

# CALIFORNIA DECISION FURTHER LIMITS POTENTIAL LIABILITY FOR CONSTRUCTION DEFECTS

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Continuing a trend, the recent 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.

By way of background, in Aas v. Superior Court (2000) 24 Cal. 4<sup>th</sup> 627, the California Supreme 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 applicable 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.”

The Aas decision left several important issues unsettled, including the definition of what constitutes “property damage,” and whether diminution in value may be an alternate basis for measuring damages.

In the Carrau decision some of these unanswered questions were addressed. The plaintiff bought 50 Marvin windows and installed them in the luxury home he built in Orinda. The windows had been treated with an ineffective preservative, with the result that they were subject to premature rotting. 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. Marvin refused to pay, although it did furnish 50 replacement windows.

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. A lawsuit by the seller against Marvin followed, which included causes of action for breach of warranty and strict products liability.

The court rejected plaintiff’s breach of warranty claim, applying the four year statute of limitations in California Commercial Code section 2725 and finding that plaintiff failed to file suit within four years of delivery of the windows.

The court then addressed the cause of action for strict products liability, for which the trial court had awarded plaintiff \$350,000. The Court of Appeal reversed this award, relying on the Aas decision and broadly characterizing Aas as holding that “a plaintiff is not entitled to recover in tort for the costs of repairing and replacing a defective product; recovery for those costs is available only under contract or breach of warranty law.”

The Carrau court appeared to sidestep the issue of whether the damage to sheetrock, stucco, and landscaping that would inevitably result from the window repairs constituted “property damage” so as to allow for recovery in tort. The court simply found that the plaintiff “did not pay for the costs of repairing this damage,” and, therefore, could not recover damages for costs that were not incurred. 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.”

The potential significance of the Carrau decision is profound. In the aftermath of the Aas decision, commentators noted that the rule of “non-liability for construction defects not causing property damage” stated in Aas only applies to tort claims, such as strict liability in tort and negligence, and does not apply to contractual claims, such as breach of warranty or contract. Carrau emphasizes that the time period for bringing suit on these contract based theories may expire much earlier than the time within which tort claims may be brought. For example, applying the simple 4 year statute of limitations for breach of a written contract, the deadline for

filing suit to recover for construction defects not causing property damage may be 4 years from the date of the sale of improved real property.

Further, while Aas made it clear that there was no tort liability for the costs to remedy defects NOT causing property damage (missing holddowns, improperly nailed sheetrock, undersized electrical services, excessive sound transmission), Carrau appears to hold that no recovery is allowed for the costs of repairing collateral damage necessarily caused in repairing the 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. While Carrau involved claims against a window manufacturer, its logic and the breadth of its holding appear to apply with equal force to contractors and subcontractors. Thus, tort recovery for construction defects appears limited to the costs of repairing resulting damage caused by the defects, absent further and imaginative theories from the plaintiffs’ bar.

Finally, the rule of non-recovery for diminution in value stated in Carrau may be open to interpretation or expansion. If, in fact, there was substantial water intrusion and resulting damage, and these costs were quantified during the sale, there would appear to be no reason to disallow plaintiff’s tort recovery for these damages. In Carrau, the court was faced with a difficult factual scenario in that the plaintiff had not actually incurred the repair costs it sought to recover as damages, and the repair costs represented either the costs to repair the windows (clearly not recoverable under Aas) or the costs to repair damage that would occur during the repair (which the court held could not be recovered), as opposed to damage that had ALREADY resulted as of the time of the sale of the residence (which costs were nominal).

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