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ATTORNEYS AT LAW

LEGAL BRIEFING

Presley v. American States Survives Attacks

by Mark S. Himmelstein

In 2001, Newmeyer & Dillion successfully represented Presley Homes at the California Court of Appeal in the case of *Presley Homes, Inc. v. American States Ins. Co.* (2001) 90 Cal. App. 4th 571. The *Presley* case addressed the common scenario in which a developer requires each subcontractor on a project to name the developer as an additional insured on its insurance policies. Specifically, the court addressed whether multiple subcontractor additional insurers (who each owe the developer a duty to defend) could limit their duty to defend based on the relative liability of the subcontractors for the alleged defects. The court held that each additional insurer that owes a duty to defend has an obligation to the developer to provide a full, complete and immediate defense. In other words, all the insurers on the risk are under an obligation to defend the developer, and it is up to them to provide the defense immediately and work out the disputes among themselves at a later date.

AB 752 was introduced in the California Legislature earlier this year at the request of the Southern California Contractors Association with support from the insurance industry. The bill attempted to overrule *Presley* and limit the responsibility of the additional insurer to a percentage of defense costs based upon the relative culpability of the subcontractor. Major opposition to the bill was voiced by the California Building Industry Association and others. This bill recently died in committee and it appears it will not be pursued further.

In federal court, in a case called *Rice v. Safeco*, Safeco convinced the district court to limit an additional insurer's duty to defend the additional insured developer to the activities of the subcontractors they insured. The insured appealed and requested Newmeyer & Dillion to file an amicus brief supporting the insured and to argue before the Ninth Circuit. In

a recent unpublished decision, the Ninth Circuit Court of Appeals reversed the district court. The Ninth Circuit held that the district court was obligated to follow the holding in *Presley* since there was no convincing evidence that the California Supreme Court would decide the issue any differently.

The *Presley* rule is, of course, important to all persons and businesses added to insurance policies as an additional insured, and not just developers.

Mark S. Himmelstein is a litigation partner representing general contractors, subcontractors and design professionals in the areas of construction, insurance and professional liability litigation.



Top Estate Planning Attorney Joins Newmeyer & Dillion

Steven A. Ruben has joined our estate planning, and trusts and estates litigation practices. Steven has extensive experience in matters involving trust and estate planning, administration and litigation, private foundations, charitable organizations and family businesses. He has received recognition in each year since 1997 as one of *The Best Lawyers in America* (Woodward/White).

Prior to joining us, Steven was a partner with Gibson, Dunn & Crutcher where he practiced for 15 years and was the firm's Departmental Coordinator for its worldwide Personal Tax and Estate Planning Department. Among the clients for whom Steven has performed legal services and provided advice are *President and Mrs. Ronald Reagan*, *Mr. W. Barron Hilton*, *Mrs. Walt Disney*, *Mr. Merv Griffin*, *The Estate of Howard Hughes*, and the *University of Southern California*.



Legislature Amends the "Fix-It" Law (SB 800)

by Craig A. Callahan

The California Legislature recently adopted amendments to clarify some ambiguities in the new construction defect claim laws (Cal. Civil Code sections 895-945.5, commonly referred to as SB 800 or the "Fix-It" Law) adopted at the end of last year. These amendments include:

Sales Documents. Builders no longer need to provide buyers with the complete statutory "Part" containing the new laws (often 60 to 80 pages); now they need only provide the "Title" containing the Fix-It Law (5 to 7 pages).

"Sales" Governed by the Fix-It Law. The previously ambiguous reference to "sale[s] of new residential units on or after

January 1, 2003" was amended to expressly refer to the date that the sales contract is signed (as opposed to the date escrow closes).

Third Party Liability. The Legislature clarified that the Fix-It Law's rule that a non-builder third party (such as a subcontractor, design professional or material supplier) will be liable only upon a showing of that party's negligence in creating the defect *does not apply* with respect to claims for which strict liability would apply or contractual claims.

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Legislature Amends the “Fix-It” Law (SB 800) *(cont'd)*

Application to “General Contractors”. The Legislature also clarified that a general contractor is treated like a subcontractor or material supplier under the Fix-It Law, unless that general contractor constitutes or is affiliated with the selling “builder.”

Affirmative Defenses. The Legislature clarified that the Fix-It Law’s statutory “affirmative defenses” are available to non-builder third parties, as well as to builders.

“Builders” subject to the Fix-It Law should review their purchase contract documents, construction contract documents, and subdivision documents, to assure compliance with current Fix-It Law statutes and practices.

Craig A. Callahan is a litigation partner at Newmeyer & Dillion LLP with 15 years experience representing developers in business litigation, insurance and construction defect matters.



Jury Instructions Revamped by Commission

by Allison M. Martin

If you have ever served on a jury or tried a case using the California Jury Instructions (“BAJI” instructions), you know first-hand how the instructions can become very confusing.

In 1996, the Blue Ribbon Commission on Jury System Improvement reported that the BAJI jury instructions were “simply impenetrable to the ordinary juror” and required revision. In response, the Judicial Council created a task force to completely redraft the instructions. In 2003, the Judicial Council unanimously approved approximately 800 new civil jury instructions and special verdict forms for use in California trial courts. The new instructions, called “CACI” instructions, took effect on September 1, 2003.

The Judicial Council has not mandated the use of the CACI instructions to the exclusion of other instructions such as BAJI. The CACI instructions, however, are now the “official

instructions” in California and are “strongly encouraged” under Rule 855 of the California Rules of Court.

As compared to the BAJI instructions, the CACI instructions are greatly simplified and use cleaner and simpler language. The instructions do not change the law, but they do a better job of stating the existing law in a way that is understandable to the average juror. The new instructions cover the same topics that appear in BAJI and include additional topics such as conversion, the “lemon law” provisions of the Sony-Beverly Consumer Warranty Act, the Family Leave Act, antitrust, and federal civil rights.

The new CACI instructions can be found on the California Superior Court web site. LexisNexis and Matthew Bender have published print volumes of the CACI instructions, including a table matching the new instruction to the related BAJI numbers.

Allison M. Martin is an associate in the Newport Beach office and her practice focuses on complex business litigation. She has significant experience in intellectual property litigation, including trademark and trade secret matters. She also handles contract disputes and employment law 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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 - Unfair Competition/Trade Secret Business & Profession Code §17200
 - Partnership Dissolution
 - Lender Liability
 - General Business Disputes
- *Real Estate*
 - Construction
 - 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*
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- Business Transition Planning
- Wills, Trusts, Probate

Trusts & Estates Administration & Litigation

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- 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

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- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

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- Venture Capital Financings
- Mergers, Acquisitions, and Leveraged Buyouts
- Public and Private Securities Offerings
- Federal Securities Law

Lending & Finance

- Documentation of Real Estate, Personal Property and Unsecured Loans
- Coordination of Loan Transactions for Borrowers

Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Clean Air Act
- Coastal Zone Management
- CEQA and NEPA
- Initiatives and Referendums
- Municipal Incorporations and Annexations