

Rules of Compromise

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The plaintiff's bar and California's building industry have finally changed the pre-litigation resolution mechanism after agreeing that it rarely worked.

October 31, 2001 - Effective July 1, 2002, California homeowners associations will be held to more pre-litigation requirements under a newly amended *Calderon* process, Civil Code Section 1375, and a new Civil Code Section 1375.05. The *Calderon* process is a pre-litigation resolution mechanism common in California.

After years of negotiations between the plaintiffs' bar and the building industry through numerous Seattle and Assembly bills, the parties crafted a compromise based on the agreement of both sides that the *Calderon* process rarely worked.

New Rules - Civil Code Section 1375

Before an association files a complaint for construction defects against a builder-respondent, the association must serve a Notice of Commencement of Legal Proceedings (Civil Code Section 1375 (b)). The notice must include the name and location of the project, an initial list of defects, damage resulting from the defects, homeowner survey summaries and testing results. Service of this notice begins a period not to exceed 180 days or 6 months.

The prior process called for a 90-day period (Civil Code Section 1375 (c)). Part of the failer of the former process was the limited time in which to successfully resolve these claims.

This notice also tolls all statutes of limitations against all potential parties, regardless of whether they were named in the notice.

Within 25 days of this notice, the respondent must request a meeting with the board of directors of the association. This meeting must take place within 10 days from the date of this request (Civil Code Section 1375 (d)).

Two important requirements geared towards successful and realistic resolution come out of this new legislation.

First is the exchange of information between the association and respondent (Civil Code Section 1375 (e)(1)). Within 60 days from the initial notice, an exchange of information begins. The association receives access to plans, contractors and construction files. The respondent is entitled to the association's reserve studies, maintenance records and survey and testing results. This exchange was a deterrent to resolution under the old rules. This section applies to developers, design professionals, general and subcontractors and

material suppliers.

The second positive step towards resolution is the involvement of subcontractors and their insurers. Within 60 days from the initial notice, the developer must provide notice to all subcontractors, their insurers and any additional insured (Civil Code Section 1375 (e)(2)).

The initial *Calderon* process did not require this, so the builder was left to bear the burden of settlement without the involvement of the subcontractors and their insurers.

Specifically, the subcontractors must provide a Statement of Insurance that includes both "(A) the names, addresses, and contact persons of all insurance carriers, whether primary or excess and regardless of whether a deductible or self-insured retention applies, whose policies were in effect from the commencement of construction of the subject project to the present and which potentially cover the subject claims; (B) the applicable policy numbers for each such policy of insurance." (Civil Code Section 1375 (e)(2))

What is so important about this last requirement is that it often takes months through actual litigation to obtain this information.

Dispute Resolution Facilitator and The Case Management Meeting

Within 20 days of the builder sending notice to the sub-contractors, all parties meet to select a "dispute resolution facilitator."

Certain requirements are placed upon this facilitator. Their role is to "attempt to resolve the conflict in a fair manner." They must also "be sufficiently knowledgeable in the subject matter and be able to devote sufficient time to the case." (Civil Code Section 1375 (f)(1))

The "case management meeting" with the dispute resolution facilitator shall be held within 100 days of service of the initial "Notice of Commencement." (Civil Code Section 1375 (f)(2)).

The facilitator's fee, which can be \$500 per hour, is to be split three ways. The association pays one-third, the respondent pays one-third and the subcontractors pay one-third. These costs can be recoverable by the prevailing party in any subsequent litigation (Civil Code Section 1375 (f)(6)).

Although this can be a financial burden to an association, the alternative, extensive litigation, is even more costly.

At this case management meeting, the parties agree on a "case management statement," which governs issues such as a document depository, more detailed lists of defects, visual inspections, invasive testing and times for the eventual dispute resolution sessions (Civil Code Section 1375 (h)).

All of the events that lead up to these sessions and the full process cannot exceed 180 days,

absent an agreement by the parties to an extension of time.

The code also addresses the builder's settlement offer and meeting with the board in addition to the association's options should it reject the offer. These requirements do not vary much from the original process, other than requiring that the builder state that it has "access to sufficient funds" to satisfy the offer.

The requirements in Section 1375 do not apply to individual homeowner complaints and most courts do not certify individual claims as class actions.

Section 1375.05 And "Trial Priority"

Also effective on July 1, 2002, this new section is added to the Civil Code and governs the filing of the complaint and mandating that these matters be given "trial priority."

Section 1375.05(b) states that the complaint shall be deemed to have been filed on the original date of service of the Notice of Commencement of Legal Proceeding under 1375. This was extensively negotiated because of the greater opportunity to extend the time period in the new *Calderon* process. It would have put the association claims at least six months behind in the court system.

The plaintiffs' bar did not want this burden to be on the associations and possibly encourage more lost ground due to dwindling insurance limits.

The plaintiffs' bar believes that these provisions go a long way to successful pre-litigation process. The reality of the original *Calderon* process was that subcontractors and their insurers did not participate. The time frames were too short and rigid and the costs were primarily borne by the developers.