

# **Arizona Legislators have Enacted Substantial Changes to Dwelling Actions**

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The Arizona Legislature has enacted substantial changes to “dwelling actions” – construction defect litigation that involves single- and multi-family homes. Senate Bill 1271, passed on April 4, 2019 and signed on April 10, 2019, establishes:

1. Limits on indemnity agreements between contractors in dwelling actions.
2. The right of a construction professional to repair or replace alleged construction defects before a dwelling action may be commenced.
3. Procedures for allocating liability among parties to a dwelling action, including a prohibition against forced indemnity for activities not germane to the design professional or contractors work.
4. Additional dwelling action notice requirements.
5. Procedures for award of attorneys’ fees in dwelling actions.

Legislation enacted in 2018 created a study committee to research and make recommendations for the apportionment of liability in the construction industry. SB1271 is the result of the committee’s work.

Please note that SB1271 does not apply to all construction contracts or construction defect lawsuits. It applies only to “dwelling actions.” The new law’s impact is therefore limited to the residential construction industry and does not apply to other construction industries, such as commercial buildings, aviation, or road construction.

In support of the bill’s substantive and procedural provisions, the Legislature made a number of findings that it incorporated directly into the bill and that will give courts guidance when interpreting the bill’s provision. The Legislature explained, for example, that:

- Given the complexity and multiparty nature of dwelling actions, it is important to provide a streamlined process for the resolution of construction defect claims and indemnification claims between the seller and the construction professionals that is efficient, economical and convenient for the parties involved.
- For the majority of dwelling actions, bifurcation of the issues of the existence of a defect and causation from the issue of apportionment of fault is more efficient, fair and convenient for the parties.
- The bifurcation process . . . does not alter the seller’s liability under the seller’s implied warranty to the purchaser.
- The bifurcation process . . . and . . . the issues of existence of a construction defect, damages, causation and apportionment of fault be tried in one trial unless the court finds that the circumstances of the particular case at issue render bifurcation inappropriate.

Laws 2019, Ch. 60, section 1 (adding A.R.S. § 12-1362(E))

Building on these principles, SB1271 establishes several new and important requirements that will govern dwelling actions.

## **Case Management**

The measure establishes a bifurcated case management framework that requires dwelling actions to proceed in two steps. The first step will address whether a defect exists, the damages caused by the defect, and the identity of those responsible for the defect. The “purchaser” bears the burden to establish its position on each of these points. The second step will determine the degree of fault of any defendant or third-party defendant for the alleged damages, and allocate the pro rata share of liability based on the relative degree of fault. During the second phase, the law requires that the “seller” prove the pro rata share of liability of any particular defendant. Laws 2019, Ch. 60, section 1 (adding A.R.S. § 12-1362(D)).

## **Damage Mitigation**

The legislation encourages parties to mitigate damages by giving potential defendants the right to repair or replace alleged defects in response to a notice of a potential dwelling action. By creating a legal right to cure, in addition to encouraging the mitigation of damages, the legislature intended to reduce the overall number of construction defect claims under the assumption that many would become unnecessary after the opportunity to cure.

## **Allocation of Damages**

Under the new law, a contractor’s or design professional’s liability for defects on a project will be limited. The legislation provides that a contractor or subcontractor “is liable only to the seller or purchaser... for the contractors or subcontractors scope of work.” A.R.S. §12-1363(E)(1) (as added by Laws 2019, Ch. 60, section 2). Section 32-1159.01(A) similarly makes void as a matter of law any indemnification provision that requires a contractor or subcontractor to be liable for more damages than it caused. These provisions created a system of pure comparative fault akin to Arizona tort law, in which each party is responsible only to the extent of its own negligence. Contractors in dwelling actions will therefore now be prohibited from imposing indemnification obligations on subcontractors for damages not caused directly by the subcontractor.

## **New Requirement for Dwelling Action Notices**

The legislation further amends the required content of the notice of a construction defect action. Under the new law, the purchaser must file an affidavit along with the complaint. This affidavit must be made under penalty of perjury and must state “that the purchaser has read the entire complaint, agrees with all of the allegations and facts contained in the complaint and, unless authorized by statutory rule, is not receiving and has not been promised anything of value in exchange for filing the dwelling action.” A.R.S. §12-1363(N) (as amended by Senate Bill 1271). Notably, the legislation does not define the meaning of the phrase “has not been promised anything of value in exchange for filing the dwelling action.” Presumably, the legislature sought to prevent spurious claims from being pursued. The breadth of the language could expose contingency fee agreements between dwelling owners and their lawyers to new scrutiny in light of the required representations under the new law.

## **Attorney’s Fees**

Finally, SB1271 addresses the award of attorneys’ fees in dwelling actions. Newly enacted section 12-1364 creates a mechanism for the court to take into account the value of the claim relative to the fees incurred in the matter, as well as the fees incurred by each party. The new law

expressly provides that the measure does not alter, prohibit or restrict the applicability of contractual provisions that provide for the award of attorney's fees. Nevertheless, the language suggests it is intended to address the concern that attorneys' fees can become the driving force in litigation and thus an impediment to the resolution of claims.

A copy of Senate Bill 1271 enacted during the 2019 legislative session can be found by clicking on [this link](#). For more information about SB1271, please visit [this link](#). Our summary of the 2018 legislation can be seen at [this link](#). SB1271 has a general effective date, and will become law 90 days after the conclusion of the Arizona legislature's 2019 general session.

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