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Right to Repair Act is spawning inconsistent rulings

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Class actions based on the incorporation of defective components into new housing are encountering unforeseen obstacles under California's Right to Repair Act. The act, codified at Code of Civil Procedure Section 895 et seq. and also referred to as "SB 800," requires plaintiffs to comply with certain prelitigation procedures. Importantly, however, the Legislature exempted certain class actions from the procedures. Civil Code Section 931 reads, in pertinent part, "As to any class action claims that address solely the incorporation of a defective component into a residence, the named and unnamed class members need not comply with this chapter."

The "this chapter" language the code refers to is titled "Chapter 4, Prelitigation Procedure," which sets forth a series of nonadversarial prelitigation procedures. The primary purpose of these procedures is to allow a builder to repair construction defects before a homeowner may file a lawsuit. Accordingly, Section 931 allows a putative class to circumvent the prelitigation procedures if their claims arise exclusively from the usage of a defective *component*. However, there is currently no guidance from a California appellate court regarding how the Section 931 should be interpreted, or pleading and proof requirements for a Section 931 "component" claim and relief from SB 800's prelitigation process.

Trial courts have been applying Section 931 inconsistently determining whether a given claim alleges a "defective component" within the meaning of the Right to Repair Act. Courts are parsing whether certain construction materials or systems are "components" under the act. Rather arbitrarily, cases may proceed under Section 931 or a court may stay a class claim pending compliance with the prelitigation procedures. These inconsistencies can cause confusion and headaches for homeowners and their counsel.

Trial courts have issued inconsistent rulings. In one case, the trial court ruled that copper pipe installed in thousands of homes is not a component of the plumbing system and ordered the class representatives to satisfy the prelitigation procedures. In another, the trial court held that solar panel roof shingles installed in homes throughout California are a component of the roof system.

Bringing an action under the Right to Repair Act - and utilizing Section 931 as a class action vehicle - has several advantages over alternative common law claims. Chapter 2 of the act, titled "Actionable Defects," enumerates the standards for new residential construction and provides a right of action for violations thereof. Civil Code Section 942 explains that in order to bring a claim for a violation of a standard, "a homeowner need only demonstrate ... that the home does not meet the applicable standard ... [n]o further showing of causation or damages is required to meet the burden of proof."

Did the Legislature intend to provide a right of action under the Right to Repair Act for classes?

Class action public policy foundations of deterrence, judicial economy and efficiency, and enforcement of the rights of unnamed class members are thwarted without the class action device, forcing each individual plaintiff to investigate and prosecute identical component claims. These cases - which claim the exact same component product failed - are archetypes of class actions, and presumably exemplify the Legislature's rationale in enacting Section 931.

The issue comes down to legislative intent. Did the Legislature intend to provide a right of action under the Right to Repair Act for classes? It certainly seems so, as Section 931 allows classes to circumvent the prelitigation procedures. But then how does the class allege a systemic violation while maintaining fidelity to the "component" language of Section 931?

Remember *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F.Supp.116 (S.D.N.Y. 1960), from first year contracts class? It's the case used to teach language ambiguity and contract interpretation. "What's a chicken," remember?

California courts have considered "what's a *component*?" In *Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC*, 163 Cal. Rptr. 3d 600 (2013), the court found that a defective fire sprinkler and/or pipe were components under the Right to Repair Act. Outside of the Right to Repair Act context, the 1st District Court of Appeal in *Taylor v. Elliott Turbomachinery Co. Inc.*, 171 Cal. App. 4th 564 (2009), found that metal valves used in an aircraft carrier's propulsion system were "component[s]," even though they were comprised of multiple parts and materials. Lastly, the state Supreme Court in *Jimminez v. Superior Court*, 29 Cal. 4th 473 (2002), accepted that a "component" could be comprised of more than a single part, as a window - the component - was "shipped in parts, assembled by others, and installed by others." These cases appear to support the argument that Section 931 applies (and exempts a class representative from SB 800's prelitigation process) where a defective component in the system is alleged.

While, arguably, satisfaction of the prelitigation procedure is not too burdensome or costly, a particular problem arises in the context of class actions. Courts will stay the action pending compliance with the prelitigation procedure, and some hold that the named plaintiffs satisfy the procedures individually, and not on behalf of the class. As it is impossible for unknown and unnamed putative class members to participate in the procedures, this impediment essentially eliminates the class action device and mandates that these claims be brought as mass torts or individual actions.

The current Right to Repair Act is contradictory and murky for homeowners and their counsel. When a developer incorporates a defective copper pipe into the plumbing systems of thousands of residential homes, can several homeowners band together to prosecute their and others' claims as a class under the act? Section 931 clearly contemplates class actions, and exempts classes addressing solely the incorporation of a defective component from prelitigation procedures - not the entire Right to Repair Act scheme. Thus, it's only logical that the Legislature intended that putative classes may bring claims under the Actionable Defects Chapter, and, again, if addressing solely the incorporation of a defective component, then they may proceed without complying with the prelitigation procedures.

Courts that are staying these actions pending the compliance with the prelitigation procedures appear to be doing so in error. The Court of Appeal needs to provide clarification on the interpretation of Section 931, or the Legislature should revisit this issue.

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