

THE RIGHT TO REPAIR ACT: A COURT'S INTERPRETATION

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As many in the residential building industry are aware, about 14 years ago, the legislature passed a bill known as SB800. The enacted law is commonly referred to as the Right to Repair Act ("Act") and applies only to new residential units where the purchase agreement with the buyer is signed by the seller on or after January 1, 2003.

A recent California Court of Appeal decision examined this Act. In *Elliott Homes, Inc. v. The Superior Court of Sacramento County, et al.*, the owners of 17 single-family homes filed an action against Elliott Homes, Inc. (the builder of their homes). They sought damages for construction defects claiming that their homes were in defective condition when they took possession and that the defects resulted in physical damage.

The Right to Repair Act establishes a non-adversarial (or cooperative) inspection and repair procedure to allow builders to attempt to resolve homeowners' construction defect claims before a lawsuit is filed. Pursuant to this procedure, a homeowner is required to serve the builder with notice of the construction defect claim, and the builder has the opportunity to repair within a given time period. If the homeowner files a lawsuit before the procedure is initiated or completed, the builder may obtain a stay of the lawsuit, or in other words, have the lawsuit put on "hold" while the pre-litigation procedures required by the Act are completed.

In the *Elliott Homes* case, the homeowners failed to give notice to the builder of the alleged defects or otherwise comply with the pre-litigation procedures before filing suit. In the trial court, the builder sought to have the action stayed. The court denied the builder's motion to stay. The Court of Appeal, reversed that decision, and directed that a stay be issued until the parties have satisfied the procedures outlined in the Act.

A quick overview of the Act: It is comprised of five Chapters. Chapter 1 defines terms. Chapter 2 sets forth standards for residential construction, the violation of which constitutes an actionable defect. Chapter 3 imposes obligations on the builder, including the obligation to furnish a minimum one-year express limited warranty. It also imposes on the homeowner the obligation to follow all reasonable maintenance responsibilities and schedules. Chapter 4 prescribes the pre-litigation procedures described above. Chapter 5 sets out the procedure for claims brought under the Act, including the applicable statute of limitations, the burden of proof, the recoverable damages, etc. It also provides that the Act is binding upon all original purchasers and their successors-in-interest.

The Court wrote in its opinion that SB800 sought to respond to two competing concerns – those expressed by builders and insurers over the costs associated with construction defect litigation, as well as those expressed by homeowners over the effects of a then recent Supreme Court decision that held that defects must cause actual damage prior to being actionable in tort. In other words, until SB800 was enacted, a purchaser of a home could not bring a construction defect action against the builder, unless and until the defect caused actual damage. The cost to repair and the diminution of value of their property related to the defect was not recoverable against the builder. Since the homeowners in this action had actual damages and were not claiming causes of action under the Right to Repair Act, they contended that they were not required to follow the pre-litigation procedures of the Act.

After considering the legislative intent, the Court of Appeal in the *Elliott Homes* case found (1) that the Legislature intended that all claims arising out of deficiencies in new residential construction, with limited exceptions, be subject to the standards and requirements of the Act, (2) that homeowners bringing such claims must give notice to the builder and engage in the pre-litigation procedure prior to filing suit, and (3) if the lawsuit is claiming deficiencies in construction that constitute violations of the standards set out in chapter 2 of the Act, the claims are subject to the Act, and the homeowner must comply with the pre-litigation procedures, regardless of the theory of liability asserted. In short, homeowners, who have actual damage resulting from deficiencies in the standards set forth in the Act, cannot do an end run around the Act by omitting any mention of it in their lawsuit.

The Right to Repair Act is beneficial to the construction industry in that it requires this notice and opportunity to repair prior to filing of a lawsuit. However, it has been detrimental in that it has provided homeowners with a cause of action against the builder even if the defect has not caused any physical damage.



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