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Calif. Court OKs Liberty Mutual's Faulty Construction Suit

By **Bibeka Shrestha**

Law360, New York (September 04, 2013, 3:10 PM ET) -- A California appeals court held last week that the Right to Repair Act does not prevent property owners from pursuing common law claims when defective construction has already caused property damage, allowing Liberty Mutual Insurance Co.'s lawsuit against homebuilder Brookfield Crystal Cove LLC to proceed.

According to the published decision, Liberty Mutual's construction defect suit against Brookfield is not barred by the Right to Repair Act's statute of limitations because the 2002 law was intended only to address cases where faulty construction had hurt property values without causing property damage or injuries.

The Right to Repair Act — which establishes procedures that homeowners must comply with before filing construction defect suits — does not eliminate a property owner's common law rights when the construction defects have led to property damage, the court said in an Aug. 28 opinion.

"Nowhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage," the court said. "A homeowner who suffers actual damages as a result of a construction defect in his or her house has a choice of remedies; nothing in the act takes away those rights."

The appeals court noted that the detailed notification procedures established by the Right to Repair Act would be "unnecessary and nonsensical" in cases where properties had already suffered damage.

Homeowners who are grappling with major property damage or those who have seen their property destroyed would be required to go through a lengthy process established under the Right to Repair Act before achieving a fix, the ruling said.

Moreover, insurers would effectively lose their right to target builders after covering the homeowner's losses because of high hurdles in meeting the act's extensive notice requirements, the appeals court said.

Even though the Right to Repair Act lets homeowners recover repair costs, that doesn't mean it provides the exclusive path to recovering those actual damages, the court concluded.

Brian Ferber, an attorney who represented Liberty Mutual, said the decision enables homeowners who have suffered property damage to bring lawsuits against contractors, instead of being forced to follow antiquated and confusing procedures that were

established under the act.

"Now, as a homeowner you can choose to forgo going through your insurance company, and you can go directly to litigation against your homebuilder," Ferber told Law360 on Wednesday. "This decision is very, very far-reaching."

Nick Cammarota, general counsel for the California Building Industry Association, said the court had repealed the plain and unambiguous language of the Right to Repair Act, though in narrow factual circumstances.

"The unintended consequences of the decision could be substantial for consumers, homebuilders and insurers who have underwritten policies based upon the view that the [law] comprehensively replaced common law tort theories," Cammarota said.

Liberty Mutual pursued the lawsuit while stepping into the shoes of policyholder Eric Hart, who bought a newly built home from Brookfield. A pipe in the home's sprinkler system burst and caused significant damage, forcing Hart to move into a hotel for several months while Brookfield made repairs.

Liberty sued Brookfield to recover the money it paid to cover Hart's hotel stay and his other relocation expenses.

Liberty Mutual is represented by Brian Ferber and Jeffrey Jayson of Law Offices of Brian J. Ferber, and by Gerald Serlin and Wendy Albers of Benedon & Serlin LLP.

Brookfield is represented by Andrew Ulich, Donald Fisher, Ivette Kincaid and Jonathan Terry of Ulich & Terry LLP.

Amicus curiae National Association of Subrogation Professionals is represented by Susan Benson of Susan M. Benson & Associates LLP.

Amicus curiae California Building Industry Association is represented by in-house counsel Nick Cammarota.

Amicus curiae Comstock Crosser & Associates is represented by Allen Lohse of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP.

The case is Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC, case number G046731, in the Court of Appeal for the State of California, Fourth Appellate District.

--Editing by Stephen Berg.

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