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10 Years After Housing Boom, End of Strict Liability Statute for Latent Defects Nears

Purchasing a new home is the biggest financial decision and investment that most individuals will make during their lifetime. What happens when it is discovered that a person's dream home has a large crack running through its foundation, or when it rains for the first time and the roof and windows leak like a sieve? Housing developers have financial incentive to build projects quickly and cheaply; accordingly, construction defects can be found in the most opulent mansions of Beverly Hills, single-family tract homes, condominiums and renovated artsy lofts. While purchasers of newer construction in California may have a rudimentary concept of what construction defects are, most home buyers are uninformed about the mechanics of litigating construction defect claims, filing deadlines and the strict pre-litigation process to which they must adhere before filing a lawsuit in California. Many homeowners are unaware that they could lose the ability to seek recourse from a builder if they do not follow the statutory pre-litigation procedures and act before the statute of limitations runs out.

The following is a brief list of the applicable Code of Civil Procedure sections that govern construction defect litigation in California:

- Section 336 (Action to Enforce CC&Rs – Five Years);
- Section 337 (Action to Enforce Written Contracts/Warranties – Four Years);
- Section 337.1 (Action for Negligence or Strict Liability for Patent Defects – Four Years);
- Section 337.15 (Action for Negligence or Strict Liability for Latent Defects – Ten Years);
- Section 338 (Action for Fraud and Arguably Breach of Fiduciary Duty – Three Years);
- Section 339.5 (Action on an Oral Contract – Two Years).

In addition to the statutes listed above, owners of single-family homes must comply with California's "Right to Repair" statute before they can institute legal action. First presented as Senate Bill 800 (SB 800) and later codified as California Civil Code sections 895-945.5, the law states that homeowners must go through a very specific pre-litigation process that begins with notifying the builder in writing of the claimed defects. This written notification gives the builder the right to attempt to repair the defect before the homeowner can file suit. Once notified in writing, builders and contractors must also adhere to a detailed pre-litigation procedure; if the

requirements of SB 800 are abandoned or ignored by the builder, the homeowner is free to file a lawsuit without going through the remainder of the right to repair process.

Single-family homes are not the only structures subject to pre-litigation requirements. For condominiums and buildings with 20 or more units, the Calderon process, or California Civil Code Section 1375, similarly places a 10-year limit on latent construction defect claims and requires the Homeowners Association to submit an inventory of defects to the builder before litigation can be pursued.

The California housing boom that occurred in the mid-2000s means that hundreds of thousands of homes are about to reach the end of the 10-year strict liability statute for latent defects. Hidden defects can prove to be enormously destructive to a home if left undiscovered and unattended. Examples of hidden defects include water intrusion by way of roofs, windows or decks, and structural damage. A persistent water intrusion problem is likely the direct result of a construction error, such as failing to use a waterproofing membrane or using improper or even cheap building materials. A homeowner may not notice the problem for many years unless they are specifically looking for it, and by the time it is noticed, the damage is likely done and/or the statute of limitations has run out.

Property sellers must disclose all known defects to prospective purchasers; however, many homeowners over the past decade bought their homes brand new from a mass home builder, or from a bank as part of a foreclosure sale. As a result, these purchasers may not have received the benefit of a true and thorough disclosure. With brand new construction, defects may not have yet presented themselves at the time of sale, and with foreclosure sales, banks are exempted from the duty to disclose. Depending on the facts of the case, purchasers of a bank-owned foreclosure may still have the right to pursue a claim for latent defects against the original builder of the home, or even the bank that sold the home. Homeowners who have purchased a seven-to-nine year old home through a bank foreclosure must be particularly vigilant regarding any defects that may be present in their home – especially if they hope to make a claim under the Right to Repair statute.

Another hurdle that many prospective litigants are facing is the insertion of mandatory arbitration clauses into purchase agreements, and CC&R's that are drafted by the developers of newer communities. Arbitration is risky and disfavored by construction defect attorneys for many reasons. There are a multitude of arguments that counsel can present to navigate around mandatory arbitration clauses. An obvious defense to a claim of mandatory arbitration is that the purchase agreement is a contract of adhesion and both substantively and procedurally unconscionable.

In addition to navigating the statutory pre-litigation procedures, construction defect litigation requires working knowledge of and experience in insurance law. There are many different types of insurance policies typically purchased by builders including traditional policies, course of construction policies, and "wrap" policies that encompass and cover the subcontractors used to construct the various aspects of the home. Increasingly, attorneys bringing construction defect claims on behalf of homeowners are faced with burning or wasting limits policies. The coverage limits available under these policies are diminished or "burned" away by every dollar that is

spent defending construction defect claims brought by homeowners who have suffered damages. Particularly in cases involving wasting limits policies, an attorney must be mindful of the finesse and strategy involved in settling a case while there are still funds available on the policy to do so.

Perhaps the best way for homeowners to preserve their most valuable asset is to take a proactive approach to investigating possible construction defects. Hiring a licensed contractor to do a walk through and determine how well a house has been constructed is a good place to start. A professional can check for signs of water damage, foundation or structural damage, as well as other potentially hidden problems that can go unnoticed but easily become catastrophic if unaddressed. One of the benefits of hiring a firm that practices in the area of construction defect litigation is that they know and work with construction professionals who double as expert witnesses during litigation. Attorneys practicing in this area can refer clients or prospective clients to reliable professionals whose work product including investigation, materials, and reports can be used throughout the course and scope of litigation.

It is imperative that your homeowner clients be mindful of how the statutory scheme surrounding construction defect law could impact their claims. Construct defect litigation is a complex area of law, combining aspects of construction, litigation, insurance issues and often claims of fraud and breach of fiduciary duty. Staying informed and up-to-date on the specifics of the law is the best way to ensure that these statutes work for, rather than against you and your homeowner clients.

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