

THE CALDERON PROCESS OF ALTERNATE DISPUTE RESOLUTION



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1. History. When most types of a multi-unit project become the subject of a construction defect claim, California law requires compliance with certain pre-litigation steps before such a case may proceed in the state courts. This pre-litigation claims procedure is often referred to as the *Calderon* Process, named after State Sen. Calderon, the author of the enabling legislation. In 1995, that statute was chaptered as California Civil Code § 1375, and it has been amended several times since its adoption. This *Calderon* Process has yet to be extended to most types of single family home projects. Various proposals have been floated in the State Legislature to extend this pre-litigation scheme to construction claims involving those other types of real property developments. So far, however, none of those proposals to expand the scope of the *Calderon* Process has survived beyond the committee stage.

2. Definitions. The following definitions relate to the various terms used in the context of the *Calderon* Process, which terms are derived from provisions of Civil Code § 1375 and related California statutes.

a. Association means “a nonprofit, mutual benefit, corporation or unincorporated association created for the purpose of managing a common- interest development. Civil Code §§ 1351(a), 1375(p)(1).

b. Common Interest Development means a real property project, of 20 units or more, which is either a community apartment, a condominium, a planned unit development, or a stock cooperative. Civil Code §§ 1351(c), 1375(p)(3).

c. Design Professional means any person or legal entity who performs design functions relating to a real property development subject to the licensing requirements of the State of California, including Business & Professions Code §§ 5535, *et seq.* (architect), §§ 5800, *et seq.* (interior designer), §§ 5640, *et seq.* (landscape architect), §§ 6700, *et seq.* (civil, structural, professional, electrical and mechanical engineer), and §§ 8740, *et seq.* (land surveyor).

d. Developer means the person or group of persons designated in the declaration of covenants, conditions and restrictions (CC&R's) as declarant, or if no declarant is designated, the person or group of persons who sign the original declaration or who succeed to special rights, preferences, or privileges designated in the declaration as belonging to the signatory of the original declaration. Civil Code §§ 1351(g), 1375(p)(2).

e. Dispute Resolution Facilitator means the mediator whose role is to attempt to resolve the dispute fairly and who is appointed under the procedure outlined in Civil Code § 1375(f). Civil Code §§ 1351(f) and 1375(f).

f. General Contractor is synonymous with the term "Builder" and means the prime contractor on the project, which in the course of construction, engaged unrelated building trades or crafts as Subcontractors to perform a work of improvement, or superintend the whole or any part of the construction of the project. Business & Professions Code §§ 7026, 7057.

g. Insurer means the general liability (CGL) carrier which insures the developer, builder, general contractor or any Subcontractor or design professional as either a named insured or an additional insured when such policy imposes upon the insurer a *potential duty* to defend or indemnify any affected named or additional insured for losses resulting from the type of claims of alleged defects identified in the Association's "Notice of Commencement of Legal Proceedings." Civil Code § 1375(e)(2).

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h. Peripheral Party means a Subcontractor or design professional having total claimed exposure of less than \$25,000. Civil Code § 1375(e)(3).

i. Respondent is the Builder, Developer or General Contractor who is served by the Association with the notice of commencement of legal proceedings. Civil Code § 1375(a).

j. Subcontractor means a specialty contractor retained by the general contractor to perform work on the project whose operations involved the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts. Business & Professions Code § 7058.

3. Applicability of Amended Statute.

a. Type & Size of Project. The *Calderon* Process only applies to claims brought by homeowner Associations against the developer of the condominium project, planned unit development, cooperative, or other common interest development, and only when such project is comprised of twenty (20) or more units. Civil Code §§ 1351(c), 1375(p)(3), and 1375.05(i).

b. Suit or Claim Pending Prior to July 1, 2002. The amended section 1375 and the newly enacted section 1375.05 does *not* apply retroactively. Any suit or claim pending in which notice was given prior to the effective date of July 1, 2002 is subject to the earlier version of Section 1375. Civil Code §§1375(r), 1375.05(i).

c. Automatic Expiration. On its own terms, unless the life of the statute is extended by subsequent legislative action, the enabling statute becomes inoperative on July 1, 2010, and is repealed on January 1, 2011. Civil Code §§1375(s), 1375.05(i).

4. Initial Notice to Respondent. The “Notice of Commencement of Legal Proceedings” (hereafter “Initial Notice”) is required to be sent by the Association by certified mail to the Respondent. Civil Code § 1375(b).

a. Constructive Notice. Service of the Initial Notice on the General Contractor is deemed sufficient to initiate the process if the Developer or Builder are not otherwise amendable to service.

b. Required Content. Under the provisions of Civil Code §1375(b), the Initial Notice must include the following information:

- (1) Name and location of project;
- (2) A preliminary list of defects, including a description of the results of the defects;
- (3) A summary of the results of a survey or questionnaire distributed to homeowners to determine the nature and extent of defects, if such exists; and
- (4) The test results or a summary of the test results conducted to determine the nature and extent of defects, if such exists.

5. Term of Calderon Process Period. Civil Code §1375(c).

a. Initial Term 180 Days. The mailing of the Initial Notice commences a period of time of one hundred eighty (180) days during which time the Association and Respondent shall attempt to either settle the dispute or agree

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to submit the dispute to some form of alternative dispute resolution.

b. First Extension - Another 180 Days. The Association, Respondent, and *any other non-Peripheral Party* may agree to extend the initial 180 day term of the *Calderon Process* for up to another 180 days.

c. Further Extensions Available. The term of the *Calderon Process* may be extended beyond the additional term only upon mutual agreement of *all participating parties*, including any Peripheral Party. Outside of that restriction, there is no outside limit on the term.

6. Tolling of Applicable Statutes of Limitation. Civil Code §1375(b)-(c).

a. Scope. Upon mailing, the Initial Notice shall operate to toll all statutory and contractual limitations on actions for damages brought by the Association against all parties. The tolling applies to all applicable statutes of limitation, whether set by statute or contract.

b. Affected Parties. The parties affected by the tolling do *not* need to be named in the Initial Notice to toll the statutory and contractual limitations.

c. Limited to Association's Claims. The tolling would *not* apply to any actions by an Association member based upon personal injury, which by their nature are *in personam* claims (only the individual homeowner has standing to sue).

d. Special Issue-Equitable Tolling. There is an open question as to whether equitable tolling would apply to claims by the Association that are based upon a theory of recovery other than monetary damages, such as injunctive relief or nuisance-based claims, which have become common in construction defect claims.

e. Length of Tolling Period. The tolling period lasts for one hundred eighty (180) days, unless a longer term for the *Calderon Process* is agreed upon, in writing, by the parties in accordance with the requirements of Civil Code §1375(c).

f. No Right of Respondent to Cancel Tolling. Under former Civil Code § 1375 (b)(3)(B) [repealed July 1, 2002], at any time during the *Calderon Process*, the Builder could give a 60-day written notice to cancel the tolling of the statute of limitations. That provision no longer exists, and the minimum tolling period, once the *Calderon Process* is initiated, is the initial 180 day term. Civil Code § 1375 (c).

7. Respondent's Initial Request to Meet with Board. Civil Code § 1375(c)(1).

a. Request Made Within 25 Days. Within twenty-five (25) days of the date the Association delivers the Initial Notice, the Respondent may request, in writing, to meet and confer with the board of directors of the Association.

b. Date of Meeting Within 10 Days of Notice. Unless the Association and Respondent agree in writing otherwise, the Board meeting must take place no later than ten (10) days from the date of Respondent's written request, at a mutually agreeable time and place.

c. More Than One Meeting Available. Only one meeting may be compelled by this section, but the Respondent and Association are able to mutually agree to more than a single meeting.

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d. Content of Meeting Is Privileged. The content of all discussions at the meeting are privileged in any subsequent civil action, unless the Association and Respondent mutually consent to their admission.

e. No Required Agenda or Notice to Parties. There is no required agenda to be discussed in the context of any Respondent's meeting with the board under this section, and there is no requirement for Respondent to notify any Insurer or any other party of the meeting.

f. Notice to Association Members. Any meeting under this section is subject to the provisions of the "Common Interest Development Open Meeting Act" so any Association member may attend, and unless a longer notice period is required under the Association Bylaws, four (4) days written notice by mail of the meeting to all Association members is required. Civil Code § 1363.05(g).

8. Respondent's Required Notice to Other Parties. Civil Code § 1375(e)(2).

a. Must Act Within 60 Days. Within sixty (60) days from its receipt of the Notice, Respondent must provide written notice (hereafter "Respondent's Notice") to all Subcontractors, Design Professionals and Insurers.

b. Required Recipients. The parties receiving Respondent's Notice must include all Subcontractors, Design Professionals and Insurers whose:

- (1) Identities are known by the Respondent; and
- (2) Identities are reasonably ascertainable from review of Respondent's records; and
- (3) Potential responsibility appears on the face of the Initial Notice.

c. Required Content of Respondent's Notice: Under the provisions of Civil Code §1375(e)(2), the Respondent's Notice must include the following information:

- (1) Copy of Initial Notice;
- (2) Notice of selection process for the Dispute Resolution Facilitator (hereafter "DRF");
- (3) Date, time, place and manner of meeting "hereafter DRF Meeting") and need of party to either attend the DRF Meeting;
- (4) Notice of need to provide written acknowledgment of receipt of the Respondent's Notice;
- (5) Notice of the **punitive effect of Party's failure to timely participate in the Calderon Process**, which includes:
 - (a) Party's waiver of right to select the DRF or challenge the appointment of the DRF;
 - (b) Party may be bound by any settlement reached under the settlement provisions of Civil Code § 1375.05(d) (discussed *infra*); and
 - (c) Party's waiver of its right to conduct or participate in site testing or inspection conducted post-Calderon Process under Civil Code § 1375.05 (discussed *infra*).

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(6) Notice to Party that it may consult counsel and should contact its Insurer with regard to the claim.

d. Effect of Respondent's Notice on Insurer. Subject to any applicable policy language that is to the contrary, an Insurer's receipt of Respondent's Notice would appear to impose upon that carrier any obligation that would be imposed under the terms of the CGL or excess policy if the named or additional insured had been served with a summons and complaint for damages. In that event, an Insurer's failure to timely act to preserve its insured's rights may potentially be viewed as an act of "bad faith" should the rights of the named insured or additional insured be compromised due to the lack of timely action by the Insurer.

e. Special Issue -What Insurer is a Party? Given the punitive effect of a party's failure to participate (*see*, Section 8.c.(5), above), of special concern is whether a given carrier is an "Insurer," and thus required to comply with the procedures of the *Calderon* Process.

(1) With the broad scope of the July 1, 2002 version of the statute, and the current trend in California state court coverage decisions to broadly construe additional insured (AI) endorsements in favor of the Builder, even beyond the scope of the work performed by the named insured, the Respondent's Notice would appear to be appropriately given to any Insurer that has issued an AI endorsement naming the Respondent, or whose liability policy with the named insured extends that AI obligation without requirement of a formal separate written endorsement.

(2) The description provided of the term "Insurer," whose participation is required under the *Calderon* Process is: "*insurers, and the insurers of any additional insured... whose potential responsibility appears on the face of the notice...*" Civil Code 1375(e)(2). That scope is further described as "*all insurance carriers, whether primary or excess and regardless of whether a deductible or self-insured retention applies, whose policies were in effect from the commencement of the construction of the subject project to the present and which potentially cover the subject claims.*" Civil Code 1375(e)(2)(A).

(3) Based on the broad scope of the given definition for the term "Insurer," in this context the term "Insurer" would appear to include the following:

(a) Any carrier who has issued a CGL policy to, or an additional insured endorsement in favor of, any Respondent, Subcontractor or Design Professional, when such policy imposes upon the carrier a potential duty to defend the insured or indemnify the insured or additional insured (AI) for losses resulting from the type of claims of alleged defects identified in the Initial Notice.

(b) Primary as well as excess policies, and regardless of whether a deductible or self-insured retention applies.

f. Insurer's Potential Escape Clause. It is plainly evident that an Insurer with a valid policy exclusion would be exempt from participating in the *Calderon* Process once it received the Respondent's Notice. The above clause "*all insurance carriers ... whose policies ... potentially cover the subject claims*" leaves a large loophole in terms of whether a liability carrier needs to participate. In the final analysis, should the carrier choose to rely on an untested Montrose-type of exclusion or a "prior known loss" exclusion, it does so at its own peril if the exclusion ultimately is found to not apply.

9. Initial Document Exchange by Respondent & Association. Civil Code § 1375(e)(1).

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a. Respondent and Association Must Act Within 60 Days. Within sixty (60) days from Respondent's receipt of the Initial Notice, Respondent and Association are required to exchange all relevant documents. Civil Code § 1375(e)(1).

b. Respondent's Required Information. The Respondent is to produce for inspection and copying "*all plans and specifications, subcontracts, and other construction files for the project that are reasonably calculated to lead to the discovery of admissible evidence regarding the defects claimed.*" Civil Code § 1375(e)(1).

c. Association's Required Information. The Association is to produce for inspection and copying "*all files reasonably calculated to lead to the discovery of admissible evidence regarding the defects claimed, including all reserve studies, maintenance records and any survey questionnaires, or results of testing to determine the nature and extent of defects.*" Civil Code § 1375(e)(1).

d. Assertion of Privilege. Any documentation in the possession of a party sought to be withheld under a claim of privilege must be identified in a privilege log, a copy of which is to be provided to all other parties. Civil Code § 1375(e)(1).

10. Party's Required Response to Respondent's Notice. Civil Code § 1375(e).

a. Statement of Insurance Within 10 Days. Under the provisions of Civil Code § 1375(e)(2), within ten (10) days from the Party's receipt of the Respondent's Notice, that Party must serve Respondent and Association the following documents:

(1) Written acknowledgment of receipt of Respondent's Notice;

(2) A Statement of Insurance that identifies all Insurers, including the policy number(s) and the names, addresses and contact person for each Insurer.

(3) *See*, Section 7.e.(2)-(3) above for definition of "Insurer."

b. Exchange of Documents Within 60 Days. All parties who receive Respondent's Notice are entitled to review the same information exchanged between Association and Respondent. These new parties are required to produce for inspection "*all relevant documents*" within sixty (60) days of their receipt of Respondent's Notice. A special issue exists as to the scope of documents required to be produced. Civil Code § 1375(e)(2).

11. Powers and Selection of the Dispute Resolution Facilitator (DRF).

a. The DRF Meeting. Civil Code § 1375(f)(1)-(4).

(1) Hearing Date, Time & Place. The DRF Meeting is to be held on the noticed date, time and place set forth in the Respondent's Notice, which should be thirty (30) days after service of Respondent's Notice, twenty (20) days after the service of the Statement of Insurance by the Subcontractors and Design Professionals, or ninety (90) days after the service of the Initial Notice. Civil Code § 1375(f)(1).

(2) Appointment of the DRF.

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(a) If all parties in attendance at the DRF Meeting are able to mutually agree to the identity of the DRF, then that person shall be appointed, subject to the disqualification procedures set forth in Civil Code §§ 1375(f)(4)-(5), 1375(n)-(o) (discussed below).

(b) If the parties cannot mutually agree, each party provides a list of three (3) candidates, and each party may thereafter strike only one candidate from the others' list. After peremptory challenges, and within ten (10) days from the filing and service of a petition for relief, the Superior Court shall select a DRF from the candidates remaining. Civil Code §§ 1375(f)(4), 1375(n)-(o).

b. Role and Qualifications of the DRF.

(1) The role of the DRF is *"to attempt to resolve the conflict in a fair manner."* Civil Code § 1375(f)(1).

(2) The DRF needs to be sufficiently knowledgeable in the subject matter and be able to devote sufficient time to the case. Civil Code § 1375(f)(1).

(3) The DRF is to maintain a current contact list of all participating parties. Civil Code § 1375(f)(1).

(4) There are no residence requirements for the DRF, but the *Calderon* Process meetings are to occur in the county in which the project is located. Civil Code § 1375(f)(1).

(5) Setting the First Case Management Meeting. Civil Code § 1375(f)(1).

(a) The first task of the DRF is to set the time, place and date for the First Case Management Meeting, and to thereafter attend and preside over such meetings. Civil Code §§ 1375(e)(1), 1375(h).

(b) Not later than ten (10) days before the meeting, Respondent must provide written notice of the time, place and date of First Case Management Meeting to all parties. Civil Code § 1375(f)(1).

(6) No later than ten (10) days from the date of the First Case Management Meeting, the DRF is to advise all parties in writing of any possible grounds for conflict of interest or recusal. Civil Code § 1375(f)(2).

(7) The DRF's notice of possible grounds for conflict of interest or recusal must also be served on any subsequently joined Subcontractor or Design Professional within ten (10) days from that party's receipt of Respondent's Notice. Civil Code § 1375(f)(2).

c. Disqualification of the DRF by the Court.

(1) Grounds for Disqualification. The grounds for disqualification of the DRF are either its failure to comply with the disclosure requirements, or that the matters disclosed by the DRF constitute a conflict of interest. Civil Code § 1375(f)(3). The court may replace the DRF only upon a showing of "good cause," which standard is liberally construed in favor of the court's exercise of its discretion. Civil Code §1375(f)(5).

(2) DRF Challenge Prior to the First Case Management Meeting. Any party may serve a "Notice of Disqualification" with the Superior Court and the DRF and all parties prior to the time of the First Case

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Management Meeting. Civil Code § 1375(f)(4).

(3) DRF Challenge by Later-Joined Parties. Civil Code § 1375(f)(5).

(a) New Party Must Object Within 15 Days From Notice. A Subcontractor or Design Professional that receives the Respondent's Notice after the DRF was selected has fifteen (15) days from the date of Respondent's service of written notice of the DRF's name, address and telephone number in which to serve a written objection to the DRF on the DRF and all parties.

(b) Court Petition After Objection. Once a party has timely objected to the appointment of the DRF, it has seven (7) days from the date of service of the objection in which to petition the Superior Court for relief.

(c) Challenge to DRF Not Available to a Later-Joined Insurer. *Contra* to the "mutual agreement" provisions of Civil Code § 1375(f)(4), the provisions of Civil Code §1375(f)(5) do not mention "Insurer" as a class of party that can challenge the DRF appointment, even though that Insurer is a subsequently joined party, which had no notice of the prior DRF Meeting.

d. DRF Determination of "Peripheral Party." Civil Code § 1375(e)(3).

(1) Claimed Exposure Less Than \$25,000. A party with a total claimed exposure of less than \$25,000 may petition the DRF to be deemed a "Peripheral Party" for purposes of the Calderon *Process*.

(a) Special Issue - Attorneys Fee Included. It remains unknown if the maximum potential exposure of \$25,000 is inclusive of attorney's fees potentially owed to Respondent under express indemnity.

(b) Peripheral Party designation relieves that party from participating in anything but sessions specifically designated for "peripheral parties" by the DRF.

(2) Procedure for "Peripheral Party" Determination. A party seeking such designation must make written application to the DRF.

(a) Application is served on Respondent and Association only.

(b) Designation as "Peripheral Party" becomes effective if no objection is received after fifteen (15) days from service or if the DRF rejects an objection that was timely made.

(3) Reclassification Possible. Once a party has been designated by the DRF to be a "Peripheral Party" it may be re-classified upon application by any party to the DRF and after an opportunity is provided for the interested party to object.

e. DRF Determination of "No Liability." Civil Code § 1375(m).

(1) Petition to DRF for Determination of "No Liability." Any Subcontractor or Design Professional may petition the DRF at any time to be released from further participation in the Calderon *Process* upon a showing that it is not potentially responsible for the defects or claims at issue.

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(2) “No Liability” Determination Not Available to Insurer. The statute does not mention an Insurer as a class of party that can have its participation excused through this petition process.

(3) Procedure for “No Liability” Determination. Party seeking designation as having “no liability” must make written application to the DRF.

(a) Moving party’s petition needs to be served on all parties.

(b) Classification of “No Liability” becomes effective if no objection is received after fifteen (15) days from service or if the DRF rejects an objection that was timely made.

(4) Subsequent Reclassification Possible. Once a party has been designated by the DRF to have “No Liability” it may be brought back into the *Calderon* Process upon a subsequent finding by the DRF, and after renote by Respondent of the claims being made against it and any current hearings scheduled.

f. Payment/Re-Allocation of DRF Costs. Civil Code § 1375(f)(6).

(1) DRF costs incurred in the *Calderon* Process are to be pro-rated amongst the parties by the ratio of 1/3 to Respondent, 1/3 to Association, and 1/3 to Subcontractors and Design Professionals.

(2) DRF costs paid in the *Calderon* Process are a recoverable cost to the prevailing party under Code of Civil Procedure 1032 in any subsequent litigation involving the same issues.

(3) Any non-settling party may petition the DRF, prior to the filing of the complaint, to reallocate the DRF costs as they apply to the non-settling party. The DRF’s determination on that issue is binding in any subsequent litigation.

12. First Case Management Meeting. This meeting between all parties, presided over by the DRF, shall result in the creation of a Case Management Statement in which the parties mutually agree to the following elements:

a. Document depository. Establishment of a document depository, with costs apportioned pro-rata, 1/3 Association, 1/3 Respondent and 1/3 Subcontractors and Design Professionals, the same as other DRF costs. Civil Code § 1375(h)(1).

b. Updated Defect List. The timing and scope of Association providing a more detailed list of defects to Respondent. Civil Code § 1375(h)(2).

c. New Parties. Identification of all other parties potentially affected and service of the Initial Notice, the Respondent’s Notice, and the Case Management Statement on those new parties. Civil Code § 1375(h)(2).

d. Visual & Destructive Testing at the Project. The timing and scope of visual inspection and destructive testing to be completed. Civil Code § 1375(h)(3)-(4).

(1) Parties may observe and photograph any intrusive testing or sampling conducted by Association. Civil Code § 1375(h)(4).

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(2) Parties may not participate in or direct such efforts unless by mutual agreement costs of such testing are shared by the parties. Civil Code § 1375(h)(4).

(3) An Insurer must be placed on notice of the pending *Calderon* Process at least thirty (30) days prior to the commencement of site inspection or testing, or it may be allowed to re-do the testing and inspection under limited conditions once it assumes the defense of its insured. Notice to the Insurer may be provided by any party to the proceeding via certified mail to the address listed on the Statement of Insurance. Civil Code § 1375.05(c).

e. Association's Settlement Demand. The timing of the Association's service of a comprehensive settlement demand and any updates required by new issues that arise during testing. Civil Code § 1375(h)(5), (7).

f. Mediation Scheduling.

(1) When possible, scheduling is to be based on issue or specific party time slots. Civil Code § 1375(h)(8).

(2) The DRF must permit attendance by parties at any "cattle call" sessions to be done via telephone. Civil Code § 1375(h)(8).

(3) Notice of the first mediation session must be sent by certified mail to all parties and all known insurance carriers by Respondent no later than twenty (20) days prior to the date of the first session. Civil Code § 1375.05(e).

(4) Notice of any subsequent sessions is to be served by "any means reasonably calculated to provide those parties actual notice." Civil Code § 1375.05(e).

g. Follow Up Dates. The DRF also will set dates then at the CMO or at a later time, under which Respondent is to submit the Association the following items:

(1) Request to meet with board to discuss written settlement offer. Civil Code § 1375 (k)(1)(A)(i). Respondent is limited to a single such meeting. Civil Code § 1375(k)(1)(H).

(2) Written settlement offer, with sufficient detail to explain the amount of the offer. Civil Code § 1375 (k)(1)(A)(ii).

(3) Statement of Respondent's access to sufficient funds to satisfy Associations demands. Civil Code § 1375 (k)(1)(A)(iii).

(4) Summary of results of site testing and inspections performed to date. Civil Code § 1375(k)(1)(A)(iv).

h. Miscellaneous Issues.

(1) Exchange of Other Information Open to Mutual Agreement. The parties may mutually agree to the exchange of other relevant information, including exchange of consultant reports and photographs, scheduling expert presentations and meetings, or any other useful exchange deemed appropriate by the parties. Civil Code §

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1375(i).

(2) Effect of Respondent's Compliance/Non-Compliance with Follow-Up Dates. Respondent's failure to provide the required item on or before the listed Follow-Up date set by the DRF, absent consent of Association or the DRF, constitutes abandonment of the process, and relieves Association of holding meetings and sending notices to Association members, as required under Civil Code § 1375(k) (discussed below). Civil Code § 1375(k)(1)(B).

(3) At the CMO Meeting, parties may mutually agree to modify or dispense with the exchange of required information. Civil Code § 1375(h).

13. Respondent's Settlement Offers. Civil Code § 1375(k).

a. Board Meet & Confer With Respondent. The Association's Board and Respondent shall meet and confer within ten (10) days of Respondent's service of a written settlement offer. Civil Code § 1375(k)(1)(C).

b. Open Association Meetings. Open Association meetings are required following the Board's rejection of a settlement offer made by Respondent under the *Calderon* Process.

(1) Following the board's rejection of Respondent's offer, there shall be an open Association meeting, held at least fifteen (15) days prior to the time Association commences its action for damages against Respondent. Civil Code § 1375(k)(1)(D).

(2) The written notice to all Association members of the board meeting shall be sent at least fifteen (15) days prior to the scheduled date of the meeting. That notice shall include the following information:

(a) Time, date and place of meeting. Civil Code § 1375(k)(1)(E)(i).

(b) Stated purpose of the meeting is to discuss problems that may lead to the filing of a civil action against Respondent and others. Civil Code § 1375(k)(1)(E)(i).

(c) Any other reasonable options available to the Association. Civil Code §1375(k)(1)(E)(ii).

(d) Complete text of the written settlement offer. Civil Code § 1375(k)(1)(E)(iii).

c. Costs Borne by Respondent. In general, the Respondent bears the costs of noticing and holding the open Association meeting. Civil Code § 1375(k)(1)(F).

(1) The mailing and service costs are paid by Respondent 100%.

(2) Respondent also must reimburse Association a per capita reimbursement of no more than \$3/member to cover the expense of holding the meeting.

d. All Communications/Transactions Are Privileged. All transactions entered into are privileged and inadmissible in any subsequent litigation. Civil Code § 1375(k)(1)(G).

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14. Party's Limited Access to Court. Civil Code § 1375(n)-(o).

a. Available Interim Relief. Any party to the *Calderon* Process may petition the Court for the following forms of interim relief:

(1) Need to conduct formal discovery, including taking a deposition of a witness or subpoenaing documents from a third party witness. Civil Code § 1375(n)(1).

(2) Resolution of disputes, on shortened notice, between parties concerning production of information required to be exchanged, either by the specific provisions of Civil Code § 1375 or under the disclosure dates set by the Case Management Statement. Civil Code § 1375(n)(2), (6).

(3) Authorize extension of time frames previously set by the Case Management Statement. Civil Code § 1375(n)(4).

(4) Seek good faith settlement determination pursuant to the provisions of Code of Civil Procedure §§ 877, et seq. Civil Code § 1375(n)(5).

(5) Any other appropriate relief. Civil Code § 1375(n)(7).

b. Procedure for Petitioning for Interim Relief. Civil Code § 1375(o).

(1) Prior to filing any moving papers all interested parties are to meet and confer with the DRF regarding the dispute. Civil Code § 1375(n)(o)(2).

(2) Once the petition is filed, the Superior Court shall hear and decide the petition within ten (10) calendar days. Civil Code § 1375(n)(o)(1).

(3) The petition or any response may not exceed three (3) pages. Civil Code § 1375(n)(o)(1).

(4) The moving party must serve all parties with the Petition within five (5) business days prior to the date of the hearing on the petition. Civil Code § 1375(n)(o)(1).

(5) Any responsive papers are to be filed and served within three (3) business days prior to the hearing. Civil Code § 1375(n).

c. Available Relief for Non-Compliance. The option available to Association or Respondent to address failure to complete the *Calderon* Process is to seek a stay by filing a verified application once an answer has been filed to the complaint. Civil Code §1375.05(g).

d. Procedure for Addressing Non-Compliance.

(1) The Petition must be filed within ninety (90) days after the answer to the complaint has been served. The "90 days after answer served" time period may be extended upon a court finding of extraordinary conditions. Civil Code §1375.05(g)(1).

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(2) A hearing is set by the Court within twenty one (21) days from the filing of the Petition at which point the Court will review either declarations or live testimony to determine whether the Association or the Respondent has substantially complied with the requirements of the Calderon Process. Civil Code §1375.05(g)(2).

(3) A stay of up to 90 days shall be granted if the Court finds there has been non-compliance, and a hearing is held during the stay in which the noncomplying party may seek to demonstrate substantial compliance. The 90-day cutoff may be extended for good cause shown by the noncomplying party. Civil Code §1375.05(g)(3)(A).

(4) Upon the failure of the Association or Respondent to establish substantial compliance, the Court can either dismiss the matter on a “without prejudice” basis or fashion some other remedy. Civil Code §1375.05(g)(3)(B).

(5) Special Issue-Relation Back? Although Civil Code §1375.05(g)(3)(B) clearly prohibits the Court from dismissing the non-complying Association’s complaint on a “with prejudice” basis, with no provision for relating back to the date of an apparently defective Initial Notice, there may be a time-barring of claims that would otherwise fall outside the 10-year statute of repose (Code of Civil Procedure § 337.15) should the date of re-filing be viewed as the triggering date.

15. Penalties Against a Party For Not Participating.

a. Penalty No. 1: Prohibition from Further Site Inspection/Testing.

(1) Subject to certain exceptions, any party that received timely notice of the site inspections and testing performed under the *Calderon Process* but which failed to fully participate in the process is barred from engaging in any further inspection or testing in litigation following conclusion of the *Calderon Process*. Civil Code §1375.05(c).

(2) Showing Required by Non-Complying Party to Obtain Relief from Court.

(a) Relief only be sought by attorney for a Subcontractor or Design Professional when that attorney has been appointed by a party’s Insurer to meet the carrier’s defense obligations under the insurance policy. Civil Code § 1375.05(c)(1), (c)(3);

(b) The defending Insurer of the moving party must not have had timely notice of the *Calderon Process* within thirty (30) days of any of the testing or inspections performed under the *Calderon Process*. Civil Code § 1375.05(c)(1);

(c) The moving party must not have participated in any of the testing or inspections performed under the *Calderon Process*. Civil Code § 1375.05(c)(2);

(d) The moving party will reasonably likely “suffer prejudice” [not “undue prejudice”] if additional testing or inspections are not allowed. Civil Code § 1375.05(c)(4); and

(e) The information is not otherwise available via reasonable alternative methods. Civil Code § 1375.05(c)(5)

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(3) If allowed, additional site inspection and testing by non-complying parties is limited to the extent reasonably necessary to avoid the likelihood of prejudice. Coordination needs to occur at the same time as undertaken by new parties or other non-complying parties who have obtained relief so multiple inspections do not occur. Civil Code §1375.05(c)

(4) Penalty Not Applicable to Late-Added Claims. Should the Association add on claims that were not part of the *Calderon* Process, no penalty attaches to those who failed to earlier participate as it pertains to the newly added/expanded claims. Civil Code §1375.05(c).

(5) Procedure for Seeking Additional Investigation. Civil Code §1375.05(c).

(a) A party who seeks additional inspection or testing based upon new claims must apply to the court for leave to conduct the further investigation.

(b) The Court will conduct an *in camera* inspection of the defect claims alleged in the *Calderon* Process to determine whether new or additional claims are being made in the litigation in such a way as to require additional testing or inspection.

(c) Any party may object to the trial court making the determination, at which point the trial judge must refer the determination to another judge.

(d) Special Issue - Relation Back? With no specific provision for relating back the newly added claims to the date of the Initial Notice, there may be a time-barring of claims that would otherwise fall outside the 10-year statute of repose (Code of Civil Procedure § 337.15) should the date of notice of amended claim be viewed as the triggering date.

b. Penalty No. 2: Noticed Party Bound by Settlement. Civil Code §1375.05(d).

(1) When a settlement has been reached as a result of mediation during the *Calderon* Process, any Subcontractor or Design Professional with proper notice of the mediation who either (a) failed to attend, or (b) attended without settlement authority, is bound by the amount of the settlement.

(2) Allocation of the settlement amount remains an open question. The party subject to the penalty may introduce evidence at the subsequent trial as to proper allocation of the settlement amount to it and other parties.

(3) A party that attends the mediation but asserts defenses to its potential liability and as a result offers no money shall not be deemed to have attended mediation “without settlement authority.”

(4) Special Issue: Liability Remains an Open Question: The specific provisions of the statute provide as follow: “*The binding effect of this subdivision shall in no way diminish or reduce a nonsettling subcontractor or design professional’s right to defend itself or assert available defenses relevant to its liability in any subsequent trial.*”

It appears, therefore, that a non-complying party may continue to attack not only the issue of allocation, but liability itself. Consequently, the only issue that remains fixed would be the settlement amount, which amount would represent the maximum amount the non-complying party would be responsible for to Respondent under

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an indemnity theory (although recovery for “prevailing party” costs and attorneys fees under a contractual attorneys’s fee clause would remain an open issue).

16. Defect Claims Involving Small Projects.

a. Projects Smaller Than 20 Units. Under the provisions of Civil Code § 1368.4, if the *Calderon* Process does not apply because the project has fewer than twenty (20) units, then the Association must still satisfy certain notice and meeting requirements prior to filing a construction defect lawsuit. It remains an open question whether the provisions of newly enacted Civil Code § 1375.05(g) [effective July 1, 2002] would apply to this pre-requisite.

b. Notice to All Association Members. Civil Code § 1368.4 requires that notice of the intent to sue must be given to all Association members no later than thirty (30) days prior to the filing of any civil action by the Association against the declarant or other developer of a common interest development for claims of damage to (1) the common areas, (2) separate interests that the Association is obligated to maintain or repair, or (3) separate interests that arises out of, or is integrally related to, damage to the common areas or separate interests that the Association is obligated to maintain to repair.

17. Post-*Calderon* Process Litigation Procedures. Civil Code §1375.05.

a. Civil Filing/Preferential Trial Setting. Civil Code §1375.05(a)-(b).

(1) Once the *Calderon* Process has ended without full and final resolution, the Association may file suit in Superior Court. Civil Code § 1375.05(a).

(2) The effective filing date of the complaint for statute of limitation purposes shall be the date of service of the Initial Notice made by the Association. Civil Code § 1375.05(b).

(3) The earliest possible trial date shall be assigned to the action, with the trial court taking into consideration the pre-trial preparation completed under the *Calderon* Process. Civil Code § 1375.05(b).

b. Preferential Deposition Scheduling. Civil Code §1375.05(f).

(1) Except on motion to the court upon a showing of good cause, the depositions in the case will be taken in the following order:

(a) Depositions of experts designated by Association;

(b) Person most knowledgeable (PMK) depositions;

(c) Depositions of experts designated by Developer; and then

(d) Depositions of experts designated by Subcontractors and Design Professionals.

(2) The requisite “good cause” that needs to be shown to the Court to alter this schedule includes the goal of early disclosure of defects and the extent the expert is prepared to testify.

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(3) Special Issue - Limitation of Scope. The deposition of Association's experts taken prior to the time of any PMK depositions may lead to a situation where the opinions of the experts may not be "final" since the later disclosed information may alter their opinions as to fault allocation, causation, and similar issues.

APPENDIX A

Time Line for the Calderon Process (2002)

(Cal. Civil Code §§ 1375 & 1375.05, effective July 1, 2002.)

DATE PROCEDURAL EVENT(S)

Day 1 Initial "Notice of Commencements of Legal Proceedings" sent by HOA to Respondent. (§1375(b))

Day 25 Respondent may request meeting with HOA. (§1375(d))

Day 35 Meeting between HOA and Respondent must take place if requested by Respondent.. (§1375(d))

Day 60 Deadline for: (1) HOA and Respondent to exchange information; and (2) Respondent to notify subcontractors/design professionals regarding claim and initial meet and confer process. (§1375(e))

Note: The Subcontractor/design professionals must acknowledge receipt of Notice and provide a statement of insurance to the HOA and the Respondent within 10 days of acknowledgment (§1375(e)(2)). Failure to participate has dire consequences (§§ 1375(f), 1375.05(c)-(d)).

Day 80 Deadline for meet and confer between HOA, Respondent, and subcontractors/design professionals to select a facilitator, (§1375(f)(1)) If unable to agree, any party may petition Superior Court for appointment of facilitator (§1375(f)(2), and the hearing must be held within 10 days. (§1375(o).) Any subcontractors/design professionals notified thereafter may object to facilitator within 15 days of notice, and petition court to replace the facilitator for god cause (§1375(f)(3)-(4)).

Day 90 All parties to be notified by Respondent regarding date of initial meeting with facilitator and all parties. (§1375(f)(1))

Day 100 Initial case management meeting of all parties and facilitator to develop case management statement and compile data regarding involvement of subcontractors/design professionals in construction.(§1375(g)-(j).)

Day 100-180 Establishment of a document depository for documents generated in the Process. In addition, the following events must take place unless all parties agree that it is not necessary: (1) a second defect list must be provided to the Respondent after the HOA has conducted a visual inspection of the project; (2) Non-intrusive visual testing by Respondent and subcontractors; (3) Invasive testing by HOA, if desired by association; (4) Provision by HOA of comprehensive demand to serve as basis for dispute resolution; (5) Invasive testing by Respondent and subcontractors if desired by Respondent and subcontractors; (6) Modified demand by HOA if desired to reflect new issues raised in testing; (7) Dispute resolution meeting/mediation. (§1375(h)-(i).)

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Day 100-180 Within 30 days of completion of inspection or testing, Respondent may submit settlement offer to HOA and request meeting. If offer submitted, Respondent and HOA must meet to discuss offer. (§1375(k).)

Day 180 Process complete unless extension agreed to by all non-peripheral parties. (§1375(c).)

Day 360 Process ends if settlement not already reached unless all participating parties agree to extend. (§1375(c).)