

Another Twist For SB 800: Court of Appeal Rules That Developer Cannot Enforce Right to Repair Act Pre-Litigation Procedure Where The Purchase Contract (Drafted By The Developer) Calls For Alternative Pre-Litigation Procedure Which The Court Finds To Be Unenforceable....

By: Edward F. Morrison, Jr., Esq.  
Larry A. Schwartz, Esq.

As many are aware, the Right to Repair Act, found in Civil Code §§ 895-945.5, often known as "SB 800", applies to residential construction defect disputes where the purchase contract was signed on or after January 1, 2003. The Right to Repair Act sets forth standards which construction for residential structures must comply with and calls for substantial, non-adversarial pre-litigation procedures in the event the homeowner or homeowners association wishes to assert a claim for defects and the builder responds to the claim and elects to go through a pre-litigation procedure.

Recently, the California Courts of Appeal have been called upon to interpret various facets of the Right to Repair Act. See, Thompson v. Toll Dublin, LLC (2008) 165 Cal.App.4th 1360 and Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal.App.4th 1194. This past month, in another recent and important decision, the California Court of Appeal, 5th District ruled, in Anders v. Superior Court (2011) DAR 2137 ("Anders"), that the non-adversarial pre-litigation procedures set forth in the Right to Repair Act are not available to the builder where (i) the builder's purchase contract called for a separate, alternative, non-adversarial pre-litigation procedure (outside of the Right to Repair Act) and (ii) the builder's alternative, non-adversarial pre-litigation procedure is found to be unenforceable.

In Anders, owners of 54 homes constructed by Meritage Homes of California, Inc. ("Meritage") filed a Complaint seeking remedies for alleged construction defects in their homes. Meritage then filed a Motion seeking to compel the plaintiff homeowners to comply with alternative pre-litigation procedures set forth in their purchase contracts. However, the alternative pre-litigation procedures called for in all but two of the plaintiff homeowners' contracts were crafted by the builder and did not follow the Right to Repair Act.

We note that the builder is permitted to apply its own, alternate pre-litigation procedure under Civil Code § 914(a) which provides, in pertinent part:

"...A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, but may not, in addition to its own nonadversarial contractual provisions, require adherence to the nonadversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable.

At the time the sales agreement is executed, the builder shall notify the homeowner whether the builder intends to engage in the nonadversarial procedure of this section or attempt to enforce alternative nonadversarial contractual provisions. If the builder elects to use alternative nonadversarial contractual provisions in lieu of this chapter, the election is binding, regardless of whether the builder's alternative nonadversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable."

At the Trial Court level, the Court granted Meritage's Motion in part and denied it in part. The Court first found the alternative pre-litigation procedures set forth in the Meritage contracts to be unconscionable and unenforceable. However, the Court found that Meritage had only made a qualified election to follow its own alternative procedures, and the Court ruled that the plaintiff homeowners were still required to comply with the statutory pre-litigation procedures set forth in the Right to Repair Act.

The plaintiff homeowners then filed a Petition for Writ of Mandate, challenging the Trial Court's order enforcing the pre-litigation procedures set forth in the Right to Repair Act. The plaintiff homeowners argued that the Right to Repair Act could not apply because the plaintiff homeowners had not signed a contract calling for Right to Repair Act non-adversarial pre-litigation procedures (and instead signed contracts which called for pre-litigation procedures which were outside the Act).

In a lengthy opinion, the Court of Appeal interpreted Civil Code § 914 to provide that if the builder's contract calls for alternative pre-litigation procedures outside the Right to Repair Act, the builder has made a "binding" election. The Court of Appeal further ruled that, when read together, the provisions of the Right to Repair Act call for the builder to forfeit all rights for pre-litigation

procedure under the Right to Repair Act if the builder chooses its own scheme and that scheme is found to be unenforceable.

The Anders decision is an important case. That decision will most certainly result in more challenges to pre-litigation procedure if the procedure is not in conformity with the Right to Repair Act. It also provides a forewarning to builders that, if they want to use their own pre-litigation procedure, they risk losing all rights to any pre-litigation procedure if the builder's scheme is found to be unenforceable for any reason.

About the Authors: Edward F. Morrison, Jr. is the founding partner and Larry A. Schwartz is Of Counsel to The Morrison Law Group, a professional corporation. Their biographies can be viewed at [www.morrisonlawgroup.com](http://www.morrisonlawgroup.com).

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