



## **Making It Clear**

### *There is confusion with California's Right to Repair Act*

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California's Right to Repair Act, as set forth in California Civil Code sections 895 through 945.5, essentially became operative for residential construction purchased on or after January 1, 2013. Since its implementation, there has apparently been some confusion as to the scope of application of the Act. The following are two significant areas where the Act has caused uncertainty in its application, one of which was recently addressed by the Appellate Courts, and one which was not yet been addressed or clarified:

1. Is the Act intended to replace the Common Law causes of action homeowners have against the parties involved in the construction (Builders, General Contractors, Subcontractors, Architects, etc.)?
2. Does the Act apply to the construction of a residential property where there has been no sale of the property (owner/builder circumstance or remodel)?

As to the first question, the California Appellate Courts have rendered published determinative opinions which resolve this issue. Most recently, the California Supreme Court in McMillan Albany LLC v. Superior Court (2018) 4 Cal.5th 241, resolved an apparent split in authority created by the Courts of Appeal. While it was understood that the Act had, in fact, supplanted common law claims for defects where only pure economic loss had occurred (subject to the exceptions identified in Civil Code section 943(a) - related to actions for breach of contract, fraud and personal injury), there was a question whether that was also the case as to claims where the construction defects had also caused property damage. In other words, with respect to property damage claims, could a homeowner also sue for negligence and strict liability in addition to a statutory cause of action pursuant to the Act?

In Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC (2013) 219 Cal.App.4th 98, the Court held the Act does not eliminate common claims where the construction defects caused actual damage. (Id. at p. 104). A few years later, in Gillotti v. Stewart (2017) 11 Cal.App.5th 875, a different Court of Appeal held that the Act precludes common claims for actual damage (Id. at p. 888-890). The Gillotti Court discussed the Act and states that the Act "provides homeowners with a statutory cause of action against (1) 'builder[s]' involved in the sale of homes

(§ 911) and (2) other (general contractors and subcontractors) not involved in the sale of homes, for violation of building standards (§§ 896, 911, 936).” (*Id.* at p. 888). As against a builder who sells homes, the homeowner need only demonstrate that the home does not meet the applicable building standard (pursuant to § 896) and no further showing of causation or damages is required to meet the burden of proof, provided that the violation arises out of or is related to the original construction (§942). As against general contractors, subcontractors and others not involved in selling homes, the homeowner must prove they caused, in whole or in part, a violation of a particular standard as a result of a negligent act or omission, or a breach of contract, etc. (§936). Upon a showing of a violation of an applicable standard, the Act allows the homeowner to recovery economic losses without having to show property damage or personal injury. (*Id.* at p. 889).

The Supreme Court in McMillan makes it abundantly clear that the Act is a replacement for the common law claims involving negligence and strict liability in the context of both pure economic loss (defect without damage), and where actual property damage has occurred as a result of one or more defects enumerated by the Act. (McMillan at p. 249). “Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury (Aas v. Superior Court (2000) 24 Cal.4th 627), the Act supplies a new statutory cause of action for purely economic loss (§§ 896-897, 942-944). And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act. (*Id.* at p. 250).

As to the second question, there are no appellate decisions that have addressed this issue. However, the specific terms of the Act make it apparent that the Act would not apply to a claim by a homeowner who hires one or more contractors to construct or remodel a home on property they already own. For example:

- Section 896, which lists all applicable building standards in virtually every component of construction, states in its title that the standards apply to “original construction intended to be sold as an individual dwelling unit.”
- Section 938 states: “This title applies only to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2013.”

What has apparently caused some confusion is the language contained in section 936 which makes the Act applicable to “general contractors, subcontractors, material suppliers, individual product manufacturers and design professionals” without a direct reference to whether their work was for a home sold or intended to be sold. The Act makes clear that these parties, not involved in the sale of homes, remain subject to the requirements of the Act where there is a determination that their negligence or breach of contract caused a violation of the building standards/or defects. However, it still appears, upon considering the Act as a whole, that the construction work or component provided by these “others” must be in relation to a new home that is sold or intended to be sold as

an individual residential unit. Until such time as the California Appellate Courts determine otherwise, the application of the Act appears to be limited in this regard, and thus would not apply to any home built (or remodeled) for an existing property owner.

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