

Homeowners Must Prove Builder's Noncompliance With Disclosure Obligations Under SB800 in Order to Defeat Right to Repair

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In *Standard Pacific Corp. v. Superior Court (Garlow)*, 2009 DJDAR 12181 (August 14, 2009), several homeowners sued a residential builder for construction defects, without first providing the builder with a claim notice and triggering the builder's opportunity to respond and repair under Civil Code Section 895, et seq. (also referred to as "SB 800," the "Right to Repair Act" or "Fix-It Law"). The builder moved to stay the litigation until the homeowners provided notice and an opportunity to repair the claimed defects. The homeowners claimed generally that because the builder did not comply with the disclosure requirements of Civil Code Section 912 it had waived its right of repair and other statutory protections, excusing the homeowners from giving a "pre-litigation" claim notice under Section 910. Section 912 contains several disclosure requirements, including the designation of an agent to receive notice of claims, the recordation of a notice of the builder's election regarding the non-adversarial procedures and the delivery of a copy of the statute to the buyer at sale. Under Section 912 (i), a builder's failure to comply with any of these requirements releases the homeowners from their obligations and allows them to file suit.

The Court of Appeal disagreed with the homeowners' position, holding that their unsupported claim that the builder had not met its Section 912 requirements was insufficient to provide such a release, and that the homeowners had the burden of producing specific evidence of the builder's noncompliance with Section 912. The court's holding was based on its disagreement with the homeowners' position that Section 912 allows for optional performance by the builder, finding that a builder's requirements under this section are mandatory in nature, and that the builder must make each of the specified disclosures to avoid losing its right to repair protections. The court's discussion about "opting in" to the provisions of SB 800 in this context should not be confused with a builder's election under Section 914 to either engage in the nonadversarial procedures set forth in SB 800 (often referred to as "opting in") or attempt to enforce alternative non-adversarial contractual provisions.

Overall, the *Garlow* decision tells us that the "pre-litigation" non-adversarial claims process and builder's right to repair under SB 800 cannot be circumvented by a claimant's mere recital that the builder has failed to meet a statutory requirement. If a claimant elects to proceed directly to litigation, it must provide specific proof that the builder did not comply with the requirements of Civil Code Section 912, thereby waiving the statutory protections of SB 800. Although this case does not suggest any changes in practice related to builders' compliance with the notice and procedural requirements of SB 800, it does serve as a reminder of the importance of satisfying these provisions for those who desire the benefits of the right to repair defects.

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Practice Areas

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