



California Construction Law Alert

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Court of Appeal Enforces Contractor's "Right to Repair" Act

On December 14, 2011, the California Court of Appeal issued a two part-ruling with regard to the nonadversarial pre-litigation procedure set out in Chapter 4 of the Right to Repair Act California Civil Code Section 895 et seq. (the "Act"). In *Baeza v. Superior Court*, 2011 Cal. App. LEXIS 1567 (Cal. App. 5th Dist. Dec. 14, 2011), the Fifth Appellate District held that the disclosure provisions of the Act do not apply to builders who elect to use their own contractual prelitigation procedures instead of statutory procedures. Furthermore, the builder's contractual provisions for a limitation on damages recoverable by homeowners on a construction defect claim, even if found to be unlawful, did not invalidate the entire contract or the contractual procedures.

The *Baeza* court first addressed the issue of whether the disclosure provisions of section 912 of the Act are mandatory for all builders, even those that opt out of the procedures in Chapter 4 in favor of their own contractual procedures.

Petitioners purchased homes from Castle & Cooke, the developer. They filed an action against the developer alleging construction defects. The developer moved for an order compelling the homeowners to comply with statutory and contractual prelitigation procedures. These procedures required the homeowners to give the developer notice of any alleged construction defects and an opportunity to repair them. The homeowners argued that the prelitigation procedures were not enforceable because the developer had failed to comply with certain statutory requirements.

In a writ review, the Court of Appeal addressed the homeowners' contentions. Starting with an analysis of the statutory scheme, the Court of Appeal explained that the Act was enacted in 2002 to specify the rights and requirements of a homeowner to bring an action for construction defects. Chapter 4 of the Act prescribes the procedures a homeowner must initiate prior to bringing a civil action against a builder for alleged construction defects. In short, the homeowner must give written notice to the builder of the nature and location of the claimed defects. The builder has a specified time within which to acknowledge receipt of the notice. The builder may then make a written offer to repair the defects and set a reasonable completion date. If the builder fails to comply with the Chapter 4 requirements, the homeowner is released from his obligations and may proceed with the filing of an action. Under the statutory scheme, the builder has the option of contracting for an alternative prelitigation procedure, in lieu of the procedure set out in Chapter 4, at the time of the initial sale of the home. Chapter 4 contains no specifics regarding what provisions the alternative provisions may or must include.

In *Baeza*, the developer opted out of the statutory procedure and instead elected to use its own contractual provisions. The homeowners contended that the developer failed to comply with section 912 of Chapter 4, requiring the builder to make disclosures to them at the time of the home sale. If a builder fails to comply with these requirements, it is not entitled to the protections of Chapter 4 and the homeowner need not submit to any prelitigation procedure. Since the purchase contract did not contain the information called for in section 912, homeowners argued that the developer's failure to comply excused them from complying with the contractual procedure.

The court rejected the homeowners' argument, holding that a builder who opts out of the Chapter 4 prelitigation procedures in favor of its own contractual procedures opts out of the entirety of Chapter 4, including section 912, and thus the disclosure provisions of section 912 do not apply.

Next, the court addressed the issue of whether the entire contractual prelitigation repair procedure was unenforceable because the purchase contract contained limitations on damages homeowners may recover. For example, the seller's liability would be limited to the amount of diminution in property value and seller would not be liable for buyer's loss of profits, business goodwill or other damages. The homeowners argued that section 901 of the Act prohibits any contractual limitation on damages that may be recovered on a construction defect claim under the Act.

The Court of Appeal concluded that the contractual damages limitation did not invalidate the entire contract. Without deciding whether section 901 indeed prohibits a builder from limiting the damages homeowners may recover, the Court pointed out that the parties had included severability clauses in the contract specifically providing "If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the validity of other provisions of this Agreement shall in no way be affected thereby." Thus, the parties had specifically intended to enforce the valid provisions of the contract, even if other provisions were found to be invalid or unlawful.

The doctrine of severability is liberally applied in California. Statutory and case law holds that the invalid parts of a contract are to be severed and the valid parts enforced, as long as the main purpose of the contract is lawful and the interests of justice are furthered by conserving the contractual relationship. Only if the central purpose of the contract is illegal, the contract as a whole cannot be enforced. Applying the law to the facts, the *Baeza* court explained that the central purpose of the contract between the homeowners and the developer was the sale and purchase of real estate, a lawful purpose. Moreover, the contractual notice-and-opportunity-to-repair provisions incorporated in the contract served the lawful purpose of dispute resolution. Even if the provision limiting the damages recoverable by homeowners were to be found unlawful, this provision was separate from and subordinate to the main purpose of the overall contract. Thus, the damages provision could be severed and voided without invalidating the lawful provisions. In sum, upholding the lawful provisions of the contract to which the parties explicitly agreed serves the interests of justice better than invalidating the entire contract.

To avoid disputes and litigation, builders who elect to draft their own prelitigation procedures instead of those prescribed in the Act, should seek professional legal advice. Burnham Brown is here to help.

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