S229762

IN THE
SUPREME COURT OF CALIFORNIA

McMILLIN ALBANY, LLC, et al.,

Petitioners,

vs.

THE SUPERIOR COURT OF KERN COUNTY,

Respondent.

After a Decision by the Court of Appeal,
Fifth Appellate District - Case No. F069370

AMICI CURIAE BRIEF OF LAW OFFICES OF BRIAN J. FERBER, INC. AND BENEDON & SERLIN, LLP

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I.

INTRODUCTION

In the late 1990's, California's Legislature was confronting a maelstrom. Construction defect litigation was at an all time high, which in turn increased housing costs and created an "affordable housing crisis." The targets of the litigation, builders, subcontractors, and insurers, voiced their concerns. Compounding these problems, this Court rendered a controversial decision, *Aas v. Superior Court* (2000) 24 Cal.4th 627, holding that

homeowners could not recover in tort for defects that had not caused physical injury or property damage (i.e., the "economic loss rule"), which left homeowners without an adequate remedy to resolve construction defect claims.

To ameliorate this crisis, our Legislature enacted SB 800, codified at Civil Code section 895, et seq.[1/] This so-called "Right To Repair Act" (*Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1202 (*"Greystone"*)) or "Fix-it" statute (*Standard Pacific Corp. v. Superior Court* (2009) 176 Cal.App.4th 828, 830) abrogated the economic loss rule, legislatively superseded *Aas*, and created a statutory scheme which provides homeowners with a remedy for a violation of a residential construction "standard" that causes *only* "economic loss." As such, SB 800 was designed to both streamline claims based on a violation of construction standards -- by resolving them outside the litigation process -- and provide homeowners a mechanism to have violations repaired *before* they could cause property damage or personal injury.

In *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98 (*"Liberty Mutual"*), the Fourth District Appellate District, Division Three, recognized that SB 800 was not enacted in a vacuum, but arose from this backdrop of existing construction defect law. After carefully analyzing the legislative history and statutory language of SB 800, the

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[1/] Unless otherwise indicated, all statutory references are to the Civil Code.

appellate court correctly held that the Right to Repair Act did not intend to eliminate common law rights and remedies where actual damage has occurred.

Two years later, the opposite result was reached in this case. However, the *McMillin* opinion from the Fifth Appellate District ignores the Legislature's intent and turns well-settled principles of statutory construction on their head. Principles of statutory construction make clear that legislative intent to overturn established law must be clearly expressed and apparent from the circumstances of the statute's enactment. Neither is present in this case. Rather, an examination of the statutory language, when construed in light of the circumstances of its enactment, demonstrates that *Liberty Mutual's* statutory analysis is both legally sound and compelling.

Moreover, *Liberty Mutual* reached the correct result from a commonsense perspective. If a catastrophic loss occurs and causes property damage or personal injury, property owners and their insurers must act quickly. If allowed to stand, the *McMillin* opinion will effectively create an irreconcilable conflict between builders (who are accorded up to a year to address a violation of standards) and property insurers (who must expeditiously adjust existing property losses and conduct repairs where claims are covered).

II.

LEGAL DISCUSSION

A. The Legal Backdrop: Construction Defect Litigation Prior To SB 800.

In *Dow v. Holly Mfg. Co.* (1958) 49 Cal.2d 720, this Court held a builder may be liable in negligence when defects in a product incorporated into a home -- in that case, heating system components -- caused injury to third parties. (*Id.* at pp. 727-728.) Seven years later, in *Seely v. White* (1965) 63 Cal.2d 9, the Court adopted the "economic loss rule" which limited damages for strict liability or negligence to physical harm to persons or property.[2/] (*Id.* at p. 18.) In *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227, the appellate court recognized that "mass produced development homes" are considered "products" for purposes of strict liability.

Almost thirty years after *Kriegler*, a homebuilder (Fieldstone) sued, under strict liability, negligence, and indemnity theories, for the costs of replacing sinks installed by a sub-contractor that had rusted and chipped prematurely due to inadequate spot welding and coating. (*Fieldstone Co. v. Briggs Plumbing Prods., Inc.* (1997) 54 Cal.App.4th 357, 362.) Because no other property had been damaged, the appellate court denied recovery. The court explained: "[T]he line between physical injury to property and economic

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[2/] Strict liability damages do *not* include economic loss, which includes "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits -- without any claim of personal injury or damages to other property. . . ." (*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 482, citing *Sacramento Regional Transit Dist. v. Grumman Flexible* (1984) 158 Cal.App.3d 289, 294, internal quotation marks omitted.)

loss reflects the line of demarcation between tort theory and contract theory. 'Economic' loss or harm has been defined as damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits-without any claim of personal injury or damages to other property. . . ." (*Id.* at pp. 363-364, internal quotation marks omitted.) Accordingly, a manufacturer may be strictly liable for physical injuries caused to persons or property, but not for purely economic losses. (*Ibid.*)

In so ruling, the *Fieldstone* court rejected the homebuilder's argument that the economic loss rule did not foreclose tort recovery because the sink defects caused injuries to other, nondefective portions of the sinks, and thus the requisite damage to "other property" had occurred. (54 Cal.App.4th at p. 364.) In the court's view, the manifestations of damage resulting from the defects were not the kind of damage to "other property" that would take the case outside the scope of the "economic loss rule." (*Id.* at p. 366.) As such, defendant could not be liable under strict liability or negligence theories. (*Id.* at pp. 366-367.)

A similar result was reached the following month in *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204. In *Zamora*, the manufacturer of defective pipes was held liable for repair costs incurred by thirty-four homeowners. (*Id.* at pp. 206-207.) Fourteen of the thirty-four homeowners, however, experienced no damage to other property from the defective pipes. (*Id.* at p. 207.) Citing the economic loss rule, the appellate court held that the manufacturer was not liable for the fourteen claims that did not result in other property damage. (*Id.* at pp. 211-212.)

Three years later, this Court solidified the broad application of the economic loss rule in *Aas, supra,* 24 Cal.4th at pp. 635-636. Favorably citing both *Fieldstone* and *Zamora*, this Court upheld the exclusion of evidence of construction defects that had not yet caused physical damage in a lawsuit involving allegations of negligence against a homebuilder stemming from alleged building code violations. (*Id.* at pp. 632-634, 640.) Relying on the economic loss rule, the Court held that homeowners could not recover in tort for defects that have not caused physical injury to persons or property. In reaching this conclusion, the Court reviewed half a century of cases treating the troublesome margin between tort and contract law, and noted that it was not announcing a new rule but was merely "[a]pplying settled law limiting the recovery of economic losses in tort actions. . . ." (*Id.* at p. 632.) The Court recounted that lower courts had applied the economic loss rule in construction defect cases to preclude the recovery of purely economic losses:

> "Speaking very generally, tort law provides a remedy for construction defects that cause property damage or personal injury. Focusing on the conduct of persons involved in the construction process, courts in this state have found such a remedy in the law of negligence. Viewing the home as a product, courts have also found a tort remedy in strict products liability, even when the property damage consists of harm to a sound part of the home caused by another, defective part. For defective products and negligent services that have caused neither property damage nor personal injury, however, tort remedies have been uncertain. Any construction defect can diminish the value of a house. But the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone. This general principle, the so-called economic loss rule, is the primary obstacle to plaintiffs' claim."

(*Aas, supra,* 24 Cal.4th at pp. 635-636, citations and footnotes omitted; see also, e.g., *KB Home v. Superior Court* (2003) 112 Cal.App.4th 1076, 1079 ["The economic loss rule bars recovery in tort for economic damages caused by a defective product unless those [economic] losses are accompanied by some form of personal injury or damage to property other than the defective product itself"]; *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1327 ["Until physical injury occurs -- until damage rises above the level of mere economic loss -- a plaintiff cannot state a cause of action for strict liability or negligence"].)

The *Aas* majority observed that "[h]ome buyers in California already enjoy protection under contract and warranty law for enforcement of builders' and sellers' obligations; under the law of negligence and strict liability for acts and omissions that cause property damage or personal injury; under the law of fraud for misrepresentations about the property's condition; and an exceptionally long 10-year statute of limitations for latent construction defects. While the Legislature may add whatever additional protections it deems appropriate, the facts of this case do not present a sufficiently compelling reason to preempt the legislative process with a judicially created rule of tort liability." (*Aas, supra,* 24 Cal.4th at pp. 652-653, citation omitted.)

The Court added that the "Legislature, whose lawmaking power is not encumbered by precedent, is free to adopt a rule like that proposed in [Chief Justice George's] concurring and dissenting opinion." (*Aas, supra,* 24 Cal.4th at p. 650.) The Chief Justice, in turn, invited the Legislature "to correct this court's unfortunate misstep in the development of the law" and "recognize an

appropriate and limited right to recover costs to remedy serious safety code violations" *before* appreciable property damage or personal injury occurs. (*Id.* at p. 673.)

B. The Legislative Backdrop: The Legislature Enacts SB 800 To Codify A Set Of Residential Construction Standards And Create Liability For Economic Loss In Construction Defect Litigation.

Shortly after *Aas* was decided, in 2002, the Legislature accepted Chief Justice George's invitation and passed SB 800, legislation which revised -- in part -- the rules for construction defect litigation. (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 374 fn. 8 ("*Lantzy*"); see also, e.g., *Greystone, supra*, 168 Cal.App.4th at p. 1202 ["In response to the holding in *Aas*, the Legislature enacted Civil Code section 895, et seq."]; see also *ibid.* [SB 800 "abrogates the economic loss rule, and legislatively supersedes *Aas*"].)

As SB 800's legislative history confirms:

- "The bill responds to concerns from homeowners and the Consumer Attorneys of California over the consequences of *Aas v. Superior Court* (2000) 24 Cal.4th 627, which held that defects must cause actual damage or personal injury prior to being actionable in tort. The bill also responds to concerns expressed by builders, subcontractors, and insurers over the costs of construction defect litigation [and its] impact on housing costs in the state." (Senate Judiciary Committee analysis of SB 800 as amended Aug. 28, 2002 (2001-2002 Regular Session), p. 3].) "'Rather than requiring resort to contentions about the significance of technical deviations from building codes, the bill specifies the standards that building systems and components must meet.' [¶] In addition, the standards are a statutory

'floor' for construction defect standards." (*Id.* at pp. 3-4.)

- "In a controversial decision, *Aas v. Superior Court* (2000) 24 Cal.4th 627, the California Supreme Court found that homeowners had no cause of action for negligence against the builders of their homes for latent defects under California's 'economic loss rule.' Essentially, the court held that since there had been no actual damage or injury to anyone from the defect, the plaintiff homeowners had no cause of action for negligence against builders. Chief Justice George registered a strong dissent in *Aas*, pointing out that it defied common sense to require that there actually be an injury from a fire before a homeowner could bring an action in negligence against a builder for a defective firewall. Both the majority of the Court and the Chief Justice urged the Legislature to revisit the economic loss rule. [¶] This bill is intended to address the perceived inequity of the *Aas* decision and give homeowners the ability to have specified defects in the construction of their homes corrected *before the defects cause actual harm or damage*." (State and Consumer Service Agency analysis of SB 800, pp. 1-2, emphasis added].)

- "This bill is intended to respond to the affordable housing crisis by addressing concerns raised by builders and insurers about increased litigation costs related to alleged construction defects and concerns raised by homeowners and consumer [attorneys] over the effects of a recent Supreme Court decision (*Aas v. Superior Court* (2000) 24 Cal.4th 627) which held that builders cannot be held liable for negligence for a construction defect unless actual damages (death, bodily injury, or property damage) have occurred." (California Housing Finance Agency analysis of SB 800, p. 1.)

- "Definition of Construction Defect. A principal feature of the bill is the codification of construction defects. For the first time, California law would provide a uniform set of standards for the performance of residential building components and systems. Rather than requiring resort to contentions about the significance of technical deviations from building codes, the bill specifies the standards that building systems and components must meet. *Significantly, these standards effectively end the debate of the controversial decision in the Aas case to the effect that homeowners may not recover for construction defects unless and until those defects have caused death,*

> *bodily injury, or property damage, no [matter] how imminent those threats may be.*" (Assembly Committee On Judiciary, SB 800 (Burton) - As Amended: Aug. 25, 2002, p. 2, emphasis added].)

Accordingly, the legislative history establishes that SB 800 was enacted to reduce construction defect litigation by specifying "standards" applicable to residential construction and by providing homeowners with a remedy for construction defects which have not yet caused immediate property damage and/or bodily injury, i.e., eliminating the common law limitation of the economic loss rule. In so doing, the Legislature intended to create a mechanism by which homeowners could identify and fix existing/on-going construction defects before those defects caused actual property damage or personal injury.

SB 800 (the "Act") accomplishes these goals by establishing a set of "standards" for new residential construction, and providing homeowners with a cause of action against, *inter alia*, builders for violation of those standards. (*Lantzy, supra,* 31 Cal.4th at p. 374 fn. 8, citing Section 896; *Greystone, supra,* 168 Cal.App.4th at p. 1210.) The standards cover water intrusion, structural, soils, fire protection, plumbing and sewer, electrical, and other areas of construction. (§ 896.) The Act provides that the standards "are intended to address every function or component of a structure." (§ 897.) The Act further provides that "[t]o the extent that a function or component of a structure is not addressed by the standards, it shall be actionable if it causes damage," i.e., the common law rule. (§ 897.)

Additionally, the "Act makes clear that upon a showing of a violation of an applicable standard, a homeowner may recover economic losses from a

builder *without* showing that the violation caused property damage or personal injury." (*Greystone supra,* 168 Cal.App.4th at p. 1202, emphasis added.) Thus, Section 942 states that homeowners can make a claim for violation of Section 896 by showing that the home "does not meet the applicable standard" without any "further showing of causation or damages." (§ 942; see also § 944.)

Finally, the Act sets out a prelitigation procedure to which a "claimant" must adhere in order to recover under the statutory scheme. (§ 943.) The claimant must initially provide a written notice of claim, setting out how "the construction of his or her residence violates any of [SB 800's] standards. . . ." (§ 910; *Greystone, supra,* 168 Cal.App.4th at p. 1211.) The builder can then address the concerns expressed by homeowners by providing inspections (§ 916), offering repair (§ 917), or actually repairing and/or arranging for repair (§§ 918, 921). (*Greystone, supra,* 168 Cal.App.4th at p. 1211.) Damages for violations of construction standards that do not cause other property damage or personal injury, are then limited to repair-related costs, including relocation and lost business income under certain circumstances. (§ 944.) The prelitigation procedure provides builders almost a *full year* to remedy violations of construction standards. (See §§ 910, 913, 916-918, 921.)

C. The *Liberty Mutual* Decision Is Correct.

In *Liberty Mutual, supra,* 219 Cal.App.4th 98, the appellate court concluded that the Right to Repair Act did not intend to replace all construction defect law. Specifically, *Liberty Mutual* held that the Act does

not abrogate a homeowner's rights and remedies which have always existed under the common law. (See *id.* at p. 101.) *Liberty Mutual* comports with well-settled principles of statutory construction.

"[T]here is a presumption that a statute does not, by implication, repeal the common law. Unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject matter . . . ." (*Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676, citations and internal quotation marks omitted, cited with approval by *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 ("*Health Facilities*").

Thus, courts presume that a statute does not, by implication, repeal the common law except when no rational basis exists for harmonizing two potentially conflicting laws. (*Health Facilities, supra,* 16 Cal.4th at p. 297; see also, e.g., *Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1086, abrogated by *Martinez v. Combs* (2010) 49 Cal.4th 35, 62-66.)

The *Liberty Mutual* court properly found that the language of the Act does not evince a clear and unequivocal intent to abrogate common law rights and remedies for construction defect claims. (See *Liberty Mutual, supra*, 219 Cal.App.4th at p. 105 ["Nothing in the Act supports a conclusion it rewrote the law on common law claims arising from actual damages sustained as a result

of construction defects"].) The court's reading of the statutory language is supported by:

- The Act's statutory provisions, which acknowledge that covered claims -- for violation of construction standards -- can co-exist with common law claims, and disallows duplication of damages. (See § 931 ["[i]f a claim combines causes of action or damages not covered by this part, . . . the claimed unmet standards shall be administered according to this part, . . ."]; § 943(a) [where a non-covered claim yielding damages are duplicative of a covered claim for violation of construction standards, the damages "awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944"]; § 944 [any damages awarded for other causes of action shall be reduced by amounts recovered pursuant to the Act for violation of the standards]; *Liberty Mutual*, *supra*, 219 Cal.App.4th at p. 107.)

- The Act's detailed time frames and provisions for notifying builders, identifying, and inspecting "claimed unmet standards." Such provisions, which give builders *almost a year* to remedy violations of standards, would be unnecessary and nonsensical where there is a catastrophic, one-time unexpected loss, which results in immediate property damage and/or personal injury. Moreover, requiring compliance with the Act in that situation would effectively extinguish the subrogation rights of homeowners' insurers who have a duty to expeditiously address covered losses, and no language in the Act supports an intent to extinguish subrogation rights. (See generally §§ 910-921; *Liberty Mutual*, *supra*, 219 Cal.App.4th at pp. 105-107.)

As the history of SB 800 illustrates, the impetus of the Act was to "'make major changes to the substance and process of the law governing construction defects'" by providing homeowners an avenue to have construction defects repaired "'before the defects cause actual harm or damage.'" (*Liberty Mutual*, *supra*, 219 Cal.App.4th at pp. 103-104.) Thus, the Act was groundbreaking reform because it allowed for the prompt and

early resolution of construction defect claims without having to litigate the application of the economic loss doctrine.

In disagreeing with *Liberty Mutual's* statutory analysis, the Fifth Appellate District in *McMillin* turns the rules of statutory construction on their head. Instead of examining whether the statutory language evinces a clear intent to supplant all common law construction defect claims, the *McMillin* court focuses on the absence of specific language in the Act expressly excluding common law causes of action such as negligence and strict liability. In other words, the *McMillin* court inverts the rule of statutory construction by assuming that the common law does *not* apply unless expressly stated otherwise. For example, the *McMillin* court places great weight on the fact that "[n]either list of exceptions, in section 943[3/] or in section 931,[4/] includes common law causes of action, such as negligence or strict liability." (Typed opn., p. 13.) The court then states that "[i]f the Legislature had intended to

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[3/] Section 943 states in pertinent part: "In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute." (§ 943, subd. (a).) The *expressio unius est exclusio alterius* principle -- the express mention of one thing excludes all other others -- has no application to the construction of section 943 because application of that principle "would contradict a discernible and contrary legislative intent." (*In re J.W.* (2002) 29 Cal.4th 200, 209-210.)

[4/] Section 931 states in pertinent part: "If a claim combines causes of action or damages not covered by this part, including, without limitation, personal injuries, class actions, other statutory remedies, or fraud-based claims, the claimed unmet standards shall be administered according to this part." (§ 931.) Thus, the Legislature made clear that section 943 did not contain an exclusive list of "exceptions" to SB 800 because section 931 recognizes that claims not covered by SB 800 include, "*without limitation*," causes of action for "personal injuries, class actions, other statutory remedies, or fraud-based claims, . . ."

made such a wide-ranging exception to the restrictive language of the first sentence of section 943, we would have expected it to do so expressly" as it did in the exception for condominium conversions.[5/] (*Ibid.*; see also typed opn., p. 9 ["The language limiting a claimant's claims or causes of action does not make an exception for common law tort causes of action where the defect has caused property damage"].) But the established rule of statutory construction is to assume the common law *applies* unless expressly stated otherwise, not the other way around.

The *McMillin* court also criticizes *Liberty Mutual* for ignoring the first sentence of section 943, which provides that "no other cause of action for a claim *covered by this title* or for damages *recoverable under Section 944* is allowed." (§ 943, subd. (a); see typed opn., p. 13.) But the *Liberty Mutual* court did not ignore that statutory provision; rather that provision, like section 896, simply refers to claims made *pursuant to* the Right to Repair Act. Section 896 states that the Act applies to "any action seeking recovery of damages arising out of, or related to deficiencies" for violations of specified construction standards. This is because the Act establishes a set of building standards for new residential construction and provides homeowners with a statutory cause of action for violation of those standards without having to show the violation caused damage to other property or personal injury. As the

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[5/] Section 896 provides in pertinent part: "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." This provision simply means that the Legislature did not abrogate the economic loss rule for condominium conversions as it did for single residential dwellings.

Liberty Mutual court properly noted, section 896 simply "refers to any action that is covered by the Right to Repair Act"; it does not establish that it is the exclusive remedy for construction defects claims that cause actual damage or injury. (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 108.)

Section 944 is similarly limited to "a claim for damages" that "is made *under this title*," i.e., pursuant to the Right to Repair Act. (§ 944, emphasis added.) Indeed, the language "any action" in section 896 cannot mean, as the Fifth Appellate District found, that the Act applies to *all* construction defect claims. (See typed opn., pp. 9, 15.) Other provisions in the Right to Repair Act expressly contemplate the existence of construction defects claims that are *not* covered by the Act. (See, e.g., § 931 [SB 800 claim combined with other causes of action]; § 943 [if a non-covered claim yields damages that are duplicative of a covered claim for violation of construction standards, damages "awarded for the items set for in Section 944 in such *other cause of action* shall be reduced by amounts recovered pursuant to Section 944 for violation of the standards set forth in this title"]; § 945.5 [setting forth affirmative defenses that can be made "in response to a claimed violations" while expressly preserving, under subdivision (h), common law defenses for "any causes of action to which this statute does not apply"].)

In sum, *Liberty Mutual's* analysis of the Right to Repair Act is the correct interpretation and should be adopted by this Court.

D. A Contrary Holding Will Create An Irreconcilable Conflict Between Homeowner Insurers And Builders.

As the court in *Liberty Mutual* appreciated, the prelitigation procedure of the Right to Repair Act (sections 910-938) makes no sense where a homeowner suffers an unexpected, one-time catastrophic loss, resulting in immediate property damage or bodily injury. (*Liberty Mutual*, *supra*, 219 Cal.App.4th at p. 106.) Where an immediate loss is suffered, rapid intervention may be required to prevent further damage or injury, or to mitigate losses. The Act's prelitigation procedure, however, enables a builder to delay its repair obligations based on the following mandatory timetable:

- The homeowner submits a written claim for a violation of standards. (§ 910.)
- Within 14 days, the builder must acknowledge receipt of the claim. (§ 913.)
- Within 14 days of the acknowledgment, the builder must complete its inspection of the claimed unmet standards. (§ 916, subd. (a).)
- Within 3 days of the first inspection, the builder may request a second inspection, which must be conducted within 40 days. (§ 916, subd. (c).)
- Within 30 days of the last inspection, the builder "may" offer in writing to repair some, all, or none of the violations. (§ 917.)
- If the offer to repair has been accepted by the homeowner, but the homeowner objects to the contractor designated to conduct the repairs, the builder has 35 days to provide the homeowner with 3 alternative contractors. (§ 918.)
- If the homeowner elects to receive alternative contractors, the builder is entitled to an additional non-invasive inspection within 20 days. (§ 918.)
- Within 35 days after the homeowner's election to receive alternative contractors, the builder must present the homeowner with a choice of contractors. (§ 918.)

- Once the homeowner agrees to the repair, the repairs must commence within 14 days. (§ 921.)

- After commencement of repairs, the builder must make "every effort . . . to complete the repairs within 120 days." (§ 921.)

Thus, under the Right to Repair Act, a builder has almost a full year to address a violation of construction standards -- a potentially reasonable amount of time if the violation has not resulted in property damage or bodily injury. However, if the Right to Repair Act provides the *exclusive remedy* where a homeowner suffers an unexpected catastrophic loss resulting in immediate property damage or bodily injury, this detailed time frame is unfeasible and creates an irreconcilable conflict between builders and homeowners' insurers who must expeditiously address covered losses, whether or not the builder has been required to act.

Regulations adopted by the California Department of Insurance set out detailed time limits for insurers to respond to insured's claims. Upon receiving notice of a claim, an insurer "shall immediately, but in no event more than fifteen (15) calendar days later," (1) acknowledge receipt; (2) provide the insured with necessary claim forms and instruction; and (3) begin investigating the claim. (10 Cal.C.Regs. § 2695.5(e).) An insurer must accept or deny the claim, in whole or in part, "immediately, but in no event more than forty (40) calendar days later." (10 Cal.C.Regs. § 2695.7(b).) Once coverage is determined, an insurer "shall immediately, but in no event more than thirty (30) calendar days later, tender payment or otherwise take action to perform its claim obligation." (10 Cal.C.Regs. § 2695.7(h).) Additionally, "[n]o insurer shall delay or deny settlement of a first party claim on the basis that

responsibility for payment should be assumed by others," except as otherwise provided by statute, regulation or policy. (10 Cal. C. Regs. § 2695.7(e).)

Accordingly, where the Legislature has provided builders almost a year to remedy violations of construction standards, a homeowner's insurer has no more than *seventy* days to adjust existing property losses and conduct repairs of covered claims. Moreover, an insurance company's failure to act promptly can result in an action for bad faith.[6] (See *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1550; *Fleming v. Safeco Ins. Co. of America* (1984) 160 Cal.App.3d 31, 37.) Thus, to avoid exposure to claims of bad faith, insurance companies will be forced to immediately repair covered losses and will become the de facto insurer of the builder -- a result not intended by the Legislature. As the court in *Liberty Mutual* recognized, "exclusive compliance with the notice provisions of the Act under those circumstances would effectively extinguish the subrogation rights of all homeowners' insurers who promptly cover their insureds' catastrophic losses." (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 106.)

In other words, in a catastrophic loss situation, once a homeowner fulfils his obligation under a policy and makes a timely covered claim, the homeowner's insurer cannot wait for the builder to act under the Right to Repair Act. If the property damage is significant, the homeowner's insurer would be acting in bad faith if it did not act immediately to mitigate the

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[6] "Dilatory practices may also expose the insurer to administrative proceedings and penalties for violating regulations adopted by the California Department of Insurance." (Croskey, et al., Cal. Prac. Guide: Insurance Litigation (The Rutter Group 2015), ¶ 12:926.)

damage and fulfil its contractual obligations. In many cases, at the outset of a loss, the insurer will not know whether the builder will accept responsibility for the damage or whether the damage was caused by another responsible third party. The insurer, nonetheless, must respond to adjust the loss regardless of the actions or inactions (or even the identity) of a responsible third party. If the insurer's immediate acts of investigating and remediating covered losses then precludes the builder from exercising its statutory rights under the Act -- and the insurer's *only* avenue of recovery is under the Act -- the insurer's subrogation rights cease to exist.

In an effort to downplay the conflict between builders and insurers, petitioners assert that homeowners do not need to wait for builders to respond "before beginning reasonable mitigation efforts in connection with a catastrophic loss."[7/] But having the homeowner/insurer begin remediation and/or repair efforts would defeat the statutory purpose of allowing the builder to inspect and offer to repair. (See *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1477 ["completing repairs

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7/ McMillin's Answer Brief On The Merits, p. 32. Petitioners support this argument by asserting that "taking reasonable mitigation action is the homeowner's/insurer's duty under section 945.5(b)." (*Ibid.*) That section, however, does not impose a duty on homeowners to undertake repairs while waiting for a builder to respond. In fact, it states the opposite: a builder may be excused from liability for damages "[t]o the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this title. This includes the failure to give timely notice to the builder after discovery of a violation, but *does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim*." (§ 945.5, subd. (b), emphasis added.)

before giving notice of defect turns the prelitigation procedure on its head and precludes the builder from inspecting and making an offer to repair"].)

In sum, the Right to Repair Act provides a statutory scheme which enables builders to avoid litigation by repairing violations of building standards. It is designed to allow builders to repair defects *before* they result in property damage or personal injury. The Act was not designed to address unexpected catastrophic losses which result in immediate property damage and/or personal injuries. The Legislature did not intend for the Act or its pre-litigation requirements to control where the construction defect causes property damage requiring immediate repair or remediation.

III.

CONCLUSION

For the above reasons, this Court should hold that the Right to Repair Act does not preclude a homeowner's common law causes of action for constructive defects where actual damage has occurred. Accordingly, having asserted no claim under the Right to Repair Act, real parties in interest did not have to comply with the prelitigation procedures of that Act.

Dated: July 15, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

[*Cal. Rules of Court*, Rule 8.204(c)(1)]

In accordance with rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certify that this **AMICI CURIAE BRIEF OF LAW OFFICES OF BRIAN J. FERBER, INC. AND BENEDON & SERLIN, LLP** contains 5,645 words, as determined by the Word Perfect x7 word processing system used to prepare this brief, excluding the tables, the cover information, the signature block, and the certificates.

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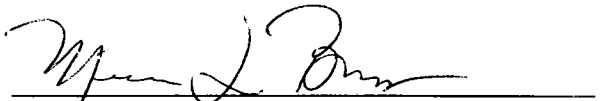
[X] (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 15, 2016, at Woodland Hills, California.



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