

### **If You Build It, You Can Be Sued!**

What is a construction defect lawsuit? Basically, you can be sued for any Defect in a building you have worked on whether you are the General or a Subcontractor for up to ten years from the completion date. It does not matter if you were a small sub-contractor or even if you did not make a mistake. Some suits come from deviations from the building code or from the architect or engineers plans. Some come from defective material or products sold to you by others. Some come from disgruntled customers with imaginary problems. You can be sued - even if no harm resulted. In short if you build it they can and will sue.

### **History of Construction Defect**

Construction defect lawsuits first surfaced in California after the Second World War. The first suits were the result of cheap track homes put up haphazardly by shady contractors. Who because of the demand for housing could sell anything with four walls and a roof regardless of how badly built the homes were. The construction boom of the 80's resulted in new complaints and new court cases that established the theory of strict liability for 10 years. In the early 90's many attorneys realized the potential of this area of Law and began approaching homeowners associations with a basic proposition. If anything needs to be fixed we will sue the Builder on behalf of the Association and everybody wins. Except of course the builder. The builders Insurance Company then Sues the sub-contractors and you have a litigation nightmare. Claims settlements are difficult and costs increase dramatically. Causing problems for everyone.

The courts in California have shaped the law. Now the Attorneys are exporting it to the majority of the other states. We are starting to see more construction defects law suits in our courts.

The bottom line if you build it the customer in some states can sue you for up to 10 years.

Attorneys and Homeowners are encouraged to look for anything that could be called a defect. Cases balloon as the list of alleged defects grows and developers or general contractors file cross-complaints against all subcontractors involved in a project. Plaintiffs' attorneys sometimes win large settlements simply by threatening to expand the case in order to entangle insurance companies in a prolonged legal battle. If the case goes to court, the strict definition of liability makes it difficult to mount a defense.

Compounding the litigation problem is the "continuous trigger" decision in *Montrose Chemical Corp. v. Admiral Insurance Co.* In this case, the court ruled that insurance could be held liable for coverage where property damage results from an act or omission that took place before the current policy went into effect. Multiple insurance policies- from any insurer ever connected with a project - can be lumped together to enlarge the money pool. Not surprisingly, these rulings have made contractors and their insurers easy targets for litigation abuse.

### **What Does All This Mean To You?**

In short, the cost of doing your business has just increased. Because insurance companies costs have went through the roof to defend these types of cases many insurers have stopped writing residential contractors altogether. The ones who will still insure you are charging higher premiums.

Many agents are re-marketing their contractors clients insurance business in an effort to

provide the same coverage at a marginal cost increase. In California insurance premiums have increased ten fold since 1980. It has not gotten that bad yet in Oregon, but companies are increasing premiums by 15 to 50 percent. Many insurance companies are just canceling all of their contractor customers. If you have had you premium increase or canceled by your insurer, you are not alone.

In California the threat of litigation and the insurance crunch have severely wounded California's housing industry. It looks like we are starting to see this in other states as well. Ironically, homeowners whose interests the trail attorneys claim to defend - often are left holding the bag in construction defect suits. Litigation can drag on for months or years, delaying repairs. Homes saddled with the stigma of litigation drop in value. Virtually any region in the nation that has experienced a housing boom is vulnerable to the problem. Oregon is no exception!

### **What Can You Do?**

The best way to avoid lawsuits is to avoid construction defects in the first place. You as a contractor can give the consumer free information from the Construction Contractors Board or <http://www.ccb.state.or.us> on how to select a reputable contractor. Part of stopping a lawsuit is educating your customer.

Here is a short list of things you can do to avoid construction defect lawsuits:

1. Build it right the first time.
2. Never build anything bigger than a lean-to without having an engineer sign off on the plan. Make sure the engineer has professional liability Insurance and get a certificate of insurance from him or his firm.
3. Make sure every sub-contractor has insurance and that you get a certificate of insurance from them every year. Make sure you are named as an additional insured. Check that your sub-contractors limits of liability are the same as yours. If your sub-contractor does not have current insurance you could end up declaring him or her as an employee. Or worse yet your insurance company pays for the damage the sub-contractors work may have done to your project! Don't laugh this happens everyday.
4. Make potential customers see examples of your work.
5. Ask prior customers for referrals; ask them if you can supply potential customers with their name and phone number so they cannot only see your work, but talk about how well the project went and how you handled problems. Nothing speaks louder than the glowing referral of a prior customer.
6. Spend time at the front end of a job to work out the gray areas. Work out all the details—work to be performed, payment schedule, when the homeowner expects you to start the project and when they expect you to finish. You want a complete meeting of the minds.
7. Use a written contract. The single biggest cause of homeowner-contractor disputes is lack of a written contract, a poorly written contract, or a contract everyone ignores. It is well worth your time and money to contact a lawyer who specializes in contracts. Get a professional written contract you can use for any project with only minor changes.
8. Put in writing the type of material you are using and the expectations of that material. If the customer wants you touse a lesser quality material for the job, make your customer sign off on this change. You Do Not Want To Be Sued For Construction Defect because the customer

wanted to save money and required you to use an inferior material.

9. Put in writing a list of "allowance items" and the budgeted amount. An allowance is a specific amount of money to buy something that has not yet been selected. When the light fixtures, etc exceed the allowance, the homeowner pays the additional amount.

10. Put any changes of the contract in writing with everyone signing off on the change. Change nothing on the project without the signature of your customer.

11. Retain complete project records - including photos and videotapes - for at least 10 years.

12. Ensure that every employee is properly trained.

13. Insist that all work is done to code.

14. Keep up to date on any problems being reported about the products that are going into your homes. A good example is the new stucco materials on the market. It looks good but it is very hard to put on right and if you don't put it on right it will cause severe damage to the building. There are other problem materials out there. Be careful. The newest construction defect is mold. Homes that are completely airtight and have moisture build up problems grow mold. It is extremely expensive to repair. Insurance claims are in the millions of dollars on this one.

15. If you build more than one home at a time or build expensive homes, consider arranging for a home warranty policy that will cover many of the construction defect exposures. A warranty is also an excellent way to make your home stand out to a potential buyer. This is an insurance policy that protects the homeowner and is backed by an insurance company that will fix the problems so your customer will not have to go to the courts to have a problem corrected. Trust me the insurance policy is less expensive than court cost.

16. Provide rigorous on-site supervision. Document your visits. Have a check list of where the project is and what is left to be done. Any delays make sure you notify the homeowner immediately and tell them why there is a delay, and how you are handling the situation.

17. Carefully evaluate the exposures resulting from contractual agreements with other contractors. Don't assume that they have your best interest at heart.