



COZEN
O'CONNOR.

PRIMER ON ARIZONA SUBROGATION LAW
presented by
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I.

CONSTRUCTION DEFECT CLAIM PROCEDURES

Because each state's Act differs in some respect from others, and because each statute contains a complex schedule by which various milestones in the pre-suit process are to be completed, the relevant statute should be consulted before committing to any course of action. The statutes seem straightforward, however, it is unclear whether the statutes apply to subrogation claims? Except for the Texas RCLA, none of the statutes even hint at whether the requirements apply to subrogation claims or whether subrogating carriers may (or are required to) provide the requisite notice to builders. At this point in the development of the law, the best procedure to follow in subrogation claims is to provide notice of the loss to the home builder as soon as liability becomes apparent. If the circumstances allow, invite the homebuilder out to the loss site and advise that repairs are to be promptly made in order to restore the insured's property to its pre-loss condition. Because the statutes are newly enacted and adopted significant questions remain to their application in subrogation and other claims. What follows is a brief analysis of the statutes that exist in Arizona, California, and Nevada.

STATE: ARIZONA

(Effective Date: August 22, 2002. Amended Effective May 10, 2004)

1. Who is subject to Act?

Any purchaser of a dwelling claiming damages to a real property arising from a construction defect or condition of the property when sold. Ariz. Rev. Stat. Ann. §12-1361(4), (6).

2. Who is protected?

Designers, builders, or sellers of dwellings. Ariz. Rev. Stat. Ann. §12-1361(7).

3. Notice required before filing suit.

Written notice required at least 90 days before filing action, except where defect presents immediate threat to life or safety. Ariz. Rev. Stat. Ann. §12-1362(A), 1363(A).

4. Consequence of claimant's failure to comply.

None.

5. Consequences of respondent's failure to comply.

None.

6. Effect on statute of limitations.

Statute of limitations tolled until 90 days after respondent receives notice of claim, or for such reasonable time as the parties agree in writing. Ariz. Rev. Stat. Ann. §12-1363(H).

7. Effect on damages.

None.

8. Other considerations.

Act does not apply if contract of sale or homeowners association documents contain commercially reasonable alternative dispute resolution procedures. Ariz. Rev. Stat. Ann. §12-1366.

Act does not apply to claims for personal injury, death, fraud, or damage to property other than a dwelling. Ariz. Rev. Stat. Ann. §12-1366(A).

In an action filed by claimant, the court shall award the successful party costs, expert witness fees, and attorneys fees. "Success" is further defined by the Act. Ariz. Rev. Stat. Ann. §12-1364.

Liability carrier for respondent must work cooperatively and in good faith to meet deadlines of act. Ariz. Rev. Stat. Ann. §12-1362(B).

ARIZONA TORT CLAIMS ACT & IMMUNITIES

I.

INTRODUCTION

Claims against public entities and public employees require special attention. Public entities and public employees are protected from certain liabilities in Arizona by statutory immunities that do not provide protection to other defendants. Certain procedural requirements apply to claims against public entities and public employees that do not apply to claims against other defendants. The failure to consider the applicable immunities may result in unnecessarily incurring costs by pursuing claims for which recovery must be denied. Failure to consider the applicable procedural requirements may result in the loss of a claim for which recovery should have been made.

Arizona Revised Statutes §12-820 through §12-826 describe immunities that protect Arizona public entities and employees from tort liabilities. The Statutes also describe procedural requirements that must be followed to pursue claims against governmental entities or employees. The Statutes include a statute of limitation specifically requiring that all actions against public entities or employees be brought within one year of the accrual of the cause of action.

II.

PROCEDURAL NOTICE REQUIREMENTS AND STATUTE OF LIMITATIONS

Injured parties seeking to obtain recoveries from public entities must be aware of procedural requirements for filing such claims and limitation periods specific to claims against public entities. A party may not merely file suit against a public entity within the time period for filing such claims against other defendants. Claims against public entities that fail to comply

with the procedural requirements for such claims or which ignore the statute of limitation applicable to such claims will be barred.

A.R.S. §12-821.01 describes the procedures a claimant must follow before suit can be filed against a public entity. The statute requires that claims against a public entity must be filed within 180 days after the cause of action accrues. The statute includes specific requirements for the information that must be stated on the notice of claim. The claim must contain facts sufficient for the public entity to understand the basis for its liability, state a specific demand, and information or documentation supporting the damages claimed. Most public entities have forms for submittal of claims. Claims are deemed denied if the public entity makes no response to the demand within 60 days of filing.

Claimants must be aware of the statute of limitation specific to claims against public entities. A.R.S. §12-821 states that all actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward. The statute applies to all claims against public entities whether the claim seeks recovery for personal injury, property damage, or other damage. The statute creates a much shorter time for filing property damage claims against public entities than the two year period within which property damage claims can be filed against other defendants.

III.

STATUTORY IMMUNITIES

A. Background

The immunities codified by the statutes protect governmental entities and employees from liability arising from acts or omissions occurring during the exercise of (1) legislative

functions or (2) administrative functions involving the determination of fundamental governmental policy. (A.R.S. §12-820.01). The Statutes also provide qualified immunities against liabilities arising from acts or omissions of government employees performing certain administrative tasks unless the employee was grossly negligent or intended to cause the injury that occurred. (A.R.S. §12-820.02).

Arizona public entities and employee were historically protected against tort liabilities, as they were in other jurisdictions, by common law governmental and sovereign immunities. However, in 1963, the Arizona Supreme Court rejected the governmental immunity doctrine. Stone v. Arizona Highway Commission, (1963) 93 Ariz. 384, 381 P.2d 107. Subsequent decisions by lower courts then restored governmental immunities in limited contexts (e.g., Massengil v. Yuma City, (1969) 104 Ariz. 308, 656 P.2d 597. In Ryan v. State, (1982) 134 Ariz. 308, 656 P.2d 597, the Arizona Supreme Court reasserted its position that governmental immunities should be limited. In Ryan, the Court stated:

“Employing the spirit of the Stone decision, we propose to endorse the use of governmental immunity as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy. Otherwise, the state and its agents will be subject to the same tort law as private citizens.” Id. at 311.

The Court recognized that, unfortunately, the immunity could be eroded by future decisions on a case-by-case basis and invited legislature intervention on the issue. The legislature responded to the Supreme Court’s invitation for legislative intervention and enacted the “Actions Against Public Entities or Public Employees” statute. A.R.S. §§12-820 through 826.

B. Absolute Immunity

The purpose behind the absolute immunity for legislative acts or administrative acts determining fundamental governmental policy provided by A.R.S. §12-820.01 is to allow governmental entities to govern without being hampered by the threat of liability for legislative or governmental decisions. Public entities cannot be liable for damages caused by acts or omissions allegedly arising out of the exercise of a legislative function or an administrative function that involves the determination of a fundamental governmental policy.

Most litigation regarding the absolute immunity provided by A.R.S. §12-820.01 concerns the question of whether an administrative function involves the determination of a fundamental governmental policy. The general rule is that the immunity applies to policy related duties but does not apply to duties that merely implement legislative policies. Pima County v. State, (Ct. App. 1992) 174 Ariz. 402, 850 P.2d 115. There is no easy test for determining whether an administrative function is immune. The legislature attempted to assist the courts in the determination by stating that the determination of a fundamental governmental policy involves the exercise of discretion. A.R.S. §12-820.01 B.

A decision of whether or not to undertake a project involves the exercise of discretion and is shielded by the immunity doctrine while the duties of implementing the policy once adopted are not discretionary and should not be protected by the immunity statute. For example, the decision to build a playground should be protected by immunity while those involved in the design and construction of the playground must observe a standard of care and the statute does not protect them from liability arising from their work. The legislature has preempted the courts from defining the issue in certain contexts by describing the following actions, among others, as

actions involving the determination of fundamental governmental policy: a determination of whether to seek or whether to provide resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel, or the provision of governmental services; or a determination of whether and how to spend existing resources, including those allocated for equipment, facilities, and personnel.

C. Qualified Immunity

The legislature decided that certain activities of public entities should be protected with immunity even though they did not involve the determination of a fundamental governmental policy or the exercise of discretion. Consequently, the legislature enacted the qualified immunities of A.R.S. §12-820.02. The qualified immunity protects a public entity from liability arising from any failure to discover violations of any provision of law during the inspection of property other than property owned by the public entity. The qualified immunity also protects public entities from liability arising from the issuance of, or the failure to revoke or suspend, any permit, license, or certificate. The qualified immunity also protects public entities from liability arising from any failure to make an arrest, any failure to return an arrested person to custody, or injuries caused by released prisoners or persons on probation.

The qualified immunities do not protect contractors hired by public entities to perform duties protected by the qualified immunities. The qualified immunity statute protects only public entities and their employees. Consequently, claims may be brought against the contractor for a public entity even though a claim against the public entity would have been barred if the work had been done by public entity employees.

The public entity remains protected by the immunity even if the work was done by a contractor. For example, a city may retain a contractor to inspect and approve residential construction for occupancy. The contracted inspector may fail to discover violations of law (code violations) that result in damage. The contractor would not be immune from liability for such negligence. A public entity, on the other hand, could not be liable for such negligence by its own employees and is not vicariously liable for such negligence by its contractors.

III.

CONCLUSION

Claims against public entities are subject to a number of rules that are different from those rules applicable to claims against other types of parties. Public entities are protected by immunities that do not protect other parties. Claims against public entities are subject to procedural requirements that do not apply to claims against other parties. The statute of limitation period applicable to claims against public entities may be much shorter than the statute of limitation period applicable to claims for similar damages against other types of defendants. A party seeking to recover damages from a public entity must be aware of these rules to protect its claim and while determining the value of its claim.

I.

THE PRODUCT LIABILITY TORTS

A. The Strict Product Liability Doctrine

In the 1960's, the American Law Institute drafted and adopted Restatement (2d) of Torts

§402A. This section states:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rules stated in subsection (1) apply although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The Restatement serves as the "model" for most strict product liability law. Many states have adopted statutory versions of the Restatement. However, there is some variation among states in the way §402A is applied.

1. Who May Be Liable for Damages Caused by Defective Products?

Any entity involved in the chain of distribution for a defective product may be liable for injuries caused by the defect. Potentially liable parties include the manufacturer, distributor, and retailer of the product. The purpose behind the strict product liability doctrine is to spread the risk of loss caused by defective products away from the innocent consumer and to the entities in the chain of distribution for the defective product that profit from the sale of the product. The seller or retailer of a defective product may be liable for resultant injuries or damages even if neither entity was at fault for creating the defect. However, in most states, a distributor or

retailer of a defective product found liable for injuries caused by the defect may seek indemnity against such liability from the entity responsible for creating the defect.

The liability of distributors and sellers not at fault for creating a product defect typically survives in states where the doctrine of joint and several liability has been abolished in favor of a pure comparative fault system of liability. In these states, product liability is considered to be a form of fault. Although the seller and/or distributor may not be jointly and severally liable with the culpable manufacturer, the fault of the manufacturer is imputed by law to the distributor/retailer.

2. Elements of the Product Liability Tort Claim

Generally, to prevail on a strict product liability claim, a plaintiff must prove that an inherent defect in a product caused the damages claimed. In other words, the plaintiff must prove (1) that the product was inherently defective and (2) that the defect in the product caused the injury or damage. Both elements of the strict product liability claim must be specifically and independently proved. The strict product liability doctrine evolved, in part, because the plaintiff injured by a defective product will not typically be in a position to prove negligence during the design/manufacturing process. Therefore, product liability plaintiffs are not required to prove the specific act or omission that created the defect.

To establish the first element of a strict product liability claim, a plaintiff must prove that the product was inherently defective. That is, the plaintiff must prove that an inherent defect existed in the product at the time the product left the custody and control of the manufacturer/supplier/retailer. Some states, such as Arizona, follow Restatement (2d) §402A and also require the plaintiff to prove that the defect rendered the product unreasonably dangerous.

To establish the defect element of the claim, the plaintiff must show a specific defect, or specific defects, that existed, or could have existed, in the product and caused the damages in issue. Typically, opinion testimony by a qualified expert is necessary to establish that the product was inherently defective. In a product's liability case, plaintiff's burden of proof is not carried by evidence of product failure and the conclusionary argument that the product must have had some kind of defect otherwise it would not have failed.

To establish the second element of a strict product liability claim, a plaintiff must prove that the damages were caused by the defect in the product. Proving that the product was inherently defective is not, by itself, sufficient to establish a prima facie product liability claim. A causal connection must be established between the inherent defect and the injury. A defendant in a product liability case is not liable for damages caused by a defective product unless the damages were actually caused by the defect in the product.

A product can be defective due to a manufacturing defect, a design defect, or due to a failure to provide adequate warning about an unavoidable danger associated with the use of the product. A product may include a manufacturing defect if the product was not manufactured as intended. A design defect may exist in a product if use of the product caused injury even though the product was manufactured as designed and intended. A product may have a failure to warn defect if the manufacturer/seller fails to provide an adequate warning of an unavoidable risk associated with the use of the product.

3. Manufacturing Defect

A product may include a manufacturing defect if the product was not manufactured as intended. A product may include a manufacturing defect if the product was not manufactured to

its own specifications. Again, many states differ as to whether the manufacturing defect must render the product unreasonably dangerous.

There are many examples of manufacturing defects. A component part of a product may have been omitted during the manufacturing process. A product may have been improperly assembled. A product may have been broken or damaged during the manufacturing process. A part or component of a product may be weaker or more prone to failure than intended.

The strict product liability plaintiff alleging a manufacturing defect must prove the existence of a specific manufacturing defect to prevail on the claim. Although the product failure can be evidence that the product was defective, the failure alone does not prove the defect. The plaintiff must prove, either through physical or circumstantial evidence, a specific defect that existed in the product and caused the failure that occurred.

Courts have acknowledged that a plaintiff may not be in a position to offer direct physical evidence of a product defect when the product is destroyed by the product failure. It has been suggested that some manufacturers design their products so that, if the product fails, the product will be completely destroyed by the failure and no evidence will remain to prove the specific defect that caused the failure. For this reason, courts have developed the "malfunction theory" to establish defect by circumstantial evidence.

The malfunction theory has particular and important application in fire subrogation cases. In these cases, the product is very often so heavily damaged or completely destroyed by the fire that no physical evidence exists to prove the product defect. Although the elements of the malfunction theory differ from state to state, a plaintiff in such cases can generally establish a manufacturing defect strict product liability claim through the following:

1. Proof that the fire originated in or at the product;

2. The product was relatively new, i.e., early in its useful life;
3. The product was properly used by the plaintiff;
4. There was never any trauma or damage to the product; and
5. Although a specific defect cannot be identified due to the physical damage to the product, plaintiff's expert can identify one or several ways in which the product could have been defective and started the fire.

For example, consider the claim against the manufacturer of a coffee maker involved in a fire. The coffee maker was purchased brand new less than a week before the fire and was properly being used for the first time. The plaintiff's expert eliminated all potential ignition sources in the area of origin other than the coffeemaker and eliminated user negligence as a cause of the fire. The coffee maker was almost completely consumed by the fire rendering it virtually useless as physical evidence. Plaintiff's expert can testify that these facts support the opinions that the coffee maker was defective and that the defect caused the fire. However, to establish a prima facie case against the manufacturer/seller, the expert must also describe a specific defective condition that could have existed in the coffee maker and caused the fire that occurred.

The malfunction theory most probably would not be permitted to prove that a fire originating in an eight year old battery charger was caused by an inherent defect in the battery charger when the remains of the battery charger are so damaged that it is impossible for any expert to identify the specific problem with the battery charger that caused the fire. A plaintiff most probably would not be able to establish the necessary elements of the claim when the battery charger functioned properly for eight years before the fire. Additionally, battery chargers

are susceptible to external damage and some extent external damage would have been expected over an eight year period.

Some states have codified affirmative defenses to product liability claims. For example, Arizona Revised Statute 12-688 states that a defendant in a product liability action shall not be liable if the defendant proves (1) the damage was caused by a subsequent modification of the product that was not reasonably foreseeable or (2) the damage was caused by the use or consumption of the product in a manner or in an activity that was not reasonably foreseeable. These statutory affirmative defenses are not typical affirmative defenses which allow a defendant to avoid liability even if a plaintiff proves the elements of its claim. The affirmative defense that the damages were caused by an alteration or modification of the product that was not reasonably foreseeable is merely a defense that the product was not inherently defective and/or the damages were not caused by an inherent defect in the product. The affirmative defense that damages were caused by the use of a product in a manner or in an activity that was not reasonably foreseeable is merely a defense that the damages were not caused by an inherent defect in the product.

4. Design Defect

Design defects are usually easier to physically identify than manufacturing defects. Design defects should be common to the entire product line and not specific, as with manufacturing defects, only to the product involved in the incident. Therefore, evidence such as exemplar products and design drawings should exist to identify the design defect even though the extent of damage to the product involved in the incident may render it useless as evidence.

A court can apply a number of tests to determine whether a product is defective in design. Design defects can be established through the aforementioned consumer expectation or

risk/benefit tests described by the Barker court. Most states also allow courts discretion to develop other design defect tests as necessary for specific circumstances.

The consumer expectation test addresses whether a product failed to perform as safely as an ordinary consumer would have expected when used in an intended or reasonably foreseeable manner. The consumer expectation standard for design defect is very similar to the Uniform Commercial Code Warranty of Fitness and Merchantability. The standard requires a product to safely perform the purpose for which it is intended.

The risk/benefit test allows a jury to find a product defective in design even if the performance of the product meets consumer expectations. Under California law, a plaintiff attempting to establish a product defect case pursuant to the risk/benefit test need only show that the product design caused injury. The burden then shifts to the defendant to show that the benefits of the challenged design outweigh the risk of danger inherent in the design in consideration of factors such as the gravity of the danger, the likelihood that the danger will occur, the mechanical feasibility of a safer or alternative design, the monetary cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design. Some states, however, require a plaintiff to prove both that the design caused the injury and that an alternative design is feasible in consideration of the factors stated above. As many commentators have noted, requiring a plaintiff to prove the feasibility of an alternative design places a burden of proof on the plaintiff more akin to the burden imposed by the negligence claim and moves the design defect claim away from the doctrine of strict product liability.

Industry standards can be very helpful in proving design defect cases. Industry standards are used as guidelines for the design and manufacturing of products. The American National

Standards Institute and Underwriters Laboratories have issued a variety of standards applicable to product design and warnings. Violation of a standard can be evidence of product defect.

Many states have codified the "state of the art" defense as an affirmative defense to a design defect product liability claim. The state of the art defense allows a defendant to avoid liability by showing that the risks complained of by the plaintiff were not, at the time the product was sold, discoverable using prevailing research and scientific techniques or procedures required by federal or statute regulatory authorities charged with supervision or licensing of the product. The state of the art defense has not been adopted in all jurisdictions. Some states, such as Arizona, hold that the state of the art defense is a complete defense to a product liability action. In other states, compliance with the state of the art creates a rebuttable presumption that the product was not defective. In yet other states, a product is presumed free from defect if there was compliance with the state of the art but the presumption may be rebutted by a preponderance of the evidence. Finally, some states hold that compliance with the state of the art is merely evidence that the product was not defective.

5. Failure to Warn Defects

The manufacturer/seller of a product may be liable for damages caused by an inherent danger in a product if there was a failure to provide adequate (1) warning of the danger and (2) instructions as to how to avoid the danger. The majority of jurisdictions impose as an element of the failure to warn claim a requirement that the danger must have been reasonably foreseeable to the manufacturer or discoverable through reasonable inspection/analysis for a duty to warn to arise. Therefore, the burden of proof imposed upon a plaintiff attempting to prove a product liability failure to warn claim is more akin to the negligence burden of proof than to the strict product liability burden of proof.

Sometimes, the line blurs between failure to warn and design defect cases. A warning might minimize a danger. However, a simple and inexpensive design change may totally eliminate the danger. Plaintiffs often allege both causes of action.

To establish a defendant's liability for damages pursuant to a product liability failure to warn theory, the plaintiff must show the following:

1. The defendant was the manufacturer/distributor/retailer of the product;
2. Use of the product in a manner reasonably foreseeable to the manufacturer involves a substantial danger that would not be readily recognized by the ordinary user of the product;
3. The manufacturer knew, or should have known, of the danger given the generally recognized and prevailing scientific knowledge available at the time of the manufacture and distribution;
4. The defendant failed to provide an adequate warning against the danger created by the reasonably foreseeable use, i.e., defendant failed to adequately warn against the specific risk of harm created by the danger;
5. The defendant failed to provide adequate instruction to avoid the danger;
6. The injury would not have occurred if adequate warning and instruction had been provided; and
7. The injury resulted from a use of the product that was reasonably foreseeable to the defendant.

A defendant is not liable for damages pursuant to the failure to warn product liability theory even though the warning and/or instruction was not adequate if the injured party knew of the danger, knew how to avoid the danger and failed to take adequate precautions against the

danger. In these situations, the failure to warn did not cause the damage and it is inferred from the plaintiff's conduct that the damage would have occurred even if the warning had been adequate.

B. Negligence

The elements of a negligence cause of action against a product manufacturer or seller arising out of a defective product are the same as for most any other type of negligence action: duty, breach of duty, causation and damage. The duty, whether in design, manufacturing, or warning, is that of reasonable care.

The negligence cause of action remains important to product liability claims despite the tremendous expansion of the strict product liability doctrine. There are four basic reasons for a plaintiff in a product action to plead both negligence and strict liability. Most importantly, pleading negligence provides a product liability plaintiff with opportunities to introduce evidence and argument to prejudice juries against product liability defendants.

Reason One: Having been instructed on strict product liability and negligence, the plaintiff's reduced burden under strict liability may be clearer and more easily understood by a jury. This is especially true in design defect cases based on the "risk-utility" analysis. When asserting a negligent design claim, a plaintiff must prove that the risk of the challenged design outweighs the utility of the design. However, in a strict liability design defect action, the defendant has the burden of showing that the utility of the design outweighs the risk.

Reason Two: Allowing a jury to consider two theories of recovery provides the jury with opportunity to compromise and expands the juries' ability to find liability. For example, a jury can find that a product was defective but that the manufacturer and/or retailer was not at fault for

creating the defect. The jury can still find liability in such a situation with a verdict for strict liability and against negligence.

Reason Three: It is generally accepted in jury trials that a Plaintiff is more likely to succeed if the jury becomes angry with the Defendant. It is significantly easier to prejudice a jury against a defendant if the general thrust of the Plaintiff's argument is that the Defendant acted unreasonably or with disregard to the harm that could have resulted from the defendant's conduct. These arguments may not be relevant in some situations if only a strict product liability cause of action is alleged.

Reason Four: A general finding of negligence serves as a safeguard against reversal on appeal. The reasonableness of a manufacturer's conduct is universally accepted as a matter for a jury. Courts are reluctant to overturn a jury finding of negligence.

C. Warranty

The warranty claim must be considered as a potential tool to recover damages caused by defects in products. The emergence and growth of the strict products liability doctrine has substantially diminished the role of warranty law in product defect claims because warranty claims are duplicative of the strict product liability claims in most product defect actions. Warranty claims, however, may provide the basis for recovery of damages arising from defective products in some situations where the strict product liability claim cannot be asserted.

Warranty claims are contract claims. Warranty claims arise from the contract for the sale of a product. Contractual warranty claims are distinct from, though sometimes subsumed by, the strict product liability and negligence tort claims.

The warranty claim is important and takes precedence over the strict product liability claim in those situations which involve only economic losses. Economic losses include costs of

repairing the defect in the product, income or profit lost due to the failure of the product to perform as expected, and other costs incurred due to the failure of the product to perform as expected. Recovery of only economic losses without other property damage or personal injury is typically not permitted pursuant to the strict product liability or negligence tort claims. (See Economic Loss Doctrine). However, the importance of the warranty claims is not limited to only those situations involving only pure economic loss.

Warranties can be express, implied by statute, or created by common law. Different warranties may be available to an ordinary consumer of a product, such as a homeowner, than are available to a business that purchases a product for use in its business operation. Express warranties created by statute typically cannot be disclaimed or limited. Implied warranties can usually be disclaimed or limited pursuant to statutory requirements.

Warranty claims are especially effective to recover construction defect damages from the builder/seller of a home when the actual defective construction was done by a project subcontractor.

1. California

Express Warranty

Express warranties are created by the express language of the written contract. Surprisingly, express warranties are also created by statute and implied into a sales contract. Express warranties can exist even when there is no written contract and no discussion of warranty during the sale of the product. California Commercial Code §2313.

The effect of an express written warranty is determined by the plain meaning of the warranty language.

The terms of an implied express warranty are created by (1) affirmations of fact or promise by the seller, (2) descriptions of the product by the seller, and (3) samples or models of the product which become part of the basis of the bargain for the product. The extent of implied express warranties are determined by a jury. The injured party need not be the purchaser of a defective product to assert the express warranty.

Express warranties **cannot** be disclaimed. California Commercial Code §1793.

California Commercial Code §2313 provides:

“(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall perform to the affirmation and promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the good shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be the seller’s opinion or commendation of the goods does not create a warranty.”

Implied Warranties

There are basically two implied warranties, the implied warranty of merchantability and the implied warranty of fitness for particular purpose. A version of each warranty is codified in both the Civil Code and the California Commercial Code. The warranty created by California Commercial Code §2314 is enforceable only against merchants of the defective product. The warranties created by Civil Code §§1792 and 1792.1 apply to retail sales of consumer goods.

All damages caused by breaches of the implied warranties are recoverable pursuant to the warranty claims. California Commercial Code §2725 and Civil Code §3333.

All four warranties can be effectively disclaimed pursuant to statutory requirements. California Commercial Code §2316 and California Civil Code §§1792.4, 1792.5.

These implied warranties are basically duplicative of the strict product liability tort claim with respect to the recovery of property damages and personal injuries. They are effective for the recovery of economic losses.

California Commercial Code §2314 states:

“Implied warranty; merchantability; usage of trade

- (1) Unless excluded or modified, (§2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may be require; and (f) conform to the promises or affirmations of facts made on the container or label if any.
- (3) Unless excluded or modified (§2316) other implied warranties may arise from the course of dealing or usage of trade.”

California Commercial Code §2315 states:

“Implied warranty: fitness for a particular purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods should be fit for such purpose.”

California Civil Code §1792 states:

“Implied warranty of merchantability; manufacturers and retail sellers; indemnity

Unless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer’s and the retail seller’s implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section.”

California Civil Code §1792.1 states:

“Goods for particular purpose; implied warranty of fitness by manufacturer

Every sale of consumer goods that are sold at retail in this state by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer’s skill or judgment to select or furnish suitable goods shall be accompanied by such manufacturer’s implied warranty of fitness.”

Common Law Warranties

California courts have permitted the creation of warranties at common law. The implied warranty of habitability is an example of a common law warranty. Common law warranties are not created by express language in a contract or by the legislature. Common law warranties are judicially created.

Statute of Limitation

In California, a four year statute of limitation is applicable to claims arising out of contracts for sales of goods. California Commercial Code §2725. The statute of limitation period begins to run on the date the defective product is delivered and not on the occurrence of the damage unless the contract specifically states otherwise. California Commercial Code §2725.

The four year statute of limitation for a breach of written warranty does not begin to run on the date of damage. Again, the statute of limitation period for a breach of written warranty claim begins to run on the date the product is delivered. Furthermore, while California Commercial Code §2725 prescribes a four year statute of limitation for breach of written contract claims while California Code of Civil Procedure §338 prescribes a three year statute of limitation for property damage and personal injury claims, California courts have held that the nature of the injury rather than the cause of action alleged determines which statute of limitation is applicable to a particular claim. Therefore, a three year statute of limitation may apply in California to a claim for property damages arising from a fire allegedly caused by a defective product whether pled in tort or contract.

2. Arizona

Arizona law is the same as California law with respect to express warranties, both written and statutorily implied, and also with respect to the UCC implied warranties of merchantability and fitness for particular purpose. Arizona has not adopted statutory implied product warranties outside the scope of the UCC warranties. Arizona courts have recognized a common law implied product warranty and a common law warranty that attaches to new home construction. However, the terms of the implied product warranty have not been defined and the common law implied product warranty claim appears to be duplicative of the strict product liability tort claim.

Express Warranty

Express warranties are created by the express language of a written contract. The effect of an express written warranty is determined by the plain meaning of the warranty language. Privity is required for an express written warranty claim.

Express written warranties are also implied by statute. A.R.S. §47-2313 states as follows:

“(A) Express warranties by the seller are created as follows:

- (1) Any affirmation of fact or promise by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall perform to the affirmation and promise.
- (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the good shall conform to the sample or model.
- (B) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be the seller’s opinion or commendation of the goods does not create a warranty.”

Implied Warranties

Arizona has adopted the UCC versions of the implied warranty of merchantability and the implied warranty of fitness for particular purpose. Privity is necessary to maintain a statutory implied warranty claim. Arizona has not adopted implied warranties similar to the warranties adopted by the California Civil Code. All damages caused by breaches of the implied warranties are recoverable pursuant to the warranty claims.

A.R.S. §47-2314 states:

“Implied warranty; merchantability; usage of trade

(A) Unless excluded or modified, (§2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(B) Goods to be merchantable must be at least such as (1) pass without objection in the trade under the contract description; and (2) in the case of fundable goods, are of fair average quality within the description; and (3) are fit for the ordinary purposes for which such goods are used; and (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and (5) are adequately contained, packaged, and labeled as the agreement may be require; and (6) conform to the promises or affirmations of facts made on the container or label if any.

(C) Unless excluded or modified (§2316) other implied warranties may arise from the course of dealing or usage of trade.”

A.R.S §47-2315 states:

“Implied warranty, fitness for particular purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under §47-2316 an implied warranty that the goods shall be fit for such purpose.”

A.R.S. §47-2316 describes the requirements that must be met to effectively limit or disclaim a statutorily implied warranty. The requirements are similar to the California requirements.

Common Law Warranties

Arizona courts have recognized a common law implied warranty different from the A.R.S. §47-2314 and A.R.S. §47-2315 implied warranties. Rocky Mountain Fire & Casualty Co. v. Biddulph Oldsmobile, 131 Ariz. 289; 640 P.2d 851 (1982); Seekings v. Jimmy GMC of

Tucson, Inc., 130 Ariz. 596, 638 P.2d 210 (1981). Privity is not required to enforce the common law implied warranty. The Rocky Mountain court and the Seekings court describe the common law implied warranty claim as a tort claim different from the statutorily implied warranties which are described as contract claims. However, no court has described the elements of the common law implied warranty claim. For all intents and purposes, the common law implied warranty claim is duplicative of the strict product liability claim.

Arizona has recognized an implied warranty of habitability and workmanlike manner that applies to new home construction. The warranty is enforceable against the builder/seller of the home if the builder/seller is in the business of building and selling homes. Privity is not required to enforce the warranty.

Statutes of Limitation

A.R.S. §12-551 which attempted to place a twelve year statute of repose on claims alleging damages caused by defective products has been declared unconstitutional.

A.R.S. §12-542 places a two year limitation on claims for property damage or personal injury.

A.R.S. §47-2725 places a four year limitation on claims for breach of contract for sale, whether written or oral.

3. Nevada

Nevada warranty law is very similar to Arizona warranty law. Nevada recognizes express written warranties and has adopted the UCC code provisions with respect to express and implied warranties. Nevada has not recognized any common law implied warranties other than the implied warranty of habitability.

Express Warranty

Express warranties are created by the express language of a written contract. The effect of an express written warranty is construed by the plain meaning of the warranty language. Privity is required for express written warranty claims seeking to recover property damages. Third party beneficiaries of an express warranty may bring personal injury claims under the warranty.

Express warranties are implied by statute as in Arizona and California. Nevada Revised Statute §104.2313 creates express warranties by the seller of a product using the same language as A.R.S. §47-2513 previously set forth herein.

Implied Warranties

Nevada has adopted the UCC versions of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Privity is necessary to maintain a statutory implied warranty claim. Nevada has not adopted implied warranties similar to the warranties adopted by the California Civil Code. All damages caused by breaches of the implied warranties are recoverable pursuant to the warranty claims.

Nevada Revised Statute §104.2314 creates the implied warranty of merchantability with the same language used by A.R.S. §47-2314 previously set forth herein. Nevada Revised Statute §104.2315 creates the implied warranty of fitness for particular purpose using the same language used by A.R.S. §47-2315 previously set forth herein.

Nevada Revised Statute §104.2316 and Nevada Revised Statute §104.2719 describe the manner in which the statutorily implied warranties can be modified or disclaimed.

Statutes of Limitation

Nevada Revised Statute §104.2725 places a four year limitation on claims for breach of a contract for sale, whether written or oral.

Nevada Revised Statute §11.190 places a three year limitation on claims for property damage.

4. New Mexico

New Mexico law is the same as Arizona law, with respect to express warranties, both written and implied, and with respect to the Uniform Commercial Code's implied warranties of merchantability and fitness for a particular purpose. New Mexico has not adopted implied product warranties outside the scope of the UCC warranties. New Mexico courts have recognized common law warranty principles where the UCC does not apply.

Express Warranty

Express warranties are created by the express language of a written contract. The effect of an express warranty is determined by the plain meaning of the contract language. An express warranty is the written assurance by one party to a contract of the existence of a fact upon which the other party may rely. See, Steadman v. Turner, 507 P.2d 799 (N.M. Ct. App. 1973).

Express warranties are also implied by statute pursuant to N.M. Stat. §55-2-313 which uses the same language as A.R.S. §47-2313.

Implied Warranties

New Mexico has adopted the UCC provisions regarding the implied warranty of merchantability and the implied warranty of fitness for particular purpose. Privity is necessary to maintain a statutory action under an implied warranty theory. New Mexico has not adopted implied warranties similar to those outlined in the California Civil Code. All damages caused by a breach of an implied warranty are recoverable pursuant to the implied warranty claim.

N.M. Stat. §55-2-314 creates the implied warranty of merchantability using the same language as A.R.S. §47-2314.

N.M. Stat. §55-2-315 creates the implied warranty of fitness for a particular purpose using the same language as A.R.S. §47-2315.

N.M Stat. §55-2-316 describes the requirements for effective limitation on disclaimer of the statutorily implied warranties.

Common Law Warranties

New Mexico courts have recognized common law warranties aside from those codified by statute. See, Camino Real Mobile Home Park Partnership v. Wolfe, 891 P.2d 1190, 1196 (N.M. 1995) (recognizing common law principles are applicable where real property is involved).

Statute of Limitations

N.M. Stat. §55-2-725 places a four year limitation on claims for breach of a contract for sale.

N.M. Stat. §37-1-4 places a four year statute of limitation on claims for damage to property.

5. Utah

Utah law is the same as California, Arizona, Nevada and New Mexico law with respect to express warranties, both written and statutorily implied, and with respect to the UCC implied warranties of merchantability and fitness for a particular purpose. Utah has not adopted any statutory product warranties outside the scope of the UCC warranties. Utah courts have not specifically addressed common law implied warranty principles in product liability situations.

Express Warranty

Express warranties are created by the express language of a written contract. The effect of an express warranty is determined by the plain meaning of the contract language.

Express written warranties are also implied by statute pursuant to Utah Code §70A-2-313 which uses the same language as A.R.S. §47-2313.

Implied Warranties

Utah has adopted the UCC version of the implied warranty of merchantability and the implied warranty of fitness for particular purposes. Privity is required to maintain a statutory implied warranty claim.

Utah Code §70A-2-314 adopts the implied warranty of merchantability using the same language as A.R.S. §47-2314.

Utah Code §70A-2-315 adopts the implied warranty of fitness for a particular purpose using the same language as A.R.S. §47-2315.

Utah Code §70A-2-316 describe how implied warranties can be effectively limited, modified or disclaimed. See, Rawson v. Conover, 2001 UT 24 and Billings Yamaha v. Rick Warner Ford Inc., 1984 Utah Lexis 831.

Common Law Warranties

Utah courts have recognized common law implied warranties in certain situations but have not addressed common law warranty principles in product liability actions. See, Carlie v. Morgan, 1996 Utah Lexis 47 (noting that the Utah Fit Premises Act, Utah Code §§57-22-1 et al., codified the common law implied warranty of habitability).

Statute of Limitations

Utah Code §70A-2-725 places a four year limitation on claims for breach of contracts for the sale of goods.

Utah Code §78-12-26 places a three year statute of limitation on claims for property damage.

