

COMMITTEE ON JUDICIARY
SENATE AMENDMENTS TO S.B. 1271
(Reference to printed bill)

1 Strike everything after the enacting clause and insert:

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 right of contribution

7 A. Except with respect to claims for alleged construction defects
8 involving an immediate threat to the life or safety of persons occupying or
9 visiting the dwelling, a purchaser must first comply with this article
10 before filing a dwelling action.

11 B. A seller ~~AND THE SELLER'S CONSTRUCTION PROFESSIONAL~~ who ~~receives~~
12 ~~RECEIVE~~ a written notice of claim pursuant to section 12-1363 ~~has~~ HAVE a
13 right pursuant to section 12-1363 to repair or replace any alleged
14 construction defects after sending or delivering to the purchaser a written
15 notice of intent to repair or replace the alleged construction defects.
16 The seller ~~does~~ ~~AND THE SELLER'S CONSTRUCTION PROFESSIONAL DO~~ not need to
17 repair or replace all of the alleged construction defects. A purchaser may
18 not file a dwelling action until the seller ~~has~~ ~~AND THE SELLER'S~~
19 ~~CONSTRUCTION PROFESSIONAL HAVE~~ completed all intended repairs and
20 replacements of the alleged construction defects.

21 C. If a seller ~~OR A SELLER'S CONSTRUCTION PROFESSIONAL~~ presents a
22 notice received pursuant to section 12-1363 to an insurer that has issued
23 an insurance policy to the seller ~~OR THE SELLER'S CONSTRUCTION PROFESSIONAL~~
24 that covers the seller's ~~OR THE SELLER'S CONSTRUCTION PROFESSIONAL'S~~
25 liability arising out of a construction defect or the design, construction

1 or sale of the property that is the subject of the notice, the insurer must
2 treat the notice as a notice of a claim subject to the terms and conditions
3 of the policy of insurance. An insurer ~~is obligated to~~ MUST work
4 cooperatively and in good faith with the insured seller OR THE SELLER'S
5 CONSTRUCTION PROFESSIONAL within the time frames specified in this article
6 to effectuate the purpose of this article. Nothing in this subsection
7 otherwise affects the coverage available under the policy of insurance or
8 creates a cause of action against an insurer whose actions were reasonable
9 under the circumstances, notwithstanding its inability to comply with the
10 time frames specified in section 12-1363.

11 D. SUBJECT TO ARIZONA RULES OF COURT, FOR EACH CONSTRUCTION DEFECT
12 FOUND TO EXIST, THE TRIER OF FACT IN ANY DWELLING ACTION SHALL DETERMINE
13 AND IDENTIFY EACH PARTY OR THIRD-PARTY DEFENDANT WHOSE CONDUCT, WHETHER BY
14 ACTION OR OMISSION, HAS CAUSED, IN WHOLE OR IN PART, THE CONSTRUCTION
15 DEFECT. IF ANY THIRD-PARTY DEFENDANT IS DETERMINED TO HAVE CAUSED, IN
16 WHOLE OR IN PART, A CONSTRUCTION DEFECT, THAT THIRD-PARTY DEFENDANT HAS A
17 RIGHT OF CONTRIBUTION AGAINST ANY OTHER THIRD-PARTY DEFENDANT DETERMINED BY
18 THE TRIER OF FACT TO HAVE ALSO CAUSED, IN WHOLE OR IN PART, THE
19 CONSTRUCTION DEFECT. THE PRO RATA SHARE OF LIABILITY AMONG THIRD-PARTY
20 DEFENDANTS SHALL BE ALLOCATED BASED ON RELATIVE DEGREE OF FAULT. A
21 THIRD-PARTY DEFENDANT'S RIGHT TO CONTRIBUTION MAY BE ENFORCED IN THE
22 DWELLING ACTION BY MOTION FOLLOWING ENTRY OF VERDICT OR BY SEPARATE ACTION
23 FILED WITHIN ONE YEAR AFTER JUDGMENT IN THE DWELLING ACTION HAS BECOME
24 FINAL. IF A RELEASE OR COVENANT NOT TO SUE OR NOT TO ENFORCE JUDGMENT IS
25 GIVEN IN GOOD FAITH TO ONE OF TWO OR MORE THIRD-PARTY DEFENDANTS, IT DOES
26 NOT DISCHARGE ANY OTHER THIRD-PARTY DEFENDANT FROM LIABILITY UNLESS ITS
27 TERMS SO PROVIDE, BUT IT REDUCES THE CLAIM AGAINST THE OTHERS TO THE EXTENT
28 OF ANY AMOUNTS STIPULATED BY THE RELEASE OR THE COVENANT OR IN THE AMOUNT
29 OF THE CONSIDERATION PAID FOR IT, WHICHEVER IS THE GREATER, AND DISCHARGES
30 THAT THIRD-PARTY DEFENDANT TO WHOM IT IS GIVEN FROM ALL LIABILITY FOR
31 CONTRIBUTION TO ANY OTHER THIRD-PARTY DEFENDANT.

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

3 12-1363. Notice and right to repair or replace; tolling of
4 time limits; admissible evidence; definition

5 A. Before filing a dwelling action, the purchaser shall give written
6 notice by certified mail, return receipt requested, to the seller
7 specifying in reasonable detail the basis of the dwelling action. A SELLER
8 WHO RECEIVES NOTICE UNDER THIS SUBSECTION SHALL FORWARD A COPY OF THE
9 NOTICE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE LAST KNOWN
10 ADDRESS OF EACH CONSTRUCTION PROFESSIONAL WHOM THE SELLER REASONABLY
11 BELIEVES IS RESPONSIBLE FOR AN ALLEGED DEFECT THAT IS SPECIFIED IN THE
12 NOTICE.

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

30 C. Within sixty days after receipt of the notice described in
31 subsection A of this section, the seller shall send to the purchaser a good
32 faith written response to the purchaser's notice by certified mail, return

1 receipt requested. The response may include the seller's notice of intent
2 to repair or replace any alleged construction defects, to have the alleged
3 construction defects repaired or replaced at the seller's expense or to
4 provide monetary compensation to the purchaser. The written notice of
5 intent to repair or replace shall describe in reasonable detail all repairs
6 or replacements that the seller ~~intends~~ AND THE SELLER'S CONSTRUCTION
7 PROFESSIONAL INTEND to make or provide to the dwelling and a reasonable
8 estimate of the date by which the repairs or replacements will be made.
9 This subsection does not prohibit the seller from offering monetary
10 compensation or other consideration instead of or in addition to a repair
11 or replacement. The purchaser may accept or reject an offer of monetary
12 compensation or other consideration, other than repair or replacement and,
13 if rejected, may proceed with a dwelling action on completion of any
14 repairs or replacements the seller ~~intends~~ AND CONSTRUCTION PROFESSIONAL
15 INTEND to make or provide. The parties may negotiate for a release if an
16 offer involving monetary compensation or other consideration is accepted.

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

20 E. If the response provided pursuant to subsection C of this section
21 includes a notice of intent to repair or replace the alleged construction
22 defects, the purchaser shall allow the seller AND THE SELLER'S CONSTRUCTION
23 PROFESSIONAL a reasonable opportunity to repair or replace the ALLEGED
24 construction defects or cause the ALLEGED construction defects to be
25 repaired or replaced pursuant to the following:

26 1. The purchaser and the seller or the seller's construction
27 ~~professionals~~ PROFESSIONAL shall coordinate repairs or replacements within
28 thirty days after the seller's notice of intent to repair or replace was
29 sent pursuant to subsection C of this section. ~~If requested by the~~
30 ~~purchaser, repair or replacement of alleged construction defects undertaken~~
31 ~~by the seller shall be performed by a construction professional selected by~~
32 ~~the seller and consented to by the purchaser, whose consent shall not be~~

~~unreasonably withheld, that was not involved in the construction or design of the dwelling.~~

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

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

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

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

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

F. During the notice and repair or replacement process, and for thirty days after substantial completion of the repair or replacement, the statute of limitations and statute of repose, including section 12-552,

1 applicable to the purchaser, including any construction ~~professionals~~
2 PROFESSIONAL involved in the construction or design, are tolled as to the
3 seller and the seller's construction ~~professionals~~ PROFESSIONAL who were
4 involved in the construction or design of the dwelling for all alleged
5 construction defects described in reasonable detail in the written notice
6 sent to the seller pursuant to subsection A of this section.

7 G. ~~Both~~ ALL parties' conduct during the repair or replacement
8 process prescribed in subsections B, C, D and E of this section may be
9 introduced in any subsequent dwelling action. Any repair or replacement
10 efforts undertaken by the seller OR THE SELLER'S CONSTRUCTION PROFESSIONAL
11 are not considered settlement communications or offers of settlement and
12 are admissible in evidence.

13 H. A purchaser may amend the notice provided pursuant to subsection
14 A of this section to include alleged construction defects identified in
15 good faith after submission of the original notice. The seller AND THE
16 SELLER'S CONSTRUCTION PROFESSIONAL shall have a reasonable period of time
17 to conduct an inspection, if requested, and thereafter the parties shall
18 comply with the requirements of subsections B, C, D and E of this section
19 for the additional alleged construction defects identified in reasonable
20 detail in the notice.

21 I. Subject to Arizona rules of court, during the pendency of a
22 dwelling action the purchaser may supplement the list of alleged
23 construction defects to include additional alleged construction defects
24 identified in good faith after filing of the original dwelling action that
25 have been identified in reasonable detail as required by this section. The
26 court shall provide the seller AND THE SELLER'S CONSTRUCTION PROFESSIONAL a
27 reasonable amount of time to inspect the dwelling to determine the nature
28 and cause of the additional alleged construction defects, ~~AND~~ AND the nature
29 and extent of any repairs or replacements necessary to remedy the
30 additional alleged construction defects and, on request of the seller OR
31 THE SELLER'S CONSTRUCTION PROFESSIONAL, sufficient time to repair or
32 replace the additional alleged construction defects. The parties shall

1 comply with the requirements of subsections B, C, D and E of this section
2 for the additional alleged construction defects identified in reasonable
3 detail in the notice.

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

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

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

17 M. If the seller does not comply with the requirements of this
18 section and the failure is not due to any fault of the purchaser or as a
19 result of an unforeseen condition, including an unforeseen weather
20 condition or government delay, the purchaser may commence a dwelling
21 action.

22 N. If the purchaser fails to comply with the requirements of this
23 section before bringing a dwelling action, the dwelling action shall be
24 dismissed. If the dwelling action is dismissed after the statute of
25 limitations or statute of repose, including section 12-552, applicable to
26 the purchaser, any subsequent dwelling action brought by the purchaser is
27 time barred as to the seller and the seller's construction ~~professionals~~
28 **PROFESSIONAL** involved in the construction or design of the dwelling.

29 O. For the purposes of this section, "reasonable detail" includes a
30 detailed and itemized list that describes each alleged construction defect,
31 the location that each alleged construction defect has been observed by the
32 purchaser in each dwelling that is the subject of the notice and the

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

4 Sec. 3. Section 32-1159, Arizona Revised Statutes, is amended to
5 read:

6 32-1159. Indemnity agreements in construction and
7 architect-engineer contracts void; applicability
8 definitions

9 A. EXCEPT AS PROVIDED IN SUBSECTION B OF THIS SECTION, a covenant,
10 clause or understanding in, collateral to or affecting a construction
11 contract or architect-engineer professional service contract that purports
12 to indemnify, to hold harmless or to defend the promisee from or against
13 liability for loss or damage resulting from the sole negligence of the
14 promisee or the promisee's agents, employees or indemnitee is against the
15 public policy of this state and is void.

16 B. IF A CONSTRUCTION PROFESSIONAL PROVIDES WORK, SERVICES, STUDIES,
17 PLANNING, SURVEYS OR OTHER PREPARATORY WORK IN CONNECTION WITH A DWELLING,
18 THE INDEMNITEE MAY REQUIRE THE CONSTRUCTION PROFESSIONAL TO INDEMNIFY AND
19 HOLD HARMLESS THE INDEMNITEE, AND ITS OFFICERS AND EMPLOYEES, FROM
20 LIABILITIES, DAMAGES, LOSSES AND COSTS, INCLUDING REASONABLE ATTORNEY FEES
21 AND COURT COSTS, BUT ONLY TO THE EXTENT CAUSED BY THE NEGLIGENCE,
22 RECKLESSNESS OR INTENTIONAL WRONGFUL CONDUCT OF THE CONSTRUCTION
23 PROFESSIONAL, OR OTHER PERSON EMPLOYED OR USED BY THE CONSTRUCTION
24 PROFESSIONAL, IN THE PERFORMANCE OF THE CONTRACT OR SUBCONTRACT. THIS
25 SECTION DOES NOT PROHIBIT THE REQUIREMENT OF INSURANCE COVERAGE THAT
26 COMPLIES WITH THIS SECTION, INCLUDING THE DESIGNATION OF ANY PERSON AS AN
27 ADDITIONAL INSURED ON A GENERAL LIABILITY INSURANCE POLICY OR AS A
28 DESIGNATED INSURED ON AN AUTOMOBILE LIABILITY POLICY PROVIDED IN CONNECTION
29 WITH A CONSTRUCTION CONTRACT OR SUBCONTRACT OR A DESIGN PROFESSIONAL
30 SERVICES CONTRACT OR SUBCONTRACT.

31 C. EXCEPT AS PROVIDED IN SUBSECTION B OF THIS SECTION, A
32 CONSTRUCTION CONTRACT OR SUBCONTRACT OR AN ARCHITECT-ENGINEER PROFESSIONAL

1 SERVICE CONTRACT OR SUBCONTRACT ENTERED INTO IN CONNECTION WITH A DWELLING
2 MAY NOT REQUIRE THAT THE CONSTRUCTION PROFESSIONAL DEFEND, INDEMNIFY,
3 INSURE OR HOLD HARMLESS THE INDEMNITEE OR ITS EMPLOYEES, OFFICERS,
4 DIRECTORS, AGENTS, CONTRACTORS OR SUBCONTRACTORS FROM ANY LIABILITY,
5 DAMAGE, LOSS, CLAIM, ACTION OR PROCEEDING, AND ANY CONTRACT PROVISION THAT
6 IS NOT ALLOWED BY SUBSECTION B OF THIS SECTION IS AGAINST THE PUBLIC POLICY
7 OF THIS STATE AND IS VOID.

8 ~~B.~~ D. Notwithstanding ~~subsection~~ SUBSECTIONS A AND C OF THIS SECTION,
9 a contractor who is responsible for the performance of a construction
10 contract may fully indemnify a person for whose account the construction
11 contract is not being performed and who, as an accommodation, enters into
12 an agreement with the contractor that permits the contractor to enter on or
13 adjacent to its property to perform the construction contract for others.

14 ~~C.~~ E. This section ~~applies to all contracts entered into between~~
15 ~~private parties. This section~~ does not apply to:

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

19 2. Agreements entered into by agricultural improvement districts
20 under title 48, chapter 17.

21 F. SUBSECTIONS B, C AND D OF THIS SECTION DO NOT APPLY TO:

22 1. AGREEMENTS FOR INDEMNIFICATION OF A SURETY ON A PAYMENT OR
23 PERFORMANCE BOND BY ITS PRINCIPAL OR INDEMNITORS.

24 2. AGREEMENTS BETWEEN AN INSURER UNDER AN INSURANCE POLICY OR
25 CONTRACT AND ITS INSURED.

26 3. AGREEMENTS BETWEEN AN INSURER AND ITS INSURED UNDER A SINGLE
27 INSURANCE POLICY OR CONTRACT FOR A DEFINED PROJECT OR WORKPLACE, EXCEPT
28 THAT:

29 (a) SUCH AGREEMENTS MAY NOT REQUIRE OR ALLOW ONE OR MORE INSURED
30 UNDER THOSE AGREEMENTS TO INDEMNIFY, TO HOLD HARMLESS OR TO DEFEND ANY
31 OTHER INSURED UNDER THOSE AGREEMENTS BEYOND THE LIMITS OF SUBSECTIONS B, C
32 AND D OF THIS SECTION.

1 (b) THE INSURER MAY NOT BE EXCUSED FROM ITS DUTY UNDER THOSE
2 AGREEMENTS TO DEFEND, INDEMNIFY AND PAY ON BEHALF OF ITS INSUREDS.

3 ~~D.~~ ~~In~~ G. FOR THE PURPOSES OF this section:

4 1. "Architect-engineer professional service contract" means a
5 written or oral agreement relating to the SURVEY, design, design-build,
6 construction administration, study, evaluation or other professional
7 services furnished in connection with any actual or proposed construction,
8 alteration, repair, maintenance, moving, demolition or excavation of any
9 structure, street or roadway, appurtenance or other development or
10 improvement to land.

11 2. "Construction contract" means a written or oral agreement
12 relating to the ACTUAL OR PROPOSED construction, alteration, repair,
13 maintenance, moving, demolition or excavation OF ANY STRUCTURE, STREET OR
14 ROADWAY, APPURTENANCE or other development or improvement to land.

15 3. "CONSTRUCTION PROFESSIONAL" HAS THE SAME MEANING PRESCRIBED IN
16 SECTION 12-1361.

17 4. "DWELLING" HAS THE SAME MEANING PRESCRIBED IN SECTION 12-1361.

18 5. "INDEMNITEE" MEANS A PERSON OR ENTITY THAT, IN A WRITTEN
19 CONSTRUCTION CONTRACT, IS TO BE INDEMNIFIED OR PROTECTED BY ANOTHER PERSON
20 OR ENTITY.

21 6. "INDEMNITOR" MEANS THE PERSON OR ENTITY THAT IS BOUND BY A
22 WRITTEN CONSTRUCTION CONTRACT TO PROVIDE INDEMNIFICATION TO ANOTHER PERSON
23 OR ENTITY.

24 Sec. 4. Applicability

25 Section 32-1159, Arizona Revised Statutes, as amended by this act,
26 applies only to contracts and subcontracts that are entered into or amended
27 on or after the effective date of this act.

28 Sec. 5. Legislative findings and intent

29 A. The legislature finds that:

30 1. Financial responsibility is a significant motive in preventing
31 accidental losses and that the ideal system is one in which general

1 contractors and subcontractors are all held financially responsible for the
2 accidental losses they cause.

3 2. Construction workplace injuries and fatalities represent a
4 disproportionately high share among the workforce and, as a result,
5 contractual terms that shift loss in the construction industry have a much
6 greater potential to cause significant harm.

7 3. In recent years, construction businesses have begun to use
8 contract provisions to either shift the financial responsibility for their
9 negligence to others or prevent the responsible party from being
10 determined. The legislature also finds that this system can result in the
11 assignment of responsibility to innocent parties while the negligent
12 parties are often not held accountable, and that this often leads to the
13 misallocation of valuable and limited resources and ultimately generates
14 increased costs that add little or no value to the consumer or the end
15 product. The misallocation contributes to both a shortage in the
16 contractor workforce and cost prohibitive insurance policies, which could
17 cause unnecessarily inflated housing prices in this state.

18 B. As a result of the findings listed in subsection A of this
19 section and for additional reasons, it is the intent of the legislature to
20 extend the provisions governing proportional liability in public
21 contracting to private contracting. This will ensure fairness in
22 construction contracting between general contractors and subcontractors and
23 will create an economic climate that promotes safety in construction,
24 fosters the availability and affordability of insurance and reduces the
25 legal costs associated with construction claims.

26 Amend title to conform

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