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IS SB 800 STILL A THING?

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A recent opinion by the California Fifth District Court of Appeal shows that California's "Right to Repair Act," or SB 800, may not be quite as dead in the water as previously thought. In a twenty-page opinion, the Court took great offense with the Fourth District's opinion in *Liberty Mutual Ins. Co. v. Brookfield* 219 Cal.App.4th 98 (2013) and repudiated it in full.

In *McMillin Albany LLC v. Superior Court of California*, 239 Cal.App.4th 1132 (2015), the Milstein Adelman firm represented 37 homeowners in a lawsuit filed against McMillin, the builder of their homes, alleging eight causes of action, including strict products liability, negligence, and breach of express and implied warranty. Plaintiffs' third cause of action alleged violations of California's "Right to Repair Act." However, the plaintiffs did not follow the pre-suit notification procedures which are required in SB 800 and filed their lawsuit without providing McMillin with an opportunity to repair the alleged defects.

Plaintiffs attempted to circumvent the SB 800 issue by thereafter dismissing the third cause of action. In response, McMillin filed a motion to stay the action, which the trial court denied under the *Liberty Mutual* reasoning that plaintiffs "were entitled to plead common law causes of action in lieu of a cause of action for violation of the building standards set out in [the Act], and they were not required to submit to the pre-litigation process of the Act when their complaint did not allege any cause of action for violation of the Act." This led to an appeal and the *McMillin* Court reviewed the issue of whether a homeowner is required to follow the Act's pre-litigation procedures even where a cause of action is no longer maintained under SB 800.

Ultimately, the *McMillin* Court held that *Liberty Mutual* failed to fully analyze the statutory language of the Act, and rejected the Fourth District's reasoning and outcome as being inconsistent with the express language of the Act, which on its face directly limits any action for construction deficiencies to the requirements of the Act. As such, the *McMillin* Court found that "no other cause of action is allowed to recover for repair of the defect itself or for repair of any damage caused by the defect."

Under *McMillin*, homeowners can no longer circumvent the notification requirements of SB 800 by simply alleging property damage. This is a great legal triumph for contractors, should the ruling be allowed to stand. However, this recent opinion draws a battle line between the Fourth and Fifth Appellate Districts, creating clear conflict that will need to be resolved by the California Supreme Court. Until such resolution is received, the issue will remain hotly contested on the trial court level in all California districts.