

New Construction Defect Legislation

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Senate Bill 800 was first introduced in February 2001 as a bill to amend the Vehicle Code. Motor vehicles remained its focus until August 2002 when it was amended to address general funding issues and then amended again to clarify California's one year statute of limitations. Not until August 25, 2002 was the bill amended yet again to address construction defects. The California Building Industry Association lobbied heavily for the new legislation. Within a mere 26 days, and with little or no analysis by the legislators, the bill passed both the assembly and the senate, and was signed into law by Governor Davis. The bill adds (i) section 43.99 to the Civil Code and (ii) Title 7, commencing with section 895 to Part 2, Division 2 of the Civil Code. It becomes effective January 1, 2003.

On the builders' side, the bill is touted as a means of reviving the attached-housing market by providing builders with the right to repair defects prior to litigation ensuing. From the perspective of homeowners, the bill appears to be a partial response to the *Aas* decision which limited actionable defects against parties not in privity to those defects which caused property damage. Finally, the bill may placate the insurance industry which has reportedly been squeamish about the absence in California of comprehensive standards regarding actionable defects.

This is a guide to this important new law, and especially Civil Code section 895 *et seq.* — the protection of which can be lost if not properly and timely followed.

CIVIL CODE SECTION 43.99

Section 43.99 provides to building inspectors, engineers, architects and general contractors having at least five years of experience (i.e., "qualified persons") immunity from suit arising out of their provision of "independent quality review of the plans and specifications" and "independent quality review of the work of improvement to determine compliance with . . . plans and specifications" in connection with residential construction. This section does not apply to actions initiated by the owner "who retained the qualified person" and where damage was caused to the owner "solely by the negligence or willful misconduct of the qualified person . . ." The fact of inspection by a qualified person (including reports, etc.) is not admissible at trial.

CIVIL CODE SECTION 895 *et seq.*

Overview — Section 895 *et seq.*, entitled "Requirements for Actions for Construction Defects," applies to residential construction. It defines "actionable defects," establishes a minimum warranty and delineates a "prelitigation procedure" including for notice, acknowledgment of notice, document production, inspection and testing, builder's right to repair and mediation. It also establishes statutes of limitation and limits recoverable damages.

Application (Chapter 1) – This title applies to original construction of individual dwelling units, whether single family or attached dwellings and whether a common interest development or otherwise, sold on and after January 1, 2003. (It does not apply to apartments or condominium conversions.) Sections 895, 911, 938. It does not apply to any action by a homeowner to enforce a contract provision or remedy, or to any action for fraud, personal injury or violation of a statute. Section 942(a). The title applies to original purchasers and their successors-in-interest, and to associations of a common development interest. Section 945.

Actionable Defects (Chapter 2) – Section 896 defines and limits what is an actionable construction defect. These defects, which are described as addressing "every function or component of a structure" (section 897), are grouped broadly into the following categories: water issues, structural issues, soil issues, fire protection issues, plumbing and sewer issues, electrical system issues and "other" (the latter includes cracking, HVAC, noise transmission, paint, tile, irrigation, drainage and landscaping). Additionally, any issue not addressed in section 896 is "actionable if it causes damage."

Commentary: Section 896 appears to be a partial response by the legislature to the decision in *Aas v. Superior Court (The William Lyon Co.)* (2000) 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718 in which the Court held that a homeowner cannot recover in negligence for construction defects unless and until the defect results in property damage. Some of the defects identified in Chapter 2 require damage to another building component, but others do not.

Builder's Obligations (Chapter 3) – Sections 900-907 set forth numerous obligations on the part of builders (a builder is defined as "a builder, developer, or original seller," section 911). Section 900 provides for a minimum one year express warranty for certain specified fit and finish items which are not subject to this new title. Section 901 provides that the protection afforded by this title cannot be limited by agreement of the parties. Sections 901-904 allow the builder to "opt out" of Chapter 2 (defining what constitutes a defect) – but not out of other portions of the title – by entering into a written "enhanced protection agreement" which must offer the same or a higher level of protection than that afforded by Chapter 2. A nonoriginal homeowner will be bound by the enhanced protection agreement if it has been recorded on title or that subsequent purchaser has actual notice of it.

Commentary: It seems unlikely that a builder would choose to offer more protection than that mandated by statute – unless it could command a substantial fee for the protection.

Prelitigation Procedure (Chapter 4) – This chapter sets forth procedures which a claimant and builder¹ must follow prior to initiation of litigation.²

Notice – The claimant must provide the builder with written notice (personally or via certified or overnight mail) alleging one or more of the defects set forth in Chapter 2. Section 910.

Response to Notice – The builder must provide the claimant (and his or her attorney, if any) with written acknowledgment that it has received notice of a claim with 14 days after its receipt (or the homeowner is released from the prelitigation procedures of this chapter). Section 913.

Document Production – Within 30 days of a written request by a homeowner, the builder must provide (at the homeowner's expense) copies of relevant plans and specifications, mass or rough grading plans, final soils reports, Department of Real Estate public reports, and available engineering calculations; maintenance recommendations; manufactured products maintenance and warranty information; and the builder's own contractual warranties at the time of the original sale.³ Section 912(a)-(d). The builder must maintain an agent

for notice with the Secretary of State or provide the homeowner in writing at the original sale (as evidenced by both parties' initials) with the name and address of a third party to whom notice can be given. Section 912(e). The builder must record on title and include in the original sales documentation a notice of the existence of the procedures set forth in Chapter 4 and notice that such procedures affect the homeowner's legal rights. Section 912(f). A builder's failure to comply with these provisions releases the homeowner from the prelitigation procedures of this chapter. Section 912(i).

Inspection and Testing – Within 14 days after acknowledging receipt of a notice of claim, the builder, at its sole expense, may complete initial inspection and testing. If, within three days of the initial inspection, the builder requests a second inspection or testing and lists the reasons therefor, such second inspection and/or testing shall be completed within 40 days of the initial inspection. If the builder fails to inspect or test within these time limits, the homeowner is released from the prelitigation procedures of this chapter. If the builder intends to hold a third party responsible for the defect, it must give such third party sufficient notice that the third party can participate in the inspection and/or testing. [Such third party includes a subcontractor, design professional, individual product manufacturer, material supplier, insurance carrier (other than the builder's insurer), or warranty or service company.] Section 916.

Commentary: It is difficult to imagine a builder could round up all necessary parties and complete any but the most cursory of inspections and/or testing within 14 days.

Repair

- **Offer to Repair and Pay Damages** – Within 30 days following the initial or, where applicable, second inspection, the builder may offer in writing to repair the defect(s) and to compensate the homeowner for all applicable damages recoverable elsewhere in this title. The written offer must include the nature, scope and location of the repair, the date for completion of the repair, and other information. Section 917. If the builder offers to repair some, but not all alleged defects, the offer must include the reasons and support for not repairing all alleged defects. Section 924.

- **Response to Offer** – *Within 30 days of receipt of the offer to repair, the homeowner may either authorize the repair or request a referral to three alternative contractors. In the latter case, the builder must provide the referral within 35 days and, within 20 days thereafter, the homeowner shall authorize the repairs. Section 918.*

- **Commencement** – *Any repair must be commenced within 14 days of the homeowner's authorization or within seven days of a mediation or within five days after a permit is obtained. Section 921(a).*

- **Completion** – The builder shall complete the repairs "as soon as reasonably possible" and shall make "every effort" to complete repairs within 120 days. Section 921(b). If the repairs are not completed within the time specified in the repair offer, the homeowner is released from the prelitigation procedures of this chapter.

- **Documentation** – *The builder must provide the homeowner with all documents relating to the repairs. Section 923.*

- **Release** – *The builder is not entitled to a release or waiver in exchange for the repair work (Section 926), but may obtain a release in exchange for a cash payment in settlement of the claims. Section 929(b).*

- **Subsequent Lawsuit** – *Following completion of the repair, the homeowner may sue the builder for violation of the standards listed in Chapter 2 or for inadequate repair or both. Section 926.* – Within 30 days following the initial or, where applicable, second inspection, the builder may offer in writing to repair the defect(s) and to compensate

the homeowner for all applicable damages recoverable elsewhere in this title. The written offer must include the nature, scope and location of the repair, the date for completion of the repair, and other information. Section 917. If the builder offers to repair some, but not all alleged defects, the offer must include the reasons and support for not repairing all alleged defects. Section 924. – The builder shall complete the repairs "as soon as reasonably possible" and shall make "every effort" to complete repairs within 120 days. Section 921(b). If the repairs are not completed within the time specified in the repair offer, the homeowner is released from the prelitigation procedures of this chapter.

Mediation – The builder's offer to repair shall also include an offer to mediate for four hours (unless the parties agree to extend it) before a "nonaffiliated mediator" selected and paid for by the builder (or jointly selected if the homeowner splits the cost). The mediation must take place within 15 days. Section 919. If no mediation takes place prior to repair, the homeowner must request mediation before filing an action. As with the pre-repair mediation, the post-repair mediation must take place within 15 days and will be limited to four hours (unless the parties agree to extend the time) before a "nonaffiliated mediator" selected and paid for by the builder (or jointly selected if the homeowner splits the cost). Section 928.

Commentary: As a practical matter, reputable mediators are sufficiently busy that they can seldom be booked a mere 15 days in advance. Additionally, four hours is generally an insufficient period of time for a mediator to resolve a construction defect dispute.

Cash Offer – *The builder is free to make a cash offer in lieu of a repair offer. If the homeowner rejects the offer, he or she may file an action. Section 929(a).*

Alteration of Statutory Timeframe – The homeowner may agree in writing to extend the statutory timeframe of any act conducted pursuant to Chapter 4. Section 930(a).

Homeowner's Failure to Follow Statute – The builder may bring a motion to stay any court or other proceeding until the requirements of Chapter 4 are satisfied. Section 930(b).

Evidence – The fact that a repair effort was made is admissible, as is the pre-repair condition and any other conduct of the parties during the Chapter 4 process (with the exception of mediation). Sections 933-934.

Interaction with Calderon Process – Where the provisions of Chapter 4 are enforced, but an action is commenced under Section 1375 of the Civil Code (the Calderon Act involving actions by associations alleging defective construction of a common interest development), the parties are excused from following substantially similar requirements of Section 1375. Section 935.

Procedure (Chapter 5)

Statute of Limitations

- Statutes of Repose – The four year statute of repose for patent defects and the 10 year statute for latent defects expressly do not apply to actions under this title. Section 941(d).
- **Statutes of Limitation** – Generally, no action may be brought more than ten years after substantial completion or the date a valid notice of completion is recorded. Section 941(a). However, certain of the defects described in Chapter 2 have significantly shorter statutes of limitation as stated therein.

• **Tolling** – If the builder fails to timely acknowledge receipt of the claim or to timely request an inspection, the applicable statutes of limitation are tolled from the time of the homeowner’s original claim to 45 days after the time for responding to the claim has expired. Where repairs are made, all applicable statutes of limitation are tolled from the time of the homeowner’s original claim to 100 days after the repair is completed, even if only a partial repair is made. Repairs do not toll the time limitations in section 7091 of the California Business & Professions Code (i.e., for the filing of complaints for violations of the Contractor License Law). Sections 927, 941.

Damages – Pursuant to Section 944, a homeowner may recover the following:

- the reasonable cost of repairing the defect itself [for a detached single-family residence, this is defined as the lesser of the cost of repair or the diminution in current value caused by the defect, Section 942(b)],
- the reasonable cost of repairing any damage resulting from the repair of the defect,
- the reasonable cost of repairing any damage resulting from the defect,
- the reasonable cost of removing and replacing any improper repair by the builder,
- reasonable relocation and storage expenses,
- lost business income if the home was used as a principal place of a business licensed to be operated from it,
- reasonable investigative costs for each established defect, and
- all other costs recoverable by contract or statute.

Affirmative Defenses – Section 945.5 sets forth the affirmative defenses which the builder may assert and provides that the builder will be excused from liability as follows:

- to the extent the defect was caused by an Act of God
- to the extent the defect was caused by an homeowner’s unreasonable failure to minimize or prevent damage
- to the extent the defect was caused by the homeowner’s failure to follow the builder’s or manufacturer’s recommendations or commonly accepted maintenance obligations
- to the extent the defect was caused by alterations, ordinary wear and tear, misuse, abuse or neglect, or by the structure’s use for something other than its intended purpose
- if the statute of limitations has run
- if a release has been obtained
- in the event of a successful repair

Conclusion – This new legislation provides a response to certain concerns of both homeowners and builders. Yet only time will tell how practical it is. As noted above, many of the time periods appear to be grossly unrealistic. Moreover, since the bill was sprung on the legislature at the last minute, there was little or none of

the analysis one might expect before the enactment of a law of this magnitude.

End Notes

1 Although the other chapters of this title apply to subcontractors, suppliers, manufacturers, design professionals, etc., it appears that Chapter 4 does not. Section 936.

2 In a class action alleging solely the incorporation of a defective component into a residence, the class members need not comply with Chapter 4. Section 931. Likewise, if there is already a pending action, the owner of a detached residence need not reinitiate the Chapter 4 process for a subsequently discovered violation of the same Chapter 2 standard. Section 932. The same is true for an owner of an attached residence where the subsequently discovered claim is for a violation of a "connected component system in the same building." Section 932.

3 Note that the maintenance recommendations, manufactured products maintenance and warranty information, and the builder's own contractual warranties also must be provided to the homeowner at the time of the initial sale, and the homeowner must be instructed to provide them to subsequent purchasers.

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