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BULLETIN

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EXTRA EXTRA

ALL CLAIMS FOR CONSTRUCTION DEFECTS IN RESIDENTIAL CONSTRUCTION SOLD ON OR AFTER JANUARY 1, 2003 ARE SUBJECT TO THE REQUIREMENTS AND PROCEDURES OF THE RIGHT TO REPAIR ACT (SB 800)

McMillin Albany LLC v. Super Ct. 2015 F069370 (Cal.App. 5 Dist.)

In a particularly dramatic and noteworthy fashion and breaking with the Fourth Appellate District and rejecting the holding in *Liberty Mut. Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98, the Fifth District Court of Appeal held that the California Legislature intended that *all* claims arising out of defects in new residential construction sold on or after January 1, 2003 are subject to the standards and requirements of the Right to Repair Act, commonly referred to as SB800, including specifically the requirement that notice be provided to the builder prior to filing a lawsuit. Thus, SB 800 is the exclusive remedy for all defect claims arising out of new residential construction sold on or after January 1, 2003.

As discussed in a prior CGDRB **2013 Bulletin**, the Fourth District Court of Appeal held in *Liberty Mutual* that compliance with SB800's pre-litigation procedures prior to initiating litigation is only required for defect claims involving violations of SB 800's building standards that have not yet resulted in actual property damage. Where damage has occurred, a homeowner may initiate litigation under common law causes of action without first complying with the pre-litigation procedures set forth in SB 800.

The rulings in *Liberty Mutual* and *McMillan Albany* have created a conflict of authority in California appellate courts that will require either further legislative revision to SB 800 or a decision by the California Supreme Court. In stunning language the Fifth Appellate undermined the Fourth Appellate District's reasoning in *Liberty Mutual*.

The issue before the Court in *McMillin Albany* was whether McMillin Albany's motion for a stay of litigation pending completion of the pre-litigation procedures of Chapter 4 of SB800 was properly denied by the trial court. Owners of thirty-seven (37) homes ("Real Parties") constructed by *McMillin Albany*, filed a first amended complaint alleging eight causes of action, one of which alleged a violation of the building standards set forth SB800. Real Parties did not give McMillin Albany notice of the alleged defect claims before filing their complaint. Eventually, Real Parties dismissed the SB800-related cause of action and contended that they

were no longer required to comply with the statutory pre-litigation process because they had dismissed the cause of action alleging the violation of SB800. McMillin Albany filed the motion for stay the litigation pending completion of the pre-litigation process which was denied by the trial court. McMillin Albany subsequently appealed the trial court's ruling.

The Fifth District Court of Appeal held that where the complaint alleges deficiencies in construction that constitute violations of the standards set out in SB800, the claims are subject to SB800, and the homeowner must comply with the pre-litigation procedures, regardless of whether the complaint expressly alleges a cause of action under SB800. The Court thoroughly analyzed the legislative history and found that it supports the Court's interpretation of SB800. The Legislature would not have viewed the legislation as "groundbreaking reform" or a "major change" in the law of construction defects if its provisions were mandatory *only* when the defect had not yet caused damage, and homeowners could still sue for damages under any common law theory once property damage occurred without being subject to the statutory pre-litigation procedures. The Court went further by reasoning that the codified construction standards could not constitute a uniform set of standards to comprehensively define construction defects if a homeowner could avoid their use simply by suing on common law causes of action after the construction defect had caused actual damage. The Court definitively held that SB800 applies broadly to any action seeking recovery of damages arising out of, or related to deficiencies in residential construction.

As discussed in one of our CGDRB **2014 BULLETINS**, the Second District Court of Appeal in *KB Home Greater Los Angeles, Inc. v. The Superior Court of Los Angeles County* (2014) 223 Cal.App.4th 1471 declined to extend the Fourth District Court's holding in *Liberty Mutual*. In *KB Home*, the Court concluded that the failure to provide KB Home with timely notice and an opportunity to inspect and offer to repair the construction defect excuses KB Home's liability for damages under SB800. The Court critically disagreed with the notion that in case of actual property damage SB800 is inapplicable in its entirety.

The Court in *McMillin Albany* went one step further than the Court in *KB Home* by outright rejecting the holding in *Liberty Mutual*. Even though Real Parties agreed during the appellate process to stay the litigation in fear of what became the eventual outcome, the Fifth District Court of Appeal exercised its discretion to consider the issues despite the assertion that they were moot. The Court in *McMillin Albany* spent an extensive amount of the opinion explaining how both the reasoning and outcome in *Liberty Mutual* are incorrect and inconsistent with the express language of SB800. The Court's opinion pointedly remarks that the Fourth District Court of Appeal only provided one sentence of actual analysis.

IMPACT

The *McMillin Albany* decision is not only significant for its ruling but squarely places two appellate districts in clear conflict with each other. As a result, we can anticipate that this issue

will be reviewed and decided by the California Supreme Court unless there is further legislature revision to SB800. More to follow.