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Feature Comment: Revisiting California's Construction Defect "Right To Repair" Act

Written by Patrick M. Roberts, Esq., this article reviews California's construction defect "right to repair" act.

In 2000, the California Supreme Court issued a landmark decision in *Aas v. Superior Court*, 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125 (2000), holding that a homeowner could not sue in tort for a construction defect unless the defect caused actual damages. This case was viewed as a substantial win for homebuilders, and plaintiff's lawyers immediately sought to undo this holding by arguing that the *Aas* damage requirement was in contradiction to public policy and that liability should be imposed on a builder before a homeowner actually suffered harm.

In response to the lobbying by plaintiff's lawyers, in 2002 the California Legislature enacted Civil Code Sections 895-945.5 called the "Right to Repair Act" ("Act"). This law took effect on January 1, 2003 and pertains to those residences which were sold on or after January 1, 2003. This Act significantly changed the way in which individual homeowners and homeowners in common interest developments addressed construction defects. The Act provided detailed and specific liability standards for newly constructed housing, identifying specific types of defects that would give rise to claims regardless of whether the defect caused damage to other property. Further, the Act created a pre-trial process that included a builder's right to repair an alleged defect. The standards apply to not only developers/general contractors, but subcontractors, materials suppliers as well as design professionals.

A key element of the Right to Repair Act was the definitions of functionality. The Act defines construction defects according to 45 specific functionality standards that apply to a new home, with the standards being divided into seven categories: 1) Water Intrusion 2) Structural Issues 3) Soils - Related Issues 4) Fire Protection Issues 5) Plumbing & Sewer 6) Electrical and 7)

Other Areas. Each standard is set forth in what is intended to be clear language to define a specific itemized defect (e.g., roofing systems must not allow water to enter the building structure). The Act did provide that a builder may opt out of the functionality standards if it provides a warranty in its contract with the homeowner that provides protection equal or greater to the functionality standards. Further, while the Act was designed to allow "defects" without establishment of resulting property damage, the Act is not a one-way street. Homeowners are required to follow all reasonable maintenance guidelines provided by the builder and product manufacturers as well as commonly accepted maintenance practices.

Under the Act, prior to filing a suit for violation of the functionality standards, a homeowner must follow a pre-litigation procedure commencing with notifying the builder of the claim. The homeowner notice needs to describe the claim in sufficient detail to determine the nature and location of the claimed violation to the extent it is known. This notice triggers a series of pre-litigation procedures and timelines with which the parties must strictly comply, including provisions for documents being provided by the developer, as well as times in which a developer can agree to offer to repair and/or mediate the dispute. These pre-litigation procedures apply as well to subcontractors and design professionals if they caused a violation of the functionality standards.

While the Act in theory was meant to streamline the construction defect litigation process, the reality is that the Act does have questionable benefits for both homeowners and developers.

Pursuant to the Act a builder must provide notice of the existence of the pre-litigation procedures and a copy of the Right to Repair Act with the original sales documentation. Both of these must be acknowledged by the purchaser and builder's representative. This simple requirement still is not adhered to by some developers.

Further, while the prelitigation procedures were intended to be fair, the timeline is overly stringent as it relates to builders. The deadlines make it nearly impossible for a builder to identify and actively involve all the implicated trades as a practical matter. Unfortunately, if a builder fails to comply with the required procedures,

the homeowner is freed from pre-litigation procedures and may immediately file suit.

As a practical matter, these pre-litigation procedures under the Act and other contractual requirements placed in sales agreements, such as judicial reference, have generally yielded smaller damage awards to plaintiffs than straightforward “construction defect” cases tried to a jury. That being the case, plaintiff’s counsels have developed certain methodologies in an attempt to opt out of the Act’s requirements.

For example, even though the first step under the Act is for a homeowner to serve a notice of a claim that provides a builder with an opportunity to invoke its right of repair, some plaintiff’s attorneys have skipped all of these pre-litigation procedures and immediately filed a lawsuit. The plaintiff attorneys then argue that it is the builder who must first prove compliance of all the statute requirements before a homeowner can be required to comply with the Act. In at least one published decision, the question of whether a plaintiff who does not follow the procedures can require a builder to affirmatively establish compliance with the obligations of the Act was rendered in the affirmative for the builder. In that case, the Trial Court concluded that it was up to the builder to establish that it had chosen to “opt in” to the statutory scheme by performing its disclosure obligations under Civil Code Section 912. At the trial court level, the developer brought a motion to stay the proceedings until plaintiffs had complied with their obligations under the code. The Trial Court ruled in favor of the homeowners. The Appellate Court, in reviewing the legislative basis for the Right to Repair Act, affirmatively held that a homeowner must bear the burden of showing that he or she need not follow the Right to Repair Act procedures. Homeowners bear the burden of establishing that a builder failed to comply with the disclosure requirements (*Standard Pacific Corp. v. Superior Court of San Bernardino* (2009) E046844).

Another “trick” that plaintiffs’ counsel has tended to utilize in these cases is to refuse to provide any specific detail pursuant to its notice of claim (which must describe the nature and location of each alleged defect). Typically, plaintiff’s counsel provides a generic all inclusive defect list. In multi-home cases, they essentially assert that each and every home suffers from the exact same all inclusive list of defects. In response

to this evasive approach, there are essentially two options for the builders. First, the builder may refuse to engage in the Right to Repair Act process until the homeowner provides proper notice. This generally is met by a response from plaintiffs of immediately filing a lawsuit and claiming the builder has refused to comply with the Act. At this stage, the builder’s option would be to simply file a motion to stay the litigation pursuant to the Act, and request that the plaintiff’s provide the information required by Act. The argument is that the homeowner’s refusal to provide such information prevents, in any practical sense, further proceeding under the Right to Repair Act. As the law is not yet developed in this area, trial courts do vary in their willingness to force the homeowners to comply with the Act.

The second approach by builders is to demand proper notice, but still proceed with inspections. Under the Act, the builder is granted two opportunities to inspect property, and using this option, they would necessarily need to engage in both inspections. Under the first inspection, they could attempt to identify deficiencies and all potentially responsible parties. One of the issues is that any repair offer by a builder should be explicitly limited to the observed deficiencies, as this would place the burden back on a homeowner to identify any additional defects with respect to later claims.

One of the key factors to remember under the Act is that while in a regular litigation matter, a builder may secure a release for cash payments to a homeowner, a builder may not obtain a release for any repair work mandated by the Act. Under normal civil litigation, if a matter is settled, a release for such defects is generally obtained. In this instance, if a dispute still exists over the defect or if a defect results from the repair of the prior defect, an owner could still file an action. Under the Act, a builder cannot extinguish the possibility of litigation even by following the Right to Repair Act’s standard procedures. This does raise certain issues. Notwithstanding the foregoing, the Right to Repair Act is generally followed by most builders, unless agreement is reached with the plaintiff’s counsel to simply put the matter into litigation.

One other interesting issue involves builders who opt out of the statutory non-adversarial pre-litigation procedures under the Act in lieu of its own contractual pre-litigation procedures. The

Act allows additional or alternative pre-litigation procedures if the parties contractually agree to the same. Under this scenario, the builder is not subject to the disclosure requirements under the Act. In the recent case of *Baeza v. Superior Court* (2011) D.J. DAR 1785, the plaintiffs sought a writ of mandate to direct the Trial Court to vacate its order requiring plaintiffs to comply with certain contractual non-adversarial prelitigation procedures prior to continuing their construction defect action against developer. The court denied the petition.

In this case, the petitioner/plaintiffs were the owners of 32 homes which had been purchased from the developer. The plaintiffs had filed an action against developer and other defendants alleging defects, and the developer moved for an order compelling plaintiffs and the owners to comply with certain statutory or contractual procedures applicable to claims of construction defects. Specifically, it sought to compel the owners of the houses to comply with contractual provisions for non-adversarial prelitigation procedures including mediation and judicial reference. For certain of the residences, developer sought to comply with statutory non-adversarial pre-litigation procedures (i.e., the Right to Repair Act). The plaintiffs opposed the motion arguing that the pre-litigation procedures are not enforceable because the developer had failed to comply with certain statutory requirements.

Essentially, the plaintiffs contended that developer had failed to comply with certain subdivisions of the Act and therefore, the plaintiffs were released from their requirements of submitting to any non-adversarial prelitigation procedure. The developer's argument was that pursuant to other sections of the Act, it had elected not to use the certain procedures in the Act but opted to use its own contractual non-adversarial pre-litigation procedures which had been acknowledged and executed in the sales agreements by the homeowners. Plaintiff's counsel essentially did not want this matter to go to judicial reference as they understood that damage awards pursuant to judicial reference proceedings are substantially less than that which would be obtained in a construction defect action jury trial.

In response to the plaintiff's various arguments, the Court concluded that a builder who opts out of certain non-adversarial statutory

prelitigation procedures under the Right to Repair Act in favor of its own contractual procedures opts out of the entirety of the section, and the disclosure provisions of the section do not apply to such a builder. Therefore, the plaintiffs would be subject to the builder's own contractual procedures relating to construction defects.

This case can be cited favorably by builders who seek to use judicial reference and other contractual pre-litigation procedures as it relates to construction defect matters. Plaintiffs will continue to attempt to evade the provisions of these sections and immediately try to file state court actions, but there is case law which would argue against such an approach.

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Cases & Decisions

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Owner's Daughter Hired Contractor But Failed To Pay Contractor In Full; Contractor Recovered From Owner Under Theory Of Unjust Enrichment

BHP LAND SERVICES, LLC v. SEYMOUR, 137 CONN. APP. 165, 47 A.3d 950 (2012)

In 2003, the mother ("Owner") purchased a farm property (the "property"). She never resided on the property. Owner's daughter ("Daughter") occupied the property and ran a business there. Owner did not participate in the business in any way. No written agreements existed regarding this arrangement. No rent was paid. Owner paid the mortgage and property taxes.

In 2007 and again in 2008, Daughter hired a contractor ("Contractor") to clear trees and grade part of the property. After work was completed, the bill was not paid in its entirety. Contractor sued seeking foreclosure of a