

LEGAL BRIEFING

Sulfate Attack Claims -- More Rubbish Than Rubble

by Joseph A. Ferrentino

The theory of sulfate "attack" has spun out of control. Advocates of the sulfate theory claim that sulfates in the soil travel with water to the concrete and penetrate the concrete. The sulfates then allegedly combine with other minerals and a chemical reaction occurs leading to the formation of ettringite in the concrete paste. Next, the ettringite expands in size causing microscopic cracking to occur. Allegedly, over time this microscopic cracking continues to worsen until the concrete purportedly turns into rubble.

While it is true that sulfates are all over the Southern California landscape, there appear to be no reported cases of a concrete slab "turning to rubble" from sulfates in Southern California. If this phenomenon is such a threat, why aren't slabs turning to rubble all over Southern California? The reason is that the foundation for the purported "science" of sulfate attack is rubbish.

First, ettringite can be formed in concrete *without* sulfate attack. As a result, subjective opinions based upon microscopic observations of concrete cores form the basis of the "scientific" conclusions. Most of the "experts" performing this analysis are not licensed engineers in California and have never been involved in the design or construction of residential concrete slabs or foundations in California.

Second, most cement has some level of sulfate in it when it is poured. Hence, the mere presence of sulfate in the concrete does not mean that a problem exists. In order to prove that sulfates have penetrated the concrete, the sulfate "experts" must establish that more sulfate is in the concrete than existed when the concrete was poured. This requires speculation.

Is there any evidence of sulfate "attack" that is not based upon subjective microscopic analysis? Advocates of the sulfate attack theory point to efflorescence, spalling stucco, and cracks in concrete as evidence of sulfate attack. However, these same proponents admit that many other mechanisms can cause these symptoms of sulfate "attack."

Advocates of the sulfate theory also contend that contractors are violating the Uniform Building Code (UBC) when placing concrete. This is just more rubbish. For example, the sulfate proponents ignore the fact that most concrete slabs poured today are placed on top of a visqueen (plastic) vapor barrier. This

barrier prevents water and anything in the water from reaching the concrete. Further, the area around the perimeter of the foundations is usually modified by homeowners. Fertilizers are loaded with sulfates and sulfates can be found in the tap water that is used to irrigate.

Also, traditionally there are two ways for engineers and builders to accommodate sulfate-laden soils and be in compliance with the UBC. Historically, the UBC simply required sulfate-resistant cement to be used in conjunction with *either* a particular water-to-cement ratio, *or* a higher compressive strength. Proponents of the sulfate theory ignore the second option. However, most engineers have opted to apply the compressive strength criteria.

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When is a Commercial Use of a Residence Not a Commercial Use of a Residence?

by V. Alan Bergfeld

When the Legislature deems it so. Upon enacting Health and Safety Code Section 1597.40, *et seq.*, the California Legislature declared that it was its intent that family day care homes for children be situated in normal residential surroundings so as to give children the home environment which is conducive to healthy and safe development. Accordingly, the Legislature established a statutory scheme preventing zoning, building and fire codes and regulations from barring the use of a residence as a day care facility for children (a "family day care home" in the language of the statute).

The Legislature also declared that every restriction or prohibition, including CC&Rs, which restricts or prohibits the use of a residence for a family day care home for children, is void. While the operation of family day care homes cannot be prohibited, the CC&Rs can regulate their operation by requiring the following: adequate insurance (including naming the association as an additional insured); indemnification of the association; compliance with the association rules and regulations; adequate supervision of, and assumption of responsibility for, the children in attendance; and compliance with all state and local laws regarding the licensing and operation of such a facility. Such provisions will provide protection and

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Newmeyer & Dillion Welcomes New Labor & Employment Partner

Thomas H. Reilly has joined the firm's Newport Beach office as a labor and employment partner. Tom has 20 years of experience representing employers in all aspects of labor and employment law, including advice regarding personnel matters and legal compliance; preparation and review of handbooks and policies; advice regarding union avoidance; representation of employers in collective bargaining and employee grievance arbitrations; and representation of employers in wrongful termination, discrimination, harassment, wage and hour, and trade secret matters.

Prior to joining Newmeyer & Dillion LLP, Tom was a Partner at Arter & Hadden LLP and a Special Counsel at O'Melveny & Myers, focusing on labor and employment law at both firms. Tom has lectured extensively to lawyers and human resource professionals and serves as a Director for the Federal Bar Association, Orange County Chapter. Tom's addition to the firm provides expanded capability to assist our clients with day-to-day labor and employment matters and to represent clients faced with employment litigation.

Ten Years Now Means Ten Years

(see Fall 2001 issue)

by Gregory L. Dillion

In *Lantzy v. Centex Homes* (August 4, 2003, S098660) [Cal. 4th_ [2003 D.A.R. 8638], the California Supreme Court made a significant ruling. It held that the ten-year statute of limitations applicable to construction defects is a statute of repose that is not subject to extension by "equitable tolling" during periods of repair by the builder.

In other words, each time a builder goes out and performs repairs, the ten-year "clock" is not stopped during the time such repairs are investigated and made. The statute still does not bar allegations of fraud or intentional misconduct. The Court left for another day whether one may equitably be estopped from asserting the statute.

Gregory L. Dillion is a founding partner of Newmeyer & Dillion LLP and has extensive experience in general business, lender liability, construction, and insurance coverage disputes.

When is a Commercial Use of a Residence *Not* a Commercial Use of a Residence? (cont'd)

defenses for the developer and the association in the event of a claim or lawsuit by the parent of an injured child.

Many developers are unaware of the family day care home legislation and continue to utilize CC&Rs that prohibit any commercial use of a residence.¹ Continuing to generally prohibit commercial use creates two problems: first, a property manager or homeowners association board of directors might reasonably interpret the commercial business prohibition to include family day care homes, creating a scenario involving an unnecessary (and losing) battle with a homeowner; and second, the developer misses an opportunity to regulate the family day care home and protect itself and the association within the bounds of the statute.

With California cutting funds in child care subsidies, we may find a shift from typical commercial child care facilities to more family day care homes. As such, it makes sense to regulate these facilities in your next set of CC&Rs.

Should you have any questions regarding this new trend, please contact Thomas L. Powell or V. Alan Bergfeld of Newmeyer & Dillion LLP.

¹ Similar limitations apply to the operation of a residential community care facility providing 24-hour non-medical care to those needing assistance in daily living activities.

V. Alan Bergfeld is a real estate transactional associate specializing in subdivision law, including the drafting of CC&Rs, deeds and related documents.

Sulfate Attack Claims -- More Rubbish Than Rubble (cont'd)

Moreover, there are no approved methods for testing the water-to-cement ratio of hardened concrete. The American Society for Testing Materials and the American Concrete Institute are two of the foremost authorities on testing standards in the world. Neither of these institutions, nor any other recognized institutions in the United States, has approved any method for determining water-to-cement ratios of hardened concrete.

The hype and expensive litigation that the proponents of the sulfate theory have generated is out of control. Unfortunately, these proponents are heavily invested and have vested interests in changing the playing field. If their pseudo-scientific methods are not challenged and exposed, their efforts to influence the testing authorities will be rewarded with changes in building standards that are virtually impossible to meet.

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

About Newmeyer & Dillion LLP

Newmeyer & 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.

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 - Business & Profession Code §17200
 - Partnership Dissolution
 - Lender Liability
 - General Business Disputes
- *Real Estate*
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 - Real Estate Finance
 - Environmental Warranty
 - Title
- *Labor*
 - Wrongful Termination
 - Employment Discrimination
 - Sexual Harassment
- *Insurance*
 - First and Third Party Coverage
 - First and Third Party Bad Faith
- *Products Liability*
- *Appellate Practice*

Real Estate Transactions

- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters
- Military Base Reuse

Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
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- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
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- Mitigation Agreements
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- Clean Air Act
- Coastal Zone Management
- CEQA and NEPA
- Initiatives and Referendums
- Municipal Incorporations and Annexations