
California "Fix-It Law" Aims to Limit Defect Lawsuits

Other states eye similar solutions, though effectiveness is unproven

Residential builders in California hope that a recently enacted state law will bring some relief from frivolous and unnecessary construction-defect suits by homeowners. Senate Bill 800, signed by Governor Gray Davis in late September, defines what sorts of building problems can be considered actionable defects and lays out a procedure that prevents homeowners from bringing suit until the builder has had an opportunity to inspect any alleged defects and offer to make repairs. Among its key provisions:

- Builders must acknowledge receipt of a written home-

owner defect claim — which may be sent by certified or overnight mail or delivered by hand — within 14 days.

- After notification, the builder has 14 days to inspect the alleged defect. The builder may tear out existing work to perform the inspection if necessary but must restore the property to its pre-inspection condition within 48 hours. Under some conditions, the builder can be granted an additional 40 days for further testing.

- After inspection, the builder has the option of offering the homeowner a cash settlement or submitting a detailed repair proposal, which the homeowner has 30 days to accept or reject.

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Docs Downplay Treated-Wood Playground Risk

In deciding to remove CCA wood from the market in cooperation with the U.S. Environmental Protection Agency (EPA), the wood-treating industry has been careful to emphasize that the wood is not a health threat in existing structures. And as the agency itself noted, "EPA does not believe there is any reason to remove or replace CCA-treated

structures, including decks or playground equipment."

There's new support for EPA's view from a team of doctors appointed by the Florida Department of Health to assess the toxic risk to children from treated-wood playground structures. In a June letter to Florida Secretary of Health John Agwunobi, M.D., the Florida Physicians Arsenic Workgroup reported that data found in their extensive review of the medical literature "have not demonstrated any clinical disease associated with arsenic exposure from this use of the CCA treated wood.... Used since the 1960s, CCA treated wood has never been linked to skin diseases or cancer in children exposed in recreational use."

The level of arsenic in soil near pressure-treated wood structures in Florida appears slightly elevated,

the doctors observed, but is still lower than the natural background level in other parts of the country and is not a cause for concern. In any case, they pointed out, the arsenic associated with treated wood is not in a form the body can readily take up: "Since the bioavailability of arsenic from playground and recreational wood and soil is low, the amount that could be absorbed also remains low and helps to further explain the absence of arsenic toxicity cases."

For people who remain concerned, however, an advisory panel's report to the EPA noted half a dozen experimental studies showing that application of polyurethane or acrylic/latex coatings, spar varnish, or oil-based water-repellent stains reduced leaching or ruboff of arsenic by 75% to 95%.

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• If the homeowner accepts the repair proposal, the builder must start work within 14 days and make “every effort” to complete the repair within 120 days. If the homeowner rejects the proposed cash settlement or repair, he or she is free to file a lawsuit against the builder instead. Likewise, if the builder has failed to meet the new law’s conditions at any previous point — by failing to respond to the original defect claim, for example, or failing to submit a repair proposal within the allotted time — the homeowner can bring suit.

Give the builder a chance. Proponents of the so-called Fix-It Law — which takes effect January 1, 2003 — contend that it will prevent the almost indiscriminate filing of lawsuits so common today. In many instances, a builder doesn’t even hear of an alleged defect until a

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suit is already underway, and at that point, making timely repairs is often out of the question.

“Most attorneys will advise the homeowner not to have a defect fixed,” says Scott DiBiasio, NAHB director of state and local political operations. “They’re looking for punitive damages later, but meanwhile the problem may be getting worse.” Giving the builder a chance to make good on problems right away, the reasoning goes, should benefit builder and homeowner alike.

Happy plaintiffs. But while SB 800 may represent a step forward, Joanna Huchting, an attorney with the California law firm Cox, Castle & Nicholson, cautions builders not to expect the new law to solve all their problems. The new legislation, she notes, is a compromise hammered out by a number of disparate groups, including building industry representatives, affordable housing advocates, and consumer attorneys.

“The plaintiff’s bar loves it,” says Huchting. Their fondness for the new law, she explains, is based on the belief that it may enable them to bypass a recent California Supreme Court decision, *Aas vs. William Lyon Company*, that prevents homeowners from suing


over defects unless those defects have caused property damage or personal injury (see “Calif. Supreme Court Says No to Homeowners,” *Notebook*, 3/01).

“SB 800 sets forward defects that don’t require property damage,” Huchting says. “For example, it says that plumbing lines shall not leak, period.” In other words, while the new law seems likely to prevent some lawsuits, it could strengthen the case of a plaintiff who is hellbent on taking a builder to court.

No time to waste. However the courts eventually interpret the new law, Huchting urges California builders to use the remaining weeks before it takes effect to familiarize themselves with its provisions and seek advice from their own lawyers. “There’s a lot to be learned,” she says.

In order to take advantage of the protection the new law provides, for example, builders will need to modify their sales contracts to inform customers of their rights and responsibilities under the law, and furnish them with further information at several specific points during the sales process. In handling actual defect complaints, builders will have a series of hoops to jump through, such as providing proof of insurance before inspecting an alleged defect and ensuring that repair proposals contain the names, addresses, phone numbers, and license numbers of all subcontractors expected to be involved in the repair.

Going national. While California is the largest state to pass such a law, similar “right to cure” legislation has already been enacted in Washington State and Arizona (Washington’s law took effect on June 13, Arizona’s on August 22.) “We see this as a growing trend,” says Scott DiBiasio. In an effort to build momentum for litigation reform elsewhere, NAHB has drafted its own model legislation, which it is now actively shopping to a number of state legislatures and home builder associations.

Describing the NAHB model as a “wish list,” DiBiasio notes that state HBAs in New Mexico, Oklahoma, Kentucky, Minnesota, and Idaho have shown interest in the legislation. Because insurance companies establish rates on a regional basis, rather than state by state, he views New Mexico and Idaho — which border on Arizona and Washington, respectively — as particularly significant. Once clusters of states begin adopting some version of its model legislation, the NAHB hopes, insurers will respond with lower liability premiums and more readily available policies. 

OFFCUTS

OSHA is expected to launch a review of its excavation standards, according to the Associated General Contractors newsletter *News and Views*. The review will be conducted under the Regulatory Flexibility Act, which requires federal agencies to undertake periodic reviews of rules that could significantly affect small employers. OSHA's excavation standard was last revised in 1990.

Mold growth on new formulations of pressure-treated lumber is causing concern among some lumber treaters, according to a report in the lumber industry newsletter *Random Lengths*. The report noted that while mold is unknown on CCA-treated lumber — now in the process of being phased out — one treater estimated that black mold may appear on about 15% of the lumber treated with the replacement chemicals ACQ and CBA.

The NRCA has received so many complaints from roofing contractors about the narrow nail-placement zones on laminated shingles, according to the August issue of *Professional Roofing* magazine, that it conducted a study of 27 laminated shingles from ten manufacturers. Reporting on the study, the article concludes that the plus or minus 1/4-inch tolerance for installing fasteners "is neither practical nor...consistently achievable in the field."

The City of Chicago is suing a half-dozen national paint companies for creating a public nuisance by manufacturing and selling lead-based paints, in a move patterned after a similar suit by the state of Rhode Island. Rhode Island's suit, the first brought by a state against the paint makers, went before a jury on September 4; Chicago filed suit on the 5th. Manufacturers acknowledge child lead poisoning as a problem but blame landlords for poor maintenance. "Litigation won't help a single child," said industry attorney Bonnie Campbell.

New York Prepares to Implement Truss Labeling Law

A recently passed New York State law provides that all commercial and industrial buildings using "truss type construction" must carry warning signs for the benefit of firefighters. The legislature's action is the latest chapter in a long-running campaign to regulate truss construction, particularly plate-connected light wood frame trusses. New York joins New Jersey and a number of municipalities in singling out truss construction as a particular hazard to fire-service personnel. Debate now shifts to the state's rule-making arena, where an ad hoc group of interested parties calling itself the Truss Labeling Coalition will attempt to thrash out language that will be workable and acceptable to all sides. The coalition includes representatives of the truss industry as well as the fire



service, along with builders, lumber suppliers, code officials, and other interested parties. The regulation will ultimately be written by the state's Code Council, appointed by the governor.

One of the council's organizers, Assistant Director for Code Development Ronald Piester, points out one immediate technical challenge facing the group: the difficulty of getting the language of the new legislation to mesh with the format of the international codes. "The law says to label commercial and industrial buildings, but in the international codes, there are no occupancy classifications that use the words 'commercial' or 'industrial,'" Piester says. In some cases, he notes, it's easy to determine whether an occupancy classification under the international code would fit the definition of commercial or industrial envisioned by the legislature. "But there are other occupancies where that's not quite so clear," he says. Representatives of the truss industry continue to oppose the narrow focus on their product, insisting that truss buildings are no more dangerous than any other wood-frame structure. While a handful of anecdotal reports of firefighter deaths in truss roof or floor collapses have been widely reported, Kirk Grundahl of the Wood Truss Council of America (WTCA) contends that the hazard has been blown far out of proportion. The truss industry would prefer a solution that didn't single out its products and is pushing for a yet-to-be-developed database system that would provide fire departments with quick information about any structure in case of fire. WTCA is also supporting new training and command and control methods to increase the safety of firefighters on the ground. Grundahl argues that these methods would be not only more fair but more effective as well.

Canadian Softwood Prices Fall

When the Bush administration slapped stiff import duties on Canadian softwood lumber producers in the summer of 2001, the move was meant to counteract what the U.S. Department of Commerce claimed were illegal subsidies to Canadian producers and aid struggling domestic lumber producers by forcing their competitors north of the border to boost prices. The NAHB and other builder organizations opposed the tariffs, predicting that they could add more than \$1,000 to the cost of a typical new home.

But things haven't played out as expected. Although import duties on Canadian wood now average about 27% — up from the original 19.3% tariff imposed in August of last year — a flood of lumber imports continues to drive down wood prices even as thousands of Canadian sawmill workers and loggers lose their jobs, according to press reports.

In September, Toronto's *Globe and Mail* reported that SPF 2x4 prices had dropped below \$200 per 1,000 board feet for the first time since March 2001. Analysts attribute the price drops to a supply glut created as the largest and most efficient western Canadian mills attempt to lower unit costs and stay profitable by running at maximum volume. Large eastern Canadian mills may soon follow suit, said the paper, while smaller and less efficient mills get pushed out of the market.

Some sawmill operators find it worthwhile to turn out large amounts of unprofitable lumber by processing the sawlogs that are a byproduct of the still profitable

pulp and paper industries. If the sputtering U.S. economic recovery continues, this trend may even increase: Some analysts are expecting a cyclical rise in demand for newsprint, office paper, and box board, which will push lumber mills to continue sawing logs even if sawn lumber prices stay low.

That paradoxical outcome suggests that the lumber market may be as complex as the long-running U.S.-Canadian trade dispute itself. A key World Trade Organization ruling in September, for example, was hailed as a victory by both sides. The U.S. side felt vindicated by the WTO's ruling that low prices charged by provincial governments for trees amounted to a financial subsidy for Canadian lumber producers, which are prohibited by international trade agreements. But Canadians took heart from a part of the ruling that overturns the American method of estimating the illegal subsidies for the purpose of setting countervailing duties.

In essence, the WTO said the U.S. was justified in imposing the tariff but had the dollar amount wrong. The U.S. had compared prices that Canadian mills pay provincial governments for stumpage against U.S. market-rate prices, and applied the difference as an offsetting import fee. But the WTO says U.S. prices have no bearing on the case. Instead, says the WTO, the U.S. must compare provincial stumpage fees with stumpage fees charged by private landowners in Canada. Since Canadian privately sold wood is less expensive than in the U.S., the U.S. must now refund some of the duty fees paid by Canadian exporters.

OFFCUTS

Solar power has been blamed for a devastating California wildfire.

State fire officials believe that September's Croy wildfire, which burned more than 3,000 acres and 35 dwellings in the Santa Cruz Mountains, originated in the solar electrical system of a remote mountain home, although analysis of its components failed to reveal the actual cause. "It makes you kind of crazy sometimes because you can't see what happened, what failed," Fire Prevention Bureau Chief Steve Espe told the *San Jose Mercury News*. "But if this is your power source, you really need to exercise due diligence."

Pennsylvania builders are campaigning to eliminate popular land conservancy programs in the area, according to the *Philadelphia Inquirer*. In a policy reversal, the state HBA is working to limit municipal power to buy open space, and to deny state funding to nonprofits that buy land in order to keep it undeveloped. Builders also want to limit land conservation easements to 15 years, says the paper.

Home Depot will swallow up three large regional flooring contractors in deals announced in September, according to press reports. The acquisitions will instantaneously make the Atlanta home-improvement retail giant the nation's largest turnkey supplier of flooring material to the residential construction sector, and marks a major move into installed sales, say observers.

Construction-related fatalities in Oklahoma increased sharply in 2001, according to a recent report by the state Labor Department. There were 33 deaths in the industry in 2001, up from 11 in 2000.

Study Sheds New Light on Smoke Detector

A series of field tests has provided Canadian researchers with some valuable information about how three common types of residential smoke alarms perform in real building fires. The Fire Risk Management



DR. JOSEPH SU, NATIONAL RESEARCH CENTER, CANADA

Program of Canada's Institute for Research in Construction teamed up with Underwriter's Laboratories of Canada to conduct the testing at a research site in Kemano, a deserted company town built by an aluminum company in the 1950s and now used by British Columbia for fire training and research.

In two Kemano houses, researchers rigged a variety of smoke detectors in various locations, then fired up a wide range of smoke-creating substances, including wood, upholstered furniture, and cooking oil. As the fires grew, they monitored the devices' responses. Among the findings:

- Combined ionization-photoelectric models equaled or outperformed ionization-only and photoelectric-only models.

- Setups that place smoke detectors in every room responded better than those that placed the units only in certain spaces.
- A closed door between the fire and the smoke detector caused a significant delay in smoke detector activation.

One unexpected finding, according to project leader Dr. Joseph Su, was the debunking of the supposed detector "dead zone" at ceiling-wall intersections. In fact, detectors placed in those areas were the first to respond. Although Canadian guidelines currently prohibit placing detectors there, Dr. Su speculates that the study may lead to more acceptance of wall-mounted detectors. For further information, contact Dr. Joseph Su at 613/993-9616 (joseph.su@nrc.ca).

BUSINESS TUNE-UP

Are You Ready to Improve? by Melanie Hodgdon

Business owners usually call me in as a consultant because they know their companies need to be improved. They may be expanding and want assistance in restructuring; they may have just purchased a more sophisticated computer system and want guidance and training in using it effectively; or they may want to rethink their systems and procedures because their paperwork hasn't kept up with increases in volume.

Before any of those things can happen, though, there has to be a realization that improvement is impossible without change. That may sound obvious, but it's not: The world is full of people who want things to be better as long as they don't have to do anything different. It takes courage, flexibility, and perseverance to make things better, but the biggest requirement is the deep-down recognition that the transition between the familiar present and the unknown-but-theoretically-better future is going to have some bumpy patches.

More than once, I've made the mistake of trying to force improvements on business owners who said they

wanted change but revealed the opposite with their actions. I don't do that anymore — doesn't work. Instead, I look for companies with the following five characteristics (this list is for small to medium-sized companies whose owner is intimately involved with running them):

- All employees affected by the proposed changes are enthusiastic or at least acknowledge that changes could be beneficial.
- Employees understand the need for a transition period; they don't expect miracles overnight.
- The owner admits that he or she must make changes, too.
- The owner is willing to commit time and resources to the process.
- Stated goals and objectives are realistic.

For such companies, the process can be invigorating and can instill a sense of team spirit. It's a pleasure to see the progress and satisfaction.