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A recent important case precedent for defining actionable construction defects, AAS v. Superior Court.

On December 4, 2000, the California Supreme Court issued an important and far reaching decision in a case involving claims for damages arising from construction defects, the case being AAS v. Superior Court. This followed an earlier (1998) finding in the same matter by the California Court of Appeal and is of great importance to all parties prospectively involved in construction defect litigation. While the case would only directly affect such litigation in the State of California, it will no doubt have a "ripple effect" across the rest of the nation because of the compelling issues raised and the manner in which they are addressed.

In the earlier finding by the Court of Appeal, it was ruled that plaintiff homeowner associations and individual owners of mass-produced housing may not recover damages in negligence actions or strict liability against developers, general contractors and subcontractors for construction defects where the claimed defects have produced only prospective economic injury and have resulted in neither personal injury nor damage to other property. Secondly, the Court ruled that plaintiffs could not recover "stigma damages" as to the diminution in value of the property caused by defects where the cost of the repair is the theory for compensation being sought.

In limiting the recovery in the first instance to personal injury or damage to other property, the Court relied upon a legal concept known as the "economic loss doctrine", a frequently cited but often misunderstood concept. In its finding, the Court concluded:

"We hold that, under the 'economic loss doctrine' ... homeowners associations and individual homeowners do not have a private right of action and negligence against developers, general contractors and subcontractors for recovery of purely economic losses they sustained as a proximate result of construction defects in mass-produced housing (including but not limited to effects involving violations of governing building codes) which yet have not caused personal injury or physical damage to other property."

While very instructive, the Appellate Court finding left several questions open. Subsequently, the California Supreme Court granted review of the case and handed down its decision in December, 2000.

By a 5-2 vote, the California Supreme Court essentially affirmed the findings of the lower court. In addition, it quoted recent case law wherein the Court refused to allow the imposition of emotional distress damages in a construction defect case. It further cited another case to the effect that the Court did not intend to dispense with the rule that appreciable, non-speculative, personal injury is an essential element of a tort cause of

action.

The Court ended its majority decision by stating:

“Homebuyers in California already enjoy protection under contract and warranty law for enforcement of builders' and sellers' obligations; under the law of negligence and strict liability for acts and omissions that cause property damage or personal injury; under the law of fraud for misrepresentations about the property's conditions; and an exceptionally long 10-year statute of limitations for latent construction defects. While the legislature may add whatever additional protection it deems appropriate, the facts of this case do not present a sufficiently compelling reason to preempt the legislative process with a judicially created rule of tort liability.”

The significance of this case is that it defines construction defects for the first time and limits such definition to actual damages. The decision will no doubt be of considerable benefit in construction litigation as to the interests of developers, general contractors and subcontractors, however, its effect upon the interests of design professionals, including engineers and architects, is currently unclear. Might it be applied in some analogous way to the benefits of these latter parties or will plaintiffs shift their attention to design professionals when seeking damages for purely economic losses? California Courts have specifically distinguished, for example, the malpractice liability of design professionals for negligence from that of a developer or builder of mass-produced housings for defects in its product, holding that the former may be liable for purely economic damages while the latter may not, for example, in *Cooper v. Jevne*, 56 Cal. App. 3d 860 (1976).

Having now defined construction defects and clarified the basis upon which recovery may be sought for them, perhaps the Court has created a greater predictability for what types of claims should be viewed favorably and what their expected outcome may be. Even better, hopefully this finding may help curtail the proliferation of construction defect litigation which has had a substantial negative effect upon the growing need for affordable housing.

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