CENTER FOR JUSTICE & DEMOCRACY
CJ&D
at NEW YORK LAW SCHOOL

IMPACT

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...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friends,

It's hard to remember of year when the futures of all three branches of the U.S. government have been up for grabs in such a radical, decisive way.

But the future is already here.

Before the death of Supreme Court Justice Antonin Scalia, Senate proponents of a very dangerous class action bill, which passed the House in December, might have delayed pushing their bill. They might have waited for a 5-4 decision from Supreme Court to give them the corporate immunity they sought, relieving Congress of the need to act. The new possibility of a 4-4 decision means we may see movement in the Senate much sooner than expected. No one really knows for sure. But it's one small example of how much is at stake politically right now.

We'll be working through the chaos, no matter what happens. The Center for Justice & Democracy is above the political fray. We stand solely for the rights of victims and the cause of protecting our civil justice system. Politicians – and even Supreme Court Justices - may come and go but CJ&D is here for the long haul and our goals never change.

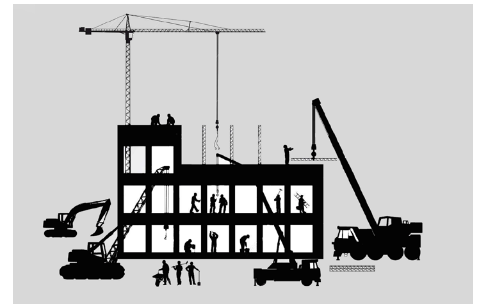
The civil justice system and civil juries are the last line of defense

Sincerely,

Joanne Doroshow
Executive Director

HOUSING

NEW IMMUNITIES FOR CONSTRUCTION DEFECTS



Crumbling foundations, leaky roofs, cracked ceilings, faulty electrical wiring, defective plumbing, dry rot. These are among the many problems homeowners can face when negligent developers/builders design or construct homes using shoddy workmanship and/or materials. More often than not, when such defects arise, forced arbitration clauses in purchase contracts and new-home warranties, in addition to anti-consumer warranty coverage exclusions often withheld from homebuyers until closing, make it more difficult or impossible for homeowners to get needed repairs or be compensated for them. "Right to cure" laws in over 30 states, which force homeowners to give builders notice and the chance to fix defects before they can bring legal action, plus statutes of repose in all 50 states, create additional obstacles to accountability and justice.

And some states, at the behest of developers, homebuilders and their political allies, have gone a step further, recently enacting legislation that makes it even harder for homeowners to sue under current

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THE CASE FOR A HOUSING "CIVIL GIDEON"

In the 1963 landmark case *Gideon v. Wainwright*, the U.S. Supreme Court unanimously ruled that criminal defendants are entitled to publicly-funded counsel if they can't afford an attorney. Yet when it comes to civil cases, the same constitutional right doesn't exist, resulting in a wide and growing justice gap for poor and low-income victims who often appear in civil court without counsel, while their opponents have lawyers. This disparity has prompted a "civil Gideon" movement that seeks the right to counsel for all indigent litigants in civil proceedings where basic human needs are at stake, like having a roof over one's head.

Indeed, the absence of access to an attorney in housing court can lead to serious consequences, including eviction and homelessness. This was the finding of a December 2015 Public Justice Center report, which examined what happened to poor renters who appeared at Baltimore City's "Rent Court," *i.e.*, a court system that handles rent eviction cases. According to the study, "Once inside the Rent Court, renters operate from undeniable

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NEW IMMUNITIES FOR CONSTRUCTION DEFECTS continued...

construction defect laws. For example, in February 2015, Nevada Gov. Brian Sandoval signed a bill into law that, among other things, narrowed what constitutes a home defect, repealed attorney fee and cost provisions in home defect judgments, lowered the statute of limitations from ten to six years and barred homeowner associations from bringing defect suits on behalf of homes in their communities. The following month, Arizona Gov. Doug Ducey signed legislation that repealed attorney and witness fee provisions and redefined the meaning of construction defect.

In September 2015, a bill went into effect in Texas that imposes burdensome pre-lawsuit/pre-arbitration procedures on condo associations with eight or more units before they can pursue construction defect claims and allows a condominium declaration to include a binding arbitration clause for such claims. Meanwhile, within a 14-month period ending December 2015, 12 cities in Colorado passed local construction defect laws that weaken homeowners' rights cities

after repeated industry efforts failed in the state legislature. Among the initiatives passed: a Denver City Council ordinance that makes it harder to file class-action lawsuits over construction defects, bans homeowner associations from eliminating mandatory arbitration clauses in builder contracts and shields builders when construction is up to city code. Some Colorado state lawmakers have already announced their intention to pass construction defect legislation that lets builders off the hook in the 2016 legislative session.

But as condo construction defect victim Mary Lavia told Colorado state lawmakers in May 2014, "The reality is that Colorado's construction defect laws aren't the cause of lawsuits – shoddy construction and bad workmanship are the cause…. Those laws are there to protect consumers from home builders who cut corners and refuse to make adequate repairs," she said, adding that legislative initiatives that take away homeowner access to the courts will result in "more poorly constructed condos and houses with more defects, because forcing homeowners into binding arbitration means home builders will have less incentive to build with quality in the first place."

THE ONGOING PROBLEM OF HOUSING DISCRIMINATION

The Fair Housing Act (FHA), signed into law by President Johnson as part of the 1968 Civil Rights Act, bars discrimination in renting, buying or financing any private or publicly-owned residential dwelling based on race, color, national origin, religion, sex, disability or the presence of children. Despite the existence of this federal law and overlapping state and local statutes, housing discrimination remains a pervasive, nationwide problem. According to a 2015 National Fair Housing Alliance report, every year an estimated four million acts of discrimination occur in the U.S. rental market alone. Civil lawsuits, whether brought by government agencies, individual victims or their advocates, can serve as an indispensible tool in combatting discriminatory patterns and practices. Below are two cases which settled this year.

***U.S. vs. Glenwood Management Corp.* (February 2016)**

The 287-unit Liberty Plaza building – reportedly the first Manhattan high-rise residential rental building constructed after the September 11 attacks and promoted online as "well-thought out" – "was designed and constructed with scores of inaccessible features" for those with disabilities in violation of the FHA, according to a federal civil rights. Glenwood settled, agreeing to make extensive retrofits to over 2,500 rental apartments in its Liberty Plaza complex and two others, inspect six other Manhattan residential complexes and retrofit them if needed, establish procedures to ensure FHA-compliance in ongoing and future development projects and pay $900,000 to victims.

***U.S. v. Kent State University* (January 2016)**

After the Department of Justice (DOJ) filed a lawsuit alleging that the university's ban on emotional support animals in student housing violated the FHA, the school agreed to change its housing policy to allow students with psychological disabilities to keep therapy animals, institute an FHA education and training program for employees, be monitored for three years to ensure compliance, pay two former students $100,000 and contribute $30,000 to a fair housing organization.

185 West Broadway
New York, NY 10013
Phone: 212.431.2882
centerjd@centerjd.org

http://centerjd.org

IMPACT

Editor:
Daniel Albanese

Written By:
Emily Gottlieb

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knowledge deficits – 50 percent of surveyed renter-defendants knew virtually nothing about how to defend their cases. Worse, they encounter systemic obstacles that minimize their voices and participation. While most landlords are represented by an attorney or debt management agent, renters typically appear at court alone, so that the cards are stacked against them.

Recognition of these unfortunate realities, plus a desire for the legal system to function fairly, has led to pilot programs in California and Massachusetts that demonstrate how low-income tenants secure more just legal outcomes with attorney representation in eviction cases. A 2015 D.C. initiative, which provides counsel to tenants in subsidized housing eviction cases, is based on the same premise.

In New York City, 90 percent of tenants facing eviction don't have legal representation in housing court, while 98% of landlords do. There were more than 21,000 home evictions each year from 1998 through 2015, resulting in thousands of families entering the city's homeless shelter system. By the end of 2015, shelters housed more than 60,000 people, 23,885 of whom were children. The New York City Council is currently considering a bill that would make NYC the first place in the U.S. to guarantee legal representation for low-income tenants facing eviction, ejectment or foreclosure proceedings. As bill co-sponsor Mark D. Levine and Coalition for the Homeless President Mary Brosnahan wrote in an October 19, 2015 *New York Times* op-ed, a mandated right to counsel would "guarantee a more level playing field in housing court," attack one of the "root causes of homelessness" by staving off evictions and "save New York money in the long run," since it "costs about $2,500 to provide a tenant with an attorney for an eviction proceeding, while we spend on average over $45,000 to shelter a homeless family." A majority of councilmembers have signed onto the legislation.

WHEN HOMES ARE TOXIC

The following examples show how lawsuits can compensate residential exposure victims, police dangerous company or industry practices, unmask negligent corporate behavior and/or save lives.

Lead Paint

Paint companies knew as early as 1912 that lead paint caused brain damage in babies and children yet marketed their product as kid-friendly and safe for home use. These companies, many of which still exist in some form, profited immensely from their deception. Though the U.S. banned residential use of lead paint in 1978, many children still live in pre-1978 housing and are therefore tragically at risk for poisoning from lead-contaminated paint dust or peelings.

Facing overwhelming health care and housing costs associated with lead-poisoned children, state and local governments have turned to the civil justice system. Take Rhode Island, which in 1999, with the help of outside counsel, became the first state to sue former lead paint manufacturers. Though the multibillion-dollar jury verdict against Sherwin-Williams, NL Industries and Millennium Holdings was overturned, a state court judge ruled that the case "brought significant attention to the serious harms of lead poisoning in Rhode Island, leading to an increased awareness in both the public and state officials." As a result, the court wrote, the rate of lead-poisoned children declined by 76 percent from 1995 to 2004, and the General Assembly passed a new law

"designed to promote the prevention of childhood lead poisoning in Rhode Island and provide Rhode Island residents with access to housing that is adequately maintained and free of lead hazards."

Similarly, in 2013, ten California cities and counties, including San Francisco, San Diego, Oakland and Los Angeles County, prevailed in a public-nuisance lawsuit against paint companies who promoted, sold and profited from lead paint while knowing it was toxic to children. After a five-week bench trial, a California judge ordered Sherwin-Williams, NL Industries and ConAgra Grocery Products to pay $1.1 billion into a lead abatement fund to help protect the lives of thousands of children living in millions of pre-1978 homes. The case is on appeal.

Emergency Housing Units

In the wake of Hurricanes Katrina and Rita in 2005, hundreds of thousands of Gulf Coast families were left without a roof over their heads. FEMA responded by purchasing $2.7 billion worth of mobile homes and travel trailers from private manufacturers, who quickly turned out more than 140,000 housing units containing excessive levels of formaldehyde, a strong-smelling industrial chemical that can increase the risk of cancer and a host of other health problems. Within months, some residents began complaining about unusual sickness, breathing problems, burning eyes, noses and throats, nosebleeds and even deaths.

Government tests revealed that units registered formaldehyde levels so hazardous that all residents should immediately be moved to safer housing. A subsequent congressional investigation revealed that the manufacturers knowingly poisoned thousands of hurricane

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survivors but remained silent as FEMA sent thousands of contaminated homes into the region.

Thousands of victims filed civil lawsuits for compensation and justice. For example, in 2010, injured residents reached a confidential settlement of 7,500-8,000 claims with Fleetwood Enterprises, which supplied FEMA with formaldehyde-tainted travel trailers, for an undisclosed amount. The following year, roughly two dozen mobile home companies agreed to a $2.6 million class action settlement to resolve thousands of injury claims. And in September 2012, a federal judge approved a $37.5 million class action settlement between nearly 55,000 residents of Louisiana, Mississippi, Alabama and Texas and over two dozen trailer manufacturers.

Chinese Drywall

A Florida housing boom plus rebuilding efforts after Hurricanes Katrina and Rita caused a shortage of domestic drywall, leading to the import of over 500 million pounds of tainted wallboard from China which was installed in more than 20,000 homes, mostly in the Southeast. Among the injuries residents experienced – frequent nosebleeds, headaches, breathing issues, asthma attacks, smelly gases, corroded pipes, blackened wiring and broken appliances – prompting victims to seek accountability in the civil courts.

For example, after homeowners filed lawsuits, manufacturer Knauf Plasterboard Tianjin agreed to cover victims' remediation costs, medical claims and economic losses as part of $1 billion settlement in 2013. Two years later, drywall maker Taishan Gypsum paid a $3.2 million default judgment to seven Virginia families after long-drawn-out attempts to avoid legal responsibility. And a federal judge is currently considering damages in a class action suit against Taishan that seeks over $1 billion on behalf of 4,150 homeowners. In January 2016, the court ruled that Taishan had engaged in discovery abuses, namely "protracted withholding of relevant evidence" for eight months, and ordered the manufacturer to produce documents, cover discovery-delay costs borne by plaintiffs and pay a $40,000 penalty.

Laminate Flooring

Lumber Liquidators, "the largest and fastest-growing retailer of hardwood flooring in North America, with over 360 stores in 46 states," sold Chinese-made laminate floorboards tainted with hazardous amounts of formaldehyde that were deceptively marketed as safe. This was the finding of a March 2015 *60 Minutes* report, which revealed that 30 of 31 flooring samples failed to meet formaldehyde emissions standards, with some registering levels over 13 times California's safety limit. In addition, workers at three different factories "openly admitted that they use core boards with higher levels of formaldehyde to make Lumber Liquidators laminates, saving the company 10-15 percent on the price" and "admitted falsely labeling the company's laminate flooring" as CA-compliant. Given that "[m]ore than 100 million square feet of the company's cheaper laminate flooring is installed in American homes every year," the scope of injury is enormous, leading many victims to seek redress from the civil justice system. Today, Lumber Liquidators reportedly faces 130 class action suits from homeowners, who allege harm from being exposed to and intentionally misled about the product's dangers.

CFPB AND MORTGAGE COMPLAINTS

The U.S. mortgage market's total value exceeds $10 trillion, making it the largest financial marketplace in the nation. The mortgage industry has also earned another, though much less coveted, distinction: since the Consumer Financial Protection Bureau began accepting consumer complaints in 2011, mortgages have been the subject of more consumer complaints than any other type of financial product. A recent CFPB report found that, as of September 1, 2015, the Bureau had handled approximately 192,500 mortgage-related complaints from consumers, with such complaints making up more than 27 percent of the total complaints the CFPB had received to date. Among consumers' key complaints: continued problems with preventing foreclosure, a lack of information when loans were transferred, trouble with the payment process and communication problems with their servicer. The study also found that Wells Fargo, Bank of America and Ocwen were complained about the most, with the three companies averaging roughly 430 complaints per month between April and June 2015.

The CFPB has used its enforcement powers to keep the mortgage industry in check. According to a July 21, 2015 CFPB press release, the agency has "secured billions of dollars in relief for consumers harmed by systematic misconduct and illegal practices by companies in the mortgage industry." It has also taken a number of actions against mortgage servicing companies and the mortgage industry, as well as promulgated extensive new mortgage rules to protect homeowners and consumers.