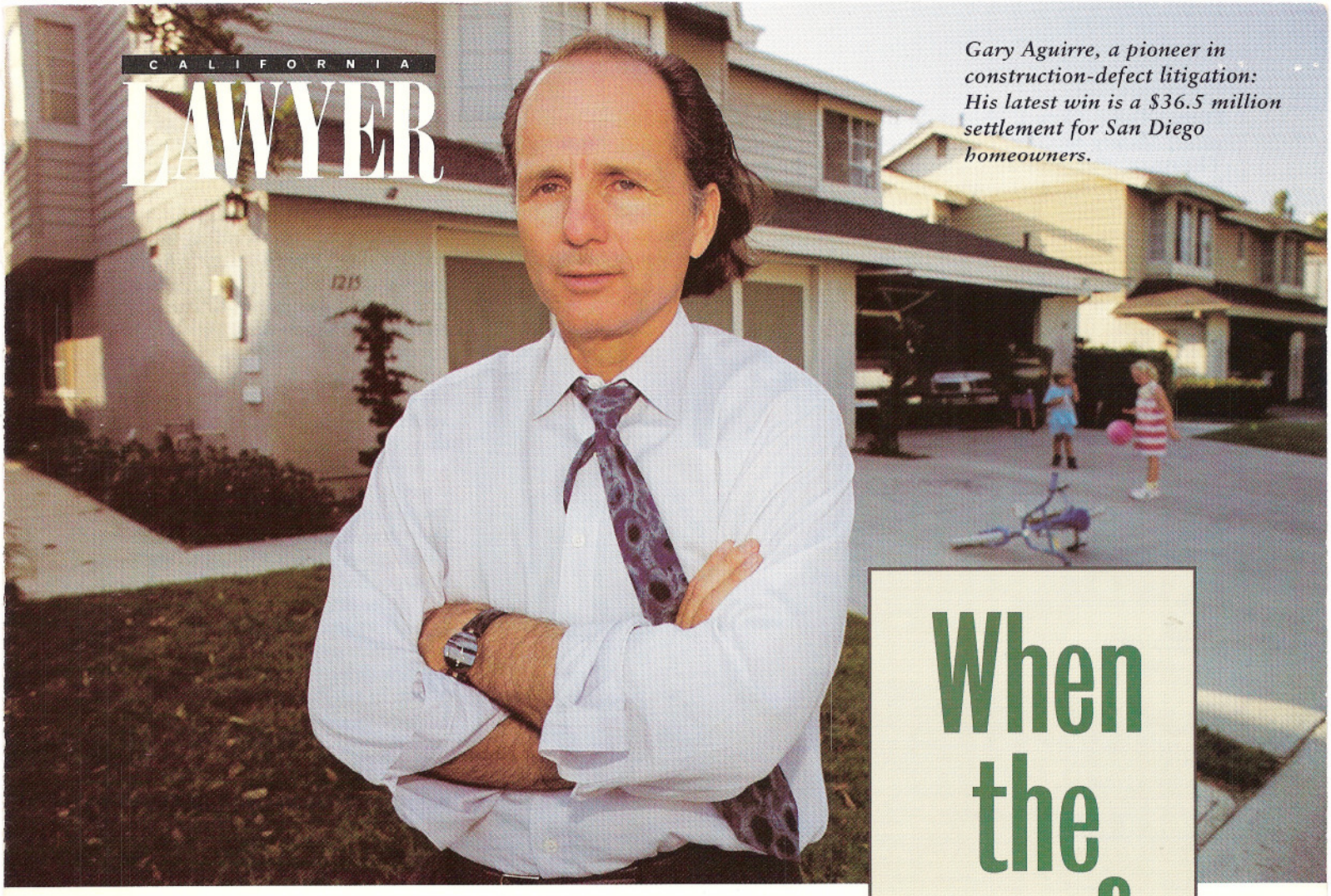
CALIFORNIA LAWYER



Gary Aguirre, a pioneer in construction-defect litigation: His latest win is a $36.5 million settlement for San Diego homeowners.

When the roof falls in

CONSTRUCTION DEFECT LITIGATION IS BECOMING A CALIFORNIA COTTAGE INDUSTRY

By Ricardo Sandoval

WHAT YOU SEE FROM 3,000 FEET on the final approach to San Diego's downtown Lindberg Field airport is arid, rocky terrain, canyons, steep hillsides and dry river beds terracing toward the Pacific Ocean. And houses. Almost everywhere on this uncertain and unstable terrain, there are houses.

Most were built in the 1980s, during the breakneck, often careless and haphazard home-building spree that barely kept pace with the region's explosive population growth. Lately, though, the growth industry here has changed from construction to litigation—construction-defect litigation over the myriad problems that plague owners of homes in most of those hastily constructed developments.

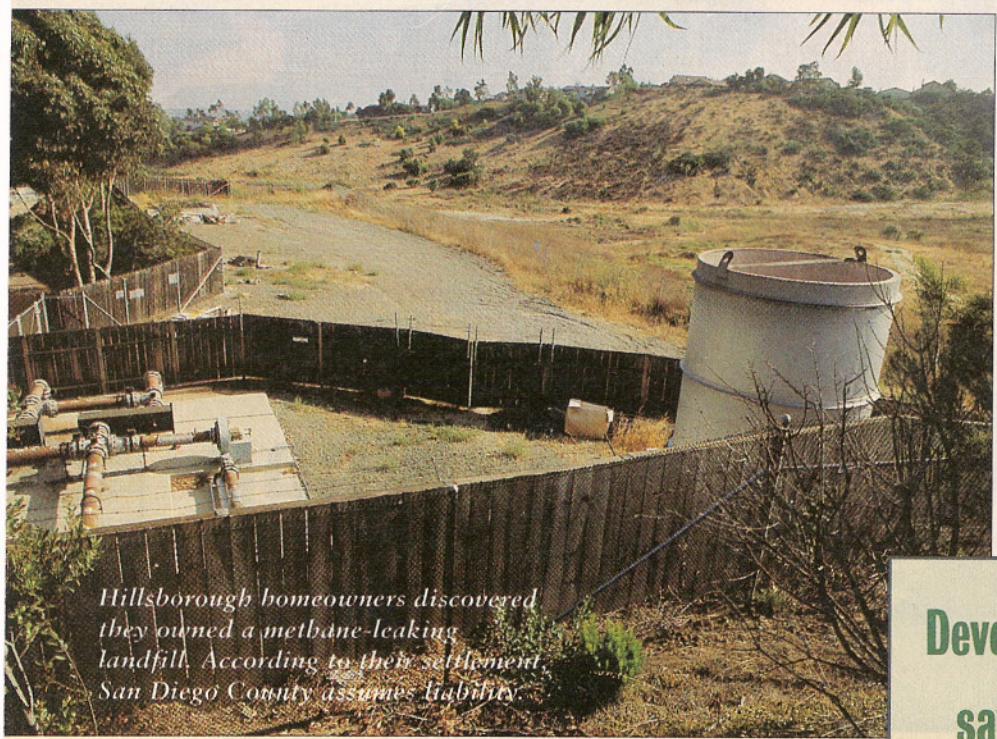
For several years California courts have held that home purchasers have remedies against construction defects, in both strict liability and implied warranty. See *Pollard v Saxe & Yolle Dev. Co.* (1974) 12 C3d 374. A 1976 statute (CCP §374) overturned adverse case law to give condominium homeowners associations standing to sue for construction defects.

For lawyers this was pay dirt. Being able to try a case under the theory of strict liability makes construction-defect cases easier to prove (although the home builder must be a "mass producer," an ambiguous requirement). Standing for homeowners associations—which could include hundreds of units—makes the cases far more lucrative.

Not surprisingly, a construction-defect plaintiffs bar has emerged from the subdivisions. Major players include Gary Aguirre of Aguirre & Eckmann in La Jolla; Brian Gerstel of San

Photograph by Cristina Taccone

Diego's Duke, Gerstel, Shearer & Bregante; Mickey McGuire of San Diego's Thorsnes, Bartolotta, McGuire & Padilla; and, more recently, Howard Silldorf of Silldorf, Burdman, Duignan & Eisenberg and Doug Grinnell of Epsten & Grinnell, both in San Diego.



Hillsborough homeowners discovered they owned a methane-leaking landfill. According to their settlement, San Diego County assumes liability.

For more than a decade, these plaintiffs attorneys have recorded a win record so overwhelming that today even the most highly regarded defense lawyers consider it a success when they're able to minimize claims against their clients. Talk of altogether avoiding monetary judgments or settlements is virtually nonexistent. "I measure my success by keeping my client in business and by putting him in a position to pass on a fair share of the claims to subcontractors," says Bruce W. Lorber of Lorber, Volk & Greenfield. Lorber, who has represented some of California's largest developers, estimates that some 90 percent of construction-defect lawsuits are settled out of court. Construction-defect litigation has proven so successful, particularly in San Diego County, that lawyers are scrambling to get into the action and are spreading litigation to other parts of the state.

Who can blame them? Wins seem to come easy for these plaintiffs lawyers. Consider recent awards and settlements: a $23 million settlement for a group of La Jolla-area homeowners from Irvine Co. executive Donald Bren's private construction firm; a $6.75 million jury verdict in favor of owners in the Del Coronado Santee Townhomes project against San Diego financier M. Larry Lawrence; a settlement worth $36.5 million (including assumed liabilities) from 40 defendants for selling a polluted landfill along with homes in Paradise Hills southeast of San Diego.

CONSTRUCTION-DEFECT litigation in its current incarnation began 15 years ago shortly after Florence E. Young, a Navy bride, moved into a new home in the Mesa Village development on the northeastern edge of San Diego. She soon found her dream home more of a nightmare: The gas and water lines leaked, the roof didn't fit, the foundation had shifted, and the swimming pool was sinking. She complained to the building company, but it brushed her complaints aside, saying that more than a year had passed since construction and it was no longer liable for defects that, Young learned, were plaguing hundreds of homes in the development.

Young persisted. Over the next five years she logged hundreds of hours studying pre-construction reports, deciphering blueprints and engineering assessments, sitting through tedious depositions with her attorney, Gary J. Aguirre of Aguirre & Eckmann in La Jolla. Aguirre had gotten rave reviews for helping secure a $3 million settlement from Pacific Southwest Airlines for the relatives of victims of a 1978 mid-air crash over San Diego. Young and Aguirre sought to unravel the liabilities of developers, subcontractors, designers and the tight-fisted insurance companies that covered their work.

Aguirre had to establish that shoddy construction practices had indeed led to the leaking roofs and sagging rooms, then convince a judge and jury that home buyers were entitled to the same rights of redress as consumers who buy any other defective product. It took six years. Experts hired to verify problems with homes in the subdivision kept finding new defects, thus adding to the complaint. In addition, the lawsuit was filed before San Diego's now-established system of completing construction-defect cases within two years.

Developers say the plaintiffs always win: 'Liability seems irrelevant.'

Aguirre says he was unsure at the time how to approach a jury with such a complicated matter. "I had people, including some big-time lawyers in this town, tell me the homeowners would not stick with this case to the end," he says. "People were also saying the jury would not understand what we were trying to prove. I had my doubts about that too. I was intimidated." He chose to bring separate actions in several trials rather than the usual method of dumping all the alleged problems onto a jury at one time. In 1982 Young and Aguirre's perseverance was rewarded with a $7.2 million settlement against Mesa Village. This, according to Aguirre, stood for a time as the largest settlement of its kind.

Aguirre had discovered his calling. The slender, bespectacled, self-described "former radical lawyer" with thinning long hair became a construction-defect pit bull. In the decade since the Mesa

Ricardo Sandoval is a business writer for the San Francisco Examiner.

Photograph by Cristina Taccone

Village victory, he has managed to clench his jaws around several developers and shake out millions in damages for his clients. The aggressive—some say temperamental—courtroom style that shaped Aguirre's post-University of California at Berkeley legal life as a farm workers' advocate and then a public defender has served him well against developers and their attorneys.

After his big wins in the PSA and Mesa Village cases, Aguirre established his reputation with a $6 million jury verdict in 1982 against building materials maker Johns Manville Corp., which had refused to replace the crumbling faux-stucco exteriors of homes throughout Southern California. In that class action, Aguirre gained special notoriety for predicting Manville's financial collapse and convincing the judge to order the company to post a bond to ensure an award for his clients.

Coincidentally, Aguirre met Young again in 1987. Despite her resolution after Mesa Village never again to be duped by developers, she found herself in another tangled construction-defect lawsuit in Hillsborough, southeast of San Diego. The homeowners were suing the builder, Treetops Unlimited, as well as San Diego County and the state air pollution control district, which had threatened them with $10,000-a-month fines for allowing methane gas to leak from a landfill they didn't know they owned.

Earlier this year the parties reached a settlement for shoddy construction and for causing lenders to abandon the subdivision, making it impossible for the owners to sell their property. San Diego County authorities will assume responsibility for the landfill, which still leaks methane and has shown traces of cancer-causing benzene—a large enough threat to force the posting of "Danger" and "No Smoking" signs several yards from unsalable $200,000 homes. Treetops paid $4.3 million for construction defects and $14.2 million for damages relating to the landfill; San Diego County is assuming $18 million in liabilities. The grand total: $36.5 million.

THE WIN COLUMN in the construction-defect game is so tilted toward plaintiffs that developers have come to believe something is wrong with the system. They complain most loudly about a perceived pro-plaintiff bias in the trial courts' reliance on strict fast-track guidelines and alternative dispute resolution. In San Diego County, where the vast majority of California's construction-defect cases originate, fast track means keeping to strict discovery periods, holding regular settlement talks with special masters and moving from filing to settlement or jury verdict within two years.

Under the San Diego system, rarely does a lawsuit go to trial and even more rarely does a defendant emerge unscathed. "I can recall only two cases that went to trial—and there was a defense verdict all around," says defense specialist James E. Chodzko of San Diego's McInnis, Fitzgerald, Rees, Sharkey & McIntyre.

"We are not getting our day in court," adds one development company official. "The judges [and special arbitrators and discovery masters] don't want to see these cases go to court. Liability seems irrelevant. The system is heavy-handed and set to make developers pay roughly half the claim."

San Diego Superior Court Judge G. Dennis Adams, who has heard a majority of the region's construction-defect cases over the last seven years, scoffs at the idea that the system is unfair. "Of course it seems [the system is skewed against them]," Adams says. "That's because they are strictly liable if there is something wrong with a home. The law itself is naturally skewed against them."

Judges push for mediation because they don't want the cases in their courtrooms. "The cases are typically—especially the large, multiparty matters—extremely difficult," says Michael Duckor, a mediator in the San Diego firm of Duckor & Spradling who regularly serves as a special master for construction-defect cases. "It becomes a gang activity, and it puts a great deal of stress and strain on judges. It is even tough to physically pack all the parties into one courtroom. They don't like the big cases with dozens of cross-complaints and defendants, although I've never seen a judge back away from the challenge."

San Diego's crowded civil calendar has little room for the litigators' delaying tactics, endless depositions and re-examination of evidence and experts' reports. "When I first got involved with these cases back in 1984 and '85, trial time was from five to seven years. For us, these cases were as welcome as the plague," says Adams.

"With fast track, a lot of the garbage went away when we said, 'Boo!' " Adams says. "The ones that would not go away were the big ones. I'd call a readiness conference in one of these cases and 65 lawyers would show up. We had to do something."

Even with fast-track disposition, discovery masters and strict schedules, cases can and do bog down. Some maintain that trials just don't make sense for these cases. "The costs for both sides are enormous, and juries often don't understand the scope of claims or the testimony of expert technical witnesses," says Merville R. Thompson, a special master who mediates construction-defect disputes. "So it behooves us to get most of the issues resolved before a trial starts."

In San Diego the easy cases are done with. So lawyers are getting aggressive—or moving on.

Frequent sizable awards do not mean defense lawyers are doing poor work, insists John B. Campbell of Campbell & Associates in San Diego. "The results of some of the cases—the big wins—get a lot of fanfare. But people don't see the many times that lawsuits are settled before trial because we proved the plaintiffs did not have enough evidence or legitimate claims to go all the way. A lot of claims start out big but are whittled down to almost nothing in the end."

Even under the current system, plaintiffs do not always win. But when they don't, it's frequently because they get greedy. "When you get into these cases, your biggest mistake can be trying to overreach," says Adams. "When you overreach, the jury will incinerate you."

Even highly regarded Aguirre & Eckmann is not immune from an occasional misjudgment. In one recent case the firm is said to have rejected an $8 million settlement offer, holding to its courtroom demand for $12 million. The jury awarded the plaintiffs $5 million. "One of the dangers for plaintiffs is throwing in claims for everything but a bad kitchen sink," says a San Diego defense

lawyer. "More and more, juries are aware of that and it can backfire."

SOME DEVELOPERS are quietly hoping proposed changes in state law will curb what they believe are excessive claims against their work. So far no major lobbying effort has been launched by building-industry advocates in Sacramento. Dan Collins, who represents the California Building Industry Association, says tinkering with established consumer laws that protect the right of homeowners to sue—especially involving matters of strict liability—will be futile because no politician wants to appear anti-consumer. Collins does foresee continued efforts to rein in what the industry considers oppressive litigation.

Two bills addressing construction-defect cases are awaiting Governor Pete Wilson's signature. Sponsored by Delaine Eastin (D-Fremont) and backed primarily by building trade associations, AB 3412 would require homeowners associations to obtain certificates of merit from building trade experts such as architects, engineers and dry-wall contractors before filing a lawsuit. AB 3708, sponsored by Carol Bentley (D-El Cajon) and pushed by a coalition of homeowners association lawyers, would restrict the ability of defendants to file cross-complaints against plaintiffs to recover damages caused by managing agents or homeowners associations. A recent appeals court decision (*Daon Corp. v Place Homeowners Ass'n*, (1989) 207 CA3d 1449) allows defendants to sue homeowners for bad management that created problems or exacerbated construction defects that might not have become problems.

In addition, some defense lawyers are thwarting lawsuits by including restrictive covenants in agreements signed by builders and homeowners that require owners to give builders first shot at fixing the problems. Additional language would hold homeowners to keeping their developments well-maintained. "We are advising our clients to include specific maintenance schedules, formulated by design and trade experts," says Jeffrey M. Shohet, a defense lawyer with Gray, Cary, Ames & Frye in San Diego.

On another front, Southern California builders are lobbying the Department of Real Estate to replace litigation with binding arbitration. "I could easily see disputes worth less than $25,000 barred from the court system," says Jonathan Woolf-Willis, a plaintiffs attorney in the Orange County firm of Fiore, Nordburg, Walker & Woolf-Willis who formerly represented construction-industry clients. "I cannot see, however, anyone being able to abridge the right of homeowners to sue over big-dollar disputes."

Lawyers on both sides predict such attempts to curb construction-defect litigation will fail. They say lawmakers won't risk appearing to take sides against consumers, especially since appellate courts have regularly upheld the right of homeowners to sue builders. The lawyers agree the substantive changes in construction-defect cases won't come from Sacramento but from Hartford, Connecticut—that is, from the insurance industry. Shocked by regular million-dollar awards against their customers, insurers are now fighting claims every step of the way.

They are also being stingy with coverage and subjecting developers to a battery of new quality tests. Developers complain that insurance companies—the ones signing the checks to plaintiffs—are jacking up the minimum quality requirements that must be met before a development is insured. In many cases, builders say, insurers are simply getting out of the business of covering home-construction projects, even those built by the biggest developers.

"Generally, no major companies are

At the Plaintiffs Bar

ALONG WITH GARY AGUIRRE, Brian Gerstel, a partner at Duke, Gerstel, Shearer & Bregante, is a leading plaintiffs lawyer. With 21 partners and 75 lawyers statewide, the firm is the state's largest construction-defect specialist. Gerstel claims that over the years he and his firm have scored more than $200 million in settlements and judgments for homeowner clients from San Diego to San Francisco.

Gerstel, 47, started in the construction-defect game in 1977 with a successful lawsuit against developers of a San Diego condo project. Homeowners saw their 75-unit hillside building sink five inches because the large columns holding it up were not sunk into bedrock, as they had been led to believe. Gerstel won a $1.5 million summary judgment for his clients after six months of discovery and trial. In 1986 he won even bigger, with a $36.5 million judgment in a case involving owners of the Christiana Community Development in Tierra Santa north of San Diego.

Another major player is Mickey McGuire, a partner with Thorsnes, Bartolotta, McGuire & Padilla in San Diego. Tall, tanned and seemingly laid-back, McGuire professes a preference for surfing over taking depositions. Often dressed in Hawaiian-style print shirts and casual pants, he listens intently and has every reason to flash his Cheshire cat's smile. Not only will his firm get a share of a $23 million jury verdict for La Jolla homeowners against executive Donald Bren's construction company, but his partners and associates have racked up settlements and awards worth more than $12 million in recent years.

"Mickey is colorful," says a San Diego defense lawyer who has opposed McGuire in several court cases. "He has a careless air about him. But when it comes to playing hardball in negotiations, or when it comes to crunch time in court, no one is better prepared. I've got a lot of respect for him, even though I find myself on the other side of the table quite often."

Like other successful construction-defect lawyers, McGuire and his firm are known for their thorough research. "We [try to] overwhelm and exhaust the defense," McGuire says. At least a dozen associates and clerks do nothing but research, interview homeowners and consult with construction, engineering and design experts.

"You have to do it this way," says Howard Silldorf of San Diego's Silldorf, Burdman, Duignan & Eisenberg. "I think that is what separates our firms from others not so well-established. They either don't have the will or the ability to fund the critical research."

—RICARDO SANDOVAL

The Roof Falls In

still writing residential-development policies," says Phil Capling, manager of Aetna Insurance Co.'s standard commercial lines operation in the San Francisco Bay Area. "We still have litigation in effect that goes back eight years. We are talking about strict liability here. We've lost tons of money. The litigation is expensive upfront, and the premiums we would charge could never cover the potential losses. It is like insuring a big-rig truck driver. The question is not if there will be a claim, but when will the claim come and how big will it be?"

Mary Wisely, chief of National Union Fire and Casualty Insurance Co.'s construction-risk division, agrees. "There are big-time questions about soil subsidence in California, and not just because of earthquakes," says Wisely. "We just don't write [policies for] residential developers anymore. Can you blame us?"

The companies that do underwrite residential developments charge sky-high premium rates.

THE BIGGEST BENEFIT of the flood of construction-defect cases seems to be better-quality homes. "Developers are getting the message," says John F. "Mickey" McGuire of Thorsnes, Bartolotta, McGuire & Padilla, a San Diego plaintiffs litigation firm.

Unleashing the flood, of course, have been lawyers such as McGuire and Aguirre (see "At the Plaintiffs Bar," page 48), and more and more are following them into the field. But in San Diego County, prospects for the highly publicized big awards may be waning. The improved building practices and closer monitoring of subcontractors by both developers and insurers seem to have diminished litigation prospects. "All the easy cases are done with," Aguirre's partner, James K. Eckmann, has said. Eckmann adds that what's left will be increasingly complex cases involving bankrupt construction firms and subcontractors and developers who build without adequate insurance coverage.

So the plaintiffs lawyers are getting more aggressive. Some builders claim they are going beyond ethical bounds in seeking clients by canvassing new developments with surveys asking questions about common defects, or by advertising in everything from homeowners association magazines to free weekly shoppers. Competition for subdivision clients is so tough, the builders claim, it's common for lawyers to line up for the chance to make a pitch to a homeowners association meeting.

Meanwhile, most of the San Diego construction-defect firms are dealing with thinning prospects by sending out feelers—even opening up offices—in Orange County, eastern Los Angeles and San Bernardino counties and the eastern reaches of the San Francisco Bay Area. The major firms, such as Aguirre & Eckmann, Duke Gerstel, Thorsnes Bartolotta and Silldorf Burdman, have satellite offices in other counties or are involved in cases in places such as Los Angeles and San Jose.

"It's happening everywhere," says Jeffrey Shohet, whose firm defends developers throughout the state. "Plaintiffs lawyers can get hold of any project, anywhere, go over it with a fine-tooth comb and find something wrong. The question is the legitimacy of the defects they find—whether it's something that will never cause a problem or something that needs to be fixed right away."

As one plaintiffs lawyer who has already opened offices in Riverside and Orange counties puts it, "Away from San Diego, the market is potentially limitless." ❖