Recent Changes in the Law Affecting Construction Defect Litigation

At Long Last, the Colorado Legislature Passed Construction Defect Reform

By David M. McLain

ON MAY 23, 2017, Governor Hickenlooper signed HB17-1279 into law. The bill states that before an HOA's executive board can institute a construction defect action, it must provide notice of the anticipated commencement of the action to each of the HOA's unit owners, along with certain disclosures about the anticipated action. The bill also requires that the HOA executive committee convene a meeting of the unit owners to consider the action, and that the construction professionals against which the claim is being brought have the opportunity to address the members of the HOA. The bill also states that the HOA executive committee may only initiate a construction defect action if it is approved by "owners of units to which a majority of votes in the association are allocated."


Governor Hickenlooper

While this sounds good, the bill goes on to state that for purposes of calculating the required majority vote, the following votes are excluded:

1) Any votes allocated to units owned by a contractor, subcontractor, developer, or builder responsible for any part of the design, construction, or repair of any portion of the common interest community, or any affiliate of such a party, including any entity controlled or owned, in whole or in part, by any person that controls or owns the company, or by the spouse of such a person.
2) Any votes allocated to units owned by banking institutions, unless a vote from such an institution is actually received by the association.
3) Any votes allocated to units of a product type in which no defects are alleged, in a common interest community whose declaration provides that common expense liabilities are not shared between the product types.
4) Any votes allocated to units owned by owners who are deemed "nonresponsive."

The problem with this is that the exclusions render the informed consent meaningless. Prior to HB17-1279, a declaration could provide that in order for an association to have standing to

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sue for construction defects, it had to obtain the informed consent of up to 67% of the owners within the community, with no exclusions. For example, in a common interest community of 100 units, the association would need to obtain the affirmative vote of 67 of the units owners within the community, regardless of ownership, in order to proceed with a construction defect action. That is no longer the case under HB17-1279.

Under HB17-1279, the HOA's executive committee needs only the approval of a simple majority of responsive owners in order to proceed with an action. Two years ago, a plaintiffs' construction defect attorney that also sits on the executive committee for his HOA testified at the Colorado legislature that even on uncontested issues, it is rare for his HOA to receive a response rate above 20 percent of the total membership. Assuming that response rate is reflective of most associations, under the same example above and under HB17-1279, if an HOA were to send out 100 ballots seeking approval of a construction defect action and get back only 20 ballots, it could proceed with an action so long as 11 votes were in favor of an action.

That said, there remains some question among the legal community as to the effectiveness of a 67 percent supermajority clause in a declaration. There are those among defense attorneys who questioned whether such clauses were ever enforceable, and there are no appellate cases upholding such clauses, so it is not as though the decision was made to trade 67 percent for a simple majority of responsive owners. In fact, if the 67 percent supermajority clauses were not enforceable, a simple majority of responsive owners is still a higher threshold than the executive committee making the decision itself.

Colorado Supreme Court Upholds "Consent-to-Amend" Provision in an HOA's Declaration. A Step in the Right Direction.

On June 5, the Colorado Supreme Court announced the Vallagio at Inverness Residential Con. Ass'n v. Metro. Homes, Inc., No. 15SC508, 2017 CO 69 (Colo. June 5, 2017) decision. By way of background, Metro Inverness, LLC developed the Vallagio at Inverness Residential Condominiums and served as the declarant for its homeowners association. When it set up the Association, the Declarant included within the Association's declaration a mandatory arbitration provision specific to construction defect claims. This provision stated that it "shall not ever be amended without the written consent of Declarant and without regard to whether Declarant owns any portion of the Real Estate at the time of the amendment."

The HOA purportedly amended the declaration to remove the arbitration provision, without the Declarant's consent, and filed a construction defect lawsuit in district court. The defendants moved to compel arbitration, relying on the arbitration provision for construction defect claims and arguing that the purported amendment to remove it was invalid because the unit owners did not obtain the Declarant's consent for the amendment. The Association, in response, argued that the unit owners validly amended the declaration to remove the arbitration provision and that the declarant consent requirement violated the Colorado Common Interest Act ("CCIOA").

Briefing and arguments on this issue made their way from the district court, through the Colorado Court of Appeals, and ultimately to the Colorado Supreme Court, which agreed to decide two issues:

1) Did CCIOA permit a developer-declarant to retain a right of consent to amendments to a provision of a common interest community's declaration mandating arbitration of construction defect claims.

2) Were claims brought under the Colorado Consumer Protection Act, §§ 6-1-101 to -1121, C.R.S. (2016) ("CCPA") arbitrable. In response to these questions, the Supreme Court made short work of the arguments advanced by the Association and concluded that CCIOA did not void the declarant "consent-to-amend" provisions and that CCPA claims are arbitrable.

In sum, the Supreme Court's decision is certainly a positive development for the Colorado construction community as it preserves the builder's ability to enforce arbitration provisions in construction defect cases. To protect your ability to arbitrate any construction defect claims brought against you by an association, be sure to include a declarant "consent-to-amend" provision in the association's declaration.