

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

\*\*\* FILED \*\*\*  
03/06/2002

03/05/2002

CLERK OF THE COURT  
FORM V000A

HON. ROLAND J. STEINLE

J. Escarcega  
Deputy

CV 2000-009323

FILED: \_\_\_\_\_

VALLEY WIDE PLASTERING  
CONSTRUCTION INC

RICHARD A ALCORN

v.

HENRY PRODUCTS INC, et al.

MARK D ZUKOWSKI

DANIEL H CLIFFORD  
WILLIAM H DOYLE  
LEONARD T FINK  
M CRAIG MURDY  
DEAN C ROBERTSON  
JOHN G RYAN  
SALT RIVER PIMA MARICOPA  
INDIAN COMMUNI  
2501 W BEHREND DR  
PHOENIX AZ 85027-0000  
MICHAEL J WHITE  
SCOTT M ZERLAUT

**MINUTE ENTRY**

The Court has read and considered all of the memorandums filed to date. The Court has also heard testimony from experts in the area of statistics and the Court has considered the experts' affidavits filed herein.

The party seeking class certification bears the burden of proof. Rule 23(a) contains four prerequisites, which must be met before a class can be certified. Once the conditions of Rule 23(a) are met, the party seeking certification must also

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demonstrate that the class falls within one of the subcategories of Rule 23(b). The court must conduct a "rigorous analysis" of the Rule 23 prerequisites.<sup>1</sup>

Here, the Court finds that the Plaintiff has failed to demonstrate the elements of numerosity and commonality for a number of reasons:

1. There were two subcontractors who applied the stucco. The Plaintiff failed to do a breakdown which demonstrates that the problem affects all homeowners or doesn't affect on those homes by only one subcontractor. Of the sample used, only sixty-nine (69) homes had defects. While the expert for the Plaintiff speculated that each subcontractor was represented in the group, no one attempted to do the analysis. This is important because the Court must determine if subclasses are necessary, Rule 23 (c)(4).

2. With respect to the roofs, the Plaintiff did not do any breakout of the roofs that had been repaired. If the roof was repaired they may no longer be part of this group or they may be another subclass, Rule 23 (c)(4).

3. The Plaintiff failed to meet the burden of showing that there should be one class rather than separate classes for each defect (roof, stucco and sprinklers) or whether there should be subclasses for each subcontractor.

4. The Plaintiff did not attempt to deal with the issue of "secondary buyers", those residents who did not purchase the home from Del Webb. There are some 505 homes which were resold. The Court finds, at a minimum, the class would be restricted to

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<sup>1</sup> Markiewicz v. Salt River Valley Water Users' Assn. 118 Ariz. 329 (Ariz. App. 1978). In Re Masonite 170 F.R.D. 417 (E.D. La. 1997). Lienhart v. Dryvit Systems, Inc 255 F 3<sup>rd</sup> 138 (4<sup>th</sup> Cir 2001) In Re Stucco 175 F.R. D. D 210 (E.D. N.C. 1997); Ilhardt v. A.O. Smith Corp. 168 F.R.D. 613 (S.D. Ohio 1996); Cohen v. Camino Sheridan Inc. 466 So 2<sup>d</sup> 1212 (Fla. App. 1985) and finally, In Re American Medical Systems Inc. 75 F 3<sup>d</sup> 1069 (6<sup>th</sup> Cir. 1069) which discussed adequate representation "is essential to due process" because a final judgment is binding on all class members.

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initial homebuyers. Subsequent purchasers may have different issues, including whether the home was inspected; whether there were any defects found; whether they were corrected prior to sale; whether any defects are covered by a new home warranty program; and finally, whether these homeowners were already compensated by the market.

5. Plaintiff objects to the Court relying upon petitions circulated throughout the homeowner's association. However, the Plaintiff has failed to demonstrate through a legitimate survey that there are a sufficient number of persons who are interested in pursuing a claim, as opposed to pursuing ADR pursuant to the C.C. & R's.

6. The Plaintiff has failed in the burden showing that there is some standardized formula for damages. There are a myriad of "home specific" issues including, but not limited to, the type of repair needed, and likewise any analysis of diminution in value will require individual inquiries to determine the market values.

Finally, while the Court need not address this issue in light of the above, the Court will find that the named Plaintiff will not adequately represent the entire class. Three out of four named Plaintiffs are making no claim on the roof. The Jones's has a large number of other individual claims which they will not give up. The Bremer's have a very rare home and there were significant improvements, including a casita, which were not done by Del Webb. Plaintiff Ryley's have only a claim for the stucco; all other issues have been resolved to her satisfaction. Therefore, these representations do not have common interests with the unnamed members of the class, nor does it appear the representatives will vigorously prosecute the interest of the proposed class.

The Court, in reviewing the diversity of issues with the named Plaintiff, finds that the named Plaintiffs could not adequately represent the class, and they provide vivid

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illustrations of the problem the Court has in finding numerosity and commonality elements.

While the Court has found Plaintiff has failed to meet it's burden under Rule 23, the Court is not foreclosing additional attempts to certify some class or classes. However, the Court will caution the parties that any further attempt must overcome certain minimum requirements.

1. Any class must include only first time homeowners.
2. The Plaintiff must do a survey which would demonstrate numerosity pursuant to a statistically sound method.
3. The Plaintiff must identify those homeowners who wish to participate in Alternative Dispute Resolution, pursuant to the C.C.& R's and would not participate in a class action.
4. There are not additional claims by other proposed class members, such as the Jones', who have individual claims, which are subject to the additional claims issues which could not be tied together.
5. Where there should be sub-classes including one per defect or one per subcontractor and/or secondary home buyers.
6. Whether the individual damage issues do not predominate any common claims.
7. Class representatives which adequately represent the class.

If additional motions are filed by the Plaintiff, the Court will scrutinize such motions using the above analysis.

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**IT IS ORDERED** denying the motion, pursuant to Rule 23, to  
certify this action as a class action.