

Homeowners Associations must meet, confer and notify before filing suit for defects

by Mickey McGuire

The Mandatory Meet, Confer and Notify Bill, previously referred to as the Calderon Bill, was signed into law by Governor Wilson October 20 and is effective January 1, 1996. The following is a brief summary of the major requirements of the new law.

Civil Code §1375 requires an exchange of information between the Common Interest Development Homeowners Association; the Builder/Developer of the project; and, the Association's members before a civil lawsuit can be filed. Although far from perfect, the law appears to be a well intentioned attempt to codify what was already "good practice" in dealing with the problems of construction defects.

It is doubtful that §1375 will have any immediate or meaningful impact on the time it takes to resolve construction defect disputes since there is no provision to bring the project's subcontractors and most importantly, their insurance companies, to the settlement table. Counsel for the Builder/Developer can mitigate this shortcoming by filing indemnity actions soon after receiving the preliminary notice from the Association. Years of experience with these cases confirms that the Builder/Developer and its insurance companies will rarely actively participate in settlement negotiations unless there is substantial involvement and monetary contribution by the subcontractors and design professionals who assisted them in putting the defective product on the market.

The new procedure is initiated by the Association mailing a preliminary list of defects and other supporting information (tests and questionnaires, if any) to the Builder. Once the notice is mailed, the statute of limitations for everyone responsible for the damages claimed is tolled for a maximum of 150 days, unless otherwise agreed upon by the Builder/Developer and the Homeowners Association. The purpose of the notice is to permit the parties to either settle the dispute or refer the action to alternative dispute resolution, if possible.

Upon receipt of this information, the Builder has 25 days

to either: notify the Association of its intent to cancel the tolling provision; ignore the notice; or, deliver a request for a preliminary meeting with the Association's Board of Directors within 10 days. If the Builder opts for the latter, the agenda of that meeting must include discussions regarding the nature and extent of the defects; methods of repair, if any are proposed by that time; and, what alternative dispute resolution procedures are proposed, such as binding arbitration or non-binding mediation. It is predicted that the Builder will attempt to push for non-binding arbitration or mediation. Subject to exceptions that may arise under specific facts, it will generally be in the best interests of the Association to elect binding alternative dispute resolution techniques.

The Association's counsel should be wary of agreeing to long extensions of time limits set forth in the Code, even though the statute of limitations are tolled, if the Builder will not consider binding alternative dispute resolution. The Association would be far better served by instituting a suit and thus beginning the two year or more wait for a trial date. In that event, any non-binding technique can be utilized by all the parties (subcontractors) with a meaningful consequence (i.e., jury trial) for failing to reach an agreement. In other words, the parties are more likely to be realistic and serious about resolving the matter short of trial in a non-binding format if there is a trial approaching. If there isn't, non-binding arbitration, mediation and/or settlement conferences have, historically, been a huge waste of time and money. Prompt resolution of defect disputes has always been the goal of the Homeowners Association, its attorneys, its members, as well as the Builder/Developer and their attorneys. Early filing of a prospective indemnity action by the Builder/Developer and subsequent consolidation of a yet to be filed plaintiff's action may provide a procedural vehicle that will not only "bring in" the subcontractors, but also "start the clock" ticking for trial — if all else fails. Importantly, the

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statute also provides for the notification and involvement of the Builder's insurance companies to the same extent as if a suit had been filed upon request of notice from the HOA.

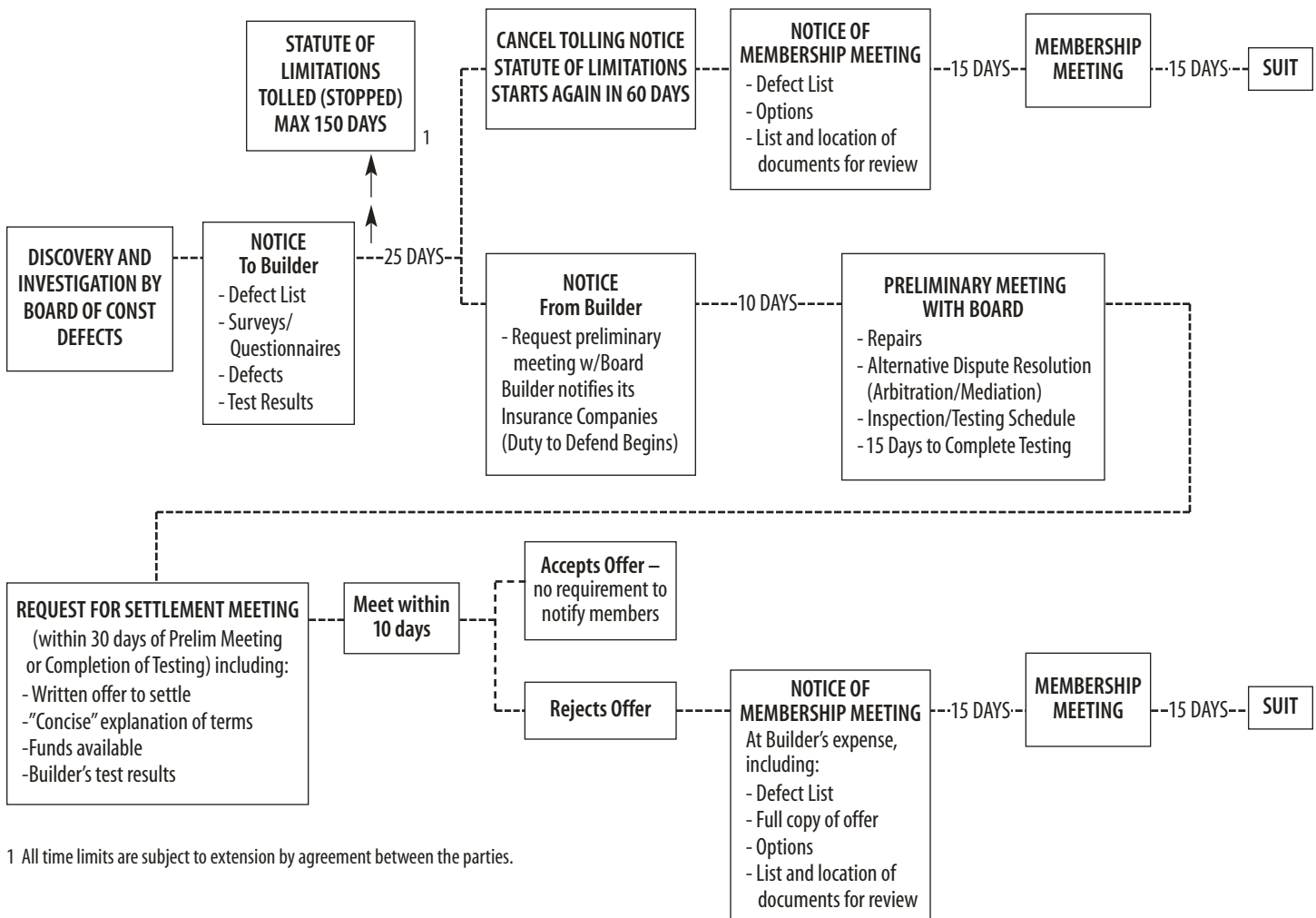
At the preliminary meeting, the Builder may present an inspection schedule (15 days to complete testing) to be completed at its own expense. The scope of inspection and testing may be at least as extensive as performed by the Association. If the Builder proposes a broader inspection or testing schedule than used by the Association, the Association must agree. Within 30 days of the preliminary meeting or completion of the Builder's inspection or testing, whichever is later, the Builder may request a meeting, to be held within 10 additional days, to "present a written settlement offer" with a "concise explanation of the specific reasons for the terms of the offer" as well as test results and a statement that it has "access" to the funds set forth in the offer.

The Association must hold a membership meeting, at the Builder's expense, with 15 days written notice. The meeting must be held at least 15 days before any suit is filed only if the

Board of Directors rejects the offer of settlement proposed by the Builder/Developer. There is no such requirement, however, if the Board of Directors accepts the offer. Unfortunately, the acceptance of an offer of settlement which does not provide "enough" in the way of repair funds after costs and fees can be more devastating to an Association and its individual members than prematurely filing litigation. In fact, a bad settlement will not be undone, but a complaint can always be dismissed if premature or ill advised.

The mandatory membership meeting above must take place even if the Builder has failed to comply with the statute if 5% of the membership requests it. This creates no hardship for the Board of Directors since keeping the members informed has always been good practice, particularly if the subject of matter of litigation is involved, so long as the fiduciary responsibility of the Board is not delegated to a majority vote. Therefore, it will be prudent to schedule these meetings whether or not 5% of the membership requests it since the Association is required to send defect lists and

CIVIL CODE §1375 FLOW CHART



“options” to civil litigation to its members.

The statute also clarifies that required meetings between the Association and its members and meetings with the Builder, where the subject matter of initiation of litigation in accordance with the statute is discussed, are privileged communications. This will provide the basis for compelling members to keep the information discussed at these meetings confidential, since they are mutual fiduciaries of the Association and Board of Directors.

The penalty for non-compliance with the law’s provision are minimal however. On the Builder’s part, it excuses compliance by the Association of most meet and confer provisions, except for the mandatory meeting with the membership at least 15 days before suit is filed. If the Association is out of compliance, any suit filed will be stayed or dismissed without prejudice until compliance is obtained.