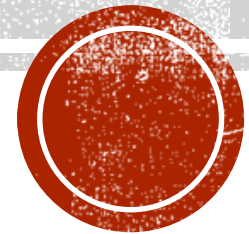


CLAIMS TRENDS FOR DESIGN PROFESSIONALS IN ARIZONA



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SUBPOENAS

DEPOSITIONS

“LET’S WORK TOGETHER”

GENERAL CONTRACTORS

SUBPOENAS AND DEPOSITIONS

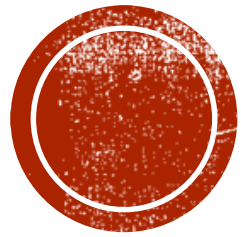
- Ultimate goal – AVOID LITIGATION
- Call(s) with opposing counsel
- Cooperation
- Protected documents
- Comprehensive production
- All parties in case?
- Focus for deposition preparation



- In quotes
- Attorneys – yes or no?
 - Stir the pot?
 - Cooperate?
- Call(s) with counsel
- Tolling Agreements



**“LET’S WORK
TOGETHER”**



GENERAL CONTRACTORS

DESIGNERS BEWARE!

The good, the bad, and the ugly

DELAY/TIMING ISSUES

All potential parties at the table – potential Third-Party Practice

Statutes of Limitations

ARIZONA'S PURCHASER DWELLING ACT



THEN

- A.R.S. §§ 12-1361 *et seq.*
- Practical application
- Practical effect



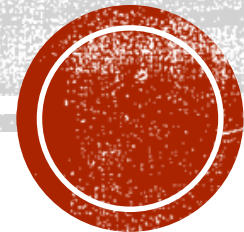
**12-1362. DWELLING ACTION; NOTICE OF INTENT TO REPAIR OR REPLACE;
JURISDICTIONAL PREREQUISITE; INSURANCE**

A. EXCEPT WITH RESPECT TO CLAIMS FOR ALLEGED CONSTRUCTION DEFECTS INVOLVING AN IMMEDIATE THREAT TO THE LIFE OR SAFETY OF PERSONS OCCUPYING OR VISITING THE DWELLING, A PURCHASER MUST FIRST COMPLY WITH THIS ARTICLE BEFORE FILING A DWELLING ACTION.

B. A SELLER WHO RECEIVES A WRITTEN NOTICE OF CLAIM PURSUANT TO SECTION 12-1363 HAS A RIGHT PURSUANT TO SECTION 12-1363 TO REPAIR OR REPLACE ANY ALLEGED CONSTRUCTION DEFECTS AFTER SENDING OR DELIVERING TO THE PURCHASER A WRITTEN NOTICE OF INTENT TO REPAIR OR REPLACE THE ALLEGED CONSTRUCTION DEFECTS. THE SELLER DOES NOT NEED TO REPAIR OR REPLACE ALL OF THE ALLEGED CONSTRUCTION DEFECTS. A PURCHASER MAY NOT FILE A DWELLING ACTION UNTIL THE SELLER HAS COMPLETED ALL INTENDED REPAIRS AND REPLACEMENTS OF THE ALLEGED CONSTRUCTION DEFECTS.

**ARIZONA'S
PURCHASER
DWELLING ACT**

NOW



ARIZONA'S PURCHASER DWELLING ACT

(CONT'D)

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

A. Before filing a dwelling action, the purchaser shall give written notice by certified mail, return receipt requested, to the seller specifying in reasonable detail the basis of the dwelling action.

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



C. Within sixty days after receipt of the notice described in subsection A of this section, the seller shall send to the purchaser a good faith written response to the purchaser's notice by certified mail, return receipt requested. The response may include the seller's notice of intent to repair or replace any alleged construction defects, to have the alleged construction defects repaired or replaced at the seller's expense or to provide monetary compensation to the purchaser. The written notice of intent to repair or replace shall describe in reasonable detail all repairs or replacements that the seller intends to make or provide to the dwelling and a reasonable estimate of the date by which the repairs or replacements will be made. This subsection does not prohibit the seller from offering monetary compensation or other consideration instead of or in addition to a repair or replacement. The purchaser may accept or reject an offer of monetary compensation or other consideration, other than repair or replacement and, if rejected, may proceed with a dwelling action on completion of any repairs or replacements the seller intends to make or provide.

ARIZONA'S PURCHASER DWELLING ACT (CONT'D)



**ARIZONA'S
PURCHASER
DWELLING ACT
(CONT'D)**

12-1361. Definitions

5. "Construction professional" means an architect, contractor, subcontractor, developer, builder, builder vendor, supplier, engineer or inspector performing or furnishing the design, supervision, inspection, construction or observation of the construction of any improvement to real property.

7. "Dwelling action" means any action involving a construction defect brought by a purchaser against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.

10. "Seller" means any person, firm, partnership, corporation, association or other organization that is engaged in the business of designing, constructing or selling dwellings, including construction professionals



ARIZONA'S PURCHASER DWELLING ACT

(CONT'D)

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

N. If the purchaser fails to comply with the requirements of this section before bringing a dwelling action, the dwelling action shall be dismissed. If the dwelling action is dismissed after the statute of 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 professionals involved in the construction or design of the dwelling.



12-1364. Dwelling actions; contested issues; attorney fees and taxable costs; expert witness fees; definitions

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.

**ARIZONA'S
PURCHASER
DWELLING
ACT
(CONT'D)**



ADMINISTRATIVE CLAIMS



ARIZONA BOARD OF TECHNICAL REGISTRATION

32-146. Malpractice claim review

A. On the filing of a complaint in any malpractice action the plaintiff's attorney shall forward a copy of the complaint to the board and a report containing the information required in subsection B.

B. The report required by subsection A shall contain the following information:

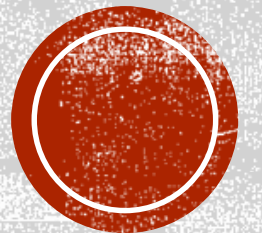
1. The name and address of each defendant.
2. The name and address of each plaintiff.
3. The names and addresses of each registrant providing services to the plaintiff.
4. A statement specifying the nature of the occurrence resulting in the malpractice action.



ADMINISTRATIVE CLAIMS

(CONT'D)

**Enforcement Advisory Committees
Representation?**



- **Attorneys admitted to practice in Tribal Courts**
- **Tribal Advocates**
- **“Deadlines”**



**TRIBAL
COURT**

PARTIES

DESIGN PRIMES



**INDIVIDUAL
PROFESSIONALS**



PARTIES (CONT'D)

- **DESIGN PRIMES**
 - **Indemnity Provisions**
 - **Flow-Down Provisions**





- **General** - An agreement to “indemnify and hold [owner] harmless from and against any and all liability incurred by it for any reason whatsoever” has been construed as a general indemnity clause that does not protect an indemnitee against its own active negligence notwithstanding the agreement's broad language.
- **Specific** – This type of provision addresses what effect the owner's negligence has on the designer's obligation to indemnify and specifically imposes upon the designer an obligation to indemnify for any type of damage, even though also caused, in part, by the negligence of the owner. For example, a provision that entitled an owner to indemnification from the designer “regardless of whether or not [the injury] is caused in whole or part by any negligent act or omission of the [owner]” was found to require a designer to indemnify the owner for both the designer's AND the owner's negligence.

INDEMNITY (CONT'D)

INDEMNIFY

VS.

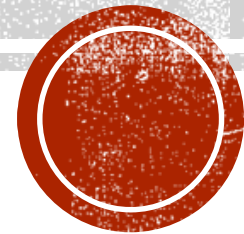
DEFEND AND INDEMNIFY



INDEMNITY

THE CONSULTANT SHALL ~~DEFEND~~, INDEMNIFY AND HOLD HARMLESS THE CLIENT, ITS OFFICERS, DIRECTORS, ~~ATTORNEYS, LENDERS~~ AND EMPLOYEES AGAINST ALL ~~ACTIONS, CAUSES OF ACTION, DEMANDS,~~ DAMAGES, FEES, EXPENSES AND COSTS, INCLUDING ~~ANY~~ REASONABLE ATTORNEY'S FEES, ARISING ~~DIRECTLY OR INDIRECTLY, RESULTING FROM OR CONNECTED IN ANY WAY IN WHOLE OR IN PART~~ FROM THE CONSULTANT'S **NEGLIGENT** PERFORMANCE OF THE SERVICES UNDER THIS AGREEMENT.

EXAMPLE



PARTIES (CONT'D)

- **INDIVIDUAL
PROFFESIONALS**



TYPES OF CLAIMS

- Negligence/Professional Negligence (10)
- Breach of Contract (9)
- Breach of Implied Warranty (4)
- Breach of the Covenant of Good Faith and Fair Dealing (4)
- Common Law Indemnity (3)
- Express Indemnity (2)
- Negligent Misrepresentation (2)
- Contribution/Appportionment (2)
- Breach of Express Warranty (2)
- Defamation
- Disparagement
- False Light
- Intentional Interference with Contract
- Aiding and Abetting Tortious Conduct
- Copyright Infringement
- Unjust Enrichment
- Punitive Damages



TYPES OF CLAIMS

- Negligence/Professional Negligence (10)
- Breach of Contract (9)
- Breach of Implied Warranty (4)
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- Common Law Indemnity (3)
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- ~~Contribution/Appportionment (2)~~
- ~~Breach of Express Warranty (2)~~
- ~~Defamation~~
- ~~Disparagement~~
- ~~False Light~~
- Intentional Interference with Contract
- Aiding and Abetting Tortious Conduct (Experts)
- Copyright Infringement
- ~~Unjust Enrichment~~
- ~~Punitive Damages~~



STATUTES OF LIMITATIONS

- Negligence
 - 2 Years/Discovery Rule
- Contract
- Breach of Implied Warranty
- Statute of Repose





No action for . . . shall be commenced more than”



Negligence – 2 years per A.R.S. § 12-542

Discovery Rule – “When the plaintiff knew or with reasonable investigation should have known”



Contract

Written – 6 years per A.R.S. § 12-548
Oral – 3 years per A.R.S. § 12-543

STATUTES OF LIMITATIONS

NEGLIGENCE & BREACH OF CONTRACT



STATUTE OF LIMITATIONS BREACH OF IMPLIED WARRANTY

North Peak Constr., LLC v. Architecture Plus, Ltd., 227 Ariz. 165, 254 P.3d 404 (App. 2011)

Breach of an implied warranty is a valid cause of action against a design professional and can be brought in addition to a claim for negligence.

A design professional impliedly warrants that he/she has exercised his/her skills with care and diligence and in a reasonable, non-negligent manner.

6-year statute of limitation

No attorneys' fees



STATUTE OF REPOSE

A.R.S. § 12-552

A. Notwithstanding any other statute, no action or arbitration based in contract may be instituted or maintained against a person who develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property more than eight years after substantial completion of the improvement to real property.



QUESTIONS

