

State of Arizona
House of Representatives
Forty-eighth Legislature
First Regular Session
2007

HOUSE BILL 2607

AN ACT

AMENDING SECTIONS 12-1361, 12-1362, 12-1363 AND 12-1364, ARIZONA REVISED STATUTES; AMENDING TITLE 12, CHAPTER 8, ARTICLE 14, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 12-1367 AND 12-1368; AMENDING SECTION 32-1159, ARIZONA REVISED STATUTES; RELATING TO CONSTRUCTION.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Section 12-1361, Arizona Revised Statutes, is amended to
3 read:
4 12-1361. Definitions
5 In this article, unless the context otherwise requires:
6 1. "Association" means either of the following:
7 (a) The unit owners' association organized under section 33-1241.
8 (b) A nonprofit corporation or unincorporated association of owners
9 created pursuant to a declaration to own and operate portions of a planned
10 community and which has the power under the declaration to assess association
11 members to pay the costs and expenses incurred in the performance of the
12 association's obligations under the declaration.
13 2. "Community documents" means the declaration, bylaws, articles of
14 incorporation, if any, and rules, if any.
15 3. " Dwelling" means a single or multifamily unit designed for
16 residential use and common areas and improvements that are owned or
17 maintained by an association or by members of an association. A dwelling
18 includes the systems, other components and improvements that are part of a
19 single or multifamily unit at the time of construction.
20 4. " Dwelling action" means any action brought by a purchaser against
21 the seller of a dwelling OR AGAINST A SUBCONTRACTOR WHO WORKED ON THE
22 DWELLING arising out of or related to the design, construction, condition or
23 sale of the dwelling.
24 5. " Multiunit dwelling action" means a dwelling action brought by an
25 association or by or on behalf of the owners of five or more individual
26 dwelling units.
27 6. " Purchaser" means any person or entity who files a dwelling action.
28 7. " Seller" means any person, firm, partnership, corporation,
29 association or other organization that is engaged in the business of
30 designing, constructing or selling dwellings, including a person, firm,
31 partnership, corporation, association or organization licensed pursuant to
32 title 32, chapter 20.
33 8. " SUBCONTRACTOR" MEANS ANY PERSON, FIRM, PARTNERSHIP, CORPORATION,
34 ASSOCIATION OR OTHER ORGANIZATION THAT IS ENGAGED IN THE BUSINESS OF
35 DESIGNING OR CONSTRUCTING DWELLINGS, INCLUDING A PERSON, FIRM, PARTNERSHIP,
36 CORPORATION, ASSOCIATION OR ORGANIZATION LICENSED PURSUANT TO TITLE 32,
37 CHAPTER 20.
38 Sec. 2. Section 12-1362, Arizona Revised Statutes, is amended to read:
39 12-1362. Dwelling action; jurisdictional prerequisite;
40 insurance
41 A. Except with respect to claims for alleged defects involving an
42 immediate threat to the life or safety of persons occupying or visiting the
43 dwelling, a purchaser must first comply with this article before filing a
44 dwelling action.

1 B. If a seller OR SUBCONTRACTOR presents a notice received pursuant to
2 section 12-1363 to an insurer that has issued an insurance policy to the
3 seller OR SUBCONTRACTOR that covers the seller's OR SUBCONTRACTOR'S liability
4 arising out of the design, construction or sale of the property that is the
5 subject of the notice, the insurer must treat the notice as a notice of a
6 claim subject to the terms and conditions of the policy of insurance. An
7 insurer is obliged to work cooperatively and in good faith with the insured
8 seller OR SUBCONTRACTOR within the timeframes specified in this article to
9 effectuate the purpose of this article. Nothing in this subsection otherwise
10 affects the coverage available under the policy of insurance or creates a
11 cause of action against an insurer whose actions were reasonable under the
12 circumstances, notwithstanding its inability to comply with the timeframes
13 specified in section 12-1363.

14 Sec. 3. Section 12-1363, Arizona Revised Statutes, is amended to read:
15 12-1363. Notice and opportunity to repair

16 A. At least ~~ninety~~ ONE HUNDRED TWENTY days before filing a dwelling
17 action, the purchaser shall give written notice by certified mail, return
18 receipt requested, to the seller specifying in reasonable detail the basis of
19 the dwelling action. The notice in a multiunit dwelling action involving
20 alleged defects that are substantially similar in multiple residential units
21 may comply with this section by providing a reasonably detailed description
22 of the alleged defects in a fair and representative sample of the affected
23 residential units. For the purposes of this subsection, "reasonable detail"
24 includes a detailed and itemized list that describes each alleged defect and
25 the location that each alleged defect has been observed by the purchaser in
26 each dwelling that is the subject of the notice.

27 B. After receipt of the notice described in subsection A of this
28 section, the seller may inspect the dwelling to determine the nature and
29 cause of the alleged defects and the nature and extent of any repairs or
30 replacements necessary to remedy the alleged defects. The purchaser shall
31 ensure that the dwelling is made available for inspection no later than ten
32 days after the purchaser receives the seller's request for an
33 inspection. The seller shall provide reasonable notice to the purchaser
34 before conducting the inspection. The inspection shall be conducted at a
35 reasonable time. The seller may use reasonable measures, including testing,
36 to determine the nature and cause of the alleged defects and the nature and
37 extent of any repairs or replacements necessary to remedy the alleged
38 defects. If the seller conducts testing pursuant to this subsection, the
39 seller shall restore the dwelling to its condition before the testing.

40 C. WITHIN THIRTY DAYS AFTER RECEIPT OF THE NOTICE DESCRIBED IN
41 SUBSECTION A OF THIS SECTION, THE SELLER MUST DO BOTH OF THE FOLLOWING:

42 1. DISCLOSE THE IDENTITY OF THE SUBCONTRACTORS THAT WORKED ON THE
43 DWELLING THAT IS THE SUBJECT OF THE NOTICE AND THAT THE SELLER REASONABLY
44 BELIEVES ARE RESPONSIBLE FOR THE ISSUES STATED IN THE NOTICE.

1 2. NOTIFY EACH SUBCONTRACTOR DESCRIBED IN PARAGRAPH 1 OF THIS
2 SUBSECTION THAT A NOTICE DESCRIBED IN SUBSECTION A OF THIS SECTION WAS
3 RECEIVED.

4 D. AFTER RECEIPT OF THE NOTICE DESCRIBED IN SUBSECTION C OF THIS
5 SECTION, THE SUBCONTRACTOR MAY INSPECT THE DWELLING TO DETERMINE THE NATURE
6 AND CAUSE OF THE ALLEGED DEFECTS AND THE NATURE AND EXTENT OF ANY REPAIRS OR
7 REPLACEMENTS NECESSARY TO REMEDY THE ALLEGED DEFECTS. THE PURCHASER SHALL
8 ENSURE THAT THE DWELLING IS MADE AVAILABLE FOR INSPECTION NO LATER THAN TEN
9 DAYS AFTER THE PURCHASER RECEIVES THE SUBCONTRACTOR'S REQUEST FOR AN
10 INSPECTION. THE SUBCONTRACTOR SHALL PROVIDE REASONABLE NOTICE TO THE
11 PURCHASER BEFORE CONDUCTING THE INSPECTION. THE INSPECTION SHALL BE
12 CONDUCTED AT A REASONABLE TIME. THE SUBCONTRACTOR MAY USE REASONABLE
13 MEASURES, INCLUDING TESTING, TO DETERMINE THE NATURE AND CAUSE OF THE ALLEGED
14 DEFECTS AND THE NATURE AND EXTENT OF ANY REPAIRS OR REPLACEMENTS NECESSARY TO
15 REMEDY THE ALLEGED DEFECTS. IF THE SUBCONTRACTOR CONDUCTS TESTING PURSUANT
16 TO THIS SUBSECTION, THE SUBCONTRACTOR SHALL RESTORE THE DWELLING TO ITS
17 CONDITION BEFORE THE TESTING.

18 ~~C.~~ E. Within ~~sixty~~ NINETY days after receipt of the notice described
19 in subsection A of this section, the seller AND THE SUBCONTRACTOR shall send
20 to the purchaser EITHER a SEPARATE OR JOINT good faith written response to
21 the purchaser's notice by certified mail, return receipt requested. IF THE
22 RESPONSES ARE SEPARATE, THE SUBCONTRACTOR SHALL SEND A COPY OF THE
23 SUBCONTRACTOR'S RESPONSE TO THE SELLER AND THE SELLER SHALL SEND A COPY OF
24 THE SELLER'S RESPONSE TO THE SUBCONTRACTOR. The response may include an
25 offer to repair or replace any alleged defects, to have the alleged defects
26 repaired or replaced at the seller's expense or to provide monetary
27 compensation to the purchaser. The offer shall describe in reasonable detail
28 all repairs or replacements that the seller is offering to make or provide to
29 the dwelling and a reasonable estimate of the date by which the repairs or
30 replacements will be made or monetary compensation will be provided.

31 ~~D.~~ F. If the seller OR THE SUBCONTRACTOR does not provide a written
32 response to the purchaser's notice within ~~sixty~~ NINETY days AFTER THE NOTICE
33 IS PROVIDED IN SUBSECTION A OF THIS SECTION, the purchaser may file a
34 dwelling action without waiting for the expiration of ~~ninety~~ ONE HUNDRED
35 TWENTY days as required by subsection A of this section.

36 ~~E.~~ G. Within twenty days after receipt of ~~the seller's~~ AN offer made
37 pursuant to subsection ~~C.~~ E of this section, the purchaser shall provide a
38 good faith written response TO THE SELLER AND THE SUBCONTRACTOR. A purchaser
39 who accepts the seller's OR SUBCONTRACTOR'S offer made pursuant to subsection
40 ~~C.~~ E of this section shall do so in writing by certified mail, return receipt
41 requested. A purchaser who rejects the seller's offer made pursuant to
42 subsection ~~C.~~ E of this section shall respond to the seller in writing by
43 certified mail, return receipt requested. THE PURCHASER SHALL SEND A COPY OF
44 THE RESPONSE TO THE SUBCONTRACTOR. A PURCHASER WHO REJECTS THE
45 SUBCONTRACTOR'S OFFER MADE PURSUANT TO SUBSECTION E OF THIS SECTION SHALL

1 RESPOND TO THE SUBCONTRACTOR IN WRITING BY CERTIFIED MAIL, RETURN RECEIPT
2 REQUESTED. THE PURCHASER SHALL SEND A COPY OF THE RESPONSE TO THE SELLER.
3 If the seller OR SUBCONTRACTOR provides a specific factual basis for the
4 offer, the response shall include the specific factual basis for the
5 purchaser's rejection of the seller's OR SUBCONTRACTOR'S offer and the
6 purchaser's OR SUBCONTRACTOR'S counteroffer, if any. Within ten days after
7 receipt of the purchaser's OR SUBCONTRACTOR'S response, the seller OR
8 SUBCONTRACTOR may make a best and final offer to the purchaser in writing by
9 certified mail, return receipt requested. THE SELLER SHALL SEND A COPY OF
10 THE FINAL AND BEST OFFER TO THE SUBCONTRACTOR AND THE SUBCONTRACTOR SHALL
11 SEND A COPY OF THE FINAL AND BEST OFFER TO THE SELLER.

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

13 1. A purchaser's good faith notice given to the seller pursuant to
14 subsection A of this section.

15 2. A seller's OR SUBCONTRACTOR'S good faith response or offer made
16 pursuant to subsection ~~G~~ E of this section.

17 3. A purchaser's good faith response made to a seller's OR
18 SUBCONTRACTOR'S offer pursuant to subsection ~~E~~ G of this section.

19 4. A purchaser's good faith counteroffer to a seller's OR
20 SUBCONTRACTOR'S offer made pursuant to subsection ~~E~~ G of this section.

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

23 ~~G.~~ I. A purchaser may amend the notice provided pursuant to
24 subsection A of this section to include alleged defects identified in good
25 faith after submission of the original notice during the ~~ninety~~ ONE HUNDRED
26 TWENTY day notice period. The seller AND SUBCONTRACTORS shall have a
27 reasonable period of time to conduct an inspection, if requested, and
28 thereafter the parties shall comply with the requirements of subsections B,
29 ~~G~~ E and ~~E~~ G of this section for the additional alleged defects identified
30 in reasonable detail in the notice.

31 ~~H.~~ J. A purchaser's written notice made pursuant to subsection A of
32 this section or an amended notice made pursuant to subsection ~~G~~ I of this
33 section tolls the applicable statute of limitations, including section
34 12-552, until ~~ninety~~ ONE HUNDRED TWENTY days after the seller receives the
35 notice or for a reasonable period agreed to in writing by the purchaser and
36 seller OR BETWEEN THE PURCHASER AND SUBCONTRACTOR.

37 ~~I.~~ K. Subject to Arizona rules of court, during the pendency of a
38 dwelling action the purchaser may supplement the list of alleged defects to
39 include additional alleged defects identified in good faith after filing of
40 the original dwelling action that have been identified in reasonable detail
41 as required by this section. The court shall provide the seller AND EACH
42 SUBCONTRACTOR, IF APPLICABLE, a reasonable amount of time to inspect the
43 dwelling to determine the nature and cause of the additional alleged defects
44 and the nature and extent of any repairs or replacements necessary to remedy
45 the additional alleged defects. The parties shall comply with the

1 requirements of subsections B, ~~E~~ and ~~G~~ of this section for the
2 additional alleged defects identified in reasonable detail in the notice.

3 ~~J~~ L. The service of an amended notice identifying in reasonable
4 detail the alleged defects during the pendency of a dwelling action shall
5 relate back to the original notice of alleged defects for the purpose of
6 tolling applicable statutes of limitations, including section 12-552.

7 ~~K~~ M. By written agreement of the seller and purchaser OR THE
8 SUBCONTRACTOR AND PURCHASER, the time periods provided in this section may be
9 extended.

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

16 Sec. 4. Section 12-1364, Arizona Revised Statutes, is amended to read:

17 12-1364. Dwelling action; attorney fees, costs and expert
18 witness fees

19 In any contested dwelling action, the court shall award the successful
20 party reasonable attorney fees, reasonable expert witness fees and taxable
21 costs. If the seller's OR SUBCONTRACTOR'S offer, including any best and
22 final offer, is rejected and the judgment finally obtained is less than or
23 less favorable to the purchaser than the offer or best and final offer, the
24 seller OR SUBCONTRACTOR is deemed to be the successful party from the date of
25 the offer or best and final offer. If the judgment finally obtained is more
26 favorable to the purchaser than the seller's OR SUBCONTRACTOR'S offer or best
27 and final offer, the purchaser is deemed to be the successful party from the
28 date of the offer or best and final offer. This section shall not be
29 construed as altering, prohibiting or restricting present or future contracts
30 or statutes that may provide for attorney fees.

31 Sec. 5. Title 12, chapter 8, article 14, Arizona Revised Statutes, is
32 amended by adding sections 12-1367 and 12-1368, to read:

33 12-1367. Joint and several liability abolished

34 IN A DWELLING ACTION, THE LIABILITY OF EACH DEFENDANT FOR DAMAGES IS
35 SEVERAL ONLY AND IS NOT JOINT. EACH DEFENDANT IS LIABLE ONLY FOR THE AMOUNT
36 OF DAMAGES ALLOCATED TO THAT DEFENDANT IN DIRECT PROPORTION TO THAT
37 DEFENDANT'S PERCENTAGE OF FAULT AND A SEPARATE JUDGMENT SHALL BE ENTERED
38 AGAINST THE DEFENDANT FOR THAT AMOUNT. TO DETERMINE THE AMOUNT OF JUDGMENT
39 TO BE ENTERED AGAINST EACH DEFENDANT, THE TRIER OF FACT SHALL MULTIPLY THE
40 TOTAL AMOUNT OF DAMAGES RECOVERABLE BY THE PLAINTIFF BY THE PERCENTAGE OF
41 EACH DEFENDANT'S FAULT AND THAT AMOUNT IS THE MAXIMUM RECOVERABLE AGAINST THE
42 DEFENDANT.

1 12-1368. Privity of contract requirement abolished; percentage
2 of fault

3 A. A PURCHASER MAY BRING A DWELLING ACTION AGAINST ANY PERSON, FIRM,
4 PARTNERSHIP, CORPORATION, ASSOCIATION OR OTHER ORGANIZATION THAT IS ENGAGED
5 IN THE BUSINESS OF PROVIDING SERVICES TO, BUILDING OR SELLING CONSTRUCTION
6 PROJECTS, INCLUDING SUBCONTRACTORS, WITHOUT REGARD TO WHETHER THERE IS
7 PRIVITY OF CONTRACT BETWEEN THE PURCHASER AND THE SELLER.

8 B. IF A PERCENTAGE OF FAULT ALLOCATED TO A DEFENDANT IS TOTALLY OR
9 PARTIALLY UNCOLLECTIBLE, THE COURT SHALL REDETERMINE THE PERCENTAGE OF FAULT
10 OF THE OTHER DEFENDANTS SO THAT THE UNCOLLECTIBLE AMOUNT IS PAID BASED ON THE
11 COURT'S DETERMINATION AS TO THE EQUITABLE AND APPROPRIATE REALLOCATION OF THE
12 UNCOLLECTIBLE AMOUNT. THE COURT'S ORDER REDETERMINING THE PERCENTAGES OF
13 FAULT SHALL INCLUDE A JUDGMENT FOR THE UNCOLLECTIBLE AMOUNT AGAINST THE
14 DEFENDANT WHOSE SHARE IS TOTALLY OR PARTIALLY UNCOLLECTIBLE AND IN FAVOR OF
15 THE OTHER DEFENDANTS.

16 Sec. 6. Section 32-1159, Arizona Revised Statutes, is amended to read:

17 32-1159. Indemnity agreements in construction and
18 architect-engineer contracts void; definitions

19 A. A covenant, clause or understanding in, collateral to or affecting
20 a construction contract or architect-engineer professional service contract
21 that purports to ~~INSURE, TO~~ indemnify, to hold harmless or to defend the
22 promisee from or against liability for loss or damage resulting from the ~~sole~~
23 negligence of the promisee or the promisee's agents, employees or ~~indemnitee~~
24 ~~INDEMNITEES~~ is against the public policy of this state and is void.

25 B. Notwithstanding subsection A ~~OF THIS SECTION~~, a contractor who is
26 responsible for the performance of a construction contract may fully
27 indemnify a person for whose account the construction contract is not being
28 performed and who, as an accommodation, enters into an agreement with the
29 contractor that permits the contractor to enter on or adjacent to its
30 property to perform the construction contract for others.

31 C. This section applies to all ~~CONSTRUCTION~~ contracts ~~AND~~
32 ~~ARCHITECT-ENGINEER PROFESSIONAL SERVICE CONTRACTS~~ entered into between
33 private parties. This section does not apply to:

34 1. Agreements to which this state or a political subdivision of this
35 state is a party, including intergovernmental agreements and agreements
36 governed by sections 34-226 and 41-2586.

37 2. Agreements entered into by agricultural improvement districts under
38 title 48, chapter 17.

39 3. ~~AGREEMENTS FOR INDEMNIFICATION OF A SURETY ON A PAYMENT OR~~
40 ~~PERFORMANCE BOND BY ITS PRINCIPAL OR INDEMNITORS.~~

41 4. ~~AGREEMENTS BETWEEN AN INSURER UNDER AN INSURANCE POLICY OR CONTRACT~~
42 ~~AND ITS NAMED INSUREDS.~~

43 5. ~~AGREEMENTS BETWEEN AN INSURER UNDER AN INSURANCE POLICY OR CONTRACT~~
44 ~~AND ITS ADDITIONAL INSUREDS, EXCEPT THAT ANY DUTY IN THE INSURANCE POLICY OR~~
45 ~~CONTRACT TO INDEMNIFY SHALL BE SUBJECT TO THE LIMITATIONS OF SUBSECTIONS A~~

1 AND B OF THIS SECTION. THE INSURER SHALL NOT BE EXCUSED FROM ITS DUTY IN THE
2 INSURANCE POLICY OR CONTRACT TO DEFEND ITS ADDITIONAL INSUREDS.

3 6. AGREEMENTS BETWEEN AN INSURER AND ITS INSUREDS UNDER AN INSURANCE
4 POLICY OR CONTRACT FOR A DEFINED PROJECT OR WORKPLACE, EXCEPT THAT SUCH
5 AGREEMENTS SHALL NOT REQUIRE OR PERMIT ONE OR MORE INSUREDS UNDER THOSE
6 AGREEMENTS TO INDEMNIFY, TO HOLD HARMLESS OR TO DEFEND ANY OTHER INSURED
7 UNDER THOSE AGREEMENTS BEYOND THE LIMITATIONS OF SUBSECTIONS A AND B OF THIS
8 SECTION AND THE INSURER SHALL NOT BE EXCUSED FROM ITS DUTY UNDER THOSE
9 AGREEMENTS TO DEFEND, INDEMNIFY AND PAY ON BEHALF OF ITS INSUREDS. THE
10 EXEMPTION UNDER THIS PARAGRAPH DOES NOT APPLY TO COVERAGE UNDER AN ADDITIONAL
11 INSURED ENDORSEMENT UNDER A GENERAL LIABILITY POLICY EVEN IF THE ADDITIONAL
12 INSURED ENDORSEMENT CONTAINS A PROJECT OR WORKPLACE SPECIFIC RESTRICTION.

13 D. ~~IN~~ FOR THE PURPOSES OF this section:

14 1. "Architect-engineer professional service contract" means a written
15 or oral agreement relating to the SURVEY, design, design-build, construction
16 administration, study, evaluation or other professional services furnished in
17 connection with any actual or proposed construction, alteration, repair,
18 maintenance, moving, demolition or excavation of any structure, street or
19 roadway, appurtenance or other development or improvement to land.

20 2. "Construction contract" means a written or oral agreement relating
21 to the ACTUAL OR PROPOSED construction, alteration, repair, maintenance,
22 moving, demolition or excavation OF ANY STRUCTURE, STREET OR ROADWAY,
23 APPURTENANCE or other development or improvement to land BUT DOES NOT INCLUDE
24 A CONTRACT, SUBCONTRACT OR AGREEMENT THAT CONCERNS OR AFFECTS PROPERTY OWNED
25 OR OPERATED BY A RAILROAD.

26 Sec. 7. Applicability

27 This act applies to construction contracts or architect-engineer
28 professional service contracts that are entered into from and after December
29 31, 2007.