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New Supreme Court Decision Could Increase the Cost of New Homes in California

By

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The California Supreme Court held last week that architects could be held liable to purchasers of houses and condominiums even in the absence of a contract between the architect and the purchaser.[1] While this was not a significant change in the law, the ruling clarified a point of law that had been in contention for years. Design professionals and their insurance companies had argued that architects should not be responsible for defects in homes built by developers and contractors when the architect did not control the construction or sale of the homes. The Court disagreed and held that under established California law, architects could be held responsible under certain foreseeable conditions and factors that extend their duty of care for designing homes to home purchasers. The Court also chose not to decide whether the architects were liable to the homeowners under a 2002 statute known as the "Right to Repair Act."[2]

What is the impact of the decision? Depending upon the perception of the decision, it could make insurance for design professionals more costly, which costs would be passed on to developers, and then added to the cost of new homes and condominiums. It will likely limit the number of established design firms that will be willing to work on new condominium projects, and the number of insurance companies willing to insure residential construction. It may limit the extent to which new and innovative designs are used on new projects. It may cause architects to attempt to shift design responsibility for major building systems and components to other parties under a "design-build" specification. This decision will likely result in architects negotiating for stronger contractual protections and alternative project delivery systems that decrease architects' liability. These are all trends that were evident prior to the Supreme Court's decision, but these trends will likely continue to accelerate in light of this decision.

Will this decision give additional protection to home buyers? It depends. Allowing homeowners to sue architects, in the absence of a contract, could increase recoveries to certain homeowners in a limited number of lawsuits. However, the additional expense and inefficiencies of litigation could lead to more costs, less innovation and fewer choices for a large number of future home buyers. Perhaps

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[1] *Beacon Residential Community Association v. Skidmore, Owens & Merrill LLC*, filed 7-3-14, S208173.
[2] California Civil Code Section 895, *et seq*.

home buyers might better be served by more efficiently dealing with warranty and defect claims without having to resort to lawsuits.

A related issue may be coming before the California Supreme Court in the near future. There is a spilt in the lower appellate courts regarding the effect of the 2002 Right to Repair Act discussed by the Supreme Court in this decision. Under the Right to Repair Act, a homeowner must give notice of any defect claim and the builder has the "right to repair" claimed defects as a precondition to the homeowner filing a lawsuit. Obviously, the prompt repair of homes and avoidance of litigation are among the intended purposes of the law, which was negotiated as a compromise between the homebuilding industry and the consumer attorneys. While the Right to Repair Act provides developers and builders of new homes the right to attempt to repair defects in hopes of avoiding lawsuits, it also gives homeowners significant extended protections. However, last year a court held that the Right to Repair Act does not preclude a homeowner for suing under "common law." [3] This common law exception could be used to avoid the Right to Repair Act, which will, in the long run, defeat the purpose of the Act, which is to encourage the parties to cooperate in facilitating prompt repairs as a means of avoiding costly litigation. This exception could further expand liability for architects, developers, and contractors, foster the expansion of construction defect litigation, limit the availability of insurance, and increase the cost of homes.

In light of the Supreme Court decision on an architect's duty of care to homeowners, what can architects do besides attempting to limit exposure contractually, paying higher insurance premiums, and ceding business opportunities to others? They can join with other design professionals, as well as developers, contractors, and subcontractors to support the Right to Repair Act, and actively oppose the "common law" exception within the court system. Let's make no mistake that the Right to Repair Act is not a panacea and will not preclude all construction defect litigation. It is over a decade old and needs some revision and improvement. However, the current statute gives the building industry and consumers alike the benefits of facilitating repairs as an alternative to the expense, aggravation, and inefficiency of litigation. While few laws are perfect, allowing the right to repair as a precondition to litigation seems a reasonable attempt to encourage parties to assume responsibility to repair homes, instead of imposing the costs of unnecessary litigation on the building industry and future home buyers. By supporting a process that encourages parties to resort to better remedies for construction defect claims, architects can avoid many of these claims and spend more time on designing better homes.

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[3] *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove, LLC* (2014) 219 Cal.App.4th 98; compare with *KB Home Greater Los Angeles, Inc. v. Superior Court (Allstate)* (2014) 223 Cal.App.4th 1471.

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