MFC News

"Building Understanding"

MFC will find out the truth about buildings and answer the hard questions.

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What's New at MFC...

Open House at MFC, Wednesday, October 14 from 4:30 - 7:30. Please drop by for snacks and a meet and greet. If you have not already, please RSVP to: office@mfcbuild.com.

Our bookkeeper, Barb Mummey, celebrated 17 years with MFC this past September. Congratulations Barb!

MFC recently revamped our website, adding a Blog feature. Be sure to check in to see Myles and Staff's latest posts.

MFC Tip of the Day

When assessing, investigating or repairing fire damage, it's very important to remember that smoke damage often goes beyond just the soot you can see on the walls. For example, a homeowner had finished repairs from a kitchen fire just in time for winter. When the heat was turned on for the first time since the fire, within minutes the entire house smelled like smoke and their freshly painted walls and new carpet were covered in residual soot. The HVAC airways had been overlooked by the insurance Adjuster and the repairing Contractor.

Quote of the Day

My house is my refuge, an emotional piece of architecture, not a cold piece of convenience.

~ Luis Barragan

Wisdom Corner

California Courts of Appeal Disagree on the Right to Repair Act

By Ken Gorman, Esq.

When the Right to Repair Act, commonly known as SB 800, was enacted in 2001 (effective January 1, 2003), the construction industry and construction defect litigation legal community had hoped it would greatly curtail construction defect litigation and make future litigation less expensive. SB 800 was the product of negotiations between plaintiff/consumer construction defect attorneys and the defense side of construction defect litigation. It received broad bipartisan support in the legislature. Its most important provisions were quid pro quos: a long list of conditions/ performance standards (see Civil Code Section 896) would be considered compensable damage regardless of whether structural damage had actually yet occurred. In exchange, the "builders" had the right to

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be notified of any claimed such conditions and had the opportunity to repair them before the homeowners could file a complaint. Nearly everyone believed that the conditions listed in the SB 800 (Civil Code Section 896) were the homeowners' exclusive remedies, supplanting traditional tort and contract causes of action. Accordingly, pre-litigation procedures were followed and many complaints in lawsuits listed only the SB 800 violations, not common law causes of action.

But in 2013 and 2014, two appellate court decisions effectively said that SB 800 was just an option for the homeowners; it was not intended to supplant common law remedies.

In *Liberty Mutual Insurance Company vs. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98 and *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, two different California Courts of Appeal rejected the arguments that the Right to Repair Act was the exclusive remedy for damages for construction defects and required homeowners to comply with the pre-litigation procedures before filing suit. That means the Right to Repair Act did not convey a right to repair at all, and did not limit the claims to the SB 800 "performance standards." Plaintiffs are now free to sue without SB 800 pre-litigation procedures for all of the traditional claims: breach of warranty, breach of contract, negligence, and product liability, as well as the SB 800 standards which do not require showing of damage. It doubled plaintiffs' remedies and eliminated the builders' ability to try to fix problems before litigation.

The Supreme Court denied review of the cases, essentially giving them its tacit approval. Predictably, plaintiffs began amending existing complaints to add traditional breach of contract and tort causes of action, and new complaints contained both common law and SB 800 claims.

However, on August 26, 2015, the Fifth District Court of Appeal published its decision in *McMillin Albany, LLC vs. Superior Court* (Aug. 26, 2015, F069370) __ Cal.App.4th __. That decision rejected *Liberty Mutual* and *Burch* and held that the Legislature in fact intended that the SB 800 pre-litigation procedures were mandatory where the claims involved construction defects:

"Consequently, we conclude the Legislature intended that all claims arising out of defects in residential construction, involving new residences sold on or after January 1, 2003 ([Civ. Code] § 938), be subject to the standards and the requirements of the Act; the homeowner bringing such a claim must give notice to the builder and engage in the pre-litigation procedures in accordance with the provisions of Chapter 4 of the Act prior to filing suit in court. Where the complaint asserts deficiencies in construction that constitute violations of the standards set out in Chapter 2 of the Act, the claims are subject to the Act, and the homeowner must comply with pre-litigation procedures, regardless of whether the complaint expressly alleges a cause of action under the Act."

The Court of Appeal directed the trial court to stay the case until the pre-litigation procedures had been complied with.

The *McMillin* decision creates an irreconcilable conflict between the Courts of Appeal. It is subject to review by the Supreme Court, which could order it de-published. Or the Supreme Court could take up the case and resolve the dispute that is now between the Courts of Appeal.

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Appellate court decisions are binding on all of the courts in their jurisdiction. *Burch*, *Liberty Mutual*, and *McMillin* all came from Southern California Courts of Appeal. (The Monterey Bay is covered by the Sixth District Court of Appeal in San Jose). So while trial courts in those Southern districts must follow the rulings of those appellate courts, attorneys and trial courts in the State's other five appellate districts are in something of a quandary. If there is only one appellate court ruling in the State, that has the effect of new law and is controlling law for all courts in the State. But when there are conflicting appellate decisions on the same point of law, trial courts in the "neutral" jurisdictions have to choose which decision they are going to follow. Everyone runs the risk of having litigation seriously affected if they bet the wrong way.

Pending resolution by the California Supreme Court, this situation is unresolved.

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For more information regarding California construction code, please click here.

Myles previously published two articles regarding SB 800 which can be viewed here at our website.

About MFC News

MFC News is the e-Newsletter published quarterly by the Editorial team at Myles F. Corcoran Construction Consulting, Inc. (MFC) located in Santa Cruz, California. It is circulated to our colleagues in the construction and construction-related fields. Visit our website www.mfcbuild.com for more information and testimonials.

Please help us make this a "Construction Community" endeavor by sending us your feedback, comments, wisdom, and ideas for future issues. Call (831) 476-4502 or contact us at: http://www.mfcbuild.com/contact/

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