

# **SB 800**

## **The Homebuilder “FIX IT” Construction Dispute Resolution Law**

*A Summary Compliance Guide  
for the California Homebuilding Industry*

**3rd Edition**





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for the California Homebuilding Industry*

### **3rd Edition**

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## **A Special Thank You**

CBIA wishes to thank the following members of the California legislature for their assistance in the development of the FIX IT law:

- Honorable John Burton, President pro Tempore,  
California State Senate
- Honorable Herb Wesson, Speaker, California State Assembly
- Honorable Joe Dunn, Chair, Committee on Housing and  
Community Development, California State Senate
- Honorable Martha Escutia, Chair, Committee on the Judiciary,  
California State Senate
- Honorable Ray Haynes, Vice Chair, Committee on the Judiciary,  
California State Senate
- Honorable Tom Torlakson, Chair, Committee on Local Government,  
California State Senate
- Honorable John Dutra, Member, Committee on the Judiciary,  
California State Assembly
- Honorable Tom Harman, Member, Committee on the Judiciary,  
California State Assembly
- Honorable Darrell Steinberg, Chair, Committee on Appropriations,  
California State Assembly

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# Foreward

by Michael D. Pattinson

As 2002 CBIA President, I have made construction dispute reform a top priority. Fifteen years of construction litigation has reduced condominium construction in California by 90 percent. Today we see the unfortunate results: teachers, firefighters, police officers, nurses and other key members of our communities can no longer afford to live where they work.

The rising cost of housing is on everyone's mind. California is home to 18 of the 25 least affordable housing markets in the nation. The median price of an existing, single-family detached home in California stands at \$323,700 – more than double the national median. The rising cost of housing in the state has resulted in part from all the unnecessary litigation against homebuilders and a virtual collapse in the insurance market for home construction.

In 2002, California homebuilders sought and achieved legislative relief from this condition – now represented by SB 800, the new right-to-repair law, otherwise known as “FIX IT.” While SB 800 was a result of hard-fought compromise – and there are challenges left to face – the new law is good for homebuilders and future California homebuyers because it

- Gives homebuilders the absolute right to repair problems that may arise in a home.
- Defines in law the standards of quality that homebuyers can expect.
- Requires that homeowners are responsible to follow specific maintenance guidelines.
- Expressly establishes affirmative defenses for homebuilders.
- Introduces alternatives to litigation that will reduce costs and solve problems quickly.

If these reforms sound simple, they are – and they are long overdue. Now it's time to put them to work. CBIA has prepared this implementation guide for you, the CBIA member, to prepare you for when the law becomes effective – January 1, 2003 – and help you take full advantage of its substantial benefits. I commend you to the pages that follow, and to the staff at CBIA for answers to questions you may have about the new law.

I also want to thank all the CBIA members who helped make this critical construction dispute reform legislation possible, especially:

- **Jim Ghielmetti**, Signature Properties
- **Harry Elliott**, Elliott Homes
- **Larry Gotlieb**, KB Home
- **Sid Dunmore**, Dunmore Homes
- **George Dale**, Dale Braden and Hinchcliffe,
- **Kathleen Carpenter**, Cooper White and Cooper LLP
- **Dave Simons**, KB Home
- And, a special thanks to **Steve Muller**, of Centex Homes, for getting FIX IT off the ground.



## Section I

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### **The Evolution of FIX IT**

Since the 1960's, the law governing construction dispute resolution has relied on a subjective interpretation of the tort law of negligence and strict liability, as well as the law of implied contracts. Never in California has there been a clear legal definition of what a construction defect is and is not. Moreover, the fact that the majority of construction defect claims made over time have never been tried means the ultimate definition has never been predictable.

Homebuilders, specialty contractors and their insurance partners have been hurt by the economic cost of resolving disputes through a regime that has enabled plaintiffs' attorneys to aggregate a large number of small claims into a single homeowners association claim and use the threat of protracted litigation to win huge cash settlements. Moreover, this corrupt system served to create an unnatural distance between homebuilders and their customers – allowing little or no opportunity for repairing problems if and when they arose.

In sum, the acceptable level of quality construction and customer service for homebuilders has become a high-risk guessing game, and the avoidance by their insurance carriers of the expenses that the game produces has become the major driver for unaffordable or unavailable coverage.

During the last decade, California homebuilders have pursued legislative relief from this chaotic and costly regime. Some successes resulted, though they have been limited to reforms to the “litigation process.” Despite these strides – and a favorable state Supreme Court decision (*Aas v. Superior Court of San Diego*) – the insurance situation in California has continued to worsen. Indeed, the situation had become so bad – as policy non-renewals and sky-high spikes in premiums continued to increase – that homebuilders and specialty contractors determined only radical and fundamental change to the laws governing construction dispute resolution would provide relief.

Accordingly, in the fall of 2001 CBIA, with the direct involvement of its volunteer members, began work on a reform proposal – to be pursued as an initiative or legislation in 2002 – that would replace California's punitive “strict liability” regime with something that made more sense – that emphasized the need to fix not litigate



problems in the home. Specifically, a concept was conceived around the fundamental reforms to California's strict liability doctrine that homebuilders had long advocated, built on a foundation of giving a homebuilder a right to repair.

The opportunity for action in the Legislature – that led to the passage of SB 800 – was created in January of 2002 when SB 355 (Escutia), a trial-lawyer-sponsored bill to abrogate the benefits to homebuilders of the *Aas* decision, and enact a pejorative “definition” of construction defects, was defeated. SB 355 was assailed by both Democrats and Republicans in the state Senate for proposing to make a bad housing situation worse. The debate over and the defeat of SB 355 served to plant the seeds for real reform.

Soon thereafter, the leadership of the Senate – notably, President pro tempore John Burton – declared its intent to resolve the construction dispute litigation problem in 2002, once and for all. In response, the CBIA “right to repair” reform model developed during the previous fall and winter – with mandated repairs to replace lawsuits, defined defects (functionality standards), limits on damages or causes of action (the repairs, only), reduced statutes of repose and contractual alternative means of dispute resolution – was placed on the table in early spring and negotiations with homebuilders, trial lawyers, insurance industry representatives and several lawmakers ensued.

On August 31, 2002, the Legislature – with the support of the homebuilding and insurance industry – passed SB 800 (Burton), the FIX IT bill, and on September 20 Governor Davis signed the bill into law. The new law

- Gives homebuilders an absolute right to repair breaches of functionality standards;
- Allows homebuilders to negotiate a cash payments/liability releases on breaches;
- Limits causes of action to statutory functionality standards;
- Reduces statute of repose/limitations on several functionality standards;
- Limits homebuilder/subcontractor liability to each functionality standard;
- Imposes several duties on homeowners, including proper notification and permission to repair;
- Sets forth specific maintenance obligations for homeowners to meet;

- Sets up a mediation hurdle if disputes arise over a repair;
- Reaffirms existing homebuilder rights to establish terms of dispute resolution in sales agreements, including mandatory binding arbitration;
- Establishes statutory affirmative defenses for homebuilders; and
- Sets forth opt-out provisions for homebuilders.

The new law – of which the following guide provides a summary, helpful suggestions, answers to anticipated questions and full text of the statute – applies to all residential homes sold on or after January 1, 2003. The new law is complex and likely to cause changes in most homebuilders' daily business operations and contractual relationships (i.e. with homeowners and specialty contractors). It is also likely to require supplemental training for most sales and customer service personnel.

Accordingly, CBIA developed this guide as the first step in helping you adapt to and take advantage of this new law.



## Section II

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### **Executive Summary**

The following is a brief summary of how SB 800 works – from the definition of actionable defects to the affirmative defenses to which homebuilders are entitled. Specifically, the following summarizes functionality standards, alternative standards requirements, document requirements, the right-to-repair procedure (including timetables, releases and mediation), nonadversarial contract procedures, alternative dispute resolution and affirmative defenses.

The legislative intent of the new law states that it is to afford both homeowners and homebuilders the opportunity for quick and fair resolution of claims.

#### **Functionality standards**

The new law defines construction defects according to standards of how a home and its components should function. The new law makes these so-called “functionality standards” the basis for a cause of action dealing with the construction of the home brought by the homeowner.

There are 45 separate standards under seven different categories. The categories include: water intrusion (18 standards), structural (4 standards), soils (3 standards), fire protection (3 standards), plumbing and sewer (1 standard) and electrical (1 standard). There is also an “other” category encompassing 15 standards. All functionality standards have 10-year statutes of limitation/repose, unless otherwise specified. The new law also requires that manufactured products function for one year, unless the manufacturer specifies otherwise. The functionality standards are also subject to affirmative defenses provided under the new law.

#### **Enhanced protection agreements**

The builder may choose to offer, by express contract, greater protection for homeowners than what is specified under functionality standards. The builder may elect to use an “enhanced protection agreement” but must do so no later than the close of escrow. The election must be communicated to the homebuyer at that time. Under an enhanced protection agreement, the homeowner may seek to enforce the agreement if a functionality breach arises. (NOTE: If the enhanced protection agreement is found to be unenforceable, the statutory functionality standards apply.) The enhanced protection agreement is binding on subsequent homeowners if the builder records the agreement. For more information on enhanced protection agreements, see Appendix C.

## Document requirements

The builder is obligated to provide and maintain certain information in accordance with various procedures of the new law. Among these requirements are

- copies of all relevant plans, specifications, grading plans, final soils reports, DRE reports and engineering calculations;
- builder's maintenance and preventative maintenance recommendations and specifications;
- all manufactured products maintenance and warranty information; and
- builder's express, limited warranty information.

## Right-to-repair procedures

Under the new law, if and when the homeowner encounters a breach of one or more functionality standards, the homeowner has a duty to notify the builder. In turn, the builder has an obligation to respond, in accordance with the following timetables (see Appendix E):

- Initial inspection – within 14 days after acknowledging the claim.
- Second inspection (if deemed by the builder to be necessary) – written notice to homeowner within three days of initial inspection and complete second inspection within 40 days of the initial inspection.  
*(NOTE: If the builder intends to hold another party responsible for its contribution to a functionality breach, the builder must provide notice to that party in enough time so that those parties may attend inspections and participate in the repair process.)*

- Builder notice to repair – within 30 days of the final inspection.
- Homeowner response – within 30 days of builder notice.  
*(NOTE: If the homeowner requests alternative contractors to complete the repair, as provided under the new law (maximum of three), the builder is entitled to an additional inspection within 20 days. The builder must present the alternative contractor choices to the homeowner within 35 days of the homeowner's request. Within 20 after receiving the alternative contractor names, the homeowner must authorize the repair.)*
- Commencement of repair – within 14 days of the final selection of a contractor.

*(NOTE: A homeowner may dispute the terms of the repair plan, in which case a mediation may be necessary. If this is the case, repair must commence within 7 days of the completion of the mediation.)*

- Completion of repair – the statute requires that the builder is required to work in a “diligent manner” and attempt to complete the repair within 120 days, but in no case may the builder exceed the timeframe specified in the repair plan.

**Special Note:** IF THE BUILDER EXCEEDS THESE TIMETABLES,  
HE OR SHE LOSES THE BENEFIT OF THE STATUTORY  
PROTECTIONS.

The repair procedure encompasses a repair plan, which includes:

- All applicable damages.
- A detailed statement of the repair and a time frame for the repair.
- Specific information relating to the contractors who will perform the work.
- Plans or technical documentation if requested by the homeowner, if available.
- An advisory to the homeowner of his or her right to request up to three additional contractors from which to select to perform the repair.
- An offer to mediate if the homeowner chooses prior to the repair.
  - The mediator is chosen and paid by the builder, unless the homeowner chooses to participate in the selection, then the cost is shared.
  - The mediation must not exceed 4 hours.
  - The mediation must occur within 15 days of the request.
  - If the mediation fails to resolve a dispute, the builder may nonetheless proceed with the repair.

The repair may be videotaped, and the builder is required to provide specific documents upon request. If the builder fails to complete the repair according to the repair plan, the claimant is released from the requirements of the new law’s pre-litigation process. The builder cannot obtain a release solely for the mandated repair, but may negotiate one with the homeowner. If a dispute arises as a result of the repair, the homeowner may proceed to file an action over a adequacy of the repair.

**Special Note:** NOTHING IN THE NEW LAW PREVENTS A BUILDER  
FROM OBTAINING A RELEASE FOR A CASH OFFER  
IN LIEU OF A REPAIR.

## **Nonadversarial procedures**

The new law establishes a statutory “nonadversarial” (pre-litigation, pre-arbitration) right-to-repair procedure and also recognizes a builder may establish a different procedure or set of procedures by contract which would pre-empt the statutory scheme. The builder may not, however, require adherence to both the statutory requirements and a contractual nonadversarial process.

The builder must notify the homeowner at the time the sales agreement is executed whether the builder intends to enforce the statutory scheme or a contractual, non-adversarial process should a claim be initiated. The choice by the builder is binding.

## **Alternative dispute resolution**

The new law specifically does not prohibit the builder from having a separate contractual provision requiring arbitration or judicial reference. Nor does the completion of the statutory pre-litigation process – or a contractual alternative – preclude these rights.

## **Affirmative defenses**

The builder may be excused in whole or in part from any obligation, damages, loss or liability if the builder can demonstrate any of the affirmative defenses specified in the new law:

- Unforeseen act of nature.
- Homeowner’s unreasonable failure to minimize or prevent damages including timely notice to the builder.
- Homeowner or agent failure to follow the builder’s or manufacturer’s maintenance recommendations or commonly accepted homeowner maintenance obligations.
- Homeowner or third party alterations, ordinary wear and tear, misuse, abuse or neglect, or use of structure for other than intended purpose.
- The claim exceeds the statute of limitations.
- The builder obtained valid release from the homeowner.
- The builder’s repair was successful in correcting the breach.

As to causes of actions to which the statute does not apply, all affirmative defenses are preserved.

## Section III

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### **Text and Commentary on the Provisions of SB 800**

*Below is provided a review and discussion points of the specific provisions of the new law. Included are significant excerpts of the new law: however, builders and their advisors should review the full text of the new law before making decisions regarding the compliance with the new law. Titles and descriptions of the new law have been added. The text of the new law is found in this section with commentary appearing in the margin.*

#### **LEGISLATIVE INTENT<sup>1</sup> BEHIND NEW STATUTE**

SECTION 1. The Legislature finds and declares, as follows:

(a) The California system for the administration of civil justice is one of the fairest in the world, but certain procedures and standards should be amended to ensure fairness to all parties.

(b) The prompt and fair resolution of construction defect claims is in the interest of consumers, homeowners, and the builders of homes, and is vital to the state's continuing growth and vitality. However, under current procedures and standards, homeowners and builders alike are not afforded the opportunity for quick and fair resolution of claims. Both need clear standards and mechanisms for the prompt resolution of claims.

(c) It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects.

1. The express intent of the new law is to afford both homeowners and builders the opportunity for quick and fair resolution of claims, and this intent is important to keep in mind in implementing compliance with the new law.



2. This section sets forth a variety of definitions making it clear that the new law applies only to residential buildings; it defines “close of escrow” for the purposes of triggering time limitations set forth in the new law, and defines certain water intrusion terms used later in the new law.

3. In common area projects, the project documents should be reviewed so that an association may obtain control over the ability to make claims under this statute at the earliest possible time.

## **TITLE 7. REQUIREMENTS FOR ACTIONS FOR CONSTRUCTION DEFECTS**

### **Chapter 1: Definitions<sup>2</sup>** *(Civil Code Section 895)*

(a) “Structure” means any residential dwelling, other building, or improvement located upon a lot or within a common area.

(b) “Designed moisture barrier” means an installed moisture barrier specified in the plans and specifications, contract documents, or manufacturer’s recommendations.

(c) “Actual moisture barrier” means any component or material, actually installed, that serves to any degree as a barrier against moisture, whether or not intended as such.

(d) “Unintended water” means water that passes beyond, around, or through a component or the material that is designed to prevent that passage.

(e) “Close of escrow” means the date of the close of escrow between the builder and the original homeowner. With respect to claims by an association, as defined in subdivision (a) of Section 1351, “close of escrow” means the date of substantial completion, as defined in Section 337.15 of the Code of Civil Procedure, or the date the builder relinquishes control over the association’s ability to decide whether to initiate a claim under this title, whichever is later<sup>3</sup>.

(f) “Claimant” or “homeowner” includes the individual owners of single-family homes, individual unit owners of attached dwellings and, in the case of a common interest development, any association as defined in subdivision (a) of Section 1351.

### **Chapter 2: Actionable Defects** *(Civil Code Section 896)*

In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision,

testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a general contractor, a subcontractor<sup>4</sup>, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title<sup>5</sup>, be liable for, and the claimant's claims or causes of action shall be limited<sup>6</sup> to violation of, the following standards, except as specifically set forth in this title. This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law<sup>7</sup>.

### ***Water Intrusion (Civil Code §896(a))***

(1) A door shall not allow unintended water to pass beyond, around, or through the door or its designed or actual moisture barriers, if any.

(2) Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers, including, without limitation, internal barriers within the systems themselves. For purposes of this paragraph, "systems" include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(3) Windows, patio doors, deck doors, and their systems shall not allow excessive condensation to enter the structure and cause damage to another component<sup>8</sup>. For purposes of this paragraph, "systems" include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(4) Roofs, roofing systems, chimney caps, and ventilation components shall not allow water to enter the structure or to pass beyond, around, or through the designed or actual moisture barriers, including, without limitation, internal barriers located within the systems themselves. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, and sheathing, if any.

4. The standards referenced below should be used to provide specific guidance to subcontractors to ensure that as built conditions comply with these functionality standards.

5. The standards are subject to the affirmative defenses set forth in Section 945.5 below. The new law provides many significant new defenses to strict liability claims against builders, including maintenance requirements. Accordingly, builders should draft maintenance requirements that specifically address each and every standard set forth in this Chapter. Maintenance requirements should be provided to homebuyers prior to close of escrow and builders should consider whether they should record a notice of the applicability of the maintenance requirements.

6. All claims for defects are limited to the functionality standards set forth in this chapter.

7. The new law does not apply to condominium conversions.

8. Note that a breach of this standard requires meeting at least three criteria: (1) the condensation must be excessive, (2) the condensation must enter the structure from the outside, and (2) the condensation must cause damage to another component part.

9. In order for this standard to be breached, water or vapor must limit the type of flooring materials that are both (1) typically used for (and) (2) the particular application. Accordingly, while flooring products are typically used for flooring purposes, flooring manufacturers' moisture tolerance recommendations define what is a suitable "particular application." For example, linoleum may be suitable for moisture levels associated with grade level cement slabs, but, depending upon moisture conditions, may not be suitable for the "particular application" of basements.

(5) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow water to pass into the adjacent structure. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashing, and sheathing, if any.

(6) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow unintended water to pass within the systems themselves and cause damage to the systems. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashing, and sheathing, if any.

(7) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to cause damage to another building component.

(8) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to limit the installation of the type of flooring materials typically used for the particular application<sup>9</sup>.

(9) Hardscape, including paths and patios, irrigation systems, landscaping systems, and drainage systems, that are installed as part of the original construction, shall not be installed in such a way as to cause water or soil erosion to enter into or come in contact with the structure so as to cause damage to another building component.

(10) Stucco, exterior siding, exterior walls, including, without limitation, exterior framing, and other exterior wall finishes and fixtures and the systems of those components and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall be installed in such a way so as not to allow unintended water to pass into the structure or to pass beyond, around, or through the designed or actual moisture barriers of the system, including any internal barriers located within the system itself. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(11) Stucco, exterior siding, and exterior walls shall not allow excessive condensation to enter the structure and

cause damage to another component. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(12) Retaining and site walls and their associated drainage systems shall not allow unintended water to pass beyond, around, or through its designed or actual moisture barriers including, without limitation, any internal barriers, so as to cause damage. This standard does not apply to those portions of any wall or drainage system that are designed to have water flow beyond, around, or through them.

(13) Retaining walls and site walls, and their associated drainage systems, shall only allow water to flow beyond, around, or through the areas designated by design.

(14) The lines and components of the plumbing system, sewer system, and utility systems shall not leak.

(15) Plumbing lines, sewer lines, and utility lines shall not corrode so as to impede the useful life of the systems.

(16) Sewer systems shall be installed in such a way as to allow the designated amount of sewage to flow through the system.

(17) Shower and bath enclosures shall not leak water into the interior of walls, flooring systems, or the interior of other components.

(18) Ceramic tile and tile countertops shall not allow water into the interior of walls, flooring systems, or other components so as to cause damage<sup>10</sup>.

### ***Structural Issues*** ***(Civil Code §896(b))***

(1) Foundations, load bearing components, and slabs, shall not contain significant cracks or significant vertical displacement<sup>11</sup>.

10. Builders should consider a maintenance recommendation that homeowners caulk or replace grout immediately where it has disintegrated.

11. “Significance” is not defined. The intent of the functionality standards is to define a breach in such a way that it is so significant that it affects the functions of the home.

12. This subsection provides a safe harbor to builders that “materially comply” with the building code, against any claim for chemical deterioration or corrosion of foundations. For example, for sulfate claims, if a builder materially complies with the code, this standard is not breached, regardless of whether damage results.

13. Pay special attention to subsection (3), as it relates to soils preparation issues on land other than the building pad where the home is built. Generally, only the building pad is certified and the builder makes no representations regarding the suitability of the use of the remaining portions of the lot, such as construction of pools, cabanas and the like. Nor does a builder generally make any representations regarding the suitability of other land for any particular purpose. The language illustrates the need for builders to review disclosure documents to be certain to make no representations regarding surrounding land. It continues to be a good practice to provide potential buyers with access to the soils reports.

(2) Foundations, load bearing components, and slabs shall not cause the structure, in whole or in part, to be structurally unsafe.

(3) Foundations, load bearing components, and slabs, and underlying soils shall be constructed so as to materially comply with the design criteria set by applicable government building codes, regulations, and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction<sup>12</sup>.

(4) A structure shall be constructed so as to materially comply with the design criteria for earthquake and wind load resistance, as set forth in the applicable government building codes, regulations, and ordinances in effect at the time of original construction.

### *Soils-Related Issues (Civil Code §896(c))*

(1) Soils and engineered retaining walls shall not cause, in whole or in part, damage to the structure built upon the soil or engineered retaining wall.

(2) Soils and engineered retaining walls shall not cause, in whole or in part, the structure to be structurally unsafe.

(3) Soils shall not cause, in whole or in part, the land upon which no structure is built to become unusable for the purpose represented<sup>13</sup> at the time of original sale by the builder or for the purpose for which that land is commonly used.

### *Fire Protection Issues (Civil Code §896(d))*

(1) A structure shall be constructed so as to materially comply with the design criteria of the applicable government building codes, regulations, and ordinances for fire protection of the occupants in effect at the time of the original construction.

(2) Fireplaces, chimneys, chimney structures, and chimney termination caps shall be constructed and installed in

such a way so as not to cause an unreasonable risk of fire outside the fireplace enclosure or chimney<sup>14</sup>.

(3) Electrical and mechanical systems shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire.

### *Plumbing and Sewer (Civil Code §896(e))*

Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action may be brought for a violation of this subdivision more than four years after close of escrow<sup>15</sup>.

### *Electrical (Civil Code §896(f))*

Electrical systems shall operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action shall be brought pursuant to this subdivision more than four years from close of escrow<sup>16</sup>.

### *Other Areas of Construction (Civil Code §896))*

(1) Exterior pathways, driveways, hardscape, sidewalls, sidewalks, and patios installed by the original builder shall not contain cracks that display significant vertical displacement or that are excessive. However, no action shall be brought upon a violation of this paragraph more than four years from close of escrow<sup>17</sup>.

(2) Stucco, exterior siding, and other exterior wall finishes and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall not contain significant cracks or separations.

(3) (a) To the extent not otherwise covered by these standards, manufactured products, including, but not limited to, windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, and appliances shall be installed so as not to interfere with the products' useful life, if any.

14. The use of the phrase "cause an unreasonable risk of fire" refers to a fire hazard.

15. Note shorter limitations period – 4 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

16. Note shorter limitations period – 4 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

17. Note shorter limitations period – 4 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

18. Note shorter limitations period – 1 year from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

19. This means that if the manufacturer is the sole defendant in the case, the new law would not apply. However, if a builder is included in the claim, the right to repair provisions apply. Included in these materials at Appendix B is a copy of a letter to the Senate Journal from Senator John Burton, which clarifies this portion of the new law.

20. Note shorter limitations period – 1 years from occupancy of adjacent unit. It applies to attached units only. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

(b) For purposes of this paragraph, “useful life” means a representation of how long a product is warranted or represented, through its limited warranty or any written representations, to last by its manufacturer, including recommended or required maintenance. If there is no representation by a manufacturer, a builder shall install manufactured products so as not to interfere with the product’s utility.

(c) For purposes of this paragraph, “manufactured product” means a product that is completely manufactured offsite.

(d) If no useful life representation is made, or if the representation is less than one year, the period shall be no less than one year<sup>18</sup>. If a manufactured product is damaged as a result of a violation of these standards, damage to the product is a recoverable element of damages. This subparagraph does not limit recovery if there has been damage to another building component caused by a manufactured product during the manufactured product’s useful life.

(e) This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure<sup>19</sup>.

(4) Heating, if any, shall be installed so as to be capable of maintaining a room temperature of 70 degrees Fahrenheit at a point three feet above the floor in any living space.

(5) Living space air-conditioning, if any, shall be provided in a manner consistent with the size and efficiency design criteria specified in Title 24 of the California Code of Regulations or its successor.

(6) Attached structures shall be constructed to comply with inter-unit noise transmission standards set by the applicable government building codes, ordinances, or regulations in effect at the time of the original construction. If there is no applicable code, ordinance, or regulation, this paragraph does not apply. However, no action shall be brought pursuant to this paragraph more than one year from the original occupancy of the adjacent unit<sup>20</sup>.

(7) Irrigation systems and drainage shall operate properly so as not to damage landscaping or other external improvements. However, no action shall be brought pursuant to this paragraph more than one year from close of escrow<sup>21</sup>.

(8) Untreated wood posts shall not be installed in contact with soil so as to cause unreasonable decay to the wood based upon the finish grade at the time of original construction. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow<sup>22</sup>.

(9) Untreated steel fences and adjacent components shall be installed so as to prevent unreasonable corrosion. However, no action shall be brought pursuant to this paragraph more than four years from close of escrow<sup>23</sup>.

(10) Paint and stains shall be applied in such a manner so as not to cause deterioration of the building surfaces for the length of time specified by the paint or stain manufacturers' representations, if any. However, no action shall be brought pursuant to this paragraph more than five years from close of escrow<sup>24</sup>.

(11) Roofing materials shall be installed so as to avoid materials falling from the roof.

(12) The landscaping systems shall be installed in such a manner so as to survive for not less than one year. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow<sup>25</sup>.

(13) Ceramic tile and tile backing shall be installed in such a manner that the tile does not detach.

(14) Dryer ducts shall be installed and terminated pursuant to manufacturer installation requirements. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow<sup>26</sup>.

(15) Structures shall be constructed in such a manner so as not to impair the occupants' safety because they contain public health hazards as determined by a duly authorized public health official, health agency, or governmental

21. Note shorter limitations period – 1 year from close of escrow.

A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

22. Note shorter limitations period – 2 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

23. Note shorter limitations period – 4 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

24. Note shorter limitations period – 5 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

25. Note shorter limitations period – 2 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.

26. Note shorter limitations period – 2 years from close of escrow. A complete list of all standards subject to shortened limitations periods is contained in Appendix A.



27. For any claims involving a component or function identified in these standards, no other claim can be made. For example, if a homeowner has a water intrusion issue, they must find a breach under subdivision (a) of Section 896. Or if someone has a claim based upon a window, they must find a breach under 896(a)(2), (3), or (g)(3). No other defect with respect to water issues or windows may be claimed. Other claims may be brought for components not addressed by the bill, but only if they cause damage.

28. The noteworthy comments regarding this provision are found in Appendix C.

29. The noteworthy comments regarding this provision are found in Appendix C.

entity having jurisdiction. This paragraph does not limit recovery for any damages caused by a violation of any other paragraph of this section on the grounds that the damages do not constitute a health hazard.

### ***Comprehensive Intent of Functionality Standards; Other Matters Causing Damage (Civil Code §897)***

The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage<sup>27</sup>.

## **OTHER OBLIGATIONS OF BUILDER AND HOMEOWNER**

### **CHAPTER 3. OBLIGATIONS**

#### ***Fit & Finish: One-Year Warranty<sup>28</sup> (Civil Code §900)***

As to fit and finish items, a builder shall provide a homebuyer with a minimum one-year express written limited warranty covering the fit and finish of the following building components. Except as otherwise provided by the standards specified in Chapter 2 (commencing with Section 896), this warranty shall cover the fit and finish of cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim, but shall not apply to damage to those components caused by defects in other components governed by the other provisions of this title. Any fit and finish matters covered by this warranty are not subject to the provisions of this title. If a builder fails to provide the express warranty required by this section, the warranty for these items shall be for a period of one year.

#### ***Builder's Enhanced Protection Agreement<sup>29</sup> (Civil Code §§901-906)***

Section 901. A builder may, but is not required to, offer greater protection or protection for longer time periods in its express contract with the homeowner than that set forth in Chapter 2 (commencing with Section 896). A builder

may not limit the application of Chapter 2 (commencing with Section 896) or lower its protection through the express contract with the homeowner. This type of express contract constitutes an “enhanced protection agreement.”

Section 902. If a builder offers an enhanced protection agreement, the builder may choose to be subject to its own express contractual provisions in place of the provisions set forth in Chapter 2 (commencing with Section 896). If an enhanced protection agreement is in place, Chapter 2 (commencing with Section 896) no longer applies other than to set forth minimum provisions by which to judge the enforceability of the particular provisions of the enhanced protection agreement.

Section 903. If a builder offers an enhanced protection agreement in place of the provisions set forth in Chapter 2 (commencing with Section 896), the election to do so shall be made in writing with the homeowner no later than the close of escrow. The builder shall provide<sup>30</sup> the homeowner with a complete copy of Chapter 2 (commencing with Section 896) and advise the homeowner that the builder has elected not to be subject to its provisions. If any provision of an enhanced protection agreement is later found to be unenforceable as not meeting the minimum standards of Chapter 2 (commencing with Section 896), a builder may use this chapter in lieu of those provisions found to be unenforceable.

Section 904. If a builder has elected to use an enhanced protection agreement, and a homeowner disputes that the particular provision or time periods of the enhanced protection agreement are not greater than, or equal to, the provisions of Chapter 2 (commencing with Section 896) as they apply to the particular deficiency alleged by the homeowner, the homeowner may seek to enforce the application of the standards set forth in this chapter as to those claimed deficiencies. If a homeowner seeks to enforce a particular standard in lieu of a provision of the enhanced protection agreement, the homeowner shall give the builder written notice of that intent at the time the homeowner files a notice of claim pursuant to Chapter 4 (commencing with Section 910).

30. A list of all documents that must be given to the homebuyer is contained in Appendix D.

31. A list of all documents that may be recorded is contained in Appendix D.

32. The election by a builder to provide an Enhanced Protection Agreement has nothing to do with a builder's election to follow his or her own pre-litigation notice, inspection, repair and alternative dispute resolution process in lieu of the process set forth in Chapter 4. The builder's alternative procedures to Chapter 4 are referred to as "alternative contractual/nonadversarial provisions."

33. This provision emphasizes the importance not only of maintenance recommendations drafted by the builder but also manufacturers' maintenance recommendations and commonly accepted maintenance practices. Section 944 should refer to Section 944.5.

Section 905. If a homeowner seeks to enforce Chapter 2 (commencing with Section 896), in lieu of the enhanced protection agreement in a subsequent litigation or other legal action, the builder shall have the right to have the matter bifurcated, and to have an immediately binding determination of his or her responsive pleading within 60 days after the filing of that pleading, but in no event after the commencement of discovery, as to the application of either Chapter 2 (commencing with Section 896) or the enhanced protection agreement as to the deficiencies claimed by the homeowner. If the builder fails to seek that determination in the timeframe specified, the builder waives the right to do so and the standards set forth in this title shall apply. As to any nonoriginal homeowner, that homeowner shall be deemed in privity for purposes of an enhanced protection agreement only to the extent that the builder has recorded the enhanced protection agreement on title or provided actual notice to the nonoriginal homeowner of the enhanced protection agreement. If the enhanced protection agreement<sup>31</sup> is not recorded on title or no actual notice has been provided, the standards set forth in this title apply to any nonoriginal homeowners' claims.

Section 906. A builder's election to use an enhanced protection agreement addresses only the issues set forth in Chapter 2 (commencing with Section 896) and does not constitute an election to use or not use the provisions of Chapter 4 (commencing with Section 910). The decision to use or not use Chapter 4 (commencing with Section 910) is governed by the provisions of that chapter<sup>32</sup>.

### *Homeowner's Obligations (Civil Code §907)*

Section 907. A homeowner is obligated to follow all reasonable maintenance obligations and schedules communicated in writing to the homeowner by the builder and product manufacturers, as well as commonly accepted maintenance practices. A failure by a homeowner to follow these obligations, schedules, and practices may subject the homeowner to the affirmative defenses contained in Section 944<sup>33</sup>.

# PRE-LITIGATION INSPECTION AND RIGHT-TO-REPAIR

## CHAPTER 4. PRELITIGATION PROCEDURE

### *Homeowner's Notice of Claim of Violation of Functionality Standards (Civil Code §910)*

Section 910. Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following prelitigation procedures<sup>34</sup>:

(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and effect as a notice of commencement of a legal proceeding<sup>35</sup>.

(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated document; and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section<sup>35.5</sup>.

34. For reference purposes, the timelines required by this Chapter are set forth in a chart in Appendix E.

35. The new law expressly provides that the document which contains a claim has the same force and effect as a notice of a legal proceeding, which generally triggers insurance coverage. Also, builders and their advisors need to carefully evaluate the impact of the extension of the limitations period as found in Sections 927 and 941 for repairs made pursuant to this Chapter. For other repairs, builders should additionally consider the impact of current tolling law.

35.5 Normal customer service proceedings may precede the formal prelitigation procedure provided in this chapter and are not qualified as an "alternative contractual non adversarial provision" referred to in Section 914, below.

### ***Definition of “Builder” (Civil Code §911)***

36. This section excludes general contractors who are not also owners from the definition of “builder”.

Section 911<sup>36</sup>. (a) For purposes of this title, except as provided in subdivision (b), “builder” means any entity or individual, including, but not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner’s claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner’s claim.

(b) For the purposes of this title, ‘builder’ does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner’s claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. For the purposes of this title, these nonaffiliated general contractors and nonaffiliated contractors shall be treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals.

### ***Builder Response to Claimed Violation; Provision of Documents (Civil Code §912(a-i))***

A builder shall do all of the following:

37. Note that these documents must be provided only if the claim relates to the structural, fire safety, or soils provisions of this title. Nevertheless, it may still be a good practice to electronically store the required documents so that these deadlines can be met. Also note that the documents mentioned in Sections (b) and (c) below could also be electronically stored for easy retrieval when necessary.

(a) Within 30 days of a written request by a homeowner or his or her legal representative, the builder shall provide copies of all relevant plans, specifications, mass or rough grading plans, final soils reports, Department of Real Estate public reports, and available engineering calculations, that pertain to a homeowner’s residence specifically or as part of a larger development tract. The request shall be honored if it states that it is made relative to structural, fire safety, or soils provisions of this title<sup>37</sup>. However, a builder is not obligated to provide a copying service, and reasonable copying costs shall be borne by the requesting party. A builder may require that the documents be copied onsite by the requesting party, except that the homeowner may, at his or

her option, use his or her own copying service, which may include an offsite copy facility that is bonded and insured. If a builder can show that the builder maintained the documents, but that they later became unavailable due to loss or destruction that was not the fault of the builder, the builder may be excused from the requirements of this subdivision, in which case the builder shall act with reasonable diligence to assist the homeowner in obtaining those documents from any applicable government authority or from the source that generated the document. However, in that case, the time limits specified by this section do not apply<sup>38</sup>.

(b) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, the builder shall provide to the homeowner or his or her legal representative copies of all maintenance and preventative maintenance recommendations that pertain to his or her residence within 30 days of service of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(c) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all manufactured products maintenance, preventative maintenance, and limited warranty information within 30 days of a written request for those documents. These documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(d) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all of the builder's limited contractual warranties in accordance with this part in effect at the time of the original sale of the residence within 30 days of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(e) A builder shall maintain the name and address of an agent for notice pursuant to this chapter with the Secretary

38. If the documents are unavailable due to circumstances not the fault of the builder, the timelines of this section (30 days) no longer apply.

39. This provision requires that the builder give actual notice to the homebuyer and subsequent purchasers of the name and address of any party other than the builder or an agent for notice that is authorized to accept claims on behalf of the builder.

40. Because SB 800 requires disclosure at the time of original sales documentation and SB 800 is not retroactive, the new law applies only to sales contracts entered into after to January 1, 2003.

41. Builders should consider whether to (1) record a notice on title records that these documents are available to subsequent purchasers, (2) require an indemnification provision in sales agreements for the homeowner's failure to provide those documents to subsequent purchasers.

42. A checklist and timeline is provided in the appendix for informational purposes.

43. "Filing an action" does not mean bypassing mandatory binding arbitration to go straight to court. A homeowner must first comply with an arbitration provision that the homeowner has already agreed to.

of State or, alternatively, elect to use a third party for that notice if the builder has notified the homeowner in writing of the third party's name and address, to whom claims and requests for information under this section may be mailed. The name and address of the agent for notice or third party shall be included with the original sales documentation and shall be initialed and acknowledged by the purchaser and the builder's sales representative. This subdivision applies to instances in which a builder contracts with a third party to accept claims and act on the builder's behalf. A builder shall give actual notice<sup>39</sup> to the homeowner that the builder has made such an election, and shall include the name and address of the third party.

#### **Include Notice in Title Documents**

(f) A builder shall record on title a notice of the existence of these procedures and a notice that these procedures impact the legal rights of the homeowner. This information shall also be included with the original sales documentation<sup>40</sup> and shall be initialed and acknowledged by the purchaser and the builder's sales representative.

#### **Statute to Be Provided at Sale**

(g) A builder shall provide with the original sales documentation<sup>40</sup>, a written copy of this title which shall be initialed and acknowledged by the purchaser and the builder's sales representative.

#### **Successors in Interest**

(h) As to any documents provided in conjunction with the original sale, the builder shall instruct the original purchaser to provide those documents to any subsequent purchaser<sup>41</sup>.

#### **Failure to Comply**

(i) Any builder who fails to comply with any of these requirements within the time specified<sup>42</sup> is not entitled to the protection of this chapter, and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action<sup>43</sup>, in which case the remaining chapters of this part shall continue to apply to the action.

## ***Builder Acknowledgement of Claim (Civil Code §913)***

Section 913. A builder or his or her representative shall acknowledge, in writing, receipt of the notice of the claim within 14 days after receipt of the notice of the claim. If the notice of the claim is served by the claimant's legal representative, or if the builder receives a written representation letter from a homeowner's attorney, the builder shall include the attorney in all subsequent substantive communications<sup>44</sup>, including, without limitation, all written communications occurring pursuant to this chapter, and all substantive and procedural communications, including all written communications, following the commencement of any subsequent complaint or other legal action, except that if the builder has retained or involved legal counsel to assist the builder in this process, all communications by the builder's counsel shall only be with the claimant's legal representative, if any.

## ***Builder's Election to Opt-Out of the Pre-litigation (Civil Code §914)***

(a) This chapter establishes a nonadversarial procedure, including the remedies available under this chapter which, if the procedure does not resolve the dispute between the parties, may result in a subsequent action to enforce the other chapters of this title. A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, but may not, in addition to its own nonadversarial contractual provisions<sup>45</sup>, require adherence to the nonadversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable<sup>46</sup>. At the time the sales agreement is executed<sup>47</sup>, the builder shall notify the homeowner whether the builder intends to engage in the nonadversarial procedure of this section or attempt to enforce alternative nonadversarial contractual provisions. If the builder elects to use alternative nonadversarial contractual provisions in lieu of this chapter, the election is binding<sup>48</sup>, regardless of whether the builder's alternative nonadversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable.

44. Once a builder knows that a homeowner is represented by an attorney, all communications must include the homeowner's attorney.

45. The builder's alternative to the procedures established by the new law is referred to as "provisions" while the pre-litigation procedures of the new law are called "procedures."

46. Builders may substitute their own alternative provisions in lieu of the statutory procedures. Those provisions may include a notice, inspection, right to repair process and some form of alternative dispute resolution. In such a case, the builder continues to be subject to the functionality standards or the enhanced protection agreement if a builder has so chosen. Builders should review their internal procedures to ensure that they comply with whichever claims handling procedure he/she has chosen.

47. Because SB 800 requires notification of the builder's election to use alternative provisions at the time the sales agreement is signed and SB 800 is not retroactive, the new law only applies to contracts entered into after January 1, 2003.

48. The election is binding and a builder may not subsequently avail itself of the statutory procedures.



49. After completion of this statutory procedure or the builder's alternative provisions, a builder has a right to enforce contractual arbitration or judicial reference.

50. If this process fails, the homeowner is released from having to go through this pre-litigation process, but a builder will still be held to the functionality standards in a subsequent arbitration or legal action.

(b) Nothing in this title is intended to affect existing statutory or decisional law pertaining to the applicability, viability, or enforceability of alternative dispute resolution methods, alternative remedies, or contractual arbitration, judicial reference, or similar procedures requiring a binding resolution to enforce the other chapters of this title or any other disputes between homeowners and builders. Nothing in this title is intended to affect the applicability, viability, or enforceability, if any, of contractual arbitration or judicial reference after<sup>49</sup> a nonadversarial procedure or provision has been completed.

### ***Builder's Failure to Acknowledge Claim (Civil Code §915)***

Section 915. If a builder fails to acknowledge receipt of the notice of a claim within the time specified, elects not to go through the process set forth in this chapter, or fails to request an inspection within the time specified, or at the conclusion or cessation of an alternative nonadversarial proceeding, this chapter does not apply and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action<sup>50</sup>.

### ***Builder's Initial Inspection (Civil Code §916 (a)-(e))***

(a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon

request, allow the inspections to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative<sup>51</sup>.

(b) Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

### **Builder's Second Inspection**

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefore in writing within three days following the initial inspection, the builder may conduct a second inspection or testing<sup>52</sup>. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

### **Builder's Failure to Inspect**

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

### **Notice of Inspection to Subs and Others**

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision does not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or

51. Inspection costs are born by the builder and, if requested, the builder must allow the inspections to be observed and recorded.

52. Although the builder is not explicitly required to notify the homeowner of the reasons for a second inspection, it is probably a good idea to do so.

53. This provision requires notice to responsible third parties where possible. Builders and subcontractors may consider adding provisions in their agreements so the responsible third party can be notified and be obligated to meaningfully participate in the process.

54. In establishing a reasonable completion date for the repair, the contractor may want to consider factors beyond the contractor's control to provide some flexibility in the time to repair, as the time established by the contractor may be strictly enforced (see, section 925).

55. With respect to the turnover of documents, this provision does not contain the same express limitation as section 912, i.e., the turnover is only required for structural, fire safety, or soils breaches. However, if it is construed as required for other functionality standards there would be no timeframe for providing the documentation.

56. This section permits the homeowner to choose up to three alternative contractors – other than the original subcontractor – to do the repairs. Builders should consider this possibility in drafting contracts with their subcontractors.

material supplier of any liability under an action brought by a claimant<sup>53</sup>.

### ***Builder's Offer to Repair (Civil Code §917)***

Section 917. Within 30 days of the initial or, if requested, second inspection or testing, the builder may offer in writing to repair the violation. The offer to repair shall also compensate the homeowner for all applicable damages recoverable under Section 944, within the timeframe for the repair set forth in this chapter. Any such offer shall be accompanied by a detailed, specific, step-by-step statement identifying the particular violation that is being repaired, explaining the nature, scope, and location of the repair, and setting a reasonable completion date for the repair<sup>54</sup>. The offer shall also include the names, addresses, telephone numbers, and license numbers of the contractors whom the builder intends to have perform the repair. Those contractors shall be fully insured for, and shall be responsible for, all damages or injuries that they may cause to occur during the repair, and evidence of that insurance shall be provided to the homeowner upon request. Upon written request by the homeowner or his or her legal representative, and within the timeframes set forth in this chapter, the builder shall also provide any available technical documentation, including, without limitation, plans and specifications, pertaining to the claimed violation within the particular home or development tract<sup>55</sup>. The offer shall also advise the homeowner in writing of his or her right to request up to three additional contractors from which to select to do the repair pursuant to this chapter.

### ***Homeowner's Response to Builder's Offer to Repair (Civil Code §918)***

Section 918. Upon receipt of the offer to repair, the homeowner shall have 30 days to authorize the builder to proceed with the repair. The homeowner may alternatively request, at the homeowner's sole option and discretion, that the builder provide the names, addresses, telephone numbers, and license numbers for up to three alternative contractors<sup>56</sup> who are not owned or financially controlled

by the builder and who regularly conduct business in the county where the structure is located. If the homeowner so elects, the builder is entitled to an additional noninvasive inspection, to occur at a mutually convenient date and time within 20 days of the election, so as to permit the other proposed contractors to review the proposed site of the repair. Within 35 days after the request of the homeowner for alternative contractors, the builder shall present the homeowner with a choice of contractors. Within 20 days after that presentation, the homeowner shall authorize the builder or one of the alternative contractors to perform the repair.

### ***Offer to Mediate (Civil Code §919)***

Section 919. The offer to repair shall also be accompanied by an offer to mediate the dispute if the homeowner so chooses<sup>57</sup>. The mediation shall be limited to a four-hour mediation, except as otherwise mutually agreed before a nonaffiliated mediator selected and paid for by the builder. At the homeowner's sole option, the homeowner may agree to split the cost of the mediator, and if he or she does so, the mediator shall be selected jointly. The mediator shall have sufficient availability such that the mediation occurs within 15 days after the request to mediate is received and occurs at a mutually convenient location within the county where the action is pending. If a builder has made an offer to repair a violation, and the mediation has failed to resolve the dispute, the homeowner shall allow the repair to be performed either by the builder, its contractor, or the selected contractor.

### ***Builder's Failure to Strictly Comply (Civil Code §920)***

Section 920. If the builder fails to make an offer to repair or otherwise strictly comply with this chapter within the times specified, the claimant is released from the requirements of this chapter and may proceed with the filing of an action. If the contractor performing the repair does not complete the repair in the time or manner specified, the claimant may file an action. If this occurs, the standards set forth in the other chapters of this part shall continue to apply to the action.

57. The builder should consider setting a deadline for the homeowner to request a mediation in the builder's offer to repair, as the new law does not establish a deadline.

### *Repair by Builders: Timeframes (Civil Code §9219a)-(b))*

Section 921. (a) In the event that a resolution under this chapter involves a repair by the builder, the builder shall make an appointment with the claimant, make all appropriate arrangements to effectuate a repair of the claimed unmet standards, and compensate the homeowner for all damages resulting there from free of charge to the claimant. The repair shall be scheduled through the claimant's legal representative, if any, unless he or she is unavailable during the relevant time periods. The repair shall be commenced on a mutually convenient date within 14 days of acceptance or, if an alternative contractor is selected by the homeowner, within 14 days of the selection, or, if a mediation occurs, within seven days of the mediation, or within five days after a permit is obtained if one is required<sup>58</sup>. The builder shall act with reasonable diligence in obtaining any such permit.

58. The repair must commence on the latter of 14 days after acceptance, 7 days after mediation or 5 days after a permit is obtained.

(b) The builder shall ensure that work done on the repairs is done with the utmost diligence, and that the repairs are completed as soon as reasonably possible, subject to the nature of the repair or some unforeseen event not caused by the builder or the contractor performing the repair. Every effort shall be made to complete the repair within 120 days.

### *Recordation of Repair (Civil Code §922)*

Section 922. The builder shall, upon request, allow the repair to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative. Nothing that occurs during the repair process may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

### *Documents Related to Repair (Civil Code §923)*

Section 923. The builder shall provide the homeowner or his or her legal representative, upon request, with copies

of all correspondence, photographs, and other materials pertaining or relating in any manner to the repairs.

### ***Builder's Partial Offer to Repair (Civil Code §924)***

Section 924. If the builder elects to repair some, but not all of, the claimed unmet standards, the builder shall, at the same time it makes its offer, set forth with particularity in writing the reasons, and the support for those reasons, for not repairing all claimed unmet standards.

### ***Builder's Failure to Timely Complete Repair (Civil Code §925)***

Section 925. If the builder fails to complete the repair within the time specified in the repair plan<sup>59</sup>, the claimant is released from the requirements of this chapter and may proceed with the filing of an action. If this occurs, the standards set forth in the other chapters of this title shall continue to apply to the action.

### ***No Release or Waiver (Civil Code §926)***

Section 926. The builder may not obtain a release or waiver of any kind in exchange for the repair work mandated by this chapter<sup>60</sup>. At the conclusion of the repair, the claimant may proceed with filing an action for violation of the applicable standard or for a claim of inadequate repair, or both, including all applicable damages available under Section 944.

### ***Tolling of Statute of Limitations (Civil Code §927)***

Section 927. If the applicable statute of limitations has otherwise run during this process, the time period for filing a complaint or other legal remedies for violation of any provision of this title, or for a claim of inadequate repair, is extended from the time of the original claim by the claimant to 100 days after the repair is completed, whether or not the particular violation is the one being repaired. If the builder fails to acknowledge the claim within the time

59. Because the time specified in the repair plan may be strictly enforced, the builder should provide flexibility for unanticipated events.

60. The exception to the release prohibition is that a builder may obtain a reasonable release in exchange for a cash payment. (Section 929(b)) The prohibition in Section 926 does not prohibit obtaining a release for a combination of repair under Chapter 4, plus a cash payment as part of a settlement, or for upgraded repairs above and beyond those repairs mandated by Chapter 4, any release drafted would have to specify that it be in consideration for the monies paid or upgraded repairs, not the repairs done solely pursuant to Chapter 4.

61. Builders should carefully consider the impact on the statute of limitations if a builder elects to use the alternative nonadversarial option.

specified, elects not to go through this statutory process, or fails to request an inspection within the time specified, the time period for filing a complaint or other legal remedies for violation of any provision of this title is extended from the time of the original claim by the claimant to 45 days after the time for responding to the notice of claim has expired. If the builder elects to attempt to enforce its own nonadversarial procedure in lieu of the procedure set forth in this chapter, the time period for filing a complaint or other legal remedies for violation of any provision of this part is extended from the time of the original claim by the claimant to 100 days after either the completion of the builder's alternative nonadversarial procedure, or 100 days after the builder's alternative nonadversarial procedure is deemed unenforceable, whichever is later<sup>61</sup>.

### ***Post-Repair Mediation (Civil Code §928)***

Section 928. If the builder has invoked this chapter and completed a repair, prior to filing an action, if there has been no previous mediation between the parties, the homeowner or his or her legal representative shall request mediation in writing. The mediation shall be limited to four hours, except as otherwise mutually agreed before a nonaffiliated mediator selected and paid for by the builder. At the homeowner's sole option, the homeowner may agree to split the cost of the mediator and if he or she does so, the mediator shall be selected jointly. The mediator shall have sufficient availability such that the mediation will occur within 15 days after the request for mediation is received and shall occur at a mutually convenient location within the county where the action is pending. In the event that a mediation is used at this point, any applicable statutes of limitations shall be tolled from the date of the request to mediate until the next court day after the mediation is completed, or the 100-day period, whichever is later.

### ***Cash Offer: Release (Civil Code §929(a)-(b))***

Section 929. (a) Nothing in this chapter prohibits the builder from making only a cash offer and no repair. In this situation, the homeowner is free to accept the offer, or

he or she may reject the offer and proceed with the filing of an action. If the latter occurs, the standards of the other chapters of this title shall continue to apply to the action.

(b) The builder may obtain a reasonable release in exchange for the cash payment. The builder may negotiate the terms and conditions of any reasonable release in terms of scope and consideration in conjunction with a cash payment under this chapter.

### ***Requirements to Be Strictly Complied With (Civil Code §930)***

Section 930. (a) The time periods and all other requirements in this chapter are to be strictly construed, and, unless extended by the mutual agreement of the parties in accordance with this chapter, shall govern the rights and obligations under this title. If a builder fails to act in accordance with this section within the timeframes mandated, unless extended by the mutual agreement of the parties as evidenced by a postclaim written confirmation by the affected homeowner demonstrating that he or she has knowingly and voluntarily extended the statutory timeframe, the claimant may proceed with filing an action<sup>61.5</sup>. If this occurs, the standards of the other chapters of this title shall continue to apply to the action.

(b) If the claimant does not conform with the requirements of this chapter, the builder may bring a motion to stay any subsequent court action or other proceeding until the requirements of this chapter have been satisfied. The court, in its discretion, may award the prevailing party on such a motion, his or her attorney's fees and costs in bringing or opposing the motion.

### ***Multiple Causes of Action (Civil Code §931)***

Section 931. If a claim combines causes of action or damages not covered by this part, including, without limitation, personal injuries, class actions, other statutory remedies, or fraud-based claims, the claimed unmet standards shall be administered according to this part, although evidence of the property in its unrepaired condition may be

61.5 The time limits set forth in this Chapter may be extended with the consent of the homeowner.



introduced to support the respective elements of any such cause of action. As to any fraud-based claim, if the fact that the property has been repaired under this chapter is deemed admissible, the trier of fact shall be informed that the repair was not voluntarily accepted by the homeowner. 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.

### ***Subsequently Discovered Claims (Civil Code §932)***

Section 932. Subsequently discovered claims of unmet standards shall be administered separately under this chapter, unless otherwise agreed to by the parties. However, in the case of a detached single family residence, in the same home, if the subsequently discovered claim is for a violation of the same standard as that which has already been initiated by the same claimant and the subject of a currently pending action, the claimant need not reinitiate the process as to the same standard. In the case of an attached project, if the subsequently discovered claim is for a violation of the same standard for a connected component system in the same building as has already been initiated by the same claimant, and the subject of a currently pending action, the claimant need not reinitiate this process as to that standard<sup>62</sup>.

### ***Evidence of Repair Admissible in Court (Civil Code §933)***

Section 933. If any enforcement of these standards is commenced, the fact that a repair effort was made may be introduced to the trier of fact. However, the claimant may use the condition of the property prior to the repair as the basis for contending that the repair work was inappropriate, inadequate, or incomplete, or that the violation still exists. The claimant need not show that the repair work resulted in further damage nor that damage has continued to occur as a result of the violation.

62. In order to avoid reinitiating the claims process, the claimed violation must be for (1) the same functionality standard, (2) of a connected component system (e.g., a roofing system – rather than windows which are not connected) if the claim involves an attached project, (3) in the same building, (4) subject to currently pending litigation by (5) the same claimant.

### ***Evidence of Parties Conduct During The Repair Process (Civil Code §934)***

Section 934. Evidence of both parties' conduct during this process may be introduced during a subsequent enforcement action, if any, with the exception of any mediation. Any repair efforts undertaken by the builder, shall not be considered settlement communications or offers of settlement and are not inadmissible in evidence on such a basis.

### ***Effect of These Proceeding Upon Calderon Claims (Civil Code §935)***

Section 935. To the extent that provisions of this chapter are enforced and those provisions are substantially similar to provisions in Section 1375 of the Civil Code, but an action is subsequently commenced under Section 1375 of the Civil Code, the parties are excused from performing the substantially similar requirements under Section 1375 of the Civil Code.

### ***Application to Subs and Others (Civil Code §936)***

Section 936. Each and every provision of the other chapters of this title apply to general contractors, material suppliers, individual product manufacturers, and design professionals to the extent that the general contractors, material suppliers, individual product manufacturers, and design professionals caused, in whole or in part, a violation of a particular standard as the result of a negligent act or omission or a breach of contract. In addition to the affirmative defenses set forth in Section 945.5, a general contractor, material supplier, design professional, individual product manufacturer, or other entity may also offer common law and contractual defenses as applicable to any claimed violation of a standard. All actions by a claimant or builder to enforce an express contract, or any provision thereof, against a general contractor, material supplier, individual product manufacturer, or design professional is preserved. Nothing in this title modifies the law pertaining to joint and several liability for builders, general contractors, material suppliers, individual

63. The intent of this section is to preserve the standards of liability for these parties. For example, the parties referenced in this section are subject to liability for negligence and breach of contract unless the courts decide otherwise. This issue was pending at the California Supreme Court in *Jimenez v. Superior Court* at the time SB800 was drafted.

64. Because the new law places requirements on builders at the time of original sales documentation and the new law is not retroactive, the new law does not apply to contracts for the sale of a new home entered into prior to January 1, 2003.

product manufacturer, and design professionals that contribute to any specific violation of this title. However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply<sup>63</sup>.

### ***Compliance with Certificate of Merit Requirements (Civil Code §937)***

Section 937. Nothing in this title shall be interpreted to eliminate or abrogate the requirement to comply with Section 411.35 of the Code of Civil Procedure or to affect the liability of design professionals, including architects and architectural firms, for claims and damages not covered by this title.

### ***Effective Date (Civil Code §938)***

Section 938. This title applies only to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003<sup>64</sup>.

## **RULES OF LITIGATION**

### **CHAPTER 5. PROCEDURE**

#### ***Statute of Limitations (Civil Code §941(a)-(3))***

Section 941. (a) Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion.

(b) As used in this section, “action” includes an action for indemnity brought against a person arising out of that person’s performance or furnishing of services or materials referred to in this title, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of

Section 428.10 of the Code of Civil Procedure in an action which has been brought within the time period set forth in subdivision (a).

(c) The limitation prescribed by this section may not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action.

(d) Sections 337.15 and 337.1 of the Code of Civil Procedure do not apply to actions under this title.

### **Tolling of Statute of Limitations**

(e) Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title, except that repairs made pursuant to Chapter 4 (commencing with Section 910), with the exception of the tolling provision contained in Section 927, do not extend the period for filing an action, or restart the time limitations contained in subdivision (a) or (b) of section 7091 of the Business and Professions Code. If a builder arranges for a contractor to perform a repair pursuant to Chapter 4 (commencing with Section 910), as to the builder the time period for calculating the statute of limitation in subdivision (a) or (b) of Section 7091 of the Business and Professions Code shall pertain to the substantial completion of the original construction and not to the date of repairs under this title<sup>65</sup>. The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section.

### **Burden of Proof.**

Section 942. In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth

65. Existing statutory and decisional law regarding tolling does not apply to repairs made pursuant to the new law, specifically Chapter 4. The only tolling provision that applies to such repairs is contained in Section 927. The new law also provides relief for builders whose license is jeopardized due to repairs made by a subcontractor. Under existing laws, those repairs re-set the 4-year and the 10-year time periods for purposes of disciplinary action by the Contractor's State License Board against the builder's license. The new law does not permit disciplinary action against the builder more than 10 years after substantial completion. Because this section does not apply to breach of contract claims, the builder may wish to consider whether this exclusion applies to Enhanced Protection Agreements.

in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction.

### ***Other Causes of Action; Damages (Civil Code §942 (a)-(b))***

Section 943. (a) Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title.

(b) As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law.

### ***Damages Recoverable (Civil Code §944)***

Section 944. If a claim for damages is made under this title, the homeowner is only entitled to damages for the reasonable value of repairing any violation of the standards set forth in this title, the reasonable cost of repairing any damages caused by the repair efforts, the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards, the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income if the home was used as a principal place of a business licensed to be operated from the home, reasonable investigative costs for each established violation, and all other costs or fees recoverable by contract or statute<sup>66</sup>.

66. Builders may continue to use attorney's fees provisions in their sales agreements.

## *Successors-in-Interest* (Civil Code §945)

Section 945. The provisions, standards, rights, and obligations set forth in this title are binding upon all original purchasers and their successors-in-interest. For purposes of this title, associations and others having the rights set forth in Section 383 of the Code of Civil Procedure shall be considered to be original purchasers and shall have standing to enforce the provisions, standards, rights, and obligations set forth in this title.

### *Affirmative Defenses.* (Civil Code §945.5 (a)-(h))

Section 945.5. A builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, under the principles of comparative fault pertaining to affirmative defenses, may be excused, in whole or in part, from any obligation, damage, loss, or liability if the builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional can demonstrate any of the following affirmative defenses in response to a claimed violation:

(a) To the extent it is caused by an unforeseen act of nature which caused the structure not to meet the standard. For purposes of this section an “unforeseen act of nature” means a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction<sup>67</sup>.

(b) To the extent it is caused by a homeowner’s unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this title. This includes the failure to give timely notice<sup>68</sup> to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner’s claim.

67. Compliance with the applicable building code, regulation or ordinance may provide a safe harbor or defense against a breach of a functionality standard caused by whether, earthquake, war, terrorism, or vandalism.

68. To the extent that a homeowner fails to give timely notice of a water issue, this may provide a defense to mold claims. Builders should include guidance to homebuyers regarding timely notice in the builder’s maintenance recommendations.

69. Cracks that result from settlement of soils may constitute ordinary wear and tear.

70. This defense focuses the cause of the functionality breach on actions taken by the builder rather than other parties.

(c) To the extent it is caused by the homeowner or his or her agent, employee, general contractor, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of these schedules and recommendations and that the recommendations and schedules were reasonable at the time they were issued.

(d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear<sup>69</sup>, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose<sup>70</sup>.

(e) To the extent that the time period for filing actions bars the claimed violation.

(f) As to a particular violation for which the builder has obtained a valid release.

(g) To the extent that the builder's repair was successful in correcting the particular violation of the applicable standard.

(h) As to any causes of action to which this statute does not apply, all applicable affirmative defenses are preserved.

## **IMMUNITY FOR THIRD-PARTY INSPECTORS**

SEC. 2. Section 43.99 is added to the Civil Code, to read:

Section 43.99. (A) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person or other legal entity that is under contract with an applicant for a residential building permit to provide independent quality review of the plans and specifications provided with the application in order to determine compliance with all applicable requirements imposed pursuant to the State Housing Law (Part 1.5 (com-

mencing with Section 17910) of Division 13 of the Health and Safety Code), or any rules or regulations adopted pursuant to that law, or under contract with that applicant to provide independent quality review of the work of improvement to determine compliance with these plans and specifications, if the person or other legal entity meets the requirements of this section and one of the following applies:

(1) The person, or a person employed by any other legal entity, performing the work as described in this subdivision, has completed not less than five years of verifiable experience in the appropriate field and has obtained certification as a building inspector, combination inspector, or combination dwelling inspector from the International Conference of Building Officials (ICBO) and has successfully passed the technical written examination promulgated by ICBO for those certification categories.

(2) The person, or a person employed by any other legal entity, performing the work as described in this subdivision, has completed not less than five years of verifiable experience in the appropriate field and is a registered professional engineer, licensed general contractor, or a licensed architect rendering independent quality review of the work of improvement or plan examination services within the scope of his or her registration or licensure.

(3) The immunity provided under this section does not apply to any action initiated by the applicant who retained the qualified person.

(4) A “qualified person” for purposes of this section means a person holding a valid certification as one of those inspectors.

(B) Except for qualified persons, this section shall not relieve from, excuse, or lessen in any manner, the responsibility or liability of any person, company, contractor, builder, developer, architect, engineer, designer, or other individual or entity who develops, improves, owns, operates, or manages any residential building for any damages to persons or property caused by construction or design defects. The fact that an inspection by a qualified person has taken place may not be introduced as evidence in a construction defect action,



including any reports or other items generated by the qualified person. This subdivision shall not apply in any action initiated by the applicant who retained the qualified person.

(C) Nothing in this section, as it relates to construction inspectors or plans examiners, shall be construed to alter the requirements for licensure, or the jurisdiction, authority, or scope of practice, of architects pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, professional engineers pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or general contractors pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(D) Nothing in this section shall be construed to alter the immunity of employees of the Department of Housing and Community Development under the Tort Claims Act (Division 3.6 (commencing with Section 810) of Title 1 of the Government Code) when acting pursuant to Section 17965 of the Health and Safety Code.

(E) The qualifying person shall engage in no other construction, design, planning, supervision, or activities of any kind on the work of improvement, nor provide quality review services for any other party on the work of improvement.

(F) The qualifying person, or other legal entity, shall maintain professional errors and omissions insurance coverage in an amount not less than two million dollars (\$2,000,000).

(G) The immunity provided by subdivision (a) does not inure to the benefit of the qualified person for damages caused to the applicant solely by the negligence or willful misconduct of the qualified person resulting from the provision of services under the contract with the applicant.

### **Implementation and Checklists**

In determining whether to be subject to the functionality standards and/or prelitigation procedures, each builder has the option of implementing both or either of the standards and procedures under this statute. Builders and their advisors need to determine the best course of action that meets each builder's business expectations.

Here are a couple of "big picture" considerations every builder and trade contractor should consider when implementing SB 800, depending upon the option chosen:

First, builders who choose to provide an enhanced protection agreement in lieu of the statutory functionality standards must be certain that the agreement is enforceable and must comply with the notice and recording requirements. And the builder will need to make any operational changes necessary to implement the enhanced protection agreement. This includes modifications to subcontracts so that a builder can partner with its trade contractor to ensure not only compliance with the standards, but with the claims-handling procedures and pre-litigation procedures adopted. Also, just in case a builder's enhanced protection agreement turns out to be unenforceable, it should implement any operational changes necessary to make sure that there is at least compliance with the statutory functionality standards—as these standards will still apply.

Second, regardless of whether a builder substitutes his or her own standards and procedures or adopts the functionality standards and procedures in the statute, it may affect virtually every aspect of a builder's operation, including the sale and acquisition of land; site work and construction; homebuyer purchase and sale documents; warranty procedures; customer service; and claims handling. The following section provides some preliminary checklists in each of these areas, pointing out some of the issues to consider when implementing SB 800.

#### **LAND ACQUISITION**

SB 800 defines "builder" as a "builder, developer, or original seller and applies to the sale of new residential units ...". This has particular significance when a builder is buying and/or selling improved property. Since there are functionality standards relating to grading and soils, these issues should be considered in connection with the due diligence, warranties and representations and indemnity provisions in land acquisition agreements.

## **SITE WORK AND CONSTRUCTION**

While it has always been critical for a builder to make sure everyone involved in the construction process is trained to understand the builder's construction practices and procedures, it is even more critical after SB 800. It is more critical because proper implementation involves some new and different approaches in negotiating trade contracts and scopes of work and new compliance guidelines. Here is a checklist of some of these considerations:

- Check subcontract agreements to determine whether any provisions are inconsistent with new standards.
- Analyze how much responsibility for standards will be transferred to subcontractors. Since trade contractors are potentially parties to any SB 800 pre-litigation procedure, it makes sense to develop a practical and equitable way to share these responsibilities.
- Consider incorporating standards into contracts as a measure of subcontractor's performance. For example, if one subcontractor is in control over one or more areas, such as paving and walkways, determine the best way of allocating responsibility between builder and subcontractor over meeting the standard within the appropriate time period.
- Develop the builder's and trade contractor's method of dealing with the timelines for responding to homeowner claims. Determine the role of subcontractor in inspection, repair and mediation processes set forth in this agreement and how to facilitate notice to the subcontractor regarding subcontractor's response to notice from builder.
- Document method of keeping track of subcontractor's contact details in case of a claim after construction is completed.
- Monitor changing insurance environment and check insurance obligations of subcontractor. Analyze impact on "additional insured" issues.
- Examine indemnity agreements to ensure that responses to SB 800 claims are covered by the scope of whatever indemnity agreement is acceptable to both parties.
- Evaluate the use of third-party inspectors and the integration of a quality control program into everyday operations and contracts.

- Create a contractual obligation for subcontractors to participate in repair and/or cash offer efforts under Chapter 4 of the new law.
- Make sure the trade contractors are familiar with the new law and make sure that initial project meetings include information regarding SB 800.

## **PURCHASE AND SALE DOCUMENTS**

- Ensure that statutory disclosure requirements concerning applicability of SB 800 to all new homes first sold after January 1, 2003 are contained in all contracts.
- Determine long-term address or third-party vendor to receive claims. Give notice of this in sales agreements.
- Make sure that disclosure documents are updated to address SB 800, such as the soils issues referenced above.
- Analyze impact on statute of limitations of enhanced protection agreements.
- Review maintenance requirements given to homeowners. Take advantage of opportunity to set standards for homeowner and homeowners association preventive maintenance. Incorporate or reference standards in closing documents.
- Review Department of Real Estate requirements for inclusion of statutory language in sales contract. Consider amending CC&Rs where necessary to conform to pre-litigation procedures.
- Double check which documents need to be disclosed at the time of sale, which need to be maintained for 10 years, and which documents need to be recorded.
- If practical, consider electronic storage of all of the key documents and providing them to homeowner at point of sale on CD-Rom—that way buyer has already been provided with many of the documents that must be provided as part of the pre-litigation procedures.
- After implementing any changes to purchase, sale and warranty documents, make sure all sales executives are trained so that they understand and can explain any new practices and procedures.

## **WARRANTY AND CUSTOMER SERVICE**

While referenced above under the Purchase and Sale checklist, it is important to repeat that all warranties, maintenance manuals and manufacturers' warranties provided to the homeowner must be reviewed, to ensure compliance with the law.

- Review current homeowner orientation practices and consider including even more detail regarding the homeowners' obligation to follow reasonable maintenance practices.
- When revising homeowner maintenance manuals, make sure the obligations are reasonable and make sure they are set forth clearly, as failure to file these guidelines may later serve as the basis of a builder or trade contractor's defense to a claim.
- Train all personnel, including sales agents, on provisions of statute.
- Create communications plan with customers after sale to inspect for violations of standards.
- Create plan to encourage use of normal customer-service protocols before initiating SB 800 procedures.
- Ensure that complaints are documented properly.
- Consider mailings after close of escrow reminding owners of the importance of ongoing maintenance. Also consider adding a maintenance walk-through at the end of the usual warranty period where failure to maintain can be pointed out and documented.
- Review developer transition practices when a homeowners association is involved. Also review maintenance guidelines given to the association in any turnover documents and consider one-year walk-thru to document the homeowners association's maintenance practices.

## **IMPACT ON CLAIMS HANDLING PROCEDURE**

Obviously there is a great deal of detail set forth in the bill regarding claims handling. Protocols need to be established to ensure that full compliance with the timelines is established. A timeline is contained in Appendix E, but here are some additional considerations:

- Ensure that job file documentation as required is available at central location to comply with 30-day requirement. Establish record retention policy; consider storing documents electronically per project and phase. Establish policy regarding distribution of information to claimants.
- Create data banks for subcontractors and insurance information so as to expedite response to claims and preparation for inspections.
- Create data banks of available experts, repair contractors and mediators available to comply with statute.
- Document claims-handling process and training protocols for claims handling staff, including areas of responsibility, delineation of authority levels.
- Create internal interpretation standards for certain types of violations of standards (i.e., size of cracks, “what to do if”).
- Consider software systems to track the timing on each claim.
- Determine paper trail and form letters for communication with claimants and their counsel.

## **IMPACT ON INSURANCE**

As noted earlier in this guide, the comprehensive general liability (CGL) insurance crisis was a major impetus for creating this legislation. Since this legislation only covers homes first sold as of January 1, 2003, most of the issue concerning insurance will be for your current and future policies.

We expect that the insurance market will react to this bill with certain adjustments to the forms of insurance. Generally stated, CGL insurance covers property damage and bodily injury. Most of the standards set forth in this new law involve some form of property damage. Certain endorsements to insurance policies may affect how these standards are covered. Obtaining a clear understanding of this issue prior to a claim is a valuable tool to take advantage of the expedited claims-handling procedures and cost savings.

Although it is anticipated that new insurance products will address these new procedures, there will be a transition period during which older policy forms may be applicable. Cooperate closely with the claims department to determine the impact of the new law, including work product exclusions, contractual obligation exclusions, self-insured retention exhaustion on your new operations.

## **CLAIMS COOPERATION**

Carriers will be adjusting to the new protocols as well as dealing with the duality of handling claims under the old system and those under the new law. Fortunately, there should be some time to create new procedures. There are several areas of concern in the insurance claims handling relationship between builder and carrier:

- Claims notification procedure, the time lines are short and brisk.
- Availability of insurance adjustors to attend inspections or have field adjustors ready.
- Availability to adjustors to attend mediations.
- Relationship of repair costs to insurance self-insured retentions and deductibles.
- Relationship of builder to additional insured carriers and provision of notice to those carriers.
- Control over repair subcontractors; who chooses?
- What will be the carrier's involvement when no issue release is provided after repair?

## APPENDIX A

### FUNCTIONALITY STANDARDS SUBJECT TO STATUTE OF LIMITATIONS LESS THAN 10 YEARS

<i>Function</i>	<i>Time Limit</i>	<i>Code Section</i>
Operation of plumbing and Sewer systems	4 years from Close of Escrow (COE)	896(e)
Electrical Systems	4 years from COE	896(f)
Cracks in exterior pathways, driveways, hardscape, sidewalks, sidewalks, and patios	4 years from COE	896 (g)(1)
Manufacture products including windows, doors, roofs, plumbing products, and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, appliances, and any other product that is completely manufactured offsite	1 year unless manufacturer specifies a greater period	896(g)(3)
Noise for attached units	1 year from original occupancy of adjacent unit	896(g)(6)
Operation of irrigation and drainage system	1 year from COE	896(g)(7)
Decay of untreated wood posts	2 years from COE	896(g)(8)
Unreasonable corrosion of untreated steel fences and adjacent components	4 years from COE	896(g)(9)
Deterioration of building surfaces due to paint or stain	5 years from COE for filing action, however, deterioration may be limited to a shorter period if manufacturer specifies.	896(g)(10)
Landscaping	2 years from COE for filing an action, however, survival period is 1 year.	896(g)(12)
Dryer ducts	2 years from COE	896(G)(14)
Fit and finish warranty	1 year	900



## APPENDIX B

### LEGISLATIVE HISTORY REGARDING MANUFACTURED DEFECTS

Senate Journal

August 31, 2002

#### MOTION TO PRINT IN JOURNAL

Senator Burton moved that the following letter be printed in the Journal. Motion carried.

August 29, 2002

*The Honorable Gregory P. Schmidt  
Chief Executive Officer*

Dear Greg:

There has been a request for clarification of Section 896(g)(3)(E) of SB 800. Under that section, if a homeowner brings a claim solely for a defect in a manufactured product and the homeowner includes the builder in the claim, the right to repair provisions apply to the claim against the builder. Otherwise, the statute does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure.

Peace and Friendship,

JOHN BURTON  
President pro Tempore

## APPENDIX C

### FREQUENTLY ASKED QUESTIONS AND ANSWERS

#### Functionality

**QUESTION: Why does the new law refer to both designed and actual moisture barriers, rather than just “actual moisture barriers”?**

Because this could create a loophole for builders who, for example, failed to install house wrap, even though the plans called for its installation.

**QUESTION: What is “unintended” water, unintended by whom?**

Intent refers to the intent of the designer/architect, as evidenced by the plans.

**QUESTION: What does “materially comply with the design criteria set by applicable government building codes, regulations, and ordinances” mean?**

One of the primary purposes of the new law is stop defect claims for technical code violations, e.g., improper nail patterns, and instead focus on whether a home functions as a home. According, “materially comply” is intended to indicate that those minor violations are no longer actionable.

**QUESTION: Some of the soils functionality standards refer to “engineered retaining walls.” What are these?**

Engineered retaining walls are walls that are designed to act as retaining walls as opposed to simple landscape or decorative walls.

#### Fit and Finish

**QUESTION: Why is the mandatory one-year fit and finish warranty contained in Chapter 3 and not one of the functionality standards in Chapter 2?**

For several reasons. First, to preserve the freedom of builders to draft contracts however they see fit (a warranty is a type of contract). Second, to avoid confusion over whether some of the component parts for which a fit and finish warranty is required were part of one of the functionality standards, thereby extending the warranty period beyond the one-year period. Third, to avoid litigation over whether the fit and finish warranty should be considered an “Enhanced Protection Agreement” that meets the minimum criteria set forth in Chapter 2.

**QUESTION: Is the fit and finish warranty automatically subject to any of the provisions of SB 800?**

Other than the requirement that every builder must provide one, none of the other provisions (pre-litigation process, the statute of limitations, the burden of proof, the affirmative defenses, the definitions, alternative dispute resolution, etc.) apply. Of course, a builder may choose to incorporate any similar provisions into the fit and finish warranty.

**QUESTION: Are there minimum standards for the fit and finish warranty?**

No, other than the requirement that they must be for a period of at least one year.

## **Enhanced Protection Agreements**

**QUESTION: What is an Enhanced Protection Agreement (“EPA”)?**

An “Enhanced Protection Agreement” (“EPA”) is an express contractual agreement by which a builder may offer equal or greater protections to a homebuyer than the functionality standards set forth in Chapter 2 of the new law. The EPA must provide those protections for time periods equal to or longer than the time periods applicable to each of the standards found in Chapter 2.

**QUESTION: Why might a builder wish to offer an Enhanced Protection Agreement?**

A builder may offer an EPA for any number of reasons. A builder may decide to further define terms in the functionality standards contained in its own contractual warranty or it might consider doing so in order to meet insurance requirements.

**QUESTION: Should a builder consult an attorney before deciding whether to offer an EPA?**

Yes. Nothing in this publication is intended to constitute legal advice. Issues to consider in deciding whether to offer an EPA include: (1) whether insurance would cover remedies for violation of the standards contained in an EPA since an EPA creates contractual liability, whereas the functionality standards are imposed by statute; (2) the heightened risk of litigation at the time a claim is filed to determine whether the EPA meets the minimum standards contained in Chapter 2; and (3) the agreement must be drafted so that it is legally enforceable or a builder will likely be held to the statutory standards anyway.

**QUESTION: Is the pre-litigation process (the notice, inspection, right to repair and mediation) contained in Chapter 4 automatically applicable to an EPA?**

No. If a builder desires to take advantage of the pre-litigation process, it may do so by an “alternative contractual nonadversarial procedure” after consulting an attorney.

**QUESTION: If a builder wishes to offer a homebuyer an EPA, when must the builder notify the homebuyer?**

No later than close of escrow.

**QUESTION: If a builder offers the homebuyer an EPA, must the builder provide the homebuyer with a copy of Chapter 2 that contains all of the functionality standards?**

Yes.

**QUESTION: When must a homeowner challenge the EPA?**

When the homeowner sends the builder a notice of a claimed violation of one of the standards.

**QUESTION: Is the EPA binding on subsequent purchasers of the home?**

Yes, if the subsequent purchasers are given actual or record notice. Record notice requires that the EPA be recorded in the chain of title at the county recorder's office.

**QUESTION: If a builder already provides a warranty with specific performance standards that are more detailed than the functionality standards contained in Chapter 2, will it automatically be considered an EPA under the new law?**

No, the warranty must be measured by the functionality standards contained in Chapter 2 to ensure that the warranty provides equal or greater protection to the homebuyer. Additionally, in order to be considered an EPA, the warranty must comply with the drafting, notice and recording requirements of the new law.

## **Other Homebuilder Options**

**QUESTION: May a builder continue to offer his or her existing warranty?**

Yes, however, by doing so, a builder may be offering a homebuyer multiple opportunities to demand repairs or sue a builder.

**QUESTION: May a builder elect to opt-out of the pre-litigation procedure established by the new law?**

Yes. A builder may opt-out by notifying the homebuyer at the time the sales agreement is executed. Once a builder has elected to opt-out, that election is binding and the builder may not subsequently return to the pre-litigation procedure established by Chapter 4 of the new law. The vehicle by which the builder makes such an election is referred to as the builder's alternative nonadversarial contractual provisions.

**QUESTION: If a builder opts out of the SB 800 pre-litigation process, do any provisions of Chapter 4 continue to apply?**

Possibly yes. The last sentence of Section 927 specifically sets forth rules for tolling the limitations period in this case. Builders are strongly advised to consider the effect of this provision before choosing to opt out.

**QUESTION: What happens if a builder does nothing?**

A builder will likely be subject to the functionality standards contained in Chapter 2, and the law will impose a one-year fit and finish warranty on the builder. Also, if a builder does nothing, the builder will probably not be able to take advantage of the right to repair for failure to strictly comply with its requirements (providing a copy of Part 2 of Division 2 to the homebuyer at close of escrow). By doing nothing, a builder may also fail to take advantage of a number of affirmative defenses provided by the new law including those that require a homebuyer to follow a builder's reasonable maintenance recommendations and guidelines.

**QUESTION: May a builder choose to repair some claims and not others?**

Yes.

**QUESTION: May builders opt into the provisions of SB 800 before January 1, 2003?**

Yes, however, both the homeowner and the builder's insurer must agree in writing.

## **Alternative Dispute Resolution**

**QUESTION: What must the builder's alternative nonadversarial contractual provisions contain?**

There are no legal requirements set forth in the statute. It may contain a notice of claim, a right of the builder to inspect or test, a right to repair, and any form of alternative dispute resolution, including binding arbitration, mediation, or judicial reference. It may include all of these provisions, none of them, or any combination. Consult a professional advisor when preparing such a provision, as it must be legally enforceable.

**QUESTION: If a builder elects to use an alternative nonadversarial contractual provision, may the builder require binding arbitration or judicial reference after the process set forth in the alternative nonadversarial contractual provision is completed?**

Yes. As set forth above, SB 800 procedures cover only the pre-litigation procedure. To the extent enforceable under current law, it also expressly reserves the right to use arbitration and/or judicial reference if the alternative procedures fail to resolve the dispute.

**QUESTION: If a builder elects to use the pre-litigation procedure established by the new law, may the builder require binding arbitration or judicial reference after the pre-litigation procedure is completed?**

Yes. SB 800 procedures cover only the pre-litigation procedure. To the extent enforceable under current law, it also expressly reserves the right to use arbitration and/or judicial reference if the statutory procedures fail to resolve the dispute.

## **Claims Procedures**

**QUESTION: When a homeowner files a notice of claim, must the homeowner specify the type of functionality standard breached?**

Yes.

**QUESTION: If a builder desires to introduce evidence of an inspection, may the builder choose an inspector that does not meet the statutory criteria for one to be considered a “qualified inspector” under the new law?**

Probably Yes. With regarding to introduction of such evidence, the new law expressly states that “the fact that an inspection by a qualified person has taken place may not be introduced as evidence in a construction defect action, including any reports or other items generated by the qualified person.” Since the law is silent on inspectors that do not meet the statutory standards, evidence of their inspections should be admissible. One qualification that does not affect the competency of the inspector is the amount of insurance carried by the inspector. Accordingly, if an otherwise qualified person does not have the minimum insurance required (\$2 million), evidence related to that inspection, may be admissible.

**QUESTION: How are the alternative subcontractors determined?**

A builder must first advise the homeowner at the time of making the repair offer to the homeowner that the homeowner has a right to request up to 3 alternative contractors to perform the repair. If the homeowner indicates that it would like to exercise this option, the builder has sole discretion to choose which 3 alternative contractors to offer to the homeowner and the builder is not required to disclose the bid amounts provided by the alternative contractors. The homeowner may choose from among the 3 alternatives. SB 800 requires no more than 3 alternative contractors cumulatively – not 3 alternatives for each functionality standard breach.

**QUESTION: Who pays for repair work performed by an alternative contractor?**

SB 800 does not specify who pays. This is a matter for negotiation between the builder and subcontractor.

**QUESTION: May a third party administer the SB 800 pre-litigation process?**

Yes.

## **Litigation**

### **QUESTION: How does SB 800 affect the Aas decision?**

To the extent that some of the functionality standards do not require resultant damage, *Aas* is partially reversed. Otherwise the decision remains in effect.

### **QUESTION: Are personal injury claims covered by SB 800?**

No.

### **QUESTION: Are claims filed by a homeowners' association considered a class action?**

No.

### **QUESTION: How are class action claims affected by SB 800?**

Class actions are almost never certified for construction defect cases due to the difficulty in finding commonality of claims. The only situation in which classes have been certified involve claims that solely allege defects in manufactured products incorporated into a home, such as fire sprinklers or furnaces. Provided that the only defendant named is the manufacturer, SB 800 does not apply. If a builder is named, SB 800's right to repair pre-litigation process applies.

### **QUESTION: How does SB 800 affect the Calderon process?**

The Calderon process remains a pre-litigation requirement which is implemented after the SB 800 pre-litigation process is complete except to the extent that some of the Calderon process requirements are "substantially similar" to the SB 800 pre-litigation process, they do not need to be repeated.

## **Miscellaneous**

### **QUESTION: Must a builder provide the entirety of Part 2 of Division 2 of the Civil Code to the homebuyer with the original sales documentation?**

To be safe, yes. Although this was a Legislative Counsel drafting error, SB 800 requires strict compliance with all of its provisions. Accordingly, builders are advised to give homebuyers a copy of the entire Part in electronic format and homebuyers must acknowledge receipt of such Part. In addition, builders should provide a hard copy only of Title 7 to the homebuyer, initialed and acknowledged by the homebuyer.

**QUESTION: How does SB 800 affect a builder's customer-service process?**

SB 800 maintains and encourages homeowners to continue to use a builder's less formal customer-service process – following whatever process a builder establishes. If a builder can resolve a functionality breach using existing customer-service processes, there is no need to file a formal notice of claim pursuant to SB 800.

**QUESTION: How can the California Building Performance Guidelines for Residential Construction be used?**

The manual may constitute commonly accepted maintenance requirements. In addition, it may be adopted with some modification to use as a fit and finish warranty. However, it should not be assumed that it constitutes an Enhanced Protection Agreement without review by legal and engineering professionals.

**QUESTION: How does SB 800 affect land developers?**

Land developers are considered builders, if they engaged in construction activities such as grading or infrastructure installation. However, due to the affirmative defenses, land developers are not responsible for functionality breaches to the extent that they are caused by the alteration (construction) activities of subsequent contractors.

**QUESTION: How does SB 800 affect custom homebuilders?**

SB 800 applies to custom homebuilders if they are selling real estate (land and house) but not if they are merely performing construction activities pursuant to a construction contract with the homeowner.

**QUESTION: Does SB 800 apply to homes that close escrow after January 1, 2003 or only homes for which a purchase agreement is entered into after January 1, 2003?**

Because SB 800 imposes numerous requirements on the builder at the time the original sales agreement is provided to, or signed by, the homebuyer, and because SB 800 is not intended to apply retroactively, the bill only applies to homes for which a purchase agreement is entered into after January 1, 2003.



## APPENDIX D

### DOCUMENT IMPLEMENTATION

#### **Documents That Should Be Given to Homebuyer**

- A copy of Chapter 2 (the Functionality Standards), if the builder intends to use an Enhanced Protection Agreement (“EPA”). Election to use EPA must be made by builder prior to close of escrow.
- A copy of the Fit & Finish Warranty.
- A copy of Part 2 of Division 2 of the Civil Code if builder is following the statutory prelitigation process found in Chapter 4.
- All maintenance and preventative maintenance recommendations.
- Copies of all manufactured products maintenance, preventive maintenance, and limited warranty information.
- Copies of all of the builder’s limited contractual warranties.
- Name and address of builder’s agent to receive notices of claim.
- Notice of the existence of the statutory pre-litigation procedures (Chapter 4) and a notice that these procedures impact the legal rights of the homeowner if the builder is following the statutory pre-litigation process.

#### **Documents That May Be Recorded**

- Enhanced Protection Agreement.
- Maintenance recommendations.
- Copies of all manufactured products maintenance, preventive maintenance, and limited warranty information.
- Copies of all of the builder’s limited contractual warranties.
- Name and address of builder’s agent to receive notices of claim.
- Notice of the existence of the statutory pre-litigation procedures (Chapter 4) and that these procedures impact the legal rights of the homeowner if builder elects to follow statutory process.\*
- Copy of alternative nonadversarial contract.

\* *Recordation required by Statute*

## **Documents That Builder Must Retain**

- Copies of all relevant plans, specifications, mass or rough grading plans, final soils reports, Department of Real Estate public reports, and available engineering calculations, that pertains to a homeowner's residence specifically or as part of a larger development tract.
- All maintenance and preventative maintenance recommendations by the builder.
- Copies of all manufactured products maintenance, preventive maintenance, and limited warranty information.
- Copies of all of the builder's limited contractual warranties.
- Notice of the existence of the statutory pre-litigation procedures (Chapter 4) and a notice that these procedures impact the legal rights of the homeowner, initialed and acknowledged by the purchaser and the builder's sales representative.
- A copy of Part 2 of Division 2 of the Civil Code initialed and acknowledged by homebuyer.

**APPENDIX E**

**TIMELINE**



## APPENDIX F

### Senate Bill No. 800

#### Chapter 722

An act to add Section 43.99 to, and to add Title 7 (commencing with Section 895) to Part 2 of Division 2 of, the Civil Code, relating to construction defects.

[Approved by Governor September 20, 2002. Filed with Secretary of State September 20, 2002.]

#### LEGISLATIVE COUNSEL’S DIGEST

SB 800, Burton. Liability: construction defects. Existing law provides for stipulated judgments in construction defect actions, as defined. The bill would specify the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, the statute of limitations, the burden of proof, the damages recoverable, a detailed prelitigation procedure, and the obligations of the homeowner. This bill would also provide that there is no personal monetary liability on the part of, and no cause of action for damages shall arise against, any person, in any of the specified categories, who is under contract with an applicant for a residential building permit to provide independent quality review of the plans and specifications provided with the application in order to determine compliance with all applicable requirements imposed pursuant to the State Housing Law or any rules or regulations adopted pursuant to that law, or to inspect a work of improvement to determine compliance with these plans and specifications, except as specified. The bill would also set forth specified findings and declarations of the Legislature regarding construction defects.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares, as follows:

- (a) The California system for the administration of civil justice is one of the fairest in the world, but certain procedures and standards should be amended to ensure fairness to all parties.
- (b) The prompt and fair resolution of construction defect claims is in the interest of consumers, homeowners, and the builders of homes, and is vital to the state’s continuing growth and vitality. However, under current procedures and standards, homeowners and builders alike are not afforded the opportunity for quick and fair resolution of claims. Both need clear standards and mechanisms for the prompt resolution of claims.
- (c) It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects.

SEC. 2. Section 43.99 is added to the Civil Code, to read:

43.99. (a) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person or other legal entity that is under contract with an Applicant for a residential building permit to provide independent quality review of the plans and specifications provided with the application in order to determine compliance with all applicable requirements imposed pursuant to the State Housing Law (Part 1.5 (commencing with Section 17910) of Division 13 of the Health and Safety Code), or any rules or regulations adopted pursuant to that law, or under contract with that applicant to provide independent quality review of the work of improvement to determine compliance with these plans and specifications, if the person or other legal entity meets the requirements of this section and one of the following applies:

(1) The person, or a person employed by any other legal entity, performing the work as described in this subdivision, has completed not less than five years of verifiable experience in the appropriate field and has obtained certification as a building inspector, combination inspector, or combination dwelling inspector from the International Conference of Building Officials (ICBO) and has successfully passed the technical written examination promulgated by ICBO for those certification categories.

(2) The person, or a person employed by any other legal entity, performing the work as described in this subdivision, has completed not less than five years of verifiable experience in the appropriate field and is a registered professional engineer, licensed general contractor, or a licensed architect rendering independent quality review of the work of improvement or plan examination services within the scope of his or her registration or licensure.

(3) The immunity provided under this section does not apply to any action initiated by the applicant who retained the qualified person.

(4) A “qualified person” for purposes of this section means a person holding a valid certification as one of those inspectors.

(b) Except for qualified persons, this section shall not relieve from, excuse, or lessen in any manner, the responsibility or liability of any person, company, contractor, builder, developer, architect, engineer, designer, or other individual or entity who develops, improves, owns, operates, or manages any residential building for any damages to persons or property caused by construction or design defects. The fact that an inspection by a qualified person has taken place may not be introduced as evidence in a construction defect action, including any reports or other items generated by the qualified person. This subdivision shall not apply in any action initiated by the applicant who retained the qualified person.

(c) Nothing in this section, as it relates to construction inspectors or plans examiners, shall be construed to alter the requirements for licensure, or the jurisdiction, authority, or scope of practice, of architects pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, professional

engineers pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or general contractors pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(d) Nothing in this section shall be construed to alter the immunity of employees of the Department of Housing and Community Development under the Tort Claims Act (Division 3.6 (commencing with Section 810) of Title 1 of the Government Code) when acting pursuant to Section 17965 of the Health and Safety Code.

(e) The qualifying person shall engage in no other construction, design, planning, supervision, or activities of any kind on the work of improvement, nor provide quality review services for any other party on the work of improvement.

(f) The qualifying person, or other legal entity, shall maintain professional errors and omissions insurance coverage in an amount not less than two million dollars (\$2,000,000).

(g) The immunity provided by subdivision (a) does not inure to the benefit of the qualified person for damages caused to the applicant solely by the negligence or willful misconduct of the qualified person resulting from the provision of services under the contract with the applicant.

SEC. 3. Title 7 (commencing with Section 895) is added to Part 2 of Division 2 of the Civil Code, to read:

## TITLE 7. REQUIREMENTS FOR ACTIONS FOR CONSTRUCTION DEFECTS

### CHAPTER 1. DEFINITIONS

895. (a) “Structure” means any residential dwelling, other building, or improvement located upon a lot or within a common area.

(b) “Designed moisture barrier” means an installed moisture barrier specified in the plans and specifications, contract documents, or manufacturer’s recommendations.

(c) “Actual moisture barrier” means any component or material, actually installed, that serves to any degree as a barrier against moisture, whether or not intended as such.

(d) “Unintended water” means water that passes beyond, around, or through a component or the material that is designed to prevent that passage.

(e) “Close of escrow” means the date of the close of escrow between the builder and the original homeowner. With respect to claims by an association, as defined in subdivision (a) of Section 1351, “close of escrow” means the date of substantial completion, as defined in Section 337.15 of the Code of Civil Procedure, or the date the builder relinquishes control over the association’s ability to decide whether to initiate a claim under this title, whichever is later.

(f) “Claimant” or “homeowner” includes the individual owners of single-family homes, individual unit owners of attached dwellings and, in the case of a common interest development, any association as defined in subdivision (a) of Section 1351.

## CHAPTER 2. ACTIONABLE DEFECTS

896. In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant’s claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law.

(a) With respect to water issues:

(1) A door shall not allow unintended water to pass beyond, around, or through the door or its designed or actual moisture barriers, if any.

(2) Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers, including, without limitation, internal barriers within the systems themselves. For purposes of this paragraph, “systems” include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(3) Windows, patio doors, deck doors, and their systems shall not allow excessive condensation to enter the structure and cause damage to another component. For purposes of this paragraph, “systems” include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any.

(4) Roofs, roofing systems, chimney caps, and ventilation components shall not allow water to enter the structure or to pass beyond, around, or through the designed or actual moisture barriers, including, without limitation, internal barriers located within the systems themselves. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, and sheathing, if any.

(5) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow water to pass into the adjacent structure. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashing, and sheathing, if any.

(6) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow unintended water to pass within the systems themselves and cause damage to framing, substrate, flashing, and sheathing, if any.



- (7) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to cause damage to another building component.
- (8) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to limit the installation of the type of flooring materials typically used for the particular application.
- (9) Hardscape, including paths and patios, irrigation systems, landscaping systems, and drainage systems, that are installed as part of the original construction, shall not be installed in such a way as to cause water or soil erosion to enter into or come in contact with the structure so as to cause damage to another building component.
- (10) Stucco, exterior siding, exterior walls, including, without limitation, exterior framing, and other exterior wall finishes and fixtures and the systems of those components and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall be installed in such a way so as not to allow unintended water to pass into the structure or to pass beyond, around, or through the designed or actual moisture barriers of the system, including any internal barriers located within the system itself. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.
- (11) Stucco, exterior siding, and exterior walls shall not allow excessive condensation to enter the structure and cause damage to another component. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.
- (12) Retaining and site walls and their associated drainage systems shall not allow unintended water to pass beyond, around, or through its designed or actual moisture barriers including, without limitation, any internal barriers, so as to cause damage. This standard does not apply to those portions of any wall or drainage system that are designed to have water flow beyond, around, or through them.
- (13) Retaining walls and site walls, and their associated drainage systems, shall only allow water to flow beyond, around, or through the areas designated by design.
- (14) The lines and components of the plumbing system, sewer system, and utility systems shall not leak.
- (15) Plumbing lines, sewer lines, and utility lines shall not corrode so as to impede the useful life of the systems.
- (16) Sewer systems shall be installed in such a way as to allow the designated amount of sewage to flow through the system.
- (17) Shower and bath enclosures shall not leak water into the interior of walls, flooring systems, or the interior of other components.

(18) Ceramic tile and tile countertops shall not allow water into the interior of walls, flooring systems, or other components so as to cause damage.

(b) With respect to structural issues:

(1) Foundations, load bearing components, and slabs, shall not contain significant cracks or significant vertical displacement.

(2) Foundations, load bearing components, and slabs shall not cause the structure, in whole or in part, to be structurally unsafe.

(3) Foundations, load bearing components, and slabs, and underlying soils shall be constructed so as to materially comply with the design criteria set by applicable government building codes, regulations, and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction.

(4) A structure shall be constructed so as to materially comply with the design criteria for earthquake and wind load resistance, as set forth in the applicable government building codes, regulations, and ordinances in effect at the time of original construction.

(c) With respect to soil issues:

(1) Soils and engineered retaining walls shall not cause, in whole or in part, damage to the structure built upon the soil or engineered retaining wall.

(2) Soils and engineered retaining walls shall not cause, in whole or in part, the structure to be structurally unsafe.

(3) Soils shall not cause, in whole or in part, the land upon which no structure is built to become unusable for the purpose represented at the time of original sale by the builder or for the purpose for which that land is commonly used.

(d) With respect to fire protection issues:

(1) A structure shall be constructed so as to materially comply with the design criteria of the applicable government building codes, regulations, and ordinances for fire protection of the occupants in effect at the time of the original construction.

(2) Fireplaces, chimneys, chimney structures, and chimney termination caps shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire outside the fireplace enclosure or chimney.

(3) Electrical and mechanical systems shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire.

(e) With respect to plumbing and sewer issues:

Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action may be brought for a violation of this subdivision more than four years after close of escrow.

(f) With respect to electrical system issues:

Electrical systems shall operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action shall be brought pursuant to this subdivision more than four years from close of escrow.

(g) With respect to issues regarding other areas of construction:

(1) Exterior pathways, driveways, hardscape, sidewalls, sidewalks, and patios installed by the original builder shall not contain cracks that display significant vertical displacement or that are excessive. However, no action shall be brought upon a violation of this paragraph more than four years from close of escrow.

(2) Stucco, exterior siding, and other exterior wall finishes and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall not contain significant cracks or separations.

(3) (a) To the extent not otherwise covered by these standards, manufactured products, including, but not limited to, windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, and appliances shall be installed so as not to interfere with the products' useful life, if any.

(b) For purposes of this paragraph, "useful life" means a representation of how long a product is warranted or represented, through its limited warranty or any written representations, to last by its manufacturer, including recommended or required maintenance. If there is no representation by a manufacturer, a builder shall install manufactured products so as not to interfere with the product's utility.

(c) For purposes of this paragraph, "manufactured product" means a product that is completely manufactured offsite.

(d) If no useful life representation is made, or if the representation is less than one year, the period shall be no less than one year. If a manufactured product is damaged as a result of a violation of these standards, damage to the product is a recoverable element of damages. This subparagraph does not limit recovery if there has been damage to another building component caused by a manufactured product during the manufactured product's useful life.

(e) This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure.

- (4) Heating, if any, shall be installed so as to be capable of maintaining a room temperature of 70 degrees Fahrenheit at a point three feet above the floor in any living space.
- (5) Living space air-conditioning, if any, shall be provided in a manner consistent with the size and efficiency design criteria specified in Title 24 of the California Code of Regulations or its successor.
- (6) Attached structures shall be constructed to comply with interunit noise transmission standards set by the applicable government building codes, ordinances, or regulations in effect at the time of the original construction. If there is no applicable code, ordinance, or regulation, this paragraph does not apply. However, no action shall be brought pursuant to this paragraph more than one year from the original occupancy of the adjacent unit.
- (7) Irrigation systems and drainage shall operate properly so as not to damage landscaping or other external improvements. However, no action shall be brought pursuant to this paragraph more than one year from close of escrow.
- (8) Untreated wood posts shall not be installed in contact with soil so as to cause unreasonable decay to the wood based upon the finish grade at the time of original construction. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.
- (9) Untreated steel fences and adjacent components shall be installed so as to prevent unreasonable corrosion. However, no action shall be brought pursuant to this paragraph more than four years from close of escrow.
- (10) Paint and stains shall be applied in such a manner so as not to cause deterioration of the building surfaces for the length of time specified by the paint or stain manufacturers' representations, if any. However, no action shall be brought pursuant to this paragraph more than five years from close of escrow.
- (11) Roofing materials shall be installed so as to avoid materials falling from the roof.
- (12) The landscaping systems shall be installed in such a manner so as to survive for not less than one year. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.
- (13) Ceramic tile and tile backing shall be installed in such a manner that the tile does not detach.
- (14) Dryer ducts shall be installed and terminated pursuant to manufacturer installation requirements. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.
- (15) Structures shall be constructed in such a manner so as not to impair the occupants' safety because they contain public health hazards as determined by a duly

authorized public health official, health agency, or governmental entity having jurisdiction. This paragraph does not limit recovery for any damages caused by a violation of any other paragraph of this section on the grounds that the damages do not constitute a health hazard.

897. The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage.

### CHAPTER 3. OBLIGATIONS

900. As to fit and finish items, a builder shall provide a homebuyer with a minimum one-year express written limited warranty covering the fit and finish of the following building components. Except as otherwise provided by the standards specified in Chapter 2 (commencing with Section 896), this warranty shall cover the fit and finish of cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim, but shall not apply to damage to those components caused by defects in other components governed by the other provisions of this title. Any fit and finish matters covered by this warranty are not subject to the provisions of this title. If a builder fails to provide the express warranty required by this section, the warranty for these items shall be for a period of one year.

901. A builder may, but is not required to, offer greater protection or protection for longer time periods in its express contract with the homeowner than that set forth in Chapter 2 (commencing with Section 896). A builder may not limit the application of Chapter 2 (commencing with Section 896) or lower its protection through the express contract with the homeowner. This type of express contract constitutes an “enhanced protection agreement.”

902. If a builder offers an enhanced protection agreement, the builder may choose to be subject to its own express contractual provisions in place of the provisions set forth in Chapter 2 (commencing with Section 896). If an enhanced protection agreement is in place, Chapter 2 (commencing with Section 896) no longer applies other than to set forth minimum provisions by which to judge the enforceability of the particular provisions of the enhanced protection agreement.

903. If a builder offers an enhanced protection agreement in place of the provisions set forth in Chapter 2 (commencing with Section 896), the election to do so shall be made in writing with the homeowner no later than the close of escrow. The builder shall provide the homeowner with a complete copy of Chapter 2 (commencing with Section 896) and advise the homeowner that the builder has elected not to be subject to its provisions. If any provision of an enhanced protection agreement is later found to be unenforceable as not meeting the minimum standards of Chapter 2 (commencing with Section 896), a builder may use this chapter in lieu of those provisions found to be unenforceable.

904. If a builder has elected to use an enhanced protection agreement, and a homeowner disputes that the particular provision or time periods of the enhanced protection

agreement are not greater than, or equal to, the provisions of Chapter 2 (commencing with Section 896) as they apply to the particular deficiency alleged by the homeowner, the homeowner may seek to enforce the application of the standards set forth in this chapter as to those claimed deficiencies. If a homeowner seeks to enforce a particular standard in lieu of a provision of the enhanced protection agreement, the homeowner shall give the builder written notice of that intent at the time the homeowner files a notice of claim pursuant to Chapter 4 (commencing with Section 910).

905. If a homeowner seeks to enforce Chapter 2 (commencing with Section 896), in lieu of the enhanced protection agreement in a subsequent litigation or other legal action, the builder shall have the right to have the matter bifurcated, and to have an immediately binding determination of his or her responsive pleading within 60 days after the filing of that pleading, but in no event after the commencement of discovery, as to the application of either Chapter 2 (commencing with Section 896) or the enhanced protection agreement as to the deficiencies claimed by the homeowner. If the builder fails to seek that determination in the timeframe specified, the builder waives the right to do so and the standards set forth in this title shall apply. As to any nonoriginal homeowner, that homeowner shall be deemed in privity for purposes of an enhanced protection agreement only to the extent that the builder has recorded the enhanced protection agreement on title or provided actual notice to the nonoriginal homeowner of the enhanced protection agreement. If the enhanced protection agreement is not recorded on title or no actual notice has been provided, the standards set forth in this title apply to any nonoriginal homeowners' claims.

906. A builder's election to use an enhanced protection agreement addresses only the issues set forth in Chapter 2 (commencing with Section 896) and does not constitute an election to use or not use the provisions of Chapter 4 (commencing with Section 910). The decision to use or not use Chapter 4 (commencing with Section 910) is governed by the provisions of that chapter.

907. A homeowner is obligated to follow all reasonable maintenance obligations and schedules communicated in writing to the homeowner by the builder and product manufacturers, as well as commonly accepted maintenance practices. A failure by a homeowner to follow these obligations, schedules, and practices may subject the homeowner to the affirmative defenses contained in Section 944.

## CHAPTER 4. PRELITIGATION PROCEDURE

910. Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following prelitigation procedures:

(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to

this part against the builder, and shall describe the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and effect as a notice of commencement of a legal proceeding.

(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated document; and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.

911. (a) For purposes of this title, except as provided in subdivision (b), “builder” means any entity or individual, including, not not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner’s claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner’s claim.

(b) For the purposes of this title, ‘builder’ does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner’s claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. For the purposes of this title, these nonaffiliated general contractors and non-affiliated contractors shall be treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals.

912. A builder shall do all of the following:

(a) Within 30 days of a written request by a homeowner or his or her legal representative, the builder shall provide copies of all relevant plans, specifications, mass or rough grading plans, final soils reports, Department of Real Estate public reports, and available engineering calculations, that pertain to a homeowner’s residence specifically or as part of a larger development tract. The request shall be honored if it states that it is made relative to structural, fire safety, or soils provisions of this title. However, a builder is not obligated to provide a copying service, and reasonable copying costs shall be borne by the requesting party. A builder may require that the documents be copied onsite by the requesting party, except that the homeowner may, at his or her option, use his or her own copying service, which may include an offsite copy facility that is bonded and insured. If a builder can show that the builder maintained the documents, but that they later became unavailable due to loss or destruction that was not the fault of the builder, the builder may be excused from the requirements of this subdivision, in which case the builder shall act with reasonable diligence to assist the homeowner in obtaining those documents from any applicable government authority or from the source that generated the document. However, in that case, the time limits specified by this section do not apply.

(b) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, the builder shall provide to the homeowner or his or her legal representative copies of all maintenance and preventative maintenance recommendations that pertain to his or her residence within 30 days of service of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(c) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all manufactured products maintenance, preventive maintenance, and limited warranty information within 30 days of a written request for those documents. These documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(d) At the expense of the homeowner, who may opt to use an offsite copy facility that is bonded and insured, a builder shall provide to the homeowner or his or her legal representative copies of all of the builder's limited contractual warranties in accordance with this part in effect at the time of the original sale of the residence within 30 days of a written request for those documents. Those documents shall also be provided to the homeowner in conjunction with the initial sale of the residence.

(e) A builder shall maintain the name and address of an agent for notice pursuant to this chapter with the Secretary of State or, alternatively, elect to use a third party for that notice if the builder has notified the homeowner in writing of the third party's name and address, to whom claims and requests for information under this section may be mailed. The name and address of the agent for notice or third party shall be included with the original sales documentation and shall be initialed and acknowledged by the purchaser and the builder's sales representative. This subdivision applies to instances in which a builder contracts with a third party to accept claims and act on the builder's behalf. A builder shall give actual notice to the homeowner that the builder has made such an election, and shall include the name and address of the third party.

(f) A builder shall record on title a notice of the existence of these procedures and a notice that these procedures impact the legal rights of the homeowner. This information shall also be included with the original sales documentation and shall be initialed and acknowledged by the purchaser and the builder's sales representative.

(g) A builder shall provide with the original sales documentation, a written copy of this title which shall be initialed and acknowledged by the purchaser and the builder's sales representative.

(h) As to any documents provided in conjunction with the original sale, the builder shall instruct the original purchaser to provide those documents to any subsequent purchaser.

(i) Any builder who fails to comply with any of these requirements within the time specified is not entitled to the protection of this chapter, and the homeowner is released



from the requirements of this chapter and may proceed with the filing of an action, in which case the remaining chapters of this part shall continue to apply to the action.

913. A builder or his or her representative shall acknowledge, in writing, receipt of the notice of the claim within 14 days after receipt of the notice of the claim. If the notice of the claim is served by the claimant's legal representative, or if the builder receives a written representation letter from a homeowner's attorney, the builder shall include the attorney in all subsequent substantive communications, including, without limitation, all written communications occurring pursuant to this chapter, and all substantive and procedural communications, including all written communications, following the commencement of any subsequent complaint or other legal action, except that if the builder has retained or involved legal counsel to assist the builder in this process, all communications by the builder's counsel shall only be with the claimant's legal representative, if any.

914. (a) This chapter establishes a nonadversarial procedure, including the remedies available under this chapter which, if the procedure does not resolve the dispute between the parties, may result in a subsequent action to enforce the other chapters of this title. A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, but may not, in addition to its own nonadversarial contractual provisions, require adherence to the nonadversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable. At the time the sales agreement is executed, the builder shall notify the homeowner whether the builder intends to engage in the nonadversarial procedure of this section or attempt to enforce alternative nonadversarial contractual provisions. If the builder elects to use alternative nonadversarial contractual provisions in lieu of this chapter, the election is binding, regardless of whether the builder's alternative nonadversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable.

(b) Nothing in this title is intended to affect existing statutory or decisional law pertaining to the applicability, viability, or enforceability of alternative dispute resolution methods, alternative remedies, or contractual arbitration, judicial reference, or similar procedures requiring a binding resolution to enforce the other chapters of this title or any other disputes between homeowners and builders. Nothing in this title is intended to affect the applicability, viability, or enforceability, if any, of contractual arbitration or judicial reference after a nonadversarial procedure or provision has been completed.

915. If a builder fails to acknowledge receipt of the notice of a claim within the time specified, elects not to go through the process set forth in this chapter, or fails to request an inspection within the time specified, or at the conclusion or cessation of an alternative nonadversarial proceeding, this chapter does not apply and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

916. (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon request, allow the inspections to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative.

(b) Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision does not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability under an action brought by a claimant.

917. Within 30 days of the initial or, if requested, second inspection or testing, the builder may offer in writing to repair the violation. The offer to repair shall also compensate the homeowner for all applicable damages recoverable under Section 944, within the timeframe for the repair set forth in this chapter. Any such offer shall be accompanied by a detailed, specific, step-by-step statement identifying the

particular violation that is being repaired, explaining the nature, scope, and location of the repair, and setting a reasonable completion date for the repair. The offer shall also include the names, addresses, telephone numbers, and license numbers of the contractors whom the builder intends to have perform the repair. Those contractors shall be fully insured for, and shall be responsible for, all damages or injuries that they may cause to occur during the repair, and evidence of that insurance shall be provided to the homeowner upon request. Upon written request by the homeowner or his or her legal representative, and within the timeframes set forth in this chapter, the builder shall also provide any available technical documentation, including, without limitation, plans and specifications, pertaining to the claimed violation within the particular home or development tract. The offer shall also advise the homeowner in writing of his or her right to request up to three additional contractors from which to select to do the repair pursuant to this chapter.

918. Upon receipt of the offer to repair, the homeowner shall have 30 days to authorize the builder to proceed with the repair. The homeowner may alternatively request, at the homeowner's sole option and discretion, that the builder provide the names, addresses, telephone numbers, and license numbers for up to three alternative contractors who are not owned or financially controlled by the builder and who regularly conduct business in the county where the structure is located. If the homeowner so elects, the builder is entitled to an additional noninvasive inspection, to occur at a mutually convenient date and time within 20 days of the election, so as to permit the other proposed contractors to review the proposed site of the repair. Within 35 days after the request of the homeowner for alternative contractors, the builder shall present the homeowner with a choice of contractors. Within 20 days after that presentation, the homeowner shall authorize the builder or one of the alternative contractors to perform the repair.

919. The offer to repair shall also be accompanied by an offer to mediate the dispute if the homeowner so chooses. The mediation shall be limited to a four-hour mediation, except as otherwise mutually agreed before a nonaffiliated mediator selected and paid for by the builder. At the homeowner's sole option, the homeowner may agree to split the cost of the mediator, and if he or she does so, the mediator shall be selected jointly. The mediator shall have sufficient availability such that the mediation occurs within 15 days after the request to mediate is received and occurs at a mutually convenient location within the county where the action is pending. If a builder has made an offer to repair a violation, and the mediation has failed to resolve the dispute, the homeowner shall allow the repair to be performed either by the builder, its contractor, or the selected contractor.

920. If the builder fails to make an offer to repair or otherwise strictly comply with this chapter within the times specified, the claimant is released from the requirements of this chapter and may proceed with the filing of an action. If the contractor performing the repair does not complete the repair in the time or manner specified, the claimant may file an action. If this occurs, the standards set forth in the other chapters of this part shall continue to apply to the action.

921. (a) In the event that a resolution under this chapter involves a repair by the builder, the builder shall make an appointment with the claimant, make all appropriate arrangements to effectuate a repair of the claimed unmet standards, and compensate the homeowner for all damages resulting therefrom free of charge to the claimant. The repair shall be scheduled through the claimant's legal representative, if any, unless he or she is unavailable during the relevant time periods. The repair shall be commenced on a mutually convenient date within 14 days of acceptance or, if an alternative contractor is selected by the homeowner, within 14 days of the selection, or, if a mediation occurs, within seven days of the mediation, or within five days after a permit is obtained if one is required. The builder shall act with reasonable diligence in obtaining any such permit.

(b) The builder shall ensure that work done on the repairs is done with the utmost diligence, and that the repairs are completed as soon as reasonably possible, subject to the nature of the repair or some unforeseen event not caused by the builder or the contractor performing the repair. Every effort shall be made to complete the repair within 120 days.

922. The builder shall, upon request, allow the repair to be observed and electronically recorded, videotaped, or photographed by the claimant or his or her legal representative. Nothing that occurs during the repair process may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

923. The builder shall provide the homeowner or his or her legal representative, upon request, with copies of all correspondence, photographs, and other materials pertaining or relating in any manner to the repairs.

924. If the builder elects to repair some, but not all of, the claimed unmet standards, the builder shall, at the same time it makes its offer, set forth with particularity in writing the reasons, and the support for those reasons, for not repairing all claimed unmet standards.

925. If the builder fails to complete the repair within the time specified in the repair plan, the claimant is released from the requirements of this chapter and may proceed with the filing of an action. If this occurs, the standards set forth in the other chapters of this title shall continue to apply to the action.

926. The builder may not obtain a release or waiver of any kind in exchange for the repair work mandated by this chapter. At the conclusion of the repair, the claimant may proceed with filing an action for violation of the applicable standard or for a claim of inadequate repair, or both, including all applicable damages available under Section 944.

927. If the applicable statute of limitations has otherwise run during this process, the time period for filing a complaint or other legal remedies for violation of any provision of this title, or for a claim of inadequate repair, is extended from the time of the original claim by the claimant to 100 days after the repair is completed,

whether or not the particular violation is the one being repaired. If the builder fails to acknowledge the claim within the time specified, elects not to go through this statutory process, or fails to request an inspection within the time specified, the time period for filing a complaint or other legal remedies for violation of any provision of this title is extended from the time of the original claim by the claimant to 45 days after the time for responding to the notice of claim has expired. If the builder elects to attempt to enforce its own nonadversarial procedure in lieu of the procedure set forth in this chapter, the time period for filing a complaint or other legal remedies for violation of any provision of this part is extended from the time of the original claim by the claimant to 100 days after either the completion of the builder's alternative nonadversarial procedure, or 100 days after the builder's alternative nonadversarial procedure is deemed unenforceable, whichever is later.

928. If the builder has invoked this chapter and completed a repair, prior to filing an action, if there has been no previous mediation between the parties, the homeowner or his or her legal representative shall request mediation in writing. The mediation shall be limited to four hours, except as otherwise mutually agreed before a nonaffiliated mediator selected and paid for by the builder. At the homeowner's sole option, the homeowner may agree to split the cost of the mediator and if he or she does so, the mediator shall be selected jointly. The mediator shall have sufficient availability such that the mediation will occur within 15 days after the for mediation is received and shall occur at a mutually convenient location within the county where the action is pending. In the event that a mediation is used at this point, any applicable statutes of limitations shall be tolled from the date of the request to mediate until the next court day after the mediation is completed, or the 100-day period, whichever is later.

929. (a) Nothing in this chapter prohibits the builder from making only a cash offer and no repair. In this situation, the homeowner is free to accept the offer, or he or she may reject the offer and proceed with the filing of an action. If the latter occurs, the standards of the other chapters of this title shall continue to apply to the action.

(b) The builder may obtain a reasonable release in exchange for the cash payment. The builder may negotiate the terms and conditions of any reasonable release in terms of scope and consideration in conjunction with a cash payment under this chapter.

930. (a) The time periods and all other requirements in this chapter are to be strictly construed, and, unless extended by the mutual agreement of the parties in accordance with this chapter, shall govern the rights and obligations under this title. If a builder fails to act in accordance with this section within the timeframes mandated, unless extended by the mutual agreement of the parties as evidenced by a postclaim written confirmation by the affected homeowner demonstrating that he or she has knowingly and voluntarily extended the statutory timeframe, the claimant may proceed with filing an action. If this occurs, the standards of the other chapters of this title shall continue to apply to the action.

(b) If the claimant does not conform with the requirements of this chapter, the builder may bring a motion to stay any subsequent court action or other proceeding

until the requirements of this chapter have been satisfied. The court, in its discretion, may award the prevailing party on such a motion, his or her attorney's fees and costs in bringing or opposing the motion.

931. If a claim combines causes of action or damages not covered by this part, including, without limitation, personal injuries, class actions, other statutory remedies, or fraud-based claims, the claimed unmet standards shall be administered according to this part, although evidence of the property in its unrepaired condition may be introduced to support the respective elements of any such cause of action. As to any fraud-based claim, if the fact that the property has been repaired under this chapter is deemed admissible, the trier of fact shall be informed that the repair was not voluntarily accepted by the homeowner. 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.

932. Subsequently discovered claims of unmet standards shall be administered separately under this chapter, unless otherwise agreed to by the parties. However, in the case of a detached single family residence, in the same home, if the subsequently discovered claim is for a violation of the same standard as that which has already been initiated by the same claimant and the subject of a currently pending action, the claimant need not reinitiate the process as to the same standard. In the case of an attached project, if the subsequently discovered claim is for a violation of the same standard for a connected component system in the same building as has already been initiated by the same claimant, and the subject of a currently pending action, the claimant need not reinitiate this process as to that standard.

933. If any enforcement of these standards is commenced, the fact that a repair effort was made may be introduced to the trier of fact. However, the claimant may use the condition of the property prior to the repair as the basis for contending that the repair work was inappropriate, inadequate, or incomplete, or that the violation still exists. The claimant need not show that the repair work resulted in further damage nor that damage has continued to occur as a result of the violation.

934. Evidence of both parties' conduct during this process may be introduced during a subsequent enforcement action, if any, with the exception of any mediation. Any repair efforts undertaken by the builder, shall not be considered settlement communications or offers of settlement and are not inadmissible in evidence on such a basis.

935. To the extent that provisions of this chapter are enforced and those provisions are substantially similar to provisions in Section 1375 of the Civil Code, but an action is subsequently commenced under Section 1375 of the Civil Code, the parties are excused from performing the substantially similar requirements under Section 1375 of the Civil Code.

936. Each and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that the general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals caused, in whole or in part, a violation of a particular standard as the result of a negligent act or

omission or a breach of contract. In addition to the affirmative defenses set forth in Section 945.5, a general contractor, subcontractor, material supplier, design professional, individual product manufacturer, or other entity may also offer common law and contractual defenses as applicable to any claimed violation of a standard. All actions by a claimant or builder to enforce an express contract, or any provision thereof, against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional is preserved. Nothing in this title modifies the law pertaining to joint and several liability for builders, general contractors, subcontractors, material suppliers, individual product manufacturer, and design professionals that contribute to any specific violation of this title. However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply.

937. Nothing in this title shall be interpreted to eliminate or abrogate the requirement to comply with Section 411.35 of the Code of Civil Procedure or to affect the liability of design professionals, including architects and architectural firms, for claims and damages not covered by this title.

938. This title applies only to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003.

## CHAPTER 5. PROCEDURE

941. (a) Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion.

(b) As used in this section, “action” includes an action for indemnity brought against a person arising out of that person’s performance or furnishing of services or materials referred to in this title, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 of the Code of Civil Procedure in an action which has been brought within the time period set forth in subdivision (a).

(c) The limitation prescribed by this section may not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action.

(d) Sections 337.15 and 337.1 of the Code of Civil Procedure do not apply to actions under this title.

(e) Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title, except that repairs made pursuant to Chapter 4 (commencing with Section 910), with the exception of the tolling provision contained in Section 927, do not extend the period for filing an action, or restart the time limitations contained in subdivision (a) or (b) of Section 7091 of the Business and Professions Code. If a builder arranges for a



contractor to perform a repair pursuant to Chapter 4 (commencing with Section 910), as to the builder the time period for calculating the statute of limitation in subdivision (a) or (b) of Section 7091 of the Business and Professions Code shall pertain to the substantial completion of the original construction and not to the date of repairs under this title. The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section.

942. In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction.

943. (a) Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title.

(b) As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law.

944. If a claim for damages is made under this title, the homeowner is only entitled to damages for the reasonable value of repairing any violation of the standards set forth in this title, the reasonable cost of repairing any damages caused by the repair efforts, the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards, the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income if the home was used as a principal place of a business licensed to be operated from the home, reasonable investigative costs for each established violation, and all other costs or fees recoverable by contract or statute.

945. The provisions, standards, rights, and obligations set forth in this title are binding upon all original purchasers and their successors-in-interest. For purposes of this title, associations and others having the rights set forth in Section 383 of the Code of Civil Procedure shall be considered to be original purchasers and shall have standing to enforce the provisions, standards, rights, and obligations set forth in this title.

945.5. A builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, under the principles of comparative fault pertaining to affirmative defenses, may be excused, in whole or in part, from any obligation, damage, loss, or liability if the builder, general contractor, subcon-



tractor, material supplier, individual product manufacturer, or design professional can demonstrate any of the following affirmative defenses in response to a claimed violation:

- (a) To the extent it is caused by an unforeseen act of nature which caused the structure not to meet the standard. For purposes of this section an “unforeseen act of nature” means a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction.
- (b) To the extent it is caused by a homeowner’s unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this title. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner’s claim.
- (c) To the extent it is caused by the homeowner or his or her agent, employee, general contractor, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder’s or manufacturer’s recommendations, or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder’s recommended maintenance schedule, the builder shall show that the homeowner had written notice of these schedules and recommendations and that the recommendations and schedules were reasonable at the time they were issued.
- (d) To the extent it is caused by the homeowner or his or her agent’s or an independent third party’s alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure’s use for something other than its intended purpose.
- (e) To the extent that the time period for filing actions bars the claimed violation.
- (f) As to a particular violation for which the builder has obtained a valid release.
- (g) To the extent that the builder’s repair was successful in correcting the particular violation of the applicable standard.
- (h) As to any causes of action to which this statute does not apply, all applicable affirmative defenses are preserved.