

# NOTEBOOK

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## Kids and Job Sites: Who's Liable?

by Kathy Price-Robinson

**T**he employees of a Texas drywall subcontractor meant no harm when they propped a pile of gypsum board against a wall and left it unattended for the weekend. But when an 11-year-old girl strayed onto the site with her 13-year-old brother, the pile nearly became deadly. Curious about what was behind, the two pulled it over. The girl was struck by 16 sheets of drywall, seriously injuring her face and left arm.

Who was at fault? The girl's parents, for not keeping her off a dangerous building site? The drywall sub? Or the contractor, for failing to supervise the subcontractor adequately?

How can you defend yourself against liability for injuries to children who trespass on your job site? Warning signs offer little protection, but a locked fence can be worth its weight in gold.



### The Attractive Nuisance Doctrine

In the case of *Amora v. Lain*, cited above, the court ruled that there were grounds for a lawsuit against the contractor because:

- Children were likely to come onto the building site
- The drywall was left unattended for days
- It could easily have been stacked in a safer manner

This case was used by Nolo Press, a publisher of consumer-oriented law books ([www.nolo.com](http://www.nolo.com)), to explain the key legal concept of "attractive nuisance." Nolo describes the term to mean "that if something on your property is both inviting and dangerous, you have a legal responsibility to try to prevent injuries to children who may wander onto the property."

**Build it and they will come.** "There's no question that kids get hurt on construction sites," says Donald Jackson, an engineer with Cal-OSHA in Ventura, Calif. "It's been a problem at least since 1953, when I was a kid playing 'army man' on construction sites." But as Jackson

*continued on page 2*

## Selling Internet Access Rights

**M**ost builders don't get involved in a homebuyer's arrangements for choosing between cable TV and a satellite dish, or between a DSL modem or cable modem. Lately, though, some large builders have discovered that it can be profitable to arrange for high-speed Internet connections for the homes they build.

**Sharing the revenue.** Pulte Corp. of Bloomfield Hills, Mich., is one of the nation's largest homebuilders. In exchange for giving a telecommunications company the exclusive right to provide cable TV and Internet access to its new homes, Pulte hopes to receive a percentage of the monthly checks that homeowners pay for the services. "We are negotiating with several of the Baby Bell companies to provide integrated bundled services — voice, video, data, and high-speed Internet access," says Alan Laing, vice president of e-business development at Pulte Corp. "We are actively negotiating for a simple revenue share."

Toll Brothers, a large builder in Huntingdon Valley, Pa., has gone a step further, deciding to become an Internet service provider (ISP). "Rather than try to strike a revenue share deal with established service providers, Toll Brothers has formed a subsidiary, Advanced Broadband, to provide those services," says Michael Zammit, managing director for telecommunications at Toll Brothers. Advanced Broadband is equipping some of Toll Brothers' larger communities with fiber-optic and hybrid coax cable. "The infrastructure is costing us about \$1,000 per home," says Zammit.

Since ISPs in many areas are eager to sign up new customers, large builders who don't negotiate for a deal may be walking away from money. "There should be something in it for you, if you are a good negotiator," says Tom Reiman from Broadband Consultants in Sacramento, Calif. "Don't give it away. Don't open a trench and wait for the company to show up."

**Small builders need not apply.** Builders considering negotiating with their local Baby Bell must, at a minimum, control the land they're building on. Most telecommunications companies won't be interested in talking with you unless you have a cluster of at least 30 new homes.

Even small builders, most of whom won't be getting a monthly check from their cable company any time soon, need to pay attention to changes wrought by the information

*continued on page 2*

## Kids and Job Sites

*continued from page 1*

notes, OSHA's monitoring power is limited to dangers to employees on a site, and not to potential trespassers.

And while nobody keeps statistics on the number of children who get hurt each year on job sites, the convergence of a brisk building climate with an abundance of school-age children in the population would suggest that there is a greater chance than ever for kids to get hurt on a job site.

## Education

In Canada, the Alberta Construction Safety Association ([www.acsa-safety.org](http://www.acsa-safety.org)) has created a safety program that is funded by the local building industry. Armed with a video, booklets, and a teacher's guide, ACSA members and staff give two-hour presentations to school kids alerting them to the dangers on a job site. One page shows the equipment that adults use to keep safe on a job site — including work boots, a face shield, safety gloves, safety glasses, a hard hat, and a safety harness — and ends with the admonition that "the playground is the safer area for the children."

**Bribery.** During a remodel, it's the homeowners and their children who need to be cautioned about dangers on the job site, which might be just feet away. Sonny Lycos, a veteran builder from Naples, Fla., recalls offering an inquisitive 8-year-old boy \$5 for each day he followed the rules, which included keeping out of the working area unless he asked permission first. The rules and the \$5 were posted on the refrigerator every morning during the two-week job, and the boy won his reward each day. "The bottom line is I bribed him," Lycos admits. "I got what I wanted and he got rewarded for being a good boy."

**Tough love.** On another job, which featured two boys who would not listen to their parents' admonitions to

keep out of the work area, Lycos finally told his crew to pack it up and go home about 2 p.m. He told the couple that, going forward, the crew would leave the very first time one of the boys entered the work area. "We had no more incidents," Lycos recalls.

## Fences, Signs, and Contracts

Many builders place their faith in warning devices like signs and caution tape. But according to Erie, Pa., attorney J. Timothy George, such measures have little effect when children are concerned.

As far as possible, George suggests, the contractor should physically prevent children from gaining access to the site. Gates that can be opened by children or fences that can be easily climbed should not be considered adequate protection. "It's crucial to secure work equipment, excavations, and buildings," he says. George also suggests that builders document any preventive measures taken with written memos.

But because kids will be kids, even the best-managed job site can't be made perfectly safe and secure. As a result, many contractors view their contract as a final line of defense. "I put a liability clause within my contract," says Greg Gibson, a builder in Glen Ellen, Calif. His document states that "as long as I have posted signs around the entrances to my job site and have made a clear effort to secure the job site from undue hazard, I will not be held responsible for the behavior of others which causes damage and or injury to self or others."

Gibson is also protected by his \$1 million liability insurance policy. At \$1,800 per year, it might sound expensive. But, Gibson says, "I just break it down as a monthly part of my overhead, as a part of doing business."

*Kathy Price-Robinson writes about homes and construction from Arroyo Grande, Calif.*

## Selling Internet Access Rights

*continued from page 1*


revolution. "In some regions of the country, like northern Virginia, no one would consider building a home without some kind of accelerated Internet connectivity," says Mike Ziegler, senior vice president of sales and marketing at Dynamic Telecom Engineering in Cleveland, Ohio. Ziegler's company is



FIRST MILE TECHNOLOGIES

**An electrician roughs in Ultrahome cable from CommScope, which includes two Category 5 cables, two coaxial cables, and one fiber-optic cable.**

an ISP that contracts with builders for the chance to wire new developments, paying builders 10% of its revenues. "If there is no cable modem or DSL ability, then I think that home is worth less, because you can't make it into a viable home office," Ziegler continues. "In effect, you're building an obsolete house."

**What's next?** Randy Luther, corporate vice president for construction technology at Centex Corp., a large builder, is committed to providing state-of-the-art systems for Internet access, but he is humble when it comes to predicting the future. "We may do all this wiring inside and out, and for all we know, someone may come up with a wireless system that makes it all obsolete," he says. 

**OFFCUTS**

**Owens Corning has filed for bankruptcy protection under Chapter 11.**

The building products manufacturer, based in Toledo, Ohio, had been crippled by its huge obligations arising from asbestos lawsuits. Although Owens Corning stopped making its Kaylo asbestos pipe insulation in 1972, its asbestos settlement costs continue to be high and are expected to reach \$600 million this year alone. Over the last few years, the company's asbestos settlement payments have totaled \$3.1 billion, and its total obligations may top \$7 billion.

**James Hardie will take over a Temple-Inland fiber-cement factory in Texas.**

James Hardie, one of the country's leading manufacturers of fiber-cement siding, recently signed an agreement to lease a fiber-cement manufacturing facility in Waxahachie, Texas, from its former competitor Temple-Inland, which has decided to abandon the fiber-cement business.

**Record crude-oil prices are a serious problem for European cement manufacturers,** who have begun turning to alternative fuels for heating kilns. According to a report from the British news service Independent Digital, Belgian cement makers recently used 60,000 tons of contaminated chicken as fuel, while their counterparts in France have burned used diapers. The operators of a plant in the French Alps have reportedly found that they can meet almost 50% of their fuel requirements by burning broken skis.

**Western lumber production hit a seven-year high in 1999,** according to the Western Wood Products Association. Driven by a strong housing market, production reached a total of 17.53 billion board feet for the year, up 6% from 1998.

## WOOD-BORING BEETLES PLAGUE CALIFORNIA BUILDER

**H**ow long does it take a wood-boring beetle to chew its way out of a piece of framing lumber, through a layer of drywall, and into the interior of a new tract house? That question lies at the heart of a lawsuit that pits several dozen homeowners at the Moonlight Ridge subdivision in Riverside, Calif., against production homebuilder Continental Homes.

The problem began late last spring, when the first pine sawyer beetles (a family of insects named for the loud grinding sounds its members make while boring through wood) began to emerge from eggs that had probably been deposited before the trees left the forest. The builder maintains that the last of the adult beetles will have emerged within a year or two. At that point, Continental says, it will patch any holes in the drywall and repaint affected areas at no cost.

While the homeowners concede that the beetles pose no structural threat, they cite a phenomenon known as "delayed emergence," which, they claim, may mean that the beetles will continue to emerge for another 10 to 15 years. "These aren't wealthy people with several homes," says Ronald Green, the homeowner's attorney. "We're talking about \$225,000 homes. If these people have to sell, their homes won't fetch a good price on the market."

Whether the court will order Continental to replace the affected homes, as the residents desire, is anyone's guess. But for builders who use partially air-dried (PAD) framing lumber, the case may be cause for concern.

"Beetles are most common in wood that's been logged as salvage," says Western Wood Products Association spokesman Gary Rubin, "but there's no grade stamp that identifies whether lumber came from salvaged trees." The only way to positively eliminate beetle larvae, Rubin says, is to use lumber that has been kiln-dried, which produces temperatures high enough to kill any insects that may be present.

Don MacKay, vice president of construction for Continental Homes, scoffs at attorney Ronald Green's assertion that the builder should have used kiln-dried framing. "Do you know of one production builder that uses kiln-dried lumber?" he asks. "If it was just a matter of paying an extra \$500, we'd do it in a heartbeat. The real problem is availability. There aren't enough kilns out there to dry the lumber we'd need."

Maybe not, but there are plenty of lawyers. "It's too early to give a number," says Ronald Green, "but this is potentially a massive problem. It could affect hundreds or thousands of homes."



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**Residents of a California housing development are suing the builder over wood-boring sawyer beetles in the framing. They claim that the infestation could have been prevented by kiln-drying the lumber before use.**



**OFFCUTS**

**A coalition of anti-immigration groups is attempting to link the controversial subject of urban sprawl to legal immigration.** The Federation for American Immigration Reform (FAIR) has been running a series of print and television ads in the Washington, D.C., area urging a more restrictive immigration policy. The campaign has been denounced by anti-sprawl groups that see inadequate land-use planning as the real cause of sprawl.

**The American Civil Liberties Union has offered to represent a group of Maryland homeowners** who risk being sued for speaking out against a developer's proposed project. Residents of the Avalon Courtyard Homes condominiums in Pikesville had signed purchase agreements containing an unusual clause, which required them to support any building plans for their community proposed by the developer, Questar Properties. According to a report in the *Baltimore Sun*, the company's president described the controversial clause — which residents have called a "gag order" — as a "buffer" against opposition from within the development.

**Got 2-bys?** Wood-products companies in the U.S. and Canada are pooling their resources to launch a three-year, \$45 million campaign to promote wood as a preferred building material. The Wood Promotion Network has hired the Chicago office of the advertising agency Bozell Worldwide, known for its "Got milk?" campaign for the dairy industry.

**Home sweet home.** As every builder who has had to deal with an irate homeowner knows, buying a home can be a stressful experience. Thanks to a recent survey by the online mortgage provider MortgageIT, we now know just how stressful: Of the 1,000 married people surveyed, 35% found the experience "somewhat stressful" or "very stressful," while a lucky 25% experienced no stress at all. Fifty-eight percent of the respondents had no arguments in the course of buying their home, while 27% reported fighting one to three times. Eight percent quarreled four to six times, and 7% more than six times.

**The prancing and pawing of each little hoof.** An environmentally conscious Texas developer has devised a novel method for laying out subdivision roads, according to an article in *Professional Builder*. "We watched the deer and mapped their trails," a landscape architect said. "When you walk the site, you see the perfect logic of the way those roads work." The deer were apparently not paid for their services.

## Don't Reject Waney Lumber

**W**hen picking through the pile of 2x4s at the lumberyard, do you look for lumber with no wane? According to Richard Jagels, professor of forest biology at the University of Maine in Orono, you may be discarding the best lumber in the pile. Writing in the Winter/Spring 2000 issue of *Understory* magazine, Jagels explains that unlike most lumber buyers, he



**The 2x6 on top has wane, indicating that it was cut from the outside of a log. Waney lumber tends to have fewer and smaller knots than lumber without wane. The 2x6 at the bottom was cut from a log's center, and has a high proportion of juvenile wood, which tends to be weaker than mature wood.**

usually prefers waney lumber, for a simple reason: These days, waney lumber, on average, is likely to be stronger and straighter than lumber with no wane.

"The presence of wane is primarily an aesthetic issue, and for structural lumber, it's of concern only where an ample bearing or nailing surface is compromised," write Jagels in his article, "How to Judge a Two-by-Four." The curved corners on waney lumber indicate that the lumber was cut from the outside of the log. "The best lumber in a tree (particularly softwoods) is found near the outside of the log," writes Jagels. "Typically, this wood has fewer and smaller knots and is outside of the juvenile or crown wood zone, which forms near the pith (center) of the tree. Juvenile wood tends to be weaker than mature wood."

If you're rummaging through the pile, Jagels recommends choosing lumber that is straight and has small knots. If the lumber has wane, all the better.

## **Western Growth Control Measures Defeated**

In last November's general election, voters in Arizona and Colorado rejected a pair of ballot initiatives that supporters claimed would have controlled sprawl and preserved open space. Opponents portrayed the measures as costly, ill-advised pieces of legislation that would have stifled all growth (see *Notebook*, 11/00).

Pre-election polls had shown both measures — Amendment 24 in Colorado and Proposition 202 in Arizona — to enjoy widespread public support. But in the end, both were soundly defeated by remarkably similar margins, with about 70% of the voters in each state casting "No" votes.

"The construction industry really mobilized to educate the public," said David Jones, executive director of the Phoenix-based Arizona Contractors Association. "We used radio ads and distributed thousands of bumper stickers. Companies put letters in employee pay envelopes, urging them to get registered and vote against the proposition. A lot of employees were given election day off, with pay."

Such organizing efforts were highly successful, Jones believes. "I've been working around the polls since I was 16 years old," he says, "and I can tell you, I've never seen such a turnout of construction people before."

Supporters of the measure blamed its defeat on an expensive advertising campaign paid for by opponents. "Developers and real-estate interests spent \$6 million on TV ads in Colorado alone," says Elise Jones, executive director of the Colorado Environmental Coalition. "That's the largest sum ever spent on a ballot initiative in the state." Despite the setback, she claimed to be confident of eventual victory. "This has primed the pump for the legislature to do some real work on the issue this year," she said. "If they don't, citizens will go back to the ballot in 2002."