



RECENT DEVELOPMENTS IN CALIFORNIA'S RIGHT TO REPAIR ACT

California Civil Code Section 895, et seq., (“Right To Repair Act” or “SB 800”) the so called “fix it” law effective January 1, 2003 expressly provides that with respect to residential construction, defects are defined as set forth in Civil Code Section 896 and said defects do not require appreciable “property damage.” The holding in Aas v. Superior Court (2000) 24 Cal.4th 627 (“Aas”) was expressly superseded for construction completed on or after January 1, 2003.

The new Civil Code sections have three main impacts with respect to construction defect litigation. First, the statutes established functionality requirements by defining specific construction defects. For example, with respect to framing, California Civil Code Section 896(b)(4). provides “[T]he building shall be constructed to materially comply with design criteria for earthquake and wind load resistance as set forth in the applicable government building codes, regulations and ordinances in effect at the time of the original construction.”

More importantly, the new statutes provide specific meet and confer guidelines concerning the builder’s right to fix alleged defects and specifically provides time limits in which to respond to a claim (14 days) and the time allowed for inspections and the repair of the property (14 days and 30 days, respectively). Under these new statutes, the builder maintains the right to offer alternative dispute resolution options such as arbitration and judicial reference.

The new statutes also have significant procedural and legal modifications. As the Aas decision is largely abrogated by Civil Code Section 896, there is no need to establish resulting property damage. Mere failure to comply with performance standards is enough to sustain a defect claim. The standards do not require breach of contract and may be enforced either by homeowners’ associations or an individual homeowner of a single home.

With respect to Statute of Limitations issues, under California Civil Code Section 896 the three-year discovery statute and four-year patent defect statute no longer apply to claims for violations of the standards. All claims must instead be brought within ten years following substantial completion unless otherwise specified. There are, however, new statutes of limitations for various “minor components” such as inner-unit noise

transmission, operation of electrical systems and the like. They are specified as one and two year statute of limitations.

Now that there has been a reasonable period of time since implementation of the Right To Repair Act (“Act” or “SB 800”), and corresponding claims brought under the same, litigation has begun to ensue with respect to various provisions of the Act. The appellate decisions in California have been somewhat of a “mixed bag”. Typically, Plaintiffs have sought relief from the Act’s provisions and have attempted to directly file construction defect actions circumventing the procedural requirements of the Act. In recent years, Courts have generally sided with the Builders on these types of issues.

In Baeza v. Superior Court (2011) 201 Cal.App.4th 1214, Plaintiff sued developer for defects arising from the construction of 32 homes. Developer sought compliance with Civil Code Section 895 et seq. and plaintiffs asserted that developer had failed to comply with the disclosure requirements of Civil Code Section 912, thereby relieving plaintiffs of the duty to comply with the Right to Repair Act. Developer opposed plaintiffs' motion on the basis that the disclosure provisions of Civil Code Section were inapplicable as the purchase and sell agreements provided for an opt out of such provisions in favor of developer's own disclosure provisions. Under Civil Code Section 914(a), a builder can opt out of the statutory procedures in favor of its own alternative procedures, as long as the builder notifies the homeowner of its intent to use alternative non-adversarial contract provisions. The Fifth District Court of Appeal held that a builder who opts out of SB 800's statutory pre-litigation procedures in favor of its own purchase and sale contractual procedures opts out of the entirety of SB 800's pre-litigation procedures, meaning that the disclosure provisions of Civil Code Section 912 do not apply to that builder. Accordingly, builder had no obligation to comply with the disclosure requirements, and plaintiffs were required to comply with the builder's remaining pre-litigation procedures before continuing to prosecute their construction defect action. The Court concluded that disclosure requirements of SB 800 do not apply to builders who opt out of SB 800's pre-litigation procedures in favor of their own procedures.

In an unpublished decision, the Fourth Appellate District of the Court of Appeal asserted plaintiffs must comply with SB 800 pre-litigation procedures or alternative agreed upon procedures with builders before filing a lawsuit. Plaintiff homeowners filed a construction defect lawsuit against defendants. Defendants moved to dismiss the stated action on the grounds that the plaintiffs purchased their homes after January 1, 2003 and were thus subject to SB 800 procedures. Pursuant to Civil Code Section 914, defendant developers elected to use an alternative contractual non-adversarial procedure via its limited warranty, which defendants recorded and which required homeowners to provide written notice of defects, and an opportunity to repair, mediate and arbitrate. Plaintiffs challenged defendants' compliance with these pre-litigation procedures. The trial court granted the defendants' motion to dismiss without prejudice. In an unpublished decision, the court, citing Baeza v. Superior Court (2011) 201 Cal.App.4th 1214, noted that under the Right to Repair Act, a builder has the option of contracting for an alternative contractual non-adversarial procedure in lieu of statutory procedures. In this case, because defendants elected that contractual procedures be a warranty, plaintiffs were not

entitled to the statutory procedures. (Tillman v. K. Hovnanian Communities, Inc. (EO52173) (2012 Cal.App.Unpub. Lexis 5919).

Further, in Darling v. Superior Court (2012) 211 Cal.App.4th 69, the Court held that a Builder may halt a construction defect lawsuit and withhold requested documents where a homeowner failed to serve builder with pre-litigation notice of complaint. Pursuant to a writ from the trial court, the California Court of Appeal, First Appellate District, determined the question of whether a homeowner must serve notice of a construction defect claim under Civil Code Section 910(a) for a builder to be obligated to respond to their request for documents under Civil Code Section 912(a). The court concluded that the homeowner must serve a notice of a construction defect claim under Civil Code Section 910 to commence the statutory pre-litigation procedure, and until such service, the builder has no obligation to respond to a request for documents under any other sections of the SB 800 Right to Repair Act. Typically, if the homeowner files a lawsuit before the pre-litigation procedure is completed, a builder may obtain a stay of the lawsuit pursuant to Civil Code Section 930(b). However, if that builder fails to comply with the requirements of the pre-litigation procedure, the homeowner may proceed with a lawsuit without completing the pre-litigation process pursuant to Civil Code Section 930(a) and 912(i).

In the very recent case of The McCaffrey Group Inc. vs. Superior Court (2014) DJDAR 3712 (March 26, 2104) , The Court was asked to determine the enforceability of provisions in home purchase contracts that require the homeowners to submit their construction defect claims to non-adversarial pre-litigation procedures before proceeding with a lawsuit. Those procedures include providing the builder with notice of the claimed defects, giving the builder the right to inspect and correct it, and, if the homeowner is still unsatisfied, engaging in non-binding mediation. The appellate court found these contractual provisions enforceable, and determined homeowners must comply with such pre-litigation procedures before suing for alleged construction defects under Right to Repair Act.

Similarly, in Cullen v. Corwin (2012) 206 Cal.App.4th 1074, the Court held that a prevailing party is not entitled to attorney's fees where it failed to comply with contractual requirement to mediate. In that case, Plaintiffs allege that defendants failed to disclose garage roof defects when they sold a vacation home to plaintiffs. The purchase agreement provided that a party who failed to attempt to mediate prior to the suit was not entitled to attorney's fees. After filing the lawsuit, plaintiffs requested mediation twice but defendants refused. Trial court ultimately granted defendants' motion for summary judgment and awarded attorney's fees to defendants. The Court of Appeal conclusively established that defendants were not entitled to recover legal fees as their motion for summary judgment did not excuse the contractual requirement of participating in mediation.

Courts have also recently held that arbitration clauses in homeowner's association's CC&Rs which seek to have home buyers give up their rights to a jury trial are enforceable. Plaintiff HOA filed a construction defect action against developer. The developer filed a motion to compel arbitration based upon an arbitration clause in the recorded CC&Rs. The trial court held that the arbitration agreement was unconscionable and therefore unenforceable. The Court of Appeal affirmed, finding that the clause did not constitute an agreement sufficient to waive the plaintiff's right to a jury trial for construction defect claims. However, the California Supreme Court recently held that the arbitration provision was enforceable against the plaintiff, consistent with the provisions of the Davis-Stirling Act and was not unconscionable (Pinnacle Museum Tower Association v. Pinnacle Market Development (2012) 55 Cal.App.4th 223).

Following similar logic, recent court decisions, including Zamora v. Lehman (2013) 214 Cal.App.4th 193, have also affirmed that Statute of Limitations periods may be contractually shortened, provided it would not prevent the effective pursuit of a judicial remedy. In Zamora, Defendants, corporate executives, signed employment agreements with a corporation providing that a party's claims were barred if not presented to the other party in writing within a year of the time the claiming party knew, or should have known, the facts giving rise to the claim. After the corporation filed bankruptcy, the bankruptcy trustee filed an action against the executives for breach of fiduciary duty. Defendants asserted they had never received notice of the claim and filed a motion for summary judgment on the basis that the claim was time barred by the one-year notice provision. The Court of Appeal held that the statute of limitations on the claim had expired and reasoned that the plaintiff and defendants could lawfully require one year's notice of the claim shortening the statute of limitations, because California courts generally accord contracting parties substantial freedom to modify statute of limitations periods unless otherwise provided by statute.

The California Court of Appeal has further extended this logical reasoning concerning the ability to contract for a shortened statute of limitations. The Court of Appeal recently upheld and enforced standard AIA contract language which effectively shortened to four years the 10-year statute of limitations for bringing claims for latent construction defects. The court held that a waiver of the delayed discovery rule and the shortening of the statute of limitations is permitted where there are two sophisticated parties in a commercial context that occupy equal bargaining positions. In the case, the parties entered into a contract for the construction of a commercial hotel. Eight years after substantial completion of the project, the owner discovered a latent defect and sued the general contractor for breach of contract. The general contractor asserted the contractual provisions of the AIA agreement which limited the statute of limitations to four years. While the Court of Appeal found that the enforceability of this clause was an issue of first impression in California, it looked to the decisions of many other states which had enforced the same provision. The Court of Appeal also focused heavily on the party's freedom of contract and the sophistication of the parties. The fact that both parties were represented by counsel in negotiations and drafting of the contract, and that each side had submitted proposed revisions and comments to the agreement was persuasive. The court affirmed the AIA contract provision limiting and shortening the statute of

limitations. (Brisbane Lodging, L.P. v. Webcor Builders, Inc. (2013) 216 Cal.App.4th 1249).

However, SB 800 (“The Right to Repair Act”) is not the only remedy for construction defect claims even when those claims fall within the scope of the Act.

In 2004, a homeowner purchased a single-family home from developer. In 2008, a pipe burst and flooded homeowner's residence. The developer agreed to pay for repairs while Liberty Mutual, the homeowner's insurance carrier, paid for homeowner's relocation expenses and interim housing. In 2011, Liberty Mutual filed a complaint against the developer seeking reimbursement. Standing in the shoes of its insured, Liberty Mutual brought a subrogation claim after the applicable statute of limitations under the Right to Repair Act had expired. By its terms, the Right to Repair Act applies to any action which seeks to recover damages arising out of, or related to, the construction deficiencies in new residential units that are sold after January 1, 2003. The Act sets forth 45 different standards of construction in seven categories and specifies different statutes of limitations ranging from one year to ten years. The statute of limitations for plumbing systems is four years from the close of escrow date of the property.

The developer demurred to Liberty Mutual's complaint, and Liberty Mutual argued that the violation of SB 800 standards is just one of many construction defect causes of action, and common law construction defect claims are not subject to the requirements of SB 800. In rendering its decision, the court focused on the legislative intent of SB 800, which it concluded was to permit homeowners to bring a claim under SB 800 when no resulting damage or injury had occurred. SB 800 specifically addressed the Aas v. Superior Court decision by the California Supreme Court, where the court found that construction defects that had not resulted in actual property damage were not actionable in court. The court in this case concluded that the legislature intended to abrogate the holding in Aas by passing the Right to Repair Act. However, the court reasoned that providing homeowners with a remedy for defects that had not yet caused damage, the legislature did not intend to supplant existing common law remedies for those defects that had already resulted in actual damage, therefore, the statute of limitations under the Right to Repair Act did not apply (Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC (Case No. GO46731) (13 C.D.O.S. 9545 (Cal. August 28, 2013))).

One issue which SB 800 has failed to address is the potential liability of Construction lenders. The law has been well-settled in California that a lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification or improvement of real property for sale . . . to others, shall not be liable to third parties for any loss or damage occasioned by any defect in the real property (California Civil Code Section 3434). Said code section provides protection to a lender “unless such loss or damage is a result of an act of the lender acting outside the scope of the activities of a lender of money”

The question arises as to whether there is an open issue with the advent of SB 800 on a lender's exposure for construction defects. "Builder" is defined in California Civil Code Section 911 as follows:

"Builder" means any entity or individual, including but not limited to a builder, developer, general contractor, contractor, or *original seller*, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim.

Essentially, SB 800 has no limitation on who is a "builder" which presents a problem for lenders who acquire newly constructed residences as the successor to the original developer. SB 800 applies to a party who sells just one home or many, and defines a "builder" to include "an original seller who, at the time of the sale, was also in the business of selling residential units to the public of the property that is the subject of the homeowner's claim." California Civil Code Section 911(a).

There does not appear to be any current published cases that provide guidance as to who qualifies as a "builder" under SB 800. Additionally, courts have provided no guidance about how to interpret the law together with California Civil Code Section 3434, which further complicates the analysis with respect to whether a lender could potentially be implicated in construction defects.

For further information on this topic or any construction related issues, please feel free to review our more detailed "Overview of Common Issues in Construction Defect Claims" on our website. Please note the cases cited in this article provide a starting point for legal research on these issues. The user is cautioned that this article is not intended to be an exhaustive treatise on or restatement of the law, or a comprehensive listing of all cases on the subject. When necessary, consultation with counsel is recommended.