
A California Homebuilder's Election to Use Its Own Alternative Contractual Dispute Resolution Procedures Is Binding and May Preclude a Right to Repair Under SB800

Only a handful of cases have interpreted California's Right to Repair Law (known as SB800) since it became effective on January 1, 2003. In *Anders v. Superior Court (Meritage Homes of California, Inc.)*, 2011 Cal. App. Lexis 148 (filed February 7, 2011), the Fifth District of the California Court of Appeal vacated the trial court's order requiring homeowners to comply with the SB800 statutory pre-litigation procedures. The homebuilder adopted an alternative repair procedure in its purchase agreement. The trial court found that procedure unconscionable and therefore unenforceable, but it required the plaintiffs to comply with the statutory procedure. The Court of Appeal held that the homebuyers were not compelled to follow the statutory procedures as a condition to commencement of an action for construction defects. Interestingly, the question of whether the homebuilder's alternative procedures were enforceable was not before the appellate court.

The Court of Appeal reasoned: "If, however, the builder imposes procedures that are found to be unenforceable, it forfeits its absolute right to attempt repairs." While the court noted that the homebuilder could still offer to repair any defects, the homeowner is not bound to accept the offer or to permit the builder to attempt the repairs prior to filing a lawsuit. Simply, while homebuilders may use statutory or alternative pre-litigation repair procedures, they may not fall back on the statutory process to forestall litigation if a court finds the alternative process unconscionable.

The *Anders* decision does not overturn SB800 or a homebuilder's right to repair. Instead, *Anders* recognizes that alternative prelitigation procedures may be at risk of being found unconscionable and therefore unenforceable. The right to repair remains intact for homebuilders who opt for the SB800 repair procedures in their contract documents. Therefore, a homebuilder's decision to elect to use procedures other than the SB800 statutory process must take into account all the possible consequences, one of which is that the absolute statutory right to repair may be lost if the builder's alternative procedures are found unenforceable.

If nothing else, *Anders* demonstrates that for those homebuilders whose primary desire is to retain the right to repair, a conservative option is to use the statutory prelitigation procedures. For those homebuilders who prefer alternative procedures, it would be advisable to have a legal review performed to confirm their enforceability.

Contact Us.

Please contact a member of Luce Forward's Common Interest Development Group or Construction Litigation Group if you have questions about this case or its impact on your documents:

www.luce.com/commoninterestdevelopment

www.luce.com/construction