

SB 800: A Poorly Drafted Law Leaves Many Transition Issues to Be Litigated

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The kinds of questions attorneys are hearing since passage of Senate Bill 800 reflect the widespread uncertainties and misunderstandings surrounding the law.

The general contractor on a 200-unit condominium project completed before January 1, 2003, the effective date of SB 800, is notified by the developer that the contractor is the "builder" under SB 800 and that the developer plans on listing the contractor as the "builder" in all disclosures to buyers. Is the general contractor really the SB 800 builder?

A roofing subcontractor receives an "SB 800 Addenda" from the developer of a multi-unit townhouse project completed before January 1, 2003, that demands the subcontractor fulfill all warranty obligations under SB 800 without any offer of additional compensation. Must the subcontractor accede to this uncompensated burden?

This article will focus on the transitional aspects of SB 800: projects that were partially constructed or partially sold as of January 1, 2003. Because it is in the interest of all builders, contractors and subcontractors to minimize the number of projects to which SB 800 applies and to thereby expand the application of *Aas v. Superior Court*, 24 Cal.4th 627 (2002), this article also will explore arguments for avoiding the application of SB 800 to transitional condominium projects.

Some background on SB 800 is needed to set the stage for discussing its application.

The Law

SB 800 was signed into law on September 20, 2002, by Gov. Davis. It applies to new construction intended to be sold as individual dwelling units, whether as single-family homes or attached units. It was sought by plaintiffs' attorneys in response to the *Aas* decision, which precluded recovery in tort for construction defects that had not yet caused property damage or physical injury. SB 800 is codified at Civil Code §§895, *et seq.*

The Builder

Civil Code §911 defines a "builder" under SB 800 as "a builder, developer, or original seller and applies to the sale of new residential units on and after January 1, 2003." The entity actually

selling the new residential unit to the public almost certainly will be considered the "builder" under SB 800. The statute does not expressly refer to general contractors and leaves unclear whether they are SB 800 "builders." While "builder" is defined as "a *builder*, developer, or original seller," a general contractor would not be in a position to provide much of the documentation and disclosures required of "builders" by SB800.

The Standards

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. In general, the standards set forth performance requirements (doors, windows and roofs should not leak; foundations should not be structurally unsafe).

Transition Problems

Two significant issues regarding the scope of SB 800 are:

- The extent to which both developers and general contractors/subcontractors can be held liable for violation of the standards on transitional projects.
- Which types of transitional condominium projects fall within SB 800.

General Contractor/Subcontractor Liability

SB 800 places a much greater burden on developers than prior law. A "builder" is, in effect, strictly liable for violation of the standards because Civil Code §941 requires only evidence of failure to meet an applicable standard in order to impose liability.

General contractors and subcontractors can be involved in the SB 800 process because Civil Code §936 provides that the statute applies to "subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that [they] caused... a violation of a particular standard as the result of a negligent act or omission or a breach of contract."

Thus, under §936, parties other than the "builder" are liable only when they are proved to have been negligent or to have breached a contract. But, "builders" will attempt to pass through their strict liability to third parties, including subcontractors, by means of flow-down, warranty and indemnity clauses in contracts.

If the contractor/subcontractor entered into the contract/subcontract before January 1, 2003, it may argue that the SB 800 standards do not apply because the statutory standards did not exist at the time of contracting. If the argument prevails, the statutory standards cannot be used to impose statutory liability on contractors/subcontractors for transitional projects. Thus, a "builder" could be liable under the standards but would need another legal basis to pass that liability on to its contractor/subcontractors.

Further, to the extent that the SB 800 standards impose liability on contractors/subcontractors in excess of what existed under prior law, an argument can be made that the standards are unenforceable as an unconstitutional interference with contractual rights and obligations between the general contractor and subcontractors and between the developer and general contractor. While developers making such an argument will face the response that they can pass on their added SB 800 costs to the public by increasing the price of units for sale, contractors/subcontractors on transitional projects do not have that option. They are locked into contractual prices negotiated before SB 800 took effect. While constitutional challenges to regulatory legislation usually are longshots, courts have tempered some prior changes in substantive law by applying them only prospectively and not retrospectively, particularly when contracts have been made in reliance on the prior state of the law.

Timing Issues for Condominium Projects

There is no clearly stated commencement date for causes of action for violation of SB 800 standards. Civil Code §911 is titled “ ‘Builder’ Defined” but appears to also provide an effective date: “applies to the sale of new residential units on or after January 1, 2003.” The term “sale” is not defined in SB 800. In the case of a single-family home or townhouse, however, there is no uncertainty as to the meaning of “sale.”

But, in the case of claims for common area defects on condominium projects -- traditionally the most hotly contested and litigated type of construction defect action -- it is necessary to refer to several different clauses to determine an effective date because there is no “sale” of the common area. The term "sale" in §911 probably has the same meaning as "close of escrow" in §895 (e), which provides:

"Close of escrow" means the date of the close of escrow between the builder and the original homeowner. With respect to claims by an association, as defined in subdivision (a) of Section 1351, "close of escrow" means the date of substantial completion, as defined in Section 337.15 of the Code of Civil Procedure, or the date the builder relinquishes control over the association's ability to decide whether to initiate a claim under this title, whichever is later.

Thus, the word "sale" in §911 almost certainly means the date of relinquishment of control over the association. If so, SB 800 applies to condominium projects on which the builder relinquished control after January 1, 2003.

But, the meaning of “relinquishment of control” is not defined in SB 800. Developers will argue for the earliest possible date -- probably the earlier of the date that a majority of the association’s board of directors was not elected/appointed by the developer or the date when the developer sold 50 percent of the units. The association will argue for the latest possible date -- probably the date on which the developer no longer had the power to elect the majority of the members of the board of directors. (Some CC&Rs give developer votes up to five times the voting power of homeowner votes.) Given the lack of definition of “relinquishment of control” and the high stakes involved, there is a substantial probability that this issue will be litigated.

SB 800 also appears intended to apply to condominium projects for which sales began before January 1, 2003 – with results that could be inconsistent. The Legislature could have eliminated many transitional questions by providing that SB 800 applied only to projects for which construction began after January 1, 2003, or for which construction contracts were signed after January 1, 2003. But, the Legislature chose to apply SB 800 to sales completed after January 1, 2003. Thus, one unit, sold before January 1, 2003, is not protected by SB 800 while an adjoining unit, sold after January 1, could be protected. Nor is the developer likely to have been able to comply with SB 800's detailed documentation and disclosure requirements for all units sold before January 1, 2003. Yet, the developer still would be liable for ensuring that all common areas of the project, including the interests of pre-2003 buyers, met the standards.

Whether SB 800 ultimately is able to strike a balance between the legitimate concerns of homeowners on the one hand and developers, contractors and subcontractors on the other hand remains to be seen. But, what does seem clear is that the transition period for SB 800 will be bumpy and is fraught with kind of uncertainty that inevitably leads to litigation.

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