



## RESIDENTIAL REVOLUTION

### Gov. Ducey Signs New Law That Changes Landscape for Residential Construction-Defect Claims

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On April 10, 2019, Gov. Doug Ducey signed into law legislation that will have a significant impact on construction-defect claims involving single- and multi-family homes in Arizona.

Senate Bill 1271 amends the Purchaser Dwelling Act (PDA), A.R.S. § 12-1361, *et seq.*, and became effective on Aug. 26. The new changes will affect a builder's indemnification contractual rights, as well as attorney fees, notice to subcontractors, and homeowner affidavits.

One of the most significant changes of SB

1271 is its impact on indemnity provisions in residential construction contracts. Prior to this bill, Arizona imposed almost no legal restrictions on the manner in which a contract for construction could apportion liability through an indemnity provision, except for construction of public improvements or buildings.

Arizona's anti-indemnity statute, A.R.S. § 32-1159, prohibited only provisions intending to indemnify a party for liabilities resulting from its sole negligence. Parties could contract to require a

subcontractor to provide indemnification for claims arising out of or connected to the subcontractor's work, not merely those caused by the general contractor's negligent acts or omissions. This was outlined by the Arizona Court of Appeals in *Amberwood Dev., Inc. v. Swann's Grading, Inc.*, No. 1 CA-CV 15-0786, (2017).

The passage of SB 1271 occurred as a result of lobbying efforts following the decision in *Swann's Grading*, which obligated the subcontractor to pay 72 percent of a multi-million-dollar settlement/arbitration award, plus fees and costs, despite any proof that the subcontractor "caused" the damages. Notwithstanding the fact that *Swann's Grading* provided a defense to the general contractor, the court determined that no causal evidence was required to trigger *Swann's Grading's* independent obligation to indemnify.

Following the *Swann's Grading* decision, a committee was created in 2018 to research and make recommendations for liability apportionment in the construction industry. SB 1271 is the resulting legislation. By imposing significant restrictions on indemnity provisions in contracts, the new law adopts a proportional liability approach and voids residential construction contracts that require subcontractors to indemnify general contractors beyond damages resulting from their own negligence. Thus, with respect to residential construction only, Arizona indemnity law is now akin to Arizona tort law, which follows a pure comparative fault scheme.

As a result of this legislation, general contractors and builders will now be exposed to more financial responsibility on the front end of repairs and construction-defect litigation. Contractors will no longer be able to shift risk onto the subcontractors if their work arises from, is resulting from, or is connected with a construction defect, regardless of their own responsibility. More importantly, without this risk, subcontractors may be less likely to come to the table for settlement discussions, opting to wait for additional discovery in order to better posture their fault apportionment position.



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These new indemnity changes are likely only to apply to contracts entered into after Aug. 26. It is well established in Arizona that, unless expressly provided therein, a statute will not apply retroactively. Although SB 1271 does contain express retroactive language, the application is specifically limited to Laws 2018, chapter 336, section 1, which concerns only the study committee to review apportionment issues. Thus, with respect to the new regulations on indemnity, there is no express language within the bill regarding retroactive application. Further, applying these changes retroactively would raise a number of constitutional concerns with respect to contract rights.

### Attorney Fees and Other Changes

Under SB 1271, the right to recover attorney fees in dwelling-defect claims has also been reestablished, as it was eliminated with the 2015 PDA Amendments. However, the new legislation provides clarification on how to determine who a prevailing party is, and sets forth guidelines for determining if attorney fees are reasonable. Both of these changes address ongoing and significant issues between the plaintiff and defense bar in both the trial court and arbitration venues.

In an effort to streamline the complex nature of construction-defect actions, and to make the claims process more efficient and economical for the parties involved, SB 1271 makes a number of changes regarding the pre-litigation procedures set forth under the PDA. For example, the amendment includes changes to increase subcontractor involvement in the PDA process. Under the new law, when a seller

receives notice under the act, she is now required to promptly forward a copy of the notice to the subcontractors the seller "reasonable believes" may be implicated. The law also extends the right to test, inspect, and repair the property—previously provided to the general contractor—to subcontractors as well.

In addition, the law establishes the level of detail owners must include in a notice to the seller. Homeowners must now file an affidavit, along with their notices, that states, "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." This affidavit will be troublesome for the plaintiffs attorneys that usually prosecute construction-defect claims on a contingency-fee basis.

SB 1271 unquestionably changes the landscape for construction-defect litigation in Arizona. The changes highlighted in this article are not a comprehensive list of all included in the bill. As with any new legislation, the full impact is still unknown. The committee that brought forth these changes continues to evaluate construction-defect litigation issues in Arizona, and so we anticipate that we will see a number of amendments and additional changes in the coming years. ■

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