

Homeowners' Attorneys Who Jump The Gun and Go Straight to Court Before Allowing a Builder its Statutory Right To Repair under SB800 Get the Yellow Flag

While enacted back in 2003, there has been a little or no case law interpreting SB800, also referred to as California's 'Right to Repair Act' or 'Fix-It Law', that provides residential builders with an absolute right to repair before a homeowner can proceed to formal litigation or arbitration. In fact, the recent trend has been for attorneys representing homeowners to ignore the Right to Repair Act and simply file suit, in total disregard of the statutory right to repair process. However, the Right to Repair Act expressly permits a Court to stay the action if a homeowner does not comply with the applicable pre-litigation process.

So, who has the burden of proving compliance with the pre-litigation process? Is it the builder or the homeowner? Answer: The homeowner. In the case of *Standard Pacific Corp. v. Superior Court (Garlow)*, 2009 DJDAR 12181 (August 14, 2009), the Court examined the legislative intent of SB800, and found that it would not streamline or promote resolution of construction defect disputes if plaintiffs were encouraged to file suit and then force the builder to the effort and expense of proving compliance with section 912 in order to obtain a stay. This is especially practical since a builder is not likely to know in advance any factual detail supporting a homeowner's contention that the builder failed to comply with the pre-litigation right to repair process.

More specifically, in *Garlow*, the builder moved to stay the litigation until the homeowners provided notice and an opportunity to repair the claimed defects. The homeowners' counsel claimed generally that the builder did not comply with the disclosure requirements of Civil Code Section 912 and had therefore waived its right of repair and other statutory protections, excusing the homeowners from providing an SB800 "pre-litigation" notice. The Court of Appeal disagreed. The Court found that the homeowners' unsupported claim that the builder had not met its Section 912 requirements was insufficient, and held that the homeowners had the burden of producing specific evidence of the builder's noncompliance with Section 912.

The *Garlow* decision provides essential clarity to trial courts who are grappling with these motions to stay. Moreover, the decision makes it abundantly clear that a builder's right to repair under SB 800 cannot be circumvented by claimants making empty assertions that a builder has failed to comply with the process. Moreover, the Court further mandates that a homeowner who proceeds to file litigation does so at great risk if they fail to provide specific proof that the builder did not comply with the requirements of Civil Code Section 912, as the builder may recover its attorney's fees incurred to bring a motion to stay the premature action.