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SPECIAL FEATURE: NEW LAWS: NEW CONSTRUCTION DEFECT LAW TO HAVE PROFOUND EFFECT ON LITIGATION

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TEXT:
[*14] **The State Legislature has enacted** a set of complex and detailed statutes that will have a major effect on the litigation of residential construction defect cases. Generally the statutes, which will be codified as *Civil Code* §§ 896--945.5 on January 1, 2003, mandate pre-litigation mediation, supplant the Supreme Court's landmark ruling in *Aas v. Superior Court*, 24 Cal.4th 627 (2000), provide definitions for numerous types of construction defects, and set new statutes of limitation. The statutes apply to residential construction defect cases involving newly-constructed homes that are sold on or after January 1, 2003.

Under the new statutes, before a homeowner or a Homeowners' Association (as defined by *Code of Civil Procedure* § 383) can file a lawsuit alleging negligent residential construction, such a claimant must serve a detailed notice of claim on the developer or the original seller (referred to collectively in the new law as "builder"). From that point, the statutes lead the parties through a maze of time-sensitive detailed procedures that are meant to lead to one or more inspections of the claimant's property and to culminate in mediation. The statutes are written in ping-pong fashion, so that once the claimant does something, the builder then has a certain time period in which to do something else, and once that something else is done, the claimant has certain time period in which to do yet something else, etc., etc. The statutes are replete with admonishments that the prescribed time limits for the various procedures are to be strictly construed, with dire sanctions for those who deviate from those time limits.

The statutes generally address the claimant and the builder. However: "If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person . . . [of the property inspection(s) and allow such person] to participate in the repair process." (§ 916(e).)

After the inspection[s] of the home[s], the builder can make a written offer to settle by way of repair, or cash payment, or a combination of the two. (§§ 917, 929.) If the settlement offer includes an offer to repair, the builder must state the location and nature of the proposed repair and information about the contractor that the builder intends to use to effect that repair. The claimant can accept the offer and the case could end. While the builder may obtain a release in exchange for a money settlement, the builder cannot obtain a release in exchange for repairing the problem. (§§ 926, 929(b).)

If the homeowner does not accept the builder's offer a mediation is to be held before a "nonaffiliated" mediator. The mediator is to be picked by and paid for by the builder or, jointly picked by and jointly paid for by the builder and the claimant, at the option of the claimant. The builder may proceed with its offer to repair, even if the claimant does not accept that offer and chooses to file a lawsuit. (§ 919.)

At the time of the sale of the home the builder can choose to provide by way of contract its own "nonadversarial" process to be used in place of the statutorily provided process. (§ 914(a).)

In *Aas v. Superior Court*, 24 Cal.4th 627 (2000) the Supreme Court ruled that homeowner plaintiffs could not recover in tort for deficiencies in construction that had not yet caused damage. So, for instance, if a builder negligently failed to provide the required fire protection material in the walls of a home, but there had not yet been a fire, there could be no tort recovery because the deficiency had not yet caused damage, and damage is an essential element of a negligence cause of action.

Writing separately, Chief Justice George concurred and dissented, claiming that there should be tort recovery for

construction deficiencies that constitute significant building safety-code violations. In response to the Chief Justice's opinion, the *Aas* majority said: "The Legislature, whose lawmaking power is not encumbered by [*15] precedent, is free to adopt a rule like that proposed in the Chief Justice's concurring and dissenting opinion. *Aas*, at 650. The Legislature has taken the Court up on its comments with new §§ 896 and 897.

Section 897 states: "The standards set forth in this chapter [at §§ 896(a)--896(g)(15)] are intended to address every function or component of a structure." Under the new standards, which actually serve to define what is defective construction, the question will no longer be whether there are tort damages, but will be whether a claim has an "actionable defect." If the construction falls below the stated standard, then the claim is actionable; if it does not fall below that standard, then the claim is not actionable under the new statutory scheme. (§ 896.)

Sections 896(a)--896(g)(15) give construction standards for just about every part of a structure about which one could think. For example: "A door shall not allow unintended water to pass beyond, around, or through the door or its designed or actual moisture barriers, if any." (§ 896(a)(1)); "Foundations, load bearing components, and slabs shall not cause the structure, in whole or in part, to be structurally unsafe." (§ 896(b)(2)); and "Stucco, exterior siding, and other exterior wall finishes and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall not contain significant cracks or separations." (§ 896(g)(2).)

The Legislature seemed to appreciate Chief Justice George's idea that deficient construction that has not caused damage and that will not lead to unsafe structures are of lesser importance. Those construction issues have been assigned shorter statutes of limitations than the 10-year statute that is generally imposed by the new law in § 941(a). For instance: The statute for irrigation issues will be a year from the close of escrow (§ 896(g)(7)); The statute for improper installation of dryer ducts will be two years from the close of escrow (§ 896(g)(14)); and the statute for improper installation of landscaping will be two years from the close of escrow. (§ 896(g)(12).)

In case anything comes up in a particular case that was left out of the long list of § 896 standards, § 897 contains the following catch-all standard: "To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage."

The new statutes allow the builder to contractually impose higher, but not lower standards than those imposed by §§ 896 and 897. An agreement to impose higher standards is called "an enhanced protection agreement." (§ 901.) An enhanced protection agreement does not appear to afford the builder any special privileges under the new statutes.

At the time of the filing of a lawsuit a homeowner can contest whether his or her enhanced protection agreement actually provides greater protection than do the § 896 standards. If the homeowner makes that contention and the builder disagrees in its responsive pleading, the builder must have the court make a determination as to which standards will apply. That determination must be made by the court within 60 days of the filing of the responsive pleading or by commencement of discovery, whichever is first. If the builder does not get the court's determination by that time, the builder waives its right to litigate under the enhanced protection agreement standards. (§ 905.)

The builder must provide an express warranty for many finished carpentry items. That warranty must be for at least one year. If the builder fails to provide such a warranty, then [*16] the statute provides that the warranty is for one year. (§ 900.)

Sections 942(b) and 944 define the categories of recovery available to a claimant. Under § 944 a claimant is entitled to the reasonable cost of repair, reasonable relocation costs, lost business income (if the home is used as a principal place of business and there is an appropriate license to operate the business in the home), reasonable investigative costs, and fees and costs that are contractually or statutorily allowed.

Section 942(b) refines these potential awards by stating that in the case of a "detached single-family home" the claimant may recover the lesser of the cost of repair or the diminution in value of the home caused by the "nonconformity." This refinement is in turn subject to "the personal use exception as developed under common law."

The affirmative defenses available to the builder are all to employ the concept of comparative fault and are all listed and discussed at §§ 945.5--945.5(h). They include an "unforeseen act of nature" (§ 945.5(a)); "unreasonable failure

to minimize or prevent . . . [the claimed] damages" (§ 945.5(b)); "failure to follow the builder's or manufacturer's recommendations [if those recommendations were provided to the homeowner in writing], or commonly accepted homeowner maintenance" (§ 945.5(c)); "ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose" (§ 945.5(d)); a statute of limitations (§ 945.5(e)); a release (§ 945.5(f); and the builder's repair was successful (§ 945.5(g)).

It appears as if the builder may be limited to the § 945.5 affirmative defenses. There is no explicit language to indicate otherwise. Conversely, there is explicit language that shows that other defense parties are not so limited. "In addition to the affirmative defenses set forth in § 945.5, a subcontractor, material supplier, design professional, individual product manufacturer, or other entity may also offer common law and contractual defenses as applicable to any claimed violation of a standard." (§ 936.) (By its terms, § 936 does not apply to cases wherein strict liability applies to the above-named parties.)

The new law's change in the statutes of limitations for residential construction defect cases is profound. In the past, the time to file a complaint for residential construction defects [*17] was generally governed by *Code of Civil Procedure* §§ 337.1 (4 years for *patent* defects) and 337.15 (10 years for *latent* defects). Those *C.C.P.* sections are explicitly excluded from applying to actions brought under the new law. (§ 941(d).) Under the new law, there will no longer be the *latent* and *patent* distinction. All cases brought under the new law will be governed by a 10 year statute whether they involve a latent defect or a patent defect (except for those involving defects for which there are specific shorter statutory periods given, as mentioned above).

Interestingly the three year time limitation imposed by *Code of Civil Procedure* § 338(b) is not explicitly excluded by the new law. That *C.C.P.* section is occasionally used in construction defect cases because it covers: "An action for trespass upon or injury to real property." "It is an axiom of statutory construction that a particular specific provision will take precedence over a conflicting general provision." *Fleming v. Kent*, 129 Cal.App.3d 887 (1982). So, since the new 10 year statute of limitations is specifically meant for residential construction defect cases, it seems that even without explicitly excluding *Code of Civil Procedure* § 338(b), the new law may effectively exclude it. Still, to the extent that a defect, perhaps that resulting from a repair under peculiar circumstances, is painted as resulting from a trespass, *Code of Civil Procedure* § 338(b) may remain viable.

A few years ago, the Legislature enacted the "Calderon process." Named after its author Assemblyman Tom Calderon, and codified at *Civil Code* § 1375, the Calderon process is designed to provide a pre-litigation mediation process for "common interest developments" that are governed by Homeowners' Associations. (*See Civil Code* § 383.) Addressing potential overlap between the new law and the Calderon process, § 935 states: "To the extent that provisions of this chapter are enforced and those provisions are substantially similar to provisions in § 1375 of the Civil Code, but an action is subsequently commenced under § 1375 of the Civil Code, the parties are excused from performing the substantially similar requirements under § 1375 of the Civil Code."