

Right to Repair Act Issues

Burch v. Superior Court followed a similar opinion by the court in *Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC* (2013) 219 C.A.4th 98, and reiterated that (1) California's Right to Repair Act (California Civil Code § 895 et. seq.) is not the exclusive remedy for a homeowner seeking damages for construction defects that have caused property damage, (2) the Act does not limit or preclude common law claims for such damages, and (3) a home builder can owe a duty of care to prospective purchasers of a home.

The Right to Repair Act defines construction defects according to adopted standards for a home and its component parts. The Act details pre-litigation procedures for a homeowner to follow before filing suit against a builder for construction defects. The Act requires a homeowner to notify a builder of a construction defect problem and allow the builder reasonable and timely access for inspection and repair. The remedies of a homeowner or its insurance carrier under the Act are limited if the homeowner and/or the homeowner's insurance carrier do not comply with the requirements of the Act.

The *Burch* decision effectively destroys the construction industry arguments that a subrogating carrier seeking damages caused by construction defects must (1) comply with the requirements of the Right to Repair Act to obtain recovery and (2) is limited to the remedies provided by the Act. Construction industry defendants typically assert such arguments as defenses to subrogation claims for damages caused by construction defects as compliance with the requirements of the Act is difficult and impractical for subrogating insurers. Under *Burch v. Superior Court*, compliance with the Act is not necessary to pursue recovery of such damages.

The Right to Repair Act was enacted by the legislature in 2002 to abrogate the holding in *Aas v. Superior Court* (2000) 24 C.A.4th 627, which held that deficiencies in residential construction were actionable in tort only if they caused property damage or personal injury. The *Aas* court held that claims to recover economic losses, such as the cost to repair a construction defect that did not cause other damage, were limited to contract remedies and were not recoverable in tort. The Right to Repair Act created a right to recover damages for specified defects that resulted in economic loss only.

The construction industry argued that the Right to Repair Act applied to all claims for damages arising out of construction defects. The construction industry argued that the Right to Repair Act applied to claims for the cost to repair construction defects (economic damages) as well as to claims for damages caused by construction defects (tort damages). The *Burch* opinion confirms that the Right to Repair Act applies only to claims for the cost to repair construction defects without resultant damage to other property and does not apply to claims for damages caused by construction defects, including damage to non-defective components of the home.

The *Burch* opinion enhances potential for subrogation recovery. It is simply not practical for an insurer to comply with the requirements of the Act to protect recovery rights in a typical property damage claim. A carrier adjusting a claim for damages arising out of a fire or flooding caused by a construction defect might be able to provide a potentially adverse party an opportunity to inspect but cannot practically provide the party an opportunity to repair. The contractual obligations of the carrier to its insured are, most probably, much different than any repair obligations for which the third party might be legally liable. Fortunately, the *Burch* court recognized that requiring a carrier to place compliance with the requirements of the Act over its contractual obligations under its insurance policy to preserve subrogation recovery rights did not make sense when complying with the requirements of the Act essentially served no practical purpose and did not further the legislative intent behind the Act.



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The *Burch* decision follows the *Liberty Mutual* decision that essentially limited the Right to Repair Act to claims to correct construction defects. It had been suggested by many commentators that decisions following *Liberty Mutual* might narrow, if not overturn, the *Liberty Mutual* decision. However, the *Burch* decision suggests that the Right to Repair Act will be limited to those situations for which it was intended and further erodes, if not completely destroys, the construction industry's ability to use a subrogating carrier's failure (i.e., inability) to comply with the requirements of the Right to Repair Act as a defense to a valid subrogation claim.

Other States Views

The *Burch*/*Liberty Mutual* decisions avoids the strict requirements of California's Right to Repair Act by alleging common law causes of action such as negligence in cases where the construction defect leads to property damage or injury. However, Right to Repair Acts passed in many states expressly hold that the state's right to repair act is the exclusive cause of action for all claims arising out of construction defect. Texas followed that rationale when they passed a Right to Repair Act that expressly held that the subrogee of an assigned claimant to comply with the strict requirements of the Act. See Tex. Prop. Code Section 27.003(a)(2). The Texas Act requires the subrogee to follow the strict requirements of the statute by providing the contractor with the written notice and opportunity to inspect and offer to repair required by the Act, before performing repairs. See *Id.* The Texas Act further provides that failure to comply with the Act will result in the contractor being deemed not liable for the cost of the repairs or any damages caused by repairs made by others at the request of the subrogee. See *Id.* Georgia's Right to Repair Act also followed that rationale by providing that a "claimant [is] anyone who asserts a claim concerning a construction defect." Ga. Code Ann. Section 8-2-36(3). The Georgia Act liberally defines the term by stating that a construction defect includes "any physical damage to the dwelling or common area, any appurtenance, or the real property on which the dwelling or appurtenance is affixed proximately caused by a construction defect." Ga. Code Ann. Section 8-2-36(5). In summary, causes of action brought in states with acts similar to the Texas and Georgia acts would have to comply with that state's Right to Repair Act.

On the other hand, other states may pass new acts or amend their current Right to Repair Acts to specifically provide an exemption for subrogation claims. The New Hampshire Act accomplishes this goal by stating that it "shall not apply to a claim brought by a person or entity subrogated to the rights of a homeowner on account of a payment made under an insurance policy." N.H. Rev. Stat. Ann. § 359-G:8(III).

States may follow the rationale of the California courts and hold that the construction acts are not the exclusive remedy for a plaintiff alleging property damages suffered because of a construction defect. Unfortunately, many states appear to be following the Texas and Georgia model by passing Right to Repair Acts that require all claims arising out of a construction to be brought under their Right to Repair Act.

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