AT AN ECONOMIC LOSS: ASSESSING THE IMPLICATIONS OF *SULLIVAN V. PULTE HOME CORP.* FOR ARIZONA CONSTRUCTION CONTRACTORS

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Many Arizona homeowners are noncontracting subsequent purchasers—they are secondhand buyers who neither bargained for nor contracted with the builders of their homes. When a construction defect was discovered, the economic loss doctrine stood as both a hurdle for those homeowners and a safety net for homebuilders.

But it turns out that the economic loss doctrine might not be such a hurdle after all. In Sullivan v. Pulte Home Corp.*, the Arizona Supreme Court held that the doctrine does not bar tort claims by noncontracting subsequent purchasers. The decision is likely to cause uncertainty for homeowners and homebuilders alike as Arizona courts wade through murky waters to figure out what* Sullivan *means for construction-defect litigation. Many unanswered questions remain after the Court's short opinion. Can subsequent purchasers really bring tort claims more than a decade after construction has ended? The Arizona Supreme Court says yes, in theory, they can.*

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INTRODUCTION

Under contract law, individuals can "order their own affairs by making legally enforceable promises."[1] In many cases, courts will remedy breaches of these promises by protecting the expectation that the injured party had when he made the contract; the court will attempt to put the injured party in as good a position as he would have been in had the contract been performed.[2] Along the same lines, the purposes of damages as a remedy under tort law are "(a) to give compensation, indemnity, or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help."[3] Both contract and tort law remedies are frequently invoked in actions involving the construction of residential homes, and Arizona's statute of repose prohibits actions based in contract against developers of real property instituted more than eight years after substantial completion of construction.[4] The economic loss doctrine, endorsed in differing forms throughout the United States, endeavors to separate matters best left to contract from those properly resolved by the law of tort.[5] In *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, the Arizona Supreme Court stated that the doctrine "bars plaintiffs, in certain circumstances, from recovering economic damages in tort."[6] The Court extended the economic loss doctrine[7] to construction defect claims, holding that a property owner was limited to contractual remedies against an architect whose negligent design caused economic loss but no accompanying physical injuries to persons or other property.[8]

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1. RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981).
2. *Id.*
3. RESTATEMENT (SECOND) OF TORTS § 901 (1979).
4. Ariz. Rev. Stat. Ann. § 12-552 (1992). Substantial completion to the improvement of real property occurs when any of the following first occurs: (1) it is first used by the owner or occupant of the improvement; (2) it is first available for use after having been completed according to the contract or agreement covering the improvement, including agreed changes to the contract or agreement; or (3) final inspection, if required, by the governmental body which issued the building permit for the improvement. *Id.* § 12-552(E).
5. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 3 (Tentative Draft No. 1, 2012) ("Except as provided elsewhere in this Restatement, there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties.").
6. 223 P.3d 664, 665 (Ariz. 2010).
7. Before *Flagstaff Affordable*, the economic loss doctrine applied only to products liability claims. *Id.*
8. *Id.*

In the wake of *Flagstaff Affordable*, Arizona courts have carved out several nuances to the economic loss doctrine as it applies to construction defect litigation. Under Arizona law, the economic loss doctrine limits contracting parties to their contractual remedies where the injury is solely economic, without accompanying physical injury to persons or other property.[9] In *Sullivan v. Pulte Home Corp.*, the Arizona Supreme Court held that the economic loss doctrine does not bar noncontracting homeowners' negligence claims to recover damages for construction defects.[10] The decision could dramatically affect the future of construction defect litigation in Arizona, as the Court appears to have favored judicial management of risk allocation to private ordering in order to protect subsequent purchasers of Arizona homes. Homebuilders[11] may face uncertainty and increased legal costs because construction defect claims by subsequent, noncontracting purchasers can no longer be dismissed on summary judgment through the statute of repose or economic loss doctrine.

Part I of this Note will provide a brief overview of the economic loss doctrine in the United States, with a focus on Arizona's application of the doctrine. Part II will review the Supreme Court's decision in *Sullivan*. Finally, Part III will discuss the *Sullivan* decision's potential implications: why *Sullivan* may give more protection to noncontracting subsequent purchasers than original purchasers; how *Sullivan* presents a problem for the network-of-contracts theory (if and when it is addressed by Arizona courts); and how it will subject subcontractors to unforeseeable liability.

I. THE ECONOMIC LOSS DOCTRINE

The economic loss doctrine is "a common law rule limiting a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property."[12] The doctrine bars tort actions for purely economic harm—which, in the construction setting, are commonly for negligent construction—where a contract is present.[13] Economic loss is "pecuniary or commercial damage, including any decreased value or repair costs for a product or property that is itself the subject of a contract between the plaintiff and defendant, and consequential damages such as lost profits."[14] Importantly, the doctrine does not apply to the issue of "whether a plaintiff may assert tort claims for economic damages against a defendant absent any contract between the

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9. *Id.* at 672. "Other property" refers to property other than the home itself. For example, consider a defective retaining wall falling on a car and crushing it. The car is "other property."

10. 306 P.3d 1, 2 (Ariz. 2013).

11. For purposes of this Note, the term "homebuilders" includes any person or business involved in the construction of homes. "Subcontractors," who often specialize in a particular aspect of construction, such as roofing, plumbing, or concrete work, are a subset of "homebuilders."

12. *Flagstaff Affordable*, 223 P.3d at 667.

13. *Id.*

14. *Id.* (citing Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 694 P.2d 198, 209–10 (Ariz. 1984)).

parties."[15] Additionally, it does not apply to damages involving personal injury or damages to "other property" (i.e., damages to property other than the property that is the subject of the contract).[16]

Courts throughout the United States have disagreed as to the applicability of the economic loss doctrine where the parties do not have a contractual relationship.[17] To illustrate the disagreement, the Supreme Court of Texas noted:

> To say that the economic loss rule "preclude[s] tort claims between parties who are not in contractual privity" and that damages are recoverable only if they are accompanied by "actual physical injury or property damage," overlooks all of the tort claims for which courts have allowed recovery of economic damages even absent physical injury or property damage.[18]

Several other courts and commentators have fallen on either side of the argument. Colorado does not apply the doctrine in construction-defect cases because it recognizes a separate duty of care.[19] California bars tort actions for solely economic loss where there is no independent personal injury or damage to property.[20] Several other states have tackled the related issue of noncontracting parties in the construction-defect arena (for example, where an original owner wishes to sue a subcontractor or architect), and have come to differing conclusions.[21] There is considerable disagreement among jurisdictions, leading to

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15. *Id.* at 667.

16. *Id.* at 670.

17. 6 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR. ON CONSTRUCTION LAW § 19:10 (Westlaw 2013) ("Third parties lacking contractual rights have no legal basis for recovery of economic loss on theories of tortious conduct that cause neither personal injury nor damage to property beyond the defective property itself. Notwithstanding such straightforward distinctions, third party recovery in tort for economic loss caused by breaches of contract or warranty duties owed between others has been for decades a subject of heated controversy.").

18. Sharyland Water Supply Corp. v. City of Alton, 354 S.W.3d 407, 418 (Tex. 2011) (internal citations omitted).

19. *See* A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862, 870 (Colo. 2005) (holding that the economic loss doctrine does not apply to negligent residential construction claims against subcontractors; subcontractors owe homeowners an independent duty of care to act without negligence).

20. *See* Aas v. Superior Court, 12 P.3d 1125, 1128 (Cal. 2000) (no recovery for economic loss without independent tort), *superseded by statute*, Act of Sept. 20, 2002, Ch. 722, 2002 Cal. Legis. Serv. (codified as amended at CAL. CIV. CODE §§ 895–945.5 (2002)), *as recognized in* Rosen v. State Farm Gen. Ins. Co., 70 P.3d 351 (Cal. 2003).

21. *See* Indianapolis–Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 741 (Ind. 2010) (barring an owner's tort claims for economic loss asserted against subcontractors); Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1190–91 & n.11 (Utah 1996) (same, but allowing intentional tort claims), *abrogated by* Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC, 221 P.3d 234 (Utah 2009); Spring Creek Condo. Ass'n v. Colony Dev. Corp., 2008 WL 802729, *1, *3 (Ohio Ct. App. Mar. 27, 2008) (denying recovery of

uncertainty for both homeowners and homebuilders. Arizona addressed this issue recently, strictly limiting the doctrine's reach to those in contractual privity.

II. *SULLIVAN V. PULTE HOME CORP.*

John and Susan Sullivan purchased the home at issue, built by Pulte in 2000, from the original purchasers in 2003.[22] Because the Sullivans purchased the home from the original buyer, they never entered into a contract with Pulte. In 2009, the Sullivans hired an engineer to look into irregularities noticed in the home's hillside retaining wall. The engineer determined that the wall had been constructed in a "dangerously defective manner."[23] The Sullivans requested that Pulte repair the wall,[24] but Pulte claimed that it was no longer under obligation to repair or pay for any construction defects.[25]

The Sullivans filed suit, alleging consumer fraud, fraudulent concealment, negligence, negligent nondisclosure, negligence per se, negligent misrepresentation, and breach of implied warranty.[26] The trial court dismissed all of the Sullivans' claims.[27] The court found that Pulte never made any representation to the Sullivans, so the fraud claims could not be sustained.[28] The breach of implied warranty claim failed because the Arizona statute of repose barred implied warranty actions against builders "more than eight years after substantial completion of the improvement to real property."[29] The remaining tort claims were barred by the economic loss doctrine and dismissed.[30]

The Sullivans appealed. The Court of Appeals held that the trial court had properly dismissed the fraud and warranty claims, but that the economic loss doctrine did not bar the tort claims, because the Sullivans never entered into a contract with Pulte.[31] Pulte petitioned the Arizona Supreme Court, which granted review and upheld the Court of Appeals decision declining to extend the economic loss doctrine to noncontracting parties.[32]

The Sullivans argued that the economic loss doctrine did not bar their tort claims because the doctrine applies only to parties who are in privity of contract.[33] The Arizona Supreme Court reviewed only the economic loss issue, and agreed

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economic losses from the architect having no contractual relationship with claimant, to whom the architect owed no duty of care).

22. Sullivan v. Pulte Home Corp., 306 P.3d 1, 2 (Ariz. 2013).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* (quoting Ariz. Rev. Stat. Ann. § 12-552(A) (1992)).
30. *Sullivan*, 306 P.3d at 2.
31. *Id.*
32. *Id.* at 2–3.
33. Brief of Plaintiff-Appellant at 35, Sullivan v. Pulte Home Corp., 290 P.3d 446 (Ariz. Ct. App. 2010) (No. 1 CA-CV 10-0754), 2010 WL 8426466.

that the doctrine does not extend to noncontracting parties.[34] In the construction context, "the economic loss doctrine does not bar the homeowner's negligence claims to recover damages resulting from construction defects."[35] The Court reiterated that under Arizona law, the economic loss doctrine does not apply to parties who have no contractual relationship.[36] It noted that both *Flagstaff Affordable* and earlier Arizona cases were clear on this point.[37] The Court also stated that the purposes of the economic loss doctrine—encouraging private ordering of economic relationships, protecting expectations of contracting parties, ensuring the adequacy of contractual remedies, and promoting accident deterrence and loss spreading—are not served where there is no contractual relationship.[38]

Pulte argued that the claim should be barred nonetheless, because the Sullivans had an actionable claim under a contract theory—the implied warranty of workmanship and habitability.[39] The Court was not persuaded, finding that although the implied warranty claims sounded in contract, they were imposed by law and thus were not the product of private ordering of risk allocation.[40] Interestingly, the Court mentioned that although the Sullivans' tort claims were not barred by the economic loss doctrine, the Sullivans might nonetheless have a hard time recovering under a tort theory.[41]

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34. *Sullivan*, 306 P.3d at 3, 4.

35. *Id.* at 2.

36. The Court narrowly interpreted its own language in *Flagstaff Affordable* that "*a contracting party* is limited to its contractual remedies for purely economic loss from construction defects." *Id.* at 3 (citing Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc., 223 P.3d 664, 670 (Ariz. 2010)) (emphasis added).

37. *Sullivan*, 306 P.3d at 3 (noting that Donnelly Constr. Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292 (Ariz. 1984), "'correctly implied that [the economic loss doctrine] would not apply to negligence claims by a plaintiff who has no contractual relationship with the defendant'" (internal citation omitted)).

38. *Sullivan*, 306 P.3d at 3.

39. Under Arizona law, privity is not required to bring the implied warranty claims at issue. Lofts at Fillmore Condo. Ass'n v. Reliance Commercial Constr., Inc., 190 P.3d 733, 734 (Ariz. 2008); *see also* Richards v. Powercraft Homes, Inc., 678 P.2d 427, 430 (Ariz. 1984). The Sullivans' implied warranty claims, however, were barred by Arizona's statute of repose, as they were brought more than eight years after substantial completion of the project. Ariz. Rev. Stat. Ann. § 12-552(A) (1992).

40. *Sullivan*, 306 P.3d at 3. The Court also found that the purpose of the statute of repose was not circumvented, because it only applied to actions based in contract. The Sullivans' claims at issue were based in tort. *Id.* at 3–4.

41. *Id.* at 4 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 6(2), reporter's note to cmt. c (Tentative Draft No. 1, 2012) that "not[es] division of authority [on the issue] but conclud[es] that subsequent home purchasers should not recover in tort from homebuilder for negligent construction").

III. *SULLIVAN*'S IMPLICATIONS FOR HOMEBUILDERS AND OTHER NONCONTRACTUAL RELATIONSHIPS

A. How Does this Decision Affect Homebuilders Going Forward?

The Court's decision—that subsequent purchasers' tort claims are not barred by the economic loss doctrine—leaves builders, architects, engineers, and other professionals in limbo and further muddles the relationship between the economic loss doctrine and the statute of repose. The Court noted that the economic loss doctrine encourages the private ordering of economic relationships and protects the expectations of contracting parties. Yet its decision ultimately allows subsequent purchasers to sidestep prior contract allocation of risk between builders and purchasers—confusing the expectations of builders entering into construction contracts throughout Arizona. On the other hand, the Court seems to give homeowners a further measure of protection against shoddy construction missed in home inspections and no longer covered by construction warranties. A subsequent purchaser of a home may be able to bring a construction-defect claim against a builder who substantially completed construction of the home decades before.

Arizona courts recognize that the statute of repose "limits the time within which parties may bring breach of contract and implied warranty actions against developers, builders, and certain others."[42] In *Albano v. Shea Homes Ltd. Partnership*, the Arizona Supreme Court held that it could not "employ a court-adopted rule of procedure to alter the substantive effect of a statute of repose," because the statute of repose defines a substantive right.[43] The Court could not create procedural rules that tolled the statute of repose.[44] That the statute of repose applies only to contract claims is unambiguous.[45] Nevertheless, the Court in *Sullivan* has created ambiguity for contractors by holding that the economic loss doctrine, which is similar in principle to the statute of repose, may allow tort claims to go forward. The statute of repose acts as a cutoff for contractual liability by establishing a time frame after which a builder—and its insurance carriers—can feel confident that it is no longer liable for nearly decade-old work.

The *Sullivan* holding is at odds with the spirit of the statute of repose and the idea that implied warranty claims do not require privity but do sound in contract. Although courts had previously hinted that a negligence action might survive the statute of repose,[46] *Sullivan* provides a convenient detour where the statute of repose bars subsequent homeowners' implied warranty claims. Presumably, a builder may now be sued in a negligence action up to two years

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42. Evans Withycombe, Inc. v. W. Innovations, Inc., 159 P.3d 547, 549 (Ariz. Ct. App. 2006) (quoting Maycock v. Asilomar Dev., Inc., 88 P.3d 565, 568 (Ariz. Ct. App. 2004)).

43. 254 P.3d 360, 366 (Ariz. 2011).

44. *Id.* at 366–67.

45. *See* Ariz. Rev. Stat. Ann. § 12-552(A) (1992) (expressly referring to actions "based in contract").

46. *Evans Withycombe, Inc.*, 159 P.3d at 550–51.

after the subsequent owner discovers or reasonably should have discovered the defect, even if the defect is discovered long after the statute of repose would bar implied warranty claims.[47]

The Court was clear that the economic loss doctrine is intended to limit a contracting party to his or her contractual remedies; the *Sullivan* decision, however, may ultimately give noncontracting subsequent purchasers more rights than original purchasers who *do* contract. Original purchasers who contract with a builder to construct a home have the luxury of negotiating the terms of their contract, at least in theory. The Court states that subsequent purchasers do not have that luxury and for that reason, the economic loss doctrine should not be a barrier to recovery. Although that logic may be sound, the decision ultimately gives noncontracting parties the ability to bring tort suits where a similarly situated contracting owner would have none because his contract remedies are barred by the statute of repose. If the Sullivans had been the original homeowners, the economic loss doctrine would have barred their tort claims, limiting their remedies to those enumerated in the contract or implied in contract by law. Because the time period allowed by the statute of repose would have passed, the original purchasers' contract claims would have been barred and the purchasers would have been without remedy. The Sullivans, on the other hand, are free to bring their tort claims.

Subsequent purchasers do have a remedy (that sounds in contract), even if it operates by function of the law and is not subject to negotiation. The Arizona Supreme Court does not provide an adequate public policy explanation for why subsequent purchasers, whose contractual rights via implied warranty are barred by the statute of repose, are allowed to bring tort claims where original contracting purchasers are not. The Court seems to rest its decision on the fact that the subsequent purchaser was not able to negotiate contractual remedies, while completely ignoring the fact that a contracting plaintiff in the same factual situation would have had no use of those same negotiated remedies due to the statute of repose.

B. Sullivan *and Subcontractors*

Like *Flagstaff Affordable*,[48] *Sullivan* suggests that subcontractors[49] could be subject to negligence claims by both original and subsequent purchasers of

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47. The statute of limitations in Arizona for negligence actions is two years. Ariz. Rev. Stat. Ann. § 12-542 (1985).

48. The specific holding of *Flagstaff Affordable* is that "a contracting party is limited to its contractual remedies for purely economic loss from construction defects." 223 P.3d 664, 670 (Ariz. 2010).

49. A general contractor contracts directly with the homeowner, usually serving as an overseer instead of an actual laborer. The general contractor then contracts out the work to subcontractors who are skilled at a specific facet of construction (e.g., plumbing, landscaping, or roofing). Therefore, subcontractors usually are not in privity of contract with the homeowner.

homes due to subcontractors' lack of direct contractual privity with the homeowners. Thus far, the Court has not addressed the question.

Outside courts have held that the economic loss doctrine should apply to all parties within a "chain of contracts" for construction. These courts have stated that a plaintiff who contracts for construction is barred by the economic loss doctrine from recovering in tort from the underlying subcontractors within a chain of contracts. For example, in *Indianapolis–Marion County Public Library v. Charlier Clark & Linard, P.C.*, the Indiana Supreme Court rejected the plaintiff–owner's suggestion that the economic loss rule did not apply to underlying subcontractors because of the absence of a bilateral contractual relationship between the owner and subcontractors.[50] The court stated that "[w]hen parties are connected through a chain of contracts, as in the construction context, courts should defer to the language of the contracts governing their relationship."[51] The court ultimately held that the economic loss doctrine precludes participants in major construction projects connected through a network or chain of contracts from proceeding against each other in tort for purely economic loss.[52] In explaining its holding, the court elaborately detailed the complicated relationships that occur within the homebuilding process and the role of the economic loss doctrine within those relationships, stating:

> In the context of larger construction projects, multiple parties are often involved. These parties typically rely on a network of contracts to allocate their risks, duties, and remedies:
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> [C]onstruction projects are multiparty transactions, but rarely is it the case that all or most of the parties involved in the project will be parties to the same document or documents. In fact, most construction transactions are documented in a series of two-party contracts, such as owner/architect, owner/contractor, and contractor/subcontractor. Nevertheless, the conduct of most construction projects contemplates a complex set of interrelationships, and respective rights and obligations. . . .
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> In such a contract chain, the parties do have the opportunity to bargain and define their rights and remedies, or to decline to enter into the contractual relationship if they are not satisfied with it. Even though a subcontractor may not have the opportunity to directly negotiate with the engineer or architect, it has the opportunity to allocate the risks of following specified design plans when it enters into a contract with a party involved in the network of contracts. In this situation, application of the economic loss rule encourages a subcontractor to protect itself from risks, holds the parties to the

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50. 929 N.E.2d 722, 736 (Ind. 2010).

51. *Id.* at 737.

52. *Id.* at 739 (citing BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 67 (Colo. 2004); Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 992–93 (Wash. 1994); Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228, 1235 (Wyo. 1996).).

> terms of their bargain, enforces their expectancy interests, and maintains the boundary between contract and tort law.
>
> The policies underlying the application of the economic loss rule to commercial parties are unaffected by the absence of a one-to-one contract relationship. *Contractual duties arise just as surely from networks of interrelated contracts as from two-party agreements.*[53]

As noted in *Indianapolis–Marion County Pub. Library*, a number of other courts have supported the notion that "[i]n the context of larger construction projects, multiple parties . . . typically rely on a network of contracts to allocate their risks, duties, and remedies . . . ."[54]

Although Arizona appellate courts have not addressed whether the economic loss doctrine applies to claims by owners against subcontractors where there is a clear chain of contracts running from the owner to the general contractor to the subcontractors (and contractual duties within that chain), the Court's rulings in *Flagstaff Affordable* and *Sullivan* suggest that the Court will strictly require actual contractual privity between the parties in enforcing the economic loss rule. Assuming the Court does not adopt the "network of contracts" analysis described in *Indianapolis–Marion County Public Library* (or some variant thereof), subcontractors will be exposed to continuing economic uncertainties from both original and subsequent purchasers of homes. The Court may argue that subcontractors have the ability to avoid this situation contractually (at least with respect to original purchasers). However, subcontractors are oftentimes among the least powerful players within the network of players involved in home construction. They are typically presented with what amounts to a "take it or leave it" subcontract agreement from a general contractor that will gladly take its business elsewhere if the subcontractor refuses to sign the agreement as presented. Such subcontractors will struggle to survive in the competitive marketplace if they develop a reputation for requesting or requiring substantive changes to subcontracts. Ultimately, the ball appears to be in the general contractors' court to consider their subcontractors' potential exposure to both original and subsequent home purchasers when drafting their purchase contracts.

In addition to increased uncertainty, subcontractors (along with architects, engineers, and other players in the construction industry) may no longer be able to have these suits dismissed at summary judgment on economic loss and statute of repose grounds. The parties, or their insurers, will likely be forced to settle, or litigate further and incur discovery costs to defeat tort claims that the Arizona Supreme Court has suggested have little chance of succeeding. Although the policy engendered by the rule in *Sullivan* may ensure that some subsequent purchasers' injuries are remedied, it could come at a high cost for the construction industry.

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53. *Id.* at 739–40 (emphasis added) (internal citations omitted).

54. *BRW, Inc.*, 99 P.3d at 71–72 (noting that the project was controlled by a "network of contracts" that had been "entered into by commercial parties capable of contractually protecting their respective economic expectations").

CONCLUSION

In short, *Sullivan* further suggests that the economic certainties homebuilders and subcontractors thought they had due to the interplay of Arizona's statute of repose and the economic loss doctrine may be all but gone. Both original and subsequent purchasers of homes may have viable negligence actions against homebuilders and subcontractors long after the expiration of the statute of repose period, so long as direct contractual privity did not exist between the homeowner and the defendant. Because the chain of liability has now grown indeterminably long and homebuilders cannot have these suits dismissed on summary judgment, costs will increase. Moreover, the rule suggested by *Sullivan* could reduce the number of homebuilders willing to deal with the uncertainties it presents, thereby reducing the homebuilder marketplace, reducing competition among subcontractors, and increasing the cost of construction.