

REFERENCE TITLE: purchaser dwelling actions; remedies

State of Arizona
House of Representatives
Fifty-fifth Legislature
First Regular Session
2021

HB 2598

Introduced by
Representative Payne

AN ACT

AMENDING SECTIONS 12-1362, 12-1363, 12-1364 AND 12-1366, 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 12-1362, Arizona Revised Statutes, is amended to
3 read:

4 12-1362. Dwelling action; notice of intent to repair or
5 replace; jurisdictional prerequisite; insurance;
6 duty of care; indemnity

7 A. Except with respect to claims **SUBJECT TO A CONTRACTUAL**
8 **ALTERNATIVE DISPUTE RESOLUTION PROVISION OR** for alleged construction
9 defects involving an immediate threat to the life or safety of persons
10 occupying or visiting the dwelling, a purchaser must first comply with
11 this article before filing a dwelling action.

12 B. A seller and the seller's construction professional who receive
13 a written notice of claim pursuant to section 12-1363 have a right
14 pursuant to section 12-1363 to repair or replace any alleged construction
15 defects after sending or delivering to the purchaser a written notice of
16 intent to repair or replace the alleged construction defects. The seller
17 and the seller's construction professional do not need to repair or
18 replace all of the alleged construction defects. **THE SELLER AND THE**
19 **SELLER'S CONSTRUCTION PROFESSIONAL OWE A DUTY TO USE REASONABLE CARE TO**
20 **THE PURCHASER FOR ALL REPAIRS THAT ARE MADE PURSUANT TO SECTION 12-1363.**
21 A purchaser may not file a dwelling action until the seller and the
22 seller's construction professional have completed all intended repairs and
23 replacements of the alleged construction defects.

24 C. If a seller or a seller's construction professional presents a
25 notice received pursuant to section 12-1363 to an insurer that has issued
26 an insurance policy to the seller or the seller's construction
27 professional that covers the seller's or the seller's construction
28 professional's liability arising out of a construction defect or the
29 design, construction or sale of the property that is the subject of the
30 notice, the insurer must treat the notice as a notice of a claim subject
31 to the terms and conditions of the policy of insurance. An insurer must
32 work cooperatively and in good faith with the insured seller or the
33 seller's construction professional within the time frames specified in
34 this article to effectuate the purpose of this article. This subsection
35 does not affect the coverage available under the policy of insurance or
36 create a cause of action against an insurer whose actions were reasonable
37 under the circumstances, notwithstanding its inability to comply with the
38 time frames specified in section 12-1363.

39 ~~D. Subject to Arizona rules of court, the identified construction~~
40 ~~professionals shall be joined as third-party defendants, if feasible.~~
41 ~~Subject to Arizona rules of court, for each construction defect found to~~
42 ~~exist, the trier of fact in any dwelling action filed pursuant to this~~
43 ~~article shall first determine if a construction defect exists and the~~
44 ~~amount of damages caused by the defect and identify each seller or~~
45 ~~construction professional whose conduct, whether by action or omission,~~

1 may have caused, in whole or in part, any construction defect. The
 2 purchaser has the burden of proof to demonstrate the existence of a
 3 construction defect and the amount of the damages caused by the
 4 construction defect. The trier of fact shall thereafter determine the
 5 relative degree of fault of any defendant or third-party defendant. The
 6 trier of fact shall allocate the pro rata share of liability based on
 7 relative degree of fault. The seller has the burden to prove the pro rata
 8 share of liability of any third-party defendant. The determination of
 9 whether a construction defect exists, the amount of damages caused by the
 10 construction defect and who may have caused, in whole or in part, the
 11 construction defect shall be bifurcated from and take place in a separate
 12 phase of the trial or alternative dispute resolution process from the
 13 determination of the relative degree of fault of any defendant or
 14 third-party defendant, unless the court finds that bifurcation is not
 15 appropriate.

16 E. The legislature finds and determines that given the complexity
 17 and multiparty nature of dwelling actions, it is important to provide a
 18 streamlined process for the resolution of construction defect claims and
 19 indemnification claims between the seller and the construction
 20 professionals that is efficient, economical and convenient for the parties
 21 involved. The legislature further finds and determines that for the
 22 majority of dwelling actions, bifurcation of the issues of the existence
 23 of a defect and causation from the issue of apportionment of fault is more
 24 efficient, fair and convenient for the parties. It is the legislature's
 25 intent that the bifurcation process prescribed in subsection D of this
 26 section does not alter the seller's liability under the seller's implied
 27 warranty to the purchaser. It is the legislature's intent that the
 28 bifurcation process prescribed in subsection D of this section be used and
 29 that the issues of existence of a construction defect, damages, causation
 30 and apportionment of fault be tried in one trial unless the court finds
 31 that the circumstances of the particular case at issue render bifurcation
 32 inappropriate.

33 D. THE SELLER AND THE SELLER'S CONSTRUCTION PROFESSIONAL OWE A
 34 NONWAIVABLE DUTY OF CARE TO A PURCHASER.

35 E. A COMPARATIVE INDEMNITY PROVISION IS THE ONLY CONTRACTUAL
 36 INDEMNITY THAT IS ALLOWED IN A CONTRACT BETWEEN A SELLER AND THE SELLER'S
 37 CONSTRUCTION PROFESSIONAL. A PROVISION IN A CONSTRUCTION CONTRACT THAT
 38 PURPORTS TO INDEMNIFY A SELLER FOR THE SELLER'S OWN ACTIONS OR INACTIONS
 39 IS VOID AND UNENFORCEABLE.

40 Sec. 2. Section 12-1363, Arizona Revised Statutes, is amended to
 41 read:

42 12-1363. Notice and right to repair or replace; tolling of
 43 time limits; admissible evidence; definition

44 A. Before filing a dwelling action, the purchaser shall give
 45 written notice by certified mail, return receipt requested, to the seller

1 specifying in reasonable detail the basis of the dwelling action. A
2 seller who receives notice under this subsection shall promptly forward a
3 copy of the notice to the last known address of each construction
4 professional who the seller reasonably believes is responsible for an
5 alleged CONSTRUCTION defect that is specified in the notice. The seller's
6 notice to each construction professional may be delivered by electronic
7 means. IF THE ALLEGED CONSTRUCTION DEFECTS IN A DWELLING, INCLUDING A
8 SINGLE-FAMILY OR MULTIFAMILY UNIT, ARE ALL SUBSTANTIALLY SIMILAR, A
9 REASONABLY DETAILED DESCRIPTION OF THE ALLEGED CONSTRUCTION DEFECTS IN A
10 FAIR AND REPRESENTATIVE SAMPLE IS SUFFICIENT NOTICE UNDER THIS SUBSECTION.

11 B. After receipt of the notice described in subsection A of this
12 section, the seller and the seller's construction professional may inspect
13 the dwelling to determine the nature and cause of the alleged construction
14 defects and the nature and extent of any repairs or replacements necessary
15 to remedy the alleged construction defects. The purchaser shall ensure
16 that the dwelling is made available for inspection not later than ten days
17 after the purchaser receives the seller's and the seller's construction
18 professional's request for an inspection. The seller and the seller's
19 construction professional shall provide reasonable notice to the purchaser
20 before conducting ~~the~~ A COORDINATED inspection. The inspection shall be
21 conducted at a reasonable time. The seller and the seller's construction
22 professional may use reasonable measures, including testing, to determine
23 the nature and cause of the alleged construction defects and the nature
24 and extent of any repairs or replacements necessary to remedy the alleged
25 construction defects. If the seller or the seller's construction
26 professional ~~conduct~~ CONDUCTS testing pursuant to this subsection, the
27 seller or the seller's construction professional shall restore the
28 dwelling to its condition 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
31 good faith written response to the purchaser's notice by certified mail,
32 return receipt requested. The response may include the seller's and the
33 seller's construction professional's notice of intent to repair or replace
34 any alleged construction defects, to have the alleged construction defects
35 repaired or replaced at the seller's or seller's construction
36 professional's expense or to provide monetary compensation to the
37 purchaser. The written notice of intent to repair or replace shall
38 describe in reasonable detail all repairs or replacements that the seller
39 and the seller's construction professional intend to make or provide to
40 the dwelling and a reasonable estimate of the date by which the repairs or
41 replacements will be made. This subsection does not prohibit the seller
42 from offering monetary compensation or other consideration instead of or
43 in addition to a repair or replacement. The purchaser may accept or
44 reject an offer of monetary compensation or other consideration, other
45 than repair or replacement and, if rejected, may proceed with a dwelling

1 action on completion of any repairs or replacements the seller and the
2 seller's construction professional intend to make or provide. The parties
3 may negotiate for a release if an offer involving monetary compensation or
4 other consideration is accepted.

5 D. If the seller does not provide a written response to the
6 purchaser's notice within sixty days, the purchaser may file a dwelling
7 action.

8 E. If the response provided pursuant to subsection C of this
9 section includes a notice of intent to repair or replace the alleged
10 construction defects, the purchaser shall allow the seller and the
11 seller's construction professional a reasonable opportunity to repair or
12 replace the alleged construction defects or cause the alleged construction
13 defects to be repaired or replaced pursuant to the following:

14 1. The purchaser and the seller or the seller's construction
15 professional shall coordinate repairs or replacements within thirty days
16 after the seller's notice of intent to repair or replace was sent pursuant
17 to subsection C of this section. If requested by the purchaser, THE
18 repair or replacement of alleged construction defects undertaken by the
19 seller shall be performed by a construction professional THAT IS selected
20 by the seller and consented to by the purchaser, whose consent shall not
21 be unreasonably withheld, AND that was not involved in the construction or
22 design of the dwelling. ~~A contractor or subcontractor that was not~~
23 ~~involved in the construction or design of the dwelling and that performs~~
24 ~~any repair or replacement of the alleged construction defect pursuant to~~
25 ~~this section is liable only to the seller or purchaser who contracted for~~
26 ~~the contractor's or subcontractor's services for the contractor's or~~
27 ~~subcontractor's scope of work and that contractor or subcontractor may be~~
28 ~~named in an amended notice pursuant to subsection I of this section or in~~
29 ~~the corresponding dwelling action.~~

30 2. Repairs or replacements shall begin as agreed by the purchaser
31 and the seller or the seller's construction professional, with reasonable
32 efforts to begin repairs or replacements within thirty-five days after the
33 seller's notice of intent to repair or replace was sent pursuant to
34 subsection C of this section. If a permit is required to perform the
35 repair or replacement, reasonable efforts shall be made to begin repairs
36 or replacements within ten days after receipt of the permit or thirty-five
37 days after the seller's notice of intent to repair or replace was sent
38 pursuant to subsection C of this section, whichever is later.

39 3. All repairs or replacements shall be completed using reasonable
40 care under the circumstances and within a commercially reasonable time
41 frame considering the nature of the repair or replacement, any access
42 issues or unforeseen events that are not caused by the seller or the
43 seller's construction professional.

44 4. The purchaser shall provide reasonable access for the repairs or
45 replacements.

1 5. The seller is not entitled to a release or waiver solely in
2 exchange for any repair or replacement made pursuant to this subsection,
3 except that the purchaser and seller may negotiate a release or waiver in
4 exchange for monetary compensation or other consideration.

5 6. At the conclusion of any repairs or replacements, the purchaser
6 may commence a dwelling action ~~or, if the contract for the sale of the~~
7 ~~dwelling or the community documents contain a commercially reasonable~~
8 ~~alternative dispute resolution procedure that complies with section~~
9 ~~12-1366, subsection C, may initiate the dispute resolution process~~
10 ~~including any claim for inadequate repair or replacement.~~

11 F. During the notice and repair or replacement process, and for
12 thirty days after substantial completion of the repair or replacement, the
13 statute of limitations and statute of repose, including section 12-552,
14 applicable to the purchaser, including any construction professional
15 involved in the construction or design, are tolled as to the seller and
16 the seller's construction professional who were involved in the
17 construction or design of the dwelling for all alleged construction
18 defects described in reasonable detail in the written notice sent to the
19 seller pursuant to subsection A of this section.

20 G. The statute of limitations and statute of repose, including
21 section 12-552, that apply to the seller's claim for indemnity or
22 contribution against any construction professional is tolled from the date
23 the seller receives the notice required by this section until nine months
24 after the purchaser's service of the civil complaint or arbitration demand
25 on the seller.

26 H. All parties' conduct during the repair or replacement process
27 prescribed in subsections B, C, D and E of this section may be introduced
28 in any subsequent dwelling action. Any repair or replacement efforts
29 undertaken by the seller or the seller's construction professional are not
30 considered settlement communications or offers of settlement and are
31 admissible in evidence.

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

40 J. Subject to Arizona rules of court, during the pendency of a
41 dwelling action the purchaser may supplement the list of alleged
42 construction defects to include additional alleged construction defects
43 identified in good faith after filing of the original dwelling action that
44 have been identified in reasonable detail as required by this section.
45 The court shall provide the seller and the seller's construction

1 professional a reasonable amount of time to inspect the dwelling to
2 determine the nature and cause of the additional alleged construction
3 defects and the nature and extent of any repairs or replacements necessary
4 to remedy the additional alleged construction defects and, on request of
5 the seller or the seller's construction professional, sufficient time to
6 repair or replace the additional alleged construction defects. The
7 parties shall comply with the requirements of subsections B, C, D and E of
8 this section for the additional alleged construction defects identified in
9 reasonable detail in the notice.

10 K. The service of an amended notice identifying in reasonable
11 detail the alleged construction defects during the pendency of a dwelling
12 action shall relate back to the original notice of alleged construction
13 defects for the purpose of tolling applicable statutes of limitations and
14 statutes of repose, including section 12-552.

15 L. By written agreement of the seller and purchaser, the time
16 periods provided in this section may be extended.

17 M. For the sale of a dwelling that occurs within the statutory
18 period set forth in section 12-552, the escrow agent, as defined in
19 section 6-801, shall provide notice to the purchaser of the provisions of
20 this section and sections 12-1361 and 12-1362. This subsection does not
21 create a fiduciary duty or provide any person or entity with a private
22 right or cause of action or administrative action.

23 ~~N. A purchaser who files a contested dwelling action under this~~
24 ~~article must file an affidavit with the purchaser's complaint, under~~
25 ~~penalty of perjury, that the purchaser has read the entire complaint,~~
26 ~~agrees with all of the allegations and facts contained in the complaint~~
27 ~~and, unless authorized by statute or rule, is not receiving and has not~~
28 ~~been promised anything of value in exchange for filing the dwelling~~
29 ~~action.~~

30 N. THE SELLER OR THE SELLER'S CONSTRUCTION PROFESSIONAL MAY NOT
31 DIRECTLY OR INDIRECTLY SEEK TO INFLUENCE OR UNDERMINE A PURCHASER'S RIGHT
32 TO LEGAL COUNSEL, INCLUDING BY REQUESTING, DEMANDING OR CONDITIONING
33 REPAIRS UNDER THIS SECTION OR A CONTRACT FOR THE SALE OF THE DWELLING ON A
34 PURCHASER'S WITHDRAWAL FROM REPRESENTATION OR AN AGREEMENT TO NOT RETAIN
35 THE LEGAL COUNSEL OF THE PURCHASER'S CHOOSING OR OTHERWISE EXERCISING A
36 LEGAL RIGHT.

37 O. If the seller does not comply with the requirements of this
38 section and the failure is not due to any fault of the purchaser or as a
39 result of an unforeseen condition, including an unforeseen weather
40 condition or government delay, the purchaser may commence a dwelling
41 action.

42 P. If the purchaser fails to comply with the requirements of this
43 section before bringing a dwelling action, the dwelling action shall be
44 ~~dismissed. If the dwelling action is dismissed after the statute of~~
45 ~~limitations or statute of repose, including section 12-552, applicable to~~

~~the purchaser, any subsequent dwelling action brought by the purchaser is time barred as to the seller and the seller's construction professional involved in the construction or design of the dwelling~~ STAYED UNTIL THE PURCHASER COMPLIES WITH THE REQUIREMENTS OF THIS SECTION.

Q. For the purposes of this section, "reasonable detail" includes all of the following:

1. An itemized list that describes each alleged construction defect with sufficient detail to allow the seller or THE seller's construction professional to identify the alleged construction defect OR FOR THE PURCHASER TO KNOW THE REPAIRS THAT THE SELLER AND THE SELLER'S CONSTRUCTION PROFESSIONAL INTEND TO MAKE OR PROVIDE.

2. The location that each alleged construction defect has been observed by the purchaser in each dwelling that is the subject of the notice AND, IF THE SELLER AND THE SELLER'S CONSTRUCTION PROFESSIONAL PROVIDE A NOTICE OF INTENT TO REPAIR OR REPLACE THE ALLEGED CONSTRUCTION DEFECT, THE EXACT LOCATION OF EACH REPAIR.

3. The impairment to the dwelling that has occurred as a result of each of the alleged construction defects or is reasonably likely to occur if the alleged construction defects are not repaired or replaced.

4. The street address for each dwelling that is the subject of the notice.

Sec. 3. Section 12-1364, Arizona Revised Statutes, is amended to read:

12-1364. Dwelling actions; attorney fees and taxable costs; expert witness fees; definition

A. In a contested dwelling action, the court ~~or tribunal~~ may award the prevailing party ~~with respect to a contested issue~~ reasonable attorney fees and taxable costs. A purchaser is deemed the prevailing party ~~with respect to a contested issue~~ if the relief obtained by the purchaser ~~for that contested issue~~, exclusive of any fees and taxable costs, is more favorable than the repairs or replacements and offers made by the seller before the purchaser filed a dwelling action pursuant to section 12-1363. The seller is deemed the prevailing party ~~with respect to a contested issue~~ if the relief obtained by the purchaser ~~for that contested issue~~, exclusive of any fees and taxable costs, is not more favorable than the repairs or replacements and offers made by the seller before the purchaser filed a dwelling action pursuant to section 12-1363.

B. An award of attorney fees pursuant to this section is limited to the amount of fees actually and reasonably incurred ~~with respect to the contested issue for which the party has been deemed the prevailing party~~. In determining whether the fees actually incurred ~~with respect to a contested issue~~ are reasonable, the court ~~or tribunal shall~~ MAY consider all of the following:

1 1. The repairs, replacements or offers made by the seller, if any,
2 before the purchaser filed the dwelling action pursuant to section
3 12-1363.

4 2. The purchaser's response to the seller's repairs, replacements
5 or offers made or proposed, if any, before the purchaser filed the
6 dwelling action pursuant to section 12-1363.

7 ~~3. The relation between the fees incurred over the duration of the~~
8 ~~dwelling action and the value of the relief obtained with respect to the~~
9 ~~contested issue.~~

10 3. IF APPLICABLE, THE EXTENT TO WHICH THE SELLER SOUGHT TO LEVERAGE
11 THE SELLER'S FINANCIAL STRENGTH AGAINST THE PURCHASER.

12 4. The amount of fees incurred in responding to any unsuccessful
13 motions, claims and defenses during the duration of the dwelling action.

14 C. This section does not alter, prohibit or restrict present or
15 future contracts that may provide for attorney fees or expert witness
16 fees.

17 D. Notwithstanding any other law, in a contested dwelling action
18 ~~that involves a single purchaser~~, the court ~~or tribunal~~ may award the
19 prevailing party ~~with respect to the contested issue~~ reasonable expert
20 witness fees. The determination of the prevailing party and the
21 reasonableness of the expert witness fees shall be made using the same
22 criteria used in determining the award of attorney fees pursuant to
23 subsections A and B of this section. ~~This subsection does not apply to a~~
24 ~~dwelling action that involves more than one purchaser or an action that is~~
25 ~~consolidated with any other dwelling action.~~ The expert witness fees
26 prescribed in this subsection are in addition to the taxable costs
27 authorized by section 12-332.

28 E. For the purposes of this section, ~~:-~~

29 ~~1. "Contested issue" means an issue that relates to an alleged~~
30 ~~construction defect and that is contested by a purchaser following the~~
31 ~~conclusion of the repair and replacement procedures prescribed in section~~
32 ~~12-1363.~~

33 ~~2.~~ "purchaser" means any person or entity, including the current
34 owner of the dwelling, who files a dwelling action during the time period
35 described in section 12-552.

36 Sec. 4. Section 12-1366, Arizona Revised Statutes, is amended to
37 read:

38 12-1366. Applicability; claims and actions

39 A. This article does not apply:

- 40 1. To personal injury claims.
- 41 2. To death claims.
- 42 3. To claims for damage to property other than a dwelling.
- 43 4. To common law fraud claims.
- 44 5. To proceedings brought pursuant to title 32, chapter 10.

1 6. To claims solely seeking recovery of monies expended for repairs
2 to alleged defects that have been repaired by the purchaser.

3 7. IF THE CONTRACT FOR THE SALE OF THE DWELLING OR AN ASSOCIATION'S
4 COMMUNITY DOCUMENTS CONTAINS COMMERCIALY REASONABLE ALTERNATIVE DISPUTE
5 RESOLUTION PROCEDURES.

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

8 C. ~~After the repair or replacement process has been completed as~~
9 ~~prescribed by section 12-1363, this article does not affect either party's~~
10 ~~ability to enforce any commercially reasonable alternative dispute~~
11 ~~resolution procedures contained in the contract for the sale of the~~
12 ~~dwelling or an association's community documents. The seller's election~~
13 ~~to enforce any commercially reasonable alternative dispute resolution~~
14 ~~procedures contained in the contract for the sale of the dwelling or an~~
15 ~~association's community documents does not negate, abridge or otherwise~~
16 ~~reduce the seller's right to repair or replace any alleged construction~~
17 ~~defects pursuant to section 12-1363.~~ If the contract for the sale of a
18 dwelling contains ~~the~~ ALTERNATIVE DISPUTE RESOLUTION procedures, the
19 procedures shall conspicuously appear in the contract in bold and capital
20 letters, and a disclosure statement in at least twelve-point font, ~~AND IN~~
21 bold and capital letters shall appear on the face of the contract and
22 shall describe the location of the alternative dispute resolution
23 procedures within the contract.

24 Sec. 5. Legislative findings

25 The legislature finds that the purpose of building and safety codes
26 is to establish the minimum construction requirements to safeguard public
27 health and safety and the general welfare of citizens in this state,
28 including purchasers, as defined in section 12-1361, Arizona Revised
29 Statutes.