



CONSTRUCTION LITIGATION LEGAL UPDATE

California Supreme Court Update: SB800

The Right to Repair Act as Exclusive Remedy for Construction Defect Claims in California

The California Supreme Court's long-awaited decision in *McMillin Albany, LLC, et al. v. The Superior Court* ("McMillin") has now been rendered.

The California Supreme Court ruled that The Right to Repair Act, principally codified at *Civil Code* §§ 895 to 945.5 ("the Act"), is virtually the exclusive remedy not just for economic loss, but also for property damage arising from construction defects. *McMillin* expressly disapproved of the holding in *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove, LLC* (2013) 219 Cal.App.4th 98, which held that the Act was adopted to provide a remedy for construction defects causing only economic loss and did not alter common law remedies in cases where actual property damage or personal injuries resulted.

The California Supreme Court also noted that the Act does not apply to any action to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Going forward, the Act will govern the pre-litigation handling, and litigation of, construction defect claims whether or not the underlying defects give rise to any property damage.

Additional Insured Endorsements

Failure to Explicitly Exclude Completed Operations Coverage

The California Court of Appeal, Fourth District, rendered its decision in *Pulte Home Corporation v. American Safety Indemnity Company* (2017) 14 Cal.App.5th 1086.

The California Court of Appeal affirmed the trial court's decision that American Safety Indemnity Company's ("ASIC") additional insured endorsement contained language that was ambiguous on the potential for coverage in construction defect actions and therefore required ASIC to provide Pulte Home Corporation ("Pulte") with a defense.

The Court of Appeal analyzed the ongoing operations additional insured endorsements provided by ASIC and considered whether that language covered completed operations for the additional insured. Ultimately, the Court held that if an insurer wants to make it clear that it is not covering completed operations for the additional insured, it should clearly do so; especially when the comprehensive general liability policy covers completed operations for the named insured.

The Court reasoned that "construction work performed at one time may deteriorate or manifest injury or damage, possibly to adjacent work, at a later time or after completion." Thus, "simply linking the ongoing operations phrase to the 'liability arising out of the work' clause" does not clearly restrict coverage to ongoing operations.

The Court of Appeal further found that ASIC's failure to provide Pulte with a defense was unreasonable and in bad faith, thus entitling Pulte to an award of punitive damages in addition to compensatory damages.

Additional Comments:

"Products-completed operations" coverage is defined as including all property damage occurring away from the insured's premises, "arising out of 'your product' or 'your work'". 'Your work' includes warranties as to fitness and quality.

Within the "products-completed operations" definitions, 'your work' is deemed complete either when the work called for in the contract is complete; work at a particular job site is complete; or the work is put to its intended use. In comparison, "ongoing operations" coverage is only with respect to liability arising out of 'your work' which is ongoing and which is performed by the named insured for the additional insured on or after the effective date of the endorsement.

By definition, completed operations coverage is more broad and as such, the Court's ruling that insurers must be clear in their exclusion of completed operations coverage has a great impact on the manner in which policies and endorsements are drafted.

People v. Sanchez and Experts' Reliance on Hearsay

The California Supreme Court held in *People v. Sanchez* (2016) 63 Cal.4th 665 that experts cannot testify about case specific facts unless that information, which is typically hearsay, is otherwise admissible or has already come into evidence, will later come into evidence, or is stipulated to be admitted. Prior to this ruling, experts could testify to hearsay information they relied upon as long as it was reasonably reliable.

The justices in *Sanchez* focused on the issue of whether the statements relied upon by the experts were inadmissible hearsay. When an expert tells a jury about case-specific out-of-court statements and relies upon them, it cannot logically be maintained that these types of statements asserted by experts are not being admitted for their truth. Id. at 686.

Although *Sanchez* was a criminal case involving gang identifications, the civil courts are following the Supreme Court's ruling as the Evidence Code is the same in civil as in criminal actions. The impact of the Supreme Court's ruling is dramatic as it will now require witnesses to testify to foundational facts that each expert would rely upon in order to formulate their opinions. The other option would be to argue the application of a hearsay exception, such as a business record, official record, former testimony, or a commercial and scientific publication. This will lengthen the time it will take to try construction defect actions as all parties will now need to call those foundational witnesses.

Expert witnesses will need to be briefed regarding this issue so that they can isolate facts upon which they rely that will need evidence to ensure the admissibility of those facts and to determine which witnesses or other evidence will provide that foundation.

This ruling will be useful as against plaintiffs and developers at trial if they are fail to produce witness testimony or other evidence to establish those facts upon which they relied on to form their opinions. If counsel does not provide admissible evidence of those facts relied upon by the experts, we will be able to strike portions of that testimony or preclude that witness from testifying regarding those foundational facts.

Most recently, during the *Carter v. Pulte* trial, our office argued the *Sanchez* hearsay ruling to preclude Travelers' expert from testifying about facts he relied upon concerning each of our subcontractors' scope of work. Travelers' expert did not have first hand information regarding each of the subcontractors' scopes of work but obtained this information from Pulte and its documents. Although Judge Goode ultimately overruled our objection based on testimony that ultimately came in through Pulte's counsel and Person Most Knowledgeable, Travelers was unprepared for the objection and caught off guard.

About PNBD

Prenovost, Normandin, Bergh & Dawe, A Professional Corporation, was founded in 1983. PNBD is very proud to announce it has been named to the 2017 Orange County's Top Law Firms list, as published in the Orange County Business Journal. PNBD was also ranked in the top 50 the previous six years. PNBD has offices located in Orange County, San Francisco, and Phoenix, Arizona.

Please contact one of our Construction Litigation Attorneys to discuss any of the subjects in this Legal Update.

Please Visit Our Website

