

LOS ANGELES

Daily Journal

WEDNESDAY, FEBRUARY 28, 2001

Renovating Recovery

In the wake of the California Supreme Court's 'Aas' decision, construction-defect plaintiffs may have to rethink damage claims.

By Edward I. Silverman and
Mathew W. Argue

The construction industry continues to keep full-speed pace with the influx of new residents in Southern California, so it is not surprising that construction defect litigation has become big business in California.

Aas v. William Lyon Company, 24 Cal.4th 627 (2000) involved a group of homeowners from a San Diego single-family housing development. The homeowners argued that they should be able to collect damages for the costs to repair serious defects that endangered their homes and personal safety and diminished the value of their property in the event of a fire or earthquake.

However, the split decision against the plaintiff homeowners holds that they cannot recover in negligence from contractors or developers for the cost to repair these defects, unless the defects caused injury to persons or other property. Thus, until other damages result from the code violation, homeowners can only recover from the builder the cost to repair the defect under contract or warranty theories, which have limitations periods of between one and 10 years.

Although a homeowner is aware of a se-

rious defect or building code violation, if the defect or violation has not yet caused personal injury or other property damage, the issue becomes whether a homeowner can achieve a meaningful recovery.

Construction defect cases such as *Aas* have become the latest battleground for the application of what is known as the economic loss rule. The rule is a creation of the courts used to explain one of the sometimes blurred differences between tort and contract law.

Broadly speaking, the rule precludes tort recovery for purely economic losses. As with many rules, the economic loss rule may be applied in a number of ways to construction defect claims.

Under a broad view, the rule may preclude tort claims for any damage to the structure itself, as well as precluding recovery for the cost to repair known defects in the component parts.

In contrast, a more limited application of the rule may allow recovery for the cost to repair defective component parts where they have caused damage to other component parts, even though the building as a whole has not been damaged.

The most common type of economic loss in the construction arena is a building code violation, even if life-threatening, that has not yet resulted in personal injury or dam-

age to the actual building as a whole.

Here, the rule may allow a builder or contractor to escape responsibility in negligence.

Examples of such defects in *Aas* included improperly constructed or connected sheer walls, inadequate fire protection measures in common walls and code violations in the electrical, plumbing and mechanical installations.

Significantly, the economic loss rule, as applied by the Supreme Court in *Aas*, may leave California homeowners with no remedies against builders or developers for serious code violations or defects that have not yet caused personal injury or other property damage.

Under *Aas*, homeowners are precluded from asserting claims for negligence.

Although the decision talks about contract remedies, based on principles of privity, they can only be brought by the original homeowner, and even then limitations periods are frequently shortened-in-form agreements for the sales of mass-produced housing.

Matthew Argue and Edward Silverman are partners with San Diego's *Procopio, Cory, Hargreaves & Savitch*. They litigated the case discussed in this article.