

# THE CURRENT STATUS OF CALIFORNIA LAW ON LIABILITY FOR CONSTRUCTION DEFECTS

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by Gregory R. Shaughnessy

In 2000 the decision by the California Supreme Court in Aas v. Superior Court (2000) 24 Cal. 4<sup>th</sup> 627 had a major impact on construction defect liability in California. The Court announced a significant limitation on the scope of potential recovery by plaintiffs in construction defect actions, holding that there could be no tort recovery (negligence/strict liability) for construction defects that have not actually caused property damage, even where the defects violated provisions of the building codes intended to prevent harm to life, health and property.

The Aas court reasoned: "Construction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses, do not comfortably fit the definition of 'appreciable harm' – an essential element of a negligence claim. ... The breach of a duty causing only speculative harm or the threat of future harm does not normally suffice to create a cause of action." The court concluded by stating that it could not "justify a broad rule permitting recovery of repair costs unaccompanied by property damage or personal injury."

In the aftermath of the Aas decision, in 2002 Senate Bill 800 was enacted. SB 800 applies to new construction intended to be sold as individual dwelling units, whether as single-family homes or attached units. New Civil Code §896 provides that a "builder" and other participants in the construction process shall be liable for violation of specified standards for new residential construction.

There have also been several decisions by the California Supreme Court and Courts of Appeal

that have construed the Aas decision. The passage of SB 800 and these subsequent decisions afford an opportunity to evaluate the current status of liability for construction defects in California.

The Aas decision placed considerable limits on the damages recoverable in tort for construction defects in California. Aas did not impact contract-based theories of recovery. Subsequent case law has placed further limitations on recoverable damages, clarifying that tort claims for defective construction must involve damage from the defects to "other work" and that damage that is the inevitable result of repairing the defective work probably does not qualify as "property damage." It is likely that the courts will continue to provide further guidance on the subject of the scope of recoverable damages. The recent trend of the law in California has been to limit liability for construction defects. This trend may well continue until claims are governed by SB 800, which will be quite some time in the future.

## **Negligence Per Se**

One of the biggest impacts of Aas was to drastically reduce the number of negligence per se claims. Under negligence per se, liability existed if the builder failed to build in compliance with the building codes or, more precisely, with the standards set forth in the building codes.

Prior to Aas plaintiffs would typically include in the list of construction defects any violations of building codes. This led to an amazing similarity in the defect reports from project to

project, with the usual characterization of such reports as “anything that can be wrong will be wrong.” The Aas decision, with its rule of non-liability for defects not causing property damage, caused a change. For example, in several cases that were pending at the time the Aas decision was announced, the plaintiffs no longer pursued recovery for the pure “negligence per se” building code violations - defects that were not also causing property damage. And plaintiffs became far more diligent in pursuing contract based theories such as breach of express and implied warranties, to avoid the limitations on tort recovery.

With the passage of SB 800, “negligence per se” effectively is back. Under SB 800, liability exists if the builder fails to meet the standards set forth in SB 800, regardless of whether there is property damage.

However, recall that SB 800 is limited to single family residential construction (homes and condominiums). It does not apply to commercial or institutional buildings, including apartment complexes. For these types of projects, the rule of non-liability for construction defects not causing property damage still applies. And for these types of projects, plaintiffs will be unable to simply list all the building code violations and the costs to remedy same to prove up their construction defect actions.

### **The Continuing Significance of, and Decisions After, Aas**

SB 800 only applies to new residential construction sold after January 1, 2003. Given the ten year statute of repose for bringing construction defect actions set forth in Civil Code §337.15, and the fact that the typical high stakes construction defect action on large condominium projects are brought 8 – 9 years after substantial completion of the project, SB 800 is not likely to have a significant impact on construction defect litigation for several years. Rather, for the next 6 – 7 years, clarification of issues left unresolved by the Aas decision will

form the cornerstone of developments in California law on construction defects. Several court decisions after Aas have already clarified some issues.

### **Absence of Property Damage No Bar to Breach of Warranty Claims**

In Hicks v. Superior Court (2001) the court held that proof of breach of warranty does not require proof that the product has malfunctioned but only that it contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product. The plaintiffs contended that the concrete foundations on a residential construction project included an inherently defective product the use of which was substantially certain to lead to foundation failure. The court effectively held that the absence of *current* property damage did not bar the breach of warranty claims.

While the scope of liability on breach of warranty claims was not an issue in Aas, the Hicks decision is important. If a plaintiff is in privity of contract with the seller of the allegedly defectively constructed building, the plaintiff can assert breach of warranty claims for the building code violations, and the Aas decision has no impact on such claims.

### **Property Damage to “Other Work” Is Necessary to Support Tort Claims**

In Jiminez v. Superior Court (2002) 29 Cal. 4<sup>th</sup> 473 the California Supreme Court held that manufacturers of defective windows installed in mass-produced homes may be subject to strict products liability. While the case is significant in extending strict liability to manufacturers of building materials, an important issue addressed in the decision was whether the defective work needed to cause damage to other work in order to be actionable. The Jiminez court, in dicta, suggested that it did, stating:

In summary, the economic loss rule allows a plaintiff to recover in strict products liability

in tort when a product defect causes damage to ‘other property,’ that is property *other than the product itself*. The law of contractual warranty governs damage to the product itself. [Citations]. To apply the economic loss rule, we must first determine what the product at issue is. Only then do we find out whether the injury is to the product itself (for which recovery is barred by the economic loss rule) or to property other than the defective product (for which plaintiffs may recover in tort).

The plaintiffs in Jiminez argued that the product was the entire house, not the windows in isolation, and since the only damage was to the product itself, and not to any “other property,” the economic loss rule barred recovery. The court rejected this argument, stating:

California decisional law has long recognized that the economic loss rule does not necessarily bar recovery in tort for damage that a defective product (e.g., a window) causes to other portions of a larger product (e.g., a house) into which the former has been incorporated.

Mesa Vista South Townhome Assoc. v. California Portland Cement Co. (2004) 118 Cal App. 4<sup>th</sup> 308 (petition for review denied and ordered decertified August 11, 2004) also involved allegedly defective concrete foundations on single family homes, specifically claims that the concrete was vulnerable to the severe sulfate condition in the underlying soil and that this had caused microscopic damage to the concrete and would eventually cause the concrete to disintegrate. The Court of Appeal held that this damage was sufficient to support the plaintiff’s tort theories, stating:

In sum, in the case before us, not only is there present, nonspeculative harm, in the form of current submicroscopic damage to the concrete, there will be continued degradation of the foundations, possibly

leading to the loss of structural integrity of the homes in later years.

The California Supreme Court refused to review this decision, but also took the unusual step of ordering the case decertified, which means that the decision cannot be cited as authority. While it is difficult to speculate why the court ordered the opinion decertified, the Mesa Vista court went to great lengths to distinguish the language in the Aas and Jiminez cases that appears to require property damage to other work to support tort claims for defective construction.

In the Mesa Vista case there were two major problems with the plaintiff’s claims: only one work component was involved (the cement) and the only damage was “microscopic” damage that might eventually lead to more serious damage. The Court of Appeal allowed the tort claims to proceed, but the Supreme Court, by decertifying the opinion, suggests that it did not agree with the Court of Appeal.

Contrast the decision in Mesa Vista with the decision in KB Home v. Superior Court (2003) 112 Cal. App. 4<sup>th</sup> 1076. The case involved tort claims by a developer against a furnace manufacturer to recover the costs of replacing allegedly defective furnaces. The key issue was whether the furnace was a single integrated product. If it was, then physical damage caused by the furnaces’ allegedly defective emissions control device to different components of the furnace would not constitute damage to “other property” within the meaning of the economic loss rule and the developer’s tort claims would fail. The Court of Appeal ruled that this was a question for the jury, and reversed the granting of judgment in favor of the furnace manufacturer.

In so doing, the KB Home court conceded that, under Aas and Jiminez, in order to recover in tort the damage had to be to “other property.” The court noted that the Jiminez decision “did not provide any direct guidance as to how” the crucial evaluation of whether there was damage

to “other property” was to be made, and then provided the following criteria:

[W]e believe distinguishing between “other property” and the defective product itself in a case involving component-to-component damage requires a determination whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product.

It is submitted that this “test” is not a particularly precise one and that subsequent case law will continue to explore the standards for determining whether there has been damage to “other property.”

### **Damage to Other Work Caused by Remedial Work May Not Qualify as “Property Damage”**

The decision in Carrau v. Marvin Lumber and Cedar Company (2001) 93 Cal.App.4<sup>th</sup> 281, appeared to further reduce the potential liability of developers, contractors and subcontractors for construction defects in California. The facts of the case are critical to a proper understanding of the decision.

The plaintiff bought 50 Marvin windows and installed them in his luxury home. Within 3-4 years after completion of the house, the windows were having problems, including at least one window that was leaking with some minor damage to wallpaper, sheet rock and stucco.

The plaintiff determined that all of the windows needed to be replaced. It was undisputed that replacement of the windows would also necessitate the performance of other work, such as removal and restoration of landscaping, replastering, restoring interior faux painting finishes that would be damaged by the repairs, and related work. Plaintiff obtained bids in the range of \$450,000 to replace the windows and perform the related remedial work.

The plaintiff ultimately sold the residence for \$5,250,000 and, as part of the sale, agreed to credit the purchasers with \$426,000 to cover the costs of installing the replacement windows and related work. A lawsuit by the seller against Marvin followed, which included a cause of action for strict products liability.

The court overturned the jury verdict of \$350,000 on the cause of action for strict products liability. Although the court acknowledged that “effecting repairs to the windows would cause damage to Sheetrock, stucco and landscaping,” the only evidence of actual property damage, other than the defective windows, was a few hundred dollars worth of damage to sheetrock and wallpaper, and as a matter of fact the plaintiff did not pay for the costs of repairing the damage - the purchaser of the house paid for it. Implicit in the court’s analysis, however, is the principal that these collateral repair costs do not constitute “property damage,” a significant limitation.

The Carrau court also went on to hold that the plaintiff could not recover damages based on the diminution in value to the residence resulting from the installation of defective windows, stating: “[W]hen the value of the home was diminished by the use of Marvin’s products, [the plaintiff] lost an economic benefit. He is not entitled to recover that benefit on a theory of products liability.”

Carrau appears to be authority that no tort recovery is allowed for the costs of repairing collateral damage necessarily caused in repairing construction defects, and suggests that the recovery of the costs of getting to the defects is also barred, at least in the absence of significant resulting damage actually caused by the construction defect.

### **Owner Who Suffered Economic Injury Has Standing to Sue for Construction Defects**

Siegel v. Anderson Homes (2004) 118 Cal. App. 4<sup>th</sup> 994, addressed the issue of standing to assert

construction defect claims. The lawsuit alleged that the plaintiffs were the subsequent purchasers of homes that contained numerous pre-existing defects, including structural damage, that they discovered only after having purchased the homes. The trial court granted a motion to exclude evidence of the defects on the ground that the defects had given rise to causes of action in the original owners such that, absent assignment of rights by the original owners, the plaintiffs lacked “standing” to bring the action.

The Court of Appeal reversed, essentially holding that the subsequent purchasers did have standing to assert the construction defect claims, stating:

The answer seems to be that the cause of action belongs to the owner who first discovered, or ought to have discovered, the property damage. It is only then that some entity capable of maintaining a legal claim will have suffered a compensable injury, e.g., the cost of repair and/or the loss in the property’s value (inasmuch as the owner then has a duty to disclose the damage to potential buyers).

Gregory R. Shaughnessy specializes in construction and regularly advises owners, general contractors and subcontractors on their legal rights and remedies and in the negotiating and drafting of general contracts, subcontracts and related documents.

For more information about the issues discussed in this article, Mr. Shaughnessy can be reached at (415) 435-2409

E-Mail: [grs@grs-law.com](mailto:grs@grs-law.com)

Website: [www.grs-law.com](http://www.grs-law.com)