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Wildfire Victims May Sue for Fire-Protection-Related Defects

Focus Column

Construction Law

By Daniel Lee Jacobson

The wildfires that recently ravaged Southern California destroyed thousands of homes. Some of those homes may have been the subject of construction-defect lawsuits. Others may have been constructed defectively, although the homeowner had not filed a lawsuit.

What happens to these lawsuits and potential lawsuits? Can a homeowner recover damages for a defectively constructed house that no longer exists? What if the reason that the fire destroyed the house was that it was constructed defectively? What if the homeowner's pre-fire complaints had nothing to do with protecting the house from fire? Does payment that a homeowner might receive from a homeowners' policy reduce any damages?

Any analysis of the damages available to a residential construction-defect plaintiff after a fire destroys his or her home necessarily must begin with a discussion of the damages that would have been available before the fire.

Generally, the measure of damages in a construction-defect case is the lesser of the cost to repair the structure and the diminution in value caused by the construction defects. *Orndorff v. Christiana Community Builders*, 217 Cal.App.3d 683 (1990).

For newly constructed homes sold on or after Jan. 1, 2003, Civil Code Section 896 provides damages for "actionable defect[s]." See Civil Code Section 896(a)-(g)(15) (defining "actionable defect"). Fire-related actionable defects are found at Section 896(d)(1)-(d)(3).

For all other homes, construction-defect damages are either contractual or tortuous in nature. *Aas v. Superior Court*, 24 Cal.4th 627 (2000). The San Diego homeowners in *Aas* sought tort damages for defective construction. The Supreme Court held that only contract damages were available to repair defective construction. In order to recover tort damages, the plaintiffs had to show that the defective construction caused damage to the structure and that the damage did not consist of the defective construction itself.

One allegation in *Aas* was that the builders had not put the proper amount of fire-protection material in the walls of the homes. The majority held that, unless that lack of fire-protection material caused damage, tort damages did not exist.

In his concurring and dissenting opinion, Chief Justice Ronald M. George said, "In determining that a negligently constructed home must first ... be gutted by fire before a homeowner may sue in tort to collect costs necessary to repair negligently constructed ... fire walls, the majority today embraces a ruling that offends both established common law and basic common sense."

The people whose houses burned down in the Southern California wildfires because of negligent construction certainly may have damages not only in contract but also in tort.

Aas teaches that actual damage must exist for there to be compensatory damages of any type. Of course, if the construction defects involved things that were suppose to stop or retard a fire, then there may be tort and contract damages - *large* damages, given that the house has been destroyed.

But what about construction defects that have nothing to do with fire

protection? What if the homeowner's complaints involved the plumbing system and leaking windows?

The houses destroyed by the wildfires no longer have plumbing problems or leaking windows. The plumbing and windows are simply gone, along with the rest of the house. Their disappearance had absolutely nothing to do with any other non-fire-protection-related defect.

To now say that it would have cost X dollars to fix the plumbing and Y dollars to fix the windows is useless, hollow and irrelevant to people who no longer have plumbing or windows. It is equally irrelevant to say that the house has diminished in value by a certain amount because of the plumbing and window defects, because the house no longer exists.

To analogize this property-damage situation to a personal-injury situation, consider that personal-injury actions do not survive the death of the injured individual. *Franklin v. Franklin*, 67 Cal.App.2d 717 (1945). There are no more personal-injury damages because the person is dead. In the property-damage situation, there are no more compensatory damages for the defectively constructed property because there is no more property.

A trespass theory sometimes is used in construction-defect actions. See *Winston Square Homeowner's Ass'n v. Centex West Inc.*, 213 Cal.App.3d 282 (1989); *Allen v. Sundean*, 137 Cal.App.3d 216 (1982). "[T]here can be an actionable trespass upon real property for which the owner may recover nominal damages even though his property is not injured." *Polin v. Chung Cho*, 8 Cal.App.3d 673 (1970).

Perhaps, in a particular case, a homeowner might want nominal damages because he or she needs to be found to be the prevailing party. Or, in some egregious case, a homeowner might seek punitive damages, and nominal damages might serve as a platform for those punitive damages. But the practical efficacy of a construction-defect plaintiff obtaining nominal damages seems limited at best.

Construction-defect plaintiffs sometimes allege fraud. See *Kovich v. Paseo Del Mar Homeowners' Ass'n*, 41 Cal.App.4th 863 (1996). To the extent that the fraud alleged caused the homeowner to pay too much for the house, perhaps the overpayment would survive as viable damages, despite the destruction of the house. Certainly, if the fraud consisted of a lie about the fire safety of the house, then the fraud action may survive.

Under the collateral-source rule, when "an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Helfend v. Southern Cal. Rapid Transit Dist.*, 2 Cal.3d 1 (1970).

"As repeatedly reaffirmed by the California appellate courts, the collateral source rule represents 'a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and *other eventualities*.'" *Miller v. Ellis*, 103 Cal.App.4th 373 (2002) (citing *Helfend*).

In *Shaffer v. Debbas*, 17 Cal.App.4th 33 (1993), the plaintiffs sued the builders of their home alleging construction defects. The defendants responded that the plaintiffs should not be entitled to recover from the defendants because the plaintiffs had recovered repair costs from their own homeowners' insurance. The plaintiffs claimed that the collateral-source rule applies only to personal-injury cases.

The court disagreed. Relying partially on the "other eventualities" language in *Helfend*, the *Shaffer* court said that the collateral-source rule applied to property-damage cases as well as personal-injury cases. It cited *Anheuser-Busch Inc. v. Straley*, 28 Cal.2d 347 (1946), a property case in which the court expressly stated that "where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for damages suffered is

not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer."

The *Shaffer* court cited *Phillip Chang & Sons Associates v. La Casa Novato*, 177 Cal.App.3d 159 (1986), in concluding that payments by a homeowner's insurer for repair of construction-defect damage are irrelevant to that homeowner's construction-defect action against the builders of the house. *Phillip Chang* held that "where a person suffers property damage, the amount of damages shall not be reduced by the receipt by him of payment for his loss from a source wholly independent of the person who caused the injury."

As to the potential for double recovery, the *Shaffer* court stated, "As *Helfend* explains, the feared 'double recovery' by a plaintiff seldom occurs because the paying insurer is subrogated to the rights of the insured as against the defendants who caused the injury."

"[A]lthough it is often said an insured and a subrogated insurer share a single cause of action, these parties cannot recover the same damages. 'When, as often happens, the insured is only partially compensated by the insurer for a loss (because of deductibles, policy limits, and exclusions), operation of the subrogation doctrine "results in two or more parties having a right of action for recovery of damages based upon the same underlying cause of action." The insured retains the right to sue the responsible party for any loss not fully compensated by insurance, and the insurer has the right to sue the responsible party for the insurer's loss in paying on the insurance policy.'" *Low v. Golden Eagle*, 101 Cal.App.4th 1354 (2002) (citing *Allstate Ins. Co. v. Mel Rapton Inc.*, 77 Cal.App.4th 901 (2000)).

In sum, the victims of Southern California's wildfires have recourse against builders whose construction caused or contributed to their fire damage. But they probably no longer have a valid case against builders whose defective construction was not fire-protection-related.

The collateral-source rule will not diminish their recovery because of payment from their insurers, and their insurers should be subrogated to the right to collect any money paid.

Daniel Lee Jacobson is an attorney with Veatch, Carlson, Grogan & Nelson in Los Angeles and an adjunct professor at Pacific West College of Law.

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