



# Legal Briefing

Summer 2002

## Revisions to Calderon Statute May Have Significant Impact on Homeowners Association Claims

by John A. O'Hara

**O**n July 1, 2002, revisions to Civil Code Section 1375 took effect which significantly impact the rights of a homeowners association ("HOA") to sue a homebuilder for construction defects. The previous version of Section 1375 was passed in an attempt to force HOAs and homebuilders to follow certain alternative dispute resolution procedures to avoid the tremendous costs of litigating such disputes in court. These procedures were referred to as the Calderon process (named after the sponsor of the original legislation). However, the Calderon process had serious flaws and rarely ever helped the parties informally resolve their disputes. The amendment to Section 1375 attempts to address these flaws in several ways.

### Extension of Timeframes and Waiver Prohibition

The timeframe of 90 days in the original Calderon statute was uniformly regarded as an insufficient timeframe to resolve significant disputes. The new statute extends the time period to investigate and resolve claims to 180 days. The 180 days may still be inadequate. However, if all parties involved agree, the timeframe can be extended for up to an additional 180 days.

The original Calderon process could be, and often was, waived by the HOA and the homebuilder because of the unrealistic timeframe in the statute. The new statute appears to prohibit a waiver of the pre-lawsuit process.

### Participation of Subcontractors and Their Insurers

Since the original Calderon statute did not require the participation of the subcontractors and their insurers in the settlement process, any resolution required the homebuilder or its insurers to front all of the defense and settlement dollars. The new statute corrects this problem by mandating the involvement of the subcontractors upon being served with notice. In fact, if a subcontractor is properly served but fails to participate, the subcontractor will be bound by any settlements, discovery, or investigation that occurred without its involvement.

### Tolling of Ten-Year Statute

Finally, a potential pitfall regarding the statute of limitations in the original Calderon statute has been corrected. The old statute provided for tolling for 150 days but did not specifically mention that statutes of repose, such as the 10-year statute of limitations, were tolled. The new statute provides for 180 days of tolling and specifically states that statutes of repose are tolled.

Newmeyer & Dillion has already outlined several strategies for using the amended Calderon process to the advantage of its homebuilding clients. Specifically, homebuilders now have an opportunity to utilize the insurance of the subcontractors at a very early stage. Should you have any questions regarding the

new Calderon process, please contact John A. O'Hara of Newmeyer & Dillion LLP.

*John A. O'Hara is a litigation partner at Newmeyer & Dillion LLP with 15 years of experience representing homebuilders in construction defect, insurance and business litigation matters.*

## N&D Obtains Defense Verdict in Strict Liability Case and Recovers \$10.4 Million From the City of Anaheim

by Gregory L. Dillion and Joseph A. Ferrentino

**O**ne of Newmeyer & Dillion's developer clients was sued for a catastrophic slope failure next to the City of Anaheim's Olive Hills Reservoir. The slope failure resulted in the evacuation of fifteen homes, including five million-dollar custom homes at the top of the slope and ten homes at the toe of the slope. With the cooperation of its developer's insurers, Newmeyer & Dillion negotiated settlements with the City of Orange, two homeowners associations and a number of the homeowners, and obtained funding which led to the demolition of the homes and re-grading of the hillside.

Greg Dillion and Joe Ferrentino argued the issue of liability at trial from March through June of 2001 against the City of Anaheim and other plaintiffs. A unanimous jury found that the firm's client had no liability whatsoever. The jury also concluded that the City of Anaheim was 100% responsible for the slope failure due to the dangerous condition of its Olive Hills Reservoir and the nuisance and trespass which occurred as a result of that condition. The court additionally held that Anaheim was liable based upon inverse condemnation.

From February 20, 2002 through April 3, 2002, Newmeyer & Dillion and the plaintiffs tried the issue of damages against the City of Anaheim. Newmeyer & Dillion's client sought to recover the payments that had been made to settle with the homeowners and fund the repair of the hillside. After Anaheim offered its evidence, the court granted Newmeyer & Dillion's motion for a directed verdict in favor of its client in the amount of \$10.377 million (100% of the amount sought). On April 3, 2002, the jury awarded the affected homeowners an additional \$17 million.

Although Anaheim will obtain certain offsets to the homeowners' recoveries, the matter is again before the court for damages based upon inverse condemnation, pre-judgment

*(continued on reverse)*



interest and attorneys' fees, including those of Newmeyer & Dillion. In addition, congratulations are due to Robert Green of Green & Hall, who also often represents developers. Mr. Green obtained a verdict in his clients' favor for \$1.86 million.

*Gregory L. Dillion is a founding partner of Newmeyer & Dillion LLP. Joseph Ferrentino is a litigation partner at Newmeyer & Dillion LLP with 10 years experience representing homebuilders in construction defect, insurance and business litigation matters.*

## Promoting Brownfields Redevelopment

by Paul L. Starita

**O**n January 11, 2002, President Bush signed H.R. 2869 into law and restored the hopes of developers, landowners, and small businesses by making the remediation (cleanup) and redevelopment of Brownfields properties economically viable. Brownfields properties are defined as "real property, the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant." This new legislation, called the "Small Business Liability Relief and Brownfields Revitalization Act" (the "Act"), is the most significant amendment in recent years to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980" ("CERCLA"). Specifically, the Act has two distinct purposes: to provide for enhanced liability protections and to create funding mechanisms for Brownfields assessment and cleanup.

### Enhanced Liability Protections

The Act creates enhanced liability protections for innocent landowners, contiguous property owners, and prospective purchasers. Additionally, it contains exemptions for de micromis generators and municipal waste. These new protections are significant because the Act's liability provisions help distinguish between large polluters and small businesses that were previously snared in CERCLA's broad regulatory net. As a result, small business will arguably have a better opportunity to obtain environmental liability insurance for proposed redevelopment projects. Although encouraging, availing oneself of these new protections requires compliance with numerous complex technical requirements. Consequently, clients are cautioned to enlist the assistance of experienced environmental compliance professionals in evaluating potential redevelopment ventures.

### Funding Mechanisms

The Act's funding mechanisms are in the form of two distinct

programs, the "Brownfields Revitalization Funding" program and the "State Response Programs." These programs promote redevelopment by providing funding for Brownfields assessment and cleanup.

Under the Brownfields Revitalization Funding program, Congress may appropriate up to \$200 million per fiscal year for years 2002 through 2006 for grants and loans to any "eligible entity." The Act's definition of "eligible entity" includes local governmental units, state or local government sponsored redevelopment agencies, states, Indian tribes, and quasi-governmental entities. The EPA has been charged with developing the program and awarding grants or loans in accordance with the Act.

With regard to "State Response Programs," the Act authorizes up to \$50 million per fiscal year in funding for state programs. Specifically, the EPA may award grants to states for the purpose of establishing a revolving loan fund to promote the purchase and redevelopment of Brownfields properties. Additionally, a state may utilize a grant to develop and fund an environmental insurance program.

### Increased Economic Activity

Overall, the Act sets the stage for increased economic activity at previously abandoned or underutilized commercial and industrial sites. However, the EPA must still develop guidelines, policy, and regulations for implementing this new legislation. With this in mind, clients should continue to actively monitor the implementation of this legislation to determine the impact on emerging redevelopment opportunities.

If you have any questions about Brownfields properties or any other related issues, please contact Paul L. Starita of Newmeyer & Dillion LLP.

*Paul L. Starita recently joined Newmeyer & Dillion LLP after eight years of practice as a Judge Advocate and Regional Environmental Counsel for the U.S. Marine Corps. Mr. Starita has extensive experience in environmental, land use, and criminal law matters.*

## Court Enforces Arbitration Agreement Governing Construction Defect Claims

by Dwight C. Hirsh

**F**or years, homebuilders in California have been using arbitration clauses in new home purchase contracts in an effort to control costs for both homebuilders and homebuyers should a dispute arise regarding construction of the home. Homebuilders faced challenges in enforcing these agreements because of California Code of Civil Procedure Section 1298.7, which has been applied by California courts to preclude a homebuilder from enforcing an arbitration agreement with

respect to construction defect disputes. In the recent case of *Basura v. U.S. Home Corporation*, the California Court of Appeal found that the Federal Arbitration Act preempts Section 1298.7 and permits the enforcement of a clause requiring arbitration of construction defect claims so long as the agreement involves interstate commerce. Since proving that a home purchase agreement involves interstate commerce is a relatively easy hurdle to overcome for most homebuilders, this case provides an excellent basis for enforcing arbitration agreements in construction defect lawsuits and reassures homebuilders that arbitration agreements with homebuyers on current projects will be enforceable.

*Dwight C. Hirsh is a transactional law attorney at Newmeyer & Dillion LLP with over seven years of general business, real estate and insurance law experience.*

## About Newmeyer & Dillion LLP

**N**ewmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

Practice areas include:

- Litigation
- Lending & Finance
- Real Estate Transactions
- Business Arrangements
- Estate Planning