

REFERENCE TITLE: purchaser dwelling actions

State of Arizona
House of Representatives
Fifty-second Legislature
First Regular Session
2015

HB 2255

Introduced by
Representative Mitchell

AN ACT

AMENDING SECTIONS 12-552, 12-1361, 12-1362, 12-1363, 12-1364, 12-1366, 33-2001 AND 33-2002, ARIZONA REVISED STATUTES; RELATING TO PURCHASER DWELLING ACTIONS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 12-552, Arizona Revised Statutes, is amended to
3 read:

4 12-552. Actions involving development of real property design,
5 engineering and construction of improvements

6 A. Notwithstanding any other statute, no action or arbitration based
7 in contract may be instituted or maintained against a person who develops or
8 develops and sells real property, or performs or furnishes the design,
9 specifications, surveying, planning, supervision, testing, construction or
10 observation of construction of an improvement to real property more than
11 ~~eight~~ SIX years after substantial completion of the improvement to real
12 property.

13 B. Notwithstanding subsection A of this section, in the case of injury
14 to real property or an improvement to real property, if the injury occurred
15 during the ~~eighth~~ SIXTH year after the substantial completion, — or, in the
16 case of a latent CONSTRUCTION defect, was not discovered until the ~~eighth~~
17 SIXTH year after substantial completion, an action to recover damages for
18 injury to the real property may be brought within one year after the date on
19 which the injury to real property or an improvement to real property occurred
20 or a latent CONSTRUCTION defect was discovered, but in no event may an action
21 be brought more than ~~nine~~ SEVEN years after the substantial completion of the
22 improvement.

23 C. The limitations in subsections A and B of this section include any
24 action based on implied warranty arising out of the contract or the
25 construction, including implied warranties of habitability, fitness or
26 workmanship.

27 D. Nothing in this section applies to actions for personal injury or
28 death nor shall this section operate to shorten the period of warranty
29 provided in an express written warranty.

30 E. For the purposes of subsections A, B and C of this section, an
31 improvement to real property is considered substantially complete when any of
32 the following first occurs:

33 1. It is first used by the owner or occupant of the improvement.

34 2. It is first available for use after having been completed according
35 to the contract or agreement covering the improvement, including agreed
36 changes to the contract or agreement.

37 3. Final inspection, if required, by the governmental body ~~which~~ THAT
38 issued the building permit for the improvement.

39 F. In this section an action based in contract is an action based on a
40 written real estate contract, sales agreement, construction agreement,
41 conveyance or written agreement for construction or for the services set
42 forth in subsection A of this section. This section shall not be construed
43 to extend the period prescribed by the laws of this state for bringing any
44 action. If a shorter period of limitation is prescribed for a specific
45 action, the shorter period governs.

~~G. With respect to an improvement to real property that was substantially complete on or before September 15, 1989, the eight and nine year periods established in subsections A and B of this section shall begin to run on September 15, 1989. Notwithstanding the provisions of subsection E of this section and section 12-505, subsection A, this subsection applies to claims that accrued before the effective date of this amendment to this section.~~

G. WITH RESPECT TO AN IMPROVEMENT TO REAL PROPERTY THAT WAS SUBSTANTIALLY COMPLETE ON OR BEFORE SEPTEMBER 15, 2015, THE SIX-YEAR AND SEVEN-YEAR PERIODS ESTABLISHED IN SUBSECTIONS A AND B OF THIS SECTION SHALL BEGIN TO RUN ON SEPTEMBER 15, 2015. NOTWITHSTANDING SUBSECTION E OF THIS SECTION AND SECTION 12-505, SUBSECTION A, THIS SUBSECTION APPLIES TO CLAIMS THAT ACCRUED BEFORE THE EFFECTIVE DATE OF THIS AMENDMENT TO THIS SECTION.

Sec. 2. Section 12-1361, Arizona Revised Statutes, is amended to read:
12-1361. Definitions

In this article, unless the context otherwise requires:

1. "Association" means either of the following:

(a) The unit owners' association organized under section 33-1241.

(b) A nonprofit corporation or unincorporated association of owners created pursuant to a declaration to own and operate portions of a planned community and which has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration.

2. "Community documents" means the declaration, bylaws, articles of incorporation, if any, and rules, if any.

3. "CONSTRUCTION CODES" MEANS THE BUILDING, PLUMBING, ELECTRICAL, FIRE, MECHANICAL OR OTHER CODES OR ORDINANCES, INCLUDING THE INTERNATIONAL RESIDENTIAL CODE HOWEVER DENOMINATED, AS ADOPTED, AMENDED AND ENFORCED BY THE CITY, TOWN OR COUNTY IN WHICH THE DWELLING IS LOCATED.

4. "CONSTRUCTION DEFECT" MEANS A DEFICIENCY IN THE DESIGN, CONSTRUCTION, MANUFACTURE, REPAIR, ALTERATION, REMODELING OR LANDSCAPING OF A DWELLING THAT PROXIMATELY CAUSED ACTUAL PHYSICAL DAMAGE TO THE DWELLING THAT IMPAIRS THE STRUCTURAL INTEGRITY OR SUBSTANTIALLY MODIFIES THE FUNCTIONALITY OF THE DWELLING AT THE TIME OF THE CLAIM AND IS THE RESULT OF EITHER OF THE FOLLOWING:

(a) A VIOLATION OF LAW, INCLUDING CONSTRUCTION CODES APPLICABLE TO THE CONSTRUCTION OF THE DWELLING.

(b) THE USE OF DEFECTIVE MATERIALS, PRODUCTS, COMPONENTS OR EQUIPMENT IN THE DESIGN, CONSTRUCTION, MANUFACTURE, REPAIR, ALTERATION, REMODELING OR LANDSCAPING OF THE DWELLING.

5. "CONSTRUCTION PROFESSIONAL" MEANS AN ARCHITECT, CONTRACTOR, SUBCONTRACTOR, DEVELOPER, BUILDER, BUILDER VENDOR, SUPPLIER, ENGINEER OR INSPECTOR PERFORMING OR FURNISHING THE DESIGN, SUPERVISION, INSPECTION, CONSTRUCTION OR OBSERVATION OF THE CONSTRUCTION OF ANY IMPROVEMENT TO REAL PROPERTY.

1 ~~3-~~ 6. " Dwelling" means a single or multifamily unit designed for
2 residential use and common areas and improvements that are owned or
3 maintained by an association or by members of an association. A dwelling
4 includes the systems, other components and improvements that are part of a
5 single or multifamily unit at the time of construction.

6 ~~4-~~ 7. " Dwelling action" means any action brought by a purchaser
7 against the seller of a dwelling arising out of or related to **A CONSTRUCTION**
8 **DEFECT OR** the design, construction, condition or sale of the dwelling.

9 ~~5-~~ "Multiunit dwelling action" means a dwelling action brought by an
10 association or by or on behalf of the owners of five or more individual
11 dwelling units.

12 ~~6-~~ 8. " Purchaser" means any person or entity who files a dwelling
13 action.

14 ~~7-~~ 9. " Seller" means any person, firm, partnership, corporation,
15 association or other organization that is engaged in the business of
16 designing, constructing or selling dwellings. Seller does not include a real
17 estate broker or real estate salesperson as defined in ~~title 32, chapter 20~~
18 **SECTION 32-2101** who provides services in connection with the resale of a
19 dwelling following its initial sale.

20 Sec. 3. Section 12-1362, Arizona Revised Statutes, is amended to read:
21 12-1362. Dwelling action; notice of intent to repair or
22 replace; jurisdictional prerequisite; insurance

23 A. Except with respect to claims for alleged **CONSTRUCTION** defects
24 involving an immediate threat to the life or safety of persons occupying or
25 visiting the dwelling, a purchaser must first comply with this article before
26 filing a dwelling action.

27 B. **A SELLER WHO RECEIVES A WRITTEN NOTICE OF CLAIM PURSUANT TO SECTION**
28 **12-1363 HAS A RIGHT PURSUANT TO SECTION 12-1363 TO REPAIR OR REPLACE ANY**
29 **ALLEGED CONSTRUCTION DEFECTS AFTER SENDING OR DELIVERING TO THE PURCHASER A**
30 **WRITTEN NOTICE OF INTENT TO REPAIR OR REPLACE THE ALLEGED CONSTRUCTION**
31 **DEFECTS. THE SELLER DOES NOT NEED TO REPAIR OR REPLACE ALL OF THE ALLEGED**
32 **CONSTRUCTION DEFECTS.**

33 ~~B-~~ C. If a seller presents a notice received pursuant to section
34 12-1363 to an insurer that has issued an insurance policy to the seller that
35 covers the seller's liability arising out of **A CONSTRUCTION DEFECT OR** the
36 design, construction or sale of the property that is the subject of the
37 notice, the insurer must treat the notice as a notice of a claim subject to
38 the terms and conditions of the policy of insurance. An insurer is obliged
39 to work cooperatively and in good faith with the insured seller within the
40 ~~timeframes~~ **TIME FRAMES** specified in this article to effectuate the purpose of
41 this article. Nothing in this subsection otherwise affects the coverage
42 available under the policy of insurance or creates a cause of action against
43 an insurer whose actions were reasonable under the circumstances,
44 notwithstanding its inability to comply with the ~~timeframes~~ **TIME FRAMES**
45 specified in section 12-1363.

1 Sec. 4. Section 12-1363, Arizona Revised Statutes, is amended to read:
2 12-1363. Notice and right to repair or replace; tolling of time
3 limits; admissible evidence; definition

4 A. ~~At least ninety days~~ Before filing a dwelling action, the purchaser
5 shall give written notice by certified mail, return receipt requested, to the
6 seller specifying in reasonable detail the basis of the dwelling action. ~~The~~
7 ~~notice in a multiunit dwelling action involving alleged defects that are~~
8 ~~substantially similar in multiple residential units may comply with this~~
9 ~~section by providing a reasonably detailed description of the alleged defects~~
10 ~~in a fair and representative sample of the affected residential units. For~~
11 ~~the purposes of this subsection, "reasonable detail" includes a detailed and~~
12 ~~itemized list that describes each alleged defect and the location that each~~
13 ~~alleged defect has been observed by the purchaser in each dwelling that is~~
14 ~~the subject of the notice.~~

15 B. After receipt of the notice described in subsection A of this
16 section, the seller may inspect the dwelling to determine the nature and
17 cause of the alleged CONSTRUCTION defects and the nature and extent of any
18 repairs or replacements necessary to remedy the alleged CONSTRUCTION defects.
19 The purchaser shall ensure that the dwelling is made available for inspection
20 no later than ten days after the purchaser receives the seller's request for
21 an inspection. The seller shall provide reasonable notice to the purchaser
22 before conducting the inspection. The inspection shall be conducted at a
23 reasonable time. The seller may use reasonable measures, including testing,
24 to determine the nature and cause of the alleged CONSTRUCTION defects and the
25 nature and extent of any repairs or replacements necessary to remedy the
26 alleged CONSTRUCTION defects. If the seller conducts testing pursuant to
27 this subsection, the seller shall restore the dwelling to its condition
28 before the testing.

29 C. Within sixty days after receipt of the notice described in
30 subsection A of this section, the seller shall send to the purchaser a good
31 faith written response to the purchaser's notice by certified mail, return
32 receipt requested. The response may include ~~an offer~~ THE SELLER'S NOTICE OF
33 INTENT to repair or replace any alleged CONSTRUCTION defects, to have the
34 alleged CONSTRUCTION defects repaired or replaced at the seller's expense or
35 to provide monetary compensation to the purchaser. The ~~offer~~ WRITTEN NOTICE
36 OF INTENT TO REPAIR OR REPLACE shall describe in reasonable detail all
37 repairs or replacements that the seller ~~is offering~~ INTENDS to make or
38 provide to the dwelling and a reasonable estimate of the date by which the
39 repairs or replacements will be made ~~or monetary compensation will be~~
40 ~~provided~~. THIS SUBSECTION DOES NOT PROHIBIT THE SELLER FROM OFFERING CASH OR
41 OTHER CONSIDERATION INSTEAD OF OR IN ADDITION TO A REPAIR OR REPLACEMENT.
42 THE PURCHASER MAY ACCEPT OR REJECT AN OFFER OF CASH OR OTHER CONSIDERATION,
43 OTHER THAN REPAIR OR REPLACEMENT AND, IF REJECTED, MAY PROCEED WITH A
44 DWELLING ACTION ON COMPLETION OF ANY REPAIRS OR REPLACEMENTS THE SELLER

1 INTENDS TO MAKE OR PROVIDE. THE PARTIES MAY NEGOTIATE FOR A RELEASE IF AN
2 OFFER INVOLVING CASH OR OTHER CONSIDERATION IS ACCEPTED.

3 D. If the seller does not provide a written response to the
4 purchaser's notice within sixty days, the purchaser may file a dwelling
5 action ~~without waiting for the expiration of ninety days as required by~~
6 ~~subsection A of this section.~~

7 ~~E. Within twenty days after receipt of the seller's offer made~~
8 ~~pursuant to subsection C of this section, the purchaser shall provide a good~~
9 ~~faith written response. A purchaser who accepts the seller's offer made~~
10 ~~pursuant to subsection C of this section shall do so in writing by certified~~
11 ~~mail, return receipt requested. A purchaser who rejects the seller's offer~~
12 ~~made pursuant to subsection C of this section shall respond to the seller in~~
13 ~~writing by certified mail, return receipt requested. If the seller provides~~
14 ~~a specific factual basis for the offer, the response shall include the~~
15 ~~specific factual basis for the purchaser's rejection of the seller's offer~~
16 ~~and the purchaser's counteroffer, if any. Within ten days after receipt of~~
17 ~~the purchaser's response, the seller may make a best and final offer to the~~
18 ~~purchaser in writing by certified mail, return receipt requested.~~

19 ~~F. The following are not admissible in any dwelling action:~~

20 ~~1. A purchaser's good faith notice given to the seller pursuant to~~
21 ~~subsection A of this section.~~

22 ~~2. A seller's good faith response or offer made pursuant to subsection~~
23 ~~C of this section.~~

24 ~~3. A purchaser's good faith response made to a seller's offer pursuant~~
25 ~~to subsection E of this section.~~

26 ~~4. A purchaser's good faith counteroffer to a seller's offer made~~
27 ~~pursuant to subsection E of this section.~~

28 ~~5. A seller's good faith best and final offer made pursuant to~~
29 ~~subsection E of this section.~~

30 E. IF THE RESPONSE PROVIDED PURSUANT TO SUBSECTION C OF THIS SECTION
31 INCLUDES A NOTICE OF INTENT TO REPAIR OR REPLACE THE ALLEGED CONSTRUCTION
32 DEFECTS, THE PURCHASER SHALL ALLOW THE SELLER A REASONABLE OPPORTUNITY TO
33 REPAIR OR REPLACE THE CONSTRUCTION DEFECTS OR CAUSE THE CONSTRUCTION DEFECTS
34 TO BE REPAIRED OR REPLACED PURSUANT TO THE FOLLOWING:

35 1. THE PURCHASER AND THE SELLER OR THE SELLER'S CONSTRUCTION
36 PROFESSIONALS SHALL COORDINATE REPAIRS OR REPLACEMENTS WITHIN THIRTY DAYS
37 AFTER THE SELLER'S NOTICE OF INTENT TO REPAIR OR REPLACE WAS SENT PURSUANT TO
38 SUBSECTION C OF THIS SECTION.

39 2. REPAIRS OR REPLACEMENTS SHALL BEGIN AS AGREED BY THE PURCHASER AND
40 THE SELLER OR THE SELLER'S CONSTRUCTION PROFESSIONALS, WITH REASONABLE
41 EFFORTS TO BEGIN REPAIRS OR REPLACEMENTS WITHIN THIRTY-FIVE DAYS AFTER THE
42 SELLER'S NOTICE OF INTENT TO REPAIR OR REPLACE WAS SENT PURSUANT TO
43 SUBSECTION C OF THIS SECTION. IF A PERMIT IS REQUIRED TO PERFORM THE REPAIR
44 OR REPLACEMENT, REASONABLE EFFORTS SHALL BE MADE TO BEGIN REPAIRS OR
45 REPLACEMENTS WITHIN TEN DAYS AFTER RECEIPT OF THE PERMIT OR THIRTY-FIVE DAYS

1 AFTER THE SELLER'S NOTICE OF INTENT TO REPAIR OR REPLACE WAS SENT PURSUANT TO
2 SUBSECTION C OF THIS SECTION, WHICHEVER IS LATER.

3 3. ALL REPAIRS OR REPLACEMENTS SHALL BE COMPLETED USING REASONABLE
4 CARE UNDER THE CIRCUMSTANCES AND AS SOON AS REASONABLY POSSIBLE SUBJECT TO
5 THE NATURE OF THE REPAIR OR REPLACEMENT, ANY ACCESS ISSUES OR UNFORESEEN
6 EVENTS THAT ARE NOT CAUSED BY THE SELLER OR THE SELLER'S CONSTRUCTION
7 PROFESSIONALS.

8 4. THE PURCHASER SHALL PROVIDE REASONABLE ACCESS FOR THE REPAIRS OR
9 REPLACEMENTS.

10 5. THE SELLER IS NOT ENTITLED TO A RELEASE OR WAIVER SOLELY IN
11 EXCHANGE FOR ANY REPAIR OR REPLACEMENT MADE PURSUANT TO THIS SUBSECTION,
12 EXCEPT THAT THE PURCHASER AND SELLER MAY NEGOTIATE A RELEASE OR WAIVER IN
13 EXCHANGE FOR CASH OR OTHER CONSIDERATION.

14 6. AT THE CONCLUSION OF ANY REPAIRS OR REPLACEMENTS, THE PURCHASER MAY
15 COMMENCE A DWELLING ACTION, INCLUDING ANY CLAIM FOR INADEQUATE REPAIR OR
16 REPLACEMENT.

17 F. DURING THE NOTICE AND REPAIR OR REPLACEMENT PROCESS, AND FOR THIRTY
18 DAYS AFTER SUBSTANTIAL COMPLETION OF THE REPAIR OR REPLACEMENT, THE STATUTE
19 OF LIMITATIONS AND STATUTE OF REPOSE, INCLUDING SECTION 12-552, APPLICABLE TO
20 THE PURCHASER, INCLUDING ANY CONSTRUCTION PROFESSIONALS INVOLVED IN THE
21 CONSTRUCTION OR DESIGN, ARE TOLLED AS TO THE SELLER AND THE SELLER'S
22 CONSTRUCTION PROFESSIONALS WHO WERE INVOLVED IN THE CONSTRUCTION OR DESIGN OF
23 THE DWELLING FOR ALL ALLEGED CONSTRUCTION DEFECTS DESCRIBED IN REASONABLE
24 DETAIL IN THE WRITTEN NOTICE SENT TO THE SELLER PURSUANT TO SUBSECTION A OF
25 THIS SECTION.

26 G. BOTH PARTIES' CONDUCT DURING THE REPAIR OR REPLACEMENT PROCESS
27 PRESCRIBED IN SUBSECTIONS B, C, D AND E OF THIS SECTION MAY BE INTRODUCED IN
28 ANY SUBSEQUENT DWELLING ACTION. ANY REPAIR OR REPLACEMENT EFFORTS UNDERTAKEN
29 BY THE SELLER ARE NOT CONSIDERED SETTLEMENT COMMUNICATIONS OR OFFERS OF
30 SETTLEMENT AND ARE ADMISSIBLE IN EVIDENCE.

31 ~~G.~~ H. A purchaser may amend the notice provided pursuant to
32 subsection A of this section to include alleged CONSTRUCTION defects
33 identified in good faith after submission of the original notice ~~during the~~
34 ~~ninety day notice period~~. The seller shall have a reasonable period of time
35 to conduct an inspection, if requested, and thereafter the parties shall
36 comply with the requirements of subsections B, C, D and E of this section for
37 the additional alleged CONSTRUCTION defects identified in reasonable detail
38 in the notice.

39 ~~H. A purchaser's written notice made pursuant to subsection A of this~~
40 ~~section or an amended notice made pursuant to subsection G of this section~~
41 ~~tolls the applicable statute of limitations, including section 12-552, until~~
42 ~~ninety days after the seller receives the notice or for a reasonable period~~
43 ~~agreed to in writing by the purchaser and seller.~~

1 I. Subject to Arizona rules of court, during the pendency of a
2 dwelling action the purchaser may supplement the list of alleged CONSTRUCTION
3 defects to include additional alleged CONSTRUCTION defects identified in good
4 faith after filing of the original dwelling action that have been identified
5 in reasonable detail as required by this section. The court shall provide
6 the seller a reasonable amount of time to inspect the dwelling to determine
7 the nature and cause of the additional alleged CONSTRUCTION defects, ~~and~~ the
8 nature and extent of any repairs or replacements necessary to remedy the
9 additional alleged CONSTRUCTION defects AND, ON REQUEST OF THE SELLER,
10 SUFFICIENT TIME TO REPAIR OR REPLACE THE ADDITIONAL ALLEGED CONSTRUCTION
11 DEFECTS. The parties shall comply with the requirements of subsections B, C,
12 D and E of this section for the additional alleged CONSTRUCTION defects
13 identified in reasonable detail in the notice.

14 J. The service of an amended notice identifying in reasonable detail
15 the alleged CONSTRUCTION defects during the pendency of a dwelling action
16 shall relate back to the original notice of alleged CONSTRUCTION defects for
17 the purpose of tolling applicable statutes of limitations, including section
18 12-552.

19 K. By written agreement of the seller and purchaser, the time periods
20 provided in this section may be extended.

21 L. For the sale of a dwelling that occurs within the statutory period
22 set forth in section 12-552, the escrow agent, as defined in section 6-801,
23 shall provide notice to the purchaser of the provisions of this section and
24 sections 12-1361 and 12-1362. Nothing in this subsection creates a fiduciary
25 duty or provides any person or entity with a private right or cause of action
26 or administrative action.

27 M. IF THE SELLER DOES NOT COMPLY WITH THE REQUIREMENTS OF THIS SECTION
28 AND THE FAILURE IS NOT DUE TO ANY FAULT OF THE PURCHASER OR AS A RESULT OF AN
29 UNFORESEEN CONDITION, INCLUDING AN UNFORESEEN WEATHER CONDITION OR GOVERNMENT
30 DELAY, THE PURCHASER MAY COMMENCE A DWELLING ACTION.

31 N. IF THE PURCHASER FAILS TO COMPLY WITH THE REQUIREMENTS OF THIS
32 SECTION BEFORE BRINGING A DWELLING ACTION, THE DWELLING ACTION SHALL BE
33 DISMISSED. IF THE DWELLING ACTION IS DISMISSED AFTER THE EXPIRATION OF THE
34 STATUTE OF REPOSE APPLICABLE TO THE PURCHASER, ANY SUBSEQUENT DWELLING ACTION
35 BROUGHT BY THE PURCHASER IS TIME BARRED AS TO THE SELLER AND THE SELLER'S
36 CONSTRUCTION PROFESSIONALS INVOLVED IN THE CONSTRUCTION OR DESIGN OF THE
37 DWELLING.

38 O. FOR THE PURPOSES OF THIS SECTION, "REASONABLE DETAIL" INCLUDES A
39 DETAILED AND ITEMIZED LIST THAT DESCRIBES EACH ALLEGED CONSTRUCTION DEFECT,
40 THE LOCATION THAT EACH ALLEGED CONSTRUCTION DEFECT HAS BEEN OBSERVED BY THE
41 PURCHASER IN EACH DWELLING THAT IS THE SUBJECT OF THE NOTICE, THE PHYSICAL
42 DAMAGE PROXIMATELY CAUSED BY EACH ALLEGED CONSTRUCTION DEFECT AND THE
43 LOCATION THAT PHYSICAL DAMAGE PROXIMATELY CAUSED BY EACH ALLEGED CONSTRUCTION
44 DEFECT HAS BEEN OBSERVED.

1 Sec. 5. Section 12-1364, Arizona Revised Statutes, is amended to read:
2 12-1364. Dwelling action; attorney fees, costs and expert
3 witness fees

4 In any contested dwelling action, the court ~~shall~~ MAY award the
5 successful party reasonable attorney fees, reasonable expert witness fees and
6 taxable costs. ~~If the seller's offer, including any best and final offer, is~~
7 ~~rejected and the judgment finally obtained is less than or less favorable to~~
8 ~~the purchaser than the offer or best and final offer, the seller is deemed to~~
9 ~~be the successful party from the date of the offer or best and final offer.~~
10 ~~If the judgment finally obtained is more favorable to the purchaser than the~~
11 ~~seller's offer or best and final offer, the purchaser is deemed to be the~~
12 ~~successful party from the date of the offer or best and final offer.~~ IN
13 DETERMINING THE SUCCESSFUL PARTY, THE COURT SHALL EVALUATE THE TOTALITY OF
14 CIRCUMSTANCES, INCLUDING THE NATURE AND AMOUNT OF THE CLAIMS ASSERTED, THE
15 REPAIRS OR REPLACEMENTS AND OFFERS MADE BY THE PARTIES PURSUANT TO SECTION
16 12-1363 AND THE RELATIVE DEGREE OF SUCCESS OF EACH PARTY ON EACH OF THE
17 CLAIMS ASSERTED IN THE DWELLING ACTION. THE COURT MAY NOT AWARD ANY ATTORNEY
18 FEES, EXPERT WITNESS FEES OR TAXABLE COSTS IN AN AMOUNT GREATER THAN THE
19 PERCENTAGE OF OVERALL SUCCESS OBTAINED BY THE SUCCESSFUL PARTY. This section
20 shall not be construed as altering, prohibiting or restricting present or
21 future contracts or statutes that may provide for attorney fees.

22 Sec. 6. Section 12-1366, Arizona Revised Statutes, is amended to read:
23 12-1366. Applicability; claims and actions

24 A. This article does not apply:

25 ~~1. If a contract for the sale of a dwelling or an association's~~
26 ~~community documents contain commercially reasonable alternative dispute~~
27 ~~resolution procedures. If the contract for the sale of a dwelling contains~~
28 ~~the procedures, the procedures shall conspicuously appear in the contract in~~
29 ~~bold and capital letters. If the contract for sale of a dwelling contains~~
30 ~~the procedures, a disclosure statement in at least twelve point font, bold~~
31 ~~and capital letters shall appear on the face of the contract and shall~~
32 ~~describe the location of the alternative dispute resolution procedures within~~
33 ~~the contract.~~

- 34 ~~2.~~ 1. To personal injury claims.
- 35 ~~3.~~ 2. To death claims.
- 36 ~~4.~~ 3. To claims for damage to property other than a dwelling.
- 37 ~~5.~~ 4. To common law fraud claims.
- 38 ~~6.~~ 5. To proceedings brought pursuant to title 32, chapter 10.
- 39 ~~7.~~ 6. To claims solely seeking recovery of monies expended for
40 repairs to alleged defects that have been repaired by the purchaser.

41 B. A dwelling action brought by an association is also subject to
42 title 33, chapter 18.

43 C. THE SELLER'S RIGHT PURSUANT TO SECTION 12-1363 TO REPAIR OR REPLACE
44 ANY ALLEGED CONSTRUCTION DEFECTS APPLIES TO ANY COMMERCIALY REASONABLE
45 ALTERNATIVE DISPUTE RESOLUTION PROCEDURES CONTAINED IN THE CONTRACT FOR THE

1 SALE OF THE DWELLING OR AN ASSOCIATION'S COMMUNITY DOCUMENTS. AFTER THE
2 REPAIR OR REPLACEMENT PROCESS HAS BEEN COMPLETED AS PRESCRIBED BY SECTION
3 12-1363, THIS ARTICLE DOES NOT AFFECT EITHER PARTY'S ABILITY TO ENFORCE ANY
4 COMMERCIALY REASONABLE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES CONTAINED
5 IN THE CONTRACT FOR THE SALE OF THE DWELLING OR AN ASSOCIATION'S COMMUNITY
6 DOCUMENTS. IF THE CONTRACT FOR THE SALE OF A DWELLING CONTAINS THE
7 PROCEDURES, THE PROCEDURES SHALL CONSPICUOUSLY APPEAR IN THE CONTRACT IN BOLD
8 AND CAPITAL LETTERS AND A DISCLOSURE STATEMENT IN AT LEAST TWELVE-POINT FONT,
9 BOLD AND CAPITAL LETTERS SHALL APPEAR ON THE FACE OF THE CONTRACT AND SHALL
10 DESCRIBE THE LOCATION OF THE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES WITHIN
11 THE CONTRACT.

12 Sec. 7. Section 33-2001, Arizona Revised Statutes, is amended to read:
13 33-2001. Definitions

14 In this chapter, unless the context otherwise requires:

15 1. "Community documents" means condominium documents as defined in
16 section 33-1202 or community documents as defined in section 33-1802.

17 2. "Dwelling" means a newly constructed single family or multifamily
18 unit designed for residential use and property and improvements that are
19 either owned by a homeowners' association or jointly by all of the members of
20 a homeowners' association. Dwelling includes the systems, other components
21 and improvements that are part of a newly constructed single family or
22 multifamily unit at the time of construction.

23 3. "Good faith" means honesty in fact in the conduct or transaction
24 concerned.

25 4. "Homeowners' association" means an association as defined in
26 section 33-1202 or 33-1802.

27 5. "Homeowners' association dwelling action" means any action filed by
28 a homeowners' association against the seller of a dwelling arising out of or
29 related to **A CONSTRUCTION DEFECT AS DEFINED IN SECTION 12-1361 OR** the design,
30 construction, condition or sale of the dwelling.

31 6. "Seller" means any of the following:

32 (a) Any person, firm, partnership, corporation, association or other
33 organization that is engaged in the business of building or selling
34 dwellings.

35 (b) Any person, firm, partnership, corporation, association or other
36 organization that performs functions relating to or furnishes the design,
37 specifications, surveying, planning, supervising, testing, constructing or
38 observation of the constructing of a dwelling.

39 (c) A real estate broker or salesperson as defined in section 32-2101.

40 Sec. 8. Section 33-2002, Arizona Revised Statutes, is amended to read:
41 33-2002. Homeowners' association dwelling actions; conditions

42 A. Notwithstanding any provision to the contrary in title 10, chapter
43 39 or ~~chapters~~ CHAPTER 9 ~~and~~ OR 16 of this title and in addition to any
44 requirements prescribed in the community documents of a homeowners'

1 association, a homeowners' association may file a homeowners' association
2 dwelling action only after all of the following have occurred:

3 1. The board of directors has provided full disclosure in writing to
4 all members of the association of all material information relating to the
5 filing of the action. The material information shall include a statement
6 that describes ~~the manner in which the action will be funded and a statement~~
7 ~~describing~~ THE NATURE OF THE ACTION AND THE RELIEF SOUGHT INCLUDING any
8 demands, notices, offers to settle or responses to offers to settle made
9 either by the association or the seller AND THE EXPENSES AND FEES THAT THE
10 ASSOCIATION ANTICIPATES WILL BE INCURRED, DIRECTLY OR INDIRECTLY, IN
11 PROSECUTING THE ACTION INCLUDING ATTORNEY FEES, CONSULTANT FEES, EXPERT
12 WITNESS FEES, COURT COSTS AND IMPACTS ON THE VALUES OF THE DWELLINGS THAT ARE
13 THE SUBJECT OF THE ACTION AND THOSE THAT ARE NOT. The material information
14 described by this paragraph shall be distributed to all members before the
15 meeting described in paragraph 2 OF THIS SUBSECTION occurs.

16 2. The association has held a meeting of its members and board of
17 directors for which reasonable and adequate notice was provided to all
18 members in the manner prescribed in section 33-1248 or 33-1804, as
19 applicable.

20 3. The board of directors of the homeowners' association authorizes
21 the filing of the action PURSUANT TO THE PROCEDURES PRESCRIBED IN THE
22 COMMUNITY DOCUMENTS. AT THE TIME OF COMMENCING A DWELLING ACTION OR AMENDING
23 A COMPLAINT TO ADD A CAUSE OF ACTION FOR A CONSTRUCTION DEFECT, THE
24 HOMEOWNERS' ASSOCIATION HAS AN AFFIRMATIVE DUTY TO DEMONSTRATE COMPLIANCE
25 WITH THE PROCEDURES PRESCRIBED IN THE COMMUNITY DOCUMENTS AND THE
26 REQUIREMENTS OF THIS SECTION.

27 4. THE ASSOCIATION PROVIDES THE SELLER WITH NOTICE OF THE ALLEGED
28 CONSTRUCTION DEFECTS AND THE RIGHT TO REPAIR OR REPLACE THE ALLEGED
29 CONSTRUCTION DEFECTS PURSUANT TO SECTION 12-1363.

30 B. If the notice required by subsection A, paragraph 2 of this section
31 is provided to the homeowners' association's members less than sixty days
32 before the expiration of a statute of limitations affecting the right of the
33 association to bring a homeowners' association dwelling action, the statute
34 of limitations is tolled for sixty days. The homeowners' association may
35 meet the remaining requirements of subsection A of this section during the
36 tolling period.

37 C. Notwithstanding any provision to the contrary in title 10, chapter
38 39 or in ~~chapters~~ CHAPTER 9 ~~and~~ OR 16 of this title and in addition to any
39 requirements prescribed in the community documents of a homeowners'
40 association, the board of directors of a homeowners' association or its
41 authorized representative shall disclose in writing to the members of the
42 association a plan that describes the manner in which the proceeds of a
43 homeowners' association dwelling action, whether obtained by way of judgment,
44 settlement or other means, have been or will be allocated. The plan shall be
45 disclosed within thirty days after the association receives the proceeds of

1 any homeowners' association dwelling action. The plan is not binding on the
2 homeowners' association, but the board of directors or its authorized
3 representative must disclose any material changes to the plan to the members
4 of the association within thirty days of making the changes.

5 D. A homeowners' association shall prepare and preserve for a period
6 of five years records that are adequate to demonstrate its compliance with
7 this section.

8 E. A director who acts in good faith pursuant to this chapter is not
9 liable for any act or failure to act pursuant to this chapter. In any action
10 filed against a director arising out of any act or failure to act pursuant to
11 this chapter, a director is presumed in all cases to have acted in good
12 faith. The burden is on the party challenging a director's conduct to
13 establish by clear and convincing evidence facts that rebut the good faith
14 presumption.

15 F. IN ANY CONTESTED DWELLING ACTION, THE SELLER HAS STANDING TO ASSERT
16 A FAILURE OF THE HOMEOWNERS' ASSOCIATION TO COMPLY WITH THE PROCEDURES
17 PRESCRIBED BY THE COMMUNITY DOCUMENTS AND THE REQUIREMENTS OF THIS SECTION.

18 Sec. 9. Severability

19 If a provision of this act or its application to any person or
20 circumstance is held invalid, the invalidity does not affect other provisions
21 or applications of the act that can be given effect without the invalid
22 provision or application, and to this end the provisions of this act are
23 severable.