



# Construction Law Newsletter

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## Developers Beware

### *SB800 Not Exclusive Remedy for Construction Defect Damages*

By Michael D. Worthing, Esq. and Kyle W. Holmes, Esq.

Adding to the few published opinions interpreting the California Right to Repair Act (Civil Code § 895 et seq., also known as SB 800), the Fourth District Court of Appeal in *Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC*, (2013) 219 Cal.App.4th 98 held that the Act is not the exclusive remedy available to homeowners who suffer actual damages from construction defects, and that common law rights and remedies remain available against a developer.

In *Brookfield*, a residence was damaged when a pipe in the sprinkler system burst. Repairs to the building necessitated that the homeowner be relocated while work was being done. Homeowner's insurer, Liberty Mutual, paid for homeowner's relocation expenses and sued the builder, Brookfield, for its costs in subrogation. The trial court ruled that the subrogee's claims were time barred under the Right to Repair Act. The Appellate Court reversed. The Court reasoned that the Right to Repair Act was passed in response to *Aas v Superior Court*, (2000) 24 Cal.4th 627 and was intended to supplement the remedies available to potential plaintiffs. In *Aas*, the California Supreme Court ruled that construction defects which had not caused actual damage to other components of the structure were not actionable in tort. Rather than wait for defective conditions in residential buildings to cause actual damage, the California Legislature provided an alternative and, according to the Fourth District, supplemental remedy through the Right to Repair Act. The Right to Repair Act permits a plaintiff to recover for allegedly defective conditions based only on a showing of failure to meet specified standards as opposed to actual damage. Since its enactment, it was widely believed that the language of the Act made it the exclusive remedy for construction defect claims for homes sold after January 1, 2003. Indeed, the trial court in *Brookfield* reached this conclusion, and held that Liberty Mutual's subrogation action was untimely. The Fourth District reversed, holding that the Act did not apply to Liberty's cause of action because as a subrogee it had suffered actual damages, and was therefore entitled to bring common law claims outside the applicable time limit under the Act.

A petition for review of *Brookfield* is pending before the California Supreme Court, but if the decision stands, it may be problematic

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because it creates uncertainty for developers, general contractors, and subcontractors, who now cannot rely on the statutes of limitation provided in the Act. Rather these businesses must now guess as to which statutes of limitation to apply to the variety of construction defect claims, parsing the law between the Right to Repair Act and common law remedies. This uncertainty is likely to affect development decisions in the future as businesses and insurers assess the likelihood that companies face litigation for past work which would otherwise have been time barred under the Act.

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