

# WSHB Case Law Update

## Home Builders Beware: Contractual Alternative Nonadversarial Procedures Found to be Unconscionable will Result in a Waiver of the Right to Repair

### *Anders v. Superior Court of Stanislaus County (Meritage Homes) (February 7, 2011)*

The California Fifth Appellate District Court of Appeal recently handed down a decision which significantly impacts a home builder's right to repair construction defects.

#### Facts

In the *Anders* case, Plaintiffs were the owners of 54 single family residences constructed in Stanislaus County who sued their home builder for construction defects. Of the 54 homeowners, 52 were either original purchasers or subsequent purchasers for which the original purchase and sale contracts and warranty documents set forth alternative nonadversarial pre-litigation procedures in lieu of the statutory procedures set forth in SB 800 (*Civil Code* §§ 910-938.) Without first complying with either the agreed-to contractual alternative nonadversarial procedures or the statutory SB 800 procedures, Plaintiffs commenced litigation, alleging multiple violations of the standards for residential construction set forth at *Civil Code* § 896. The home builder defendant moved to stay the action and compel compliance with the contractual alternative nonadversarial procedures, arguing that, prior to the commencement of any litigation, all Plaintiffs were first required to attempt to resolve

their respective disputes through the agreed-to contractual pre-litigation dispute protocol set forth in the sales documents.

At the hearing on defendant's motion, the trial court determined the alternative pre-litigation requirements set forth in the sales documents were unconscionable and, therefore, unenforceable against Plaintiffs. Notwithstanding this determination, the trial court found that the home builder made only a qualified election to use the alternative contractual pre-litigation requirements and ruled that the case thus defaulted into the pre-litigation requirements of SB 800. The trial court ordered the case stayed and ordered the parties to comply with the statutory pre-litigation requirements of SB 800. Plaintiffs filed a writ of mandate seeking review of the trial court's order. On appeal, Plaintiffs contended that a home builder's election to utilize alternative nonadversarial pre-litigation procedures in the purchase documents was a binding election and precluded the home builder from seeking to use the SB 800 procedures as a fall-back or default protocol in the event a court found the alternative procedures unenforceable.

## Holding

On appeal, the Fifth District focused on a strict interpretation of *Civil Code 914* and found that contractual alternative pre-litigation procedures cannot be qualified such that, in the event they are found unenforceable, the parties default into the statutory procedures. Section 914(a) states in pertinent part:

"This chapter establishes a nonadversarial procedure. . . A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, *but may not, in addition to its own nonadversarial contractual provisions, require adherence to the nonadversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable.*" (Italics added)

In so doing, the Court of Appeal held that a home builder may elect to choose its own alternative nonadversarial pre-litigation procedures, but if such are deemed unenforceable, the homeowner is released from the requirements of SB 800 and may proceed directly with litigation. Specifically, the court wrote:

"A builder who elects to use alternative pre-litigation procedures in lieu of those set out in the statute has the right to attempt repairs, so long as it does so pursuant to procedures that are fair and enforceable. *If, however, the builder imposes procedures that are found to be unenforceable, it forfeits its absolute right to attempt repairs.* It may still offer to repair any defects, but the homeowner is not bound to accept the offer or to permit the builder to attempt the repairs prior to litigation. The builder thus has an incentive to ensure its alternative procedures are proper and enforceable, and the homeowners' pro-

tection against unnecessary delay is preserved." (Italics added)

## Issues Left Unresolved

The Court of Appeal did not discuss the issue of what constitutes an unconscionable or unenforceable set of alternative nonadversarial pre-litigation procedures, nor did it discuss the potential scenario in which there are alternative pre-litigation procedures which are arguably unconscionable, but the home builder does not seek to enforce them. Two questions remain unanswered. First, in such a case where the alternative nonadversarial pre-litigation procedures are arguably unconscionable, can the home builder forgo seeking compliance with the alternative pre-litigation protocol by only seeking to enforce the statutory pre-litigation procedures set forth in SB 800? Also, can Plaintiffs circumvent the pre-litigation dispute resolution process by alleging in the complaint that the contractual nonadversarial procedure is unconscionable?

It is certain, however, that as the SB 800 process matures, home builders will see a variety of challenges to their absolute right to repair. With more and more plaintiffs seeking damages over repairs and continuing to seek damages even where repairs have been performed, it is critical for a home builder not only to ensure strict compliance with SB 800 once a claim is made, but such compliance must also begin at the initial stages of developing the project.



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