



Business Litigation Alert

Sept.
2015

In a Win For Homebuilders, a California Court Strengthens the Scope and Applicability of the Right to Repair Act

In *McMillin Albany, LLC, v. Superior Court*, ___ Cal. App. 4th ___, 2015 WL 5029324 (Aug. 26, 2015), the Court of Appeal held last week that when homeowners allege deficiencies in residential construction, they must comply with the prelitigation procedures of the Right to Repair Act, even if they only assert common law causes of action for construction defects and do not seek any remedies under the Act. The Court of Appeal also stated in dicta that a homeowner's exclusive remedy lies under the Act and that common law causes of action, such as negligence or strict liability, are no longer viable.

In *McMillin*, homeowners filed a construction defect action against their homebuilder. The plaintiffs alleged multiple causes of action, including claims for violation of the Act, strict products liability, negligence, and breach of express and implied warranty. The plaintiffs then voluntarily dismissed their claim for violation of the Act. The builder moved to stay the action because the plaintiffs had failed to comply with the Act's prelitigation procedures. The trial court denied the motion, finding that the plaintiffs' remaining common law causes of action were not subject to the Act. The Court of Appeal disagreed, holding that all construction defect claims are subject to the Act, and a homeowner must comply with the prelitigation procedures, regardless of whether the complaint expressly alleges a cause of action under the Act. The Court of Appeal found that the plain language of the Act and its legislative history both compelled this conclusion.

In reaching its holding, the *McMillin* court expressly rejected *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC*, 219 Cal. App. 4th 98 (2013), in which the Fourth Appellate District held that the Act does not eliminate common law rights and remedies where actual damage results from defects in a home.

This split in authority will likely require a resolution by the California Supreme Court at some point. Until then, builders should argue based on *McMillin* that they have an "absolute right" to attempt to repair alleged construction defects before homeowners can sue in court, even if the homeowners only pursue common law causes of action.

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