

California Senate Bill 800: "Groundbreaking" Legislation Concerning Construction Defect Claims

Last-minute legislation intended to increase the supply of affordable, multi-family housing in California was signed into law in early October 2002 and will be effective as of January 1, 2003. Crafted as a compromise among developer/builder interests and consumer attorneys, the bill is aimed at reducing the number of construction-defect lawsuits that have been seen as resulting in a dearth of new condominium and townhouse construction throughout California since the early 1990's and a significant factor in the increased cost of housing. The bill also is intended to facilitate the ability of developers/builders to obtain liability insurance for the housing constructed.

According to the preamble of the actual substantive legislation, the bill is intended to improve the standards and procedures for early disposition of construction defects. SB800 is applicable to the original construction of any residential dwelling, or other building or improvement located on a lot or within a common area and intended to be sold as an individual dwelling unit. The legislation specifies the rights and limitations of individual owners of single family homes and individual units of attached dwellings and, in the case of a common interest development (i.e., condominium project), any association of owners, to bring an action for construction defects against a builder, developer or original seller ("builder"), and the requirements for doing so. The bill includes applicable standards for home construction, thereby defining what constitutes a construction defect, by functions or components of a structure (e.g., with respect to water issues, roofs, windows, doors, decks, foundation systems and slabs, hardscape, exterior walls, retaining walls, etc.).

A new 10-year outside statute of limitations applies in any action brought under the new legislation. The homeowner's burden of proof to establish a claim for violation of the standards is set forth -- the owner need only demonstrate that the home does not meet the applicable standard (subject to statutorily permitted affirmative defenses), and need not prove causation or damages. (Existing case law requires actual damages resulting from the defect.) SB800 also specifies the measure of damages recoverable by a homeowner for a violation, namely, the reasonable value of repairing any violation, any damages caused by the repair efforts, the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards, the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income only if the home was a principal place of a business licensed to be operated from the home, reasonable investigative costs, and all other fees or costs recoverable by contract or statute. In the case of a detached single-family home, the reasonable value of repairing any non-conformity is limited to the actual repair costs or the diminution in the current value of the home caused by the non-conformity, whichever is less.

The statute also requires the builder to provide the buyer with a minimum one-year express written limited warranty covering "fit and finish" items, but allows the builder to offer greater protection under an "enhanced protection agreement" conforming to certain standards and subject to various procedures for enforcement or denial of enforcement of such an agreement. The homeowner is obligated to follow all reasonable maintenance obligations and schedules

communicated by the builder in writing at the time of the sale, as well as "commonly accepted" maintenance practices, and the homeowner's failure to do so may subject the owner to an affirmative defense on those grounds to the extent of the damages caused or contributed to thereby.

The builder is required to provide copies of all relevant plans, specifications, soils reports, DRE public reports and available engineering calculations that pertain to a homeowner's residence specifically, or as part of a larger development tract, within thirty days of receipt of a written request from an owner stating that it is made in relation to the structural, fire safety or soils provisions.

Prior to actually filing an action against any party alleged to have contributed to a violation of the standards, the homeowner must initiate various pre-litigation procedures. The builder's failure to comply with any of the requirements of SB800 removes the builder from the protection of the pre-litigation procedures and releases the homeowner from those requirements before filing suit. Those procedures include the homeowner giving written notice of the claim. The builder must acknowledge receipt of the notice of a claim within 14 days after receipt and if notified that the claimant is represented by an attorney, must include the attorney in all subsequent communications. The builder must maintain and give actual notice to the homeowner of an agent for receipt of such notice, record on the title to the property a notice of the existence of the pre-litigation procedures, and deliver the information to the original purchaser at time of sale, together with written instructions to provide those documents to any subsequent purchaser.

The legislation sets forth a non-adversarial procedure prior to filing suit and provides that the builder may attempt to commence alternative dispute resolution contractual provisions, if they exist, but cannot rely on both, and must notify the homeowner at the time when the sales agreement is executed on which procedure the builder will rely. SB800 is not intended to affect existing law concerning the applicability, viability or enforceability of alternative dispute resolution procedures requiring a binding resolution of claims other than construction defect claims.

A builder electing to inspect for the claimed unmet standards set forth in the homeowners' notice must complete an initial inspection and any necessary testing, at the builder's own expense, within 14 days after the builder's acknowledgment of receipt of the notice. A second inspection is permitted if reasonably necessary, and, if so, must be completed within 40 days of the initial inspection or testing. If the builder intends to hold a subcontractor, design professional, product manufacturer or material supplier, including an insurance carrier (other than his own), warranty company or service company responsible for its contribution to the unmet standard, the builder must provide notice sufficiently in advance to allow them to attend the initial, or, if requested, second, inspection.

Within 30 days of the inspection or testing, the builder may offer in writing to repair the violation and compensate the homeowner for all applicable damages recoverable under the new legislation within a specified time frame and set forth a host of other required information concerning the proposed repairs. The homeowner has 30 days from receipt of the builder's offer of repair to authorize the builder to proceed or, alternatively, to request that the builder identify

three alternative independent local contractors to make the repairs. If the homeowner elects the alternative, the builder is entitled to conduct another non-invasive inspection within 20 days of the homeowner's election in order to permit the proposed alternative contractors to view the site. The builder has 35 days after the homeowner's request to provide the list of alternative contractors, and the homeowner then has 20 days to authorize either the builder or one of the alternative contractors to make the repairs.

The builder's offer to repair must be accompanied by an offer to mediate the dispute at the homeowner's election. The mediation is limited to four hours, except as mutually agreed, within 15 days of the homeowner's request, before a "non-affiliated" mediator selected and paid for by the builder. If the homeowner agrees to split the cost of the mediator, however, the mediator will be selected jointly. If the builder has made an offer of repair and the owner does not elect to mediate or the mediation fails to resolve the dispute, the homeowner must allow the builder to make the repairs. If the builder fails to make an offer of repair or otherwise to strictly comply with the pre-litigation procedures or if the repairs are not completed on time or in the manner specified, the claimant may proceed to file a lawsuit.

The builder may not obtain a release or waiver of any kind in exchange for the repair work, and, after the repairs are made, the claimant may proceed with a lawsuit. In connection with such a lawsuit, the time period under any applicable statute of limitations is extended from the time of the homeowner's original notice to 100 days after the repairs are completed, whether or not the particular violation which is the subject of the complaint is the one repaired. If the builder fails to acknowledge the claim, to proceed with the statutory process or to request an inspection within the time specified, the limitations period is extended to 45 days after the time for responding to the homeowner's notice of claim has expired.

If the builder has invoked the pre-litigation procedures and completed a repair, then, if there has been no previous mediation between the parties, the homeowner must request a mediation in writing prior to filing suit, following the mediation procedures discussed earlier. In that event, if the 100-day period described earlier has expired, any applicable statute of limitations is further tolled from the date of the homeowner's request to mediate until the next court day after the mediation is completed.

The builder is not prohibited by the legislation from making an offer of cash and no repair to the owner (but apparently may not offer both), in which case the homeowner may either accept the offer or reject it and immediately proceed with a lawsuit. An offer of a cash payment may include as a condition a "reasonable" release (whereas the builder is precluded from obtaining one if he elects to make repairs). The builder may move to stay any homeowner court action or proceeding until all of the pre-litigation procedure requirements have been satisfied.

No other cause of action for a construction defect claim covered by the legislation or for damages beyond that provided by SB800 is allowed. The legislation, however, does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury or violation of a statute. Even if claims not covered by the pre-litigation procedures are made (e.g., personal injuries, fraud, class actions, other statutory remedies), the

claimed unmet standards still must be administered according to the SB800 pre-litigation procedures.

If suit is brought, the builder's liability for damages may be reduced under the principles of comparative fault based on specified affirmative defenses, including: unforeseen acts of nature; the homeowner's unreasonable failure to minimize or prevent the damages claimed in a timely manner, such as failing to allow reasonable and timely access for inspections and repairs, failure to follow the builder's or manufacturer's recommendations or commonly accepted homeowner maintenance obligations; the violation was caused by the homeowner or an independent third party's alterations; ordinary wear and tear; misuse; abuse; or neglect.

In order for the homeowner and builder to avail themselves of the perceived benefits of the provisions of SB800 and to avoid the consequences of a failure to comply with the specific requirements, a thorough knowledge of the intricate workings of the legislation is well advised.