CONSTRUCTION

HOMEOWNERS WHO PURCHASE DIRECTLY FROM HOMEBUILDERS MAY SEEK RECOVERY OF ATTORNEYS' FEES ON CLAIMS FOR BREACH OF THE IMPLIED WARRANTY OF WORKMANSHIP AND HABITABILITY.

by Todd A. Baxter

Three things have long been settled law in Arizona regarding residential construction: (1) a homebuilder owes a homeowner an implied warranty of workmanship and habitability with regard to the construction of the home; (2) the implied warranty arises, not from *the contract* for construction, but from the actual construction of the home; and (3) the protection of the implied warranty extends to subsequent purchasers who did not purchase their homes directly from the builder.

Because the implied warranty arises from construction of the home, and provides a remedy that is contractual in nature even to homeowners who have no contract with the builder, for some time, there was a question regarding whether a successful party on an implied warranty claim was entitled to an award of attorneys' fees under Arizona's contract fee-shifting statute (A.R.S. § 12-341.01(A)). In 2012, in the matter of *Sullivan v. Pulte*, the Arizona Court of Appeals answered that question. The court held that the fee-shifting statute did not authorize an award of attorneys' fees for a claim for breach of the implied warranty because the fee-shifting statute applies only to express contracts and contracts *implied-in-fact*, but the implied warranty is *implied-in-law*. Explaining further, the Court of Appeals noted that claims for breach of the implied warranty "sound in contract" rather than in tort, but do not "arise out of a contract" for purposes of determining an award of attorneys' fees.

The homeowners in *Sullivan* were subsequent purchasers, but nothing in the Court of Appeals' opinion indicates that the absence of a contract between the homeowners and the builder had any bearing on the decision of the attorneys' fees issue. Instead, the decision appears to be based on the implied warranty arising from construction of the home rather than from contract. By contrast, in the matter of *Sirrah v. Wunderlich*—decided June 16, 2016—the same court held that the successful parties there, the homeowners, were entitled to an award of attorneys' fees for their breach of implied warranty claim, precisely because they were parties to a contract with the builder.

On appeal, the builder, Sirrah, relied on the decision in *Sullivan* and argued that no fees should be awarded for the breach of implied warranty claim because that claim did not "arise out of or enforce a contract." The Court of Appeals disagreed.

The court distinguished *Sullivan* and noted that the homeowners there had no express or implied-in-fact contract with the builder, but that the implied warranty claim "in this case was based on the express construction contract between Sirrah and the Wunderlichs[,]"and that "[t]he implied warranty attached to that express contract and the Wunderlichs' claim for breach of that warranty thus enforced a term or provision of it." (Emphasis added). Although the opinion in *Sirrah* did not reject the principle that the implied warranty arises from construction of the home, the court apparently based its decision on the concept that the implied warranty "is imputed into the contract for construction . . . " thus focusing on the *contract* rather than the *construction* as was the case in earlier decisions.

The original extension of implied warranty claims to subsequent purchasers effectively eliminated any distinction between them and original purchasers (who bought their homes directly from the builder) for purposes of such claims. With the *Sirrah* decision, the Court of Appeals has now reinstated a distinction between original purchasers and subsequent purchasers: where original purchasers bring a claim for breach of the implied warranty, the successful party may potentially recover their attorneys' fees; where subsequent purchasers bring such a claim, no fees may be awarded under the statute.

The notion that a claim for breach of the same warranty—implied by law and arising from construction of the home—"arises out of a contract" when made by an original purchaser and does not "arise out of a contract" when made by a subsequent purchaser seems counterintuitive. Nevertheless, unless and until the Arizona Supreme Court is presented with an opportunity to resolve the issue, that distinction is the law of the land.

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