

Colorado Construction Defect Litigation

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1 OVERVIEW OF COLORADO LAW

Many of the standards and rules governing construction defect law in the State of Colorado arise out of the public policy that a builder is in a better position than the consumer to ensure that the construction of a residence is suitable. In the case of Sloat v. Methany, 625 P.2d 1031, 1033 (Colo.1981) the Colorado Supreme Court remarked as follows:

the rule of caveat emptor ... was based upon an arms-length transaction between the seller and buyer and contemplated comparable skill and experience, which does not now exist; they are not in an equal bargaining position and the buyer is forced to rely on the skill and knowledge of the builder. The position of the builder-vendor, as compared to the buyer, dictates that the builder bear the risk that the house is fit for its intended use.

Another rationale for the rule is to inhibit the unscrupulous, fly-by-night, or unskilled builder and to discourage much of the sloppy work and jerry building that has become perceptible over the years.

Based on the disparity of expertise and bargaining power between builder and home buyer, Colorado law has developed a number of mechanisms to manage the disputes arising out of both residential and commercial construction.

As discussed below, the letter of the law governing construction defect litigation arises both out of common law and statute enacted by the Colorado's General Assembly. While many of these laws are fairly straightforward, many more are open to ongoing debate as to how these concepts should be applied to achieve fair and equitable results. This survey is intended to provide a simplified overview of how construction defect laws operate for the benefit of both consumer and builder.

1.1 Common Law

The common law governing construction defect litigation in Colorado has been developed through decades of precedent published by both the Colorado Court of Appeals and the Colorado Supreme Court. Over this time, laws proscribing claims for construction defects primarily hinge on theories of recovery including negligence, breach of the implied warranty of habitability, breach of express warranties and breach of contract. The operation of these theories of recovery as well as affirmative defenses are discussed in further detail below.

1.2 Statutory Law

Based on the increasing liability exposure builders face in the State of Colorado largely from dynamic geotechnical conditions and harsh weather, Colorado's General Assembly has passed laws in an attempt to regulate claims regarding builder liability for construction defects.

One of the first such laws, passed in 1984, was the soils disclosure statute. Section 6-6.5-101, C.R.S. that required a builder to provide its consumers a summary report on the effects of any expansive soils on the real property subject to sale along with a publication detailing construction means and methods used to address the unique hazards presented by those soils.

The Colorado Construction Defect Action Reform Act at § 13-20-801, C.R.S. et seq. (“CDARA”) passed in 2001 was a landmark development in construction defect law. CDARA was initially enacted by a coalition interested in “preserving adequate rights and remedies for property owners who bring and maintain” claims of construction defects. § 13-20-802, C.R.S.

Under the original Act, an owner was required to provide builders a list of defects for which damages were sought within sixty days of commencement of suit. § 13-20-803, C.R.S. A claimant could only recover damages for actual or probable damages to real property, loss of use or bodily injury. § 13-20-804, C.R.S. It also changed the law to state that builders could reserve on claims against third-party subcontractors or design professionals until after settlement or judgment so they would not risk losing their claims under the statute of limitations. § 13-80-104, C.R.S. Finally, the initial Act amended the Colorado Common Interest Ownership Act at § 38-33.3-101, C.R.S. (“CCIOA”) to require homeowner associations to disclose claims of construction defects it asserted in litigation to prospective buyers of member units.

Only two years later, the political climate in Colorado changed and CDARA was revised primarily for the purpose of limiting a builder’s liability. As discussed in greater detail below, numerous revisions were made to reduce the measure and character of damages claimed against builders. Among the more important revisions made were limitations on a builder’s liability for treble damages under the Colorado Consumer Protection Act at § 6-1-101, C.R.S. (“CCPA”), the imposition of a notice of claim procedure intended to afford a builder the opportunity to resolve a dispute prior to the initiation of litigation, and a reduction in the measure of damages for a construction defect.

In 2007, the political pendulum swung back to align with the interests of home buyers with the enactment of the Homeowner Protection Act, added by Laws 2007, Ch. 164 at § 1, eff. April 20, 2007 (“HPA”). While the HPA changed several components of construction defect litigation, the most important applied to waivers of builder liability typically contained in a builder’s buy/sell agreement in consideration of builder providing an express limited warranty. Under the HPA, builders can no longer enforce such a waiver to preclude claims of negligence, breach of contract or the implied warranty of habitability.

2 CONSTRUCTION PROFESSIONALS SUBJECT TO CONSTRUCTION LITIGATION

Colorado law does not treat all construction professionals the same. Important differences between builder-vendors, general contractors of custom homes, subcontractors and design professionals give rise to different claims and defenses.

2.1 Builder-Vendor

Colorado common law defines a builder-vendor as one who is in the business of building new homes that are sold to the general public through a commercial sale. Sloat v. Methany, 625 P.2d 1031, 1033-34 (Colo.1981). This class of construction builders is the most common as it includes those commercial entities that build tract and speculative homes for sale to the general public. The status of a builder-vendor is important as it is this class of construction professional that owes the implied warranty of habitability.

2.2 General Contractor / Custom Builder

A general contractor of a custom home has different liabilities from that of a builder-vendor because construction is affected pursuant to a set of plans typically devised by design professionals engaged either by the general contractor or the owner. The duties owed by a general contractor of a custom home include the duty to build without negligence as well as those duties memorialized by contract including express warranties. See A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862 (Colo.2005). However, the general contractor of a custom home does not owe an implied warranty of habitability because there is no commercial sale to the general public involved. It is also important to understand that this duty in tort only applies to residential construction as opposed to commercial construction where duties are governed by contract. This distinction is discussed in further detail below in connection with Colorado's adoption of the economic loss rule.

2.3 Subcontractors and Third Party Claims

Subcontractors owe the same duty as a general contractor to build residential construction without negligence and in a good and workmanlike manner. Based on these shared duties, many general contractors sue subcontractors alleging that the subcontractor owes the damages claimed by a homeowner. These are known as third-party claims provided for under Rule 14(a) of the Colorado Rules of Civil Procedure.

2.4 Design Professionals

Licensed architects, engineers and other design professionals are also amenable to construction defect actions primarily for the representations they make regarding the suitability of design. To the extent these professionals are licensed by the state, a certificate of review confirming that the action against the licensed design professional does not lack substantial justification must be filed within sixty days after service of the complaint. See § 13-20-602(1), C.R.S. While electricians, plumbers and graders are also professions licensed by the state, they are not typically considered the type of professional intended for protection under this statute.

2.5 Agents of Construction Professionals and the Apparent Authority Doctrine

When a construction company or design firm is sued, it is common for an owner to sue the individual representatives of those business entities as well. While Colorado law respects and acknowledges the corporate entity as barring an agent's liability to the owner in contract as individual representatives are not privy to the owner in contract, this is not the case for torts. Agents of the general contractor and subcontractors owe the same duty in tort to build residential construction without negligence. To the extent an agent misrepresents the suitability of construction means or methods, they are liable for such misrepresentations under the apparent authority doctrine. See Grease Monkey Intern., Inc. v. Montoya, 904 P.2d 468 (Colo.1995)(adopting the apparent authority doctrine at section 261 of the Restatement (Second) of Agency).

2.6 Developers

Developers are parties to construction defect litigation as plaintiffs, defendants, and third-party plaintiffs. Developer liability to a homeowners association typically arises out of the fiduciary duties owed to the members under CCIOA. Under section § 38-33.3-303, C.R.S., a developer owes a fiduciary duty in the performance of its role as an officer or director of a developer controlled homeowners association. This fiduciary duty exists until the earlier of sixty days after conveyance of seventy-five percent of the units that may be created or the developer's voluntary relinquishment of governance. See § 38-33.3-303(5)(a), C.R.S. Common claims against the developer is that it knew substandard means and methods were used in the construction of the association's improvements and failed to remedy such defects, concealed the existence of such defects or did not properly account for reserves required to account for increased maintenance costs attributable to defective construction.

3 THEORIES OF RECOVERY

The theories of recovery used in construction defect litigation are copious. The primary claims of breach of contract, breach of express warranty, breach of implied warranty, negligence, misrepresentation, indemnification, contribution and violation of the CCPA are the most common which are more fully discussed below.

3.1 Breach of Contract

Breach of contract claims arise when either a verbal or written promise made in exchange for some consideration (eg. monetary payment), is not performed. Industrial Products Intern., Inc. v. Emo Trans, Inc., 962 P.2d 983, 988 (Colo.App.1997). Breach of contract claims subject to construction defect litigation correlate very closely with the common law claims requiring good and workmanlike construction. Beyond good and workmanlike construction, contract claims can address breaches applicable to the failure to obtain certain types of insurance as well as agreements to indemnify and defend.

3.2 Breach of Express Warranty

Claims for breach of express warranty can arise out of either verbal or written representations regarding the quantity or quality of construction. Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo.1984). Consequently, a breach of warranty claim can arise simply based on a buyer's allegation that a builder's agent represented that the construction had some particular quality when it is later discovered that such quality could never exist. The statement upon which a breach of express warranty may be brought must be an affirmation of fact or promise and not a mere statement of opinion. Shaw v. General Motors Corp., 727 P.2d 387 (Colo.App.), *cert. denied* (1986) (statement of opinion will not constitute express warranty; statement must be an "affirmation of fact or promise").

Historically, builder-vendors have offered limited express warranties in consideration of a buyer's waiver of all other claims against the builder-vendor. This practice has now been held in violation of public policy under the HPA and such waivers are no longer enforceable. See § 13-20-806(7), C.R.S.

3.3 Breach of Implied Warranties

There are three primary implied warranties that apply to builder-vendors. These implied warranties include: (1) the implied warranty of habitability ; (2) the implied warranty of workmanlike construction; and (3) the implied warranty of building code compliance. Carpenter v. Donohoe, 388 P.2d 399 (Colo.1964). Even defects caused by geotechnical hazards and the weather can establish a failure to construct the building in a workmanlike manner. Newcomb v. Schaeffler, 279 P.2d 409 (Colo. 1955). As stated above, these implied warranties arise when a builder-vendor sells a home in the course of its regular business to a member of the public at large. Sloat v. Methany, 625 P.2d 1031, 1033-34 (Colo.1981). Implied warranties extend only to the original purchaser and not to subsequent buyers. H. B. Bolas Enters., Inc. v. Zarlengo, 400 P.2d 447 (1965). Subsequent buyers may still sue in negligence but only for latent defects (i.e. defects that are not readily observable through reasonable inspection). Weller v. Cosmopolitan Homes, Inc. 622 P.2d 577, 578 (1980), *aff'd*, 663 P.2d 1041 (Colo. 1983). The burden of proof under the implied warranty of habitability is substantially different from that of negligence because no proof of builder fault is required. The evidence only need show that the structure is not suited for its intended purpose of habitability. See CJI-Civ. 4th 30:9.

Developers are subject to the implied warranty that land is fit for a particular purpose when land is improved and sold for an express purpose. Rusch v. Lincoln-Devore Testing Lab., Inc. 698 P.2d 832 (Colo.App.1984).

According to dicta announced by the Colorado Supreme Court in the case of Hersh Companies Inc. v. Highline Village Associates, 30 P.3d 221, 225 at fn. 5 (Colo.2001), the sale of a home is one for services rather than goods making implied warranties under the Uniform Commercial Code ("UCC") inapplicable. See § 4-2-102, C.R.S. With certain exceptions, there

are no implied warranties under the UCC applicable to construction professionals as the primary purpose of the contract concerns services not goods. Persichini v. Brad Ragan, Inc., 735 P.2d 168, 174 (Colo.1987)(discussing factors determining whether transaction is one for goods or services); Bailey v. Montgomery Ward & Co., Inc., 690 P.2d 1280, 1282 (Colo.App.1984)(same); Miller v. Sologlass California, Inc., 870 P.2d 559, 565-66 (Colo.App.1993)(denying product theory of liability when allegations did not concern defective product).

The implied warranty of habitability does not apply to subcontractors and agents of general contractors as they are not in the course of selling homes to the general public as part of their business.

3.4 Negligence

Colorado law has historically recognized that general contractors and subcontractors alike owe a duty to homeowners to build in a non-negligent manner. See A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862 (Colo.2005). As a direct extension of this law, individuals who affect defective construction may be held personally liable for damages arising out of their negligence. Sanford v. Kobey Bros. Constr. Corp., 689 P.2d 724 (Colo.App.1984).

3.4.1 Economic Loss Rule Versus the Independent Duty

A common misconception among contractors is that liability to owners is limited to the contractual agreement forged between the parties. In a typical transaction for goods, liability that arises from the transaction should the buyer suffer purely economic losses is governed by the terms of the contract between buyer and seller. The buyer cannot sue the seller when the contract states that the buyer may not recover for a defect in goods under certain circumstances. In the law, this concept is known as the economic loss rule.

The economic loss rule is a legal policy in place to allow buyers and sellers to negotiate the economic costs of the risks each accepts in a transaction. For example, if a car manufacturer could not limit its liability when its product malfunctions or fails, it would be forced to sell its automobiles for exorbitant amounts to cover the economic costs to repair its vehicles as they break down over time. Under such a scenario, few could afford to purchase a vehicle. By adopting the policy under the economic loss rule, more parties can purchase automobiles at a reduced price because the buyer, as opposed to the seller, accepts the cost of the risk of the car breaking down over time.

The economic loss rule also applies to the allocation costs associated with risks attendant to construction with certain important limitations. The Colorado Supreme Court adopted the operation of the economic loss rule in the seminal case of Town of Alma v. Azco Construction, Inc., 10 P.3d 1256 (Colo.2000). In Town of Alma, the Court was asked to decide whether the town and individual landowners could recover repair costs against a contractor, Azco, related to

unworkmanlike construction of a public water system which failed more than a year after completion. The defending contractor argued that recovery in tort was barred by the economic loss rule because their contract only guaranteed the system for one year. The Colorado Supreme Court agreed and held that absent an independent duty in tort, terms of contract governed the liabilities between parties.

Five years later, the Colorado Supreme Court reviewed two cases to elucidate its holding in Town of Alma. The primary point it sought to clarify is when an independent duty in tort exists to create an exception from the economic loss rule. In BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66 (Colo.2004) a steel subcontractor on a public works project brought an action for negligence against an engineering firm and inspector hired by the general contractor, alleging their improper plans and inspection caused the subcontractor cost overruns. The Colorado Supreme Court rejected the notion that the engineers and inspectors owed any duty in tort to the steel subcontractor primarily noting that given the equal bargaining power and sophistication between the general contractor and subcontractor, each could have accounted for these risks by contract. Accordingly, the steel subcontractor was barred from pursuing a claim of negligence for alleged design defects and improper inspection.

Less than a year later, the Colorado Supreme Court construed the economic loss rule in the context of multi-family residential construction in the case of A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862 (Colo.2005). In Yacht Club, subcontractors claimed the contractual duties owed to the general contractor barred the plaintiff homeowners association from asserting a claim of negligence pursuant to the economic loss rule. After recognizing the disparate bargaining position between construction professional and homeowner, the Colorado Supreme Court held that subcontractors as well as general contractors owed homeowners an independent duty beyond contractual obligations to build without negligence. Based on this independent duty, the economic loss rule did not bar homeowner claims of negligence against the subcontractors.

These decisions help exemplify the public policy underlying Colorado construction defect law. Colorado construction defect law seeks to protect parties with disparate bargaining power. In a commercial transaction, such disparity typically does not exist. Therefore, terms of contract should govern. In a residential transaction, the disparity does exist so an independent duty outside of contract also governs the conduct of the construction professional. While there is no Colorado precedent on the issue, such a theory would likely apply to residential design professionals for the same reasons.

3.5 Misrepresentation or Concealment

The theory of misrepresentation and concealment is a potent claim against construction professionals as it reaches to those individuals who spawn the misrepresentation as well as their principals or employers. See Grease Monkey Intern., Inc. v. Montoya, 904 P.2d 468 (Colo.1995)(adopting the apparent authority doctrine at section 261 of the Restatement (Second)

of Agency); Sanford v. Kobey Bros. Constr. Corp., 689 P.2d 724 (Colo.App.1984)(holding individuals liable for their negligence regardless of whether such fault occurred in the course of agency). This tort applies in situations where the misleading information causes an injury to property or a loss in a business transaction. Bloskas v. Murray, 646 P.2d 907 (Colo. 1982)(recognizing the tort of negligent misrepresentation causing physical harm, as set out in Restatement (Second) of Torts § 311 (1965); First National Bank v. Collins, 616 P.2d 154, *cert. denied* (Colo.App.1980), (adopting Restatement (Second) of Torts § 552 (1977)). A construction professional's duty to disclose includes statements which are known to create a false impression, facts the buyer is unable to investigate, facts later learned to not be true, and events which frustrate promised future performance. See CJI-Civ 4th 19:5. Statements of opinion or future intent cannot substantiate a misrepresentation unless the opinion is reasonably understood to be a fact or a person never intended to perform or learns of events that frustrate the intended performance. See CJI-Civ 4th 19:15; 19:5.

3.6 Indemnification/Contribution

The theory of indemnification and contribution relate to the breach of a contractual duty between two parties for which damages are owed to a third party. Indemnification arises out of a contractual agreement to remunerate a party for specified damages suffered by a third party for which the primary party has become liable. Contribution is the same theory except the claim arises out of negligence. According to Colorado statute, there can be no claim for contribution where a valid claim for indemnification exists. § 13-50.5-102(6), C.R.S.

A common practice among general contractors is to have its subcontractors signing a subcontractor agreement stating that the subcontractor agrees to indemnify and defend the general contractor not only for the fault of that subcontractor, but the general contractor as well. Under such agreements, all liability for defective construction could be passed through to the subcontractors leaving little incentive to the general contractor to ensure that the properly coordinate construction to prevent defects.

After recognizing that this shifting of financial responsibility was in derogation of not only consumer interests but the public welfare, Colorado's General Assembly enacted an act concerning the prohibition against the shifting of financial responsibility for negligence in construction agreements under SB07-087. Under this legislation, agreements where the general contractor seeks indemnification from a subcontractor for its own negligence is void as in violation of public policy and unenforceable. § 13-21-111.5(6), C.R.S.

Although the general rule is that a claim of indemnity does not arise until settlement or judgment, this is not the case with construction defect claims. Section 13-80-104(1)(b)(II), C.R.S. provides in pertinent part as follows:

all claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person:

(A) Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and

(B) Shall be brought within ninety days after the claims arise, and not thereafter.

In CLPF-Parkridge, LP v. Harwell Investments, Inc., 105 P.3d 658 (Colo.2005), the Colorado Supreme Court analyzed the operation of § 13-80-104(1)(b)(II), C.R.S. and explicitly held that although a general contractor, who sought to pass through the liability it owed third party homeowners, could choose to file a third-party complaint against its subcontractors in a primary action or file a subsequent separate action. The Colorado Supreme Court held that if the general contractor chose to file a separate, subsequent lawsuit, "it must be commenced within a narrow ninety day period after settlement or judgment in the construction defect lawsuit."

3.7 Soils Disclosures

Section 6-6.5-101, C.R.S. sets forth the statutory disclosure requirements which impose an obligation upon a builder to provide the purchaser of a new residence a summary report of the site soil conditions and resulting recommendations. Whether this duty is satisfied by tender of the original soils report remains to be seen. It also applies to individuals acting on behalf of a corporate developer. Hoang v. Arbess, 80 P.3d 863, *cert denied* (Colo.App.2003).

Where there is a significant potential for expansive soils affecting the property subject to the transaction, there are additional requirements. In such case, the builder or his representative must also supply each buyer with a copy of a publication detailing the problems associated with expansive soils, the construction means and methods used to address these problems, and suggestions for care and maintenance.

A developer, builder or representative fails to provide the report or publication required under the statute to the purchaser, then they are subject to a five hundred dollar civil penalty payable to the purchaser. More importantly, they are exposed to a claim of negligence per se in failing to disclose material information.

3.8 Colorado Consumer Protection Act ("CCPA")

The Colorado Consumer Protection Act § 6-1-101 et seq., C.R.S., ("CCPA") was enacted to protect consumers from deceptive trade practices. There are five elements that must be proven to prevail on a CCPA claim. Plaintiff must prove that:

1. the defendant engaged in an unfair or deceptive trade practice;
2. challenged practice occurred in the course of the defendant's business, vocation, or occupation;
3. the challenged practice significantly impacted the public as actual or potential consumers of the defendant's goods, services, or property;
4. the plaintiff suffered injury in fact to a legally protected interest; and
5. the challenged practice caused the plaintiff's injury.

Crowe v. Tull, 126 P3d 196 (Colo. 2006). Each violation is considered a separate violation with respect to each consumer or transaction involved; except that the maximum civil penalty shall not exceed one hundred thousand dollars for any related series of violations. § 6-1-112(1), C.R.S.

In the case of Park Rise Homeowners Association Inc. v. Resource Construction, 155 P3d 427 (Colo. App. 2006) the Colorado Court of Appeals reviewed the question of whether puffery could be violative of the CCPA. The Park Rise Court rejected plaintiff's contention that the CCPA, as a matter of law, makes puffery actionable and dismissed the claim.

Another hurdle facing plaintiff is the requirement that the practice complained of "significantly impacted the public as actual or potential consumers of the defendant's goods, services, or property." This presents a challenge in construction defect cases where a single property and an individual owner are involved as compared to a homeowners association where numerous consumers can be affected. Plaintiff counsel typically cite to the case of Quist v. Specialties Supply Co., Inc., 12 P.3d 863 (Colo.App.2000) for the supposition that a single occurrence of a deceptive practice can give rise to a question of fact regarding significant public impact barring summary judgment on a CCPA claim. This case arises out of the defective installation of a gas fire place by a subcontractor for a tract homebuilder. In that case, the subcontractor admitted that it routinely failed to connect a vent to gas fireplaces it installed for the tract builder. Based on this representation, the court held that there was a prima facie showing of a significant public impact.

A line of more recent cases has called this precedent into question. Crowe v. Tull, 126 P.3d 196, 208 (Colo.2006)(noting that attorney liability under the CCPA would be limited based on private nature of relationship and not a "large swath" of the general public); Broduer v. American Home Assurance Co., 169 P.3d 139 (Colo.2007)(holding public nature of workers' compensation insurance does not itself prove a significant public under the CCPA); Rhino Linings USA Inc. v. Rocky Mountain Rhino Lining, Inc. 62 P.3d 142 (Colo.2003)(holding three of five hundred and fifty dealers affected does not prove a significant public impact). Given this state of the law, some courts may be inclined to favorably rule on a motion for summary judgment regarding CCPA claims.

3.9 Civil Conspiracy

The general rule is that the principal general contractor is not liable for the negligent conduct of its subcontractors. Grease Monkey Intern., Inc. v. Montoya, 904 P.2d 468, 472 (Colo.1995)(acknowledging that vicarious liability does not arise from the conduct of an independent contractor but can arise from the agent's misrepresentations). Beyond the apparent authority doctrine discussed above, this black letter law can be circumvented by pleading a civil conspiracy.

A civil conspiracy arises when two or more persons agree to a negligent common course of action that results in damages to a third-party. Resolution Trust Corp. v. Heiserman, 898 P.2d 1049 (Colo.1995)(citing § 13-21.111.5(4), C.R.S.). While the rule does not apply in the context of contractual agreements, construction professionals in residential construction can be jointly and severally liable under a civil conspiracy based on the independent duty they owe homeowners to build without negligence if they engage in an agreed construction method.

4 DEFENSES

Beyond defenses typical in the common law including comparative fault, mitigation of damages, and non-party negligence, most salient affirmative defenses in construction defect litigation are governed by statute under CDARA as discussed below.

4.1 Construction Defect / Bodily Injury

The definition of Actual Damages under CDARA may be found at § 13-20-802.5(2), C.R.S. According to § 13-20-804(1), C.R.S., a claim for negligent construction cannot be asserted unless there is actual damage to or loss of use to real property or bodily injury. The initial version of CDARA allowed damages if there was a probability they could occur. This exception was eliminated when the Act was revised in 2003. This statute further states that an owner cannot claim damages for a technical violation of a building code unless one of the events described above arises. This is consistent with the Act's 2003 revisions which deleted recovery for probable damages.

CDARA also allows recovery for bodily injury. The definition of bodily injury is problematic in terms of whether that definition can be substantiated by claims of emotional distress alone. Under Colorado, a claim for emotional distress cannot arise absent a physical injury to a party or another who stands along with that party in a zone of danger in which the other suffers peril that causes physical manifestations of emotional distress. Towns v. Anderson, 579 P.2d 1163, 1165 (Colo.1978)(holding heating company and utility corporation liable for negligent infliction of emotional distress which resulted in physical manifestations, stemming from boy's witnessing, while just off front porch of his house and while his sister was therein, a gas explosion that lifted the house from its foundation and caused a fire). This rule suggests that a claim of emotional distress alone cannot substantiate a claim for personal injury.

However, in the case of Herod v. Colorado Farm Bureau Mutual Insurance Co., 928 P.2d 834 (Colo.App.1996), a panel of the Court of Appeals held that plaintiffs could pursue a personal injury claim against the insurance company for emotional distress arising out of a breach in tort absent any physical manifestation. The claim for personal injury damages was based on a claim of the breach of the duty of good faith and fair dealing owed by an insurer. As discussed above, the public policy underlying Colorado construction defect law is similar to that law governing an insurer's duty of good faith and fair dealing based on the disparate bargaining power between the parties. Given this correlation, an argument exists that a claim for damages under CDARA may be predicated merely upon emotional distress as opposed to any physical injury to person or property which has been recognized by at least one trial court. See Shams v. Howard, No. 2003CV2359 (Boulder County Dist. Ct., August 31, 2005).

4.2 Statutes of Limitations/Repose

A statute of limitation governs the time periods under which an action must be commenced once it has accrued. A statute of repose is different in that it bars all claims after a certain period of time regardless of when a claim accrues or injury occurs. Mortgage Investments Corporation v. Battle Mountain Corporation, 70 P.3d 1176 (Colo. 2003).

4.2.1 Claim Accrual

A claim for relief against any architect, contractor, builder or builder-vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property begins to run at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury. § 13-80-127 (1)(b), C.R.S.

It is not necessary that the claimant know that a defect is causing the condition. All that is necessary is that the claimant discover or should have discovered the physical manifestation of the defect that caused the injury. For example, if claimant notices a water stain on the ceiling, he need not know that the stain was caused by a hole in the roof or leaky plumbing running through the ceiling. The statute would begin to run from the time the claimant discovered or should have discovered the water stain.

While the statute is favorable to defendants, summary judgment on the statute of limitations is not common because the defendant has the affirmative burden of showing that the defect is the one causing the physical manifestation and the scope of defects which can be attributed to a given physical manifestation. Wildridge Venture v. Ranco Roofing, Inc., 971 P.2d 282 (Colo.App.1998)(holding that expert reports authored for the benefit of homeowner association reporting systemic roof problems was not enough to prove knowledge of physical manifestations of disputed roof defects). Another common problem precluding summary judgment based under the statute of limitations is questions of fact that arise as to when the

owner could have reasonably known of the physical manifestation. Stiff v. BilDen Homes, Inc., 88 P.3d 639 (Colo.App.2003)(holding that owner could not have known of physical manifestation of defect in floating concrete slab until it underwent excess movement).

4.2.2 Two Year Statute of Limitation

Section 13-80-127(1)(a), C.R.S. provides for a two year statute of limitation of actions against construction professionals like architects, contractors, builders, builder-vendors, engineers, inspectors, and those performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property.

4.2.3 Six Year Conditional Statute of Limitations

Section 13-80-104, C.R.S. provides that in no case shall any action be brought against any architect, contractor, builder or builder-vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property more than six years after the substantial completion of the improvement to the real property. The exception is when the defect manifests in the fifth or sixth year from substantial completion in which case the action must be brought within two years after the date upon which the cause of action arose. § 13-80-104(1)(a), C.R.S.; § 13-80-104(2), C.R.S. If the cause of action arose on the last day of the sixth year then the latest date any suit could be brought would be two years from that time.

4.2.4 Eight Year Statute of Repose

Section 13-80-104(2), C.R.S. prohibits any action against a construction professional brought more than eight years after substantial completion.

4.2.5 Repair Doctrine/Equitable Tolling

In the case of Highline Village Associates v. Hersh Companies, Inc., 996 P.2d 250 (Colo.App.1999), the Court described the repair doctrine as follows:

This repair doctrine requires proof of a promise that the repairs will cure the defect and that plaintiff reasonably relied upon that promise. Thus, the required proof is similar to, but not the same as, that needed for application of the doctrine of promissory estoppel under Restatement (Second) of Contracts § 90 (1981). Such a promise need not be express; it may be one that is reasonably implied from all of the circumstances. City of Bedford v. James Leffel & Co., *supra*; Little Rock School District v. Celotex Corp., *supra*.

Such an approach makes good sense and is consistent with public policy. So long as the maker of the product or the contractor is undertaking repairs to remedy the

defect (irrespective of any disclaimers of liability for that defect) and those repairs appear to accomplish their purpose, requiring the vendee or owner to institute suit against the maker or the contractor while those repairs are being made would be inconsistent with the policy that favors voluntary settlement of disputes. Indeed, a rejection of the doctrine might well lead to wholly unnecessary litigation.

Given the equitable tolling provisions under the repair doctrine, a construction professional cannot claim the statute of limitations as a defense where it undertakes work or makes representations upon which the claimant reasonably relies when deciding to refrain from instituting legal action.

4.3 Consumer Protection Act Statute of Limitation

The question of whether the statute of limitations under CDARA governs claims under the CCPA is one that has yet to be resolved under Colorado law. Typically, where a claim is governed by its own statute of limitations, a more general statute does not apply. See Dawson v. Reider, 872 P.2d 212 (Colo.1994). The statute of limitations governing CCPA claims is three years from the date of when the consumer discovered or should have discovered through reasonable diligence the deceptive practice. See § 6-1-115, C.R.S. Based on the precedent discussed below regarding the statute of limitations applicable to a breach of warranty, Colorado law suggests that the CCPA statute of limitations would prevail over the two year statute governing actions against construction professionals.

4.4 Breach of Warranty Statute of Limitations

In the case of Hersh Companies Inc. v. Highline Village Associates, 30 P.3d 221 (Colo.2001), the Colorado Supreme Court was asked to determine whether the two year statute of limitations governing claims of construction defects applied to breaches of warranty. Noting that where a claim is governed by its own statute of limitations, a more general statute does not apply. See Dawson v. Reider, 872 P.2d 212 (Colo.1994). Accordingly, the Court held that the three year statute of limitations as to breaches of warranty apply as opposed to the more general two year statute governing construction defect actions.

4.5 Product Liability Act

Colorado law has historically rejected the notion that the strict product liability doctrine applies to the construction of a home. See Wright v. Creative Corp., 498 P.2d 1179 (Colo.App.1972). The same may not be true for homes built from modular or prefabricated components because the goods involved are more integral to the transaction than the construction services as discussed above under theories of implied warranty.

4.6 Exculpatory Clauses / Waiver

Historically builder-vendors have managed their exposure to the risks of construction defect litigation by providing contractual limitations to their liability. This is typically accomplished in the form of offering an express warranty in consideration of a buyer's waiver of any and all claims against them other than those under the express warranty. In response, the 2007 Colorado Legislature passed the Homeowner's Protection Act. HB07-0368. The most important part of this legislation was to declare void as a matter of public policy home buyer waiver of claims against a builder-vendor.

Section 13-20-806(7)(a), C.R.S. states in pertinent part:

In order to preserve Colorado residential property owners' legal rights and remedies, in any civil action or arbitration proceeding described in section 13-20-802.5 (1), any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the "Construction Defect Action Reform Act", this part 8, or provided by the "Colorado Consumer Protection Act" article 1 of title 6, C.R.S., as described in this section, or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitation or repose, are void as against public policy.

Based on this new legislation, builder-vendors can no longer limit their liability through waivers contained in contracts.

4.7 Duty to Mitigate

A construction defect claimant has a duty to mitigate his damages though any costs incurred in the mitigation efforts may be claimable as damages. See Tull v. Gunderson's Inc., 709 P.2d 940 (Colo.1985).

5 DAMAGES

As alluded to above, the issue of damages in construction defect litigation is a complex modulus of definitions and quantifications under CDARA subject to various interpretations. The provisions regarding the measure of damages allowed by CDARA is discussed below.

5.1 Common Law Measure of Damages

Historically, Colorado common law dictated that in a case of injury to real property, the appropriate measure of damages was the diminution of value attributable to the injury or repair value which ever was less. See, Zwick v. N.E. Simpson, 572 P.2d 133 (Colo. 1977); Razi v. Schmitt, 36 P.3d 102 (Colo. App. 2001); Federal Insurance Co. v. Ferrellgas, Inc., 961 P.2d 511,

513 (Colo. App. 1997). However, Colorado Courts did recognize limited exceptions to this general rule in cases where the property has no market value, repairs have already been made, or where a property has been recently acquired as a private residence and the interest is in having the property restored. See Board of County Commissioners v. Slovek, 723 P.2d 1309(Colo. 1986).

The Colorado Supreme Court, in the case of Slovek discussed the operation of the competing judicial axioms where repair cost exceeds diminution in value resulting in contentions of economic waste. In its review, the Slovek Court cautioned that the “considerations governing what is an ‘appropriate case’ for departure from the market value standard” could not be reduced to a set list. Id. at 1315. In any event, it was made clear that courts should be principally guided by the “goal of reimbursement of the plaintiff for losses actually suffered.” Id. at 1316. In either instance, it was recognized that where repair costs constitute economic waste, then the appropriate measure of damages was considered diminution in the fair market value of the property. See, Gold Rush Investments, Inc. v. G.E. Johnson Construction Co., Inc., 807 P.2d 1169 (Colo. App. 1990) and Sanford v. Kobey Brothers Construction Corp., 689 P.2d 724 (Colo.App.1984).

5.2 Statutory Measure of Damages / Actual Damages

On April 25, 2003, CDARA was amended to limit and define the remedies available to a party that has suffered an injury to real property. Section 13-20-806(1), C.R.S. indicates in pertinent part that “[a] construction professional otherwise liable shall not be liable for more than actual damages . . .” Under § 13-20-802.5(2), C.R.S., actual damages for an injury to real property is defined as the “fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less...” Id. Conspicuously absent from this definition is the term diminution in value.

The verbiage “whichever is less” contained within the definition of actual damages evidences the Colorado General Assembly’s intent to abrogate the common law exception governing the measure of damages for an injury to real property provided under Slovek. Given the absence of the term diminution in value under the definition of actual damages, a question arises as to whether the General Assembly intended to entirely remove this measure of damages from construction defect law.

The terms repair value and replacement value appear fairly straightforward. This would be the cost to repair or rebuild a structure to make a claimant whole. However, the term fair market value of the real property without the alleged construction defect gives rise to a question of whether this measure of damages supplanted diminution in value. Remuneration in the form of the fair market value of the real property without the alleged construction defect would provide a claimant not only the appraised value of their property, but the owner would also be entitled to retain the real property at issue. Rarely, if ever do these properties lose their value

entirely even in a catastrophic construction failure because residual value typically remains based on the value of the lot and remaining construction that is not defective.

In short, no matter how distressed a property, it is most likely that it has some salvage value. Allowing the owner to obtain full market value and retain the residual value would amount to double recovery which is highly disfavored in the law. Farmers Group, Inc. v. Williams, 805 P.2d 419, 427 n. 6 (Colo.1991); Rusch v. Lincoln-Devore Testing Lab., Inc., 698 P.2d 832, 834 (Colo.App.1984). The General Assembly is presumed to know the state of the common law when it enacts legislation. Common Sense Alliance v. Davidson, 995 P.2d 748 (Colo.2000). Assuming the legislature's knowledge of the law disfavoring double recovery, one could reasonably conclude that the measure of damages regarding fair market value reflects the traditional concept of diminution in value which has been confirmed at the trial court level. See Shams v. Howard, No. 2003CV2359 (Boulder County Dist. Ct., August 31, 2005).

5.2.1 Contract Damages

“Generally, the measure of damages for a breach of contract is the loss in value to the injured party of the other party's performance caused by its failure or deficiency, plus any other incidental or consequential loss caused by the breach, less any cost or other loss that the injured party has avoided by not having to perform.” General Insurance Company v. City of Colorado Springs, 638 P.2d 752 (Colo.1981)(stating Restatement (Second) of Contracts, § 347 (1981).

5.3 Allocation of Damages

Allocation of damages among multiple defendants is a hotly contested issue. One theory is that expert allocation of damages violates the jury's purview as fact finder. Therefore, damages are allocated by the jury after hearing expert testimony on fault. Contrary to this notion, a recent line of cases under Colorado law has held that absent an allocation of repair costs attributable to design versus construction defects, a claim for damages is speculative and barred as a matter of law. City of Westminster v. Centric-Jones Constructors, 100 P.3d 472 (Colo.App.2003).

5.4 Treble Damages Under the CCPA and CDARA

Under § 6-1-113(2)(a)(III), C.R.S. treble damages can be awarded for bad faith conduct amounting to a CCPA violation. Bad faith conduct means fraudulent, willful, knowing, or intentional conduct that causes injury. § 6-1-113(2.3), C.R.S. However, the scope of these treble damages have been limited by provisions of CDARA. First, to the extent the jury concludes the construction professional is guilty of a bad faith CCPA violation, § 13-20-806(3), C.R.S. limits the award of treble damages and attorney fees to \$250,000.00 so long as the construction professional under takes the notice of claim process further described below. Non-economic loss arising out of personal or bodily injury is also limited to \$250,000.00.

5.5 Punitive / Exemplary Damages

An owner is entitled to exemplary or punitive damages under § 13-21-102, C.R.S. if the construction professional's conduct is found to be fraudulent, malicious, or willful and wanton. Subsection (1)(b) of this statute states that "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

5.6 Attorney Fees

The definition of actual damages under CDARA includes the award of attorney fees as applicable in contract or statute. The most common statutory vehicle used to recover an award of attorney fees is the CCPA. Attorney fees may also be awarded for common law intentional torts, breaches of fiduciary duty and to the prevailing party pursuant to the terms of a contract.

5.7 Pre-Judgment Interest

The right to recover prejudgment interest for damages other than those resulting from personal injuries is a matter of law determined under § 5-12-102, C.R.S.; Farmers Reservoir and Irrigation Company v City of Golden, 113 P.3d 119 (Colo. 2005) *rehearing denied*. This statute codifies the doctrine of moratory interest and serves as a general pre-judgment and post-judgment statute. Great Western Sugar Co. v. KN Energy, Inc., 778 P.2d 272 (Colo.App.1989). "In contract actions, moratory interest or prejudgment interest is employed to compensate the plaintiff for the monetary losses sustained on wrongfully withheld money or property from the accrual of a claim for relief until entry of judgment." Huffman v Caterpillar Tractor Co., 645 F. Supp. 909, 913 (D. Colo. 1986). In the case of Hott v Tillotson-Lewis Const. Co., 682 P2d 1220 (Colo. App. 1983), the fact finder determined that the house was defective and that plaintiffs had been charged and paid for materials not used in construction. The date of the wrongful withholding in the Hott case was determined to be the date of completion of the house. The Colorado Court of Appeals held that plaintiff was entitled to prejudgment interest under C.R.S. 5-12-102 on a property damage breach of contract claim even though the damages were unliquidated. See also Coleman v United Fire & Cas. Co. 767 P2d 761 (Colo Ct App 1988)(holding prejudgment interest ran from the date of installation of a defective roof).

Where interest is awarded earlier than the filing of the suit, it is awarded on past losses only. This is discussed in the case of Shannon v Colorado School of Mines, 847 P.2d 210 (Colo.App.1993). In Shannon, the Colorado Court of Appeals distinguished Hott and Isbill Associates Inc v City & County of Denver, 666 P2d 1117 (Colo.App.1983), on which Hott relied. The issue in Shannon was whether plaintiff was entitled to interest on loss of income only or also on future wages. The Court determined plaintiff was entitled to prejudgment interest on past but not on future wages. Section 5-12-102, C.R.S. specifically awards interest on money which is due and owing prior to the date of payment or prior to the date judgment is entered. See

Riva Ridge Apartments v. Robert G. Fisher Co., 745 P.2d 1024 (Colo.App.1987)(ruling that until payment for services is “expected or demanded” payment is not due and nonpayment is not a wrongful withholding.); see also W.H. Woolley & Co. v. Bear Creek Manors, 735 P.2d 910 (Colo.App.1986).

Riva Ridge Apartments v. Robert G. Fisher Co., 745 P.2d 1024 (Colo.App.1987) was a case in which a property owner sued a construction manager and its surety for breach of a construction management agreement. The Colorado Appellate Court held that prejudgment interest should be awarded from the date the complaint was filed. The Court stated:

“Fisher's liability for prejudgment interest arose under 5-12-102(1)(a) C.R.S. (1986 Cum.Supp.) which provides in pertinent part: “Interest shall be at the rate of eight percent per annum compounded annually for all moneys ... after they are *wrongfully withheld* or *after they become due* ...” (emphasis supplied) Section 5-12-102(3), C.R.S. (1986 Cum.Supp.) states: “Interest shall be allowed ... even if the amount is unliquidated at the time of wrongful withholding or at the time when due.”

There is nothing in the record showing any “wrongful withholding” of any money from plaintiffs, or any demand for or expectation of payment by plaintiffs at any time prior to the filing of this suit. Until such time as payment for services is expected or demanded, payment cannot be deemed to have become due and nonpayment cannot be deemed a wrongful withholding. Consequently, the trial court should have awarded plaintiffs prejudgment interest against Fisher only from the date they filed their complaint in this action. See W.H. Woolley & Co. v. Bear Creek Manors, 735 P.2d 910 (Colo.App.1986); Danburg v. Realties, Inc., 677 P.2d 439 (Colo.App.1984).

In W.H. Wooley & Co. v. Bear Creek Manors, 735 P.2d 910 (Colo. App. 1986), landowners instituted an action to quiet title to land that was the subject of a development agreement. Developers counterclaimed for fraud, breach of contract, quantum meruit, constructive trust, and partnership dissolution. The Colorado Court of Appeals held that the trial court properly awarded developers' prejudgment interest only from date of the filing of their counterclaims in suit to quiet title, in the absence of evidence that any money had been wrongfully withheld from those developers or that any demand for or expectation of payment had been made any time prior thereto.

Under § 13-20-802.5(2), C.R.S. actual damages will be *the lesser of* the (1) fair market value of the real property without the alleged construction defect; (2) the replacement cost of the real property; or (3) reasonable cost to repair that alleged construction defect together with relocation costs. Based on the Colorado Appellate Court cases, plaintiff will be able to obtain prejudgment interest on the portion of the damages attributable to “past losses” even if

unliquidated. This has been argued in cases where there is catastrophic damage or where a home was so poorly constructed that it was of no material value.

Pre-judgment interest in a case not involving personal injury as an element of damages and the exact amount of interest must therefore be stated in order for a judgment to be final. See Grand County Custom Homebuilding, LLC v. Bell, 148 P.3d 398 (Colo. App. 2006). In Bell, the court cited two Seventh Circuit decisions holding that a judgment is final where the exact amount is not stated but can be readily calculated from the face of the judgment. The Bell court did not decide whether this rule should be adopted in Colorado since the amount could not be calculated from the face of the judgment.

6 COLORADO COMMON INTEREST COMMUNITY ACT / HOA DERIVATIVE MEMBERSHIP STANDING

The Colorado Common Interest Community Act 38-33.3-101, C.R.S. (“CCIOA”) is a piece of complex legislation intended to provide the ground rules for the development, regulation and governance of homeowner associations. While the Act provides for fiduciary duties owed by developers as referenced above, the most important aspect of its operation as it applies to construction defect law is that it affords homeowner associations derivative standing to represent two or more members with regard to damages, not only to common or limited common elements, but an owner’s unit as well.

In the case of Yacht Club II Homeowners Association, Inc. v. A.C. Excavating, 94 P.3d 1177 (Colo.App.2003), it was argued that a homeowner association could not pursue damages for construction defects in an owner’s individual units because the association had no title interest to that property. The Appeals Court rejected this notion stating the following:

By its terms, the plain language of § 38-33.3-302(1)(d), C.R.S. permits an association to bring an action not only on its own behalf but also on behalf of “two or more unit owners.” The only limitation on an action on behalf of unit owners is that the matter be one “affecting the common interest community.”

Under the CCIOA, individual units are a part of the “common interest community.” See § 38-33.3-103(30), C.R.S.2003 (defining “unit” as “a physical portion of the common interest community which is designated for separate ownership or occupancy and the boundaries of which are described in or determined from the declaration”).

Therefore, under the provisions of CCIOA, a homeowner association can sue on its own behalf as well as have derivative standing on behalf of its members to sue for damages to both common elements and an owner’s unit.

7 ALTERNATE DISPUTE RESOLUTION / ARBITRATION

While the public policy underlying construction defect litigation in Colorado favors consumers, these theories have had little effect in overcoming the public policy mandating enforcement of alternative dispute resolution or arbitration clauses. “Colorado has followed federal precedent to determine the scope of an arbitration clause under the UAA [Federal Uniform Arbitration Act] by requiring the district court to apply the presumption favoring arbitration and to prohibit litigation unless the court can say with positive assurance that the arbitration provision is not susceptible of any interpretation that encompasses the subject matter of the dispute.” City and County of Denver v. District Court, 939 P.2d 1353, 1364-65 (Colo.1997). “If ambiguities are found in the arbitration agreement, [the court] must afford the parties a presumption in favor of arbitration and resolve doubts about the scope of the arbitration clause in favor of arbitration.” Allen v. Pacheco, 71 P.3d 375, 378 (Colo.2003).

“More specifically, [the court] must compel arbitration unless [it] can say with positive assurance that the arbitration clause is not susceptible of any interpretation that encompasses the subject matter of the dispute.” Id. “This positive assurance test is applied in gray areas which require contract interpretation by the court to determine the parties’ intentions.” City and County of Denver, at 1364; cf. Riley Mfg. Co., Inc. v. Anchor Glass Container Corp., 157 F.3d 775, 781 (10th Cir.1998)(discussing two situations under the Federal Arbitration Act where the presumption in favor of arbitration may not apply).

“Creative legal theories asserted in complaints should not be permitted to undermine the presumption favoring alternative means to resolve disputes.” City and County of Denver, 939 P.2d at 1364. Accordingly, the Colorado Supreme Court stated “that the district court must compel ADR unless the court can say with positive assurance that the [ADR clause] is not susceptible of any interpretation that encompasses the subject matter of the dispute.” Id. (citing Jefferson County School Dist. v. Shorey 826 P.2d 830, 840 (Colo.1992)). “[T]he district court must accord the parties a presumption in favor of ADR and must resolve doubts about the scope of the ADR clause in favor of the ADR mechanism.” Id. “Therefore, to decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim.” Austin v. US West, Inc., 926 P.2d 181, 184 (Colo.App. 1996).

Based on this law, the law firm of Harris, Karstaedt, Jamison & Powers, P.C. was able to successfully argue to the Colorado Court of Appeals that an arbitration provision in an expired warranty was enforceable. Shams v. Howard, 165 P.3d 876 (Colo.App.2007). This precedent further illustrates the import of the presumption in favor of arbitration under Colorado law.

7.1 Notice of Claim Procedure

The April 2003 revisions to CDARA set in place a notice of claim procedure (“NCP”) to which all claimants were required to affect prior to initiating a law suit for construction defect

damages. Under these amendments, CDARA expressly applies to “actions” brought against “construction professionals” for “actual damages.” See §§ 13-20-802.5, 13-20-803(1), C.R.S. Section 13-20-803.5(1), C.R.S. mandates that a claimant serve a notice of claim to the construction professional respondent no later than seventy-five days prior to filing suit. “‘Notice of claim’ means a written notice sent by a claimant to the last known address of a construction professional against whom the claimant asserts a construction defect claim that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect.” § 13-20-802.5(5), C.R.S.

Subsections 1 through 8 of § 13-20-803.5, C.R.S., outline the notice of claim process now required by the CDARA. No later than seventy- five days before filing an action against a construction professional, or no later than ninety days before filing the action in the case of a commercial property, a claimant shall send or deliver a written notice of claim to the construction professional by certified mail, return receipt requested, or by personal service. Following the mailing or delivery of the notice of claim, at the written request of the construction professional, the claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant's property during normal working hours to inspect the property and the claimed defect. The inspection shall be completed within thirty days of service of the notice of claim.

Within thirty days following the completion of the inspection process, or within forty-five days following the completion of the inspection process in the case of a commercial property, a construction professional may send or deliver to the claimant, by certified mail, return receipt requested, or personal service, an offer to settle the claim by payment of a sum certain or by agreeing to remedy the claimed defect described in the notice of claim. A written offer to remedy the construction defect shall include a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction work necessary to remedy the defect described in the notice of claim and all damage to the improvement to real property caused by the defect, and a timetable for the completion of the remedial construction work. Unless a claimant accepts the offer in writing within fifteen days of the delivery, the offer shall be deemed to have been rejected.

A claimant who accepts a construction professional's offer to remedy or settle by payment of a sum certain a construction defect claim shall do so by sending the construction professional a written notice of acceptance no later than fifteen days after receipt of the offer. If an offer to settle is accepted, then the monetary settlement shall be paid in accordance with the offer. If an offer to remedy is accepted by the claimant, the remedial construction work shall be completed in accordance with the timetable set forth in the offer unless the delay is caused by events beyond the reasonable control of the construction professional. If no offer is made by the construction professional, the construction professional fails to perform on its offer or if the claimant rejects an offer, the claimant may bring an action against the construction professional for the construction defect claim described in the notice of claim, unless the parties have contractually

agreed to a mediation procedure, in which case the mediation procedure shall be satisfied prior to bringing an action. Any action commenced by a claimant who fails to comply with the requirements of this section shall be stayed, which stay shall remain in effect until the claimant has complied with the NCP requirements.

7.2 Initial Defect List

The original version of CDARA required the filing of an initial defect list as a predicate to the setting of trial. § 13-20-803, C.R.S. This requirement is somewhat redundant now given the more stringent requirements of the NCP. Regardless, it still remains a statutory requirement.

8 CONCLUSION

As illustrated above, Colorado construction defect law is in a dynamic state of change to address the interests of both consumers and builders alike. Given the recent rate of legislation enacted to regulate the construction industry and the continuing growth of the Colorado economy, the prospect that this body of law will become static is questionable. As this body of law changes, the law firm of Harris, Karstaedt, Jamison & Powers, P.C. will remain prepared to address the challenges that await in the construction industry in the future.

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