

Reprinted in part from
Volume 21, Number 5, May 2011
(Article starting on page 459 in the actual issue)

ARTICLE**WATCH YOUR STEP—IF ITS S.B. 800 ALTERNATIVE PRELITIGATION PROCEDURES ARE NOT ENFORCEABLE, A BUILDER CANNOT COMPEL A HOME PURCHASER TO COMPLY WITH THE STATUTORY S.B. 800 PRELITIGATION PROCEDURES**

By W. Scott Shepard*

SB 800,¹ referred to by some as the “Right to Repair” Act, sets forth detailed non-adversarial notice and right to repair procedures a homeowner subject to the Act must follow prior to filing a construction defect lawsuit.² Significantly, Civil Code, §914, subd. (a) authorizes the home builder to choose to use *alternative* non-adversarial contractual provisions in lieu of the statutory procedures. However, the builder must notify the homeowner that alternative procedures will be utilized in the event a dispute arises at the time the sales agreement is executed.³ The recent court of appeal decision in *Anders v. Superior Court (Meritage Homes of California, Inc.)*,⁴ construes the language of that section as providing that a home builder who attempts to enforce its own contractual notice and right to repair procedures relating to construction defects after the sale of a new home that do not resolve the construction defect dispute or are found to be unenforceable, cannot also require the homeowner to comply with the statutory non-adversarial notice and right to repair procedures before the homeowner files a suit for construction defects. Instead, the homeowner will be free to pursue litigation without complying with the statutory procedures. In addition, the

* W. Scott Shepard is a shareholder in the Walnut Creek Office of Miller Starr Regalia, specializing in construction and other related real estate litigation.

trial court's ruling in this same case reveals that trial courts will look closely at whether the builder's alternative contractual right to repair procedures set forth in the home purchase documents are similar to or better for the homeowner than the statutory non-adversarial notice and right to repair procedures under SB 800.

This article gives an overview of SB 800, and analyzes the *Anders* decision and its effects on homeowners and home builders where alternative procedures were prescribed.

I. BACKGROUND ON THE CONSTRUCTION DEFECT LEGISLATION KNOWN AS SB 800.

In 2002, the California Legislature passed SB 800, known as the "Fix-It" or "Right to Repair" legislation.⁵ This compromise Right to Repair legislation is codified at Civil Code, §§895 to 945.5.⁶ Assuming that the builder complies with certain preliminary statutory requirements set forth in Civil Code, §§895 to 945.5, SB 800 limits the right of a homeowner to file a construction defect lawsuit against the builder, or its contractors, subcontractors, material suppliers, material manufacturers or design professionals, without first commencing the non-adversarial statutory notice and right to repair procedures or the contractual notice and right to repair procedures set forth in the purchase documents for the home.⁷ SB 800 was enacted in response to concerns that the growing volume and extreme cost of residential construction defect litigation in California was increasing the cost of homes to consumers due to increased litigation and insurance costs, curtailing production of single-family homes and drastically reducing the construction of condominiums and recent legal decisions prohibiting recovery of certain types of damages by homeowners until the homeowner had suffered actual damages, as opposed to only the potential for future damages.⁸

A. SB 800 Benefits To The Home Builder.

The major benefit to the builder under SB 800 is the absolute right to repair any alleged construction defects with homes prior to litigation, assuming that the builder complies with certain preliminary requirements and the statutory right to repair procedures.⁹ These preliminary requirements include the following:

- (1) The builder must maintain with the Secretary of State the name and address of an agent for providing notice under SB 800 or, alternatively, elect to use a third-party for receiving that notice if the

builder has notified the homeowner in writing of the third-party's name and address to whom claims and requests for information under the statute may be mailed. (If the agent for notice is a third-party, the name and address of that agent must be included with the original sales documentation, and be initialed and acknowledged by the purchaser and the builder's sales representative.);

(2) If the builder contracts with a third-party to accept claims and act on its behalf under SB 800, the builder must give actual notice to the homeowner as part of the original sales documentation for the home, also initialed and acknowledged by the purchaser and the builder's sales representative, and must provide the name and address of that third party to the homeowner;

(3) The builder must record on title to the property a notice of the existence of the SB 800 statutory procedures, and a notice that these procedures impact the legal rights of the homeowner;

(4) The builder must provide the homeowner in the original sales documentation a notice of the existence of the SB 800 statutory procedures, and a notice that these procedures impact the legal rights of the homeowners, which also must be acknowledged by the purchaser and the builder's sales representative;

(5) The builder must provide the homeowner with a written copy of the SB 800 statute with the original sales documentation, which must be initialed and acknowledged by the purchaser and the builder's sales representative; and

(6) As to any documents provided to the homeowner in conjunction with the original sale of the home, the builder must instruct the original purchaser to provide those documents to any subsequent purchaser of the home.¹⁰

Compliance with these preliminary procedures is mandatory on the part of the home builder.¹¹

If the builder has complied with all these preliminary procedures, then before a homeowner can proceed with a construction defect action against the builder (or any party alleged to have contributed to a violation of the building standards set forth under SB 800, Civil Code, §896), the homeowner must provide written notice to the builder of the homeowner's claim that the construction of the residence violates the construction performance standards set forth in Civil Code, §896. The notice must also describe the construction defect claims in reasonable

detail sufficient for the home builder to determine the nature and location of the claimed violations.¹² Upon receipt of a written notice of a claim of a construction defect from a homeowner, a builder, or his or her representative, must acknowledge in writing receipt of the notice of the claim within 14 days after receipt of the notice of the claim.¹³ If the homeowner makes a written request of the builder for certain statutorily enumerated documents, the homebuilder also must, within 30 days of receipt of the written request, provide copies of the statutorily enumerated documents, or make arrangements for the copying of those documents, to the homeowner.¹⁴

A significant component of SB 800's statutory scheme is the pre-litigation right of the home builder to inspect and attempt to repair the complained-of defects. Civil Code, §916, subd. (a), provides the builder with the right to inspect the claimed unmet building standards within 14 days of the builder's acknowledgement of receipt of the notice of claim.¹⁵ The statute also provides for a second opportunity for the home builder to inspect the alleged defects if a written request is made within three days following the initial inspection.¹⁶ Within 30 days of the initial inspection or, if requested, the second inspection of the home, the home builder may offer in writing to repair the alleged violations of the construction standards.¹⁷ Upon receipt of the offer to repair from the home builder, the homeowner has 30 days within which to authorize the builder to proceed with the repair. Alternatively, the homeowner may request that the builder provide the homeowner with up to three alternative contractors who are independent of the home builder and who regularly conduct business in the county where the home is located to perform the repairs.¹⁸ The builder has 35 days after the homeowner's request for the names of additional contractors to present the homeowner with the choice of additional contractors.¹⁹

Most importantly, within 20 days after the date that the builder presents the homeowner with the names of up to three additional contractors, the homeowner *must* authorize the builder, or one of the alternative contractors, to perform the proposed repair.²⁰ In addition, the offer to repair conveyed to the homeowner must be accompanied by an offer by the builder to mediate the dispute if the homeowner so chooses.²¹ If the builder has made an offer to repair and the mediation has failed to resolve the construction defect dispute, the homeowner must allow the builder or the selected contractor to make the proposed repair.²² Therefore, as long as the builder follows all of the preliminarily required statutory procedures and complies with all of the

timeframes and requirements set forth in right to repair procedures found in Civil Code, §§912 through 919, the builder has the right to repair any claimed construction defects prior to the filing or the continuation of any construction defect litigation against the builder.

In any construction defect litigation covered by SB 800, *the homeowner* bears the burden of proving: (1) its compliance with the statutory notice and repair procedures; (2) that the builder did not comply with the preliminary procedures; or (3) that the builder did not comply with the statutory notice and right to repair procedures in order to proceed with the litigation.²³

B. SB 800 Benefits To The Homeowner.

One of the principal benefits to the homeowner under SB 800 is that the homeowner's burden of proof at trial concerning the construction defects has been eased tremendously. Civil Code, §896 sets forth an enumerated list of standards for residential construction.²⁴ The plaintiff need only prove that the home builder did not meet one or more of the many statutorily enumerated standards for residential construction in order to establish a construction defect and liability.²⁵ This relieves the homeowner from the somewhat difficult prior burden of proof that the builder breached relevant standards of care for construction. Furthermore, SB 800 provides that original owners and their successors-in-interest, including homeowners' associations with the rights under Civil Code, §1368.3, have standing to assert the benefits and protections set forth under SB 800.²⁶ Homeowners can also recover as damages under SB 800 certain "economic losses" that had previously been curtailed under the California Supreme Court decision in *Aas v. Superior Court (William Lyon Company)*.²⁷ Lastly, the statutory scheme imposes on builders certain minimum consumer written fit and finish warranty obligations that benefit homeowners.²⁸

C. SB 800 Allows A Builder To Elect To Provide Its Own Separate Non-Adversarial Contractual Notice And Right To Repair Procedures.

Although SB 800 sets forth the non-adversarial notice and right to repair procedures discussed above and codified in Civil Code, §§910 to 938, Civil Code, §914 also allows a builder to attempt to provide contractual notice and right to repair provisions that are different from the non-adversarial procedures and remedies set forth in SB 800.²⁹ Civil Code, §914 specifically provides:

A builder may attempt to commence non-adversarial contractual provisions other than the non-adversarial procedures and remedies set forth in this chapter, ... [A]t the time the sales agreement is executed, the builder shall notify the homeowner whether the builder intends to engage in the non-adversarial procedures of this section or attempt to enforce alternative non-adversarial contractual provisions....³⁰

Other provisions in the same section seem to clearly set forth that the builder cannot require a homeowner to comply with the builder's own non-adversarial contractual right to notice and repair procedures and also to comply with the statutory non-adversarial procedures if the builder's alternative procedures do not resolve the claim or are deemed to be unenforceable. This language is found in the following provisions of §914:

A builder...may not, in addition to its own non-adversarial contractual provisions, require adherence to the non-adversarial procedures and remedies set forth in this chapter, *regardless of whether the builder's own alternative non-adversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable....* If the builder elects to use the alternative non-adversarial contractual provisions in lieu of this chapter, the election is binding, regardless of whether the builder's alternative non-adversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable.³¹

In the *Anders* case, the builder elected to include its own separate notice and right to repair procedures in its home sales contract documents, which are discussed in detail below.

II. THE ANDERS DECISION CONFIRMS THAT IF A BUILDER'S ALTERNATIVE PROCEDURES DO NOT RESOLVE A CONSTRUCTION DEFECT DISPUTE OR ARE FOUND TO BE UNENFORCEABLE, THE BUILDER CANNOT ALSO REQUIRE A HOMEOWNER TO COMPLY WITH THE STATUTORY NOTICE AND REPAIR PROCEDURES.

In *Anders*, the owners of 54 single-family homes built by developer Meritage Homes of California, Inc. ("Meritage Homes"), sued Meritage Homes for construction defects without first going through either the SB 800 non-adversarial notice and repair procedures or the contrac-

tual notice and repair provisions contained in the Meritage Homes' purchase documents for the homes.³² The 54 single-family homeowners in *Anders* fell into three categories: (1) the owners of 28 homes who purchased their homes directly from Meritage Homes pursuant to purchase contracts and warranty documents that required them to follow Meritage Homes' alternative notice and repair procedures for construction defect claims ("Original Purchasers"); (2) the owners of 24 homes who were the successors-in-interest to original purchasers who had purchased their homes directly from Meritage Homes pursuant to purchase documents that required them to follow Meritage Homes' contractual notice and repair procedures ("Subsequent Purchasers"); and (3) the owners of two homes whose contractual purchase documents with Meritage Homes required them to follow the statutory notice and repair procedures set forth in SB 800.³³

After plaintiffs filed their construction defects lawsuit, Meritage Homes brought a motion in the trial court to compel compliance with its contractual pre-litigation notice and right to repair procedures and to stay the litigation until the homeowners completed such procedures.³⁴ Based on Meritage Homes' motion, the trial court found that Meritage Homes' pre-litigation notice and repair procedures outlined in Meritage Homes' Builders' Limited Warranty ("HBLW") were unconscionable and inconsistent with the statutory provisions in Civil Code, §§895 to 945.5. Therefore, the trial court concluded that they were unenforceable.³⁵ Despite this ruling, the trial court went on to partially grant the motion and ordered that the homeowners comply with the statutory SB 800 pre-litigation notice and repair procedures because: (1) all of the homes were purchased during the time period covered by SB 800; and (2) Meritage Homes had made a qualified election in the HBLW to enforce its own procedures allowing the Court to order the homeowners to comply with the statutory notice and repair procedures.³⁶ After the trial court's order, the homeowners filed a petition for writ of mandate requesting that the court of appeal direct the trial court to vacate its order and deny Meritage Homes' motion in its entirety.

The homeowners' petition for writ of mandate appear to present an issue of first impression, i.e., can a homebuilder whose alternative contractual notice and repair procedures are deemed unenforceable, compel a homeowner also to follow the statutory notice and repair procedures prior to commencing or continuing construction defect litigation against the builder.

III. THE COURT OF APPEAL FOUND THE STATUTORY LANGUAGE QUITE CLEAR IN SETTING FORTH THAT THE BUILDER CANNOT REQUIRE THE HOMEOWNER TO COMPLY WITH THE STATUTORY NON-ADVERSARIAL NOTICE AND REPAIR PROCEDURES IF ITS OWN CONTRACTUAL PROCEDURES ARE FOUND TO BE UNENFORCEABLE.

In the *Anders* case, the Court of Appeal concluded that the language of Section 914 was very clear in providing that a home builder who elects to use its own contractual notice and right to repair provisions, which either do not resolve the dispute or which are later found unenforceable, cannot compel a homeowner to also comply with the statutory notice and right to repair procedures before filing suit. In reaching this conclusion, the court of appeal discussed in detail the language of Section 914 which provides:

(a) This chapter establishes a non-adversarial procedure, including the remedies available under this chapter which, if the procedure does not resolve the dispute between the parties, may result in a subsequent action to enforce the other chapters of this title. A builder may attempt to commence non-adversarial contractual provisions other than the non-adversarial procedures and remedies set forth in this chapter, but may not, in addition to its own non-adversarial contractual provisions, require adherence to the non-adversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative non-adversarial contractual provisions are successful in resolving the dispute are ultimately deemed enforceable.

At the time the sales agreement is executed, the builder shall notify the homeowner whether the builder intends to engage in the non-adversarial procedure of this section or attempt to enforce alternative non-adversarial contractual provisions. If the builder elects to use alternative non-adversarial contractual provisions in lieu of this chapter, the election is binding, regardless of whether the builder's alternative non-adversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable.

The court of appeal went on to discuss the specific provisions of the purchase documents involved in the homeowner's purchase of their homes. The original Meritage Homes sales contracts for the homes

purchased by the original and subsequent purchasers included the following provisions:

(a) *Defects; Notice and Opportunity to Cure:* If after Buyer's Close of Escrow for the purchase of the Property, Buyer discovers a material structural or other defect in the Property, or any improvement located thereon...that Buyer feels may be the responsibility of Seller ("Defect"), Buyer shall notify Seller in writing in accordance with the terms and conditions of the Home Builder's Limited Warranty.... Buyer shall not pursue any other remedies available under this Section 14 until Seller has had the notice and opportunity to cure the Defect described above....

(b) *Arbitration of Disputes:* ...

(c) *Civil Code Sections 895-945.5 Elections:* To resolve any future disputes, Buyer and Seller agree to rely upon normal customer service procedures, those alternative dispute provisions set forth or referenced in this Agreement and the Home Builders' Limited Warranty at section VII, and, if such disputes remain unresolved, binding contractual arbitration provisions as set forth above and in the Home Builder's Limited Warranty at Section VIII. Pursuant to Civil Code section 914, Seller elects the preceding methods and will not compel Buyer to those non-adversarial, prelitigation procedures described [in] Civil Code section 914, et seq. ...

The court of appeal held that these provisions in the sales contract constituted an *election* by Meritage Homes to use its own alternative notice and repair procedures allowed by Civil Code, §914, subd. (a). The court of appeal then ruled that Meritage Homes, in addition to electing its alternative procedures, had attempted to enforce its alternative contractual procedures by bringing its motion in the trial court to compel the homeowners to comply with its prelitigation procedures.³⁷ Noting that it is the builder's "attempt" to use or enforce its alternative contractual prelitigation procedures that precludes it from requiring the homeowner to later comply with the statutory prelitigation procedures,³⁸ the court held that "if the builder attempts to enforce its alternative procedures and those procedures are determined to be unenforceable, the builder may not require the homeowners to comply with the statutory procedures."³⁹ The court of appeal further discussed

the second paragraph of Civil Code, §914, subd. (a), which requires the builder to notify the home buyer at the time the sales agreement is executed of its election to either use the statutory prelitigation procedures or its own alternative prelitigation procedures. That subsection goes on to specify that the builder's election is binding "regardless of whether the builder's alternative non-adversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable." When read together, said the court, these two paragraphs of the statute mean that if the builder elects or attempts to use its own prelitigation procedures in lieu of the statutory procedures, it is bound by that conduct; no matter how a court ultimately rules on whether the builder's alternative contractual procedures are enforceable, the builder cannot later seek to require the homeowner to also comply with the statutory procedures.⁴⁰

The court of appeal rejected Meritage Homes' argument that Civil Code, §914 only prohibited the builder from seeking compliance with the statutory procedures if its alternative contractual procedures were *enforceable* and *actually used* by the builder. The Legislature's use of the phrase "regardless of whether" instead of "even if" in subdivision (a) of Section 914, demonstrates that the Legislature intended that the builder be bound by the election whether or not a court later found the alternative procedures unenforceable. The court of appeal believed its finding was further supported by the language of Civil Code, §915, which provides:

If a builder fails to acknowledge receipt of the notice of a claim within the time specified, elects not to go through the process set forth in this chapter, or fails to request an inspection within the time specified, or *at the conclusion or cessation of an alternative non-adversarial proceeding*, this chapter does not apply and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action.

This means that if the alternative proceeding under the home builder's warranty procedures ceases because the warranty procedures are found to be unenforceable, then the homeowner is released from having to comply with the statutory procedures before filing suit.

Lastly, the court looked at the language of Civil Code, §927, which extends the statute of limitations on homeowners' construction defect lawsuits as follows:

If the builder elects to attempt to enforce its own non-adversarial procedure in lieu of the procedure set forth in this chapter, the time period for filing a complaint or other legal remedies for violation of any provision of this part is extended from the time of the original claim by the claimant to 100 days after either the completion of the builder's alternative non-adversarial procedure, or *100 days after the builder's alternative non-adversarial procedure is deemed unenforceable*, whichever is later.

This statute of limitations language in Section 914 does not contemplate the builder being able to proceed with its alternative contractual non-adversarial procedures and then proceed with the statutory procedures if its contractual procedures are found unenforceable.⁴¹

The court of appeal also believed that its interpretation of Section 914 was consistent with the purpose of SB 800 to give the home builder the right to make repairs before the homeowner commences litigation. A builder who elects to use its own alternative contractual prelitigation procedures has the right to make repairs thereunder, so long as the homebuilder makes these repairs pursuant to alternative contractual procedures that are fair and legally enforceable. By imposing alternative contractual procedures that are unenforceable because they are unconscionable, or conflict with the SB 800 statutory scheme, the builder forfeits its absolute right to make repairs before litigation. The court of appeal felt that its holding gives the builder great incentive to ensure that its alternative contractual procedures are proper, fair and enforceable.⁴²

The court of appeal went on to review and reject the trial court's finding that the builder had only made a "qualified" election to apply its own alternative contractual procedures on terms that would also permit trial court to order homeowners to comply with the statutory procedures. In making this argument in the trial court, Meritage Homes relied on the following language from its HBLW:

Your only remedy in the event of a construction defect in or to the home or the common elements or to the real property...is the coverage provided to you under this limited warranty. Notwithstanding the foregoing, nothing in this limited warranty shall diminish any rights, obligations, or remedies that you or we may have under California Civil Code sections 895 through 945.5 or under any procedures adopted in place of California Civil Code sections 910 through 938.

The court of appeal interpreted this contractual language to set forth an intent by the parties that the limited warranty be construed so as to avoid denying the homeowner any rights provided by SB 800. It could not be legitimately construed to mean that if a court found the home builder's warranty provisions unenforceable, then the SB 800 prelitigation procedures must be followed by the homeowner. The court of appeal held that the trial court's interpretation directly conflicted with the language in the purchase documents that the builder elected, pursuant to Civil Code, §914, its own alternative contractual procedures. It went on to hold that Meritage Homes' "qualified" election argument would "eviscerate" the provisions of Section 914 which make the builder's election to engage in its own prelitigation procedures binding and preclude it from attempting to use both its own and the statutory procedures.⁴³

Lastly, based on the transcript of the trial court hearing, it appeared to the court of appeal that the trial court had based its ruling on the idea that requiring the homeowners to comply with the statutory procedures would not harm them and would be to their benefit.⁴⁴ However, the court of appeal ruled that it is irrelevant whether the homeowners arguably would benefit from being compelled to go through the statutory notice and repair procedures. The court of appeal found that imposing such a requirement would be directly contrary to the express provisions of §914, subd. (a). It was not the place of the trial court to substitute its judgment for what is best for the parties in such a way as to conflict directly with the express language of the statute.⁴⁵ Therefore, the court of appeal granted the homeowners' petition for writ of mandate and directed the trial court to vacate its order compelling the original and subsequent purchasers to comply with the SB 800 statutory prelitigation procedures. However, it did not overturn that portion of the trial court's order directing the two home buyers whose purchase contracts required them to follow the prelitigation procedures set forth under SB 800 to comply with those procedures before proceeding with their construction defect lawsuit.⁴⁶

IV. TAKEAWAYS FROM *ANDERS V. SUPERIOR COURT*.

It is clear from the court of appeal's decision in *Anders* that if a builder's alternative notice and repair procedures set forth in the home sales contract documents do not resolve a construction defect dispute or are later found to be unenforceable by a court, California courts will not require a homeowner to also comply with the SB 800 statutory notice and repair procedures set forth in Civil Code, §§910,

et seq. In addition, it is clear from this decision that trial courts, such as *Anders*, will protect a homeowner's right to sue the builder if the builder's notice and right to repair procedures are unconscionable or inconsistent with SB 800 and thus found unenforceable.

Although neither the trial court nor the court of appeal in *Anders* set forth in the written record what the trial court found unconscionable about Meritage Homes' notice and right to repair procedures or its HBLW, or what was inconsistent between these documents and the SB 800 statutory scheme, the plaintiff homeowners made several arguments, discussed below, to support their attack on Meritage Homes' notice and repair procedures and HBLW.

A. Unconscionability.

Procedural unconscionability relates to the manner in which the parties negotiated the contract, the relevant circumstances of the parties at the time, and the factors of oppression and surprise.⁴⁷ Plaintiffs in *Anders* focused on the fact that the homeowners were the much weaker party, as compared to large corporate homebuilder Meritage Homes, in the negotiation of the purchase contracts. They contended that the individual plaintiff homeowners had no meaningful opportunity to negotiate the terms of the notice and repair procedures or HBLW or have them reviewed by a real estate professional or attorney before their execution.⁴⁸

In the statement of facts in their law and motion pleadings, plaintiffs contended that none of the individual homeowners separately reviewed or signed at any time the HBLW. They further pointed out that Meritage Homes' evidence only established, at best, that at the time they signed the home sales contract the homeowners were shown only a shorter "sample" of the HBLW, but not the full actual HBLW itself.⁴⁹ The plaintiffs also focused on the "surprise" element of unconscionability, contending that the contract documents and the HBLW did not set forth the actual rules that would apply to an arbitration conducted under the HBLW. In addition, they argued that the referenced, but not provided, arbitration rules, as well as the actual named provider of the arbitration services, both could change in the future. Plaintiffs cited the following provisions contained in Meritage Homes' HBLW:

The arbitration shall be conducted by Construction Arbitration Services, Inc., or such other reputable arbitration service that PWC shall select at its sole discretion, at the time

the request for arbitration is submitted. The rules and procedures of the designated arbitration organization that are in effect at the time the request for arbitration is submitted will be followed.⁵⁰

Plaintiffs argued that Meritage Homes did not provide the homeowners as part of the purchase process with a copy of the Construction Arbitration Services, Inc. arbitration rules. In addition, the homeowners would not know which arbitration rules would apply to their later arbitration because the HBLW allowed Meritage Homes, at its sole discretion, to change the provider of the arbitration services at a later date and provided that the arbitration would be conducted according to the rules of that arbitration service in force at the time that the homeowner submitted its request for arbitration. Plaintiffs argued that the identity of the provider and the rules that would apply to any arbitration under the HBLW were not definitively set forth at the time the homeowners signed their purchase contracts.

Substantive unconscionability relates to whether the contractual terms produce unfair or one-sided results.⁵¹ As to substantive unconscionability, plaintiffs argued that the terms of the notice and right to repair provisions and the HBLW were completely one-sided in favor of the developer. Plaintiffs cited to two court of appeal cases, *Baker v. Osborne Development Corp.*⁵² and *Bruni v. Didion*,⁵³ which had found similar home builder limited written warranties and notice and right to repair procedures requiring binding arbitration to be unconscionable.⁵⁴

B. Conflict With SB 800.

Plaintiffs' argued that Meritage Homes' notice and right to repair procedures and HBLW conflicted with SB 800 because, whereas Civil Code, §916, subd. (a), required that the builder conduct its inspection of the alleged construction defects within 14 days after receipt of notice of the claim, Meritage Homes' procedures set forth no deadline for it to conduct any inspection. Meritage Homes' procedures did not contain any provision whereby the homeowners had the right to receive copies of any of the documents the builder is required to provide the homeowner under Civil Code, §912, subd. (a). While SB 800 requires the builder to either repair all of the unmet building standards claimed by the homeowner or set forth in writing the reasons for the builder not repairing such claimed defective conditions in Civil Code, §924, Meritage Homes'

procedures gave no such corresponding right to the homeowners. As was likely important in the eyes of the trial court, SB 800 specifically does not allow the builder to demand a waiver and release of all claims in exchange for any repairs under Civil Code, §926. However, the HBLW used by Meritage Homes in *Anders* sets forth that once the builder had made a payment to the homeowner or repaired any construction defects, the homeowner was required to sign a full release of the builder's liability for any construction defects. Lastly, and likely of similar importance to the trial court, was the fact that under SB 800, if a builder fails to properly comply with the statutory notice and right to repair procedures, the homeowner may still file a construction defect litigation for damages against the builder. However, under Meritage Homes' notice and right to repair procedures and its HBLW, if Meritage Homes failed to comply with its own procedures or warranties, the homeowner's remedy was purportedly limited to mediation or binding arbitration, not proceeding with litigation.⁵⁵

In conclusion, given the decision in *Anders* and in the cases referenced above and cited by plaintiffs in the underlying litigation, it is likely that trial courts will not find builder-authored notice and right to repair procedures and limited warranties to be enforceable unless they set forth procedures that are similar to or better *from the homeowner's perspective* than the notice and right to repair procedures legislated into law by SB 800. In addition, it will be incumbent on the builder to show that the homeowner was clearly advised of the arbitration provision, consented to the arbitration provision and was provided with the identity of and rules of the arbitration provider on or before the execution of the purchase documents if it hopes to have its arbitration provision found enforceable.

NOTES

1. Civ. Code, §§895 to 945.5. For an extended discussion of SB 800, see §29:2 of 11 *Miller & Starr, California Real Estate 3d*, at pp. 8-14 (2005 ed.).
2. SB 800 applies to virtually all "new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003." Civ. Code, §938.
3. Civ. Code, §914.
4. *Anders v. Superior Court*, 192 Cal. App. 4th 579, 121 Cal. Rptr. 3d 465 (5th Dist. 2011).
5. *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC*, 113 Cal. Rptr. 3d 399 (Cal. App. 4th Dist. 2010), review granted and opinion superseded, 117 Cal. Rptr. 3d 614, 242 P3d 67 (Cal. 2010); *Standard Pacific Corp. v. Superior Court*, 176 Cal. App. 4th 828, 830, 98 Cal. Rptr. 3d 295 (4th Dist. 2009).
6. *Anders v. Superior Court*, *supra*, 192 Cal. App. 4th at 585.

7. Civ. Code, §910.
8. *Standard Pacific Corporation, supra*, 176 Cal.App.4th at 831.
9. Civ. Code, §918.
10. Civ. Code, §912, subds. (e) to (i).
11. *Standard Pacific Corporation, supra*, 176 Cal.App.4th at 833-834.
12. Civ. Code, §910, subd. (a).
13. Civ. Code, §913.
14. Civ. Code, §912, subd. (a).
15. Civ. Code, §916, subd. (a).
16. Civ. Code, §916, subd. (c).
17. Civ. Code, §917.
18. Civ. Code, §918.
19. Civ. Code, §918.
20. Civ. Code, §918.
21. Civ. Code, §919.
22. Civ. Code, §919.
23. *Standard Pacific Corp., supra*, 176 Cal.App.4th at 834.
24. Civ. Code, §896, subds. (a) to (g).
25. Civ. Code, §942.
26. Civ. Code, §945.
27. *Aas v. Superior Court*, 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P3d 1125 (2000). See Civ. Code, §944.
28. Civ. Code, §900.
29. Civ. Code, §914.
30. Civ. Code, §914.
31. Civ. Code, §914 (emphasis added).
32. *Anders v. Superior Court, supra*, 192 Cal. App. 4th at 585 (5th Dist. 2011).
33. *Id.*, at 586.
34. *Id.*, at 585.
35. *Id.*
36. *Id.*
37. *Id.*, at 588-589.
38. *Id.*, at 589.
39. *Id.*
40. *Id.*
41. *Id.*, at 589-590.
42. *Id.*, at 590-591.
43. *Id.*, at 591.
44. *Id.*, at 591-592.
45. *Id.*
46. *Id.*, at 592-593.
47. *Pinnacle Museum Tower Assn., supra*, 187 Cal. App. 4th at 40-45; *Thompson v. Toll Dublin, LLC*, 165 Cal. App. 4th 1360, 1371, 81 Cal. Rptr. 3d 736 (1st Dist. 2008); *Villa Milano Homeowners Ass'n v. Il Davorge*, 84 Cal. App. 4th 819, 828, 102 Cal. Rptr. 2d 1 (4th Dist. 2000), as modified on denial of reh'g, (Nov. 27, 2000).
48. Plaintiff's Opposition to Meritage Homes' Motion to Compel Compliance with Prelitigation Procedures and Stay Action; Memorandum of Points and Authorities in support thereof, filed December 3, 2009 (Plaintiffs' Opposition") in *Anders*, at pp. 12-13.
49. Plaintiff's Opposition in *Anders*, at p. 3.
50. Plaintiff's Opposition in *Anders*, at p. 13.

51. *Pinnacle Museum Tower Assn., supra*, 187 Cal. App. 4th at pp. 41; 40-45; *Thompson, supra*, 165 Cal. App. 4th 1371.
52. *Baker v. Osborne Development Corp.*, 159 Cal. App. 4th 884, 71 Cal. Rptr. 3d 854 (4th Dist. 2008).
53. *Bruni v. Didion*, 160 Cal. App. 4th 1272, 73 Cal. Rptr. 3d 395 (4th Dist. 2008), as modified, (Mar. 24, 2008).
54. *See also, Pinnacle Museum Tower Assn., supra*, 187 Cal. App. 4th at pp. 41, 40-45; *Thompson, supra*, 165 Cal. App. 4th 1372-1373.
55. Plaintiff's Opposition in *Anders*, at pp. 3-11.

Miller & Starr Real Estate Newsalert

Managing Editor:	Karl E. Geier
Executive Editor:	Karen Turk
Editor Emeritus:	Edmund L. Regalia
Founding Editors:	Harry D. Miller & Marvin B. Starr
Attorney Editor:	John Frey
Production Assistant:	Cortney Carter
Design & Layout:	Specialty Composition/Rochester DTP

Miller & Starr Real Estate Newsalert (USPS # pending) is issued six times per year, published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at periodic rate is pending as St. Paul, MN. POSTMASTER: Send address changes to: Miller & Starr Real Estate Newsalert, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

The law firm of Miller Starr Regalia, founded by Edmund Regalia, Marvin Starr, and Harry Miller is headquartered in Walnut Creek. Members of the firm have been writing and editing the treatise, Miller & Starr, since shortly after the firm was founded in 1964. Karl E. Geier, a shareholder of the firm, is the current editor-in-chief of the treatise.



**MILLER STARR
REGALIA**

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Nothing contained herein is intended or written to be used for the purposes of: 1) avoiding penalties imposed under the Federal Internal Revenue Code; or 2) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

Subscription information can be obtained by calling (800) 328-4880.

© 2011 Thomson Reuters