CASE NO. S229762

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

McMILLIN ALBANY, LLC, et al.
Petitioners,

v.
SUPERIOR COURT OF KERN COUNTY,
Respondent

CARL & SANDRA VAN TASSEL, et al.
Real Parties in Interest.

Kern County Superior Court Case No. S-1500-CV-279141

From the Published Opinion of the Court of Appeal, Fifth Appellate District,
Civil Case No. F069370

APPLICATION TO FILE AMICUS CURIAE BRIEF
and
AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS
(In support of Real Parties in Interest Carl & Sandra Van Tassel, et al)

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STATUTES AND REGULATIONS

The **National Association of Subrogation Professionals** ("NASP") respectfully moves this Honorable Court for leave to file a brief as amicus curiae pursuant to California Rule of Court 8.520. Counsel for NASP has notified all counsel of its intent to file said brief. The Real Parties in Interest have consented to the filing of the brief.

The proposed amicus brief was prepared on a pro bono basis by the undersigned and has not been drafted by counsel for any of the parties involved in the litigation.

INTRODUCTION

The case presented by the Real Parties in Interest addresses the statutory requirements of SB800 (codified at Civil Code § 895, et seq.) as such requirements relate to a homeowner's right to seek damages from a home manufacturer/builder when a single, possibly catastrophic loss involving damage to the structure occurs. The Real Parties in Interest assert that the statutory notice requirements of SB800 do not apply to the claims presented in their underlying complaint because the defective construction in the case caused other physical property damage, and not just pure economic loss. The Fifth District issued its opinion on August 25, 2016 finding that SB800 is the exclusive remedy for homeowners who seek to bring a defect-related action against the builder of their home in direct conflict with the Opinion published in *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98.

This case presents important issues to homeowners and their insurance carriers in instances where there is a one-time loss resulting from defective construction. If homeowners are required to address the statutory requirements of SB800, it affects the

ability homeowners have to obtain immediate relief from serious, possibly catastrophic losses, from their insurance carriers - and at the same time not lose rights to seek reimbursement against the truly responsible party for damages suffered or paid by such insurer. In many cases, immediate mitigation of damages requires a homeowner to seek assistance from an insurance carrier through a homeowner's insurance policy. Amicus contends that the statutory requirements prescribed by SB800 were not designed or intended to address catastrophic and/or one-time unexpected property damage losses. Should the opinion issued by the Fifth District stand, it will greatly affect subrogation rights of insurance carriers that pay to remediate such claims. Amicus asserts that SB800 does not apply to subrogating carriers because the very nature of the claim presented and paid under a homeowner's insurance policy involves claims for restoration, remediation and property damages, and not pure economic losses.

Of great concern to Amicus is that the interpretation of SB800 by the Fifth District is in direct controversy with the Opinion published in *Liberty Mutual*. That Court clearly considered limiting the rights of homeowners/insurance carriers to pursue common law claims resulting from one time losses. "Enforcement of a requirement of exclusive compliance with the notice provisions of the Act under those circumstances would effectively extinguish the subrogation rights of all homeowners' insurers who promptly cover their insureds' catastrophic losses. There is nothing in the Act or in its legislative history that shows the Legislature intended to eliminate those subrogation rights." [*Liberty Mutual* Opinion dated 8/28/2013, pg. 9]. Abrogating subrogation rights was unintended by the Legislature and that the same has resulted due to the misapplication of SB800 to such singular extensive property damage losses as in the

within case. It is respectfully requested that this Honorable Court consider the actual underlying implications of what builders are seeking to accomplish via a decision on SB800 and the ripple effect its interpretation will have on homeowners and their insurers alike.

INTEREST OF AMICUS

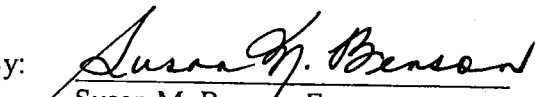
The National Association of Subrogation Professionals ("NASP") is a non-profit trade association of insurance companies, third party administrators, subrogation specialists, and attorneys practicing in the field of subrogation and recovery. NASP has approximately 3,000 members, representing more than 450 insurance companies and self-funded entities. The purpose of NASP is to "create a national forum for the education, training, networking and sharing of information and, ultimately, the most effective pursuit of subrogation on an industry-wide basis."

NASP has become the "voice of subrogation" for the industry, the public and legislative bodies around the country. The members of NASP recover billions of dollars in property and automobile insurance loss expenditures every year through subrogation and recovery practices, all resulting in reduced premiums for the public. NASP believes its submission of an amicus curiae brief will assist the Court in deciding this matter by adding NASP's unique and specialized perspective on subrogation and the significant policy considerations involved. NASP has previously filed amicus briefs in the U.S. Supreme Court and several state supreme courts.

NASP has an interest in the issues presented in this case, as the court's decision will affect its member carriers' rights of reimbursement for claims that seemingly come within the purview of SB800. Such reimbursement rights also benefit the general public, as enhanced or unfettered rights have been shown to enhance the recoveries of insureds' policy deductible losses and, as noted above, to keep premiums more affordable. NASP has unique information to offer the Court in this regard beyond that which has been presented by the parties. NASP does not intend to merely duplicate the arguments of Plaintiff/Appellant's Brief.

CONCLUSION

NASP appreciates the Court's kind consideration of this request, and respectfully prays that its motion for leave to file the attached brief as Amicus Curiae be granted.

By: 

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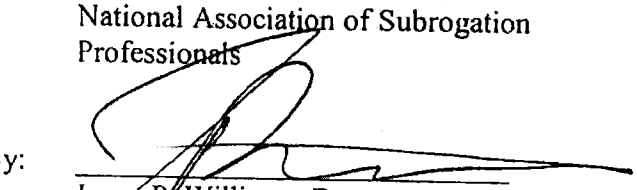
By: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion for Leave to File Amicus Curiae Brief has been served upon the following counsel of record on this the 14th day of July, 2016 as follows:

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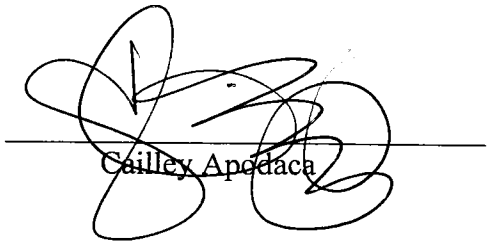
X I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 14, 2016 at Encino, California.



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STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

This matter arises from a construction defect action involving homes built by McMillin Albany, LLC and McMillin Park Avenue, LLC (hereinafter collectively "McMillin") in Bakersfield, California that suffered from a variety of defective conditions which resulted in damage to homes. The Plaintiff homeowners in the underlying action sued McMillin for various causes of action sounding in tort and contract along with a single cause of action for violation of the building standards set forth in Civil Code Section 896, which is also referred to as "SB800" or the "Act." Although Plaintiffs dismissed their cause of action alleged under SB800, McMillin filed a Motion to Stay the proceedings under Civil Code Section 930(b) based upon the Plaintiffs' failure to complete the SB800 pre-litigation procedure. The trial court denied the Motion to Stay and upon Writ to the 5th District Court, the Motion to Stay was granted finding that SB800 is the exclusive remedy for homeowners who seek to bring a defect-related action against the builder of their home.

Amicus urges this Honorable Court to consider the actual underlying implications of what builders are seeking to accomplish via a decision on SB800 and the ripple effect its interpretation will have on homeowners and their insurers alike.

ARGUMENT

1. SB800 DOES NOT APPLY TO THE WITHIN LOSS AND CLAIM

SB800, which became effective on January 1, 2003, establishes a notification process to undertake prior to the filing of certain types of claims related to construction deficiencies. The bill provides that any "action ... related to deficiencies in ... residential construction" against a builder be governed by certain standards. SB800 attempts to

define what constitutes a "defect" in a residential building. For example, with respect to water intrusion issues, SB800 mandates that the installation of windows, doors, roofs and plumbing are constructed so that they do not leak and allow water to pass or enter. Civil Code § 896(a)(1). With respect to plumbing and sewer issues, SB800 requires that the same be installed to operate properly and not materially impair the use of the structure by its inhabitants. *Id.* These are only a couple examples to illustrate to the Court the numerous listed "defects" that can be presented to a builder for repair.

Should there be a deviation from such standards, then SB800 states that the builder be put on notice of such deviation or deficiency so that the builder can repair it pursuant to the code's requirement. Such pre-litigation procedures are in place to allow builders to repair "defects" to mitigate damages before litigation ensues with respect to these "defects," not resultant damages from a "defect." This can be particularly important when the deficiencies are similar across numerous properties in a new development or condominium community.

Amicus asserts that the Legislature, by enacting SB800, did not intend to extinguish the right of a homeowner or its insurance carrier to pursue claims for serious or catastrophic property damage losses (in other words, where a fire, water or exposure loss causes other property damage to the residence) that were caused by construction defects. Amicus notes that Plaintiff/Appellant's claim is one for negligent construction leading to consequential damages, and not simply a deviation from the construction standards prescribed in SB800. As will be demonstrated further below, SB800 does not apply in this instance.

2. **SB800 DOES NOT REQUIRE NOTICE BE GIVEN PRIOR TO REPAIRS FOR DAMAGES**

It is a builder's general contention that notices of claim under Civil Code Section 910 must be provided to them before repairs of any kind are performed to the subject property. This is not true. By way of background, California Civil Code Section 930(a) explicitly states:

> "the time periods and all other requirements in this chapter are to be strictly construed, and, unless extended by the mutual agreement of the parties in accordance with this chapter, shall govern the rights and obligations under this title. **If a builder fails to act in accordance with this section within the time frames mandated...the claimant may proceed with filing an action**" (emphasis added).

Thus, in strictly construing the requirements of Civil Code Section 910, it does not make any mention that a written notice of claim must be delivered before repairs are made to the damaged home. It is clear from the language of Civil Code Section 910 itself that the builder must only be provided with a written notice of "claim" and that this notice must occur before filing an action. This is the only time frame given under Civil Code Section 910. Once a notice of claim was provided to a builder and they failed to respond, a Claimant is free to file their action. There is no mention of a requirement for notice prior to making any repairs for damages caused by a defect and requiring immediate, emergency repair or remediation.

Builders are attempting to establish new time lines that are not set forth in the explicit language of Civil Code Section 910. This is essentially an effort to create unrealistic time lines in an attempt to have this Court establish that the pre-litigation procedures of SB800 serve as a statutory bar to a homeowner and their insurance company for claims for damages from "defects." Clearly, this is contrary to the explicit language of Civil Code Sections 910 - 938 and contrary to the legislative intent of SB800.

The Legislative intent of California Civil Code Sections 910 - 938 was to resolve "defect" only claims before litigation becomes necessary. It is not lost on this Amicus

that California Courts have established that builders are entitled to enforce the pre-litigation requirements, and that it is the Plaintiff that bears the burden of proving compliance with SB800 or to establish why SB800 does not apply. (See *Standard Pacific Corp. v. Superior Court* (2009) 176 Cal. App. 4th 828, 829; and *Kingsbury v. U.S. Greenfiber, LLC* (2009) U.S. Dist. LEXIS 92014, 20 (C.D. Cal.)) In *Standard Pacific*, several homeowners filed suit against the builder for problems relating to the construction of homes located within a development. (*Standard Pacific* at 829.) The builder brought a motion to stay pursuant to Civil Code Section 930(b) for the homeowners' failure to comply with the pre-litigation procedures set forth in Civil Code Section 910. In opposition, the homeowners asserted that the builder failed to comply with Civil Code Section 912, but offered no factual showing of non-compliance. (*Id.* at 829.) In effect, the ruling in *Standard Pacific* granted the builders' motion to stay the proceeding unless the homeowners could present to the lower court evidence that the builder did not comply with Civil Code Section 912. (*Id.* at 835.)

The case of *Kingsbury v. U.S. Greenfiber, LLC* involved thousands of homeowners who filed a motion for class certification. [*Kingsbury v. U.S. Greenfiber, LLC* (2009) U.S. Dist. LEXIS 92014, 20 (C.D. Cal.).] The heart of the lawsuit stemmed from the allegation that claimants purchased homes that were constructed with a type of insulation that was deemed dangerous, in addition to numerous other named defects. (*Id.*) The Court in *Kingsbury* held that a homeowner informing a builder of problems with the construction of residences through normal customer service procedures does not satisfy SB800 pre-litigation procedures. (*Id.*)

Additionally, nowhere in SB800 does it state that the homebuilder or general contractor shall be the only person to perform repairs to a home damaged as a result of a construction defect. In fact, SB800 specifically allows for other contractors to perform the repairs to a home. Pursuant to California Civil Code Section 917, a homeowner has a right to use separate contractors to perform repairs to a home damaged by the

homebuilder's defect. Furthermore, there is no requirement in SB800 that the homebuilder perform any repairs to a home. Pursuant to California Civil Code Section 929(a), "nothing in this chapter prohibits the builder from making only a cash offer and no repair." In fact, homebuilders have an incentive in making cash offers to homeowners in that they are then entitled to obtain a "reasonable release" in exchange for the cash payment. [California Civil Code Section 929(b).] Conversely, a homebuilder is prohibited from obtaining a release or waiver in exchange for repair work to a home. California Civil Code Section 926. Unfortunately, this does not happen and builders instead wait to see what happens from a procedural process, knowing full well that a homeowner's insurer will have to pick up the tab and the builder will seek to avoid liability on a potential technicality under SB800.

In the situations outlined in *Standard Pacific* and *Kingsbury*, the notification requirements set forth in SB800 make sense as they involve numerous properties with "defects" that can, or possibly can, be inspected and repaired. Therefore, such notice provides builders with opportunities to cure deficiencies or non-compliance issues with their own subcontractors, and possibly within their contractual obligations, if they so choose, **BEFORE** any appreciable or **ACTUAL** damage event occurs. When there is no defect to repair because it caused appreciable or catastrophic damages, this process makes no sense and was clearly not contemplated by the legislature when the SB800 was enacted. However, if strict compliance is required in certain scenarios, the same must equally apply to builders as well.

3. A BUILDERS' FAILURE TO COMPLY WITH SB800 RELEASES CLAIMANTS FROM THE REQUIREMENTS SET FORTH IN SB800

Under California Civil Code Section 913, "a builder or his or her representative shall acknowledge, in writing, receipt of the notice of claim within 14 days after receipt of the notice of the claim." Under California Civil Code Section 915, "if the builder fails to acknowledge receipt of the notice of claim within the time specified, elects not to go

through the process set forth in this chapter, or fails to request an inspection within the time specified.....this chapter does not apply and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action" (emphasis added).

Regardless of when notice under Civil Code Section 910 is given, a builder has an obligation to respond, the same as Plaintiffs are required to give notice. As such, when a builder fails to respond to **any** notice of claim, a claimant is then relieved from its duties under Civil Code Section 910 and thus is free to file their action under SB800 as stated by Civil Code Section 915.

This unfortunately has not historically been the case. Rather, developers/builders lie in wait for lawsuits, ignoring notices of claims, whether those notices are deficient or not, and then try to hide behind SB800 asserting non-compliance with Civil Code Section 910, seeking dismissals of said lawsuits without any consequence for ignoring notices of claims. What is good for the goose should be good for the gander, and if a builder ignores a proper notice of claim, regardless of its timing, then it too should be subject to the strict interpretation of Civil Code Sections 913 and 915. Thus, if a builder failed to respond as stated by Civil Code Section 930(a), then a claimant may proceed with its action as the builder has waived its rights to the pre-litigation process under SB800.

4. IF STRICT COMPLIANCE WITH SB800 IS MANDATED FOR EVERY LOSS, THEN HOMEOWNER INSURERS' SUBROGATION RIGHTS WILL BE EXTINGUISHED ON EVERY SERIOUS PROPERTY DAMAGE CLAIM

An insurance carrier that has been compelled to indemnify its insured for a loss created by another's wrongful act is equitably entitled to "step into the shoes" of the injured party and pursue recovery from the wrongdoer. *Employers Mutual Liability Ins. Co. vs. Tutor-Saliba Corp.* (1998) 17 Cal.4th 632, 639. *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633. This subrogation doctrine places the ultimate

burden on the person who, "in equity and good conscience," ought to pay for the loss or damage incurred. *Fireman's Fund Ins. Co. v. Morse Signal Devices* (1984) 151 Cal. App. 3d 681, 686.

In the context of property insurance, the right of subrogation "remains inchoate before the loss and only matures into a legal concept after a loss to the insured's property occurs." *Liberty Mutual Ins. Co. vs. Altfillisch Construction Co.* (1977) 70 Cal. App. 3d 789, 796. There must be actual loss, "appreciable damage." There is no obligation of the insurer to its insured as to potential losses, meaning if there are "defects", but no damage. *McMillin Scripps North Partnership v. Royal Ins. Co. of Am.* (1993) 19 Cal. App. 4th 1215.

The California Court of Appeals in the case of *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove, LLC* (2013) 219 Cal. App. 4th 98, hit the nail on the head when it held that a homeowner who suffers actual damages as a result of a construction defect in a home has "a choice of remedies" and "nothing in the [Right to Repair] Act takes away these rights." (*Id.* at 104.) In *Liberty Mutual*, a homeowner sustained extensive damages to his real property residence as a result of a failed sprinkler system. The builder, Brookfield Crystal Cove, LLC ("Brookfield"), made repairs to the subject property, however, denied the claim asserted by the homeowner's insurer, Liberty Mutual Insurance Company ("Liberty Mutual"), for reimbursement of the relocation expenses it paid to the insured during the repairs of the damage. The trial court found that Liberty Mutual's claim was time barred under the Right to Repair Act, sustained Brookfield's demurrer, and dismissed the action. The Court of Appeals reversed the trial court's ruling stating:

> "The Right to Repair Act was enacted to provide remedies where construction defects have negatively affected the economic value of a home, although no actual property damage or personal injuries have occurred as a result of the defects. **We hold the Act does not eliminate a property owner's common law rights and remedies, otherwise recognized by law, where, as here, actual damage has occurred.**" (*Id.* at 101.)

Moreover, the Court of Appeals, in reaching its decision in *Liberty Mutual*, looked at the Legislative History of the Right to Repair Act in order to get a better "understanding of the Act's impetus and purpose." (*Id.* at 103.)(emphasis added). After a review of the Legislative History, the Court ultimately commented that:

> "Nowhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damages. Instead, the legislative history shows that the legislation was intended to grant statutory rights in cases where construction defects caused economic damages; the Act did nothing to limit the claims for actual property damage. **Simply put, a homeowner who suffers actual damages as a result of a construction defect has a choice of remedies; nothing in the Act takes away those rights.** (*Id.* at 104.)"(emphasis added)

While the Right to Repair Act, and the previous rulings of the Courts involving the Right to Repair Act, do not specifically address the rights and duties of subrogating insurers in cases where construction defects cause actual damages, the holding in *Liberty Mutual* does, finding that subrogation claims are not covered by the Right to Repair Act (*Id.*). More specifically, the Court in *Liberty Mutual* held:

> If, as Brookfield argues, the Right to Repair Act applies to all claims involving construction defects regardless of actual damage, **a homeowner whose property was severely damaged or destroyed would be required to await a solution during a lengthy process. As noted by the amicus curiae on behalf of Liberty Mutual, enforcement of a requirement of exclusive compliance with the notice provisions of the Act under those circumstances would effectively extinguish the subrogation rights of all homeowners' insurers who promptly cover their insureds' catastrophic losses.** There is nothing in the Act or in its legislative history that shows that the Legislature intended to eliminate those subrogation rights. (*Id.* at 106.)(emphasis added).

The facts in *Liberty Mutual* are not an uncommon anomaly wherein there is a loss that involves a single residence that suffered catastrophic damage (water or fire normally) as a result of a construction defect, which rendered the residence uninhabitable. As such, under the holding in *Liberty Mutual*, in addition to its claims for violations of construction standards under California Civil Code § 896, et seq., insurers and homeowners alike have valid common law claims and remedies against builders/developers for the construction defects that caused **actual damages** to the real property. To hold otherwise would allow builders/developers to escape liability for their defective construction that resulted in damages where repairing a defect after the fact is pointless.

It may be argued that the holding of *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal. App. 4th 1471, addresses SB800 in relation to subrogation claims. This is distinguishable because at the time of that holding, the *Liberty Mutual* decision had just been published in the days before oral argument. As such, a reading of the procedural history of *KB Home* shows that the subrogating carrier's common law claims had been previously dismissed.

Thus, the Court of Appeals in *KB Homes* only addressed the SB800 claims left over, but essentially invited an appeal from the Real Party in Interest insurance carrier for reconsideration of the previously dismissed common law claims.[1] This is likely due to the Justices agreeing with the *Liberty Mutual* holding, but the same was not before them at that time, so further comment could not be made.

That being said, even if this Court considers the arguments set forth by McMillin in this present matter, the arguments are severely flawed. The facts in McMillin are completely different from the facts in normal subrogation settings and catastrophic losses involving one home. McMillin involved 37 homes which had similar construction defects. The homes in this instance had not suffered catastrophic damage which rendered the homes uninhabitable. Contrary to the present case, the Court's ruling in *Liberty Mutual* deals with a substantially similar fact pattern and procedural history as all cases where there has been serious or catastrophic damage to a residence and a homeowner's insurer had to step in immediately to make repairs. Not repairs to defects, but repairs for resultant damages from defects, something not contemplated by the Right to Repair Act or SB800. Rather, these losses involve one home that sustains catastrophic water, fire or other damage rendering the residence uninhabitable, and where the builder, like in *Liberty Mutual*, had notice of the actual defect and resulting damages, and chose not to pay those damages. This is the custom and regular practice of builders, to lie in wait and then hide behind SB800 to avoid liability for the damages resulting from a defect.

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[1] See *KB Home* at 1474, stating, "That issue was the subject of KB Home's earlier writ petition, which we dismissed as moot after the trial court sustained the demurrer to Allstate's common law tort claims pursuant to our alternative writ. ... Thus, whether the Act or tort common law applies in this case is not an issue properly before us at this time. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 15:227.5, p. 15–96.16 [issues not raised in petition may not be raised in return].) Nothing in our decision prevents Allstate from raising that issue in an appeal from the final judgment. (See *Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 1254 [order sustaining demurrer to some but not all causes of action normally subject to appeal from final judgment]; cf. *Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 504 [interlocutory order granting summary adjudication reviewable on appeal from final judgment].)____)."

To illustrate this a bit further, unlike the cases that gave rise to the rulings in *Standard Pacific*, *Kingsbury*, and the instant case, those cases involved dozens or hundreds of homeowners with claims for defects in the construction of homes within a development, or even a single home with claims for multiple defects, such as faulty light switches, drainage problems, cracked drywall, shifting foundations, or cracking stucco, to name a few, that could be investigated and repaired after months of document exchanges, inspections and mediations. In these instances, the subject residences were still habitable and its occupants could navigate the lengthy SB800 pre-litigation process while still living in their homes. Conversely, in cases that involve only one property, one Plaintiff, one Defendant, and a single incident, wherein a defect caused extensive water, fire, or other damage to the subject property due to the sub-standard construction by a builder/developer, which rendered the subject property uninhabitable and required immediate repairs to be performed, the lengthy SB800 process is not practicable whatsoever.

The following is a time line representing the dates under the SB800 pre-litigation process:

SB800 PRE-LITIGATION TIMELINE	
Day 1	Homeowner's written notice of violation served on builder.
Day 14	Written acknowledgment of homeowner's notice due from homebuilder (14 days from the date of notice).
Day 28	Homebuilder to have completed initial inspection of home (14 days after acknowledgment).
Day 75	Deadline for homebuilder to make offer to repair, cash offer, or deny claim.
Day 300	Date by which builder is to make "every effort" to have repairs completed if homebuilder agrees to make repairs.

Based on the foregoing time line, it is clear that SB800 was not intended to apply to catastrophic losses which result in extensive property damage and claimants seeking remedies for having sustained those damages. In these instances there is no defect to repair to prevent such damages and thus the timeframe to make such repairs is moot. If SB800 were to apply, a homebuilder would have over two (2) months before ever having to make an offer to repair, offer of cash, or deny the claim and ten (10) months before having the homeowner's home repaired. This could leave a homeowner without a residence for almost a year, and would contradict a homeowner's, or insurer's, statutory and contractual duty to mitigate damages. It would also violate an insurer's obligation to properly respond to and adjust the claims of its insureds.

If a home insurer was forced to decline to provide an immediate response to its insureds' catastrophic losses and go through the lengthy repair process set forth is SB800, the Courts would be inundated with bad faith claims. Homeowners' insurers have obligations to act in good faith and handle, adjust and pay a claim independent of any statutory scheme as prescribed in SB800. Insurance Code §790.03. To require any insurance carrier to wait longer before conducting repairs upon a catastrophic loss such as this, while attempting to meet the alleged standards within Civil Code §§ 895-945.5, would open a Pandora's Box, which would be inconsistent with the governing of insurance claims, public policy, and the intent of the California Legislature. More specifically:

1. Insurers could be placed into a position of delaying payment on these types of claims while builders took their time in responding to notices of potential claims and/or defects, up to 60 days, thus interfering with the public policy goal of reimbursement of individuals for losses; and,

2. Contractors and developers could avoid liability and their obligations to the public policy goal of having quality construction in California, just by virtue of the

fortuitous existence of insurance coverage to homeowners, essentially insuring themselves under homeowners' policies without ever paying a single premium.

It is clear that from the statutory language of SB800, and the existing case law analyzing SB800, the legislative intent was to establish a non-judicial mechanism for resolving large construction defect cases, and not to shield builders from liability as to their sub-standard construction of residences that result in subsequent damages.

Bringing this full circle, if a homeowner had a violation of one of the construction standards set forth in SB800, the homeowner could not make a claim under his or her homeowner's policy because there would be no actual appreciable damage and no actual loss. The homeowner's only remedy would be as prescribed in the statute, i.e. provide the builder with notice of the violation. Thus, if SB800 is construed in the manner which Plaintiff/Appellant and Amicus believe was contemplated by the Legislature - as only applying to violations of construction standards that need to be remediated and not claims where the deficiencies have caused serious other property damages, then there is no conflict between the application of SB800 and a homeowner's or an insurer's common law rights and remedies. (The subrogation rights only arise upon an actual loss to the property).

The reality of what takes place where there is a serious or catastrophic loss caused by a defect that results in damages is that a homeowner immediately turns to their insurance company and makes a claim under his/her homeowner's policy, regardless of the statutory requirements of SB800. They don't call the builder first after a loss resulting in serious or catastrophic damages, but instead do what every ordinary homeowner would do in that situation – they call their insurance company. When there are "defects" that can be fixed by a builder, i.e. cracked drywall or a door that doesn't shut property, but the home is not uninhabitable, then an everyday homeowner may call their builder. As such, it is clear that if a homeowner, or its insurer, is required to undertake the aforementioned strict notice procedures as a condition precedent to a later lawsuit, then a homeowner, or

an insurer that provides assistance to its insured, will not be able to fully pursue their/its rights and remedies against the truly responsible party.

CONCLUSION

Amicus contends that the Legislature did not contemplate the application of SB800 for such losses and it is readily apparent in the actual application of SB800 in this instance and similar instances that insurers are facing throughout California. As the Plaintiff/Appellant aptly states, if this Honorable Court concludes that SB800 applies to such losses, then it has effectively turned California homeowner insurers into *de facto* insurers for the builders and subcontractors – certainly not the intended result of SB800.

As noted above, insurance subrogation efforts serve a very important role for insurance carriers and the general public (both social benefit and lower homeowner premiums).[2] While SB800 in its most general sense acts to create a fine balance when new homeowners discover construction defects, it was clearly not intended to undermine common law remedies, which include such subrogation efforts, and the benefits that they create.

The trial court erred in sustaining the demurrer on the grounds set forth by Plaintiff/Appellant and Amicus. This Court should reverse the trial court's order sustaining Defendant/Appellee's demurrer and remand the case for trial.

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[2] See http://www.youtube.com/watch?v=7pMwTljyvxI&feature=plcp (public service video providing overview of the benefits of insurance subrogation).

Dated: July 13, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c) (1), I certify that the total word count of the Amicus Curiae Brief of the National Association of Subrogation Professionals (In Support of Appellant), excluding the Application to File Amicus Curiae Brief, Table of Contents, Table of Authorities, and Certificate of Compliance is 4,422 words.

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