Newly Revised Arizona Purchaser Dwelling Act Changes Rules for Construction Defect Claims

When the Arizona Legislature enacted the Purchaser Dwelling Act (the "Act") in 2002, it imposed various pre-litigation notice and inspection requirements on purchasers and homeowners’ associations before they could file a lawsuit alleging defective construction against those engaged in the business of designing, constructing or selling dwellings. (A.R.S. §§12-1361 through 12-1366.)

Key provisions of the original Act included that a prevailing party in any subsequent litigation could recover expert fees, in addition to attorneys’ fees. A purchaser also had the option to reject a seller’s offer to repair or replace the alleged construction defects and to proceed with a court action for the defect.

Last week, Governor Doug Ducey signed into law House Bill 2578, which made material changes to the Act. Highlights of the revised Act include these key points:

- The Act continues to apply to purchasers of dwellings—and homeowners’ associations—seeking to bring an action involving a construction defect in the dwelling (a “dwelling action”) against those engaged in the business of designing, constructing or selling dwellings (“sellers”). The definition of “seller” is expanded to include “construction professionals,” which the Act defines as "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.”

- As a prerequisite to filing a lawsuit, the purchaser first must provide the seller with a written notice that includes a detailed and itemized list of each alleged construction defect, including the location of each defect and the impairment that has occurred or is likely to occur if the defect is not repaired. Parties bringing dwelling actions on behalf of multiple dwelling owners are no longer permitted to provide written notice of the alleged defects by listing a sample of the defects, as the original Act allowed.

- The seller has 60 days to provide a “good faith written response.” The response may include notice of the seller’s intent to repair any alleged construction defects or to have the alleged construction defects repaired or replaced at the seller’s expense. A seller may also offer money or other consideration. A purchaser is free to reject an offer of monetary compensation, as the prior Act also provided. In a significant change, the amended Act now provides that a purchaser cannot reject a seller’s offer to repair or replace the alleged construction defects. A purchaser can, subject to certain limitations, request that any repair or replacement be performed by a construction professional not involved in the original construction or design of the dwelling.

- The new law adds a definition for the term “construction defect,” specifying that it requires a “material deficiency” resulting from: (1) a violation of applicable codes; (2) use of defective materials, products, components or equipment; or (3) failure to conform to “generally accepted workmanship standards in the community.”

- The revised Act contains detailed procedures that apply if the seller gives notice of its intent to repair or replace the alleged construction defects. Among other things, the purchaser must “allow the seller a reasonable opportunity” to make the repairs. The purchaser and seller are required to cooperate to coordinate repairs within 30 days. The time for starting repairs varies, however, according to whether a permit is required, and repairs must be completed “within a commercially reasonable time frame.”

- A purchaser’s failure to comply with the Act’s requirements as revised is now grounds for dismissing a dwelling action. In addition, if the seller gives notice of an intent to repair or replace the alleged construction defects, the purchaser may not file a dwelling action until the repairs or replacements are completed. The purchaser may commence a dwelling action if the seller fails to comply with the Act’s requirements unless the failure is caused by the purchaser or the result of unforeseen conditions, such as weather conditions.

- The parties’ conduct during the repair or replacement process may be introduced as evidence in any subsequent dwelling action. Notably, the Act previously provided that the parties’ notices and responses were not admissible in evidence.

- The statutes of limitations and repose are tolled during the notice and repair or replacement process and for thirty days after substantial completion of any repair or replacement, with respect to any construction defect that was described in the purchaser’s notice under the Act.

- The amended Act repeals a provision of the former law, which allowed the successful party in a dwelling action to recover its reasonable attorneys’ and expert witness fees. This is a significant change in the statutory framework as it applies to expert witness fees. Expert witness fees in construction defect actions generally are not recoverable under Arizona law. The recovery of attorneys’ fees under the amended Act will be governed by contract and existing Arizona law, which allows a prevailing party...
to recover fees in certain circumstances. Those who opposed H.B. 2578 claimed that doing away with the fee award provision will make it economically infeasible for many purchasers to litigate construction defects.

- The Act continues to require disclosure in the purchase contract of the purchaser’s right to file a written complaint with the Arizona Registrar of Contractors.
- The amended Act also imposes enhanced obligations on homeowners’ associations before a dwelling action can be commenced. The association must provide detailed disclosures to association members before a lawsuit is filed, including “the expenses and fees that the association anticipates will be incurred, directly or indirectly, in prosecuting the action including attorney fees, consultant fees, expert witness fees, court costs and impacts on the values of the dwellings that are the subject of the action and those that are not.” An association also must demonstrate that it complied with any requirements of the applicable community documents before filing suit. A seller has standing to challenge any failure by an association to comply with the Act and/or the requirements of the applicable community documents.
- H.B. 2578 contains neither an emergency clause nor a delayed effective date. As a result, it will be effective 90 days after the Arizona Legislature adjourns “sine die” or without assigning a day for further meetings or hearings.

A copy of H.B. 2578 is available here.

© 2015 Perkins Coie LLP

CONTACTS

Jodi Knobel Feuerhelm
Partner
Phoenix
D +1.602.351.8015

Ronald E. Lowe
Partner
Phoenix
D +1.602.351.8210

RELATED SERVICES

PRACTICES
- Real Estate & Land Use
- Construction