

McMillin Albany LLC v Superior Court 1/18/18
Construction Defect; Right to Repair Act (Civil Code §§ 910–938.);
Pre-litigation Requirements for Claims against Builders

Plaintiffs Carl and Sandra Van Tassel and several dozen other homeowners (collectively the Van Tassels) purchased 37 new single-family homes from developer/general contractor McMillin Albany LLC (McMillin) at various times after January 2003. In 2013, the Van Tassels sued McMillin, alleging the homes were defective in nearly every aspect of their construction, including the foundations, plumbing, electrical systems, roofs, windows, floors, and chimneys. The operative first amended complaint included common law claims for negligence, strict product liability, breach of contract, and breach of warranty, and a statutory claim for violation of the construction standards set forth in section 896. The complaint alleged the defects had caused property damage to the homes and economic loss due to the cost of repairs and reduction in property values.

As the builder, McMillin approached the Van Tassels seeking a stipulation to stay the litigation so the parties could proceed through the informal process contemplated by the Right to Repair Act. (Civil Code §§ 910–938.) That process begins with written notice from the homeowner to the builder of allegations that the builder’s construction falls short of the standards prescribed by the Act.

(§ 910.) The builder must acknowledge receipt (§ 913) and thereafter has a right to inspect and test any alleged defect (§ 916). Following any inspection and testing, the builder may offer to repair the defect (§ 917) or pay compensation in lieu of a repair (§ 929). The Act regulates the procedures for any repair, authorizes mediation, and preserves the homeowner's right to sue in the event the repair is unsatisfactory and no settlement can be reached. (§§ 917–930.) For the purposes of this title, “builder” does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. For purposes of this title, these nonaffiliated general contractors and nonaffiliated contractors shall be treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals. (Civil Code, §911.)

The Van Tassels elected not to stipulate to a stay and instead dismissed their section 896 claim. McMillin moved for a court-ordered stay. (§ 930, subd. (b)) In response, the Van Tassels argued that because the complaint now omitted any claim under the Act, the Act's informal prelitigation process did not apply. The Van Tassels

cited *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98, 101, which held that the Act was adopted to provide a remedy for construction defects causing only economic loss and did not alter preexisting common law remedies in cases where actual property damage or personal injuries resulted.

The trial court denied the motion for a stay. It observed that the issues decided in *Liberty Mutual* might be the subject of further appellate inquiry, but concluded it was bound to follow the case. Recognizing that the question was not free from doubt, the trial court certified the issue as one worthy of immediate review. (Code Civ. Proc., § 166.1.) McMillin sought writ relief.

The Court of Appeal granted the petition and issued the writ, disagreeing with *Liberty Mutual* and another case that had followed it, *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411. The court examined the text and history of the Act and concluded that the Act was meant to at least partially supplant common law remedies in cases where property damage had occurred. In the Court of Appeal's view, "the Legislature intended that all claims arising out of defects in residential construction" involving post-2003 sales of new houses "be subject to the standards and the requirements of the Act." Accordingly, the Court of Appeal held the Act's prelitigation

resolution process applied here even though the Van Tassels had dismissed their statutory claim under the Act. The court concluded that McMillin is entitled to a stay pending completion of the prelitigation process.

As explained below, the statute here leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. (§ 943, subd. (a).) In other areas, however, the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 632), the Act supplies a new statutory cause of action for purely economic loss (§§ 896–897, 942–944). And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act.

Justice Liu begins the Court's unanimous opinion with the text of the Act, which "comprehensively revises the law applicable to construction defect litigation for individual residential units" within

its coverage. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 382, fn. 16.) The Act adds title 7 to division 2, part 2 of the Civil Code. (§§ 895–945.5.) The Act sets forth detailed statewide standards that the components of a dwelling must satisfy. **It also establishes a pre-litigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury.**

Section 896, which codifies a lengthy set of standards for the construction of individual dwellings, begins with a preamble describing the intended effect of those standards. As relevant here, the preamble says: “In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder . . . shall, except as specifically set forth in this title, be liable for, and the claimant’s claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. **This title applies to original construction intended to be sold as an individual dwelling unit.** As to condominium conversions, this title

does not apply to or does not supersede any other statutory or common law.” (§ 896.)

Three aspects of this text are instructive. First, the provision **applies to “any action” seeking damages for a construction defect**, not just any action under the title. (§ 896.) This suggests an intent to create not merely *a* remedy for construction defects but *the* remedy. Second, “the claimant’s claims or causes of action shall be limited to violation of the following standards, except as specifically set forth in this title.” This express language of limitation means that a party seeking damages for a construction defect may sue for violation of these standards, and *only* violation of these standards, unless the Act provides an exception. This clause evinces a clear intent to displace, in whole or in part, existing remedies for construction defects. Third, “this title applies to original construction intended to be sold as an individual dwelling unit,” but “as to condominium conversions, this title does not apply to or does not supersede any other statutory or common law.” The Act governs claims concerning stand-alone homes; for such disputes, the Act’s provisions do “supersede any other statutory or common law” except as elsewhere provided.

The Court turns next to chapter 5 (§§ 941–945.5), which contains key provisions governing the damages recoverable in an action under

the Act and the extent to which the Act provides the exclusive vehicle for recovery of such damages. The Legislature was well aware of the main categories of damages involved in construction defect actions (economic loss, property loss, death or personal injury) and their treatment under existing law. The major stakeholders on all sides of construction defect litigation participated in developing the Act. The Legislature also expressly considered *Aas* and its rule requiring property damage or personal injury, not just economic loss, for any tort suit alleging a construction defect. Informed by the various stakeholders' concerns, the Legislature enacted provisions that reflect a conscious effort to address how and when various categories of damages would be recoverable going forward.

The provisions of chapter 5 make explicit the intended avenues for recouping economic losses, property damages, and personal injury damages. Section 944 defines the universe of damages that are recoverable in an action under the Act. (§ 944) In turn, section 943 makes an action under the Act the exclusive means of recovery for damages identified in section 944 absent an express exception:

“Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed.” (§ 943, subd. (a).) In other words, **section 944 identifies what damages *may* be recovered in an action under the Act, and**

section 943 establishes that such damages *may only* be recovered in an action under the Act, absent an express exception.

The list of recoverable damages in section 944 and the list of exceptions in section 943 have different consequences for recovery of economic losses, personal injury damages, and property damages:

Economic Loss. As noted, before the Act, tort recovery of purely economic losses occasioned by construction defects was forbidden by this court's decision in *Aas*. (*Aas, supra*, 24 Cal.4th at p. 632.) **Section 944 now specifies that various forms of economic loss are recoverable in an action under the Act.** (§ 944) Consequently, a party suffering economic loss from defective construction may now bring an action to recover these damages under the Act without having to wait until the defect has caused property damage or personal injury.

Personal Injury. In contrast, personal injury damages are not listed as a category recoverable under the Act. (§ 944.) This omission places personal injury claims outside the scope of section 943, subdivision (a), which makes an action under the Act the exclusive remedy for those damages listed in section 944. To make the point even clearer, the Legislature also included personal injury claims in a

list of claims that are exempt from the exclusivity of the Act. (§§ 931)
Thus, common law tort claims for personal injury are preserved.

Property Damage. As with economic losses, the Act expressly includes property damages resulting from construction defects among the categories of damages recoverable under the Act. (§ 944) This places claims involving property damages within the purview of section 943, subdivision (a), which makes a claim under the Act the exclusive way to recover such damages. And unlike personal injury claims, negligence and strict liability claims for property damages are not among the few types of claims expressly excepted from section 943's exclusivity. (§ 943, subd. (a))

To sum up this portion of the statutory scheme: For economic losses, the Legislature intended to supersede *Aas* and provide a statutory basis for recovery. For personal injuries, the Legislature preserved the status quo, retaining the common law as an avenue for recovery. And for property damage, the Legislature replaced the common law methods of recovery with the new statutory scheme. **The Act, in effect, provides that construction defect claims not involving personal injury will be treated the same procedurally going forward whether or not the underlying defects gave rise to any property damage.**

Among several arguments, the Van Tassels read section 897 as providing that any defect covered by that section can form the basis of a suit under the common law rather than under the Act. Again, the statutory text and context do not support this reading. Were the Justices to agree with the Van Tassels that a defect standard based on damage causation reflects a legislative intent to preserve a common law claim for such defects, this would create difficulties in applying section 896. That section measures defectiveness for some but not all building components by whether damage was caused and, under the Van Tassels' reading, would support a common law claim for some but not all standard violations. Had the Legislature intended such a selective preservation of common law remedies, the Supreme Court notes it would have said so, as it did elsewhere.

The legislative history of the Act confirms that displacement of parts of the existing remedial scheme was no accident, but rather a considered choice to reform construction defect litigation.

First, language in the Legislature's analyses of the Act's effects reflects an intent that the Act would govern not only no damage cases, but cases where property damage had resulted. The Act's standards were designed so that "except where explicitly specified

otherwise, liability would accrue under the standards regardless of whether the violation of the standard had resulted in actual damage or injury.” Both halves of this intended application are significant: Liability under the standards would attach even in the absence of actual damage, thus effectively abrogating *Aas*. And liability under the standards would also attach in cases of actual damage; in other words, the Legislature anticipated that passage of the Act would result in standards that governed liability even when violation of the standards *had* resulted in property damage. The Legislature thus recognized and intended that claims under the Act would cover territory previously in the domain of the common law.

Second, the Act “establishes a mandatory process prior to the filing of a construction defect action,” with the “major component of this process” being “the builder’s absolute right to attempt a repair prior to a homeowner filing an action in court.” These purposes, the creation of a mandatory prelitigation process and the granting of a right to repair, would be thwarted if the Act permitted homeowners to continue to sue as before at common law, without abiding by the procedural requirements of the Act, for construction defect claims involving damages other than economic loss.

Third, although there is no doubt that the Act had the intended effect of overriding *Aas*'s limits on construction defect actions, that effect was treated in both the Assembly and Senate as one consequence of the overall reform package, not as the principal goal of the Act. The Assembly Committee on the Judiciary described as a "principal feature of the bill" the establishment of construction defect standards and to effectively end the debate over the controversial decision in the *Aas* case." In a similar vein, the Senate Committee on the Judiciary described the Act as creating standards that would "govern any action seeking recovery of damages arising out of or related to construction defects" and "essentially overrule the *Aas* decision." If the Van Tassels' interpretation of the Act were correct, then the legislative analyses certainly bury the lede.

In sum, the legislative history confirms what the statutory text reflects: **the Act was designed as a broad reform package that would substantially change existing law by displacing some common law claims and substituting in their stead a statutory cause of action with a mandatory prelitigation process.**

Echoing an argument made by the Court of Appeal in *Liberty Mutual*, at p. 98, the Van Tassels contend that the detailed prelitigation procedures and timelines set out in chapter 4 (§§ 910–

938) cannot rationally be applied to defects that create a sudden loss requiring emergency repairs. From this, they infer that the Act and its procedures were never intended to extend to claims for defects resulting in actual damage. This is not a case in which any party had to take emergency action. But the emergency scenario does not give reason to doubt that the Act applies to property damage cases.

The Act requires a homeowner, before suing, to provide a builder with written notice and a general description of an alleged construction defect. (§ 910, subd. (a).) The Act then subjects the builder to a series of deadlines by which it must acknowledge receipt, supply relevant records, and, if it chooses, inspect, offer to repair the defect, and commence repairs. (§§ 912–913, 916–917, 921.)

In nonemergency cases, there is no tension between these provisions and the portions of the Act that extend its application to cases involving property damage. In the absence of delay risking a worsening of any damage, a homeowner will have time to give the requisite notice and await the builder's response. If the builder drags its feet in a way that exacerbates damage, the Act protects the homeowner. (See § 944; *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1478)

Defects that trigger sudden ongoing, escalating damage present a more difficult problem. The Act does not expressly address how its operation might change in such unusual circumstances. The minimal requirements of formal written notice and awaiting a builder response could be onerous in cases where a construction failure creates a need for emergency action by a homeowner or the homeowner's insurer. Notably, the Act also imposes on homeowners a general duty to act reasonably in order to mitigate losses. (See § 945.5, subd. (b).) A failure to give formal written notice before taking any other action might well be excused in circumstances where a homeowner has acted reasonably to mitigate losses and has provided informal notice, and subsequent written notice, in a manner that is as timely and effective as reasonably practicable under the circumstances. (See *Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, 378; cf. *KB Home*, 223 Cal.App.4th 1471)

A similar principle of reasonableness must be applied to the interpretation of the builder's rights and obligations. Although the Act establishes various maximum time periods in which the builder may respond, inspect, offer to repair, and commence repairs (§§ 913, 916–917, 921), the builder avails itself of the full time allowed by the Act at its peril. The builder is liable for the damages its construction defects cause, and even when a homeowner has acted unreasonably

in failing to limit losses, the builder remains liable for “damages due to the untimely or inadequate response of a builder to the homeowner’s claim.” (§ 945.5, subd. (b).) What constitutes a timely response will vary according to the circumstances, and the maximum response periods set forth by the Act do not necessarily insulate a builder from damages when the builder has failed to take remedial action as promptly as is reasonable under the circumstances. The Act’s liability provisions thus supply builders and homeowners clear incentives to move quickly to minimize damages when alerted to emergencies. (*KB Home*, at p. 1478.)

The Van Tassels highlight section 930, subdivision (a), which requires “the time periods . . . in this chapter . . . to be strictly construed, . . . unless extended by the mutual agreement of the parties.” But this directive simply ensures that the time periods are followed when the parties have not agreed otherwise. It does not mean that the parties are necessarily immune from liability for failing to take swifter action when circumstances dictate.

Because this case does not involve a catastrophic occurrence or emergency repairs, the Court need not decide definitively how the Act would apply on such facts. But its review of the Act’s provisions reveals enough play in the joints to suggest that the Act can be

adapted well enough to extreme circumstances. The tension between the Act's timelines and the occasional need for expeditious action in exigent circumstances does not provide a sufficiently compelling reason to disregard the numerous indications in the Act's text and history that the Legislature clearly intended it to govern cases involving actual property damage. The Justices disapprove *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC*, 219 Cal.App.4th 98, and *Burch v. Superior Court*, 223 Cal.App.4th 1411, to the extent they are inconsistent with the views expressed in this opinion.

The Van Tassels voluntarily dismissed without prejudice their cause of action for violation of section 896's standards. Even so, the operative complaint includes claims resting on allegations that McMillin defectively constructed the foundations, plumbing, roofs, electrical conduits, framing, flooring, and walls of the plaintiffs' homes. This suit remains an "action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction" of the plaintiffs' homes (§ 896), and McMillin's liability under the Van Tassels' negligence and strict liability claims depends on the extent to which it violated the standards of sections 896 and 897. Thus, the Van Tassels were required to initiate the prelitigation procedures provided for in the Act. (See *Elliott Homes, Inc. v. Superior Court* (2016) 6 Cal.App.5th 333, 341) Although the Legislature

preserved common law claims for personal injury, it made the Act the virtually exclusive remedy not just for economic loss but also for property damage arising from construction defects. The present suit for property damage is therefore subject to the Act's pre-litigation procedures, and the Court of Appeal was correct to order a stay until those procedures have been followed.

In holding that claims seeking recovery for construction defect damages against the builder are subject to the Act's prelitigation procedures regardless of how they are pleaded, the Justices have no occasion to address the extent to which a party might rely upon common law principles in pursuing liability under the Act. Nor does the holding embrace claims such as those for breach of contract, fraud, or personal injury that are expressly placed outside the reach of the Act's exclusivity. (§ 943, subd. (a).) That limit does not help the Van Tassels' position here, for while the complaint includes breach of contract and breach of warranty claims, it also includes claims for strict liability and negligent failure to construct defect-free homes, to which no statutory exception applies. Accordingly, the Van Tassels must comply with the Act's prelitigation procedures before their suit may proceed. Because the Van Tassels have not yet done so, McMillin is entitled to a stay. (§ 930, subd. (b).)

The Supreme Court will affirm the judgment of the Court of Appeal and remand for further proceedings not inconsistent with this opinion.

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