



LEGAL BRIEFING

The Manufactured Lawsuit— How to Combat the Latest Litigation Trend

By Jan A. Gruen

Over the years, claims have consistently been asserted against builders and architects for the defective design and construction of residential building projects. In the old days, these claims alleged water intrusion through the building envelope or skin and sought compensation for the resulting damage associated with these conditions. Typically the claims were made after homeowner complaints made to builders went unanswered or repairs failed. Frustrated, homeowners would then contact an attorney.

Fast forward to recent times, and a cottage industry has emerged. Plaintiff attorneys are trolling for business in subdivisions where contented homeowners remain so, until they find in their mailbox a solicitation letter from a lawyer claiming that their house is all but falling down. These letters, sent by a select group of firms specializing in the creation of construction defect actions, whether or not defects exist, encourage an “evaluation” of the home to see if the owner is one of the unlucky ones.

Ultimately a suit is filed, and it is not difficult to discern who benefits and who is hurt by this latest litigation craze. The plaintiff lawyers and their experts clearly profit by receiving handsome attorneys’ fees and expert fees as they test a handful of homes and brand them as permanently defective. The unwitting homeowner who has the testing done to “prove” the existence of defects will forever need to disclose to future purchasers reports that are dramatic yet often inaccurate. These

reports have an impact on property values regardless of whether the defects exist or not.

There are several simple and effective solutions to counter this trend:

- Ensure that new buildings are designed and built to SB 800 standards as set forth in Civil Code section 896, et seq.;
- Provide responsive customer service that addresses homeowner complaints promptly, professionally;
- Live up to the warranty that is provided;
- Offer a comprehensive and easy-to-use homeowner maintenance manual and reference guide and explain it to customers whenever possible;
- Document customer service and conditions before, during, and after repairs;
- Upon discovery of solicitation efforts in a community, offer to meet with homeowners, review their concerns, and address complaints that appear appropriate or reasonable.

While these lawsuits will keep coming, the above techniques will reduce the value of claims, the number of claims, and make overall exposure more manageable.

A version of this article was printed in the September 2007 edition of *Builder/Architect Bay Area*.

Jan Gruen is managing partner of the firm’s Walnut Creek office and has more than 18 years’ litigation experience representing home builders, landowners and businesses, in insurance and real estate matters. She may be reached at jan.gruen@ndlf.com.



Tips to Compelling Arbitration in Construction Defect Claims

By John E. Bowerbank

Often homebuilders are surprised to learn that under California law a home purchaser can willingly and voluntarily enter into an agreement with the homebuilder for binding arbitration of construction defect claims, then later decide to avoid the arbitration provision and sue the homebuilder in the California courts. Section 1298.7 of the Code of Civil Procedure specifically allows a home purchaser to opt out of arbitration and file suit in the courts. If California law applies to the arbitration provision, a builder cannot successfully compel binding arbitration after a homeowner files a lawsuit in the California courts.

The million dollar question is whether there is a way to circumvent California’s law against compelling arbitration in construction defect lawsuits. The answer is “Yes” provided a builder can demonstrate that the real property purchase involved “interstate commerce.” In that case, the Federal Arbitration Act (“FAA”) preempts Section 1298.7 and thus a homebuilder should be able to compel arbitration. A builder can meet the burden of showing that the contract involved “interstate commerce” by, among other things, engaging in national marketing/advertising

efforts, using out-of-state subcontractors/suppliers, and/or attracting out-of-state home purchasers. The easiest way to improve a homebuilder’s chances to trigger the FAA is to specifically state in the purchase agreement that the FAA’s procedures apply, rather than the California Code of Civil Procedure.

What about homeowners who purchased from an original purchaser (i.e. subsequent purchasers)? Unfortunately, a homebuilder cannot compel “subsequent purchasers” to arbitrate their construction defect claims. This is because the “subsequent purchaser” never voluntarily and directly entered into a contract to waive their Constitutional right to a jury trial by submitting the dispute to arbitration.

Fortunately for homebuilders, a recent California case held that where a homebuilder successfully compels arbitration under the FAA, the court action involving the “subsequent purchasers” should be stayed pending the outcome of the arbitration involving the “original purchasers.” As a result, a homebuilder may be able to avoid simultaneously defending against an arbitration and a lawsuit.

The ability of the homebuilder to compel arbitration affords a valuable alternative to litigation and adding appropriate language to contracts should be given careful consideration.

A version of this article ran in the Sept. 2007 *Builder & Developer*.

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The Building Industry Association of Southern California, Orange County Chapter, recognized **Newmeyer & Dillion** with a 2007 Spotlight Award as “Most Involved Associate Member Company” at its recent 16th Annual Tribute to Excellence.

Greg Dillion was selected by his peers for inclusion in *The Best Lawyers in America® 2008* in the field of insurance law (Copyright 2007 by Woodward/White, Inc., of Aiken, S.C.).

Congratulations to **Jan Gruen**, managing partner of the Walnut Creek office of Newmeyer & Dillion LLP, who was named to the “Top 50 Women Attorneys” in the latest compilation of Northern California Super Lawyers, as published in the August issue of *San Francisco* magazine and in the companion Northern California *Super Lawyers*. The office recently celebrated its second anniversary.

Kudos as well to eight attorneys from our Newport Beach office who were named to the roster of 2007 Southern California “Rising Stars,” a compilation of the area’s up-and-coming attorneys from the publishers of Super Lawyers. Repeat honorees were: **Jeffrey M. Dennis** and **Shane E. Coons**, partners in the firm’s highly regarded litigation group, and partner **Charles S. Krolkowski**, an eminent domain specialist, as well as associates **Bonnie T. Roadarmel**, an insurance specialist, and **Carol Sherman Zaist**, a business and real estate litigator. Making the list for the first time were construction litigation partners **Shawn E. Cowles**, **Jay B. Freedman** and **Laura Watkins Ives**.

Cheryl Van Steenwyk joins the firm as a partner in the Newport Beach office. She is a business and real estate litigator specializing in shopping centers who previously was a partner at Katten Muchin Rosenman LLP in Century City.

The firm welcomes as new associates in our Newport Beach litigation group: **Steven Wang**, **Adrienne Matheson** and **Jennifer Lyons**. Jennifer specializes in business, construction and real estate litigation, including insurance law and land-use and eminent domain. Adrienne practices in business and construction litigation, as well as labor and employment law. Steven focuses on business, construction and real estate litigation, and insurance law.

UPCOMING EVENTS

Mealey’s Construction Defect SuperConference

Wed.-Fri., November 7-9, 2007

The Westin Casuarina Las Vegas

John O’Hara co-chairs and joins **Greg Dillion** and **Reed Archambault** as panelists for a high-powered agenda looking at the current state of construction defect litigation, risk management, emerging issues, how high-rise construction differs, insurance coverage and other topics.

More info: www.lexisnexis.com/conferences

1st Annual UC Irvine Real Estate Forum Presented by The Paul Merage School of Business Center for Real Estate

Tuesday, Dec. 4, 2007, 7:30 a.m. to 2 p.m.

The Island Hotel, Newport Beach

Newmeyer & Dillion co-sponsors conference that explores the various dimensions of the changing investment climate and strategies for successfully navigating these changes in Southern California. *More info: e-mail [Nikki Nguyen, nikki.nguyen@tfgroup.com](mailto:Nikki.Nguyen@tfgroup.com)*

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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.

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 - Business & Professions Code §17200
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 - Lender Liability
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 - Real Estate Finance
 - Environmental Warranty
 - Title
 - Inverse Condemnation and Eminent Domain
 - Government Tort Claims
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 - First and Third Party Coverage
 - First and Third Party Bad Faith
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- 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
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- Employment and Independent Contractor Matters
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- Department of Real Estate and Other Regulatory Filings
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- Coordination of Loan Transactions for Borrowers

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- Mitigation Agreements
- Subdivision Map Act
- Environmental Permitting