

# Heads We Win Tails You Lose:

How “Cherry Picking” SB 800 Has Created The *Perfect Storm* For Unconscionability Litigation

## INTRODUCTION

In the landmark case *Aas v. Superior Court* (2000) 24 Cal. 4th 627, the California Supreme Court prohibited tort recovery for “*economic loss*” cases, where defects had not yet manifested into actual physical harm.

“Defects are not enough: ‘appreciable, non-speculative present injury’ is an essential element of a tort cause of action.” *Aas* at 646.

This highly controversial case created an avalanche of industry discussion and subsequent legislative tinkering intended to improve California construction defect claims.

Remarkably, legislative action was actually invited by the *Aas* Supreme Court which held that a *rule for defects without damage* is best left to the legislature:

“In our view, the many considerations of social policy. . . emphasize that certain choices are better left to the Legislature. That body has at its disposal, a wider range of options and superior access to information about the social costs and benefits of each. Legislatures in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views.” *Aas, supra*, 652.

This judicial “*punt*” bypassed the opportunity to address how trial courts should handle “serious defects” that were certain to manifest serious damage in the near future. Chief Justice George, in his dissent asked;

“Why should a homeowner have to wait for a personal tragedy to occur in order to recover damages to repair known serious building code safety defects caused by negligent construction? It obviously is preferable to pay a relatively few dollars at an early date to correct a serious safety risk that may cost millions or billions of dollars to redress if inhabitants are forced to wait for disaster to strike and for death, personal injury or property damage to ensue.” (*Aas* dissent, 653,654 C.J. George)

This question would ultimately be addressed by the legislature in the enactment of SB 800, which allows for recovery for defects without damage in certain circumstances. *Civil Code* section 895 et.seq.

SB 800 followed *Aas* as the long awaited “*Messiah*” bringing light to practitioners of residential construction defect litigation. Certainly, the expectations for this post *Aas* legislation was high:

- Manifestation of damages under *Aas* was supposed to be explained;
- appreciable property damage was supposed to be defined;

- guidelines for handling serious defects that had not yet shown “appreciable damage” were supposed to be enacted, and
- building standards that could function as “standards for claims” were to be enacted to help the courts define when the parties had “actionable defects.”

Unfortunately, the California Legislature acted with more haste than judgment. In 2002, a transportation bill was hijacked by the legislature and its entire contents deleted and swiftly replaced with SB 800, the new “fix it” legislation that would “fine tune” the residential construction industry claims practice. Unfortunately, SB 800 became a “*devil’s compact*” between lawyers, the construction industry and their insurers by legal commentators. (*James Acret* cite)

Eventually, SB 800, CC §895 et. seq., would include significant “pro buyer” provisions that would protect home buyers at builders’ expense. It is these “consumer friendly” provisions of SB 800 that builders are now actively attempting to “*defang*.” Whether they are successful will depend on the court’s interpretation of legislative intent and whether “public policy” allows SB 800 to be “cherry picked” to permit builder’s sympathetic purchase contracts.

Chapter 2, CC §896, the “*actionable defect*” standards<sup>1</sup>, is sometimes called the legislative “*super building code*,” enacted into SB 800, so that litigating parties would know which defects are “actionable” and which are not. Significantly, serious actionable defects were enacted within SB 800 that **do not** require actual manifestation of physical harm. Predictably, many of those actionable defects standards are being modified by builder contracts to eliminate builder liability, in violation of stated legislative policy.

Chapter 4, the extensively ordained “*pre-litigation*” procedure, is being replaced with non binding “*feel good Kumbaya*” kinds of “*non adversarial*” procedures that were neither contemplated nor intended by the legislature. We will ask whether CC §914, the Election to Pursue Other Non-Adversarial Contractual Procedures” is being abused by builders to eliminate CC §905, the Enhanced Protection Agreements.

Specifically, how are practitioners to assert that SB 800 Builder contracts, are one-sided, unfair and unconscionable? Can these new “untested” builder contracts pass procedural and substantive due process muster? Do they violate the letter and the spirit of SB 800 when builders “*cherry pick*” the *good stuff* from SB 800 and eliminate the pro buyer provisions?

### **THE PUBLIC POLICY UNDERLYING SB 800 AND ITS MAJOR PROVISIONS**

Let us consider for a moment the high minded legislative history for SB 800, in which the California Legislature proclaimed:

- a. “The California system for the administration of justice is one of the fairest in the world . . .

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<sup>1</sup> Essentially the *actionable defect* categories include; 1. Water Intrusion, 2. Structural, 3. Fire Protection, 4. Plumbing and Sewer, 5. Electrical, and, 6. Hardscape, and Slabs . CC §896 et. seq.

- b. The prompt and fair resolution of construction defect claims is in the interest of consumers, homeowners, and the builders of homes, and is vital to the state's continuing growth and vitality. However, under current procedures and standards, homeowners and builders alike are not afforded the opportunity for quick and fair resolution of claims. Both need *clear standards* and *mechanisms* for the prompt resolution of claims.
- c. It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects.” CC §895 *Legislative Findings, Declarations and Intent Relating to Stats. 2002, c.722 (SB 800) section 1, Historical and Statutory Notes*

The central ideal seems to be that “justice delayed is justice denied,” so lets enact new rules for residential construction that will allow for speedy resolution of buyer / builder claims. In exchange for this “expedited” process, some procedural safeguards normally guaranteed litigants under California civil law, can be lessened. There is now a significant procedural and substantive difference between pursuing a defendant in a civil car crash case and in pursuing a builder for defective / damaged residential housing. Taken together, the *Aas*, case, mandatory arbitration provisions and the “cherry picking” of SB 800, have come together to create the “*perfect storm*” for challenging “*unconscionable*” and/or “*extra judicial*” SB 800 builder provisions.

#### BINDING ARBITRATION: THE LYNCHPIN OF THE BUILDER’S CONTRACT

We start with the proposition that arbitration was devised to offer litigants a *fast-track*, cost-effective alternative to courtroom litigation. Like most benefits in life, however, arbitration requires litigants to make significant trade-offs.<sup>2</sup> *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35Cal.3d 312, 322; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 707. Moreover, it is no secret that builders have long used binding arbitration provisions not for their economy and efficiency, but instead to keep buyers out of court and as far away from the civil rules and sympathetic jurors as possible. The

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<sup>2</sup> In a very real sense, arbitration is significantly different from civil law, which arises out of the fundamental principles of democracy and constitutionalism. By its very nature, arbitration constitutes a *denial of access to the courts* and the civil litigation rules of law. Parties considering arbitration as an alternative to civil action should be mindful of the following:

- (1) Parties who draft contracts with arbitration clauses (often non-negotiable) can “arbitrarily” and unilaterally deny other contracting parties entree to the constitutional protections of our judicial system;
- (2) Arbitrations do not require arbitrators to be lawyers or even judges;
- (3) Arbitrators do not have to follow the law;
- (4) Arbitration litigants generally waive trial by jury;
- (5) Arbitration litigants generally waive the right of discovery; and
- (6) Arbitration litigants generally waive the right of appeal.
- (7) Once a matter is ordered into arbitration, it is critical for parties to understand that there is no relief from the court system for errors of law or fact [“ the arbitrator’s findings on both law and fact are conclusive. The court cannot set aside an arbitrator’s error of law no matter how egregious.” *Moncharsh v. Heily* (1993) 3 Cal.4th 1, 8)]

traditional view of arbitrations as economical, efficient and equitable alternatives to litigation in court has recently come under scrutiny. [cites here, Bosworth, other cases that say arbitrations have left the building]

Initially, the *builder community* was delighted with their assessment of SB 800 as “builder friendly” and believed its provisions could be added to their purchase contracts to further restrict buyer’s rights. However, when the industry dust had settled, the builder community was less than pleased with buyer friendly provisions that permitted recovery for defects without the necessity of *Aas* type physical harm. Residential construction litigators whose clients purchased after January 1, 2003, must now undertake a careful analysis to determine whether offending provisions in are legally unconscionable and whether it makes sense to invalidate them entirely and litigate in civil court.

### **Broad Basis for Relief.**

*Code of Civil Procedure* sections 1281 and 1281.2 allow a court to invalidate a written agreement to submit to arbitration on grounds that exist for the revocation of any contract. *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 165; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (“*Armendariz*”).

9 U.S.C. §2 provides that "A written provision . . . to settle by arbitration a controversy thereafter arising . . . or . . . to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, the Federal Arbitration Act does not preempt California’s Arbitration Statutes, *Code of Civil Procedure* §§1280, et seq. *Armendariz, supra*, 24 Cal.4th at p. 97-98.

*Code of Civil Procedure* §1667 states that a contract is unlawful if it is contrary to an express provision of law, contrary to the policy of express law, though not expressly prohibited, or otherwise contrary to good morals. *Code of Civil Procedure* §1668 provides that a contract that exempts any one from responsibility for his own fraud, or willful injury to the person or property of another or violates a law, whether willful or negligent, is against the policy of the law. *Code of Civil Procedure* §1670.5 allows a court to refuse to enforce any contract if the contract is unconscionable at the time it was made or it may enforce the remainder of the contract without the unconscionable clause in order to avoid an unconscionable result.

Simply stated, when builders go too far, buyers must challenge the agreements as unconscionable. Below are some specific SB 800 contract provisions and their analysis.

### **UNCONSCIONABLE PROVISION TO LIMIT BUYER’S RECOVERY TO “ACTUAL DAMAGES”**

Builder SB 800 Contract Provision:

“DAMAGES PURSUANT TO TITLE 7 CHAPTER 2: For all disputes involving a Title 7, Claimed Violation, including a breach or non-compliance of a standard set forth in California Civil Code Sections 895 through 897,

Buyer is only entitled to *actual damages*. Actual damages are measured by the lesser of the (i) cost of repair or (ii) diminution in current value of real property caused by the nonconformity.”

This attempted modification was believed necessary by builders’ counsel because of the widespread belief that certain SB 800 “actionable defect” provision did not require the occurrence of “actual damage” as defined in *Aas*. Pursuant to CC §896(a)

- “(1), “A door shall not allow unintended water to pass **beyond, around, or through** the door or its actual moisture barriers . . .”
- Pursuant to CC §896(a)(2), “Windows, patio doors, deck doors, and their systems shall not allow water to pass **beyond, around, or through** the window, patio door, or deck door or its designed or actual moisture barriers, including, internal barriers within the systems themselves . . .”
- Pursuant to CC §896 (a)(4), “Roofs, roofing systems, chimney caps, and ventilation components shall not allow water to enter the structure or to pass **beyond, around, or through** the designed or actual moisture barriers, including, without limitation, internal barriers located within the systems themselves. For purposes of this paragraph, "systems" include, without limitation, framing, substrate, and sheathing if any.”
- Pursuant to CC §896(a) (10), “Stucco, exterior siding, exterior walls, exterior framing, other exterior wall finishes and fixtures . . . pot shelves, horizontal surfaces, columns, and plant-ons, shall be installed in such a way so as not to allow unintended water to pass into the structure or to pass beyond, around, or through the designed or actual moisture barriers of the system, . . .”

Nowhere do these provisions of SB 800 (CC § 896) mention “*actual damage*” as a requirement for a justicible claim. This was one of the compromises enacted by the legislature to protect buyers who had water intrusion defects that could be addressed before they caused actual serious damage.

Pursuant to CC §896 (b), “With respect to structural issues:

- “(1) Foundations, load bearing components and slabs, shall not contain significant cracks or significant vertical displacement.
- Pursuant to CC §896 (b)(2) Foundations, load bearing components and slabs, shall not cause the structure, in whole or in part to be structurally unsafe.”
- Pursuant to CC §896 (b)(3), “Foundations, load bearing components, and slabs and underlying soils, shall be constructed so as to materially comply with the design criteria set by applicable government building codes regulations and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction.”
- Pursuant to CC §896 (b)(4), “A structure shall be constructed so as to materially comply with the design criteria for earthquake and wind load resistance, as set forth in the applicable government building codes regulations and ordinances in effect at the time of original construction.”

Nowhere do these provisions of SB 800 (CC § 896) mention “actual damage” as a requirement for a justicible claim. This was one of the compromises enacted by the legislature to protect buyers who had foundation, slab and/or soils defects that could be addressed before they caused actual serious damage.

### **UNCONSCIONABLE PROVISION TO PERMIT BUILDER ARBITRATION APPEAL**

#### ARBITRATION APPEAL PROVISION:

“PROCEDURES FOR APPEAL OF CERTAIN CASES. In any Proceedings in which a claim or arbitration award exceeds \$500,000 in value, Buyer and Seller hereby adopt and agree to the JAMS Optional Appeal Procedure.

This attempted modification was believed necessary by builders’ counsel because of the widespread belief that even in arbitration, owners could receive substantial six figure awards that would otherwise bind builders to pay. By including the arbitration appeal provision builders provided themselves a “get out of jail free” card that made the arbitration anything but “binding.”

Essentially, the argument is a simple one: Builder appellate provisions inordinately benefits builders without benefit to buyers. The appellate procedure in the Arbitration Appeal Provision defeats the very purpose of arbitration, which is to achieve a fast and final resolution of a dispute. Moreover, provisions with monetary thresholds can only benefit the sellers and not buyers.

The California courts have uniformly held that such an arbitration appeal provision is substantively unconscionable, because such an appellate review procedure defeats the finality and conclusiveness expected of an arbitration award. The court in *Saika v. Gold* (1996) 49 Cal.App.4th 1074 stated:

“The ‘very essence’ of arbitration is finality. By choosing arbitration, parties avoid the palaver of procedural challenge that lend, at least for a time, uncertainty to any judgment rendered in the courts. With only very narrow exceptions, an arbitrator’s decision cannot be reviewed for error of fact or law. ‘Conclusiveness is expected; the essence of the arbitration process is that an arbitral award shall put the dispute to rest.’ ” *Id.* at p. 1076. [Citations omitted.]

Moreover, the court in *Saika* rejected an appellate procedure that had a monetary threshold, because it “*tilts the playing field in favor of the doctor.*” *Id.* The *Saika* court pointed out the illusory nature of the appeal procedure:

“But, in the vernacular of late 20th century America, let us ‘get real.’ As a practical matter, the benefit, which the trial de novo clause confers on patients, is nothing more than a chimera . . .

In sum, while the trial de novo clause in the present case purports to apply to both parties, it is the same “heads I win, tails you lose” proposition that the court condemned in *Beynon.*” *Id.* at p. 1080. [Citation omitted.] what are these???

In *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, the Supreme Court found that a \$50,000 threshold was substantively unconscionable:

“Auto Stiegler and its amici curiae make several arguments to distinguish this

case from *Beynon* and *Saika*. . . But if that is the case, they fail to explain adequately the reasons for the \$50,000 award threshold . . . Thus, the \$50,000 threshold inordinately benefits defendants. Given the fact that Auto Stiegler was the party imposing the arbitration agreement and the \$50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant.” *Id.* at p. 1073. [Citations omitted.]

Although the Supreme Court remarked that an asymmetrical provision may be permissible, such asymmetry had to have a *legitimate commercial need*:

“Although parties may justify an asymmetrical arbitration agreement when there is a ‘legitimate commercial need,’ that need must be ‘other than the employer's desire to maximize its advantage’ in the arbitration process. There is no such justification for the \$50,000 threshold. The explanation for the threshold offered by amicus curiae Maxie, Rheinheimer, Stephens & Vrevich--that an award in which there is less than that amount in controversy would not be worth going through the extra step of appellate arbitral review--makes sense only from a defendant's standpoint and cannot withstand scrutiny.” *Id.* [Citations omitted.]

The Supreme Court also rejected the last argument that this procedure was less objectionable than a second arbitration:

“Auto Stiegler also argues that an arbitration appeal is less objectionable than a second arbitration, as in *Beynon*, or a trial de novo, as in *Saika*, because it is not permitting a wholly new proceeding, making the first arbitration illusory, but only permitting limited appellate review of the arbitral award. We fail to perceive a significant difference. Each of these provisions is geared toward giving the arbitral defendant a substantial opportunity to overturn a sizable arbitration award. Indeed, in some respects appellate review is more favorable to the employer attempting to protect its interests.” *Id.* at p. 1073-1074.

The \$500,000 threshold can only be viewed as applying primarily, if not exclusively, in favor of builder. Builder under SB 800 can never have a claim or arbitration award in any amount or in excess of \$500,000 against a buyer. The builder knew that when it imposed the threshold, that builder would be the defendant and the appealing party. Builder did not and cannot satisfy the requirement that such a threshold is necessary to meet a legitimate commercial need other than the desire to maximize its advantage and get a third bite of the apple.<sup>3</sup>

### **Distinguishing Between Procedural and Substantive Unconscionability to Attack Builder SB 800 Provisions**

Litigants must distinguish between procedural and substantive unconscionability to attack unfair builder SB 800 provisions. *Civil Code* §1670.5 provides:

"(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the

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<sup>3</sup> Builder gets a third bite of the apple, because under paragraph B.8.3.10, the arbitration can hear and decide “post trial motions.”

unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The court in *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081 set out the guidelines for determining whether an alternate dispute resolution provision is unconscionable. The prevailing view is that procedural and substantive unconscionability must both be present, but they do not have to be present in the same degree. The *Pardee* court and other courts, which have addressed the issue, adopt a sliding scale that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. *Id.* at p. 1088.

*Procedural unconscionability* looks at the manner in which the contract was negotiated and circumstances of the parties. *Kinney v. United Healthcare* (1999) 70 Cal.App.4th 1332, 1329. *Substantive unconscionability* focuses on the actual terms of the contract itself and whether the terms are unfairly one-sided for the party with the superior bargaining power, and whether there is commercial justification for the lack of mutuality. *Armendariz, supra*, 24 Cal.4th at p. 117-118, *O'Hare, supra*, 107 Cal.App.4th, 273-274.

**SUBSTANTIVE UNCONSCIONABILITY: BUYER MUST LITIGATE IN TWO DIFFERENT FORUMS WHICH IS EXPENSIVE, INEFFICIENT AND RISKS INCONSISTENT RESULTS.**

“BUYER AND SELLER, to the extent either such party is *defending* a claim in the Proceedings may, if it chooses, HAVE ALL NECESSARY AND APPROPRIATE PARTIES INCLUDED AS PARTIES TO THE PROCEEDINGS.”

Although this provision appears to apply equally to both builder and buyer, it does not. In order to determine if an arbitration provision is sufficiently bilateral, a court must look beyond the appearance of mutuality and examine the actual effects of the provision. In *Stirlen, supra*, 51 Cal.App.4th at p. 1519, *Supercuts* justified the arbitration provision on the theory that the employment disputes to which it applies could be initiated by an employer as well as an employee. The court found the argument:

“*exceedingly disingenuous*. The mandatory arbitration requirement can only realistically be seen as applying primarily if not exclusively to claims arising out of the termination of employment, which are virtually certain to be filed against, not by, *Supercuts*.” *Id.* at p. 1540-1541. [Emphasis added.]

*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 725; *Szetela, supra* [credit card companies typically do not sue their customers in class action lawsuits.].

In *Woodside Homes v. Superior Court* (2003) 107 Cal.App.4th 723, the court noted in a footnote that “Woodside, having received its money from Buyers (or their lenders), would have little reason to think it would ever initiate litigation against Buyers.” *Id.* at p. 734, fn. 16.

Nevertheless, builder argues that the term “dispute” in the provision is not limited to construction defect claims but any claims arising out of the Property or the relationship

between Purchaser and Seller. This argument is equally disingenuous.

No matter how broadly builder defines the word “dispute,” builder would never have a reason to initiate litigation against buyers for any claims that arose after the close of escrow. If buyers had failed to complete the purchase of the property, the Purchase Agreement contained a separate provision for arbitration of those claims.

Builder, however, can, if it so chooses, bring in all necessary and appropriate parties, because it, invariably, will be the defendant in such proceedings. However, the right to arbitration depends on a contract. Therefore, a party cannot be compelled to submit a dispute to arbitration unless that party has agreed in writing to do so. See, *Code of Civil Procedure* §§1281 and 1281.2(c); *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit, Inc.* (1992) 6 Cal.App.4th 1266, 1271. If the builder did not provide the court with any evidence of any contract between builder and the construction subcontractors containing an arbitration agreement there is no guarantee that the subcontractors could or would participate in the arbitration.

In contrast, the builder in *Woodside Homes* represented to the court and provided a declaration that the subcontractors on the project were all bound by agreements to participate in any reference of disputes related to their work. *Woodside Homes, supra*, 107 Cal.App.4th at p. 725-726. This representation and declaration satisfied the appellate court that the builder had gotten all of its subcontractors to agree to participate and that unless all subcontractors did not agree to the reference, the entire case would remain in court. *Id.* at 731 and fn. 9. If builders do not make provision for their subcontractors to be included in binding arbitration, buyer may well be forced to litigation in arbitration and in civil court.

Moreover, even if a buyer had the right to bring other parties responsible for the defects in his home into the arbitration, buyer cannot compel any of the construction subcontractors to participate in the arbitration. Buyers typically have no contractual relationship with any of the construction subcontractors.

Thus, the claims of multiple parties and multiple causes of action which involve common issues of law and fact, must be litigated in one forum. It is prohibitively expensive and inefficient to litigate concurrently in two forums common issues of law and fact. Moreover, proceeding in two different forums poses the risk of different or inconsistent outcomes. Under *Code of Civil Procedure* §1281.2(c) and *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394, trial courts can decline to order arbitration because of substantive unconscionability.

**UNCONSCIONABLE PROVISION: LIMITING RECOVERABLE COSTS IN ARBITRATION.**

“Each party shall bear its own attorneys’ fees and costs, including expert witness costs, in the Proceedings.”

Despite language that Builder advances the fees and costs of the arbitration and on the appeal (paragraphs B.8.3.4 and B.8.4.4), Builder does not front all the costs in the arbitration. The provision states that “Each party shall bear its own attorneys’ fees and costs, including expert witness costs, in the Proceedings.”

A construction defect case is expert driven. Buyer would have to pay for his

investigative and expert costs twice, once in the arbitration, and again, in the public court litigation. However, in the arbitration, Buyer could not recover his expert costs, under *Stearman v. Centex*, (cite) because they are expressly excluded. It is not clear who is responsible for the payment of depositions of experts and expert witness fees. See *Code of Civil Procedure* §2034.430. Paragraph B.8.3.12 would also prohibit recovery of expert costs that would be recoverable under *Code of Civil Procedure* §998.

Buyer would have to pay for the costs of a record of the arbitration in order to preserve his right to appeal (paragraph B.8.4.1), a cost that he could recover if he were the prevailing party in the public court system. Because there is no limitation on discovery, Buyer would have to pay the cost of all other depositions, a cost that he could also recover if he were in court. There is no provision for the recovery of any of the costs that typically can be recovered if he successfully litigated in court. See *Code of Civil Procedure* §1033.5(a).

Nor would Buyer be able to recover prejudgment interest available under *Civil Code* §§3287-3291. Even if the appellate procedure was not unconscionable, the arbitration award would not bear interest until the court confirmed the award.

Furthermore, if Builder or its carrier should fail to pay the arbitration fees on time, JAMS has the right to an administrative suspension of the case, unless Buyer advances the fees.<sup>4</sup>

Thus, the costs that Buyer is likely to pay are unconscionable, because they are greater than those, which he would have to pay if the entire case remained in the public court system.

#### **UNCONSCIONABLE PROVISION: LIMITING THE TYPES OF RECOVERABLE DAMAGES**

In addition to his inability to recover his costs of litigation, the Title 7 Addendum has two inconsistent provisions regarding the type of damages recoverable. Although Paragraph B.3.3 of the Title 7 Addendum states that buyer can recover (1) the cost of repairing the damage, (2) the cost to repair the damage caused by the Title 7 Claimed Violation, (3) the cost to remove or replace an improper repair, (4) any alleged relocation expenses, (5) storage expenses, (6) lost business income, (7) investigation costs and (8) all other fees and costs recoverable by contract or statute as a result of the Title 7 Claimed Violation (APP 000125), Paragraph B.8.2 takes it back, one pages later, and limits the damages for a Title 7 Claimed Violation in *mandatory binding arbitration* to “actual damages” defined as “*the lesser of* the (i) the cost to repair or (ii) diminution in the current value of the real property caused by the nonconformity”<sup>5</sup>.

Moreover, even though buyer is not entitled to his remedies under *Civil Code* §944, builder is entitled to “the affirmative defenses set forth in California Civil Code Section 945.5” This provision lacks mutuality.

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<sup>4</sup> JAMS Comprehensive Arbitration Rules And Procedures Rules 31 and 6(c). See Request for Judicial Notice, RJN 000001 - 000014.

<sup>5</sup> JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness requires that remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court.

Builder can argue that the limitation of actual damages only applies to a Title 7 violation but not to any other damages. Most, if not all, the defects alleged in the complaint fall within the definition of actionable defects set out in *Civil Code* §896. This asymmetrical damage limitation inures only to the benefit of builder and only limits buyer's damages.

Moreover, the limitation on damages to "actual damages" is inconsistent with Paragraph B.8.3.7 that allows the arbitrator to provide all recognized remedies available at law or equity for any cause of action. If builder had a claim for damages, there would be no limitation on the type of damages it could recover.

This provision lacks mutuality and there is no commercial justification to distinguish between a Title 7 claimed violation and a non-Title 7 claimed violation, if only to benefit builder or between the damages recoverable by buyer or builder.

**UNCONSCIONABLE PROVISION: ADEQUATE BUILDER DISCOVERY CAUSING EXPENSIVE, PROTRACTED DISCOVERY**

Unlike the California Discovery Statutes or the JAMS Rules, Paragraph B.8.3.8 places no limitation on the frequency or amount of discovery that can be propounded. A limitation on discovery is one important component of the simplicity, informality, and expedition of arbitration. Adequate discovery does not mean unfettered discovery. *Armendariz, supra*, 24 Cal.4th at p. 104, 106, fn. 11; *Mercuro v. Superior Court* (2002), 96 Cal.App.4th 167, 184.

This provision returns the parties to the days when a party could propound an unlimited number of written interrogatories and requests for admission. Under the broad language of paragraph B.8.3, any number of depositions, interrogatories and requests for admission would be permitted. Discovery in a construction defect dispute is expert driven. Interrogatories and requests for admission are simply unnecessary.

The discovery provision not only turns back the clock, but wastes time and money, which can only benefit Warmington. The provision allows a corporation with substantial financial resources (including insurance and insurance defense counsel) to bury a consumer with paper, with the burial funded by an unlimited war chest.

**6. Warmington Should Not Be Able To Foist Unfettered And Unlimited**

**Law And Motion Practice In Arbitration.**

Generally, arbitrators only have authority to hear and decide summary judgment or adjudication motions. See, JAMS Rule 18; *Schlessinger v. Rosenfeld* (1995) 40 Cal.App.4th 1096, 1105-1109. Paragraph B.8.3.10 allows for *unlimited* law and motion practice including post trial motions and returns to the former practice of allowing a summary adjudication of less than a cause of action.

The law and motion provision wastes time and money, which can only benefit Warmington. The provision allows a corporation with substantial financial resources (including insurance and insurance defense counsel) to bury a consumer with paper, with the burial funded by an unlimited war chest.

**7. The Confidential Record Violates Public Policy.**

Paragraph B.8.3.11 requires that a "confidential" stenographic record of the hearing shall be made." Since there is no limitation on the number of arbitration

sessions, the cost of a stenographic record could be substantial. If Mr. Niedzwiedz wanted a copy of the hearing either for purposes of cross-examination or for appeal, this would be a cost borne solely by Mr. Niedzwiedz. Mr. Niedzwiedz would have to pay for the costs of a record of the arbitration in order to preserve his right to appeal. See Paragraph B.8.4.1.

The *Woodside Homes* court held that there was nothing unfair about maintaining the confidentiality of the proceedings as between the parties to the arbitration. *Woodside Homes, supra*, 107 Cal.App.4th at p. 731-732. The *Woodside Homes* court ignores *Civil Code* §1667 that provides that a court can refuse to enforce a contract that is contrary to an express provision of law, contrary to the policy of express law, though not prohibited, or otherwise contrary to good morals.

*Code of Civil Procedure* §124 states that, “Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public.” By inserting a provision that shifts the proceedings into a confidential arbitration, Warmington attempts to shield itself from public scrutiny. In *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1151-1152, the court reviewed a confidentiality provision that required that any arbitration remain confidential. The court held that the provision requiring the arbitration to remain confidential was substantively unconscionable. While the secrecy provisions appeared to be “facially neutral,” they usually favored corporations over individuals. The provisions acted as a gag order and prevented potential plaintiffs from having access to precedent and may prevent them from obtaining information necessary for framing a case of intentional misconduct or unlawful discrimination.

The confidential stenographic record only benefits Warmington. Warmington seeks to preclude access to life safety deficiencies in the other homes in the tract. This provision is substantively unconscionable.

## **B. The Title 7 Addendum Is Procedurally Unconscionable.<sup>6</sup>**

### **1. Petitioner’s Undisputed Evidence Of Unconscionability.**

Mr. Niedzwiedz made a strong showing of procedural unconscionability. The undisputed evidence established that the Title 7 Addendum was a contract of adhesion and had a high level of procedural unconscionability:

- The day that he signed the Purchase Agreement and the Addendums was the last day that he could purchase the home. There was no time to take the documents home and review them at his leisure. APP 000108.
- On the day that he signed the Purchase Agreement, Mr. Niedzwiedz received a mound of documents over 116 pages. The package of documents included a June 30, 2003 letter regarding the Right to Repair Law attaching Part 2, Division 2 of the California *Civil Code* consisting of **61 pages** [Exhibit 1 to the Niedzwiedz Declaration]; Acknowledge of Receipt Form for Disclosure Statements for Quail Hill Buyers and the Disclosure Statements [Exhibit 2 to the Niedzwiedz Declaration]; and a copy of the Public Report. APP 000107.

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<sup>6</sup> JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness states that “the consumer must be given notice of the arbitration clause. *Its existence, terms, conditions, and implications must be clear.*” [Emphasis added.] RJN 000015.

- Mr. Sager told Mr. Niedzwiedz to sign, and if he didn't sign, there were other potential buyers for the home. APP 000107The discussion was brief, no more than 20 minutes, because Mr. Sager was preparing paperwork on another sales transaction, and he was in a hurry. APP 000107 - 000108.
- Mr. Sager did not go over any of the provisions of the Purchase Agreement, addenda or any of the mound of other documents that he provided to Mr. Niedzwiedz. APP 000108.
- Warmington ostensibly adopts the JAMS rules, but then sets out a page of exceptions to the JAMS rules that are substantively unconscionable. Paragraph B.8.3 states that the parties "shall use the procedures adopted by the Judicial Arbitration and Mediation Service ("JAMS") or such other entity offering alternate dispute resolution procedures. . . , provided that the following rules and procedures shall apply in all cases unless the parties agree otherwise." APP 000126 - 000127.
- The Title 7 Addendum is not written in consumer-friendly language but is a bewilderingly lengthy and complex set of nonadversarial and adversarial procedures that only an attorney practicing construction defect law would understand.
- Even if Mr. Niedzwiedz knew to what "Title 7" referred, the reference to Title 7 would appear to incorporate the provisions of Title 7, *Civil Code* §§895 et seq. Instead, the Title 7 Addendum proceeds to replace the statutory pre-litigation procedures contained in Title 7 of the *Civil Code*, *Civil Code* §§910-938 with its own pre-litigation procedures.
- The mandatory arbitration provisions are buried in the middle of page three of the Title 7 Addendum with nothing setting these provisions off from the nonadversarial provisions. APP000126.
- Mr. Niedzwiedz was not given Warmington's pre-litigation procedures until the day before escrow closed. APP 000108.

**2. Warmington Did Not Rebut Any Of This Evidence Of Procedural Unconscionability.**

Although Warmington submitted the Carolyn Festner declaration, she never states in her declaration that she was the person who met with Mr. Niedzwiedz on September 13, 2003. Indeed, she did not submit a further declaration that she, in fact, spoke with Mr. Niedzwiedz on the day in question. Moreover, Warmington did not submit a declaration from Mr. Sager rebutting any of the facts in the Niedzwiedz declaration. The Festner declaration did not create a factual dispute.

**3. The Fact That Mr. Niedzwiedz Signed The Purchase Agreement And Separately Initialed The Title 7 Addendum Does Not Defeat His Strong Showing Of Procedural Unconscionability.**

Relying on *Woodside Homes* (2003) 107 Cal.App.4th 723, Warmington argued that Mr. Niedzwiedz has not shown that he had no other alternatives to the Warmington home he purchased.<sup>7</sup> The availability of market substitutes may be relevant on the issue

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<sup>7</sup> The *Woodside Homes* court does not explain who would have the burden on the issue of the availability of similarly priced housing stock in the region. However, the burden of proof on that issue should not be on a homeowner. Knowledge of a party is a strong factor calling for alteration of the burden of proof. For example, in *Sanchez v. Unemp.*

of whether a contract is one of adhesion. However, it is not a prerequisite for procedural unconscionability. Even if a clause is not an adhesion contract, it can still be found unconscionable. *Szetela v. Discover Bank*, *supra*, 97 Cal.App.4<sup>th</sup> 1094, at p. 1100; *Harper v. Ultimo* (2003) 113 Cal.App.4<sup>th</sup> 1409-1411. This case involves procedural unconscionability regardless of whether the contract is a contract of adhesion.

Warmington also argued that the Title 7 Addendum was not procedurally unconscionable, because Mr. Niedzwiedz signed the Addendum and acknowledged that he had read and understood and agree to submit disputes to binding arbitration. Although the opportunity to read and understand the arbitration provision is relevant on the issue of whether an arbitration provision is procedurally unconscionable, a party is not thereafter barred from claiming that the provision is unconscionable.

In addressing the adhesive nature of the Agreement, a similar argument was advanced and rejected in *Higgins v. Superior Court* (2006) 140 Cal.App.4<sup>th</sup> 1238, 1251:

“The second justification offered by the trial court for granting the television defendants’ petition to compel arbitration was that petitioners had an opportunity to read the Agreement and Release before signing them. While this is factually correct and bears on whether the Agreement is procedurally unconscionable, no authority is cited for a supposed rule that if a party reads an agreements he or she is barred from claiming it is unconscionable. Such a rule would seriously undermine the unconscionability defense.”

The defendants in *Higgins* argued, as does Warmington, that the petitioners were never told that they could not negotiate any of the terms of the Agreement or that petitioners ever made an attempt to do so. The *Higgins* court rejected this argument and found that the Agreement and exhibits were a contract of adhesion:

“The remaining question is whether petitioners were relegated only to signing or rejecting the Agreement. The television defendants note that there is no evidence petitioners were told they could not negotiate any terms of the Agreement or that petitioners made any attempt to do so. Although literally correct, the uncontested evidence was that on the day petitioners signed the Agreement the television defendants initially met with the Leomitis alone.

Inferentially, at the television defendants’ urging, immediately after the meeting

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*Ins. App. Bd.* (1977) 20 Cal.3d 55, 71, the court held that the unemployment claimant had burden of proving availability for work, but Department of Employment Development, which has greater knowledge of labor market, had the burden of proving that claimant has not made self available to “substantial field of employment.” Similarly, Warmington, which has greater knowledge of the availability of similarly priced housing stock in the region, should have the burden of providing this evidence.

concluded, the Leomitis gave the Agreement and exhibits to petitioners with directions to "flip through the pages and sign." The documents were returned in five to 10 minutes. One of the producers testified that he told the Leomitis "that these agreements must be executed as a condition to their further participation in the program."

From these facts, we conclude the party with the superior bargaining position who was not willing to engage in negotiations presented the Agreement to petitioners on a take-it-or-leave-it basis. Accordingly, we conclude the Agreement and exhibits constitute a contract of adhesion."

The *Higgins* court also addressed other procedurally unconscionable aspects of the Agreement:

"In this case, the arbitration provision appears in one paragraph near the end of a lengthy, single-spaced document. The entire agreement was drafted by the television defendants, who transmitted copies of it to the petitioners. The latter [the television defendants] made no effort to highlight the presence of the arbitration provision in the Agreement. It was one of 12 numbered paragraphs in a section entitled "MISCELLANEOUS." In contrast to several other paragraphs, no text in the arbitration provision is highlighted. No words are printed in bold letters or larger font; nor are they capitalized. Although petitioners were required to place their initials in boxes adjacent to six other paragraphs, no box appeared next to the arbitration provision.

It is true that the top of the first page advises petitioners to read the entire agreement before signing it and the second-to-last paragraph states that the person signing acknowledges doing so. This language, although relevant to our inquiry, does not defeat the otherwise strong showing of procedural unconscionability." *Id.* at p. 1252-1253.

In sum, Mr. Niedzwiedz's execution of the Purchase Agreement and his separately initialing the Title 7 Addendum do not defeat his strong showing of procedural

unconscionability. The undisputed evidence was that he had no opportunity in the 20 minutes he was at the sales office to read or understand all of the documents that he received. He had no opportunity to modify the provisions of the Title 7 Addendum or any other document handed to him that day. If he didn't sign, he was told that there were other buyers for his home. Mr. Niedzwiedz made a strong showing of procedural unconscionability.

**4. The Title 7 Addendum Is Misleading, Because It Lulls The Unsuspecting Buyer Into Believing That The Claims Process Is Not Adversarial.**

The title "Title 7 Addendum" is misleading to anyone other than a construction defect lawyer. Even if Mr. Niedzwiedz knew to what "Title 7" referred, it would still be misleading, because it would appear to incorporate the provisions of Title 7, *Civil Code* §§895 et seq. Instead, the Title 7 Addendum proceeds to replace the statutory pre-litigation procedures contained in Title 7 of the *Civil Code*, *Civil Code* §§910-938 with its own pre-litigation procedures and to establish mandatory arbitration. Mr. Niedzwiedz was not given Warmington's pre-litigation procedures until the day before escrow closed. APP000108.

The Title 7 Addendum appears to create a nonadversarial claims resolution procedure. On page 1, at paragraph A.1, the Title 7 Addendum states that "The statutory pre-litigation procedures contained in Sections 910 through 938 of Title 7 ("Statutory Pre-litigation Procedures") may be replaced by Seller's election to use a contractual non-adversarial claims resolution procedure."

At the top of page 2, at paragraph A.7, the Title 7 Addendum heading states in all capitals and underlined:

"ELECTION TO USE SELLER'S NON-ADVERSARIAL CLAIMS  
PROCESS FOR HANDLING OF CONSTRUCTION CLAIMS."

The body of the paragraph states: “Title 7 permits Seller to elect to use alternate contractual **non-adversarial claims handling provisions** for construction defect disputes in lieu of the Statutory Pre-litigation Procedures. By his or her signature below, Buyer acknowledges that Seller has elected to use the *non-adversarial claims process* described in **Section B** of this Addendum in lieu of the Statutory Pre-litigation Procedures set forth in Title 7.” [Bold in original; bold italics added]

Continuing on page 2, at paragraph B.1, Warmington touts its “Customer Service Program” to respond to claims and complaints regarding construction and design of the home. The next paragraph, B.1.1, states that “[t]he procedures set forth in the Sections below are intended to be utilized after the parties have attempted to resolve the Title 7 Claimed Violation through the “Customer Service Program.”

Even more egregious is Paragraph B.2 that states that Seller has elected to utilize: “alternative non-adversarial procedures to address claims, controversies and disputes relating to the Property.” Seller has elected to utilize alternative non-adversarial procedures (“Claims Process”), which are to be used in lieu of the Statutory Pre-litigation Procedures set forth in Chapter 4 of Title 7.”

Though the definition of the “Claims Process,” refers to “non-adversarial” procedures, the Claims Process includes mandatory binding arbitration, a process that under no circumstances can be considered “non-adversarial.”

It is not until a reader gets to the middle of page 3 at paragraph B.8 that a reader finds the provision for “Mandatory Binding Arbitration.” Warmington does not do anything to separate or highlight the nonadversarial provisions contained in the Title 7 Addendum from the adversarial provisions.

### **C. Unconscionability Permeates The Entire Title 7 Addendum.**

There is no indication in the record whether the trial court considered severing an unconscionable provision of the Title 7 Addendum. As the court explained in *Armendariz, supra*, 24 Cal.4th at p. 124:

“If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.”

The *Armendariz* court found that the entire contract was tainted because more than one provision was unlawful, indicating a “systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer’s advantage.” *Id*

Although the trial court could have cured the unconscionability through severance of the unconscionable provision(s), in this instance, severance is not possible. Severance cannot cure the fact that Mr. Niedzwiedz will have to litigate his claims in two different forums. Severance is also not possible, because the Title 7 Addendum contains multiple serious defects that indicate a systemic effort to impose arbitration on a buyer and that creates an inferior forum for Mr. Niedzwiedz to prosecute his claims against Warmington and that only works to the advantage of Warmington.

Mr. Niedzwiedz urges this Court to void the entire Title 7 Addendum, because the unconscionability permeates the entire Addendum and is an inferior forum to resolve the entire dispute.

#### IV.

##### **The Mold/Mildew Addendum Is Not Enforceable.**

Buried in the mound of documents received by Mr. Niedzwiedz was a document entitled “Mold/Mildew Addendum.” The title of the document appears innocuous but is misleading. It states: “Mold/Mildew Addendum”. The first page is innocuous and discusses what homeowners should know about mold.<sup>8</sup> However, the second page

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<sup>8</sup> Society has long recognized the danger of mold contamination. Chapter 14 of Leviticus states:

“33. On the seventh day the priest shall return to inspect the house. If the mildew has spread on the walls, he is to order that the contaminated stones be torn out and thrown into an unclean place outside the town.

contains a disclaimer and waiver of liability:

“Seller will not be liable for any actual, special, incidental or consequential damages based on any legal theory whatsoever. . . unless caused by the sole negligence or willful misconduct of Seller” and “Buyer hereby releases Seller from any and all claims. . .resulting from exposure to mold. . .provided, however, that in no event is Buyer releasing Seller. . .if caused by the sole negligence or willful misconduct of Seller.”

*Civil Code* §1668 provides:

"All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

By limiting its liability to its sole negligence or willful misconduct, Warmington’s Mold/Mildew Addendum runs afoul of section 1668.

As noted in *YMCA of Metropolitan Los Angeles v. Superior Court* (1997), 55 Cal.App.4th 22, 26-27, an exculpatory adhesion contract has been found to violate public policy when such a contract exhibits some, but not necessarily all, of the following factors: (1) the contract involves a business or undertaking generally thought suitable for public regulation, (2) the party seeking exculpation performs a service of great importance to the public, which is often a matter of practical necessity, (3) the party seeking exculpation holds itself out as willing to perform a service for any member of the public or at least for any within certain established standards, (4) as a result of the

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41. He must have all the inside walls of the house scraped and the material that is scraped off dumped into an unclean place outside the town.

- 43 If the mildew reappears in the house after the stones have been torn out and the house is scraped the priest is to go and examine it and, if the mildew has spread in the house, it is a destructive mildew: the house is unclean.

- 45 It must be torn down - its stones, timbers and all the plaster – and taken out of the town to an unclean place.

- 46 Anyone who goes into the house will be unclean till evening.

- 47 Anyone who sleeps or eats in the house must wash his clothes.” (The Bible Leviticus Chapter 14)

essential nature of service which the party invoking exculpation possesses, it has a decisive advantage in bargaining strength, (5) in exercising superior bargaining power, the party seeking exculpation confronts the public with a standardized adhesion contract of exculpation, which makes no provision for the purchaser to obtain protection against negligence and (6) as a result of the transaction, the person or property purchasers are placed at risk of carelessness by the seller or his agents.

The construction of residential housing is a highly regulated business and in constructing the homes, a developer and general contractor must have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. In constructing the homes, a developer and general contract must be licensed. As a licensed general contractor, under the licensing laws, the general contractor must show such degree of knowledge and experience in the classification applied for, and such general knowledge of the building, safety, health, and lien laws of the state and of the administrative principles of the contracting business as the board deems necessary for the safety and protection of the public. In constructing the homes, governmental approval is required at all stages of the construction. and construction. The exculpatory clause violates public policy. *Stewart v. Cox* (1961) 55 Cal.2d 857, 862-863; *Connor v. Great Western Savings & Loan Assn.*, (1968) 69 Cal.2d 850, 865; *Acosta v. Glenfed Development Corp.*(2005) 128 Cal.App.4th 1278, 1297-1300.

The Mold/Mildew Addendum satisfies each of the factors and is unenforceable. The protection that it offers, Warmington's sole negligence or willful misconduct, is illusory, since Warmington did not construct the homes but contracted with subcontractors to construct the homes. The Mold/Mildew Addendum is an unlawful disclaimer of liability against the public policy of this state. This Addendum is wholly illusory and operates to insulate Warmington from liability and damages that otherwise would be imposed under California law.

## How Builders Are Unconscionably “*Cherry Picking*” SB 800 To Buyers Detriment

### A. **Substantive Unconscionability.**

A trial court cannot disregard oppressive or one-sided terms in the Title 7 Addendum. Although the terms appear to apply equally to both parties, given that builders will invariably be the defendant in a construction defect lawsuit, it is reasonable to conclude that it imposed these provisions with knowledge or belief that it would be generally the defendant in the arbitration, thereby tilting the playing field decidedly in its favor:

- Any party can bring another party into the arbitration but only to the extent such party is *defending* a claim. APP 000127. Under no circumstances could builder have any claims. Nor does builder contend that it has any claims against buyer. Moreover, buyer must proceed in two forums at the same time, which is cost prohibitive, inefficient and poses the risk of inconsistent results. Buyer’s claims against the subcontractors, design professionals, and product suppliers (the “Construction Defendants”) remain in the Superior Court. Builder offered no evidence that it could and would bring these parties into the arbitration. Nor did Builder offer any business justification for the lack of mutuality.
- Builder has imposed an appellate review procedure under the Judicial Arbitration & Mediation Services (“JAMS”) rules that allows an appeal if the award surpasses a \$500,000 threshold. Since builder will invariably be the defendant, this appellate review procedure can only be viewed as applying, primarily, if not exclusively, to builder. Again, uilder offers no commercial reason for the threshold. Given that it imposed the threshold, it is reasonable to conclude that it imposed the threshold with knowledge or belief that it would invariably be the defendant in the arbitration.
- Although Paragraph B.3.3 of the Title 7 Addendum states that buyer can recover (1) the cost of repairing the damage, (2) the cost to repair the damage caused by the Title 7 Claimed Violation, (3) the cost to remove or replace an improper

repair, (4) any alleged relocation expenses, (5) storage expenses, (6) lost business income, (7) investigation costs and (8) all other fees and costs recoverable by contract or statute as a result of the Title 7 Claimed Violation (APP 000125), Paragraph B.8.2 takes it back, one page later, and limits the damages for a Title 7 Claimed Violation in *mandatory binding arbitration* to “actual damages” defined as the cost to repair or diminution in value (APP 000126).

- Although the arbitrator can provide any remedies available at law or equity for any cause of action, builder could recover any remedies available at law or equity against buyer. (APP 000127).
- Although builder advances the fees charged by JAMS and the arbitrator, under builder’s Title 7 modifications to the JAMS rules, the parties bear their own attorneys’ fees and costs. Litigation costs and interest that would be recoverable in the public court system are not recoverable.
- Although the Title 7 Addendum permits discovery, under Builder’s Title 7 modifications to the JAMS rules, builder foists prohibitively expensive and protracted discovery procedures removing the benefits of arbitration as an economical and efficient alternative to traditional litigation (APP 000127).
- In another modification to the JAMS rules, the Title 7 Addendum imposes prohibitively expensive and protracted law and motion practice removing the benefits of arbitration as an economical and efficient alternative to traditional litigation.
- Among the stack of documents was also a two-page document with the innocuous title of “Addendum N to Purchase Agreement-Mold/Mildew Addendum.” In the separate Mold/Mildew addendum, the first page is innocuous and discusses what homeowners should know about mold. However, the second page contains a *disclaimer and waiver of liability* of any actual, special, incidental or consequential damages unless caused by the sole negligence or willful misconduct of builder. Here, the Mold/Mildew Addendum is an unconscionable limitation of

liability. By limiting its liability to its sole negligence and willful misconduct, builder exculpated itself from its own negligence contrary to *Civil Code* §1668.

**B. Evidence of Procedural Unconscionability.**

The trial court disregarded Mr. buyer's undisputed evidence of procedural unconscionability:

- The day that he signed the Purchase Agreement and the Addendums was the last day that he could purchase the home. There was no time to take the documents home and review them at his leisure. APP 000108.
- On the day that he signed the Purchase Agreement, buyer received a mound of documents over 116 pages. The package of documents included a June 30, 2003 letter regarding the Right to Repair Law attaching Part 2, Division 2 of the California *Civil Code* consisting of **61 pages** [Exhibit 1 to the buyer's Declaration]; Acknowledge of Receipt Form for Disclosure Statements for Quail Hill Buyers and the Disclosure Statements [Exhibit 2 to the buyer Declaration]; and a copy of the Public Report. APP 000107.
- Mr. Sager told buyer to sign, and if he didn't sign, there were other potential buyers for the home. APP 000107.
- The discussion was brief, no more than 20 minutes, because Mr. Sager was preparing paperwork on another sales transaction, and he was in a hurry. APP 000107 - 000108.
- Mr. Sager did not go over any of the provisions of the Purchase Agreement, addenda or any of other mound of documents that he provided to Mr. buyer. APP 000108.
- Builder ostensibly adopts the rules of JAMS, but then sets out a page of exceptions to them. APP 000126 - 000127.

- The Title 7 Addendum is not written in consumer-friendly language but is a bewilderingly lengthy and complex set of procedures that only an attorney practicing construction defect law would understand.
- Even if buyer knew to what “Title 7” referred, the reference to Title 7 would appear to incorporate the provisions of Title 7, *Civil Code* §§895 et seq. Instead, the Title 7 Addendum proceeds to replace the statutory pre-litigation procedures contained in Title 7 of the *Civil Code*, *Civil Code* §§910-938, with its own pre-litigation procedures.
- The mandatory arbitration provisions are buried in the middle of page three of the Title 7 Addendum with nothing setting these provisions off from the non-adversarial provisions. APP 000126.
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- Buyer was not given builder’s pre-litigation procedures until the day before escrow closed. APP 000108.
- Although builder submitted the Carolyn Festner declaration, she never states in her declaration that she was the person who met with buyer on September 13, 2003. Indeed, she did not submit a further declaration that she, in fact, spoke with buyer on the day in question. Moreover, builder did not submit a declaration from Mr. Sager rebutting any of the facts in the buyer declaration. The Festner declaration did not create a factual dispute.

Finally, although the trial court can cure the unconscionability through severance of the unconscionable provision(s), in this instance, severance is not possible. Severance cannot cure the fact that buyer will have to litigate his claims in two different forums. Severance is also not possible, because the Title 7 Addendum contains multiple serious defects that indicate a systemic effort to impose arbitration on a buyer and that creates an inferior forum for buyer to prosecute his claims against builder and that only works to the advantage of builder.

ALTERNATIVE NON-ADVERSARIAL DISPUTE RESOLUTION PROVISIONS

As drafted, some alternative dispute resolution provisions are neither economical, efficient nor equitable alternatives to litigation in the traditional forum of a civil action. Indeed, the alternative dispute provisions which Builders compel Buyers to accept as a condition to the purchase of his home incorporate the worst of both worlds. The bewildering, inconsistent, and misleading set of non-adversarial and adversarial procedures contained in the five-page document entitled "Title 7 Addendum" and in two-page "Mold/Mildew Addendum are a minefield for the consumer. The trial court should have denied the petition to compel arbitration as substantively and procedurally unconscionable.

Introduction here to SB 800 provisions

**C. Conclusion.**

The very essence of arbitration is fairness, economy and finality. builder should not be able to thwart equal access to justice and tilt the playing field in its favor because of its knowledge that it would invariably be the defendant in a construction defect arbitration. The Title 7 Addendum and the Mold/Mildew Addendum are unenforceable.