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The world of construction defect claims in transition

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As escrows close during the reign of Senate Bill 800 (Civil Code Sections 43.99 and 895 to 945.5), the world of construction defect claims enters transition.

For escrows closed through Dec. 31, 2002, SB800 will have no pertinence and construction defect claims will be handled as they have been for years. With a 10-year statute of limitations for latent defects (CCP Section 337.15), "traditional" construction defect claims and litigation will continue for nine years or more. However, with the current building boom and the closing of thousands of 2003 escrows, claims controlled by SB800 will begin to appear and probably soon.

Among the many questions yet to be answered about SB800 relate to the potential waiver of a builder's rights against subcontractors and insurers. The potential for that waiver arises the inspection process prescribed by SB800. In summary, that process is as follows:

- Once a claim is made, if the builder wishes to inspect the "claimed unmet standards" (an SB800 euphemism for "claimed construction defects"), it shall complete the initial inspection and testing within 14 days of acknowledgment of receipt of the claim;
- If the builder deems a second inspection or testing necessary, and if it specifies the reason in writing within three days following initial inspection, the builder may conduct a second inspector testing; and that second inspection and/or testing may be completed within 40 days of the initial inspection or testing; and
- "If a builder intends to hold a subcontractor, design professional, individual, product manufacturer, or material supplier, including 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 to participate in the repair process...This subdivision shall not apply to the builder's insurance company...(N)othing in this subdivision shall be construed to relieve the subcontractor (et al.) of any liability under an action brought by a claimant." Civil Code Section 916(e).

What we do know from Section 916(e) is that a builder's failure to include a subcontractor in a defect inspection will not affect homeowner's rights against that subcontractor. The provision could become important if the builder goes bankrupt or, for some other reason, the homeowner seeks relief directly from the subcontractor. However, absent a bankruptcy, it is most often the case that homeowners seek relief from the builder only, and the fact that the statute preserves the homeowner's right to pursue the subcontractor directly is most often irrelevant.

What we don't know from Section 916(e) is this: As between the builder and the subcontractor, what is the effect of the builder failing to notify the subcontractor and/or others about the inspection(s)? Does the failure to invite a subcontractor to the inspection(s) mean that the builder has waived its rights to get indemnity from that subcontractor? Arguably, the answer is "yes."

Typically, waiver is found when the complaining party (subcontractor, design professional, etc.) can show prejudice. If a subcontractor is denied the opportunity to attend an inspection, that subcontractor will contend that it suffered great prejudice by being denied an inspection opportunity.

How can the subcontractor be expected to assess the homeowner's claims and/or participate in a repair proposal if that subcontractor was never given a chance to inspect the claimed defects? Of course, that prejudice could be nullified if the homeowner would permit an additional inspection, but it would not be surprising if a homeowner refused to allow inspections other than those required by SB800.

The homeowner (especially if he or she is receiving the advice of counsel) might see the refusal of an additional inspection as leverage in getting the claim resolved.

Further, it is questionable whether a judge would order any additional inspection unless the builder can show

good cause for why the subcontractor was not given timely notice of the statutory inspection(s).

For builders who intend to comply with SB800, it would be most prudent to assure that any "subcontractor, design professional, individual, product manufacturer, or materials supplier, including insurance carrier..." who might be responsible for a "claimed unmet standard" is given notice of any invited to any inspection provided for under the statute. Failure to apprise potentially responsible parties of a statutory inspection could very well result in the builder being barred from asserting a claim against subcontractors and others who may be at fault.

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