



HYBRID REAL ESTATE/ CONSTRUCTION DEFECT CASES

Navigating the Intersection of Nondisclosure,
Defect Claims & Insurance

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Program Overview

Nondisclosure Claims

Elements, materiality, TDS/SPQ disclosures, and evidentiary challenges

Construction Defect Framework

Negligence standards, permits, owner-builders, and statutes of repose

Insurance Coverage

Third-party and first-party obstacles, exclusions, and expert strategy

Damages & Mediation

Proper measures of recovery, remedies, and resolving disputes efficiently

Understanding the "Hybrid" Case

What Makes It "Hybrid"?

A single set of facts gives rise to both real estate nondisclosure claims against sellers/agents and construction defect claims against contractors, architects, or owner-builders — often simultaneously.

Typical Factual Scenarios

- Residential flips with concealed prior repairs
- Remodel disputes with undisclosed unpermitted work
- Water intrusion and structural failures discovered post-sale
- Drainage failures, mold, and foundation movement

⚠ **Key Theme: Practitioners must litigate "two cases in one" — each governed by distinct standards of proof, different defendants, and separate insurance ecosystems.**

Real Estate Nondisclosure Claims: Core Elements

Seller nondisclosure and negligent misrepresentation both require proof of:

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- (1) a material fact;
 - (2) known to the seller;
 - (3) not disclosed to the buyer;
 - (4) on which the buyer relied; and
 - (5) resulting in damages. Mere existence of a defect is not actionable — concealment or omission is.
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Real Estate Nondisclosure Claims: The Materiality Standard

A fact is material if it would influence a reasonable buyer's decision to purchase or affect the price. Courts assess materiality objectively. Cosmetic (visible) conditions rarely qualify; structural, safety, habitability and permit issues routinely do.



Real Estate Nondisclosure Claims: The Burden of Proof



The burden of proof requires proof of actual knowledge of the condition. Can be proved by either direct or circumstantial evidence.

"The seller must have known" does not meet the burden of proof.

Real Estate Nondisclosure Claims: Common Evidentiary Problems

Estate Sales

Personal representative may lack actual knowledge and by law disclosure obligations are limited.

Seller Disclaimers

"As-is" language and inspection contingencies

Professional Flippers

What is the level of involvement? Presumed knowledge may be inaccurate.

Non-Occupant Sellers

Never lived in property — what did they know?

The Role of CAR Disclosures in Hybrid Cases

California's mandatory disclosure framework creates both a floor and a ceiling for what sellers must reveal. In hybrid cases, these documents are often the starting point — and the battleground — for nondisclosure claims.



Transfer Disclosure Statement (TDS)

Sellers must disclose known material facts affecting value or desirability. The TDS is the primary disclosure document and creates the clearest evidentiary record. Incomplete or evasive answers are fertile ground for plaintiff's counsel.



SPQ / SBQ

The Seller Property Questionnaire goes deeper into structural, permit, and repair history. Responses here often contradict what buyers later discover. Gaps and omissions are frequently central to hybrid litigation.



Supplemental Inquiries & Due Diligence

Buyer's independent investigation — including inspections and permit searches — can affect comparative fault. But buyers are not charged with discovering latent defects a reasonable inspection would not reveal.

Practice Tip: Always compare TDS/SPQ representations against permit records, contractor invoices, and prior listing photos. Inconsistencies drive settlement value.

Form Inconsistencies

Inconsistencies, missing explanations, partial explanations, and ambiguous explanations create major issues.

This is a prime source of claims against buyers' agents.

"You should have told me to ask for more information."

[Transfer Disclosure Statement \(TDS\)](#)

[SPQ / SBQ](#)

Construction Defect Claims in Remodeled Residential & Commercial Properties

Unlike a newly constructed home that would be governed by SB 800, defect claims in remodeled homes and commercial properties are rooted in common law negligence — a crucial distinction with significant proof implications.

Negligence — Not Strict Liability

Plaintiff must prove duty, breach of the applicable standard of care, causation, and resulting damage. There is no strict liability shortcut. Expert testimony on the standard of care is almost always required.

Owner-Builder Liability

When the seller acted as owner-builder, they assume contractor-level duties. However, an owner-builder who hires licensed contractors, builds according to approved plans and does not have actual knowledge of defects will ordinarily not be liable.

Claims Against Design Professionals

- Architects and Engineers may be liable to third parties, such as buyers. *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP (2014) 59 Cal.4th 568*
- Requires proof that the design professional fell below the standard of care, which must be proved by expert testimony.
- Requires a certificate of merit when the case is filed
- Most design professional contracts have limitation of liability and waiver of consequential damages clauses which are enforceable in the absence of gross negligence
- Due to reporting requirements, many cases settle for less than \$50,000, or even less than \$5,000 which is the reporting limit for architects
- Tip: Reporting is not required if you can resolve the dispute before filing a lawsuit or arbitration demand
- Professional liability policies are "burning limits," i.e. the limits are depleted by the cost of defense, including attorney's fees. In addition, the design professional insured's consent is required to settle.

Proof Problems, Timing & Practical Obstacles

Statute of Repose

Under CCP §337.15, no action may be brought more than **10 years** after substantial completion of a construction improvement. This hard bar — not a discovery rule — eliminates claims regardless of when the defect manifests. Calculating the trigger date is critical in hybrid cases involving older remodels.

Statute of Limitations

CCP §337.1 (patent defects, 4 years) and §337.15 once a latent defect becomes patent plaintiff has 3 or 4 years within which to sue, but no longer than 10 years. When does a latent defect become patent?

Three Core Issues

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Establishing Negligence

Was the work below the applicable standard of care? Requires qualified expert testimony — often a licensed contractor or engineer.

2

The Measure of Damage

The “lesser of rule” means that the measure of damages is the lesser of the reasonable cost to repair or diminution of value unless there is a special reason to make repairs.

3

Resulting Damage for Insurance Coverage

For purposes of obtaining insurance coverage, only resultant property damage is covered by a CGL policy - not the cost of repairing construction defects. This rule does not apply to professional liability coverage.

 This is a key takeaway, and should be part of the initial analysis of the case.

Insurance Coverage & Collectability Challenges

In hybrid cases, insurance coverage often determines settlement value more than liability exposure. Understanding the coverage landscape — and its gaps — is essential for realistic case evaluation. This will be a brief overview, was covered in an earlier program.

Pro Tip: Experts who can show defects as causing "resulting damage" are critical to triggering insurer participation and funding resolution. Construction defects, damages for breach of contract, fraud, and breach of warranty, even if significant, are not covered by CGL policies.

Common Coverage Exclusions

Earth Movement Broadly excludes settling, subsidence, and soil movement — even when caused by faulty drainage or grading	Poor Maintenance In a first party claim insurers argue damage resulted from owner neglect, not an insured event
Mold Many CGL policies have a mold exclusion	Known Condition that Precedes the Policy Insurer denies coverage claiming damage predates the policy period

Brokers, Agents & Home Inspectors: Peripheral Players with Outsized Expectations

Clients often arrive convinced their agent or inspector bears primary responsibility. The reality is more nuanced — and managing those expectations is itself a critical lawyering task.

Listing & Buyer's Agents

Civil Code §2079 only requires agents to conduct a competent visual inspection of accessible areas. The AVID form records what was observed. Buyer's agents owe fiduciary duties — a higher standard. Broker cases tend to settle for less than clients expect.

Home Inspector Liability

Home inspectors operate under narrow contractual scope — they inspect visible, accessible conditions. Most contracts include limitation-of-liability provisions capping recovery at the inspection fee. The home inspector is rarely a viable primary defendant.

 **Client Management: Set expectations early. Agent and inspector claims are valuable for leverage and additional settlement contributions — not primary sources of full recovery.**

Damages, Remedies & Mediation Dynamics

Proper Measure of Damages

In nondisclosure cases, **Civil Code §3343** controls: the buyer recovers the difference between the price paid and the actual value at close of escrow. This requires expert testimony from a real estate appraiser.

Key Damage Distinctions

Cost of Repair

An appraiser can use the cost of repair to determine the diminution in value of the property.

Intangible Factors

Intangible factors can affect the value of the property.

Rescission

Theoretically available for material fraud — practically rare. Seller must return purchase price; buyer returns property. Logistics and financing complications make this an unlikely outcome.

Mediation Obstacles

- Unrealistic plaintiff expectations
- Confusion between liability and collectability
- Coverage gaps reducing available settlement funds
- Emotional attachment to the property or outcome
- Confusion about the measure of damages

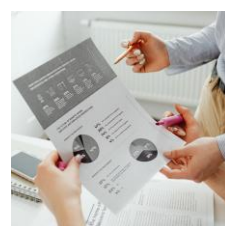
Practical Guidance for Construction & Real Estate Counsel

Effective representation in hybrid cases demands early, disciplined investigation and a realistic settlement framework. The following strategies separate effective practitioners from reactive ones.



Structure Mediation for Realistic Resolution

Prepare clients for the gap between gross repair costs and net recoverable damages after exclusions, betterment offsets, and policy limits. Frame the mediation narrative around collectability, not just liability. Multi-party mediations require sequencing — typically resolving coverage disputes before addressing apportionment.



Understand the Measure of Damages & Prepare the Client

Ordinarily the “benefit of the bargain” rule does not apply in a nondisclosure case. Appraisal experts are expensive. Attorney’s fees are non-recoverable against agents and brokers. Contractors oftentimes have no assets and insurance coverage, if any, may be limited by the resultant damage exclusion.



Engage Experts Early and Strategically

Forensic engineers, licensed contractors, and real estate appraisers are essential. The right expert can quantify damages, frame causation, and — critically — frame the defect in terms that trigger insurance coverage. Expert selection is a strategic, not just evidentiary, decision.

Key Takeaways & Best Practices

Hybrid real estate and construction defect cases reward the attorney who understands both frameworks, investigates early, and counsels clients realistically about exposure and recovery.



Know Which Case You're In

Nondisclosure and construction defect claims have different elements, different defendants, and different proof standards. Frame each theory separately.



Understand the Burden of Proof

You must prove negligence in a construction defect claim, and actual knowledge in a nondisclosure claim.



Follow the Insurance

Coverage — not liability — drives settlement value. Map every available policy from day one and engage experts who understand how to frame "resulting damage."



Counsel Clients Realistically

Manage expectations on betterment, rescission, and agent/inspector recovery early. Surprised clients at mediation are the most common obstacle to resolution.

Thank You. Questions?



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