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# Where the Legal Winds Are Blowing

What California Decisions Say About Extrapolation Evidence in Construction Defect Cases

By Steven Disharoon

California has seen a growing trend of construction defect plaintiffs turning to so-called “extrapolation evidence” in an attempt to establish more severe or widespread damages based on smaller sample sizes.

There is no firmly established standard in California for approaching such evidence in construction defect cases, and no per se rule against it. However, the handful of cases touching upon the issue, and the variable nature of construction defect damages, support that the practice should be permitted in this area of law only in the rarest of circumstances.

One of the few construction defect cases to address extrapolation evidence, *Ayala v. Pardee Const. Co.*, did so briefly and in an unpublished opinion. Nevertheless, the case provides guidance, as the court questioned the sufficiency of the offered sample size and noted there was no evidence that the properties at issue “were so similar” such that extrapolating between them was proper.



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Likewise, in *Camenson v. Milgard Mfg. Inc.*, another unpublished opinion, the court rejected an extrapolation theory with respect to allegedly defective windows, where only eight out of approximately 1.3 million windows were tested.

Thus, extrapolation evidence requires a sufficient sample size and reliable data, as well as substantial similarity across the extrapolated areas. The nature of multi-unit construction, and the varying forces that can damage it, demonstrate that such similarity is often impossible to establish.

Indeed, the California Supreme Court recognized long ago the “fundamental maxim that each parcel of land is unique” (*City of San Jose v. Superior Court*), and courts have denied class certification in construction defect cases due to the unique nature of the damages at issue (e.g., *Hicks v. Kaufman and Broad Home Corp.*). These decisions at least implicitly reject the use of extrapolation evidence to establish construction defect claims unless the proponent overcomes this presumption of the inherent unique damages at issue.

Even when courts permit extrapolation, the reasoning supports limiting the practice in construction defect cases. For example, in *Consolidated Electrical Distributors Inc. v. Kirkham, Chaon & Kirkham Inc.*, the plaintiff sued to recover payment for electrical fixtures supplied to a construction project, and needed to establish that the fixtures were actually installed. The court upheld the use of extrapolation evidence, whereby an expert visually confirmed the installation of the fixtures in certain parts of the property and, using the blueprints, extrapolated that the same fixtures must be present in other identical areas.

Notably, this case did not involve construction defects, meaning the plaintiff did not have to prove any inherently unique damages. Further, corroborating evidence was available in the form of purchase orders confirming delivery of the fixtures. Both of these points exemplify how the reasoning used to justify extrapolation here typically will not apply to a construction defect case.

As in any case, a sufficient factual and scientific foundation is required to permit extrapolation evidence. In the construction defect context, if a party seeks to extrapolate damages to different areas, then those areas must be identical, or at least extremely similar, both in design and with respect to the damage that affected them.

One can envision a scenario where this is possible, probably not with respect to resultant damages, which are inherently unique, but perhaps concerning statutory performance standards in California’s Right to Repair Act (for example, where the same substandard component, such as a plumbing line that was defectively designed, is indisputably present in each of the areas to which the defect is extrapolated).

But absent such rare indicia of reliability, courts should exclude extrapolation evidence as speculative, unduly prejudicial, and simply inconsistent with the nature of construction defect damages. ■

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