

# New Developments in California Construction Law

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## Contents

- Presenter Biographies
- Understanding Liability in Construction Claims
- Jimenez v Superior Court (T.M. Cobb Co.) – Case On Point
- SB 800 – ‘Builders Right To Repair’ Bill - Introduction and Summary of Contents
- SB 800 Actionable Defects
- SB 800 Calendar
- Risk Management

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# Understanding Liability in Construction Claims

While constructional defects claims touch several areas of the law, generally, the two most common areas under which claims arise are:

1. Contract: Disputes related to what was agreed upon (can be written or oral)
2. Tort: Negligence, Intentional, Fraud, and Strict Liability

For this discussion we are going to focus on the Tort claims, specifically the difference between Negligence and Strict Liability as it applies to material suppliers.

First, we need to define these terms –

Negligence: Failure to act as a reasonably prudent person under the same or similar circumstances, which results in damage to other.

Strict Liability: Regardless of your reasonableness, you will still be held responsible for damage to other if you engaged in the activity. (This includes things such as ultra-hazardous activities and the keeping of wild animals)

Strict Liability in Products: Regardless of your reasonableness, you will still be held responsible for damage to others, if you place a product into the public stream of commerce without adequate risk management.

In constructional defect claims, most issues arise out of either claims of Negligence or Strict Liability in Products. The issue of Negligence is fairly self-explanatory, in that, if you act as other than a reasonably prudent construction material supplier you are going to be liable. The burden of showing that you acted in such a manner, rest with the Plaintiff. The court will presume that you did act reasonably prudent and the Plaintiff must present evidence of why you did not.

The next area of common claims is Strict Liability in Products. This is a special requirement for those who engage in activities that place products/goods into our public stream of commerce. If you manufacture, distribute, or sell a product, this applies to you. This special requirement is intended to protect the public at large by preventing inadequate or poor products from entering the stream of commerce that originate from an industry where the reasonable standard would accept less than “adequate” products. You can see that the Negligence standard wouldn’t work, as any one manufacturer would be acting just like the rest, which would appear, on the face of it, to be reasonable for the given industry.

The Court cited policy considerations for applying strict liability to products that included the consumers inability to prove that a defect was caused by a flaw in the manufacturing process, the manufacturer is best able to reduce the risks of defects, and that the manufacturer can equitably distribute the loss broadly among the buying public as a cost of doing business (*Escola* 24 Cal.2<sup>nd</sup> 453). This is extended to include retailers, distributors and suppliers of goods.

## Understanding Liability in Construction Claims – *CONTINUED*

When the Courts imposed this new standard, it effectively removed reasonableness and replaced it with “if you built, sold, or distributed it, you are liable”, unless... There are several defenses available to avoid liability. These include many factors; just a few are: the product is not defective, can the product be economically made safer (or is it cost prohibitive in relation to the benefit); is the product adequately labeled (warnings and instructions); and was a foreseeable Plaintiff using the product in a foreseeable manner. However, it is important to recognize that the burden has shifted to the Defendant to prove the product was not “defective”.

Now that a manufacturer can be held either negligent or strictly liable in tort, the next question is what damages are recoverable or what are you potentially “liable” for? Without going too far into recoverable damages, generally the plaintiff is entitled to recover those damages to persons and property that arise out of the event. The measure of damage for a residential home is either the cost of repair or the diminution in value. While the measure in most tort actions is the lesser of these, the plaintiff can always recover the cost of repair even if it is greater than the diminution in value. Residential homes are treated “special” due to public policy considerations.

Another important measure of damage related to product claims in California is the “economic loss rule”. To apply the “economic loss rule”, there must first be a product at issue. Then the question is whether the damage claimed by the plaintiff is to the product itself or to other person or property. Damage solely to the product itself is not recoverable or said, “to be barred from recovery under tort law’s economic loss rule”. Damage to a person or other property is recoverable.

The question is whether the individual component, such as a window, or the entire home is the “product”?

For example, a defective window is installed in a home allowing water to damage the framing and drywall. If the entire home were defined as the “product”, then any damage caused by that defective window would be categorized as damage to the product itself, and thus barred under the “economic loss rule”. If the window is defined as the “product”, the damage to the framing and drywall would be damage to other property and recoverable.

In the most recent case of *Jimenez*, the California Supreme Court clarified the latter, holding that individual components in a mass-produced home are individual products and any damage cause to the other parts of the home are not barred. However, the cost to replace or loss in value of the window itself is not recoverable under negligence or strict liability in products. The Plaintiff may still recover this value under warranty and contract law.

# Jimenez: Case On Point

**Case Name:** Jimenez v. Superior Court (T.M. Cobb Co.),  
Cal.4<sup>th</sup> (2002)

**Summary of the Facts:** The plaintiffs, owners of a mass-produced residential home, brought action against the defendant(s), a window manufacturer. The plaintiffs alleged that the defendant “designed, developed, manufactured, produced, supplied and placed into the stream of commerce” defective windows, which were installed in their home. The plaintiff alleged both strict liability and negligence causes of action; wherein, the defendant moved for a summary adjudication that it could not be held strictly liable for a defective or dangerous condition in the home. The plaintiff conceded that the defendant did not own or have control over the construction of their home; however, the plaintiff further argued that manufacturers of component parts used in a mass-produced home are strictly liable for damages caused by those component parts, including damage to other parts of the home.

**Issue:**

- 1.) Can a manufacturer of windows installed in a mass-produced home during its construction ever be strictly liable in tort for harm resulting from defects in those windows?
- 2.) Can a manufacturer, if held strictly liable, also be held strictly liable in tort for resulting physical damage to other parts of the house in which the windows were installed?

**Holding:**

- 1.) Manufacturers of component parts that are installed in mass-produced homes can be subject to strict products liability in tort when their defective products cause physical harm.
- 2.) Manufacturers of defective windows installed in a mass-produced home may be held strictly liable in tort for damage that the defective window causes to other parts of the home in which they are installed. Under California decisional law, the “economic loss rule” would not bar recovery in tort by the homeowner for such damages.

**Note:** It is important to note that the Court only applied the second holding specifically to windows. The Court expressly reserved whether such a holding would apply to defective raw materials and that there may be some situations where defective “component” parts may be barred from recovery under California’s “economic loss rule”.

## Jimenez: Case On Point – *CONTINUED*

### Related Cases for Future Study:

Escola v. Coca Cola Bottling Co.,  
24 Cal.2d 453 (1944)

“a manufacturer should be liable in tort for placing on the market a defective product that causes personal injury”

Greenman v. Yuba Power Products, Inc.,  
50 Cal.2d 57 (1963)

“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”

Vandermark v. Ford Motor Co.,  
61 Cal.2d 256 (1964)

“Retailers like manufacturers are engaged in the business of distributing goods to the public.” Distributors and suppliers are also held strictly liable in tort.

Kriegler v. Eichler Homes, Inc.,  
269 Cal.App.2d 224 (1969)

“We think, in terms of today’s society, there are no meaningful distinctions between Eichler’s mass production and sales of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same” [Escola outlines public policy considerations]

La Jolla Village Homeowner’s Assn. V. Superior Court,  
212 Cal.App.3d 1131 (1989)

The court held that sub-contractors hired by a developer cannot be held strictly liable in tort for defects in a mass-produced home, unless it also owns or controls the housing development.

Limited: See Jimenez - sub-contractors are held strictly liable if they provide products.

Seely v. White Motor Co.,  
63 Cal.2d 9 (1965)

Manufacturers can be held strictly liable in tort for physical harm to person or property, but absent warranty claims, cannot be held liable for the level of performance of the product itself.

# SB 800 – ‘Builders Right To Repair’ Bill

## Introduction and Summary of Contents

Senate Bill (SB) 800, the ‘Builders Right To Repair’ bill was signed into law September 20, 2002, and took effect for every living unit sold in California after January 1, 2003. The bill specifies the rights and requirements of a homeowner to bring a construction defect action, contains building standards and functionality requirements for new residential units, and gives a detailed pre-litigation procedure.

SB 800 was developed as a compromise of various factions of the building and legal communities to address the problems of the home building industry. The text of the bill states the intent of the legislature is to improve the procedure for the administration of civil justice in construction defect cases.

Problems that led to the development and passage of the bill into law include:

- Issues of quality in home building and consumer protection
- Pervasive construction defect litigation
- A lack of insurance coverage for builders, subcontractors, and suppliers

Other important components of SB 800:

- Immunity for ‘qualified’ third party quality inspectors
- Pre-litigation procedure allows ‘Builders Right To Repair’ before being sued
- Allows recovery for damages previously excluded under *Aas*
- Builders must notify owners of maintenance requirements and SB 800 protections at time of sale
- Builders now have a document retention requirement, by statute
- Specific statute of limitations, less than the blanket 10 years, for many components in residential construction
- Builders cannot demand a ‘release’ for performing repairs. Builders can get a full release if they offer cash or upgrades in return for release.
- The pre-litigation process does toll the statute of limitations
- Conduct during the pre-litigation procedure is admissible in a subsequent suit
- Bill does apply to subcontractors, suppliers, manufacturers and designers, except pre-litigation procedure

### *Contents of Bill*

Section	Description	Pages
1.	Why	1
2.	Independent Quality Review	2
3.	Definitions	1
4.	Actionable Defects	5
5.	Obligations	2
6.	Pre-litigation Procedure	10
7.	Procedure	3
	Total Pages	24

# SB 800 Actionable Defects

## CHAPTER 2. ACTIONABLE DEFECTS (abbreviated descriptions)

In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law.

### (a) Water Issues

- (1) A door shall not allow unintended water to pass beyond moisture barriers.
- (2) Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond moisture barriers.
- (3) Windows, patio doors, deck doors, and their systems shall not allow excessive condensation.
- (4) Roofs, roofing systems, chimney caps, and ventilation components shall not allow water beyond moisture barriers.
- (5) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow water to pass into the adjacent structure.
- (6) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow unintended water to pass within the systems themselves and cause damage.
- (7) Foundations and slabs shall not allow water or vapor to enter into the structure so as to cause damage.
- (8) Foundations and slabs shall not allow water or vapor to enter into the structure so as to limit the installation of the type of flooring materials.
- (9) Hardscape, irrigation systems, landscaping systems, and drainage systems, shall not cause water or soil erosion or come in contact with the structure so as to cause damage to another building component.
- (10) Stucco, siding, exterior walls, exterior framing, exterior wall finishes and fixtures, pot shelves, horizontal surfaces, columns, and plant-ons, shall be installed in such a way so as not to allow unintended water to pass into the structure or beyond moisture barriers.
- (11) Stucco, siding, and exterior walls shall not allow excessive condensation to cause damage to another component.
- (12) Retaining and site walls and their drainage systems shall not allow unintended water to pass beyond moisture barriers so as to cause damage.
- (13) Retaining walls and site walls, and their drainage systems, shall only allow water to flow beyond, around, or through the areas designated by design.
- (14) The plumbing system, sewer system, and utility systems shall not leak.
- (15) Plumbing, sewer, and utility lines shall not corrode so as to impede the useful life of the systems.
- (16) Sewer systems shall allow the designated amount of sewage to flow through the system.
- (17) Shower and bath enclosures shall not leak water into the interior of walls, flooring systems, or the interior of other components.
- (18) Ceramic tile and tile countertops shall not allow water into the interior of walls, flooring systems, or other components so as to cause damage.

### (b) Structural Issues:

- (1) Foundations shall not contain significant cracks or vertical displacement.
- (2) Foundations shall not cause the structure to be structurally unsafe.
- (3) Foundations and soils shall comply with the design criteria for chemical deterioration or corrosion resistance in effect at the time of construction.
- (4) A structure shall comply with the design criteria for earthquake and wind load resistance.

## SB 800 Actionable Defects – *CONTINUED*

### (c) Soil Issues:

- (1) Soils and retaining walls shall not cause damage to the structure.
- (2) Soils and retaining walls shall not cause the structure to be unsafe.
- (3) Soils shall not cause the land upon which no structure is built to become unusable.

### (d) Fire Protection:

- (1) A structure shall comply with the design criteria and codes.
- (2) Fireplaces, chimneys, chimney structures, and chimney termination caps shall not to cause unreasonable risk of fire.
- (3) Electrical and mechanical systems shall not to cause unreasonable risk of fire.

### (e) Plumbing and Sewer Issues:

Plumbing and sewer systems shall operate properly and not impair use of the structure. Four-year statute.

### (f) Electrical System Issues:

Electrical systems shall operate properly and not impair the use of the structure. Four-year statute.

### (g) Other Areas of Construction:

- (1) Exterior hardscape (driveways, sidewalls, etc.) shall not have excessive cracks or vertical displacement. Four-year statute.
- (2) Stucco, siding, and exterior wall finishes shall not contain significant cracks or separations.
- (3) (A) To the extent not otherwise covered by these standards, manufactured products, shall be installed so as not to interfere with the products' useful life.  
(B) "useful life" means a representation of how long a product is warranted or represented, through its limited warranty or any written representations, to last by its manufacturer, including recommended or required maintenance. If there is no representation by a manufacturer, a builder shall install manufactured products so as not to interfere with the product's utility.  
(C) "manufactured product" is completely manufactured offsite.  
(D) If no useful life representation is made, the period shall be no less than one year. This subparagraph does not limit recovery if there has been damage to another building component caused by a manufactured product during the manufactured product's useful life.  
(E) This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure.
- (4) Heating, shall be capable of maintaining a temperature of 70 degrees Fahrenheit three feet above the floor in any living space.
- (5) Air-conditioning, shall be consistent with the size and efficiency design criteria in Title 24 of the California Code of Regulations.
- (6) Attached structures shall comply with interunit noise transmission standards. One-year statute.
- (7) Irrigation and drainage shall operate properly. One-year statute.
- (8) Wood posts shall not be installed in so as to cause decay. Two year statute.
- (9) Steel fences shall be installed so as to prevent corrosion. Four year statute.
- (10) Paint and stains shall be applied so as not to cause deterioration of the building. Five year statute.
- (11) Roofing materials shall be installed so as to avoid materials falling from the roof.
- (12) Landscaping shall be installed so as to survive for not less than one year. Two year statute.
- (13) Ceramic tile and backing shall be installed so it does not detach.
- (14) Dryer ducts shall be installed pursuant to manufacturer requirements. Two year statute.
- (15) Structures shall be constructed so as not to impair the occupants' safety.

**The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage.**

# ‘Builders Right to Repair’ Calendar

Activity		Weeks																																																							
		0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45										
1	Homeowner Notice																																																								
2	Builder acknowledges Homeowner notice w/ in 14 days																																																								
3	Notify subcontractor(s) of inspection 1 w/ "adequate" notice																																																								
4	Builder complete inspection 1																																																								
5	Builder restore home within 2 days of inspection 1																																																								
6	Builder request for second inspection within 3 days of inspection 1																																																								
7	Builder sends documents to owner 30 days of request																																																								
8	Notify subcontractor(s) of inspection 2 w/ "adequate" notice																																																								
9	Builder complete inspection 2 w/ in 40 days of inspection 1																																																								
10	Builder restore home within 2 days of inspection 2																																																								
11	Builder Offer to Repair [or Cash], and offer to mediate, w/ in 30 days of inspection 2																																																								
12	Mediation w/ in 15 days of request to mediate																																																								
13	Homeowner authorize repairs or request alternate contractors, or accepts cash offer w/ in 30 days of offer																																																								
14	Inspection 3 w/ in 20 days of request for alternate contractors																																																								
15	Builder presents choice of 3 alternate contractors w/ in 35 days of request for alternate contractors																																																								
16	Homeowner authorizes repair w/ in 20 days of alternate contractor choices																																																								
17	Permit acquisition - no defined time																																																								
18	Commence Repairs w/ in 14 days of authorization of repair, or 7 days of mediation, or 5 days after permit acquisition																																																								
19	Total Pre-Repair (in days)																																																								
20	Repairs (in days)																																																								
21	Total Process (in days)																																																								
22	Total Process (in months)																																																								
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24	This timeline is simplified for a general understanding.																																																								
25	Refer to exact language of the bill for claims.																																																								

## ‘Builders Right to Repair’ Calendar

	Activity	Mediate	Cash	Repair Short	Repair Medium	Repair Medium	Repair Longest
1	Homeowner Notice	0	0	0	0	0	0
2	Builder acknowledges Homeowner notice w/ in 14 days	14	14	14	14	14	14
3	Notify subcontractor(s) of inspection 1 w/ "adequate" notice						
4	Builder complete inspection 1	14	14	14	14	14	14
5	Builder restore home within 2 days of inspection 1						
6	Builder request for second inspection within 3 days of inspection 1						
7	Builder sends documents to owner 30 days of request						
8	Notify subcontractor(s) of inspection 2 w/ "adequate" notice						
9	Builder complete inspection 2 w/ in 40 days of inspection 1						40
10	Builder restore home within 2 days of inspection 2						
11	Builder Offer to Repair [or Cash], and offer to mediate, w/ in 30 days of inspection 2	30	30	30	30	30	30
12	Mediation w/ in 15 days of request to mediate	15		15	15		
13	Homeowner authorize repairs or request alternate contractors, or accepts cash offer w/ in 30 days of offer		30			30	30
14	Inspection 3 w/ in 20 days of request for alternate contractors						
15	Builder presents choice of 3 alternate contractors w/ in 35 days of request for alternate contractors				35	35	35
16	Homeowner authorizes repair w/ in 20 days of alternate contractor choices				20	20	20
17	Permit acquisition - no defined time						
18	Commence Repairs w/ in 14 days of authorization of repair, or 7 days of mediation, or 5 days after permit acquisition			7	14	14	14
19	Total Pre-Repair (in days)	73	88	80	142	157	197
20	Repairs (in days)	0	0	120	120	120	120
21	Total Process (in days)	73	88	200	262	277	317
22	Total Process (in months)	2.4	2.9	6.7	8.7	9.2	10.6
23							
24	This timeline is simplified for a general understanding.						
25	Refer to exact language of the bill for claims.						

# Risk Management

- The SB 800 standards are not unique to California
- Internal control structures
- Integrating technology in managing issues
- Insurance issues – whether and when to report claims
- Notice to Others – whether to go it alone.