

CONSTRUCTION LAW UPDATE:

A Builder who Opt's out of Right to Repair Act's Prelitigation Procedures in Favor of its Own Contractual Prelitigation Procedures is Not Subject to the Act's Disclosure Requirements

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In 2002, the California Legislature enacted Senate Bill SB800, also commonly known as the Right to Repair Act. The Act is a statutory scheme that governs civil actions for construction defects brought by homeowners against homebuilders. Chapter 4 of the Act sets forth certain nonadversarial procedures that a homeowner must initiate before filing a construction defect lawsuit against a builder. Section 914 of Chapter 4 allows a builder to essentially opt out of the Act's pre-litigation procedures and, at the time of the initial sale of the home, contract for an alternative nonadversarial prelitigation procedure. Section 912 of the Act, also part of Chapter 4, requires the builder, among other things, to provide certain disclosures regarding the Act and its prelitigation requirements to homebuyers at the time of the initial sale of a residence; otherwise the builder is not entitled to the protections of Chapter 4.

On December 14, 2011, the California Court of Appeal, Fifth Appellate District, held that a builder who opts out of the statutory nonadversarial prelitigation procedures in favor of its own contractual nonadversarial prelitigation procedures is not required to make the disclosures set forth in section 912. (*Daniel A. Baeza v. Superior Court*, 2011 DJDAR 17851)

In *Baeza*, the owners of 32 homes purchased from the defendant builder, filed an action against the builder alleging defective construction of their homes. The builder moved the Kern County Superior Court for an order compelling the plaintiffs to comply with: (1) the prelitigation procedures set forth in the Act; and (2) nonadversarial prelitigation procedures outlined in the purchase contracts. The Superior Court ordered the original purchaser plaintiffs to comply with the contractual nonadversarial prelitigation procedures and denied the motion as to five subsequent purchaser plaintiffs. Plaintiffs filed a writ petition contending that because of the builder's failure to comply with section 912 of the Act, the homeowners were not required to comply with the prelitigation requirements set forth in either the Act or the purchase contracts. (*Id.* at pp. 17851-17854) The Court of Appeal denied the writ petition.

The Court of Appeal, after embarking on an analysis of the statutory language, essentially found that while the failure to meet the disclosure requirements of section 912 relieved homeowners of complying with the statutory pre-litigation procedures, it did not relieve them of compliance with the contractually agreed upon pre-litigation procedures. The Court also found that there was a reasonable basis for

distinguishing between builders who elect to follow the statutory procedures and those who elect to follow their own alternative contractual procedures that might explain why section 912 was not specifically made applicable to both groups by the legislature. The basis for the distinction is the notice to the homebuyer. When the statutory procedures apply, a homebuyer may not be aware of the Right to Repair Act and its prelitigation procedures unless some disclosure is made to them about the Act and its contents as required in section 912. However, contractual nonadversarial prelitigation procedures are set forth in the contract documents and agreed to by the purchaser. In other words, homebuyers have notice of the contractual procedures and of the builder's election to follow them in lieu of the statute because they are part of the contract to which the buyer agrees. (*Id.* at pp.17854 - 17855)