

LEGAL BRIEFING

**Court Confirms That 10-Year Statute of Repose Begins to Run on Completion, Not Sale**

*By Mark Himmelstein*



In a challenging market such as we have today, it is common for completed houses to sit for months or even years until sold to a homeowner. In California, a state with a 10-year statute of repose for the filing of a lawsuit alleging latent construction defects, this invariably raises the issue of whether the 10-year period begins to run from the date of filing the notice of completion or from the date of the sale of the house.

The most recent case decided by the California Court of Appeals, *Gundogdu v. King Mai, Inc.*, dealt with this question and reassured homebuilders of the intent of existing California law. In this case, the developer, King Mai, filed a notice of completion in 1995 for a single family home. In 1997, nearly 16 months later, the developer sold the home to the plaintiffs. In 2006, more than 10 years from the notice of completion, but less than 10 years from the sale of the home, the plaintiffs filed a complaint for negligence and breach of implied warranty.

The developer filed a motion for summary judgment, arguing that the complaint was barred by California Civil Code section 337.15, which imposes a 10-year statute of limitations on actions for property damage caused by latent

deficiencies in design or construction. The statute provides that the 10-year period begins to run upon “substantial completion” of the improvement, which is triggered by the earliest of any of the following: the date of final inspection by the applicable public agency, the date of recordation of a valid notice of completion, the date of use or occupation of the improvement, or one year after termination or cessation of work on the improvement.

The Court held that the statute of limitations begins to run upon substantial completion of a new home, regardless of when the home or other homes in the subdivision are completed or sold. The court reasoned:

“The purpose of section 337.15 is to protect contractors and other professionals and trades people in the construction industry from perpetual exposure to liability for their work. . . . The statute reflects a legitimate concern that ‘expanding concepts of liability could imperil the construction industry unless a statute of limitations was enacted.’ . . . such concerns legitimately include the prohibitive cost of insurance against a perpetual and never ending risk.”

Despite that the plaintiffs brought the lawsuit within 10 years of purchasing the home, the court held that their claims were barred because the lawsuit was filed more than 10 years from the notice of completion. The fact that the developer  
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**Newmeyer & Dillion NEWS**

The firm will celebrate the fifth anniversary of our **Walnut Creek** office on June 13. Under the direction of Managing Partner **Alan Packer**, we now have a total of nine attorneys and 10 staff members serving the needs of our Northern California clientele. As mentioned in our last issue, we also have relocated to new offices to accommodate our ongoing growth.



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**Newmeyer & Dillion** was ranked #8 in the *California Real Estate Journal* list of top real estate law firms.

**Alan Packer**, managing partner in our Walnut Creek office, was quoted at length in a May 26 *Daily Journal* article by Jason Armstrong entitled: "Searching for Cracks in Construction Law," examining recent plaintiffs' attorney maneuvers to circumvent SB800. Packer pointed out such examples as seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB800, such as notices of the law's provisions on a property's title. Or ignoring notice provisions altogether and instead filing a lawsuit.

At the recent West Coast Casualty 17th Anniversary Construction Defect Seminar, **John O'Hara**, a partner in our Newport Beach office, said most attorneys believe SB800 is working as intended, as reported by Editor Art Barrett in *Martin Brower's Orange County Report*, a respected real estate industry newsletter. O'Hara reported the consensus among speakers is that, seven years after its implementation, the law is enabling construction defect claims to be resolved without lawsuits. O'Hara joined firm partners **Greg Dillion**, **Joe Ferrentino**, and **Laura Ives** on panels discussing insurance coverage issues, the market's impact on litigation and multiple mediations.

We welcome the following new associates to the firm:

In Newport Beach, **Nathan Owens** returns to the firm, practicing business, construction and real estate litigation, as well as insurance law. Owens earned his JD from Pepperdine University School of Law. Also a graduate of Pepperdine Law, **Heather B. Condon** emphasizes business and real estate litigation.

In Walnut Creek, **Scott W. Glassmoyer** comes aboard as an associate concentrating on business, construction and real estate litigation and insurance law. He earned his JD from Boston College Law School. **Ivo G. Daniele** has joined the litigation group to focus on construction litigation; he graduated from Vermont School of Law.

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retained ownership of the home for more than 16 months prior to the purchase did not affect the Court's analysis.

The Court followed the clear intent of the statute in limiting the time in which a builder is exposed to construction defect claims. Arguably, the result would be the same if the house was first sold within 16 months of the expiration of the 10-year period. This statute has been in effect through prior down markets, and the legislature has not changed the law based on market conditions.

A version of this article appeared in the June 2010 edition of *Builder & Developer* magazine.

**Mark Himmelstein** is a partner in our Newport Beach office and has over 25 years' experience in construction and real estate litigation and construction contract negotiation and disputes. He can be reached via e-mail at [mark.himmelstein@ndlf.com](mailto:mark.himmelstein@ndlf.com)

## UPCOMING EVENTS

### PCBC 2010

Thurs., June 10, 2010

Moscone Center, San Francisco

**Alan Packer** will participate in a panel, "REO Project Risks — What Have We Gotten Ourselves Into?", from 11 a.m.

to 12 noon, advising anyone who is involved in distressed assets of a necessary game plan to address risks. For info, [www.pcbc.com](http://www.pcbc.com).

**Alan Packer** will also moderate a workshop sponsored by the California Homebuilding Foundation on "Maximizing the Benefits of California Homebuilder's Right to Repair Act: It's Not Just About the Fix," a how-to guide on the landmark SB800 bill. From 1 p.m. to 4 p.m. For info, <http://www.myCHF.org/go/chf/education/index.cfm>.



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## 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.

### Litigation

- *Business*
  - Unfair Competition/Trade Secret Business & Professions Code §17200
  - Partnership Dissolution
  - Lender Liability
  - General Business Disputes
- *Real Estate*
  - Construction
  - Real Estate Finance
  - Environmental Warranty Title
  - Inverse Condemnation and Eminent Domain
  - Government Tort Claims
  - Regulatory Takings
- *Labor & Employment*
  - Wrongful Termination
  - Employment Discrimination
  - Sexual Harassment
  - Prevailing Wage
- *Insurance & Risk Management*
  - First and Third Party Coverage
  - First and Third Party Bad Faith
  - Construction "Wrap" Policies
- *Products Liability*
- *Probate*
- *Appellate Practice*
- *Intellectual Property*

### Bankruptcy

- Individual Debtors
- Small Business Debtors
- Asset Protection and Exemption Analysis
- Creditors' Rights
- Workouts

### 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 Contracts and Related Matters
- Military Base Reuse
- Due Diligence

### Real Estate Lending & Finance

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

### Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

### Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Environmental Permitting
- CEQA and NEPA