

## Construction Defect Litigation: The Playing Field Has Changed A Navigational Guide to Senate Bill 800

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### Introduction

Senate Bill 800 (CC §§895–945.5; henceforth referred to as SB 800) took effect on January 1, 2003, and it has changed the playing field for construction defect litigation involving new residential property sold on or after January 1, 2003, if a builder wants to take part in it. (All references are to the California Civil Code, unless otherwise stated.) The law is an attempt to make certain defects actionable without the prerequisite of resulting damage, in response to *Aas v Superior Court* (2000) 24 C4th 627, 101 CR2d 718. As such, it is favorable to the homeowner-plaintiff. On the other hand, it gives the builder the right to fix the problem before the homeowner can file suit, which is a remedy that builders have sought for years.

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### ***SB 800 . . . changed the playing field for construction defect litigation involving new residential property.***

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By way of background, in *Aas*, the California Supreme Court ruled that a homeowner could not sue for negligence unless the negligent construction caused resulting damage. The homeowner could still sue for breach of contract and breach of warranty for such negligent construction.

Many groups began to work toward a legislative solution to ensure that homeowners who bought homes with deficient construction had an effective remedy. Builders, on the other hand, wanted to make sure that they had a way to control the number of construction defect claims, and their scope. Many insurers who had previously insured builders were no longer offering coverage because there had been so many lawsuits. The insurance companies applauded the *Aas* ruling, but the legislature wanted to enact legislation that would attract insurers back to this area.

The legislature worked with both the building industry and trial lawyers to devise a law that would give both groups more protection. The result is a law that

establishes extensive new rights, obligations, and remedies, representing a compromise between both groups. The two sides worked right up to the end of the legislative year to obtain this compromise, but the law is not flawless; there are still some ambiguous provisions that will need to be worked out in the real world. The statute is complicated, with numerous deadlines and procedural requirements that must be met if the builder is to preserve its absolute right to fix the claimed defect and prevent the immediate filing of a civil action by the homeowner.

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In general, the new statute:

- Defines construction standards;
- Imposes a mandatory claims procedure;
- Establishes repair procedures; and
- Establishes regulations for litigation of the claims.

The law applies only to new homes intended to be sold as individual dwelling units.

The law allows builders the absolute right, if they wish, to fix defects in new construction sold after January 1, 2003, if the builder has followed the statutory requirements and has provided the required documentation in the sales contract and at the original close of escrow. Homeowners cannot sue under the statute unless they have given the proper notice to the builder and allowed the builder (or an alternate builder chosen by the original builder) to inspect the property and fix the problem if the builder wishes to do so.

The law lists standards for actionable defects that are intended to address every function or component of a structure. The statutory standards cover the following issues: water, structure, soils, fire protection, plumbing and sewer, electrical system, hardscape, walls and siding, manufactured products, heating, air conditioning, noise between attached structures, irrigation and drainage, untreated wood posts, paint and stains, roofing, landscaping, ceramic tiles, and dryer ducts. These standards apply to all subcontractors, material suppliers, product manufacturers, and design professionals. [CC §§896 and 936.](#)

The new law changes many statutes of limitations, shortening some and extending others. There are new statutes of limitations that range from 1 year to 10 years; the old statutes of limitations for patent and latent defects do not apply to the standards established in the statute.

Claims for damages not covered by the new statute are not limited by the new limitation periods in the statute.

The new statute apparently will not apply to custom homes built specifically for an owner of a piece of real property who contracts to have a home built. The statute applies only to the *sale of new construction*. As a result, lawyers representing homeowners and contractors should consider whether their clients want to contractually “opt in” to the new law. The new standards are a benefit to the homeowner, but the homeowner may not want to be subject to the repair remedy. If the parties wish to incorporate the statutory scheme into their relationship, they will need to provide for it in the contract.

One major problem results from the statute’s definition of “builder,” which is defined as “a builder, developer, or original seller” of new construction sold after January 1, 2003. [CC §911](#). Unfortunately, this definition will create some practical problems. If a general contractor is hired by a developer, the definition would apply to both the developer and the general. However, to rely on the protections of this statute, the “builder” is required to provide certain notices and documents at the close of escrow. In the case of a general contractor who is not the seller, how will this requirement be met? Similarly, a homeowner in this situation would need to give notice to both the general and the developer, and both would have the right to repair, but which party’s right has priority? Another difficult situation will result when an owner obtains a permit as an “owner/builder.” Who now is the builder? Are all of the subcontractors “builders”?

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***[A] troublesome area is whether material compliance with . . . building codes and regulations is a “safe harbor” and an absolute defense.***

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A second troublesome area is whether material compliance with design criteria set by applicable government building codes and regulations is a “safe harbor” and an absolute defense against claims based on structural and fire protection defects established by the new law. The defense bar will undoubtedly so argue, but the law does not specifically establish this defense. Instead, the law states only that the home shall be designed in this manner, thus imposing yet another requirement on the builder and the design professionals. In addition, the phrase “materially comply” is ambiguous and will generate extensive debate among experts on both sides.

A third set of potential issues arises if the homeowner elects to use an alternate contractor to perform the statutory repairs. The statute provides that a “builder’s”

successful repair is an affirmative defense to a civil action. [CC §945.5\(g\)](#). But what if the homeowner is dissatisfied with the repairs or the original contractor fails to pay the alternate contractor? (Although the statute does not expressly cover the point, presumably the original builder must compensate the alternate contractor for the repair, which exposes the homeowner to a mechanic’s lien arising from a relationship over which he or she has no control.) The issues of the quality of the third party’s repair and payment for the repair will be faced in three potential actions: (1) between the original contractor and the alternate contractor involving contractual issues of payment; (2) between the homeowner and the alternate contractor involving the homeowner’s claims of defective repair and the alternate contractor’s enforcement of a mechanic’s lien; and (3) between the homeowner and the original builder, who must rely on the quality of the alternate contractor’s repair to establish the affirmative defense. Should such actions be consolidated? If not, does each party face potential collateral estoppel, depending on the findings in the respective actions? A homeowner faced with a mechanic’s lien recorded by a contractor that was performing a statutory remedy may assert that it is unconscionable to allow a lien under those circumstances. The new relationship was intended to solve an existing legal problem, not create a new one.

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***Another . . . question is whether general liability insurance covers the new construction standards.***

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Other issues may also arise: Does the homeowner have any contractual relationship with the alternate contractor? What direct rights, if any, does the homeowner have against the alternate contractor? What role, if any, does the original builder have in the repair work? The statute requires the builder to “ensure” that the repair work is performed diligently, but will the original builder be viewed as an indemnitor of the work? It is not unreasonable to expect that the homeowner will attempt to hold both contractors responsible for defective repairs and that the two contractors will seek indemnification from one another, based on each of the contractor’s alleged contributing fault. The number and variety of procedural and contractual issues that can be imagined from the introduction of the alternate contractor are endless. The statute does not address any of them, except to the extent that a “successful repair” by the builder is an affirmative defense.

Another practical question is whether general liability insurance covers the new construction standards. [SB 800](#) does not overrule or in any way limit the *Aas* decision.

Therefore, a homeowner still cannot assert a cause of action for negligence in the absence of resulting damage. *Aas* stated that the homeowner could still sue for breach of express warranty or breach of contract, both of which are usually not insurable. It is still too early to know how insurers will treat claims brought under [SB 800](#).

The outline on page 108 is intended as a reference guide to the provisions of [SB 800](#). The new statute consists of four specific, and somewhat independent, sections:

- The construction standards for actionable defects;
- The “fit and finish warranty” and related enhanced protection agreement provisions;
- The pre-litigation claims and repair procedure, including additional obligations on the builder; and
- The procedures that apply to civil litigation.

Each section has its own complexities. The outline will help to keep the statute’s internal organization straight, which, in turn, will assist the practitioner in interpreting the various provisions, identifying those that are and are not dependent on other sections of the statute, and identifying the procedural requirements that apply.

The new playing field has three clear landmarks. First, homeowners with construction defect claims on property covered by the statute must follow its claim procedures; they cannot go directly to the courthouse. Second, builders and other professions and trades on the other side of the statute can ignore the homeowner’s claim, if they like, but they will not be able to take advantage of the remedies offered in the statute and they will likely find themselves in a traditional lawsuit. Third, if builders intend to take advantage of the new statute, they must comply with its procedural requirements.

## Navigating the Minefield

### Senate Bill 800: Civil Code §§895–945.5

#### I. STANDARDS: ACTIONABLE DEFECTS (§896)

##### A. Scope (§§895, 896, 897, 911)

1. Applicable to all actions for damages involving the sale of new residential construction on or after January 1, 2003, related to deficiencies in residential construction, design, specifications, surveying, planning, testing, or observation.
2. Builders' and others' liability and any causes of action limited to violation of specified statutory standards.
3. Applicable to original construction of individual dwelling units.
4. Focus on practical function.

##### B. Standards

1. Statutory standards intended to address every function or component of a structure (even if not specifically addressed; anything that causes damage shall be actionable) (§897).
2. Categories of statutory standards and special statutes of limitations:
  - a. "Water Issues" (§896(a))
    - (1) Does not specify prerequisite of resulting damage.
    - (2) Water shall not get into the home.
  - b. "Structural Issues" (§896(b))
    - (1) Shall not contain significant cracks or significant vertical displacement or be structurally unsafe.
    - (2) Do subsections (b)(3) and (b)(4) create a safe harbor and affirmative defense (*i.e.*, if the home is designed and constructed so as to "materially comply" with building codes)?
  - c. "Soil Issues" (§896(c))

Shall not cause damage to the structure, cause the structure to be unsafe, or cause land to be unusable.
  - d. "Fire Protection Issues" (§896(d))
    - (1) Shall be constructed to materially comply with building codes.
    - (2) Shall not cause an unreasonable risk of fire outside the fireplace or chimney.
    - (3) Electrical and mechanical systems shall not cause an unreasonable risk of fire.
  - e. "Plumbing and Sewer Issues" (§896(e))
    - (1) Shall not unreasonably impair the use of the structure.
    - (2) New statute of limitations: 4 years from close of escrow.
  - f. "Electrical System Issues" (§896(f))
    - (1) Shall not unreasonably impair the use of the structure.
    - (2) New statute of limitations: 4 years from close of escrow.
  - g. "Other Areas of Construction" (§896(g)(1)–(14))
    - (1) Hardscape

- (a) Shall not contain excessive cracks or cracks displaying vertical displacement.
- (b) New statute of limitations: 4 years from close of escrow.
- (2) Walls and siding shall not contain significant cracks or separation.
- (3) Manufactured products (includes windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, and appliances)
  - (a) Shall be installed so as not to interfere with the product's useful life as represented by the manufacturer or, if no representation, with the product's utility.
  - (b) "Useful life" cannot be less than one year.
- (4) Heating systems must be capable of maintaining room temperature of 70 degrees three feet above floor.
- (5) Air-conditioning systems must comply with [Title 24 of Cal Code Regs](#) or successor law.
- (6) Noise between attached structures
  - (a) Compliance with applicable building code governing interunit noise transmission; if no code, section does not apply.
  - (b) New statute of limitation: 1 year from occupancy of adjacent unit.
- (7) Irrigation and drainage
  - (a) Shall not damage landscaping or other external improvements.
  - (b) New statute of limitation: 1 year from close of escrow.
- (8) Untreated wood posts
  - (a) Shall not be installed in contact with soil so as to cause unreasonable decay.
  - (b) New statute of limitation: 2 years from close of escrow.
- (9) Untreated steel fences
  - (a) Shall be installed so as to prevent unreasonable corrosion.
  - (b) New statute of limitation: 4 years from close of escrow.
- (10) Paint and stains
  - (a) Shall be applied so as not to cause deterioration of the building surface for the period specified by manufacturer.
  - (b) New statute of limitation: 5 years from close of escrow.
- (11) Roofing materials shall be installed to avoid materials falling from roof.
- (12) Landscaping systems

- (a) Shall be installed to survive for 1 year.
- (b) New statute of limitation: 2 years from close of escrow.
- (13) Ceramic tile and backing shall be installed so that tile does not detach.
- (14) Dryer ducts
  - (a) Shall be installed and terminated pursuant to manufacturer's requirements.
  - (b) New statute of limitation: 2 years from close of escrow.
- h. Catch-All (§896(g)(15))
 

The residence shall be constructed in such a manner so as not to impair safety, as defined.

## II. OBLIGATIONS (§§900–907)

### A. Fit and Finish Warranty (§900)

- 1. Builder shall provide homeowner with minimum one-year written limited “fit and finish” warranty.
- 2. Scope: cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim.
- 3. Not applicable to damage to those components caused by defects in other components.
- 4. “Fit and Finish Warranty” matters are not subject to the new law.
- 5. Failure to provide warranty: statutory one-year warranty imposed.

### B. Enhanced Protection Agreement (EPA) (§§901–906)

- 1. Builder may offer greater protection or protection for longer period than standards by written “Enhanced Protection Agreement,” but cannot offer less or limit application (§901).
- 2. If EPA in place, §896 standards do not apply, except as minimum standard (§902).
- 3. Builder's election to provide EPA (§903)
  - a. Must elect in writing no later than close of escrow, as defined in §895(e).
  - b. Must provide homeowner with complete copy of Chapter 2 (*i.e.*, §§896, 897) and give notice to homeowner that builder has elected not to be subject to its provisions.
- 4. Homeowner's right to dispute or enforce Chapter 2 standards (§904)
  - a. Homeowner may seek to enforce statutory standards if homeowner disputes that the protections or the time periods in EPA are not greater than or equal to statute. Homeowner shall give written notice to builder of that intent when homeowner files notice of claim pursuant to statute.
  - b. Builder has the right to bifurcate this issue and is entitled to expedited, binding determination of the application of the statute or EPA within 60 days of filing pleadings, and no later than the beginning of discovery (§905).
    - (1) Builder should demand right and raise issue in responsive pleading.

- (2) Failure to seek determination constitutes waiver. Standards then apply.
5. Non-Original Homeowner (§905)  
Privity with builder for EPA ONLY if:
  - a. Builder recorded EPA or
  - b. Provided actual Notice of EPA to Non-Original Homeowner
6. EPA affects only Chapter 2 standards; does not constitute an election to use or not to use provisions of Chapter 4 (§§910–938) (§906).
- C. Homeowner Maintenance Obligation (§907)
  - a. Homeowner must follow reasonable maintenance obligations (from both product manufacturer and builder) and schedules communicated in writing to homeowner by builder.
  - b. Builder shall provide reasonable maintenance guidelines to homeowner at close of escrow (§912(b)).
  - c. Homeowner's failure to meet maintenance obligations subjects homeowner to affirmative defense in §944

### III. PRE-LITIGATION PROCEDURES (§§910–938)

- A. Chapter establishes Non-Adversarial Procedure (NAP) (§914)
  1. Builder's election: Notice to homeowner at execution of sales agreement whether builder intends to engage in statutory NAP or other alternative nonadversarial contractual provision.
  2. Builder's election is binding, notwithstanding whether alternative NAP successful or enforceable; cannot require both.
  3. New law does not affect existing statutory or decisional law on alternative dispute resolution (beware of enforceability issues if builder elects contractual NAP) (§914(b)).
- B. Homeowner Claim Process
  1. Condition precedent to civil litigation (§910); builder may file motion to stay any premature civil action, and recover attorney fees and costs (§930(b)).
  2. Written notice of claim (§910(a))
    - a. Service: certified mail, overnight mail, personal delivery.
    - b. Contents:
      - (1) Name, address, and preferred method of contact;
      - (2) If a homeowner association, shall include addresses of affected units/homes;
      - (3) Statement that claimant alleges a violation of the statute by builder; and
      - (4) Description of claim in reasonable detail sufficient to determine the nature and location, to extent known, of claimed violation.
    - c. Compliance with customer service procedure in builder-generated contract or warranty will not satisfy the notice requirements (§910(b)).
    - d. Service of this document has the same force and effect as a notice of commencement of a legal proceeding.
  3. If the applicable statute of limitation runs during process, time period for filing claim can be extended as follows (§927):

- a. If builder conducts a repair, 100 days after repair is completed (regardless of what is being repaired); if mediation is requested after repair, then 100 days or the next court date after the mediation, whichever is later (CC §928);
  - b. If builder does not acknowledge the claim within the time specified or fails to timely request an inspection, 45 days after the time period to respond to the initial claim;
  - c. If builder requires the use of alternative NAP, 100 days after the NAP is concluded or 100 days after the alternative NAP is deemed unenforceable.
4. In case of subsequently discovered claims of unmet standards, homeowner must comply with statute again unless the subsequently discovered violation is for a violation of a standard that is already the subject of a claim and pending action (§932).
- C. Builder's Response (§§912, 913, 915, 916, 925, 930 (and see §920))
- 1. Acknowledge receipt of claim in writing within 14 days after receipt. Include homeowner's attorney in all subsequent communications, if disclosed on claim or in written notice (§913).
  - 2. Failure to acknowledge receipt or respond:
    - a. Homeowner released from NAP ("this chapter") if builder:
      - (1) Fails to timely acknowledge receipt (§915);
      - (2) Elects not to pursue process (§915);
      - (3) Fails to request inspection within required time, or at conclusion of alternative NAP (§915);
      - (4) Fails to inspect property within specified time requirements (§916(d));
      - (5) Fails to finish repair within time specified (§925);
      - (6) Fails to comply with requirements of "chapter." (§930(a));

or

      - (7) Fails to provide documents and perform other duties (§912).
    - b. Time limits strictly construed and can be extended only by mutual agreement of the parties (§930(a)).
  - 3. Inspection process (§916)
    - a. Builder may elect inspection of claimed violations.
    - b. Builder must complete "initial inspection" within 14 days of acknowledgement of receipt of claim.
      - (1) Inspection time must be mutually convenient, including for attorney;
      - (2) Builder must provide written proof of insurance to cover damages or injuries during inspection and testing;
      - (3) Builder must restore property to pre-testing condition within 48 hours;
      - (4) Builder shall allow, on request, observation and electronic recording, videotaping, or photographing by claimant or representative.
    - c. Optional second inspection or testing (§916(c))
      - (1) Builder must specify reasons within 3 days following initial inspection;

(2) Must complete second inspection within 40 days of initial inspection;

d. Notice to subcontractors, etc. (§916(e))

(1) If builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier responsible, must provide sufficient notice to allow them to attend inspection. (Note: Beware of short time periods and need for prompt notification to third parties). This subdivision does not apply to builder's insurer.

(2) Builder must provide notice to homeowner and attorney of identities of all who will attend inspection.

D. Offer to Repair (§917)

1. Builder may, within 30 days of initial or second inspection, offer in writing to repair.

a. Offer must include:

(1) Compensation for all damages recoverable under §944;

(2) Specific details of violations, nature and scope of repair, reasonable completion dates, and names of contractors builder will be using for repairs;

(3) Technical documentation on request of homeowner;

(4) Notice of homeowner's right to request up to three additional contractors to perform repairs;

b. Must include offer to mediate (§919).

*NOTE:* Mediations are limited to four hours duration and must take place within 15 days after receipt of request to mediate. (§§919, 928))

2. Homeowner's optional responses to builder's offer to repair (§918)

a. Homeowner has 30 days to authorize builder to proceed; or

b. Homeowner may request three alternative contractors

(1) Builder then has right to additional noninvasive inspection;

(2) Additional inspection must occur at mutually convenient time within 20 days of homeowner's election to obtain additional names.

(3) Builder must present names of alternative contractors within 35 days of request.

c. Within 20 days after "presentation," homeowner shall authorize builder or one of alternative contractors to perform the repair.

3. Homeowner entitled to file civil action if builder (§920):

a. Fails to make repair offer;

b. Fails to "otherwise strictly comply" with chapter within specified time limits; or

c. Fails to complete repairs in time or manner specified.

4. Resolution by builder's repair (§921)

a. Builder shall make appointment, and

(1) Make all arrangements to effectuate repair;

(2) Compensate homeowner for damages;

(3) Commence repairs on mutually convenient date within 14 days of acceptance, or, if alternative contractor used, within 14 days of

selection, or if a mediation occurs, within 14 days of the mediation, or within 5 days after a permit is obtained;

(4) Act with utmost diligence to complete as soon as reasonably possible, making every effort to complete with 120 days (§921(b)).

(5) Upon request, allow observation and electronic recording, videotaping, or photographing of repair (§922).

(6) Upon request, shall provide all correspondence, photographs, and other materials pertaining to or relating to the repair (§923).

(7) Builder may not obtain a release or waiver of any kind in exchange for the repair. At conclusion, homeowner is free to sue for inadequacy of repair (§926).

b. If builder decides to repair only some of the items, builder shall, at the time it makes the offer to repair, set forth with particularity in writing the reasons for not repairing all items (§924).

c. Post repair mediation (§928)

If repair completed before action is filed, and there has been no prior mediation, homeowner shall request mediation in writing, subject to statutory limits (limited to four hours; shall occur within 15 days after request; builder selects and pays for mediator).

E. Builder's Cash Offer in Lieu of Repair (§929)

1. Nothing prohibits negotiation or offer of cash settlement.

2. Builder may obtain a reasonable release in exchange for cash payment (§929(b)).

F. Builder's Obligations (Beyond Claim/Inspection/Repair Procedures)

1. Notices and elections

a. Written election of offer of EPA by close of escrow (§903).

Must be accompanied by complete copy of "Chapter 2"

b. "Actual notice" to non-original homeowner of EPA (§905)

Builder may record EPA as alternative to actual notice

c. Provide maintenance obligations and schedules in writing (§§907, 912(b), 945)

d. Written notice to homeowner of election to use third party agent (§912(e))

Name and address must be included in original sales documentation and shall be initialed and acknowledged by purchaser and builder's representative.

e. Written notice to homeowner of statutory procedures and notice of impact on legal rights (§912(f))

Notice shall be included in original sales documentation and shall be initialed and acknowledged by purchaser and builder's representative.

f. Notice to homeowner to provide original sale documents to subsequent purchaser (§912(h))

g. Notice to homeowner at time of sale of intent to engage in statutory or alternative NAP (§914)

2. Copies of documents

- a. The “Section 912” Requirements
  - (1) Copies of all relevant plans, specifications, mass or rough grading plans, final soils reports, DRE reports, and available engineering calculations (§912(a))
    - (a) To homeowner within 30 days of request
    - (b) Document copying procedures are specified
  - (2) Copies of all maintenance and preventative maintenance recommendations (§912(b))
    - (a) To homeowner or representative within 30 days of request, and
    - (b) To homeowner “in conjunction with” initial sale.
  - (3) Copies of all manufactured products maintenance, preventive maintenance, and limited warranty information (§912(c))
    - (a) To homeowner or representative within 30 days of request; and
    - (b) To homeowner “in conjunction with the initial sale.”
  - (4) Copies of all builder’s contractual limited warranties in effect at time of sale (§912(d))
    - (a) To homeowner or representative within 30 days of request; and
    - (b) To homeowner “in conjunction with” initial sale.
  - (5) Written copy of “this part” of statute (§912(g))
    - (a) To homeowner with the original sales documentation; and
    - (b) Shall be initialed and acknowledged by purchaser and builder’s representative.
    - (c) “This part” should be “this title” (*i.e.*, §§896–945.5)
3. Recording of documents
  - a. Enhanced Protection Agreement (§905) (for builder’s privity with subsequent purchaser)
  - b. Notice of existence of statutory procedures and notice that procedures impact legal rights of homeowner (§912(f)) (also must be included in original sales documentation; see above)
4. Include homeowner’s counsel in communications
  - a. Provide counsel with copies of documents under §912(a)–(d)
  - b. Include counsel in all subsequent communications during claims process and any subsequent process (§913)
5. Provide written limited fit and finish warranty (see above) (§900)
6. Maintain agent for notice with secretary of state (§912(e))
 

As alternative, builder may elect to use third party—notice and acknowledgement requirements (see above)

#### IV. LITIGATION PROCEDURES

##### A. Homeowner’s Burden of Proof

Homeowner need only demonstrate that home does not meet applicable statutory standard. No showing of causation or damages required to meet burden of proof, provided violation arises out of original construction (§941(e)).

B. Statute of Limitations

1. 10 years after substantial completion of improvements (no later than recordation date of valid notice of completion) (§941(a)).

2. Actual possession and control exception: Limitation period shall not be asserted by a person if that person is in actual possession or control “at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action.” (§941(c))

3. 4-year and 10-year limitation periods of CCP §§337.1 and 337.15 for patent and latent defects, respectively, do not apply (§941(d)).

C. Limitation on Causes of Action

No other cause of action for a claim covered by the statute or for damages covered is allowed (§942(a)).

D. Measure of Damages—Limitation (§944)

1. Homeowner entitled “only” to:

- a. Reasonable value of repairing violation;
- b. Reasonable cost to repair damage occurring during repair efforts;
- c. Reasonable cost to repair and rectify damage resulting from failure of home to meet standards;
- d. Reasonable cost of removing and replacing improper repair;
- e. Reasonable relocation and storage expenses;
- f. Lost business income if home was licensed principal place of business;
- g. Reasonable investigative costs;
- h. All other fees or costs recoverable by contract or statute.

2. Detached Single Family: “Reasonable value of repairing” is repair cost or diminution in current value caused by nonconformity, whichever is less, subject to personal use exception under common law (§942(b)).

E. Affirmative Defenses (§945.5)

All applicable affirmative defenses are preserved as to any causes of action to which statute does not apply:

1. Unforeseen act of nature.
2. Homeowner’s unreasonable failure to minimize or prevent damages in timely manner.
3. Failure to follow recommendations or commonly accepted homeowner maintenance obligations. (Builder’s written notice to homeowner of recommended maintenance schedule is condition for reliance on this affirmative defense.)
4. Alteration, ordinary wear and tear, misuse, abuse or neglect, or use of structure for unintended purpose.
5. Time period for filing actions bars claim.
6. Valid release.
7. Successful repair.

F. Evidence

1. Inspection and Testing—Nothing that occurs may be used to support spoliation defense in subsequent litigation (§916(b)).
2. Repair Process—Nothing that occurs may be used to support spoliation defense in subsequent litigation (§922).
3. Parties' conduct during "this process" (§934)
  - a. Admissible in subsequent enforcement action, except mediation.
  - b. Builders' repair efforts are not to be considered settlement communications or offers of settlement, and are not inadmissible on such basis.
4. Causes of action not subject to statute - evidence of property in unrepaired condition admissible to prove respective elements.

Fraud cause of action: If the fact that property has been repaired under the statute is deemed admissible, trier of fact shall be informed that repair was not voluntarily accepted by homeowner (§931).
5. Proceedings to enforce standards:
  - a. Prior repair effort is admissible; but claimant may use condition preceding repair as basis for contending repair inappropriate, inadequate or incomplete, or that violation still exists (§933).
  - b. Evidence of both parties' conduct during the process may be introduced during subsequent action, with the exception of mediation (§934). NOTE: It appears making a cash offer outside of mediation would be admissible.

**V. NEW STATUTE OF LIMITATIONS**

<b>Item</b>	<b>Time Limit (Code Section)</b>
All standards unless stated otherwise	10 years after substantial completion (§941)
Plumbing and sewer systems	4 years from close of escrow (COE) (§896(e))
Cracks in pathways, driveways, hardscape, sidewalls, sidewalks and patios	4 years from COE (§896(g)(1))
Noise for attached units	1 year from original occupancy of adjacent unit (§896(g)(6))
Irrigation and drainage system	1 year from COE (§896(g)(7))
Decay of untreated wood posts	2 years from COE (§896(g)(8))
Corrosion of untreated steel	4 years from COE (§896(g)(9))
Deterioration of building surface due to paint/stain	5 years from COE unless shorter time specified by manufacturer (§896(g)(10))
Landscaping systems	2 years from COE (§896(g)(12))
Dryer ducts	2 years from COE (§896(g)(14))

*NOTE:* Fit and Finish Warranties are for a period of one year, the Enhanced Protection Agreement cannot be less than the period of the statutory Fit and Finish Warranty, and the “Useful Life” of a manufactured product may not be less than one year. These are not statutes of limitations, but they should be noted. See §§896(g)(3)(D), 900, and 901.

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