

Newmeyer & Dillion Wins Recent Appellate Victory for California Builders

Newmeyer & Dillion Thwarts Plaintiffs' Tactics to Undermine the Fix-It Law: Key Appellate Victory Requires Homeowners to Follow Statute

On August 14, 2009, Newmeyer & Dillion won an important victory for California builders in Standard Pacific Corp. vs. Superior Court (Garlow) out of the 4th Appellate District of California. In Garlow, the appellate court rejected an increasingly common tactic seeking to undermine the Fix-it Law and conduct construction defect business as usual. Plaintiffs' counsel employing this tactic sought to shift the burden to the builder to first prove it had satisfied all of the statute's requirements before it would be entitled to receive notice and the right to inspect and repair. The appellate court held that *the prelitigation procedures are mandatory and that builders must be given notice and opportunity to repair in the first instance*. The only way a homeowner can avoid the statute is by introducing evidence that the builder failed to comply with the statute. This constitutes the first published appellate decision on this important issue.

This case involved a standard construction defect lawsuit filed by several homeowners against Standard Pacific Corp. ("Standard Pacific") in 2008. The homeowners completely skipped over the Fix-it Law's notice and opportunity to repair requirements. As provided by the Fix-it Law, Standard Pacific moved to stay the proceedings pending homeowners' compliance with the statute. In response, the homeowners argued that in order to be entitled to notice and opportunity to repair, a builder must first prove that it had "opted-in" to the statute by proving that it had complied with each and every one of the builder's duties set forth in section 912.

The trial court ignored the express language of the statute, accepted homeowners' arguments and refused to stay the matter. Standard Pacific appealed.

Overruling the trial court, the appellate court firmly rejected the plaintiffs' approach. In accordance with what most builders have believed all along, the appellate court held that a homeowner must first follow the statute's prelitigation procedures. The appellate court placed the burden of avoiding the statute where it belongs, squarely on the homeowners: "the homeowner must bear the burden of showing that he or she need not follow those procedures *Thus, the rule is that homeowners must comply with the prelitigation procedures of the Fix-it Law prior to filing a lawsuit, unless the homeowner can prove that a builder has not complied with the Fix-it Law.*" (Emphasis added.)

As plaintiffs' counsel continue to ignore and misinterpret the Fix-it Law, published decisions such as Garlow should serve as an invaluable tool to force plaintiffs' counsel to comply with the Fix-it Law and provide builders with the hard-fought and won rights under the statute. N&D will continue to lead the way to ensure that its builder clients get everything they bargained for with the Fix-it Law. We anticipate that the next order of business will be to force plaintiffs' lawyers to comply with the requirement to provide a notice that actually identifies "the nature and location of each claimed violation" instead of the same generic defect list for each home.