

**Builder's Alternative Prelitigation Dispute Resolution Procedures:  
Enforceability**

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California law on construction defect claims requires a prelitigation notice to be given to the builder. The law also contains several default provisions for how the prelitigation process is conducted. In addition, the trend in the law, as demonstrated by the 2014 case of *McCaffrey Group, Inc. v. Superior Court ("McCaffrey")*, is to allow builders to establish and enforce homeowner compliance with reasonable alternative prelitigation procedures. Although the *McCaffrey* case involved individual homeowners, its outcome is also relevant to construction defect claims brought by community associations.

In *McCaffrey*, the Court of Appeal upheld a builder's contractual provision for a mandatory prelitigation alternative dispute resolution procedure prior to the filing of a construction defect lawsuit. The case involved a group of homeowners suing the builder of single family homes for alleged construction defects. The builder's purchase and sale agreements contained contractual provisions requiring a two-step process be followed before homeowners filed a construction defect lawsuit. First, the homeowners were required to provide the builder written notice of their claim and permit the builder an opportunity to inspect and repair the alleged defects. The second step required the parties to submit the claim to non-binding mediation if the claim did not resolve. Finally, the contractual provisions described that if mediation did not resolve the claim, either party would then be permitted to file a lawsuit, which would be resolved by judicial reference.

In *McCaffrey*, the homeowners attempted to bypass the prelitigation procedures called for in the purchase and sale agreements by immediately filing a lawsuit. The builder responded by filing a motion to compel alternative dispute resolution, asking the trial court to enforce its contractual prelitigation requirements. The trial court sided with the homeowners, finding the contractual provisions to be unconscionable and, thus, unenforceable. However, the Court of Appeal reversed the trial court's decision and ordered the trial court to enforce the contractual provisions.

To understand the Court of Appeal's decision, it helps to have some background regarding the Right to Repair Act, also known as Senate Bill 800 (California Civil Code sections 895 *et seq.*). The Right to Repair Act, which applies to new residential construction sold on or after January 1, 2003, enumerates a variety of applicable standards for home construction and specifies the rights and responsibilities of the parties. It also provides a number of procedural rules and a detailed prelitigation procedure.

At issue in *McCaffrey* was Chapter Four of the Right to Repair Act, which prescribes a prelitigation procedure that a homeowner is required to follow prior to filing a construction defect lawsuit. The Right to Repair Act's prelitigation procedure requires the homeowner to provide notice to the builder of construction defects, which then triggers a series of short deadlines for the builder to acknowledge

the claim, conduct an inspection of the property and make an offer to repair the alleged defects. The Right to Repair Act also expressly authorizes the builder to contract for an alternative prelitigation procedure, effectively opting out of the statutory procedure enumerated under the Right to Repair Act.

In *McCaffrey*, the Court of Appeal considered whether the alternative prelitigation procedure designed by the builder was unconscionable. The Court dismissed each of the homeowners' arguments as to the unconscionability of the builder's alternative procedure. In doing so, the Court pointed out that to be substantively unconscionable, a contract term must do more than merely grant a greater benefit to one side; rather, the term must be so one-sided as to "shock the conscience." The Court found nothing in the builder's alternative procedure that reached this level of inequity.

Although *McCaffrey* specifically dealt with contractual provisions in the purchase and sale agreements of *individual homeowners*, these alternative prelitigation procedures are terms often found within an *association's* CC&Rs. The Court's discussion regarding the substantive unconscionability of these terms can also be applied to an analysis of such CC&R provisions.

Given the Court's decision in *McCaffrey*, the trend appears to be that builders will have a wide degree of freedom to draft their own alternative prelitigation procedures. It also looks like that these alternative procedures will be enforceable unless they are found unconscionable. It is important to be aware of these provisions and their potential impact on an association's rights and responsibilities when considering a construction defect lawsuit.