

ENFORCING THE RIGHT TO REPAIR: THREE EMERGING TRENDS

By: John O'Hara and James Hultz

I. OVERVIEW OF THE RIGHT TO REPAIR ACT.

In 2002, the California Legislature enacted Civil Code sections 895-945.5. This law, sometimes referred to as the “Right to Repair Act,” took effect on January 1, 2003, and is now starting to be fully tested in practice and in the courts. It is now clear that plaintiffs fully plan to resist the Right to Repair Act’s reforms. Below, we offer a brief overview of the Act, and highlight a few emerging trends in how plaintiffs’ lawyers are resisting its reforms and requirements.

A. Genesis of the Right to Repair Act.

The stage for the reform was set in 2000, when the California Supreme Court issued its decision in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 101 Cal.Rptr.2d 718, holding that a homeowner could not sue in tort for a construction defect unless the defect caused actual damage. While builders cheered the decision, plaintiffs’ lawyers immediately sought to undo it by arguing that the *Aas* damage requirement clashed with public policy and that liability should be imposed *before* a homeowner actually suffered harm. This argument found a willing audience in the California Legislature where the question quickly became *when*, and not *if*, they would roll back *Aas*.

B. The Building Industry Seeks a Right to Repair.

As recognized by Sun Tzu centuries ago, “the best battle is the battle that is won without being fought.” (Tzu, *The Art of War* (tr. by S. B. Griffith, 1971).) Once it became clear that anti-*Aas* legislation was inevitable, the building industry sought to ensure that real reform would be included. A cornerstone of such reform would provide the builder an absolute right to inspect and repair alleged defects before the homeowner could file suit. Under the Right to Repair Act, a builder could resolve defect claims without ever stepping foot into a courtroom.

C. The Interested Parties Reach a Complicated Compromise.

After a great deal of negotiating, the parties agreed on what would be included in the Right to Repair Act. The Right to Repair Act’s 41 co-authors added over 10,000 words to the Civil Code and created a complicated maze of timelines, mandates and requirements. The Prelitigation Procedure chapter alone includes 20 separate deadlines ranging from 48 hours to 120 days. Given its complexity, major questions regarding the implementation and meaning of much of the Right to Repair Act will undoubtedly be resolved by the courts. However, the basic building blocks of the Right to Repair Act seem clear: the builder is entitled to an absolute right to inspect and repair construction deficiencies before a homeowner can file a lawsuit; construction defect lawsuits are limited to violations of enumerated functionality standards; and damages are limited, in most cases to the lesser of the reasonable repair costs and diminution in value.

II. EMERGING TRENDS: EFFORTS TO EMASCULATE THE RIGHT TO REPAIR.

Because the Right to Repair Act applies only to homes sold after January 1, 2003, and construction defect cases are typically filed several years after the initial sale, it is still too early to predict the ultimate impact of the reforms. However, one overarching trend has already become disturbingly clear: plaintiffs' lawyers are frantically searching for ways to undermine the builder's Right to Repair.

A. Trend One: No Notice / Shifting the Burden.

As the very first step under the Right to Repair Act, a homeowner must serve a notice of claim that provides the builder with an opportunity to invoke its right to repair. Despite this clear and unambiguous prerequisite, some plaintiffs' attorneys skip all of the prelitigation procedures and start by filing a lawsuit. These attorneys then argue that the builder must first prove compliance with all of the statute's requirements before they can be required to comply with the Right to Repair Act.

This improper attempt to shift the burden should be vigorously resisted by the building industry. The Right to Repair Act provides a new remedy to the builder faced with a premature lawsuit - a motion to stay the action until the homeowners comply with the statute. There are also some teeth in the statute: the builder may recover the attorney's fees for having to bring the motion.

B. Trend Two: Insufficient Notice / Hiding the Ball.

The notice required under the Right to Repair Act must describe the nature and location of each alleged defect. However, in another emerging trend, many plaintiffs' attorneys are refusing to provide any such detail. Instead, they provide a generic, all inclusive defect list. In multi-home cases, they assert that each and every home suffers from the exact same, all-inclusive, list of defects. In one recent case Newmeyer & Dillion handled, a plaintiffs' lawyer tried to argue that 17 homes had the exact same 127 defects. If a builder receives such an overbroad, defective notice, it has two basic options:

Option One: Object, demand proper notice and refuse to engage in the Right to Repair Act process until and unless the homeowner provides proper notice. In response, Plaintiffs will likely immediately file a lawsuit and actually claim that the *builder* refused to comply with the Right to Repair Act. At this point, the builder may file a motion to stay and, in addition to the points raised above, can forcefully argue that the homeowner's refusal to provide specific information prevents further proceedings under the Right to Repair Act process. For instance, without such information, the builder cannot determine potentially responsible parties and, consequently, cannot comply with its obligations under the statute to provide responsible parties with notice and opportunity to attend inspections.

Until the law is further developed, trial courts may vary in their willingness to force the homeowners to comply with the Right to Repair Act. However, to make the Right to Repair meaningful, builders must demand that courts enforce the statute.

Option Two: Object and demand proper notice, but proceed with inspections. The Right to Repair Act grants the builder two opportunities to inspect. Under this option, the builder would utilize both. During the first inspection, the builder can attempt to identify deficiencies and all potentially responsible parties. The builder would then invite the potentially responsible parties to attend the second inspection. The builder could also use both inspections to further document the inaccuracies of the homeowner's generic, all-inclusive, defect list.

If these inspections result in an offer to repair, the offer should be explicitly limited to observed deficiencies. This would place the burden back on the homeowner to identify any additional defects.

C. Trend Three: Demanding Minor Repairs.

During the Right to Repair Act process, homeowners will often request that the builder repair minor problems that are not defined as defects under the Right to Repair Act. Strictly speaking, such minor items need not be addressed as part of the Right to Repair process. However, as a practical matter, these minor issues may be the driving force behind the homeowner's involvement in the case and, if those issues are resolved, the homeowner may opt-out of any further proceedings. Therefore, the builder may want to consider offering "courtesy repairs" to fix these minor issues as part of the Right to Repair Act process. The offer to repair should specify that the condition does not rise to the level of a defect and explain the reasons that the builder is nonetheless willing to make the repair. Alternatively, a builder could elect to address these minor problems through customer care and completely outside of the Right to Repair Act process.

Six years after achieving real construction defect litigation reform through the Right to Repair Act, builders are starting to see the fruits of their labor. They should enforce their rights under the Right to Repair and vigorously resist all efforts to strip them away.

John O'Hara is a litigation partner and James Hultz is a litigation associate in the Newport Beach headquarters of Newmeyer & Dillion LLP. Both can be reached via email at john.ohara@ndlf.com and james.hultz@ndlf.com respectively.