capitol
Sacramento, CA 95814

Re: Request Signature on AB 903 (Steinberg)

Dear Governor Davis:

The Personal Insurance Federation of California (PIFC), which represents insurers who provide construction dispute resolution insurance to subcontractors throughout the state of California, **supports AB 903** by Assembly Member Steinberg.

AB 903 would provide a clarifying definition of the term "builder" to mean "any entity or individual who, at the time of sale, was in the business of selling residential units to the public and applies to the sale of new residential units entered into contract on or after January 1, 2003, including a developer, builder or original seller." PIFC views AB 903 as a clarifying amendment on the definition of what a "builder" is. This amendment is within the spirit of the agreement reached in SB 800 (Burton/Wesson) of last session.

For the reasons stated above, **PIFC supports AB 903 and requests your signature on this measure.** We are committed to continue to work with all parties to further expand new reforms in this area to provide affordable insurance to subcontractors and affordable housing to California consumers. If you have any questions regarding our position, please contact Dan Dunmoyer or Dan Chick at (916) 442-6646.

Sincerely,

Dan Dunmoyer
President

Dan Chick
Sr. Legislative Advocate

cc: Assembly Member Steinberg, Author
Lynn Schenk, Chief of Staff
Linda Adams, Legislative Affairs Secretary
Ann Richardson, Office of the Governor
Richard Figueroa, Office of the Governor

980 NINTH STREET • SUITE 2030 • SACRAMENTO, CA 95814 • PHONE (916) 442 • 6646 • FAX (916) 446 • 9548
E-MAIL: info@pifc.org • WEBSITE: www.pifc.org

nibbi

NIBBI BROTHERS
CONSTRUCTION
1433 17TH STREET
SAN FRANCISCO
CALIFORNIA 94107
(415) 863-1820
FAX (415) 863-1150

STATE CONTRACTORS
LICENSE NO. 757497

September 19, 2003

The Honorable Gray Davis
Governor of California
State Capitol
Sacramento, CA 95814

Re: Assembly Bill 903 (Steinberg) – Support

Dear Governor Davis:

On behalf of Nibbi Brothers Construction, I am writing to respectfully request that you sign AB 903 (Steinberg) into law. Nibbi Brothers is a San Francisco-based, union-affiliated commercial building contractor employing approximately 150 people annually in this state. Our company has built a variety of private and public works projects in California.

This measure would provide the necessary technical clean-up to last year's construction defect liability legislation, SB 800 (Burton). SB 800 made far-reaching changes to California's construction defect liability system. Some of the standards set forth in SB 800 are in desperate need of clarification. One such area is the definition of "builder," which is appropriately clarified in the provisions of AB 903. Among other things, AB 903 also specifies the application of certain provisions to general contractors.

This is a reasonable measure which will help ensure that California's construction defect liability laws are fair and accurate. Therefore, I respectfully request that you sign this measure into law.

Sincerely,

NIBBI BROS. CONSTRUCTION

Larry Nibbi

LN/pm

September 22, 2003

The Honorable Gray Davis
Governor of California
State Capitol
Sacramento, CA 95814

Re: Assembly Bill 903 (Steinberg) – Support

Dear Governor Davis:

I send this letter to you, on behalf of Webcor Builders, respectfully requesting that you very seriously look at the issues at hand, considering all of the California employees involved, and sign the AB903 (Steinberg) into law. Webcor Builders is a San Mateo-based, union-affiliated commercial building contractor employing approximately 700 people in this state. Webcor has constructed a wide variety of public works projects, as well as private in the state of California.

The measure provides necessary technical clean up to last year's construction defect liability legislation, SB 800 (Burton). SB 800 made far-reaching changes to California's construction defect liability system. Certain standards set forth in SB 800 *mandate* clarification. More specifically the definition of 'builder', which is appropriately clarified in the provisions of AB 903. Among other things, AB 903 also specifies the application of certain provisions to general contractors.

This is a reasonable measure, which will help ensure that California's construction defect liability laws are fair and accurate. Urgent action under your leadership is required!!

Very truly yours,

WEBCOR BUILDERS

RM Edington

Robert M. Edington
Associate General Counsel

San Mateo Office: 951 Mariners Island Blvd., 7th Floor, San Mateo, CA 94404 • T 650.349.2727 • F 650.578.8158 • www.webcor.com
San Francisco Office: 242 California Street, San Francisco, CA 94111 • T 415.773-2370 • F 415.773.2383
Southern California Office: 520 South Grand Avenue, Suite 1240, Los Angeles, CA 90071 • T 213.239.2800 • F 213.239.2828

September 22, 2003

The Honorable Gray Davis
Governor of California
State Capitol
Sacramento, CA 95814

Re: Assembly Bill 903 (Steinberg) – Support

Dear Governor Davis:

On behalf of Webcor Builders, I am writing to respectfully request that you sign AB 903 (Steinberg) into law. Webcor Builders is a San Mateo-based, union-affiliated commercial building contractor employing approximately 700 people in this state. Our company has built a variety of private and public works projects in California.

This measure will provide the necessary technical clean up to last year's construction defect liability legislation, SB 800 (Burton). SB 800 made far-reaching changes to California's construction defect liability system. Some of the standards set forth in SB 800 are in desperate need of clarification. One such area is the definition of "builder," which is appropriately clarified in the provisions of AB 903. Among other things, AB 903 also specifies the application of certain provisions to general contractors.

This is a reasonable measure, which will help ensure that California's construction defect liability laws are fair and accurate. Therefore, I respectfully ask that you sign this measure into law.

Very truly yours,

John C. Bowles
Senior Vice President

San Mateo Office: 951 Mariners Island Blvd., 7th Floor, San Mateo, CA 94404 • T 650.349.2727 • F 650.578.8158 • www.webcor.com
San Francisco Office: 242 California Street, San Francisco, CA 94111 • T 415.773.2370 • F 415.773.2383
Southern California Office: 515 South Figueroa Street, Suite 1240, Los Angeles, CA 90071 • T 213.239.2800 • F 213.239.2828

CONSUMER ATTORNEYS OF CALIFORNIA

September 23, 2003

The Honorable Gray Davis
State Capitol, 1st Floor
Sacramento, CA 95814

Dear Governor Davis:

Consumer Attorneys of California is pleased to support AB 903, which clarifies the landmark construction defects legislation you signed last year (SB 800). AB 903 is the product of careful negotiations and represents a consensus of the parties on how the definition of builder should be amended. The bill makes it clear that general contractors with no ownership interest in the property are not considered "builders" for purposes of SB 800's pre-litigation process.

We believe that this non-controversial legislation furthers the original intent of SB 800 and we hope you will sign the bill. Thank you for considering our views.

Sincerely,

Bruce Brusavich

Bruce Brusavich
President

cc: Ann Richardson

Legislative Department

770 L Street, Suite 1200, Sacramento, CA 95814-3396 • (916) 442-6902 • FAX (916) 442-7734
info@caoc.org • www.caoc.com

Jennifer Haymore

From: Ramsey, West [West.Ramsey@dof.ca.gov]
Sent: Friday, September 26, 2003 8:53 AM
To: Ann Richardson; Armand Feliciano; Bill Lloyd; Casey Elliott; Chris Walker; Daniel Felizzatto; Geri LaDuke; Jamey Tak; Jennifer Haymore; Linda Adams; Lupita Cortez; Pam Gibbs; Pamela Oto; Shannon George
Subject: FW: E-mail EBR--AB 903 (Gov Desk List 9/24)

> -----Original Message-----
> From: Martinez, Nona
> Sent: Friday, September 26, 2003 8:44 AM
> To: Miyashiro, Robert; Ramsey, West
> Subject: FW: E-mail EBR--AB 903 (Gov Desk List 9/24)
>
>
>
> -----Original Message-----
> From: Gmeinder, Keith
> Sent: Thursday, September 25, 2003 2:17 PM
> To: Martinez, Nona
> Cc: Pimentel, Paula
> Subject: E-mail EBR--AB 903
>
> AB 903--Construction Defect Cases. Existing law specifies the rights
> and requirements of a homeowner to bring an action for construction
> defects. This bill would revise various provisions related to such
> actions. Among other things, the bill would revise the definition of
> a builder and specify the application of certain provisions to general
> contractors. It would make technical changes regarding a builder's
> election to inspect and the application of affirmative defenses. It
> would revise provisions relating to the statute of limitations. It
> would also specify that the provisions governing home construction
> defects would apply to new residential units where the seller signed
> the purchase agreement on or after January 1, 2003. DCA indicates
> that this bill would have no fiscal effect on the Contractors State
> License Board. We have no fiscal concerns with the provisions of this
> bill.
>
> Keith Gmeinder
> Principal Program Budget Analyst
> California Department of Finance
> Keith.Gmeinder@dof.ca.gov
> Phone: (916) 445-8913 Fax: (916) 327-0225
>

STATE AND CONSUMER SERVICES AGENCY

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(l)		
Department:/Board Consumer Affairs	**Bill Number/Author:** AB 903 (Steinberg/D – Sacramento)	
Sponsor(s): Author ☐ **Admin Sponsored** **Proposal No.**	**Related Bills** None	**Chaptering Order (if known)** ☐ **Attachment**
Subject: Construction Defect Cases		

SUMMARY

AB 903 would clarify the affirmative defenses available to subcontractors, design professionals, materials suppliers, individual product manufacturers and any other party subject to the specified title in construction defect litigation. Specifically, affected parties other than builders would have the same affirmative defenses specified in the construction defect statute. This bill would amend the law regarding construction defect disputes by clarifying the term "builder." This bill would correct typographical errors in the statute and reorganize procedural provisions under the statute.

PURPOSE OF THE BILL

According to the author, SB 800 (Burton, Chapter 722, Statutes of 2002) enacted reforms in the area of construction defect disputes. AB 903 would clarify the definition of builder in order to correct the possible misinterpretation that inclusion of "developer" within the definition might include general contractors who work for an owner but do not have the capacity to sell the affected property. This bill is intended also to clarify that affected parties other than builders, manufacturers in particular, would have the same specified affirmative defenses referenced in statute. AB 903 would also correct an error that was brought to the author's attention.

The author has chosen to include provisions from SB 458 (Burton) and SB 523 (Escutia) in this bill.

Departments That May Be Affected Contractors' State License Board				
☐ New / Increased Fee	☐ Governor's Appointment	☐ Legislative Appointment	☐ State Mandate	☐ Urgency Clause
Dept/Board Position ☒ Sign ☐ Veto ☐ Defer to:		**Agency Secretary Position** ☒ Sign ☐ Veto ☐ Defer to:		
Director /Chair Date Kathleen Hamilton 9/18/03		Agency Secretary Date 9/09/03		

RECOMMENDATION AND SUPPORTING ARGUMENTS

SIGN. AB 903 would favorably impact consumers by clarifying the definition of "builder" in existing construction defect law. Consumers would be able to understand more clearly what the law requires. By cross-referencing affirmative defenses in statute, AB 903 would ensure that subcontractors and other specified entities would be able to use the full range of affirmative defenses.

ANALYSIS

Existing law:

1. Defines "builder" as a builder, developer or original seller, and applies this definition to the sale of new residential units on and after January 1, 2003 [Civil Code Section 911].
2. Imposes specified prerequisites, including certain pre-litigation procedures, in order to bring an action against a builder or developer of new residential housing on and after January 1, 2003, for construction defects [Civil Code Section 895 et seq.].
3. Provides that a builder, under principles of comparative fault pertaining to affirmative defenses, may be partially or totally excused from liability if the builder can demonstrate that certain affirmative defenses apply. Those affirmative defenses include, but are not limited to, unforeseen acts of nature, damage caused by a homeowner's unreasonable conduct, and damage repaired by the builder during the right to repair [Civil Code Section 945.5].
4. Applies the same principles of comparative fault and affirmative defenses to subcontractors, design professionals, materials suppliers, and individual product manufacturers, but in a different section of the code by reference to Section 945.5 [Civil Code Sec. 936].
5. Requires builders to provide homebuyers with a written copy of the laws relating to a specified item, which must be initialed and acknowledged by the purchaser and builder [Civil Code Section 912(g)].

This bill would:

1. Revise the definition of "builder" so that it means any entity or individual, including, but not limited to a developer, builder, general contractor, contractor or original seller, who at the time of sale, was also in the business of selling residential units to the public or was in the business of building, developing or constructing residential units for the property that is the subject of the homeowner's claim.
2. Clarify that "builder" does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as a general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. Requires these nonaffiliated general contractors/contractors to be treated the same as subcontractors, material suppliers, individual product manufacturers and design professionals.
3. Correct the spelling of spoilation to spoliation. Spoliation is defined as "the destruction, or the significant and meaningful alteration of a document or instrument."
4. Reorganize a portion of Section 941 ("time limit for bringing action") relating to making a claim by placing that portion into its own section of the code.

5. Make a technical change to clarify that the provisions relating to comparative fault apply to a subcontractor, material supplier, individual product manufacturer, or design professional. This change would reference Civil Code Section 936 that refers to these entities.
6. Specify that provisions governing home construction defect actions apply to new residential units where the purchase agreement with the buyer was signed by the seller on and after January 1, 2003.
7. State legislative intent that the Department of Insurance conduct a study in consultation with specified entities to determine whether lower rates are justified for comprehensive general liability insurance policies with respect to construction defect claims arising out of projects built with apprentices enrolled in an apprenticeship program approved by the California Apprenticeship Council.
8. Correct the erroneous reference to statutory "part" and replace it with "title."

BACKGROUND

Last year, the Legislature enacted SB 800 (Burton, Chapter 722, Statutes of 2002), which made changes to the state's construction defect liability system. SB 800 specified a homeowner's rights and requirements with regard to bringing an action for construction defects. SB 800 provided builders with a right to attempt a repair of an alleged defect prior to litigation.

Clarification of Term "Builder"

Under current law, a homeowner may mistakenly bring suit against a general contractor because the homeowner believes the general contractor is the "builder" even though the general contractor is not the seller of the house. AB 903 would eliminate this potential misconception by clarifying that the definition of builders only would apply to those specified entities or individuals who sell or were in the business of building, developing or constructing, residential units for the property that is the subject of the homeowner's claim, thereby preventing contractors from being wrongfully held liable.

Affirmative Defense

An affirmative defense is a defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal or civil liability, even if it is proven that the defendant committed the alleged acts. Self-defense, insanity and necessity are some examples of affirmative defenses.

Affirmative defenses mentioned in Civil Code Section 945.5 include an unforeseen act of nature (weather condition, earthquake or manmade event(s) such as war, terrorism or vandalism); homeowner's unreasonable failure to minimize or prevent damages in a timely manner; homeowner's failure to follow the builder's or manufacturer's recommendations or commonly accepted homeowner maintenance obligations; homeowner ordinary wear and tear or by the structure's use for something other than was intended.

AB 903 would respond to concerns expressed by representatives of the window manufacturing industry that existing law, which provides manufacturers with affirmative

defenses by reference to another code section, leaves open a possibility that manufacturers will not be able to assert the full range of affirmative defenses in SB 800. To respond to these concerns, this bill would cross reference Civil Code Section 936. This section of law applies affirmative defenses to subcontractors, design professionals, materials suppliers and individual product manufacturers.

Civil Code Section 936 was added to statute through SB 800. Cross referencing Civil Code Section 936 to Civil Code Section 945.5 would close the loophole on any possibly that manufacturers would not be able to take advantage of the affirmative defenses of Civil Code Section 945.5.

AB 903 would clarify that affirmative defenses are available to subcontractors, design professionals, materials suppliers, individual product manufacturers and any other party subject to the specified title in construction defect litigation. Specifically, affected parties other than builders would have the same affirmative defenses specified in the construction defect statute.

Apprentice Construction

According to the author's office, more affordable housing (low to moderate income) is needed in California. Currently, it has become difficult for some builders, who want to build affordable housing, to obtain general liability insurance because the rates are high. It has been suggested by some people in the building industry to offer lower insurance rates to builders who use apprentice labor; however there is no data to suggest that there would be lower construction defects by using apprentice labor. Therefore, AB 903 would state legislative intent that the Department of Insurance conduct a study to determine if such lower rates would be justified. There are currently 66,000 apprentices in California. Approximately 18 percent or 12,000 apprentices are in the building and construction trades.

"Title" rather than "Part"

SB 800 created a new Title 7 in Part 2 of the Civil Code. Existing law requires builders to provide homeowners with a written copy of the entire statutory "part," although the term "title" was intended. Compliance with this statute requires builders to produce hundreds of sections of the Civil Code, rather than the relevant title.

AB 903 would correct this error that requires builders to provide homebuyers with a written copy of a statutory part where the term statutory "title" should be sufficient. This correction would clarify the provision. "Part 2" of the Civil Code contains seven different "titles," some of which are very lengthy. By using the term "title," this bill would clarify that builders only need to provide homeowners with the relevant sections of law pertaining to construction defects, as was the intent of SB 800.

LEGISLATIVE HISTORY

SB 800 (Burton, Chapter 722, Statutes of 2002) enacted major changes to the state's construction defect liability laws. SB 800 specified applicable standards for home construction, statute of limitation, burden of proof, recoverable damages and a homeowner's

obligations. SB 800 also specified detailed pre-litigation procedures and provided third-party inspectors with immunity from liability.

RELATED LEGISLATION

None.

PROGRAM BACKGROUND

Contractors' State License Board

The Contractors' State License Board (CSLB) was established in 1929 to regulate the construction industry. It currently licenses and regulates over 216,000 active licensees in more than 40 license classifications that includes general contractors, landscape contractors and swimming pool contractors.

The CSLB is responsible for investigating complaints filed by consumers against licensed and unlicensed contractors for poor workmanship and construction defects. In fiscal year 2001-2002, the CSLB received 25,764 complaints. Of those investigated and confirmed as possible violations, 1,192 complaints were arbitrated. The CSLB issued 1,086 citations to licensed contractors, and 1,128 citations to non-licensed contractors.

A fifteen-member board appoints the CSLB executive officer, or Registrar of Contractors, and directs administrative policy for the agency's operations. The 15 members include 9 public members, 5 contractor members and 1 labor representative. The Governor appoints 5 public members, the contractor members and the labor representative. The Senate Rules Committee and the Speaker of the Assembly each appoint two public members.

California Apprenticeship Council

The CAC was established by the Shelley-Maloney Apprentice Labor Standards Act of 1939. The CAC holds an open quarterly meeting to conduct the business of apprenticeship in California and fulfill its statutory responsibilities: providing policy advice on apprenticeship matters to the director of the Department of Industrial Relations, issuing rules and regulations on specific apprenticeship subjects to be published in the California Code of Regulations, and conducting appeals hearings.

As administrator of apprenticeship, the DIR's director investigates and issues determinations regarding apprentice disputes, and the CAC hears appeals of these determinations.
Of the council's 17 members, 14 are appointed by the Governor for four-year terms; six represent management, six represent labor, two represent the public. The remaining three are ex officio members representing the Chancellor of the California Community Colleges, the superintendent of public instruction, and DIR's director.

OTHER STATES' INFORMATION

Of the 50 states, only 15 (Colorado, Idaho, Illinois, Indiana, Kentucky, Maine, Minnesota, Missouri, New York, Ohio, Pennsylvania, South Dakota, Texas, Vermont and Wyoming) do not license or regulate the contracting industry.

FISCAL IMPACT

- None.

ECONOMIC IMPACT

- None.

LEGAL IMPACT

- Unknown

SUPPORT/OPPOSITION

The CSLB has no official position on AB 903.

Support:

- California Builders Industry Association
- Consumer Attorneys of California
- Construction Employers' Association

The Personal Insurance Federation of California will be sending a letter of support.

Opposition:

- None.

ARGUMENTS

Pro:

- Would provide clarity in construction defect law.
- Would potentially eliminate wrongful lawsuits against general contractors, who are not sellers of residential properties, while directing homeowners to the responsible parties.
- Would eliminate needless time and expense, especially when general contractors are being wrongfully held liable.
- Would benefit consumers' understanding of the legal requirements regarding the construction defect disputes process.

Con:

Although there is no known opposition to this legislation, it could be argued that AB 903:

- Would not necessarily eliminate general contractors who are not sellers of residential properties from being sued by aggrieved homeowners, who on general principle may name anyone connected to the alleged construction defect(s).

VOTES

Assembly Concurrence **78-0**

Senate Floor **40-0**

Assembly Floor **76-0**

LEGISLATIVE STAFF CONTACT

Katherine Demos
Legislative Analyst
Division of Legislative & Regulatory Review
Department of Consumer Affairs
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E-mail: katherine_demos@dca.ca.gov

CONFIDENTIAL-Government Code §6254(l)		
Department:/Board Housing and Community Development	**Bill Number/Author:** AB 903/Steinberg	
Sponsor: ☐ **Admin Sponsored** **Proposal No.**	**Related Bills** SB 523/Escutia, SB 458/Burton	**Chaptering Order (if known)** ☐ **Attachment**
Subject: Construction Defects: Technical Corrections to SB 800		

SUMMARY

This bill would increase the specificity, correct technical errors, re-order some of the provisions of SB 800/Burton (Ch. 722/2002), last year's comprehensive bill establishing a process for the resolution of construction defects. The bill also would express legislative intent that the Department of Insurance conduct a study regarding general liability insurance in connection with construction defect claims and apprentices.

PURPOSE OF THE BILL

The purpose of this ball is as a vehicle for non-controversial changes to SB 800/Burton (Ch. 722/2002).

RECOMMENDATION AND SUPPORTING ARGUMENTS: SIGN.

The Department of Housing and Community Development recommends that the Governor **SIGN** this bill: Increasing specificity as to covered builders, revising grammar, fixing a spelling mistake, and reordering the provisions would make no policy changes to existing provisions for the resolution of construction defects enacted last year by SB 800/Burton. Correcting the technical errors will make the provisions of SB 800 more understandable and bill implementation easier and less confusing.

Departments That May Be Affected				
☐ New / Increased Fee	☐ Governor's Appointment	☐ Legislative Appointment	☐ State Mandate	☐ Urgency Clause

Dept/Board Position	Agency Secretary Position
☒ Sign	☒ Sign
☐ Veto	☐ Veto
☐ Defer to:	☐ Defer to:
Director /Chair Date 9/26/03	Agency Secretary Date 9/29/03

ANALYSIS

This bill would:

- Include a general contractor along with subcontractor, material supplier, individual product manufacturer, or design profession in sections affecting the liability of these professionals with respect to construction defects under the SB 800 provisions.

- Include a general contractor along with a builder, developer or original seller in sections affecting the liability of these professionals with respect to construction defects under the SB 800 provisions, provided that.

    - Such individuals are those also in the business of selling residential units to the public for the property that is the subject of a homeowner's claim or in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of a homeowner's claim.

    - "Builder" does not include an entity or individual whose involvement with a residential unit that is the subject of a homeowner's claim is limited to his capacity as general contractor and who is not a partner, member, subsidiary of, or otherwise similarly affiliated with the builder. Such nonaffiliated general contractors shall be treated under SB 800 as subcontractors, material suppliers, individual product manufacturers, and design professionals.

- Clarify that the SB 800 provisions apply only to new residential units with a purchase agreement signed by the seller on or after January 1, 2003.

- Include, with a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, in SB 800 provisions for affirmative defenses in response to claimed violations.

- Express legislative intent that the Department of Insurance conduct a study, in consultation with representatives of the labor, insurance, and building industries, to determine whether lower rates are justified for comprehensive general liability insurance policies with respect to construction defect claims arising out of projects build with specified apprentices.

Existing law:

- Provides a comprehensive scheme, including functionality standards for homes that serve as liability standards, within which aggrieved homeowners and home builders address issues of construction defects.

- Provides builders a right to attempt a repair of a construction defect prior to litigation.

Comments:

The bill makes no policy changes to existing provisions but revises the grammar, improves specificity, and fixes a spelling mistake. In addition, the bill separates one section into two separate sections and renumbers the next section to allow for the insertion of the new section.

LEGISLATIVE HISTORY

SB 523/Escutia (2003) would require that a developer provide a homebuyer a copy of the statue (i.e., Title 7 of Part 2, Division 2, of the Civil Code) that governs the resolution of construction defects instead of a copy of the entire Part of the Civil Code containing those laws. (Recalled from the Governor's desk by the Legislature)

SB 458/Burton (2003) would excuse from liability, loss, damage, or other obligation, or other party (in addition to a builder) who is subject to the provisions for resolving construction defects if the party can demonstrate any of specified affirmative defenses. (Assembly Inactive File)

SB 800/Burton (Ch. 722/2002), as applicable to new, individual, housing units sold after January 1, 2003, made major substantive and procedural changes to the laws governing resolution of construction defects, including a mandated pre-trial negotiation process between a home owner and builder prior to filing a law suit.

AB 1700/Steinberg (Ch. 824/2001) revised the pre-litigation (Calderon) process for resolving construction defect actions between builders and homeowners' associations involving common interest developments (operative July 1, 2002, inoperative July 1, 2010).

SB 1029/Calderon (Ch. 864/1995) established a process for addressing construction defects in common interest developments, including a requirement that homeowners' associations serve notice to builders before pursuing construction defect litigation.

PROGRAM BACKGROUND

This Department reviews and proposes building standards for construction and rehabilitation of residential structures. These standards form the residential portion of the California Building Standards Code, which is Title 24 of the California Code of Regulations. The Department also promulgates regulations to ensure that hotels, motel, apartments, single-family dwellings, and other residential buildings are maintained in compliance with the model building codes and other more restrictive provisions of State law. The Department inspects mobilehome parks and employee housing to ensure compliance with these and other laws. In addition the Department provides technical assistance to housing advocates, community groups, and local governments on strategies to increase California's supply of housing.

Resolution of construction defects is handled between the parties and in the civil courts if the parties are unable to come to agreement.

California Supreme Court decision *Aas v. Superior Court*, (2000) 24 Cal. 4th 627, provided that builders may not be held liable in negligence for construction defects unless those defects have caused death, bodily injury, or property damage. In effect, SB 800 overrode the ruling of the California Supreme Court in *Aas v. Superior Court*, and replaced it with a standard that is less strict, but still requiring a higher burden of proof than existed before the ruling. SB 800 was considered to have struck a reasonable balance between reducing housing costs and protecting homeowners' due process rights.

SB 800 made it more difficult to sue builders in tort. Before initiating litigation, plaintiffs must show that construction defects violate certain performance-based building standards, rather than simply showing that defects exist in their homes by fault of the builder. SB 800 also required homeowners and builders to undergo a detailed prelitigation process, wherein builders have the right to offer repairs and dispute mediation. Homeowners were also granted the right to inspect and copy a wide range of information maintained by builders on their homes' design and construction.

Builders and others have maintained that housing costs remain high in part because of construction defect litigation. When builders cannot reliably predict the frequency or extent to which they face construction defect suits, they remain reluctant to enter the residential market. Builders are particularly reluctant to build affordable housing, which limits their profits while exposing them to the same or greater risk of being sued as with market rate housing. A high risk of expensive lawsuits also leads insurers to raise premiums for builders. These factors all raise the cost of housing construction.

OTHER STATES' INFORMATION

An increasing number of states allow for alternative dispute resolution in construction defect cases and other tort or breach of contract actions. Texas, Arizona, and Washington, in addition to California, have enacted right-to-repair statutes. As provided by SB 800, California is the only state requiring a specified, pre-trial procedure before initiating construction defect litigation.

FISCAL IMPACT

This bill would have no fiscal impact on this Department.

ECONOMIC IMPACT

None.

LEGAL IMPACT

None.

APPOINTMENTS

None.

SUPPORT/OPPOSITION

Support: None recorded.

Opposition: None recorded.

ARGUMENTS

Pro:

- By correcting technical errors and increasing specificity, this bill would make the intent and requirements of last year's construction defects bill clearer and less confusing.

Con:

- If the Department of Insurance conducts a study, the subject matter should include all projects where there are construction defect claims, not just projects where apprentices are involved.

VOTES

Assembly Floor			Concurrent	Senate Floor			Concurrent
DATE	AYE	NO	September 13, 2003	DATE	AYE	NO	
May 15, 2003	76	0	Passed 78/0	September 9, 2003	40	0	

LEGISLATIVE STAFF CONTACT

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Mike Herald	323-0169	498-9244	705-6016	535-8125

76'L

ENROLLED BILL MEMORANDUM TO GOVERNOR

BILL NO: AB 903 **AUTHOR:** Steinberg **DATE:** 10/21/03 **DATE DUE:** 10/12/03

ASSEMBLY: 76-0 **SENATE:** 40-0 **CONCURRENCE:** 78-0

REVIEWED BY: **RECOMMENDATION:** **Sign** ☐ **Veto** ☐

SUMMARY: This bill clarifies the affirmative defenses available to subcontractors, design professionals, materials suppliers, individual product manufacturers and any other party subject to the specified title in construction defect litigation. Specifically, affected parties other than builders would have the same affirmative defenses specified in the construction defect statute. This bill would amend the law regarding construction defect disputes by clarifying the term "builder." This bill would correct typographical errors in the statute and reorganize procedural provisions under the statute.

SPONSOR: Author

SUPPORT: Business, Transportation and Housing Agency
Department of Housing and Community Development
State and Consumer Services Agency (SCSA)
Department of Consumer Affairs
Department of Finance (No Concerns)
Governor's Office of Planning and Research (Defer to SCSA)
California Building Industry Association
Consumer Attorneys of California
Construction Employers' Association
Governmental Advocates, Inc.
Personal Insurance Federation of California

OPPOSITION: None received.

FISCAL IMPACT: No fiscal concerns.

ARGUMENTS IN SUPPORT: Consumers would be able to understand more clearly what the law requires. By cross-referencing affirmative defenses in statute, this bill would ensure that subcontractors and other specified entities would be able to use the full range of affirmative defenses. This non-controversial bill furthers the original intent of SB 800 (Burton), Statutes of 2002.

ARGUMENTS IN OPPOSITION: No substantive arguments in opposition.

BACKGROUND INFORMATION: Last year's SB 800 made sweeping changes to the state's construction defect liability system. As part of SB 800, the definition of "builder" swept into the category of "builder" general contractors who work for developers, but are not in the business of selling residential units and thus have no control over the sale of the units. This is not what was intended. According to the author, the provisions of this bill were suggested by building industry representatives, the consumer attorneys, legislative counsel and Assembly and Senate staff familiar with SB 800.

Fort, Frances

From: Jerry Zanelli [jzanelli@earthlink.net]
Sent: Tuesday, December 09, 2003 11:59 AM
To: frances.fort@asm.ca.gov
Subject: CEA MODIFICATIONS TO CONSTRUCTION DEFECTS PROPOSAL 12-3-03.doc

Construction Defects Proposal

SUBCONTRACTOR RELEASE FROM CROSS-COMPLAINT

In any lawsuit alleging construction defects, a cross-defendant may, within sixty (60) days of responding to a cross-complaint, request that the cross-complainant provide it with a statement, signed by the attorney for the cross-complainant, indicating that there is a reasonable and meritorious basis for the action against the cross-defendant and the defect category alleged by the plaintiff(s) for which the cross-complainant claims the cross-defendant is responsible. If the cross-complainant fails to provide such a signed statement within thirty (30) days thereafter, the cross-defendant may move for a dismissal, without prejudice, from the action and may seek recovery of fees and costs incurred in bringing this motion however this section may not be relied upon as a basis for recovery of any other fees and costs **and may not be cited or used as a basis for a future action for abuse of service or malicious prosecution**.

INDEMNITY PROVISIONS

Add new Civil Code Section 945.6 as follows:

Construction contracts; indemnification of promisees against liability; contracts in residential construction.

(a) For all construction contracts for residential construction as defined in Title 7 (commencing with Section 895), all provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and which purport to indemnify the promisee against liability for all claims for actionable defects, or other damages to property, arising from the negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to such promisee, or for defects in design furnished by such persons, are against public policy and are void and unenforceable; provided, however, that this provision shall not affect the validity of any insurance contract, worker's compensation or agreement issued by an admitted insurer as defined by the Insurance Code. **This section shall not prevent parties to a construction contract from negotiating and expressly agreeing to include a duty to defend in which the promisor agrees to defend the promisee for any claim or loss arising out of the construction contract. In the event the promisor provides such a defense, then the promisee may be responsible for its pro rata share of the costs of defense incurred, in relation to the promisee's liability.**

ADDITIONAL INSURED OBLIGATIONS

With regard to any insurance contract that names a party as an additional insured, the duty to defend an additional insured is limited to only those claims and causes of action which arise out of the named insured's construction contract. In any lawsuit alleging construction defects, for purposes of this statute, each type of defect claimed is a separate cause of action. The unreasonable failure of an insurer to provide a defense to an additional insured shall be deemed a waiver of this provision.

GOOD FAITH DETERMINATIONS

A finding that a settlement is a "good faith settlement" pursuant to Code of Civil Procedure section 877.6, et seq. shall, in addition to the effect thereof under other sections of this chapter, bar any and all cross-complaints for express contractual indemnity or implied contractual indemnity or breach of contract, **provided however, that any good faith settlement which seeks to bar claims for contractual indemnity must include within the settlement a dismissal and release of the indemnitee for all damages caused in whole or in part by the work of the settling party. Further, unless separately settled between the indemnitee and indemnitor, the dismissal of a contractual indemnity cross-complaint shall not include a dismissal of any claims for attorney fees and/or costs which may be owed pursuant to contract.**

HOMEOWNER'S RESPONSE TO BUILDER'S OFFER TO REPAIR

Amend Civil Code Section 918 as follows:

918. Upon receipt of the offer to repair, the homeowner shall have 30 days to authorize the builder **or their representative** to proceed with the repair. **Except for multi-family units of 10 or more, the** ~~The~~ homeowner may alternatively request, at the homeowner's sole option and discretion, that the builder provide the names, addresses, telephone numbers, and license numbers for up to three alternative contractors who are not owned or financially controlled by the builder and who regularly conduct business in the county where the structure is located. If the homeowner so elects, the builder **or their representative** is entitled to an additional noninvasive inspection, to occur at a mutually convenient date and time within 20 days of the election, so as to permit the other proposed contractors to review the proposed site of the repair. Within 35 days after the request of the homeowner for alternative contractors, the builder shall present the homeowner with a choice of contractors. Within 20 days after that presentation, the homeowner shall authorize the builder **or their representative** or one of the alternative contractors to perform the repair.

Bloomstine & Bloomstine
Governmental Relations

1100 N Street, Suite 2C, Sacramento CA 95814 • 916-444-9453 • fax 916-444-8413

December 9, 2003

Ms. Frances Fort
Assemblyman Steinberg's Office
State Capitol, Room 2114
Sacramento, CA 95814

Dear Ms. Fort:

Thank you for taking some much time in the construction defect realm of public policy. As you know, I represent the Southern California Contractors Association and their number one legislative priority is to halt the hemorrhaging of the subcontractor's general liability insurance market.

You have asked for supporting documents showing the problem that SCCA members are encountering. I tender the attached and the following.

In short, the problem is that subcontractors, in residential developments, are forced to insure work that they do not perform. As you can imagine from an insurer's perspective, insuring a subcontractor in this situation becomes a near impossible task.

SCCA has identified two culprits contributing to this situation. The first is the so-called Type 1 indemnity agreement. These agreements are found in the contracts between the subcontractors and the developer. The language originates from Civil Code Section 2782 which, in summary, prohibits a subcontractor from indemnifying a developer from damages arising out of the developer sole negligence. Hence, if a developer is 1% responsible for damages and that developer has required the subcontractors working on a project to sign a Type 1 indemnity agreement, the subcontractors are liable for all of the damages. This exposure is extremely significant considering the prevalence of construction defect claims across the state. The state should not condone, as it does, this type of agreement.

The second culprit identified by SCCA is the California Court of Appeal's decision in *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571. *Presley* requires subcontractors, in construction defect litigation, to not only tender defenses for their work, but for the work for all of the subcontractors working on a project. This is blatantly unfair and is remarkably costly.

As a result of these two culprits, long-time, legitimate contractors are being punished for work that they may not have performed and contractors that fold in relative short time are the beneficiaries of these unfair policies. I cannot help but ask: what is the public policy rationale for requiring subcontractors to insure work that they do not perform?

SCCA members have experienced doubling and tripling of their general liability insurance premiums due in large part to *Presley* and Type 1 indemnity agreements. These increases have occurred over the last two to three years.

One SCCA member, in fact, has officially closed their doors for business. Nelson and Belding, a Gardena-based grading union contractor, witnessed their premiums double last year from roughly $1 million to over $2 million. Nelson and Belding's insurer stated recently that their premiums would again

increase again in May 2004. No amount of work that Nelson and Belding could do would cover the increase costs of the premium. Today, December 9, 2003, Nelson and Belding began auctioning off their equipment. Roughly 200 union employees (mainly operators but also union mechanics and laborers) will no longer call Nelson and Belding their employer.

I have identified one document that summarizes this entire hemorrhaging problem in one paragraph. The document is titled "Notice of Motion and Motion for Determination of Good Faith Settlement" and shows a developer's counsel arguing that the developer is completely free of any liabilities in this construction defect case because the subcontractor was forced to sign a Type I indemnity agreement and because of the developer's "defense immunity" in the *Presley* decision.

We have come to a point where California law is completely shielding developers from any liabilities arising from construction defect claims.

I stand by to assist you in understanding the magnitude of the problems that I have outlined.

Very Truly Yours,

Todd A. Bloomstine

Attachments:

Lyon's Notice of Motion and Motion for Determination of Good Faith Settlement
Equitable and Express Indemnity in Residential Construction
Continental Heller and Heppler Decisions
Court of Appeals Ruling Threatens Affordable Housing
C.D Proposal

whether a settlement has been made in good faith: (1) a rough approximation of plaintiff's total recovery to the settlor's proportionate liability; (2) the amount paid in settlement; (3) the allocation of settlement proceeds among plaintiffs; (4) a recognition that settlor should pay less in settlement than he would if he were found liable after trial; (5) financial conditions and insurance policy limits of settling defendants; (6) the existence of collusion, fraud, or tortious conduct aimed to injure the interest of non-settling defendants; and (7) information available at the time of settlement. (*Id.*, at 499.)

B. The Parties Opposing the Settlement Bear the Burden of Showing That The Settlement Is Not In Good Faith.

Any party asserting a lack of good faith has the burden of proof on that issue. (California Code of Civil Procedure section 877.6(d); *Tech-Bilt, supra*, at 499.)

C. The Settlement Amounts Are Clearly Within the Reasonable Range of the Settling Parties' Liability.

(i) Lyon's and Lyon/Copley's $1,871,277 Contribution Places Lyon's and Lyon/Copley's Overall Settlement Contribution Within the Ballpark.[2]

Lyon and Lyon/Copley have a strong argument that, if the case were to proceed to trial, their ultimate liability would be zero based on their strong indemnity agreement and their widespread additional insured status under the subcontractor insurance policies. Notwithstanding

[2] In assessing Lyon's and Lyon/Copley's net proportionate liability, the court is entitled to consider that the subcontractors and their insurers will most likely be responsible for all of the Plaintiffs' damages and all of Lyon's and Lyon/Copley's defense costs if the case were to proceed to trial. Each subcontractor promised in writing to indemnify Lyon and Lyon/Copley for all claims, demands and liability incurred by Lyon and Lyon/Copley which arise out of or are connected with their scope of work. (See Exhibit "B" to the Vickers Declaration.) Based on this express indemnity agreement, Lyon and Lyon/Copley contend that they need not prove fault on the part of the subcontractor, but only that the claim, demand or liability arises out of or is connected with the subcontractor's construction of the Projects. (*Continental Heller Corporation v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 503 [61 Cal.Rptr.2d 668].) With respect to their additional insured status, Lyon tendered the defense and indemnity of this matter on March 27, 2001, under more than 230 insurance policies issued by insurers of the culpable subcontractors. Lyon and/or Lyon/Copley is named as an insured on these policies pursuant to additional insured endorsements and/or the equivalent thereto. Since most of these insurers unreasonably ignored the tenders or mishandled the claims, these insurance policies would ultimately be legally required to pay all defense costs and the entirety of any judgment. Further, regardless of the validity of the indemnity agreement, the court in *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321 [81 Cal.Rptr.2d 557], held that all damages "arising out of" a subcontractor's work must be paid for by additional insurers.

Equitable and Express Indemnity In Residential Construction

By John R. Blakely Esq.
Kring & Chung, LLP

Equitable Indemnity:

Generally speaking, indemnity arises where one party has sustained a loss and attempts to recover a portion of that loss from another allegedly liable party. For example, assume that a homeowner experiences water leaks around windows in a home due to a combination of product failure and installation deficiencies. Assume that the homeowner sues the builder and recovers damages attributable to all the window leaks.

Absent a written agreement, the loss is divided among the parties on an equitable basis. This is known as equitable indemnity and each party bears the loss in proportion to their respective liability. In our example, the builder can then bring an equitable indemnity action against the framer (window installation) and window manufacturer. A jury will ultimately decide the percentage of fault allocated to the builder, framer, and window manufacturer. The framer and window manufacturer will be required to reimburse (indemnify) the builder for their respective percentage allocation of the loss. The idea of prohibiting indemnification for a builder's negligence is not new. Arizona adopted such a statute in 1998.

Express Indemnity:

As an alternative to equitable indemnity, the parties may enter into a written indemnity agreement to apportion the risk of a future loss. Almost all residential subcontracts today contain written indemnity agreements. A written indemnity agreement is also known as express indemnity. In the construction arena, the builder is the indemnitee and the subcontractor is the indemnitor. In MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal.App.3d 413, the court outlined three types of express indemnity as follows:

Type III

In a Type III agreement, the subcontractor agrees to indemnify the builder for any loss suffered which is attributable to the subcontractor's negligence. Type III indemnity is very similar to equitable indemnity.

Type II

In a Type II agreement, the subcontractor agrees to indemnify the builder for any loss suffered which is attributable to the subcontractor's negligence as well as any loss attributable to the builder's own passive negligence.

Type I

In a Type I agreement, the subcontractor agrees to indemnify the builder for any loss suffered which is attributable to the subcontractor's negligence as well as any loss attributable to the builder's own active and/or passive negligence.

The only statutory prohibition relating to express indemnity is that the subcontractor can not indemnify the builder for the builder's sole negligence or wilful misconduct. This prohibition is codified at Civil Code Section 2782. The following is an example of a typical Type I indemnity clause:

> (a) With the exception that this Paragraph 12 shall in no event be construed to require indemnification by Subcontractor to a greater extent than permitted by the laws and the public policy of the State of California and without in any manner limiting Contractor's rights and remedies in the event of a breach of this Subcontract, Subcontractor agrees to indemnify, defend, and hold harmless Contractor, including its officers, agents, employees, affiliated parent and subsidiary companies and each of them (individually, "Indemnified Party" and collectively the "indemnified Parties") from and against any and all claims, causes of action, liabilities, losses, costs, damages and/or expenses in law or equity (including, without limitation, attorneys' fees and expenses) of every kind and nature whatsoever (collectively, the "Claims") arising out of or in connection with this Subcontract, the Work hereunder or any other work performed by Subcontractor at the Project Site provided that a Claim (i) is attributable to personal or bodily injury to or death of any person or persons, including, without limitation, employees of Subcontractor, or damage to property of any kind whatsoever, including, without limitation, loss of use thereof, or violation of Laws, as defined in Paragraph 19, and (ii) is caused in whole or in part by any act or omission to act or willful misconduct by Subcontractor, anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable, regardless of whether such injury, death or damage is caused or contributed to by any act or omission to act by Contractor, anyone directly or indirectly employed by Contractor, or anyone for whose acts Contractor may be liable. Subcontractor's obligation to indemnify and hold Contractor harmless shall apply with full force and effect regardless of any active and/or passive negligent act or omission by Contractor or its agents or employees and regardless of any concurrent negligence, whether active or passive, primary or secondary, by Contractor, by anyone directly or indirectly employed by Contractor, or by anyone for whose acts Contractor may be liable. However, Subcontractor shall have no obligation to indemnify any indemnified Party against liability for death, injury or damage or other loss, damage or expense arising solely from the negligence or willful misconduct of such indemnified Party or for defects in design furnished by Contractor, its agents or employees of independent contractors, other than Subcontractor, who are directly responsible to Contractor.

For the most part, subcontractors have no bargaining power when it comes to express indemnity. Builders generally will not negotiate the provisions and will simply find another subcontractor if there are objections to the indemnity provision.

The effect of a Type I indemnity agreement can have serious consequences for subcontractors and their insurers. Take our example from above. Assume that a homeowner experiences water leaks around windows in a home due to improper installation. Further, assume that the builder directed the framer to install the windows improperly. Both the developer and the framer would be partly responsible for the leaks. Assume that the homeowner sues the builder and recovers damages attributable to all the window leaks.

The builder can then bring an express indemnity action against the framer. Assuming the builder was not solely negligent, the framer will be required to reimburse (indemnify) the builder for the entire loss. In essence, the builder has shifted the entire risk of loss to the subcontractor and its insurer regardless of the builder's own negligence. The builder can be ninety-nine percent negligent and the subcontractor one percent negligent and the subcontractor must indemnify the builder for the entire loss.

There is a further question of whether the builder must show that the subcontractor was negligent for the indemnity provision to become operative. The courts have addressed this issue in both Continental Heller Corp. v. Amtech Mechanical Services, Inc. (1997) 53 Cal.App.4th 500 and Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265. In Continental Heller, the court held that based upon the language of the indemnity agreement there was no need to show negligence on the part of a subcontractor for the indemnity provision to be operative. The court in Heppler, however, determined that a showing of negligence was required for the express indemnity to become operative.

The Continental Heller and Heppler decisions have a significant impact on settlement negotiations in standard construction defect cases. Depending on the wording of the agreement and a court's interpretation of the agreement, it is possible that the subcontractor's duty to indemnify the builder could arise even in the absence of negligence on the part of the subcontractor.

Homebuilders are keenly aware of the availability express indemnity and the court cases interpreting them. Attorneys for the builders have gone to great lengths to draft onerous indemnity provisions for use in construction subcontracts. The ability of a builder to shift almost all risk of loss (except sole negligence and willful misconduct) to subcontractors has resulted in an exodus of insurance carriers from the California residential subcontractor market. While carriers are willing to insure subcontractors, they are not willing to take on the added risk of essentially insuring builders through express indemnity provisions. They have not collected premiums for such risks nor are they able to calculate such risks in their underwriting procedures.

A more fair and balanced approach to indemnity in the residential construction arena is pure equitable indemnity. Under such an arrangement, each party is directly responsible for their own negligence - no more. Insurance carriers are then able to underwrite the risk for each entity

without having to worry about being on the hook for another party's negligence. Those subcontractors and builders who are bad risks will eventually be priced out of the market. On the other hand, those subcontractors who are conscientious and construct a quality work product will be rewarded with lower insurance premiums.

*** John R. Blakely, Esq. is a partner with the law firm of Kring & Chung, LLP. Mr. Blakely can be reached at (909) 941-3050 or jblakely@kringandchung.com. For more information about Mr. Blakely or the firm, please visit www.kringandchung.com.**

Continental Heller Corp. v. Amtech Mechanical Services, Inc.
(1997) 53 Cal.App.4th 500

and

Heppler v. J.M. Peters Co.
(1999) 73 Cal.App.4th 1265

By John R. Blakely Esq.
Kring & Chung, LLP

In Continental Heller Corp. v. Amtech Mechanical Services, Inc. (1997) 53 Cal.App.4th 500, the court held that an indemnity provision was operative despite the fact that the indemnitor was not negligent. In 1978, Oscar Meyer hired Continental Heller to act as general contractor in connection with the expansion of one of its meat packing plants. In turn, Continental Heller subcontracted with Ralph Manns Co. (which was later acquired by Amtech) to install the ammonia refrigeration system in the expanded plant. The subcontract contained a provision whereby Amtech agreed to indemnify Continental Heller for any loss "which arises out of or is in any way connected with" Amtech's "acts or omissions" in the performance of its work.

In 1989, an explosion occurred at the meat packing plant which caused property damage and injury to several Oscar Meyer employees. The explosion was caused by the failure of a valve manufactured by another party and installed by Amtech in connection with the performance of its work under the subcontract. Various complaints were filed against Oscar Meyer and Continental Heller claiming damages resulting from the explosion. Continental Heller tendered its defense to Amtech based on the indemnity agreement contained in the subcontract. Amtech denied Continental Heller's tender. Eventually, Continental Heller settled the claims against it for $20,000.

Subsequently, Continental Heller filed suit against Amtech for reimbursement of the $20,000 as well as its attorneys fees incurred in defending the claims. The trial court specifically held that Amtech was not negligent in the installation of the valve and that Amtech's work was not the proximate cause of the leak and subsequent explosion. Nonetheless, the trial court determined that Continental Heller was entitled to indemnity from Amtech.

Amtech appealed the trial court's decision claiming that in order to establish a right to indemnity under the subcontract, Continental Heller needed to show that its loss was caused by some failure in Amtech's performance of its work. In upholding the ruling of the trial court, the appellate court stated that in order to establish a right to indemnity from Amtech under the indemnity provision, Continental Heller did not need to show that Amtech was at fault in causing Continental Heller's loss or that its performance was a "substantial" or "predominating" cause of that loss. The appellate court reasoned that the contract language showed that the parties intended that Amtech would indemnify Continental Heller regardless of whether the loss arose from Amtech's negligence or from any other cause, so long as the loss was not caused by Continental Heller's sole negligence or willful misconduct. The court further reasoned that this "allocation of risk" was reasonable in light of the fact that Amtech was in the better position to protect against a loss arising out of its work.

In Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265, the court held, among other things, that defendant subcontractors must be found negligent before rights under an express indemnity provision contained in subcontracts entered into with J.M. Peters could be exercised. The Heppler court reasoned that, despite the trial court's pre-trial ruling that the indemnity provisions (there were two provisions at issue) were Type I and Type II, a showing of fault (negligence plus causation) on the part of the subcontractors was a prerequisite to indemnity.

In 1986, J.M. Peters and three other developers entered into agreements to grade a large tract of land and construct a master development known as Crestmont. On its portion of the land, J.M. Peters developed a project of 152 single family homes known as Black Mountain Vistas North, Unit II. In connection with the construction of the Black Mountain Vista homes, J.M. Peters entered into subcontracts with various subcontractors for the grading of the land and construction of the homes. Subsequently, the Homeowners Association ("HOA") filed a lawsuit and the homeowners filed a class-action lawsuit, which were ultimately consolidated. Eventually, J.M. Peters and several subcontractors entered into a settlement with the HOA and the homeowners. As part of the settlement, J.M. Peters assigned its express indemnity rights as against four non-settling subcontractors to the HOA and the homeowners. The HOA and the homeowners proceeded to trial against the four non-settling subcontractors asserting, as one cause of action, express indemnity. Two different indemnity provisions were at issue. The first provided "To the fullest extent permitted by law, Subcontractor hereby agrees to defend, indemnify and hold Contractor harmless from all claims, demands or liability for. . .damage to property arising out of or in connection with Subcontractor's . . . performance of the Work and for any breach or default of the Subcontractor in the performance of its obligations under this Agreement. However this indemnification shall not apply if such claims, demands or liability are ultimately determined to have arisen through the sole negligence of Contractor." The second

provision provided: "Contractor does agree to indemnify and save Owner [J.M. Peters] harmless against all claims for damages to persons or to property growing out of the execution of the work, and at his own expense to defend any suit or action brought against Owner founded upon a claim of damage." The trial court, in pre-trial rulings found these provisions to be Type I and Type II, respectively, (pursuant to the guidelines set forth in MacDonald and Kruse) and reserved jurisdiction to decide the effect of the indemnity provisions after verdict if the jury found negligence and causation as to any of the non-settling subcontractors. At trial, the jury returned verdicts in favor of three of the four non-settling subcontractors and the court subsequently awarded those subcontractors their fees and costs as the "prevailing party" on the subcontracts. The HOA and the homeowners appealed, arguing that it was error for the trial court to hold that a finding of fault (negligence and causation) on the part of the subcontractors was a prerequisite to indemnity. The Court of Appeals affirmed the trial court's holding.

The Heppler holding is significant for many reasons but, most importantly, the Court of Appeals specifically distinguished Continental Heller Corp. v. Amtech Mechanical Services, Inc. (1997) 53 Cal.App.4th 500 stating that the reasoning set forth by the court in Continental Heller in support of its decision that an indemnitor can be held liable for damage regardless of a finding of fault on the part of the indemnitor was not applicable to a standard "construction defect" case. In specifically distinguishing Continental Heller, the Heppler court noted two specific differences which set the two cases apart: (1) the indemnity provision at issue in Continental Heller contained language stating that the indemnity obligation would apply "to any acts or omissions, willful misconduct or negligent conduct, whether active or passive, on the part of Subcontractor;" whereas the indemnity provisions at issue in Heppler did not contain such broad language; and, (2) Continental Heller involved a claim for damages related to the work of one subcontractor which left the subcontractor in a better position than the general contractor to protect against loss arising out of its performance; conversely, Heppler involved many subcontractors which each had only one specific job or component part of the project to perform, these subcontractors were subject to J.M. Peters' supervision, and they did not control the trades which preceded or followed them. Specifically, the court reasoned as follows:

> Turning to the indemnity provisions contained in these subcontracts, we find indemnitor fault was a prerequisite for indemnity. Given the contractual language and commercial context in which they arise, the indemnity provisions -- reasonably read -- did not obligate the subcontractors to indemnify Peters for Peters's liability unless such liability was attributable to them because of their negligent conduct . . . . The indemnity language contained in the preprinted subcontracts does not evidence a mutual understanding of the parties that the subcontractor would indemnify Peters even if its work was not negligent. Indemnity provisions are to be strictly construed against the indemnitee, and had the parties intended to include a indemnity provision that would apply regardless of the subcontractor's negligence, they would have had to use specific, unequivocal contractual language to that effect . . . . Moreover, the attendant circumstances -- subcontractors performing a limited scope of work that was to be combined with the work and materials of numerous others to build mass-produced residences -- do not support an expansive indemnity obligation. Absent specific

contractual language, the notion there was a meeting of the minds that these subcontractors would be liable if they were not negligent does not pass scrutiny. Rather, it is much more credible the parties intended the subcontractors' indemnity obligation to arise only if the subcontracts performed negligently and caused damage. (Heppler v. J.M. Peters, supra, Daily Journal D.A.R. at 8010-8011.)

The Continental Heller and Heppler decisions have a significant impact on settlement negotiations in standard construction defect cases. Depending on the wording of the agreement, and a court's interpretation of the agreement, it is possible that the subcontractor's duty to indemnify the builder could arise even in the absence of negligence on the part of the subcontractor.

*** John R. Blakely, Esq. is a partner with the law firm of Kring & Chung, LLP. Mr. Blakely can be reached at (909) 941-3050 or jblakely@kringandchung.com. For more information about Mr. Blakely or the firm, please visit www.kringandchung.com.**

Court of Appeals Ruling Threatens Affordable Housing in California

By Paul T. McBride, Esq.
Kring & Chung, LLP

Building subcontractors- framers, plasterers, drywallers, electricians, graders, etc.- will find it more difficult, if not impossible, to obtain liability insurance because of a recent California Court of Appeals decision. In *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571, the Court of Appeals ruled that an additional insured endorsement issued by a subcontractor's liability carrier to a developer requires the subcontractor's liability carrier to provide the developer with a defense to *all* claims against the developer in a construction defect lawsuit, not just the claims arising from the subcontractor's work. For example, the insurance carrier for the ceramic tile subcontractor must now defend the developer for claims relating to roof defects, stucco defects, and grading defects, not simply for claims relating to ceramic tile defects. This illogical rule will force insurance companies, in calculating premiums, to treat even the most minor subcontractors the same as developers, with catastrophic long-term results for the California building industry and housing market. We expect that defendant American States Insurance will ask the California Supreme Court to reverse this decision. However, until it does so, this is the law in California.

Subcontract agreements in the construction industry have always required the subcontractor to defend and indemnify the general contractor against claims or losses arising from the subcontractor's work. This is only fair. If the general contractor is sued for roof leaks caused by faulty work of the roofing subcontractor, the roofing subcontractor should be required to defend the suit and pay the loss. For at least the past 20 years the subcontractor's defense and indemnity obligation has typically been reinforced by an additional provision in the subcontract agreement requiring the subcontractor to have the general contractor named as an additional insured on the subcontractor's liability policy. The general contractor can then look directly to the subcontractor's insurance carrier for defense of claims arising from the subcontractor's work. This additional protection for the general contractor is especially important where the general contractor is sued several years after the project is completed and the subcontractor has gone out

of business in the interim.

The typical additional insured endorsement issued to a general contractor by a subcontractor's insurance carrier is always expressly limited to claims arising out of the subcontractor's work. Obviously, the stucco subcontractor's insurance carrier does not intend to defend the general contractor for claims arising out of the concrete subcontractor's work. However, in the *Presley* case, that is precisely what the court required.

The *Presley* case involved a typical construction defect case in which homeowners sued their builder, Presley Homes, for various construction defects. Presley Homes in turn sued its subcontractors for indemnity. Presley Homes also tendered its defense to the various insurance companies from which it held additional insured endorsements, including American States Insurance Company. American States insured the framer and the concrete subcontractor on the project, and had issued additional insured endorsements on their policies to Presley Homes at the time of construction.

American States acknowledged its additional insured obligation to Presley Homes and agreed to defend Presley Homes with respect to claims arising out of the framing and concrete subcontractors' work. However, negotiations over a cost-sharing agreement broke down and Presley Homes filed an declaratory relief action against American States seeking a ruling that American States owed Presley Homes a defense to *all* claims in the lawsuit.

The trial court ruled that American States Insurance did not have a duty to defend Presley Homes for claims not arising from the work of American States' insureds. This decision was reversed on appeal. The Court of Appeals ruled that Presley Homes was entitled to a defense by American States against all claims in the lawsuit, not simply those arising out of its insureds' work. The court acknowledged that the language in the additional insured endorsement would require only a defense of claims relating to the insureds' work. However, it overrode this language and held that, *as a matter of public policy*, the insurance company must defend all claims.

The court justified its decision by stressing the difference between an insurance carrier's duty to indemnify and its duty to defend. It acknowledged that American States had no duty to *indemnify* Presley against claims arising from other subcontractors' work. For instance, if Presley Homes eventually settled the claims relating to stucco for $100,000, American States would not have to pay this settlement amount. However, in the court's opinion, it would have a duty to pay Presley's defense costs, i.e., attorney and expert fees, connected with defending the stucco claims. It could not pick and choose which claims to defend. It could, however, sue for contribution from other insurance companies obligated to provide a defense to Presley Homes.

In reaching its decision, the Presley court relied on the California Supreme Court's decision in *Buss v. Superior Court* (1997) 16 Cal.4th 35, a case dealing with an insurance company's defense obligation when an insured is sued for various acts, some of which are covered under the policy and some of which are not. In *Buss*, the Supreme Court held that the insurance company must provide a defense to the entire action, stating: "To defend

meaningfully, the insurer must defend immediately. To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least partially covered from those that are not." The court further held that, at the end of the action, the insurance carrier could obtain reimbursement from the insured of defense costs incurred for claims on which no coverage was established.

The crucial difference between *Buss* and *Presley*, which the *Presley* court did not even address, is that *Buss* involved only one defendant, whereas *Presley* involved multiple defendants. The *Presley* ruling requires the insurance company for just one of the defendants to provide a defense for claims arising from the acts of all the other defendants. This ruling shows a lack of appreciation by the Court of Appeals of the dynamics of construction defect litigation.

In a complex construction defect lawsuit, the general contractor can easily incur attorney and expert fees in excess of $1,000,000. It seeks to recover these fees from the various insurance companies from whom it holds additional insured endorsements. Under the *Presley* ruling, the general contractor can pick just one of the additional insured carriers and force it to pay all of its defense costs. This unlucky insurance carrier picked by the general contractor then must pursue the other subcontractors' insurance carriers for contribution.

It is easy to envision a nightmare scenario for a insurance carrier under this rule. Assume Insurance Company X insured the cabinet installer on a project. The claims relating to the cabinets are relatively minor, requiring $10,000 to defend, and eventually settling for $5,000. However, as Insurance Company X is large and solvent, the general contractor tenders its defense of the entire action to it. Under *Presley*, Company X must accept this tender and pay hundreds of thousands of dollars to investigate and defend claims relating to grading, framing, roofing, stucco, drywall, and the myriad other trades involved in building a large residential project. It has the burden of pursuing all the other subcontractors' insurance carriers for contribution. Did Company X bargain for this when it calculated the insurance premium it would charge its cabinet installer insured? Obviously, it did not.

The scenario can get even worse when one considers that the general contractor, at the time of construction, does not always obtain additional insured endorsements from each trade at the job. The subcontractors agree to provide additional insured endorsements, but they sometimes fail to follow through and the general contractor lets them work on the job anyway. In our previous example, assume that the stucco subcontractor was allowed to work on the job without providing an additional insured endorsement. Therefore, the insurance carrier for the stucco subcontractor does not owe an additional insured obligation to the general contractor. To whom should Insurance Company X (the cabinet installer) look for reimbursement of its costs incurred in defending the general contractor on the stucco claims?

Insurance underwriters calculate risks and assign a premium value to those risks. However, they cannot calculate the incalculable. How does one assign a premium to the chance that a minor building subcontractor will be required to defend all claims in complex construction defect lawsuit? The easy solution is to simply decline to renew that subcontractor's insurance policy.

This is, in fact, happening. One our of clients, a drywall subcontractor, has been notified by its liability insurance carrier they his policy will not be renewed, specifically because of the *Presley* decision. We believe this will be the ultimate result of the court's decision. If it is, builders will have won a Pyrrhic victory. They will be able to more easily shift their litigation costs to their subcontractors. But who will build their homes?

*** Paul T. McBride, Esq. is a partner with the law firm of Kring & Chung, LLP. Mr. McBride can be reached at (949) 261-7700 or pmcbride@kringandchung.com. For more information about Mr. McBride or the firm, please visit www.kringandchung.com.**

C.D. PROPOSAL

SUBCONTRACTOR RELEASE FROM CROSS-COMPLAINT

In any lawsuit alleging construction defects, a cross-defendant may, within sixty (60) days of responding to a cross-complaint, request that the cross-complainant provide it with a statement, signed by the attorney for the cross-complainant, indicating that there is a reasonable and meritorious basis for the action against the cross- defendant and the defect category alleged by the plaintiff(s) for which the cross-complainant claims the cross-defendant is responsible. If the cross-complainant fails to provide such a signed statement within thirty (30) days thereafter, the cross-defendant may move for a dismissal, without prejudice, from the action and may seek recovery of fees and costs incurred in bringing this motion however this section may not be relied upon as a basis for recovery of any other fees and costs.

INDEMNITY PROVISIONS

Add new Civil Code:

(a) For all construction contracts for residential construction as defined in Title 7 (commencing with Section 895), all provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and which purport to indemnify the promisee against liability for all claims for actionable defects, or other damages to property, arising from the negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to such promisee, or for defects in design furnished by such persons, are against public policy and are void and unenforceable; provided, however, that this provision shall not affect the validity of any insurance contract, worker's compensation or agreement issued by an admitted insurer as defined by the Insurance Code.

ADDITIONAL INSURED OBLIGATIONS

With regard to any insurance contract that names a party as an additional insured, the duty to defend an additional insured is limited to only those claims and causes of action which arise out of the named insured's construction contract. In any lawsuit alleging construction defects, for purposes of this statute, each type of defect claimed is a separate cause of action. The unreasonable failure of an insurer to provide a defense to an additional insured shall be deemed a waiver of this provision.

GOOD FAITH DETERMINATIONS

A finding that a settlement is a "good faith settlement" pursuant to Code of Civil Procedure section 877.6, et seq. shall, in addition to the effect thereof under other sections of this chapter, bar any and all cross-complaints for express contractual indemnity or implied contractual indemnity or breach of contract.

JKPEDROTTI.
GOVERNMENT RELATIONS

December 9, 2003

Frances:

Enclosed are several examples of the liability insurance difficulties being experienced by contractors and sub-contractors. I could probably get many more examples if time was not an issue; however, I think the examples would just be more of what is being provided.

These examples are from my clients: Golden State Builders Exchanges (30 individual builders exchanges representing approximately 20,000 construction related businesses) and Engineering and Utility Contractors Association (specializing in heavy construction).

Please call should you have additional questions.

Sincerely,

J. Kevin Pedrotti

Telephone.916.441.3111
Facsimile.916.441.1019
email: kevin@jkpedrotti.com
www.jkpedrotti.com
1029 "J" Street, Suite 340
Sacramento, CA 95814

December 8, 2003

Mr. Bill Fong, Vice President
The Andrews Group, Inc.
1801 Walters Court
Fairfield, Ca. 94533

Re: Insurance Costs & Availability

Dear Bill:

In accordance with your request, we would like to provide you with a brief summary of the current conditions that we have to work with in terms of placing the insurance for our construction clients.

As you know, Jenkins/Athens Insurance Services is one of the largest independent insurance brokerage operations in Northern California. Our primary focus is working with clients that have premiums in excess of $100,000. We specialize in the construction industry, writing both commercial and residential. This includes general contractors, subcontractors, and homebuilders.

Listed below are a few of the issues that we face on a daily basis:

Commercial

- Minimum premium levels now at least $100,000
- Limited classes
- Non-admitted carriers writing more monoline general liability because they are the only carriers willing to issue the Additional Insured Endorsement 11/85
  - Higher deductibles
  - Creates issue of having to place property, auto & inland marine with separate carrier
- Apartments, senior housing or HUD projects that have possibility of conversion, create construction defect potential litigation problems. Thus, some carriers will not write contractors working in this area.
- Clean accounts with low loss ratios are seeing 15%-25% increases.

Corporate Headquarters
P.O. Box 5687
Concord, CA 94524-0668
PHONE 925.798.3384
TOLL FREE 800.234.5303
FAX 925.671.8533

Sacramento
1455 Response Road
Suite 260
Sacramento, CA 95815-5263
PHONE 916.925.3525
TOLL FREE 877.228.00000
FAX 916.925.3595

Los Angeles
445 South Figueroa Street
26th Floor
Los Angeles, CA 90071-1602
TOLL FREE 800.234.6762
FAX 213.629.4448

www.jenkins-athens.com

License #0536478.

Residential

- Very few general liability options for subcontractors: AIG only valid option for our subcontractors right now
- Minimum premiums of $50,000, if you can get the carrier to quote.
- Carrier unwilling to provide $2MM products aggregate
- Creates additional costs on the excess liability if project requires more than $2MM liability limits
- No Additional Insured Endorsement 11/85 availability
- If homebuilders OCIP unravel, large percentage of smaller subcontractors will have no options for their general liability needs
- We have seen rates go up 300% in last two years.

Due to excessive construction defect litigation, carriers, who previous wrote general liability for contractors in our state, made the decision to cease writing this class of business in California in order to concentration on more productive business elsewhere. The high cost of doing business in California, especially in terms of expensive and time- consuming litigation, decreased their profitability.

Bill, if you need any further information, please give me a call.

Sincerely,

Stephen Hall
Vice-President

SHH:lo

December 8, 2003

Deer Creek Heating and Air, Vina
530-839-2545

His problem is his general liability carrier dropped from a A+ rating to un-ratable. There was only 1 insurer willing to write him for current insurance at very high price.
He has no coverage on work done previously.

Four Counties Roofing, Chico
530-343-1416

Roofer: GL in 2002 was $28,000. For 2003 he only got 2 quotes, one @ $40,000 and one at $120,000 - both with major exclusions.

Hardesty & Sons, Inc, Chico
530-891-6561

2002 General Liability, $48,000. 2003: $138,000 to an out of state carrier. Only 2 California carriers would write them - the quotes were $320,000 and $631,000. They went 6 days without insurance and couldn't work.

Adams Plumbing, Marysville
530-741-9695

They filled out the renewal forms incorrectly, identifying ALL work they have ever done over 30 years (instead of just the work they would do over the next year). It included residential and condo, although they are NOT doing residential and condo now. They were not renewed, nor could they correct the error in filling out the renewal forms. Went without insurance for over a week - ended up paying more for less.

Paseo Haciendas Development, LLC, Chico
530-343-5488

This developer is trying to build 23 single family residences. Insurance costs have significantly increased the cost of each home. This raises the home rates on all homes selling, and fuels the increase in asking prices on all homes.

- It took 3 months for developer to get his insurance and it cost more than expected. Job started late -Time is Money in construction.
- The General Contractor was NOT about to get insurance, so developer now has to build as "owner/builder."
- Subcontractors have been disallowed by their insurance carriers to do work on these single family residences.
- Subcontractors who were able to get insurance to work on the houses paid "extortion" rates.

"...and the inability of contractors to build residential housing is at a crisis level. Without construction, this state would be in a world of hurt right now.

Altman General Engineering, Yuba City
530-671-1155

"I am seriously contemplating quitting the construction business ...if things do not change by April 30, 2004"

General liability used the be on payroll, then changed to gross receipts. Now it is being quoted at a $35,000 MINIMUM (it can go up but it cannot go down). Which means that during times with little or no work, I will still owe premium. This is significantly different that how I run my cash flow now.

Feather River Commercial Construction, Yuba City
530-674-1500

This is a major General Contractor in the Yuba/Sutter area. He is losing subcontractors whom he has worked with for years - those with quality and dependability. The Subs can't afford the insurance they have to buy to do the work. It used to be the General could buy an "Umbrella" policy and have the sub covered -- but that's not affordable any more either. Generals are forced to work with subs who still have coverage, regardless of their quality or dependability.

December 9, 2003
Continued...

Community Housing Improvement Program, Inc (CHIP), Chico
530-891-6931

As a General Partner in an apartment complex development, their investor and other partner required liability and Builders Risk insurance. The investor wanted a separate policy for this apartment complex; they didn't want to just be named as "Also Insured" on CHIPs existing policy. To do that, CHIP would have had to pay at least $100,000. Fortunately another option was agreed to between the partners.
CHIP advises they were renewed this year for liability at a much higher cost. They could not get a second option - no other insurer would offer coverage.

Four Seasons Roofing, Chico
530- 895-0418

13 years as a roofer, employs 59 people. No losses. Liability was expiring 10/1 so began looking for renewal in August. Was paying $160,728. Only got one quote by 10/1, the amount was over $500,000. Couldn't pay that, kept looking for insurance. All employees furloughed for 10 days because of no insurance. Worked with over 20 insurance agents to try to find insurance. After 10 days got insured for $302,484. PLUS FINANCE CHARGES! of $7,750.
History:
2001-02: $48,000
2002 - 03: $160,728
2003 - 04: $302,484

He sees other roofing companies in town not carrying liability at all, and/or paying employees cash to reduce insurance cost. This means they can do residential work for **hundreds of dollars per hour cheaper that he.**

Kevin Pedrotti

From: "Tara Haas" <thaas@EUCA.com>
To: "Kevin Pedrotti" <kevin@jkpedrotti.com>
Sent: Tuesday, December 09, 2003 12:28 PM
Subject: FW: YOUR HELP NEEDED TO REDUCE CONSTRUCTION LIABILITY INSURANCE COSTS

-----Original Message-----
From: WFOSKIR@aol.com [mailto:WFOSKIR@aol.com]
Sent: Tuesday, December 09, 2003 6:40 AM
To: Tara Haas
Subject: Re: YOUR HELP NEEDED TO REDUCE CONSTRUCTION LIABILITY INSURANCE COSTS

Tara,

Yes, my GL has increased as well about 100%. And being that we do residental work there is no market for us because nobody wants to cover residental. So that means they just throw out a huge # and we have only 2 choices, take the price or stop doing residental. In this market today there is no commercial work, public works in minimal and residental is the only thing keeping us going. I wish I could bid a job the way I get insurance quotes. Take it or go home!

Maric

Kevin Pedrotti

From: "Tara Haas" <thaas@EUCA.com>
To: "Kevin Pedrotti" <kevin@jkpedrotti.com>
Sent: Monday, December 08, 2003 4:42 PM
Subject: FW: Your help needed to reduce Construction liability Insurance costs

Info on GL insurance that you requested.

TH
-----Original Message-----
From: [redacted]
Sent: Friday, December 05, 2003 4:18 PM
To: Tara Haas
Subject: Re: Your help needed to reduce Construction liability Insurance costs

Tara, In response to your request please find the following information for your use:
We have been insured by the Travelers Ins. Co. for five(5) years and during that period with have had no (ZERO) claims against our General Liability or Umbrella Liability Policies.The following is a rate progression for each of the past three years. The amount is rate per thousand of payroll.
2001 G/L $47.04 U/L $13.81
2002 G/L $58.79 U/L $19.27
2003 G/L $66.15 U/L $24.32
% Increase 37.6% on the G/L and 65.7% on the U/L
At this rate I will be forced to close our business after a couple more renewals and a 40 year business will no longer have to taxes to the Sate of California!!! Call any questions. [redacted]

----- Original Message -----
From: thaas@euca.com
To: [redacted]
Sent: Friday, December 05, 2003 2:40 PM
Subject: Your help needed to reduce Construction liability Insurance costs

GR Committee Members,

I received the email below this morning from our lobbyist, Kevin. He is asking that we provide specific examples of the availability and affordability of construction liability insurance. Just the facts, please.

If we don't respond, then the legislature is not going to know the difficulties that you all face on this issue, so please take a moment right now to reply with a quick comment.

We need these examples by Tuesday, so please respond ASAP.

Thanks,

Tara Haas
EUCA Director of Government Relations
Direct: 925-362-7304
Email: thaas@euca.com

OK. Here is our opportunity. Construction liability insurance continues to represent a major concern. I have been part of several working groups to address issue and at end of day,

Kevin Pedrotti

From: "M Smith" <msmith@sbxchange.net>
To: "Kevin Pedrotti" <kevin@jkpedrotti.com>
Sent: Friday, December 05, 2003 3:43 PM
Subject: Fw: Construction Defect Insurance

----- Original Message -----
From: "Cathy Skeen" <cathy@excelbondsinsurance.com>
To: "Melodie Smith" <msmith@sbxchange.net>
Sent: Friday, December 05, 2003 3:40 PM
Subject: FW: Construction Defect Insurance

> Dear Kevin,
>
> As an owner of an insurance agency that specializes in contractors and
> developers, I have several examples of how bad the industry is for General
> and Sub-Contractors and would like to share with the committee:
>
> Cities, Counties, Municipalities along with developers, owners and prime
> contractors require sub-contractors to provide them with "additional
> insured" coverage's that includes completed operations coverage to the
> "additional insured". Other requirements include primary coverage,
waivers
> of subrogation, per-project liability coverage. These extensions of
> coverage have been expected and received from everyone requiring them up
> until approximately 2 years ago. Insurance companies have restricted or
> eliminated completely these endorsements and coverage extensions to the
> point contractors are unable to bid jobs because they cannot meet spec's.
> If the sub enters into an agreement with a general requiring these
> coverage's, often times they are in breach of contract because they cannot
> obtain coverage period.
>
> Insurance premiums have increased between 20% to 100% for contractors
within
> the last year with restrictions in coverage along with a tremendous
increase
> in deductibles. Previously, a contractor would have general liability
> coverage without a deductible, last year deductibles typically hovered
> around $5,000 to $10,000 for a medium sized contractor. Today that
> deductible has increased to $25,000 for contractors paying as little as
> $50,000 in premium.
>
> Additionally, most carriers now exclude mold from their coverage. This
means
> that if a plumbing contractor has a leak in a pipe he installed, the
carrier
> can refuse coverage because it turned into a "mold" claim.
>
> The above examples are for commercial contractors only. Contractors

working
> on the residential side have experienced much worse. Often times they
> cannot find coverage at any price. The developer is then forced to
purchase
> a "wrap-up" policy which will provide coverage for him, the general
> contractor and all of the sub-contractors. A wrap-up on a 20-unit
> condominium project can reach a premium excess of $1,000,000 for a
> $2,000,000 policy covering the everyone on the project!
>
> Many subcontractors that have worked on residential projects cannot find
> coverage at reasonable prices and are going out of business. An example
is
> an engineering contractor that has graded residential lots in the past;
In
> 2002, his insurance premium was $39,000 based upon $5,000,000 in receipts.
> This year, he was presented a "claims made" policy for a premium of
$99,000
> or an "occurrence" policy for $439,000 based upon the same amount of
> receipts.
>
> Because of confidentiality I cannot provide you specifics, but will tell
you
> that I completed the survey for Jim Brulte in June when he was soliciting
> information regarding the problems with workers' compensation and told him
> that comp. was not the only problem in the industry right now. Something
> significant must be done in the litigation arena before Insurance Carriers
> are willing to provide coverage's, or price it competitively.
>
> On behalf of my clients and all contractors in California, I hope changes
> can occur through legislation to limit awards, damages and time for
> defective workmanship in order for insurance carriers to come back in the
> market with adequate coverage's and pricing.
>
> Sincerely,
>
>
> A. Catherine Skeen
> Principal, Excel Bonds & Insurance Services
> 3620 American River Drive, Suite 125
> Sacramento, Ca. 95864
> (916) 971-8844
>
>
>

Fort, Frances

From: Rudy Bachmann [rbachmann@specialtyconstruction.com]
Sent: Monday, December 08, 2003 8:18 AM
To: frances.fort@asm.ca.gov
Cc: leslie@slocbe.com
Subject: RE: Construction Defects and Associated Problems with Insurance

Frances,
I'm writing to you after receiving an email from Leslie Halls our Executive Director for the Sal Luis Obispo County Contractors Exchange. I have been on the board of directors for 3 years now and have been in business in SLO County for 12 years as a General Building and General Engineering contractor working for both public and private owners. We have approximately 80 employees and do about $25 mil a year building everything thing from major pipeline line to commercial buildings.

The biggest problem that we've experienced is the associated high costs and unavailability of insurance due to the exposure for construction defects. I believe this again is due to the construction defects and the large number of trail lawyers, not to true defective construction. We have seen a great reduction in the number of subcontractors that have insurance and can even bid or work on projects especially public projects due to the stronger enforcement of insurance requirements. I know of several sub contractors that are working without insurance because they can't afford it.

For large corporations such as mine it really reduces the competition for the larger public projects because many of our competitors can not secure insurance.

The residential market in particular is very tough and I can speak to this first hand as our general liability insurance does not provide coverage for this component. For us to add this coverage it basically is down to a $200k project specific wrap policy which is only economical on projects of 10 units or more. The

If fact building codes and the inspection process have become better over time. By making changes to the construction defects laws by shorting time limits and creating greater opportunity for contractors to correct problems prior to litigating, teh construction industry and teh associated jobs created will continue. This would also reduce the costs for housing.

Thank you for considering these comments.

Sincerely,

Rudy Bachman
President
Specialty Construction, Inc.

Construction Defects Proposals

(1) Jerry Zanelli, CEA
(2) Todd Bloomstine, SCCA
(3) Kevin Pedrotti, Golden State Builders Exchanges
(4) Rudy Bachman, San Luis Obispo County Contractors Exchange

Assembly Bill No. 903

CHAPTER 762

An act to amend Sections 896, 911, 912, 916, 936, 938, 941, and 945.5 of, and to amend, renumber, and add Section 942 to, the Civil Code, relating to construction defects.

[Approved by Governor October 10, 2003. Filed with Secretary of State October 11, 2003.]

LEGISLATIVE COUNSEL'S DIGEST

AB 903, Steinberg. Construction defect cases.

Existing law specifies the rights and requirements of a homeowner to bring an action for construction defects.

This bill would revise and recast various provisions governing home construction defect actions. The bill would, among other things, revise the definition of builder and would specify the application of certain provisions to general contractors. The bill would make technical changes relating to a builder's election to inspect and the application of certain affirmative defenses, and would recast provisions relating to the applicable statute of limitations, and the exclusivity of these provisions. The bill would specify that the provisions governing home construction defect actions apply to new residential units where the purchase agreement was signed by the seller on and after January 1, 2003. The bill would also make a statement of legislative intent regarding a specified study.

The people of the State of California do enact as follows:

SECTION 1. Section 896 of the Civil Code is amended to read:

896. In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title

does not apply to or does not supersede any other statutory or common law.

(a) With respect to water issues:

(1) A door shall not allow unintended water to pass beyond, around, or through the door or its designed or actual moisture barriers, if any.

(2) Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers, including, without limitation, internal barriers within the systems themselves. For purposes of this paragraph, "systems" include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(3) Windows, patio doors, deck doors, and their systems shall not allow excessive condensation to enter the structure and cause damage to another component. For purposes of this paragraph, "systems" include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(4) Roofs, roofing systems, chimney caps, and ventilation components shall not allow water to enter the structure or to pass beyond, around, or through the designed or actual moisture barriers, including, without limitation, internal barriers located within the systems themselves. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, and sheathing, if any.

(5) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow water to pass into the adjacent structure. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashing, and sheathing, if any.

(6) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow unintended water to pass within the systems themselves and cause damage to the systems. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashing, and sheathing, if any.

(7) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to cause damage to another building component.

(8) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to limit the installation of the type of flooring materials typically used for the particular application.

(9) Hardscape, including paths and patios, irrigation systems, landscaping systems, and drainage systems, that are installed as part of the original construction, shall not be installed in such a way as to cause water or soil erosion to enter into or come in contact with the structure so as to cause damage to another building component.

(10) Stucco, exterior siding, exterior walls, including, without limitation, exterior framing, and other exterior wall finishes and fixtures and the systems of those components and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall be installed in such a way so as not to allow unintended water to pass into the structure or to pass beyond, around, or through the designed or actual moisture barriers of the system, including any internal barriers located within the system itself. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(11) Stucco, exterior siding, and exterior walls shall not allow excessive condensation to enter the structure and cause damage to another component. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(12) Retaining and site walls and their associated drainage systems shall not allow unintended water to pass beyond, around, or through its designed or actual moisture barriers including, without limitation, any internal barriers, so as to cause damage. This standard does not apply to those portions of any wall or drainage system that are designed to have water flow beyond, around, or through them.

(13) Retaining walls and site walls, and their associated drainage systems, shall only allow water to flow beyond, around, or through the areas designated by design.

(14) The lines and components of the plumbing system, sewer system, and utility systems shall not leak.

(15) Plumbing lines, sewer lines, and utility lines shall not corrode so as to impede the useful life of the systems.

(16) Sewer systems shall be installed in such a way as to allow the designated amount of sewage to flow through the system.

(17) Shower and bath enclosures shall not leak water into the interior of walls, flooring systems, or the interior of other components.

(18) Ceramic tile and tile countertops shall not allow water into the interior of walls, flooring systems, or other components so as to cause damage.

(b) With respect to structural issues:

(1) Foundations, load bearing components, and slabs, shall not contain significant cracks or significant vertical displacement.

(2) Foundations, load bearing components, and slabs shall not cause the structure, in whole or in part, to be structurally unsafe.

(3) Foundations, load bearing components, and slabs, and underlying soils shall be constructed so as to materially comply with the design criteria set by applicable government building codes, regulations, and

ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction.

(4) A structure shall be constructed so as to materially comply with the design criteria for earthquake and wind load resistance, as set forth in the applicable government building codes, regulations, and ordinances in effect at the time of original construction.

(c) With respect to soil issues:

(1) Soils and engineered retaining walls shall not cause, in whole or in part, damage to the structure built upon the soil or engineered retaining wall.

(2) Soils and engineered retaining walls shall not cause, in whole or in part, the structure to be structurally unsafe.

(3) Soils shall not cause, in whole or in part, the land upon which no structure is built to become unusable for the purpose represented at the time of original sale by the builder or for the purpose for which that land is commonly used.

(d) With respect to fire protection issues:

(1) A structure shall be constructed so as to materially comply with the design criteria of the applicable government building codes, regulations, and ordinances for fire protection of the occupants in effect at the time of the original construction.

(2) Fireplaces, chimneys, chimney structures, and chimney termination caps shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire outside the fireplace enclosure or chimney.

(3) Electrical and mechanical systems shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire.

(e) With respect to plumbing and sewer issues:

Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action may be brought for a violation of this subdivision more than four years after close of escrow.

(f) With respect to electrical system issues:

Electrical systems shall operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action shall be brought pursuant to this subdivision more than four years from close of escrow.

(g) With respect to issues regarding other areas of construction:

(1) Exterior pathways, driveways, hardscape, sidewalks, sidewalks, and patios installed by the original builder shall not contain cracks that display significant vertical displacement or that are excessive. However, no action shall be brought upon a violation of this paragraph more than four years from close of escrow.

(2) Stucco, exterior siding, and other exterior wall finishes and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall not contain significant cracks or separations.

(3) (A) To the extent not otherwise covered by these standards, manufactured products, including, but not limited to, windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, and appliances shall be installed so as not to interfere with the products' useful life, if any.

(B) For purposes of this paragraph, "useful life" means a representation of how long a product is warranted or represented, through its limited warranty or any written representations, to last by its manufacturer, including recommended or required maintenance. If there is no representation by a manufacturer, a builder shall install manufactured products so as not to interfere with the product's utility.

(C) For purposes of this paragraph, "manufactured product" means a product that is completely manufactured offsite.

(D) If no useful life representation is made, or if the representation is less than one year, the period shall be no less than one year. If a manufactured product is damaged as a result of a violation of these standards, damage to the product is a recoverable element of damages. This subparagraph does not limit recovery if there has been damage to another building component caused by a manufactured product during the manufactured product's useful life.

(E) This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure.

(4) Heating, if any, shall be installed so as to be capable of maintaining a room temperature of 70 degrees Fahrenheit at a point three feet above the floor in any living space.

(5) 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.

(6) Attached structures shall be constructed to comply with interunit noise transmission standards set by the applicable government building codes, ordinances, or regulations in effect at the time of the original construction. If there is no applicable code, ordinance, or regulation, this paragraph does not apply. However, no action shall be brought pursuant to this paragraph more than one year from the original occupancy of the adjacent unit.

(7) Irrigation systems and drainage shall operate properly so as not to damage landscaping or other external improvements. However, no

action shall be brought pursuant to this paragraph more than one year from close of escrow.

(8) Untreated wood posts shall not be installed in contact with soil so as to cause unreasonable decay to the wood based upon the finish grade at the time of original construction. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(9) Untreated steel fences and adjacent components shall be installed so as to prevent unreasonable corrosion. However, no action shall be brought pursuant to this paragraph more than four years from close of escrow.

(10) Paint and stains shall be applied in such a manner so as not to cause deterioration of the building surfaces for the length of time specified by the paint or stain manufacturers' representations, if any. However, no action shall be brought pursuant to this paragraph more than five years from close of escrow.

(11) Roofing materials shall be installed so as to avoid materials falling from the roof.

(12) The landscaping systems shall be installed in such a manner so as to survive for not less than one year. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(13) Ceramic tile and tile backing shall be installed in such a manner that the tile does not detach.

(14) Dryer ducts shall be installed and terminated pursuant to manufacturer installation requirements. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(15) Structures shall be constructed in such a manner so as not to impair the occupants' safety because they contain public health hazards as determined by a duly authorized public health official, health agency, or governmental entity having jurisdiction. This paragraph does not limit recovery for any damages caused by a violation of any other paragraph of this section on the grounds that the damages do not constitute a health hazard.

SEC. 2. Section 911 of the Civil Code is amended to read:

911. (a) For purposes of this title, except as provided in subdivision (b), "builder" means any entity or individual, including, but not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim.

(b) For the purposes of this title, "builder" does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. For purposes of this title, these nonaffiliated general contractors and nonaffiliated contractors shall be treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals.

SEC. 3. Section 912 of the Civil Code is amended to read:

912. A builder shall do all of the following:

(a) Within 30 days of a written request by a homeowner or his or her legal representative, the builder shall provide copies of all relevant plans, specifications, mass or rough grading plans, final soils reports, Department of Real Estate public reports, and available engineering calculations, that pertain to a homeowner's residence specifically or as part of a larger development tract. The request shall be honored if it states that it is made relative to structural, fire safety, or soils provisions of this title. However, a builder is not obligated to provide a copying service, and reasonable copying costs shall be borne by the requesting party. A builder may require that the documents be copied onsite by the requesting party, except that the homeowner may, at his or her option, use his or her own copying service, which may include an offsite copy facility that is bonded and insured. If a builder can show that the builder maintained the documents, but that they later became unavailable due to loss or destruction that was not the fault of the builder, the builder may be excused from the requirements of this subdivision, in which case the builder shall act with reasonable diligence to assist the homeowner in obtaining those documents from any applicable government authority or from the source that generated the document. However, in that case, the time limits specified by this section do not apply.

(b) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, the builder shall provide to the homeowner or his or her legal representative copies of all maintenance and preventative maintenance recommendations that pertain to his or her residence within 30 days of service of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(c) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all manufactured products maintenance, preventive maintenance, and limited warranty information within 30 days of a written request for those documents.

These documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(d) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all of the builder's limited contractual warranties in accordance with this part in effect at the time of the original sale of the residence within 30 days of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(e) A builder shall maintain the name and address of an agent for notice pursuant to this chapter with the Secretary of State or, alternatively, elect to use a third party for that notice if the builder has notified the homeowner in writing of the third party's name and address, to whom claims and requests for information under this section may be mailed. The name and address of the agent for notice or third party shall be included with the original sales documentation and shall be initialed and acknowledged by the purchaser and the builder's sales representative.

This subdivision applies to instances in which a builder contracts with a third party to accept claims and act on the builder's behalf. A builder shall give actual notice to the homeowner that the builder has made such an election, and shall include the name and address of the third party.

(f) A builder shall record on title a notice of the existence of these procedures and a notice that these procedures impact the legal rights of the homeowner. This information shall also be included with the original sales documentation and shall be initialed and acknowledged by the purchaser and the builder's sales representative.

(g) A builder shall provide, with the original sales documentation, a written copy of this title, which shall be initialed and acknowledged by the purchaser and the builder's sales representative.

(h) As to any documents provided in conjunction with the original sale, the builder shall instruct the original purchaser to provide those documents to any subsequent purchaser.

(i) Any builder who fails to comply with any of these requirements within the time specified is not entitled to the protection of this chapter, and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action, in which case the remaining chapters of this part shall continue to apply to the action.

SEC. 4. Section 916 of the Civil Code is amended to read:

916. (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal

representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon request, allow the inspections to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative.

(b) Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision does not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability under an action brought by a claimant.

SEC. 5. Section 936 of the Civil Code is amended to read:

936. Each and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that the general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals caused, in whole or in part, a violation of a particular standard as the result of a negligent act or omission or a breach of contract. In addition to the affirmative defenses set forth in Section 945.5, a general contractor, subcontractor, material supplier, design professional, individual product manufacturer, or other entity may also offer common law and contractual defenses as applicable to any claimed violation of a standard. All actions by a claimant or builder to enforce an express contract, or any provision thereof, against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional is preserved. Nothing in this title modifies the law pertaining to joint and several liability for builders, general contractors, subcontractors, material suppliers, individual product manufacturer, and design professionals that contribute to any specific violation of this title. However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply.

SEC. 6. Section 938 of the Civil Code is amended to read:

938. This title applies only to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003.

SEC. 7. Section 941 of the Civil Code is amended to read:

941. (a) Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion.

(b) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this title, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 of the Code of Civil Procedure in an action which has been brought within the time period set forth in subdivision (a).

(c) The limitation prescribed by this section may not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action.

(d) Sections 337.15 and 337.1 of the Code of Civil Procedure do not apply to actions under this title.

(e) Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title, except that repairs made pursuant to Chapter 4 (commencing with Section 910), with the exception of the tolling provision contained in Section 927, do not extend the period for filing an action, or restart the time limitations contained in subdivision (a) or (b) of Section 7091 of the Business and Professions Code. If a builder arranges for a contractor to perform a repair pursuant to Chapter 4 (commencing with Section 910), as to the builder the time period for calculating the statute of limitation in subdivision (a) or (b) of Section 7091 of the Business and Professions Code shall pertain to the substantial completion of the original construction and not to the date of repairs under this title. The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section.

SEC. 8. Section 942 of the Civil Code is amended and renumbered to read:

943. (a) Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title.

(b) As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law.

SEC. 9. Section 942 is added to the Civil Code, to read:

942. In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section

896), provided that the violation arises out of, pertains to, or is related to, the original construction.

SEC. 10. Section 945.5 of the Civil Code is amended to read:

945.5. A builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, under the principles of comparative fault pertaining to affirmative defenses, may be excused, in whole or in part, from any obligation, damage, loss, or liability if the builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, can demonstrate any of the following affirmative defenses in response to a claimed violation:

(a) To the extent it is caused by an unforeseen act of nature which caused the structure not to meet the standard. For purposes of this section an "unforeseen act of nature" means a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction.

(b) To the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this title. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim.

(c) To the extent it is caused by the homeowner or his or her agent, employee, general contractor, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of these schedules and recommendations and that the recommendations and schedules were reasonable at the time they were issued.

(d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose.

(e) To the extent that the time period for filing actions bars the claimed violation.

(f) As to a particular violation for which the builder has obtained a valid release.

(g) To the extent that the builder's repair was successful in correcting the particular violation of the applicable standard.

(h) As to any causes of action to which this statute does not apply, all applicable affirmative defenses are preserved.

SEC. 11. It is the intent of the Legislature that the Department of Insurance conduct a study in consultation with the representatives of the labor, insurance, and building industries, to determine whether lower rates are justified for comprehensive general liability insurance policies with respect to construction defect claims arising out of projects built with apprentices enrolled in an apprenticeship program approved by the California Apprenticeship Council.

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CALIFORNIA LEGISLATURE

2003–04 REGULAR SESSION
2003–04 FIRST EXTRAORDINARY SESSION
2003–04 SECOND EXTRAORDINARY SESSION
2003–04 THIRD EXTRAORDINARY SESSION
2003–04 FOURTH EXTRAORDINARY SESSION
2003–04 FIFTH EXTRAORDINARY SESSION

SUMMARY DIGEST

of

Statutes Enacted and Resolutions (Including Proposed Constitutional Amendment) Adopted in 2003

and

1999–2003 Statutory Record

GREGORY SCHMIDT
Secretary of the Senate

E. DOTSON WILSON
Chief Clerk of the Assembly

Compiled by
DIANE F. BOYER-VINE
Legislative Counsel

This bill would provide that, in the event of an incorporation of a new city after the revised allocation of regional housing needs, the city and county may reach a mutually acceptable agreement on that determination and report it to the council of governments and the department, or to the department for areas with no council of governments, or request the council of governments or the department to revise the determination of those housing needs, as specified.

Ch. 761 (AB 859) Nakano. Ballona Wetlands.

The Safe Neighborhood Parks, Clean Water, Clean Air, and Coastal Protection (Villaraigosa-Keeley Act) Bond Fund allocates $220,400,000 to the State Coastal Conservancy, including $25,000,000 to acquire, protect, and restore specified wetlands projects.

This bill would reappropriate $25,000,000, appropriated in the Budget Act of 2000 from that fund to the State Coastal Conservancy for the Ballona Wetlands, to the State Coastal Conservancy to acquire, protect, and restore the Ballona Wetlands, as specified.

The bill would provide that it would not become operative unless an SB 666 is enacted and takes effect on or before January 1, 2004.

Ch. 762 (AB 903) Steinberg. Construction defect cases.

Existing law specifies the rights and requirements of a homeowner to bring an action for construction defects.

This bill would revise and recast various provisions governing home construction defect actions. The bill would, among other things, revise the definition of builder and would specify the application of certain provisions to general contractors. The bill would make technical changes relating to a builder's election to inspect and the application of certain affirmative defenses, and would recast provisions relating to the applicable statute of limitations, and the exclusivity of these provisions. The bill would specify that the provisions governing home construction defect actions apply to new residential units where the purchase agreement was signed by the seller on and after January 1, 2003. The bill would also make a statement of legislative intent regarding a specified study.

Ch. 763 (AB 944) Steinberg. Property and business improvement areas: benefit assessments.

The Property and Business Improvement District Law of 1994 authorizes cities to form property and business improvement districts that may levy assessments within a district for the purpose of making improvements and promoting activities of benefit to the properties within the district.

This bill would also authorize the assessments to be levied for the purpose of making improvements and promoting activities of benefit to the businesses within the district. The bill would revise various provisions to refer to the rights and obligations under this law of property or business owners within the district. The bill would authorize a city council, by resolution, to determine that bonds should be issued to finance improvements within a district. The bill would make other related changes.

Ch. 764 (AB 1082) Laird. Public employee health care benefits: domestic partners.

Existing law authorizes public agencies that contract with the Public Employees' Retirement System (PERS) for employee and annuitant health care benefits to provide those benefits to domestic partners. For these purposes, a domestic partnership is defined according to existing state law. Employer, employee, and annuitant contributions for health care benefits are deposited in one of 2 continuously appropriated funds.

This bill would authorize a contracting agency, that adopted a local definition of domestic partnership prior to January 1, 2000, to provide health care benefits to those domestic partners. By expanding the eligibility for benefits, the bill would increase the contributions

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HON. FABIAN NUÑEZ
Speaker

HON. LELAND Y. YEE
Speaker pro Tempore

HON. SALLY J. LIEBER
Assistant Speaker pro Tempore

HON. DARIO FROMMER
Majority Floor Leader

HON. KEVIN McCARTHY
Republican Leader

E. DOTSON WILSON
Chief Clerk of the Assembly

PAM CAVILEER
Minute Clerk

A.B. No.

899 Introduced, read first time, 459; to committee, 615; from committee, re-referred, 1230; from committee, 1574; read second time, to Consent Calendar, 1597; read third time, passed, to Senate, 1712; from Senate, with amendments, 3699; Senate amendments concurred in, to enrollment, 3783; enrolled, to Governor, 3969; vetoed, 4009; Governor's veto stricken from file, 4120; request to rescind action, unanimous consent withheld, 4594; motion to rescind action carried, 4595

900 Introduced, read first time, 459; to committee, 560; from committee, re-referred, 1179; from committee, author's amendments, read second time, amended, re-referred, 1185; from committee, 1955; read second time, to third reading, 1957; read third time, passed, to Senate, 1969; from Senate, with amendments, 3699; re-referred to committee pursuant to Assembly Rule 77.2, 3792; action rescinded, returned to Senate by unanimous consent, 3800; from Senate, returned to Assembly, 3822; re-referred to committee pursuant to Assembly Rule 77.2, Joint Rule 62(a) suspended, 3824; from committee, 3864; Senate amendments containing an urgency clause, concurred in, to enrollment, 4210; enrolled, to Governor, 4241; vetoed, 4340; Governor's veto stricken from file, 4464

901 Introduced, read first time, 459; to committee, 1226; from committee, author's amendments, read second time, amended, re-referred, 1227; from committee, 1481; read second time, to third reading, 1508; read third time, passed, to Senate, 1748; from Senate, with amendments, 6574; Assembly Rule 77 suspended, Senate amendments containing an urgency clause, concurred in, to enrollment, 6590; enrolled, to Governor, 6600; Chapter 84 (2004)

902 Introduced, read first time, 460; to committee, 560; from committee, author's amendments, read second time, amended, re-referred, 747, 1139; from committee, re-referred, 1355; from committee, 1726; read second time, to Consent Calendar, 1744; read third time, passed, to Senate, 1856; from Senate, to enrollment, 2872; enrolled, to Governor, 2897; Legislative Intent, statement printed, 3038; Chapter 180 (2003)

903 Introduced, read first time, 460; to committee, 560; from committee, author's amendments, read second time, amended, re-referred, 1331, 1461; from committee, 1502; read second time, to Consent Calendar, 1524; read third time, passed, to Senate, 1709; from Senate, with amendments, 2826; returned to Senate by unanimous consent, 2838; from Senate, with amendments, 3699; to Special Consent Calendar, 3700; Senate amendments concurred in, to enrollment, 3949; enrolled, to Governor, 3979; Chapter 762 (2003)

904 Introduced, read first time, 460; to committee, 560; from committee, author's amendments, read second time, amended, re-referred, 748; from committee, to Chief Clerk pursuant to Joint Rule 56, died pursuant to Art. IV, Sec. 10(c) of the Constitution, 4485

905 Introduced, read first time, 460; to committee, 561; from committee, author's amendments, read second time, amended, re-referred, 1047; from committee, re-referred, 1289; from committee, to Chief Clerk pursuant to Joint Rule 56, died pursuant to Art. IV, Sec. 10(c) of the Constitution, 4479

906 Introduced, read first time, 460; to committee, 660; from committee, author's amendments, read second time, amended, re-referred, 1173; from committee, re-referred, 1354; from committee, 2019; taken up without reference to file, read second time, amended, returned to second reading, 2030; to third reading, 2104; read third time, passed, to Senate, 2236; from Senate, with amendments, 3598; Assembly Rule 77 suspended, 3717; Senate amendments concurred in, to enrollment, 3726; enrolled, to Governor, 3968; Chapter 494 (2003)

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HON. CRUZ M. BUSTAMANTE
President of the Senate

HON. JOHN L. BURTON
President pro Tempore

HON. GREGORY P. SCHMIDT
Secretary of the Senate

A.B. No.

902 From Assembly, read first time, 1074; to committee, 1281; from committee, re-referred to committee, 1366; committee roll call, 1375; from committee, 1785; read second time, 1822; read third time, passed, to Assembly, 1915

903 From Assembly, read first time, 976; to committee, 1105; committee roll call, 1719; from committee, 1774; read second time, amended, 1807; read third time, passed, to Assembly, 1876; from Assembly, 1890; action rescinded, read third time, amended, 2357; read second time, 2373; read third time, passed, to Assembly, 2427; Senate amendments concurred in, 2606

906 From Assembly, read first time, 1275; to committee, 1402; committee roll call, 1697; from committee, 1803; read second time, amended, re-referred to committee, 1849; from committee, 2353; read second time, amended, 2355; committee roll call, 2359; read third time, passed, to Assembly, 2382; Senate amendments concurred in, 2490

908 From Assembly, read first time, 644; to committee, 983; from committee, re-referred to committee, 1305; committee roll call, 1308; from committee, 1785; read second time, 1822; read third time, passed, to Assembly, 1915

909 From Assembly, read first time, 1098; to committee, 1281; author's amendments, 1385; 1604; committee roll call, 1717; from committee, 1782; read second time, amended, re-referred to committee, 1813; from committee, 2050; read second time, 2068; read third time, passed, to Assembly, 2199, 2205; Senate amendments concurred in, 2295

911 From Assembly, read first time, 2864; to committee, 2934; author's amendments, 3034; committee roll call, 3977; author's amendments, 4080; committee roll call, 4321; from committee, 4377; read second time, amended, re-referred to committee, 4414; from committee, 4640; read second time, amended, 4651; read third time, passed, to Assembly, 4729, 4752; Senate amendments concurred in, 4936

914 From Assembly, read first time, 1214; to committee, 1328; author's amendments, 1645; from committee, re-referred to committee, 1705; committee roll call, 1717; author's amendments, 2011, 2354; returned by committee without action, 5632

915 From Assembly, read first time, 1000; to committee, 1105; committee roll call, 1612; from committee, re-referred to committee, 1630; from committee, 1785; read second time, 1822; read third time, passed, to Assembly, 2091

918 From Assembly, read first time, 466; to committee, 983; author's amendments, 1283; from committee, 1316; committee roll call, 1325; read second time, 1338; read third time, refused passage, 1900; motion to reconsider, 1901; read third time, passed, to Assembly, 1950; Senate amendments concurred in, 2101

920 From Assembly, read first time, 1074; to committee, 1281; author's amendments, 1319, 1534; committee roll call, 1615; from committee, 1656; read second time, amended, re-referred to committee, 1689; author's amendments, 1804; from committee, 2224; committee roll call, 2237; read second time, amended, 2256; read third time, amended, re-referred to committee, 2406; from committee, re-referred to committee, 2860; author's amendments, 3651; from committee, 3974; committee roll call, 3975; read second time, 3988; read third time, passed, to Assembly, 4104, 4108; Senate amendments concurred in, 4215

921 From Assembly, read first time, 1275; to committee, 1402; committee roll call, 1756; from committee, 1777; read second time, amended, re-referred to committee, 1809; author's amendments, 3584; from committee, re-referred to committee, 3652, 3686; author's amendments, 4229; committee roll call, 4458; from committee, 4474; committee roll call, 4495; read second time, amended, re-referred to committee, 4514; from committee, 4798; read second time, 4821; read third time, passed, to Assembly, 4874; from Assembly, 5084; action rescinded, read third time, amended, 5155; ordered to inactive file, 5492; died on file, 5639

922 From Assembly, read first time, 1131; to committee, 1328; from committee, re-referred to committee, 1575; committee roll call, 1586; from committee, 1785; read second time, 1822; read third time, passed, to Assembly, 1915

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Business Arts Plaza, 3601 W. Olive Ave., 8th Floor, Burbank, California 91505-4681.

On August 12, 2016, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE FILED CONCURRENTLY WITH AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST; DECLARATION OF DANIEL J. GONZALEZ; EXHIBIT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 12, 2016, at Burbank, California.

Kathy Turner

Kathy Turner

SERVICE LIST
McMillin Albany v. Superior Court of Kern County
(Van Tassel)
Fifth District Case No.: F069370 • Supreme Court Case No. S229762

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California Court of Appeal Fifth Appellate District 2424 Ventura Street Fresno, California 93721 (559) 445-5491	Case No. F069370 Electronic Service Copy via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling)