



## Expert Analysis

# Breaking Down Calif.'s Ever-Changing 'Right To Repair'

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On Sept. 20, 2002, California Governor Grey Davis signed into law Senate Bill 800 known as the “Right to Repair Act” in response to the building industry’s demands to have an absolute right of repair for construction related deficiencies and the consumer bar’s demands to eliminate the economic loss doctrine for defects that must result in damage under the existing *Aas v. Superior Court* (2002) 24 Cal.4th 627 decision. The “Right to Repair Act” as codified in Civil Code §§ 895-945.5, often referred to as SB800 established a prelitigation protocol for construction defect claims for any property that was sold after Jan. 1, 2003, including certain obligations on the part of the homeowners, shortened statutes of limitations and functionality standards for construction. SB800 was to provide an exclusive remedy to homeowners through this statutory scheme (Civil Code §943) as opposed to pursuing traditional common law claims including negligence, breach of implied warranties and strict products liability. Now, over 15 years later, the applicability of the right to repair statute has been challenged with two competing lines of authority — both of which are valid California law and in direct conflict with each other.



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The first line of authority comes from the Fourth Appellate District in the holding of [Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC](#) (2013) 219 Cal.App.4th 98. The 4th District held that Right to Repair Act was not the exclusive remedy to homeowners seeking relief for construction deficiencies, but one alternative in an election of remedies. For alleged defects that have not yet resulted in actual property damage in violation of the *Aas* standard, the homeowner may elect to proceed under SB800. For alleged defects that have manifested in actual damages, a homeowner may elect to proceed under traditional common law causes of action and avoid the prelitigation procedures and builder’s right to repair afforded under SB800. The Liberty Mutual decision was upheld in the Second Appellate District in the *Burch v. Superior Court* (2014) 223 Cal.App. 4th 1411 decision, wherein the court ruled that SB800 does not preclude a homeowner from pursuing common law claims for construction defect damages that have caused actual property damage.

The second line of authority comes a year later in 2015, wherein the Fifth Appellate District rejected the holding in Liberty Mutual and Burch reaffirming the statutory intent of SB800 as the exclusive remedy for homeowners asserting construction defects for both actual and anticipatory damage. In *McMillan Albany LLC v. Superior Court [Van Tassell]* (2015) 239 Cal.App. 4th 1132, the 5th District held that the Right to Repair Act (SB800) was intended to be the exclusive remedy for all defect claims arising out of new residential construction sold after Jan. 1, 2003. This included the requirements by the homeowners to provide prelitigation notice, inspections and the right to repair on the part of the builder. The Third Appellate District in the *Elliot Homes v. Superior Court [Hicks]* (2016) 6 Cal.App. 5th 333 decision supported the McMillan Albany LLC interpretation of the SB800 Statute as the exclusive remedy for construction defect claims. The Court in Elliot Homes ruled that an analysis of the Right to Repair Act, and its legislative history, clearly indicates that the prelitigation dispute resolution provisions of the Act were intended to apply to “any

action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction..." regardless of the legal theories of recovery pled by the plaintiffs. The Elliot Homes court specifically rejected the holdings of Liberty Mutual and Burch, citing that "[a]mong other things, the bill seeks to respond to concerns expressed by builders and insurers over the costs associated with construction defect litigation, as well as concerns expressed by homeowners and their advocates over the effect of a recent Supreme Court decision that held defects must cause actual damage prior to being actionable in tort. [Aas v Superior Court (2000) 24 Cal.4th 627]. This bill would establish a mandatory procedure prior to filing a construction defect lawsuit. This procedure would provide the builder the right to attempt a repair of the defect prior to litigation."

So California currently has four different binding appellate court decisions in four different appellate districts with conflicting but valid legal authority. This uncertainty in the law is adversely affecting numerous cases at the trial court level as to whether the SB800 Right to Repair statute is the exclusive remedy or if plaintiffs can still recover construction defect damages under common law claims. Thankfully this question will be definitively answered by the California Supreme Court which has accepted the McMillan Albany LLC v. Superior Court [Van Tassell] (2015) — Supreme Court Case No. S229762 for hearing. As of the present date, the matter has been fully briefed including all Amicus briefs and is awaiting a date certain for oral arguments. The Supreme Court will once and for all resolve the handling of construction defect claims in California as originally sought by the California legislature over 15 years ago when it first passed the SB800 statute.

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