

## SENATE BILL 800: ISSUES OF INTEREST TO DESIGN PROFESSIONALS

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### **Overview**

On September 20, 2002, Governor Davis signed Senate Bill 800 (SB800) that made sweeping changes in the law governing California new *residential* housing construction. The new legislation, which took effect on January 1, 2003, has two aspects. First, it establishes new rights for, and imposes new requirements on, residential owners pursuing construction defect actions (California Civil Code Sections 895 through 945.5). Second, it extends limited immunity to individuals and entities hired by building permit applicants to review plans and specifications or inspect construction to determine compliance with building codes and project plans and specifications (Civil Code Section 43.99).

### **Genesis of Legislation**

The genesis of SB800 is the California Supreme Court's decision in *Aas v. Superior Court* (2000) 24 Cal.4<sup>th</sup> 627 which limited construction defect recoveries to actual *property* damage. In response to that decision, plaintiffs' attorneys successfully lobbied for SB800 which, among other things, expands the scope of recoverable damages in residential construction litigation to include the cost to bring defective construction into compliance with an

expansive set of new building "standards." Thus, the effect of SB800 is to abrogate the holding in *Aas* for new residential construction.

SB800 does more than just enact new standards. In addition to expanding the scope of recoverable damages, it defines a construction defect; it establishes specific building standards for new residential construction; it imposes new warranty obligations on builders; it prescribes mandatory pre-litigation mediation procedures; and it enacts a new statute of repose for residential construction; and, it establishes limited immunity for anyone providing peer review and construction review services.

This article discusses SB800 in highlight fashion. Design professionals should consult SB800 (California Civil Code Sections 43.99 and 895 through 945.5) and their counsel for the details of the new law.

### **Construction Covered By SB800**

SB800 applies to all aspects of residential development, including design, construction, specification, surveying, planning, supervision, testing or construction observation. It applies only to dwellings *originally* sold on or after January 1, 2003 and covers detached single-family homes, attached dwellings, and common interest

developments (i.e., community apartments, condominiums, planned unit developments and stock cooperative).

### **Parties Liable for Violations of SB800**

SB800 imposes liability on anyone involved in the design, construction and sale of dwellings *originally* sold on or after January 1, 2003. SB800 applies not only to a builder (i.e., a builder, developer or seller) but also to subcontractors, material suppliers, individual product manufacturers, and design professionals who, through a negligent act or omission or breach of contract cause, in whole or in part, a violation of SB800's building standards. That means, in order to prevail against a design professional for violation of SB800, an owner must establish that a design professional's negligent act or omission or breach of contract caused the violation, and attorneys must continue to obtain Certificates of Merit under CCP Section 411.35 before filing suit against architects. Thus, it appears that SB800 does not abrogate the standard of care test of liability for architects.

SB800 expressly provides that it also does not change design professional liability for damages not covered by SB800. SB800 has no affect on design professionals who limit their practices to non-residential work. Existing law, including damages limitations of *Aas*, will continue to apply to commercial and industrial projects, including condominium conversions.

#### **New Residential Building "Standards"**

SB800 defines a construction defect as a failure to meet one or more newly

enacted building "standards." Any builder (i.e., a builder, developer or original seller) who fails to meet one or more of the newly enacted standards will be liable for all resulting damages, including the cost to bring a nonconforming function or component into compliance.

SB800's building standards cover all functions and components of a residential structure (i.e., "any residential dwelling, other building or improvement located upon a lot or within a common area"). The standards cover seven "issues": water; structural; soils; fire protection; plumbing and sewer; electrical; and "other;" these are intended to encompass every function or component of a residential structure. Where SB800 does not address a particular function or component, that function or component will be deemed defective if it causes damage.

SB800's standards are extensive, expansive, and detailed. For example:

- windows, roofs, decks, foundations and exterior siding cannot allow water intrusion.
- Plumbing and sewer systems cannot leak or corrode.
- Foundations cannot contain "significant" cracks or vertical displacement and cannot be "unsafe."
- Soils and retaining walls cannot cause structural damage and soils must be stable.
- Exterior pathways, driveways, sidewalks and patios cannot contain cracks or display "significant" or "excessive" vertical displacement.

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- Exterior finishes cannot contain “significant” cracks or separations.
- Installation of manufactured products cannot interfere with their useful life as warranted or represented by the manufacturer.
- Heating systems must meet strict guidelines and air conditioning systems must meet Title 24 energy criteria.
- Attached structures must meet any existing inter-unit noise transmission standards.
- Irrigation and drainage systems must operate properly and not damage landscape or other improvements.
- Landscaping systems must survive for at least one year.
- Ceramic tiles cannot detach.
- Structures cannot contain public health hazards.

Notwithstanding its detail, SB800 fails to identify several key terms (e.g., “excessive,” “significant” or “reasonable”). Whether a crack is “significant,” or condensation is “excessive,” will therefore be left to a judge or jury to decide. As with any new legislation, such terms will acquire definitions as cases brought under SB800 move through the judicial system. Nevertheless, there is the possibility of inconsistent results. For example, one jury may conclude a crack was “significant” while another may determine that an identical crack was not “significant”.

Although SB800 may not alter the manner in which design professionals’ services are judged, SB800 standards may become a minimum that a design

professional must meet.

Design professionals should consult the text of SB800 for a detailed list of the new standards. (See the attached Appendix for a more detailed outline of the standards).

### **Homeowner Maintenance and Repair Obligations**

SB800 provides some protection to the construction industry by requiring that homeowners follow all reasonable written maintenance guidelines and schedules and comply with commonly accepted maintenance practices. Homeowners who fail to meet their maintenance and repair obligations will share responsibility for any resulting damage.

### **Pre-litigation Mediation Procedures**

SB800 prescribes detailed pre-litigation mediation procedures that must precede an action for violation of SB800’s standards. Those procedures are similar to, but more extensive than, those required for actions against common interest development builders, developers or general contractors (Civil Code Section 1375). Under the new procedures, mediation of a typical residential construction defect claim would take approximately 300 days to complete.

Design professionals will not automatically be involved in mediations. SB800 anticipates that the claim process will begin with a homeowner’s claim against the builder. The builder then decides whether or not to involve design professionals in the pre-litigation

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process, primarily through an indemnity claim. SB800 does not preclude, however, a homeowner's direct action against a design professional for violations of SB800 standards. In that case, design professionals are required to follow the new mediation procedures.

SB800's pre-litigation procedures mandate inspections and provide the opportunity for repairs at the option of the builder. The inspections and repairs are not privileged nor protected from discovery. Accordingly, the fact that repairs were attempted could be evidence in a subsequent legal action. Because evidence of attempted repairs could be admissible in a later lawsuit, any repairs, if undertaken, must be **effective**. A "Band-Aid" approach could prove disastrous in a later action.

### **Certificates of Merit**

Certificates of Merit under Code of Civil Procedure § 411.35 are not a requisite for invoking SB800's *mediation* provisions. If the mediation fails, however, an attorney must obtain a certificate of merit under before filing an action against a design professional for negligence or indemnity.

### **New Statute of Limitations and Statute of Repose**

SB800 revises the statute of limitations by eliminating the distinction between patent and latent defects and imposes a ten-year statute of *repose* for violations of SB800 standards.

### **Statute of Limitations Versus Statute of Repose**

The difference between a statute of limitations and a statute of repose is subtle but important. A statute of limitations provides a date by which a claim must be made, usually by filing a lawsuit or initiating arbitration proceedings. It is ordinarily triggered by discovery of property damage. A statute of repose provides an "outside" date by which a claim must be made, whether or not a defect has caused property damage. If a claim is not made within the statute of repose, it cannot be later brought even in the case of clearly verifiable damage and liability.

### **Two-fold Approach to Statutes of Limitations and Repose**

SB800 provides a ten-year statute of *repose* that begins to run on substantial completion of a project. All claims for construction defect must be filed no later than ten years after substantial completion. The time period may be shortened by more restrictive statutes of limitations. This is best explained by way of example.

If a roof begins to leak five years after substantial completion, the three-year statute of *limitations* for property damage would begin to run so that a claim based on the leaking roof would have to be made within three years of discovery of the leak, or eight years after substantial completion. The ten-year statute of repose would not extend the deadline for making a claim because the three statute of limitations for property would expire before the ten-year statute of repose.

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If the roof did not begin to leak until eight years after substantial completion, the claim would have to be brought within the ten-year statute of repose. The three-year property damage statute would not extend the ten-year statute of repose.

As a general rule, a construction defect claim must be made within the *earlier* of two time periods: that established by the statute of limitations or that established by the statute of repose.

### **Special Statutes of Limitations For Specific Building Components or Functions**

SB 800 shortens the statute of limitations (i.e., deadlines for filing claims) involving specific building functions or components:

- Claims for paint and stain failures must be brought within 5 years of the close of original escrow the original sale of the property.
- Claims for violation of plumbing, sewer and electrical standards; for “significant,” “excessive” or vertical displacement in exterior hardscape; and for corrosion to untreated steel frames and components must be brought within 4 years of the close of escrow of the original sale.
- Claims for decay of untreated wooden posts or failure of landscape systems to survive for 1 year must be brought within 2 years from the close of original escrow.

- Claims for failures to properly install dryer ducts must be brought within 2 years of the close of the original escrow.
- Actions involving inter-unit noise standards must be brought within 1 year of the original occupancy of an adjacent unit.
- Actions for failures of irrigation and drainage systems to operate properly must be brought within 1 year from the close of original escrow.

### **Restrictions on Statutes of Limitations and Repose**

The ten-year statute of repose may not be asserted by anyone in actual possession or control of a residential structure at the time of an alleged deficiency. Accordingly, the ten-year statute of repose will not commence to run until a builder sells or otherwise relinquishes effective control of a dwelling. The fact that a builder or developer remains in control of a residential structure would not extend the statute of repose for other parties, including design professionals.

The new 10-year statute of repose does not apply to actions not based on a claimed violation of a SB800 standard (e.g., breach of contract, warranty or express contractual indemnity). Those actions will continue to be governed by existing law, including statute of limitations.

### **Repairs Do Not Extend Statutes of Repose**

Repairs under SB800 will not trigger a new period for the statutes of limitation

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or repose. Instead, the ten-year statute of repose will continue to be calculated from substantial completion of the *original* construction.

### **Damages**

SB800 expands a homeowner's recoverable damages to allow reimbursement for the cost to correct a nonconforming building component or function regardless of the presence of actual physical damage. Under the *Aas* case, a homeowner could not recover the cost to repair deficient building components unless the components had caused actual property damage.

Owners of *single-family detached dwellings* may recover the *lesser* of the cost to repair defects or the diminution in value caused by the defect. Owners of *attached dwellings* may recover the cost to repair any SB800 violation: (1) the cost to repair and rectify any defect resulting from a dwelling's failure to meet a SB800 standards; (2) reasonable costs to remove and replace an improper repair; (3) reasonable relocation and storage costs; (4) lost business income if the dwelling was a principal place of a licensed business; (5) reasonable investigation costs for violation of SB800 standards; and (6) any costs and fees provided by contract and statute.

### **SB800's Relation to Other Actions**

SB800 does not apply to claims for breach of contract, fraud, personal injury or violation of a statute. Homeowners may include such claims in an action brought under SB800, but damages recoverable under those claims will be reduced by the damages awarded for a

violation of SB800 standards.

### **Subsequent Purchasers**

SB800 binds original purchasers and their successors-in-interest. Subsequent homeowners must follow SB800's procedures and may assert an SB800 claim so long as the claim is not barred by the statute of limitation.

Homeowner associations are considered original purchasers and have standing to enforce SB800's provisions, standards, rights and obligations.

### **Affirmative Defenses**

SB800 does not limit a design professional's common law or contractual affirmative defenses to a residential defect claim unless the design professional was strictly liable for a SB800 violation -- an unlikely scenario under most circumstances. On the other hand, SB800 limits the affirmative defenses available to a *builder* (i.e., a builder, developer or original seller of new residential units) for claimed violations of SB800 standards. The defenses available to builders are:

- An "unforeseen act of nature," defined as a weather condition, earthquake, or man-made event such as war, terrorism or vandalism, in excess of the design criteria contained in applicable building codes, regulations and ordinances at the time of the original construction.
- A homeowner's unreasonable failure to minimize or prevent damages, including a failure to give timely notice to the builder

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after discovery of a violation or to allow reasonably and timely access for inspections and repairs under SB800.

- A homeowner's failure to follow a builder's or manufacturer's reasonable recommendations and schedules or commonly accepted homeowner obligations, provided the owner had written notice of those schedules and recommendations.
- Alterations by homeowners, their agents, or independent third parties to a structure; ordinary wear and tear; misuse, abuse or neglect; or use of the structure for other than its intended purpose.
- The action was brought beyond the statute of limitations.
- A valid release from the homeowner.
- The builder's repair corrected a particular violation of a SB800 standard.

SB800 does not restrict the defenses available against actions not based on violations of SB800 (e.g., breach of contract, fraud, personal injury or breach of a statute).

### **Effect on Design Professionals**

Although SB800 appears primarily aimed at developers, builders and sellers of new residential property, design professionals must nevertheless be aware of its potential impact on their practices.

### **SB800's Functionality Standards**

SB800 building standards blur the distinction between construction and design. Some standards address design issues through performance criteria (e.g. "Roofs ... shall not allow water to enter the structure ..."); other standards address "construction" or "installation" issues (e.g. "Exterior walls ... shall be installed in such a way so not to allow unintended water to pass into a structure ..."); still other standards mix design and construction issues.

SB800's failure to differentiate clearly between design and construction issues is problematic for design professionals. Even the most detailed and complete set of plans and specifications cannot prevent faulty construction or installation of building components by contractors or subcontractors. Accordingly, design professionals must be cautious. Design professionals should also act proactively. They should note violation of SB800's standards and inform their client and, if required by contract, contractor in writing of any perceived violations. Written observations and recommendations that put an owner and contractor on notice of defects have two salutary effects: they minimize defects during construction and provide a defense against a later construction defect claim.

### **Architects' Opinions Re Compliance with SB800 Standards**

Developers, builders and owners have begun to look to design professionals for guidance and assistance in dealing with SB800, while others have attempted to shift responsibility for construction

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errors and omissions to design professionals.

Some owners are requesting that design professionals provide an opinion that a project meets SB800's standards. Such requests can be a trap for the unwary by increasing exposure for construction defects beyond that ordinarily assumed by design professionals under law.

Design professionals should also avoid opinions concerning issues that could become an express warranty or guarantee of a project's design. Design professionals ordinarily do not warrant or guarantee their services. Providing an opinion that a design meets SB800's standards may invite warranty or guaranty liability where none would otherwise exist.

### **Qualified Immunity for Quality Peer and Construction Review**

SB800 provides qualified immunity for any person or entity that, under a contract with a residential building permit applicant, performs a quality review of plans and specifications for code compliance, or reviews residential construction for compliance with plans and specifications.

### **Stringent Qualifications**

To qualify for SB800's immunity, the person or entity must:

- have at least five years verifiable field experience,
- be either (a) a certified building inspector, combination inspector or combination dwelling inspector certified by the ICBO

and have passed the ICBO written exam for those categories, or (b) a registered professional engineer, licensed general contractor or licensed architect.

- maintain professional errors and omissions insurance with limits of at least \$2 million.

The reviewer cannot engage in any other activity on the project (e.g., as architect, engineer or contractor) and cannot provide quality review services to anyone other than the permit applicant. A project architect or engineer cannot, under guise of performing quality review services, qualify for immunity under SB800.

### **Only Qualified Immunity**

SB800's immunity is not absolute. Any protection afforded by SB800 may, in practice, be illusory. SB800 does not proscribe suits by the permit applicant who hired a peer or construction reviewer. Permit applicants, faced with SB800 claims, would likely pursue an indemnity claim against a reviewer and shift responsibility for SB800 violations to the reviewer. Moreover, when the applicant's damages were the result of the **sole** negligence or willful misconduct of a peer or quality reviewer, SB800 appears to allow a third party to pursue an indemnity claim against the reviewer.

### **Conclusion**

SB800 presents a veritable legal mine field for developers, builders, contractors, subcontractors, design

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professionals, homeowners, homeowner associations, lawyers, and judges. There are no extant case authorities that interpret the specific provisions of SB800. The path through this minefield is not clear at present, and will only become so as homeowners, builders, designers, attorneys, and ultimately, the courts, address claims brought under SB800. Practitioners are advised to consult their counsel concerning specific provisions of SB800.

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## **APPENDIX**

### **Summary of SB800 Building Standards**

SB800 imposes new construction “standards” in seven categories, according building components and functions. They can be found at Civil Code Sections 896 and 897.

#### **1. Water Issue Standards**

- A door must not allow unintended water (as water that “passes beyond, around, or through a component or the material that is designed to prevent that passage”) to pass beyond, around or through the door or its designed or actual moisture barriers.
  - Windows, patio doors, deck doors and their systems must not allow water to pass beyond, around, or through the window, patio or deck door, or designed or actual barrier, including internal barriers within windows, window assemblies, framing, substrates, flashing and trim. Windows, patio and deck doors and their system must not allow “excessive” condensation to enter the structure and cause damage. “Excessive” condensation is undefined.
  - Roofs, roofing systems, chimney caps and ventilation components must not allow water to enter a structure or pass beyond, around or
- through the designed or actual moisture barriers, including internal barriers within the components.
- Decks, deck systems, balconies, balconies systems, exterior stairs and stairs systems must not allow water to pass into an adjacent structure or allow unintended water to pass within the components themselves and cause damage to their systems, including framing, sub strait flashing and sheathing.
  - Foundation systems and slabs must not allow water or vapor to enter into a structure and cause damage to another building component, or to limit the installation of a type of flooring material because of water intrusion or condensation.
  - Hardscape (including paths, patios, irrigation, landscaping and drainage system, installed as part of original construction) must not cause water or soil erosion to enter into or come in contact with a structure and damage its component.
  - Stucco, exterior siding, and exterior walls must not allow unintended water to pass into a structure or pass beyond, around or through the designed or actual moisture barriers of a

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component or to allow “excessive” condensation to enter a structure and cause damage to a component. “Excessive” condensation is undefined.

- Retaining and side walls must not allow unintended water to pass beyond, around or through their designed or actual moisture barriers, including internal barriers, and thereby cause damage. This standard does not apply to those portions of any wall or drainage system designed to have water flow beyond, around or through them, but only water designed to flow beyond, around or through the components may do so.
- Components of plumbing, sewer and utilities systems must not leak or corrode as to impede the useful life of those systems. Sewer systems must allow the designated amount of sewage to flow through them.
- Shower and bath enclosures must not leak water into the interior of walls, flooring systems, or other components.
- Ceramic tile and tile counter parts must not allow water into the interior of walls, flooring systems or other components and cause damage.

## **2. Structural Issue Standards**

- Foundations, load bearing components and slabs must not contain “significant” cracks or vertical displacement. “Significant” is not defined.
- Foundations, load bearing components, and slabs must not cause a structure to be structurally “unsafe”. “Unsafe” is not defined. Foundations, load bearing components and slabs, and underlying soils must comply with design criteria in government building codes, regulations and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction.
- Structures must comply with all design criteria for earthquake and wind load resistance in government building code, regulations and ordinances in effect at the time of the original construction.

## **3. Soils Issue Standards**

- Soils and engineered retaining walls must not cause, in whole or in part, damage to a structure built on soil or on the engineered retaining wall, and must not cause, in whole or in part, a

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structure to be structurally “unsafe.” “Unsafe is not defined.

- Soils must not cause land upon which no structure is built to become unusable for the purpose for which the land was represented at the time of the original sale by the builder, or for the purpose for which that land would be commonly used.

#### **4. Fire Protection Issue Standards**

- A structure must comply with design criteria in building codes, regulations and ordinances for protection of occupants in effect at the time of the original construction.
- Fireplaces, chimneys, chimneys’ structures and chimneys’ termination caps must not cause an unreasonable risk of fire outside of fireplace or chimney.
- Electrical and mechanical systems must not cause an unreasonable risk of fire.

#### **5. Plumbing and Sewer Issues**

- Plumbing and sewer systems must operate properly and not materially impair the use of a structure by its inhabitants.

#### **6. Electrical Systems**

- Electrical systems must operate properly and not materially impair the use of the structure by its inhabitants.

#### **7. “Other” Issues**

- Original exterior pathways, driveways, landscape, sidewalls, sidewalks and patios must not contain cracks or display “significant” or “excessive” or vertical displacement. “Significant” and “excessive” are not defined.
- Stucco, exterior siding and other exterior finishes and fixtures cannot contain “significant” cracks or separations. “Significant” is not defined.
- Installation of manufactured products (including windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint and appliances) must not interfere with those products’ useful life. SB800 defines “Useful life” means a manufacturer’s representation of how long a product is warranted or represented to last, including recommended or required maintenance.

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Absent a manufacturer's representation, installation of manufactured products must not interfere within its utility.

- Heating systems must be able to maintain a room temperature of 70° F at a point 3 feet above the floor in any living space. Air conditioning installed in any living space must comply with Title 24 of the California Code of Regulations or its successor.
- Attached structures must comply with inter-unit noise transmission standards contained in government building codes, ordinances or regulations in effect at the time of the original construction. Absent such codes, ordinances or regulations, there is no "standard" for inter-unit noise transmission.
- Irrigation and drainage systems must operate properly and not damage landscaping or other external improvements.
- Untreated wooden posts must not contact soil and cause "unreasonable" decay based on finished grade at the time of the original construction. "Unreasonable" is not defined.
- Untreated steel frames

and components must not "unreasonably" corrode.

- Paint and stains must not cause deterioration of building surfaces for the time specified by their manufacturer.
- Roofing materials must be installed to avoid those materials falling from a roof.
- Landscaping systems must be installed to survive for not less than one year.
- Ceramic tile and tile backing must be installed so that the tile does not detach.
- Dryer ducts must be installed and terminated according to manufacturer requirements.
- Structures shall not impair occupants' safety by containing public health hazards as determined by authorized public health officials, health agencies or governmental agencies.

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