

Notebook

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California Condo Lawsuits Trigger Liability Insurance Crunch

Defect Lawyers Eye Neighboring States

Judgments and settlements in construction defect lawsuits, awarding hundreds of millions of dollars to condominium associations, have caused large liability insurers to pull out of the California market, refusing to insure contractors for multifamily work. Partly because of the insurance crunch, construction of attached dwellings has ground to a near halt throughout California.

By one estimate, more than 80% of the multifamily developments in the San Diego area have already been taken to court. Now, California law firms are casting hungry looks at fast-growing Nevada, according to a December 4 report in the *New York Times*. More than a hundred California attorneys have reportedly applied to the Nevada bar in the past year, lured by the promise of easy pickings in developments around Las Vegas. And lawyers have barely begun to tap into a growing new market: defect suits against builders of single-family homes.

Lawyer greed, or builder incompetence? Critics charge the attorneys with manufacturing suits and inflating damages, and blame the litigation landslide for deflating property values and contributing to California's continuing construction slump. But attorneys counter that builders, not lawyers, should accept the blame: A pell-mell construction fever in the 1980s, they insist, left cheated homeowners



Most lawsuits stem from water intrusion problems. Here, an investigator has uncovered major structural rot.

SEAHAWK ENTERPRISES

stuck with substandard buildings while developers reaped hefty profits. Unskilled subs working without adequate supervision built gross defects into thousands of homes, they assert.

Political tug of war. Set off by rising insurance costs, a backlash against the flood of lawsuits has hit the California capitol. A 1995 law requires a 90-day negotiation process between builders and homeowners associations before any lawsuit can go to court. A handful of more radical reforms is before the legislature: A reduction in the statute of limitations, a restrictive definition of what constitutes a defect, and a cap on associated damages are among the measures that made no progress last year, but are back again this year.

The tort reform proposals have the backing of the influential California Building Industry Association (CBIA),

but are fiercely opposed by the powerful and well-connected trial lawyers' lobby. Caught in the middle, legislators face a dilemma: Whether to side with the builders who say their industry is being shut down by bogus lawsuits, or to protect home buyers who say they've been shafted by substandard builders.

State senate staffer Alan Gordon, who heads a legislative task force on the problem, says investigators see some merit on both sides of the issue: "There are some overzealous lawyers out there, but it all comes down to shoddy construction," he says. "Most of the lawsuits are based in fact. They originate with water intrusion and soil subsidence." To justify high legal fees, says Gordon, many attorneys extend the scope of the suits to minor items. But he says, "The lawyers are doing a good job for the consumers."

continued

OFFCUTS

The IRS has postponed the deadline

for businesses to start paying taxes electronically. Businesses that owed more than \$50,000 in payroll taxes in 1995 now have until July 1 to start using the new system. Businesses with lower tax bills have until January 1, 1999. For help and information, call the Electronic Federal Tax Payment System (EFTPS) hotline at 800/555-4477 or 800/945-8400.

Natural building materials

like straw bales and straw/clay blocks are the focus of a new learning program at the Fox Maple School of Traditional Building in Brownfield, Maine, reports the school's newsletter. A primary goal is to make the labor-intensive materials practical for modern builders with small crews. In addition to its usual timber-framing courses, Fox Maple will offer workshops this summer in thatch roofs and wattle-and-daub walls. For information, call 207/935-3720.

Overexposure to concrete and masonry dust

can cause silicosis, a disabling and sometimes fatal lung disease, warns the National Institute of Occupational Safety and Health (NIOSH). Workers exposed to silica dust should be protected by dust control measures, not respirators. For a copy of the pamphlet Preventing Silicosis and Death in Construction Workers, call NIOSH at 800/356-4674.

Contractor Makes His Own Peace with Vietnam

Former G.I. Returns to Build School

In 1969, John Bochain spent a year in Vietnam as an Air Force explosives expert. Like many of his generation, he says, "I had some bad experiences that I never could put behind me."

When Bochain heard that an organization called Global Volunteers was taking groups of Americans to Vietnam to help with local projects, he saw a chance to make peace with the past. Working one-on-one with a Vietnamese contractor and his crew, Bochain, now a Connecticut contractor and JLC subscriber, led a team of American volun-

cuts. He never made a mistake."

Getting to know his American crew was also its own reward, Bochain says. "I was the only veteran. We had two people from Microsoft, a retired lawyer, a couple of retired teachers. One woman was 84 years old. She was great — she worked as hard as anybody. People still keep in touch. Most of them sent me Christmas cards."

And in place of the bitter memories of war, Bochain says, he can now treasure memories of the gratitude the American volunteers earned from the children who will learn in the school-room they built. "The people liked us. They had a ceremony at the end. The



Connecticut contractor John Bochain learns by doing on a Vietnam school construction project. Above, Bochain helps lay ceramic tile over a dirt floor. Right, barefoot Vietnamese craftsman cuts a joint with a bow-saw.



teers from all walks of life as they built a kindergarten addition in the village of Tan Hiep, south of Ho Chi Minh City.

Working on the building gave the crew a glimpse of Vietnamese life no tourist could ever catch, says Bochain. The Vietnamese must rely on simple techniques, he explains, but their skills and energy impressed him. "They can't afford electricity or power tools," he says. "They used a hand augur and a bow saw. Their hammers were handmade. But they used beautiful wood — straight-grain mahogany, the real good stuff. And their 75-year-old joinery guy made perfect

children got up and sang, and they gave us all silk-screened T-shirts with pictures of the addition. They lined up on the walkway and gave us flowers."

Global Volunteers schedules three-week "service-learning" trips throughout the year to countries all over the world. Volunteers pay for their own food and lodging (\$350 to \$2,350 per trip), as well as their own air fare, and work under the direction of local organizers. The cash contribution is tax-deductible. For more information, contact Global Volunteers (375 E. Little Canada Rd., St. Paul, MN 55117; 800/487-1074). □

Gas Furnace Exhaust Can Corrode and Clog Metal Vents

Natural gas is about the cleanest-burning fuel around. But it's not perfectly clean: Along with water vapor and relatively harmless carbon dioxide, the exhaust from gas appliances contains trace amounts of sulfur and nitrogen compounds. If the water vapor in the exhaust cools enough to condense in the vent pipe or flue, these sulfates and nitrates condense along with it, forming a weak solution of nitric and sulfuric acid that can corrode metal or masonry.

A southern California heating contractor recently told *JLC* about a case where the problem went beyond corrosion. Called to a house to investigate a malfunctioning furnace, he found the unit connected to a metal vent pipe that was completely plugged with a white crystalline precipitate. Exhaust condensing in the long run of vent had



PETER RINTYE

Corrosion and combustion byproducts have blocked this vent pipe. The crumbly white substance could be aluminum oxide, zinc oxide, or a variety of sulfate, nitrate, and carbonate salts.

not only corroded the metal, it had reacted with elements from the pipe to form a crumbly mass that collected in an elbow.

"This happens when a new, more efficient furnace is hooked to a vent that's

too big," said the contractor. "In the old furnaces, the stack temperature ran about 400°F. In the new models, the exhaust is cooler, and it condenses instead of going up the chimney."

Worse, after the furnace began to shut itself off automatically — as it should when the vent is blocked — someone came back and tinkered with the burner until it would operate without proper exhaust venting. When the homeowners called, it was only to complain that the house wouldn't heat properly — they didn't realize that their furnace posed a serious health and safety risk.

The lesson: Each of the many gas appliances on the market today has specific exhaust vent requirements. Don't take those requirements lightly — make sure each burner is installed by a qualified professional in strict accordance with the manufacturer's instructions. □

OSHA Issues New Scaffold Standard

Training Is Key Element

OSHA's revised scaffold regulation, which went into effect in November 1996, is not much different than the old one, says a report in the NAHB newsletter *Building Safely Quarterly*. And as before, much of the standard does not apply to residential work. But some important changes do affect residential job sites, including these items:

- Workers more than 10 feet up on ladder jack staging must tie off for fall protection.
- Using ladders or other makeshift devices (sawhorses, etc.) on top of a scaffold to gain additional height is prohibited.
- Crossbraces can serve as railings if the arms cross at the height where the railing is required.

The new rule still requires a "competent person" to supervise scaffold erection

and to train and certify anyone using the scaffold. Training material is available from the Scaffolding Industry Association (SIA) in Van Nuys, Calif. (818/782-2012), the United Brotherhood of Carpenters (202/546-6206, ext. 318), and NAHB (800/223-2665). Many state and local Home Builder Associations also present safety seminars on scaffolding and fall protection.

But you might start by reading the directions that come with the scaffolding, notes Jay Klein of Albany Ladder, in Binghamton, N.Y. "We hand out manufacturer's instructions with every scaffold we rent or sell, but they usually end up on the floor of the builder's pickup."

Learning and complying with the OSHA guidelines is a good way to keep your scaffolding safe, says Klein. Focus on the basics, he advises: "I can think of six or eight cases in the past few years where someone has been killed or hurt because of an obvious mistake."

Dave Herstedt of OSHA's Denver office points out, "Not everyone's going to use every type of scaffold, so you don't need to know everything in the world." Herstedt says the "general requirements" section of the standard tells you most of what you need to know.

Klein noted that even smaller job sites may attract OSHA's attention if there is scaffolding up. While the agency has yet to mount a full-force enforcement campaign, Klein says, he already knows of small builders who have drawn serious fines for violating the new standard.

But OSHA's Herstedt does not foresee a big new push for enforcement: "We're not going to go out and smack everybody around just because we've got a new rule. But if you put up scaffolding that is an eyesore, everyone is going to notice it — the police, the fire department, the neighbors — and we will get complaints." □

Condo Lawsuits

On the other hand, notes Gordon, the litigation craze is drawing in the innocent along with the guilty. “A lot of builders put up a lot of crap during the 1980s,” he says. “But now everybody’s getting sued. It’s a real mess.”

Unfortunately for builders, the political equation is stacked against them. Homeowners outnumber contractors and tradespeople more than 10 to 1 in any state. In California, the efforts to limit builder liability may backfire, says Northern California remodeler Richard Zimmer: “The legislature might make the statute of limitations longer, not shorter.”

Widely publicized horror stories detailing the disintegration of dream houses have damaged the whole industry, says Zimmer: “We fight the reputation thing all the time. In the public’s eye, contractors are lower than politicians.”

A climate where lawsuits thrive. California builders are also at a distinct disadvantage in court. Decades of pro-consumer legislation, coupled with developing case law, have made the state’s legal climate uniquely hospitable to construction defect litigation.

Only in California are builders bound to honor a ten-year implied warranty on the houses they build. And only in three states — California, Texas, and Pennsylvania — are builders held to a standard of “strict liability” that makes them responsible for any defect, even when the builder is not negligent. In California, the definition of a “defect” is up to the jury, so that even slight deviations from standard nailing patterns can be held to be flaws. Beyond that, California currently allows “associated damages” like mental anguish to reach seven times the cost of actual repairs.

Real defects. Some lawyers may have brought cases that are unfounded, admits roofing consultant Chuck Osterman, who has served as an expert witness in many lawsuits against developers. But Osterman says the big cases would have gone the same way in any state. “They are putting the roofs on

wrong,” he says emphatically. “If there are 24 requirements in the roofing manufacturer’s installation guidelines, these guys are violating all 24. There is a total lack of supervision and a total lack of training.”

And while small cosmetic flaws do get dragged into many suits, says Osterman, “Ninety percent of these suits would never have happened if there hadn’t been two things: Leaking roofs and leaking windows.”

Developments he has examined in states outside California display the same widespread deficiencies, says Osterman. “Las Vegas is going to blow wide open,” he predicts. “Right after that will be Phoenix.”

Insurance woes. The shortage of affordable liability insurance has contractors struggling to adapt. Remodeler Zimmer says he was dropped by his former insurer, The Travelers, when the

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company stopped writing liability coverage in California. But Zimmer said his insurance broker was able to find another carrier who would cover him.

Zimmer, who has never been sued, says his good liability coverage helps him distinguish himself from other contractors in the customer’s eye. “Insurance means more than a license, because it means you haven’t been sued,” he said. “Many licensed contractors are going without insurance. Their customers assume they have it, but they don’t.”

Zimmer’s insurance agent, Casey Roberts of Bondi-Anderson Associates in Santa Rosa, Calif., explained that contractors who can’t buy coverage from an “admitted carrier” — one regulated by the state and protected by a state-financed reinsurance pool — have

to turn to “non-admitted” carriers who may not be as well capitalized or reliable. When The Travelers dropped all its California accounts, says Roberts, Zimmer was picked up by another admitted carrier because of his clean claims record. But Roberts says that wouldn’t have happened if Zimmer worked in a county where many condo developments have been built — even though his company has no involvement with condos. “He works in Malibu,” said Roberts. “If he worked in Marin, he’d have to go with a non-admitted carrier, and he’d pay more.”

Roberts says the post-condo environment is making business tougher for all contractors. “It won’t put them out of business,” he says. “But they’re going to have to be more professional — deal only with licensed, insured subs that they know and trust, and only with a written contract.”

To protect themselves, says Roberts, general contractors should be certain that their subs’ insurance policy names the general contractor as an additional insured — otherwise, the fine print in the GC’s policy may reduce or void his coverage. He advises having a lawyer read your insurance policy and alert you to any such loopholes.

JLC legal columnist Gary Ransone emphasizes that insured contractors should not let their insurance lapse. “You may never get that coverage at that price again,” he says. Insurance can prove crucial if you’re sued, he warns: “If you get dragged into a lawsuit and your insurance kicks in, it will pay for a lawyer to defend you — which could be your biggest expense.”

The supervision thing. Expert witness Osterman offers his own advice for dealing with subs. “When you have a sub install a product, make sure that the manufacturer’s instructions are attached to the contract as specifications — and supervise to make sure those instructions are followed.” The supervision is the key element, says Osterman: “General contractors tell us, ‘I subbed out the labor. It’s not my fault.’ That’s no excuse — in court, you are responsible for all the work done on that building.” □