

**2015 ARIZONA LEGISLATIVE AMENDMENTS
AFFECTING REAL ESTATE LENDING
(May 12, 2015 ACMLA meeting)**

Following is a summary of legislative amendments enacted during the most recent session (the First Regular Session) of the 52nd Arizona Legislature that (to varying degrees) affect real estate and real estate lending. The general effective date of all legislation enacted during the session is July 3, 2015. The text of these amendments can be found on the Arizona Legislature's website (<http://www.azleg.gov>).

Construction Defect Dwelling Actions

Arizona law gives a seller the opportunity to repair or replace any alleged construction defects. A purchaser was previously required to notify the seller by certified mail at least 90 days before filing a **dwelling action**, specifying in reasonable detail the basis of the dwelling action. After the seller received notice, the seller was permitted to inspect the dwelling to determine the nature and cause of the alleged defects and the nature and extent of any repairs or replacements needed to remedy the defects.

Within 60 days after the seller received the purchaser's notice, the seller was required to send the purchaser a good faith written response to the notice by certified mail. The response could include an offer to repair or replace any alleged defects (or to have them repaired or replaced at the seller's expense) or to provide monetary compensation to the purchaser. If the seller failed to provide a written response to the purchaser's notice within 60 days, the purchaser was permitted to file a dwelling action.

HB 2578 makes a number of substantial changes in that it:

1. Allows a seller who receives a written notice of claim to repair or replace any alleged construction defect after sending or delivering to the purchaser a written notice of intent to repair or replaced the alleged construction defect. The seller does not need to repair or replace all of the alleged construction defects.
2. Prohibits a purchaser from filing a dwelling action until the seller has completed all intended repairs and replacements.
3. Allows the seller to offer monetary compensation or other consideration instead of or in addition to repairing or replacing.
4. Allows the purchaser to accept or reject an offer of monetary compensation or other consideration, other than repair or replacement, and proceed with a dwelling action on completion of repair or replacement, and allows the parties to negotiate for a release if an offer involving monetary compensation or other consideration is accepted.

5. Provides that, if a seller issues a notice of intent to repair or replace, the purchaser must allow the seller a reasonable opportunity to repair or replace, including coordination of repairs or replacements within 30 days after the notice of intent was sent.

(a) Requires the purchaser and the seller or the seller's construction professionals to coordinate repairs or replacements within 30 days, and allows the purchaser to consent to the construction professional that the seller has chosen to perform repairs and replacements.

(b) Directs repairs or replacements to begin as agreed by the parties with reasonable efforts to begin repairs or replacements within 35 days after the notice of intent was sent. If a permit is required, repairs or replacements should begin within ten days after receipt of the permit or after 35 days after the notice of intent, whichever is later.

(c) Requires that all repairs or replacements be completed within a commercially reasonable time frame using reasonable care under the circumstances.

(d) Requires the purchaser to provide reasonable access for the repairs or replacements.

(e) Provides that the seller is not entitled to a release or waiver solely in exchange for any repair or replacement, but allows the parties to negotiate a release or waiver in exchange for monetary compensation or other consideration.

(f) Provides that at the conclusion of any repairs or replacements, the purchaser may (i) commence a dwelling action, or (ii) initiate a dispute resolution process if the contract for sale of the dwelling or the community documents contain a commercially reasonable alternative dispute resolution (ADR) procedure that is consistent with A.R.S. § 12-1366.C, which may include a claim for inadequate repair or replacement.

6. Provides that, during the notice and repair or replacement process and for 30 days after substantial repair or replacement, the statute of limitations and the statute of repose applicable to the purchaser, including any construction professionals involved in the construction or design, are tolled (suspended) as to the seller and the seller's construction professionals for all alleged construction defects described in reasonable detail in the written notice sent to the seller.

7. Provides that the conduct of the parties during the repair or replacement process may be introduced in any subsequent dwelling action, including any repair or replacement efforts by the seller.

8. Provides that, if the seller does not comply with the right to repair statute, and the failure is not due to the fault of the purchaser or as a result of any unforeseen weather condition or government delay, the purchaser may commence a dwelling action.

9. Provides that, if the purchaser fails to comply with the statute before bringing a dwelling action, the dwelling action must be dismissed.

10. Provides that if the dwelling action is dismissed after the statute of limitations or the statute of repose, any subsequent dwelling action brought by the purchaser is time barred as to the seller and the seller's construction professionals.

11. Repeals A.R.S. § 12-1364 relating to dwelling actions, attorneys' fees, costs and expert witness fees. Attorneys' and experts' fees may now be recovered in a contested dwelling action only if the contract between the parties provides for such a recovery [this is a significant change].

12. Provides that the statutes do not affect either party's ability to enforce any commercially reasonable ADR procedures in the contract for the sale of the dwelling or an association's community documents.

(a) Provides that the seller's election to enforce ADR procedures does not negate or reduce its right to repair or replace any construction defects.

(b) Requires (i) that any ADR procedures in a sales contract be in bold and capital letters, and (ii) that a disclosure statement in at least 12 point font appear on the face of the contract and describe the location of the ADR procedures within the contract.

13. Prescribes the contents of the disclosure to be made by an HOA board of directors to the HOA members before filing a dwelling action.

14. Provides that in any contested dwelling action, the seller may assert the HOA's failure to comply with the community documents and the requirements of the statute.

Condominium and Planned Community Associations

A.R.S. §§ 33-1256 and 33-1807 previously required condominium associations and planned community associations, respectively, to (i) record a notice with the County Recorder in the county where the association is located containing the name, designated agent or management company and the general contact information for the association, and (ii) to update the notice within 90 days following any changes.

A.R.S. § 10-11622 requires domestic and foreign nonprofit corporations (including condominium and planned community associations) to file annual reports with the Arizona Corporation Commission (ACC) containing certain information.

HB 2084 now requires condominium and planned community associations to submit, in conjunction with their annual reports, a separate statement to the ACC containing: (a) the name of the association's designated agent or management company; (b) the address and phone number of the association; and (c) an email address, website and fax number, if any. HB 2084 also provides that written responses to notices of violations received by owners be sent to the address listed on the notice, instead of the address filed with the County Recorder.

Voting for Removal of HOA Board Member

Under prior law, an HOA board member could be removed from the board by a majority vote of a quorum of HOA members that are entitled to vote. To call for the removal of a board member, a petition must have been circulated and signed by at least 25% of those entitled to cast a vote in the HOA or 100 votes, which is less. Upon receipt of a petition, the board was required to call and provide written notice of a special meeting of the HOA to be held within 30 days. At any special meeting called for the removal of a board member, a quorum is present if enough members are in attendance to cast 20% of the total votes or 1,000 votes, whichever is less (see A.R.S. § 33-1813).

SB 1091 clarifies that, when removing an HOA board member, quorum and vote counts are based on the members **eligible to vote**, rather than the members entitled to cast votes.

Trustee's Sale Notices

A.R.S. § 33-808 specifies the contents of a notice of trustee's sale.

SB 1448 now also requires a specific bold-face and capitalized statement to be included in the first paragraph of a notice of trustee's sale stating that if there is a defense or objection to the sale, an action must be filed and a court order obtained in order to stop the sale no later than 5:00 p.m. on the last business day before the scheduled sale date or the sale will be final.

Judgment Liens

A.R.S. § 33-961 requires a copy of a judgment of a court, certified by the clerk, to be filed and recorded in the office of the County Recorder in each county where the judgment creditor desires the judgment to become a lien upon the real property of the judgment debtor. The statute outlines the information to be included in the certified copy of the judgment. A.R.S. § 33-962 outlines the procedure for filing a judgment of a justice or municipal court; the law previously required the judgment creditor to file a certified transcript of judgment from the justice or municipal court with the Superior Court in order to place a lien on a judgment debtor's real property.

HB 2311 now allows a certified copy of a judgment of **any** court in Arizona to be filed with the County Recorder to become a lien on a judgment debtor's real property, effective for judgments filed from and after December 31, 2015.

Contract Progress Payments/Design Professionals

The Arizona Prompt Payment Act (A.R.S. §§ 1129.01 through 1129.07) provides the contractual rights and obligations of both the owner and contractor in construction projects and requires an owner to make prompt and timely progress payments to contractors, subcontractors and material suppliers according to the provisions of the contract. Progress payments are to be made in 30-day billing cycles, or as otherwise stated in a clear and conspicuous manner in the contract. Payments are to be based on work or services already completed or materials that have been supplied according to the contract or subcontract. The owner may withhold payment and

decline to approve a billing or invoice for various reasons, but must give proper and timely notice to the contractor.

HB 2336 creates the Arizona Design Professional Prompt Pay Act and applies its provisions to future contracts and services by design professionals for state, county and local government construction projects.

Real Estate Tax Liens/Partial Payments

A.R.S. §§ 41-18101 and 41-18104 require a County Treasurer to secure unpaid delinquent tax payments by selling tax liens at an aggregate amount equal to all unpaid taxes, penalties, interest and charges due on the property for which taxes are delinquent. A tax lien purchaser is awarded a certificate of purchase (CP), which bears interest at the bid rate beginning on the first day of the month following the sale of the lien. To redeem a property tax lien, the person owing the back taxes must pay the County Treasurer all fees, including taxes, interest and charges accrued on the property. If the county in which the lien is being redeemed has an elderly assistance fund, the county treasurer must deposit an amount equal to the difference between the CP interest rate and 16% as provided by A.R.S. §§ 42-18153 and 42-18053.

SB 1135 requires treasurers in counties with at least three million people to accept partial payments for delinquent taxes (equal to at least 25% of the principal amount of the oldest remaining taxes plus accrued interest and fees due on that principal amount) and to issue subsequent year CPs for unpaid delinquent taxes. County Treasurers cannot accept partial payments after they receive notice that an action to foreclose has been initiated. Holders of subsequent years' CPs may file in Superior Court to foreclose the right to redeem beginning three years after the date the tax lien was assigned, but not more than ten years after the last day of the month in which the tax lien was assigned.

HB 2653 repeals the specific provisions of A.R.S. § 42-18153 that deal with the redemption of a real property tax lien in a county that has established an elderly assistance fund.

Loan Originator Licensing

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act) mandated a nationwide licensing and registration system for mortgage loan originators (MLOs), outlines the minimum standards for licensing, and requires an applicant to pass a qualified written test developed by the Nationwide Mortgage Licensing System and Registry (NMLS). A qualified written test is designed to adequately measure the applicant's knowledge and comprehension in appropriate subject areas, including ethics, federal and state law pertaining to mortgage origination, fraud and consumer protection.

Arizona law defines a **loan originator** as a natural person who for compensation or gain or in the expectation of compensation or gain does any of the following: (a) takes a residential mortgage loan application; (b) offers or negotiates terms of a residential mortgage loan; or (c) on behalf of a borrower, negotiates with a lender to obtain a temporary or permanent modification of an existing residential mortgage loan agreement.

A.R.S. § 6-991.03 prohibits a person from acting as a loan originator unless licensed by the Arizona Department of Financial Institutions (DFI). To obtain a license, an applicant must complete a course of study, including at least 20 hours of education, during the three-year period immediately preceding the time of the application, pass a loan originator's examination, and obtain a unique identifier through the NMLS.

In 2013, the NMLS developed the Uniform State Test, which contains a national test component with uniform state content. Applicants are tested on their knowledge of high level state-related content that is based on the SAFE Act and the CSBS/AARMR Model State Law. As of January 1, 2015, 46 states had adopted the Uniform State Test.

HB 2169, among other things:

1. Requires an applicant for an MLO license to pass the Uniform State Test developed by the NMLS.
2. Requires the applicant to complete four hours of study on Arizona law as part of the 20-hour educational requirement for licensure.
3. Requires an MLO to have completed one hour of study on Arizona law as part of the continuing education requirement for renewal.

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