Notebook...

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No Harm, No Foul

California high court considers "latent defects" lawsuits

by Ted Cushman

The California Supreme Court has agreed to hear a controversial construction defect case that may significantly change the state's legal landscape. In the San Diego County case of *Aas v. Superior Court*, or "*Aas*," the state's 4th Circuit Court of Appeals has ruled that multifamily and tract builders in the state cannot be held liable for the cost of repairing so-called "latent defects." In the words of the three-judge panel, "homeowners...do not have a private right of action against developers and contractors for recovery of purely economic losses they sustain as a result of construction defects in mass-produced housing...which have not yet caused personal injury or physical damage to property other than the defectively constructed portions of the residential structures themselves."

The ruling came in a lawsuit brought against San Diego builder William Lyon Company and a wide assortment of subcontractors. Lawyers for homeowners known as Aas and Provencal, who lived in two different Lyon developments, charged that the projects were riddled with inferior and defective workmanship. But the appeals court held that the jury would not be shown evidence of alleged code violations, such as improperly installed or missing shear walls and firewalls, since there was no claim that those deficiencies had hurt anyone or damaged other parts of the building. Only evidence involving present damage, like leaking roofs and cracked walls or foundations, would be admitted.

The decision would rule out parts of many large damage suits, common in California, in which experts tear off siding or open walls to expose incorrect nailing, missing blocking, and the like. If upheld on appeal, the *Aas* decision may limit the tidal wave of multimillion-dollar lawsuits that has brought attached-home construction in southern California to a near halt and created an acute shortage of contractors' liability insurance statewide.

The *Aas* decision directly affects only negligence suits against high-volume builders, and will do little to protect custom builders and subs from suits based on contract or warranty claims. And in cases where physical damage or injury (as opposed to purely economic loss) is alleged, all California contractors will continue to be vulnerable to lawsuits for up to 10 years after the work is performed.

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Plaintiffs in the "Aas" lawsuit said that obvious defects such as loose shingles (left) prompted their lawsuit, and that destructive testing (right) revealed further flaws. Most of the cases were settled out of court, but lawyers are still arguing over whether homeowners should be compensated for defects that have not resulted in damage.

Significance. At first glance, say some lawyers, the *Aas* decision does not appear to break new ground. "My initial response was, 'I don't see how this makes new law,' " remarked Juan Acosta, a legislative advocate for the California Building Industry Association (CBIA). "You learn this your first year in law school — you can only collect for negligence if there are actual damages." And as San Diego attorney Ken Kasdan, a successful plaintiff's lawyer, pointed out, "the *Aas* decision has been accepted for review by the Supreme Court, so it does not have the force of law in California."

The *Aas* ruling does not affect custom builders and subs, who are still liable for damages from defects, such as this leaky flashing, for up to ten years.

But some southern California lawyers view *Aas* as highly important. Newport Beach attorney Thomas Miller, whose firm has won more than $200 million in suits against developers and builders, told the *Orange County Register*, "[homeowners] are really going to get hurt by this if we don't find a way around it." And although the *Aas* decision has been vacated pending the high court's review, it is still influencing cases, according to San Diego attorney Michael Freeland, who defended a concrete subcontractor in the *Aas* and *Provencal* cases. "Technically we are not allowed to cite the *Aas* decision in court," Freeland told *JLC*. "However, the law that supports the court's reasoning is all still good law. You can use the rationale used by the *Aas* court in any similar case."

Prior rulings. The final outcome depends on the Supreme Court, whose job will be to clear up confusion created by old and sometimes contradictory precedents. In the *Aas* case, the judges applied the high court's "economic loss doctrine" as spelled out in the 1965 case of *Seely v. White Motor Co.*, a case involving an allegedly defective truck: "Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone."

But the *Aas* ruling contradicts a 1984 ruling in the case of *Huang v. Garner*, in which Huang was allowed to sue a developer and builder for code violations which had not caused physical damages. There, the 3rd Circuit appeals court cited another ruling from the case of *J'Aire v. Gregory* which, however, as the *Aas* judges pointed out, involved a delay in construction, not a defect.

The conflict between *Huang* and *Aas* may be one reason the high court agreed to review the case, observers say. There isn't much settled law on the strict liability of builders, points out CBIA's Acosta, because "there haven't been many decisions. Ninety-plus percent of these cases settle out of court, and the ones that go to trial are argued on different grounds."

Shifting battleground. Whatever the high court decides, lawyers can still argue that builders are bound by an implied warranty or by promises made in sales literature. Or, as Kasdan suggested in a letter to the Supreme Court supporting review of the *Aas* decision, plaintiffs could argue that the builders acted as design professionals and sue for professional malpractice.

"As a practical matter," observed Acosta, "plaintiffs include every possible theory of recovery in the complaint, bring in as many subs as possible, and let the defense sort out who has what liability." The *Aas* decision, hopes Freeland, "may help to discourage plaintiffs from pulling a laundry list of code violations out of their computer and trying to collect on all of them. If nothing else, it's a blow in favor of the subs."

Pending appeal. The *Aas* and *Provencal* suits themselves have been settled — all except for one defendant. The attorney for plaintiffs in the *Provencal* case, Duanne Schinnick, is still pursuing an insulation sub who he says failed to properly detail firewalls.

According to Schinnick, many defects in the Provencal project were obvious and shocking: "Three-quarters of the houses had leaking roofs. There were drywall cracks as large as an inch. Some of the walls that were at the top of a slope moved by an inch — the homeowners said that at night in the quiet they could hear the houses moving."

But Schinnick hopes his case against the insulation sub — which does not involve any actual present damages — will establish the principle that code violations alone are grounds to sue for damages. "Failing to comply with the building code is a harm to the homeowner," he insists. "It is below the standard of care."

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Green Guidance from Government

Stymied by a Congress that refuses to allocate funds to combat global warming, President Clinton earlier this year steered his environmental campaign into the arms of a partnership between the residential building industry and several government agencies, including HUD and the Department of Energy. Titled the Partnership for Advancing Technology in Housing (PATH), the effort recognizes that home energy use is believed to constitute 20% of total U.S. carbon emissions, which contribute to global warming. If the program's stated goals are met, consumers are expected to save $11 billion a year in energy and housing costs, and the air will be spared 24 million tons of carbon emissions annually.

The PATH initiative will create incentives for manufacturers, builders, and remodelers to develop and install energy-saving products — like insulating windows, fluorescent lights, solar roofs, and efficient water heaters — in 15 million existing homes and 50% of new homes built in the next decade. Manufacturers and new-home builders will benefit most from PATH incentives, but small builders and remodelers will get some help from the promised expediting and discounting of permit applications for projects that meet PATH objectives. And because a planned mass marketing program is expected to create consumer demand for PATH homes and remodels, contractors with a "green" focus could see their market expand.

The PATH Web site (www.pathnet.org), cosponsored by the NAHB, will be highly publicized to consumers and contractors, and will highlight best practices and emerging technologies. The Web page will also include a forum for manufacturers, contractors, and consumers to discuss energy issues. The exact scope of the PATH program is still unclear, but funding for the program, along with a proposed tax incentive for energy-efficient homes, will be decided when Clinton's 1999 budget is approved.

Build House, Break for Lunch

You could brag shamelessly if your company built a whole house in four months. If you claimed you could do it in four days, people would call it a fish tale. So imagine the reaction if anyone claimed a house could be built in a little over four-and-a-half hours.

But that's exactly what happened when more than 250 members of the Middle Tennessee HBA made a run at the *Guinness Book of World Records* time for the fastest house built. The house — which was put up between 7:00 a.m. and 11:39:08 a.m. on June 12, including carpets and landscaping — was a Habitat for Humanity project, and the event was covered by CBS, NBC, CNBC, and local stations.

As is usual with projects that come in on time, planning and organization were key, with material deliveries timed to the minute. HBA volunteers were grouped in closely focused teams that got in, got their work done, and got out. Obviously, there was considerable overlap among trades, but no coffee breaks and no small talk about last night's game.

Here's how long each major phase took to complete, in minutes: framing, 74; rough plumbing, 22; rough electric, 30; rough hvac, 18; wall insulation, 18; roofing, 68; cornice, 45; blown insulation, 25; drywall, 90; siding, 90; painting, 45; cabinets, 20; finish plumbing, 10; gutters, 20; wood trim, 45; finish electric, 28; finish hvac, 18; carpet and vinyl flooring, 82; and landscaping, 75.

Crewmembers of the Middle Tennessee HBA work together constructing a home for Habitat for Humanity in the world-record time of 4 hours, 39 minutes.

Home Builder Refines ICF Construction

When Dallas-based Centex Homes wanted to offer its customers energy-efficient homes built with insulating concrete forms (ICFs), it had trouble finding information on production methods for the relatively new material. So the company decided to test and refine production home building with ICFs itself, with technical and marketing support from the Portland Cement Association (PCA), Owens-Corning, the Cement and Concrete Promotions Council of Texas, and Lite-Form International. As a result, Centex is building 30 ICF homes, which will be available for viewing during the NAHB's annual convention in Dallas in January.

Besides standardizing foam-form building procedures, the company has hired the Florida Solar Energy Center to compare the energy performance of six ICF homes with that of six conventional homes in the same subdivision. PCA is also looking to the future, targeting 25 of the nation's top builders and working with them to begin ICF home-building trials of their own.

Centex Homes is building 30 houses to test production techniques using ICFs. Energy performance will be compared with conventionally built homes.

Offcuts ...

A new gas water heater can be installed outside in southern states, eliminating the need for a chimney or vent pipe, thereby encouraging current electric water heater users to make the switch. The heater was a joint project of Chicago's Gas Research Institute and the American Water Heater Company of Johnson City, Tenn. The heater costs $400 and is sold under the names Weather-Pro and Enviro Tuff. A cold-climate design is in the works.

Asbestos-containing roofing cements, mastics, and coatings pose no risk of asbestos exposure, according to a federal court decision, and have been removed from OSHA's standards. The action followed a petition by the Asbestos Information Association/North America. Asbestos-bearing shingles and other roofing materials are still included in the exposure standards.

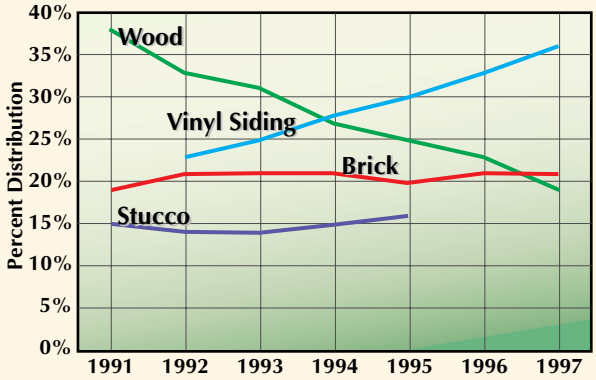
Chemically-sensitive homeowners will be happy to hear about Meadowood, a ryegrass and resin building panel that doesn't include or emit formaldehyde or urea gas. The 4x8-foot sheets, which can be used like plywood and sell for $20 each, are made in Albany, Ore. A plant scheduled to open in California's Central Valley will provide rice farmers with an alternative to field burning, which has been outlawed.

Rhode Island: An inequity in the workers comp law was eliminated earlier this year when the legislature voted that all employees must be covered. Previously, companies with fewer than four employees did not have to pay into the system.

Vinyl Siding Up, Wood Siding Down

Vinyl has overtaken wood as the most popular siding material installed on newly built homes. While wood siding claimed 38% of the market in 1991, its use plummeted to less than 20% by 1997, according to a HUD/Census Bureau survey. Meanwhile, use of vinyl siding rose from less than 25% in 1992 to more than 35% in 1997. Brick and stucco maintained their shares throughout the decade at about 20% and 15%, respectively.

Principal Type of Exterior Wall Material
Total U.S., All New Houses, 1991 to 1997



Source: USDOC, Bureau of the Census, Characteristics of New Housing, per NAHB, Jan 1998

Construction Workers Earn More

Last year, the average construction worker earned $627 per week, compared with an average of $432 in other private industries, according to figures released by the U.S. Dept. of Labor. Among other statistics for 1997:

- Of the more than 8.3 million people employed in the construction industry, 87.1% hold non-supervisory jobs.
- Unions represented 19.5% of construction trades workers.
- Each $1 million spent on new construction in the United States creates a total of $3.6 million in economic activity across other industries and services.
- The value of new construction put in place was $600 billion — 4% of the gross domestic product.

State By State ...

California: Come January, all licensed contractors and subcontractors engaged in home improvement work will be required to take an open-book certification exam. Contractors will have until July 1, 2000, to obtain the certification.

Connecticut: The Department of Consumer Protection has launched a major effort to warn the public about unregistered contractors, and to get those contractors registered. Says state HBA Executive Director William Ethier, "Unregistered contractors... are competing against legitimate contractors who are...playing by the rules."

Minnesota: Beginning May 1, 1999, all new homes built in the state must have mechanical ventilation. According to the state director of inspections, the requirements are the toughest in the country and are designed to give occupants fresh air, supply water heaters and furnaces enough air to operate correctly, reduce carbon monoxide in the house, and prevent moisture buildup, which often leads to mold and rot.

Ohio: After a worker fell 28 feet to his death during a Mason, Ohio, metal-roof decking operation in 1996, a federal grand jury returned a four-count indictment against Elkhart, Indiana-based LeMaster Steel Erectors, Inc. The indictment, issued in July, charges the company with willfully violating fall-protection regulations and making false statements that proper fall protection was in use when the accident occurred.