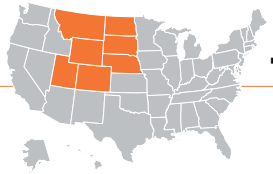

Local Pols Stiff Colorado Plaintiff's Bar

The Colorado legislature's ties to legal hacks have prevented meaningful action on construction defect statute reform, but local jurisdictions have posted guard.

BY DAVID MCLAIN

In 2007, construction permits for condominiums and townhomes made up about 25% of all permits pulled in Colorado. Today, permits pulled for for-sale multifamily attached homes account for only 2%-4% of the total. This has led to a shortage of attainable housing along the Front Range of Colorado and beyond. One of the causative factors leading to this shortage has been Colorado's construction defect litigation, which has primarily focused, since the late 1990s, on condominiums and townhomes. Over the last four or five years, the state legislature has taken up the issue, but every year, attempts to enact meaningful reform have been thwarted by attorneys who make their living suing Colorado's home builders. Because of the inability of the state legislature to pass meaningful reforms, the issue has increasingly become one of local concern. Primarily through the efforts of the Home Builders Association of Metro Denver, 15 local jurisdictions have passed their own construction legislation, affecting over half of the state's residents, or 2.5 million Coloradans.

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Local Ordinances Put Brakes on Litigation

By protecting covenants and other HOA and homeowners documents from amendments that favor construction defect attorneys, local governments are forcing homeowners and other property shareholders to work with builders before litigating conflicts.

Protection for Arbitration >> Juries typically award cost of repair damages three times higher than an arbiter would under similar facts. That's why plaintiff's attorneys do everything they can to push their cases in front of juries, including getting arbitration requirements removed from associations' declaration of covenants, conditions, and restrictions (CC&Rs). To combat this tactic, most of the local ordinances enacted either provide that all multifamily construction defect claims must be arbitrated or they protect arbitration language found in communities' CC&Rs from unilateral removal by the homeowners. Additionally, several jurisdictions now permit home builders to include language requiring arbitration of construction defect claims as a note on the subdivision plat. The approved plat is recorded with the clerk and recorder's office prior to development and construction; therefore, the plat note requiring arbitration becomes a covenant running with

EPA SOCKS IT TO MORE DENVER CONTRACTORS

Two Denver-area contractors are the latest companies caught in ongoing investigations into lead paint training violations. The U.S. Environmental Protection Agency settled with KSK Builders and HomeWrights for doing renovations without having properly certified or trained personnel or having required compliance records on hand. The EPA began its dragnet last year, targeting home renovations on houses built before 1978 regulations barred the use of lead paint. Dozens of worksites in northeastern Denver-area communities have been inspected so far. KSK Builders agreed to pay $2,000 in its EPA settlement, while HomeWrights was hit with a $9,400 penalty. The Renovation, Repair and Painting Program requires firms that disturb lead paint in homes, childcare facilities and preschools built before 1978 follow lead-safe practices and be certified by the EPA or an EPA-authorized state or use certified renovators trained by EPA-approved educators. ■

Local Colorado Jurisdictions That Have Enacted Construction Defect Reform to Date:

Jurisdiction	Ordinance or Plat Note	Protection of Arbitration	Informed Consent	Right to Repair	Restriction on Claims for Technical Code Violations	Protection for Construction That Complies With Code
Arvada	Plat Note	Yes	No	No	No	No
Aurora	Ordinance	Yes	Yes	Yes	No	No
Aurora	Plat Note	Yes	No	No	No	No
Castle Rock	Plat Note	Yes	No	No	No	No
Centennial	Ordinance	Yes	Yes	Yes	No	No
Colorado Springs	Ordinance	No	Yes	Yes	Yes	Yes
Commerce City	Ordinance	Yes	Yes	Yes	No	No
Denver	Ordinance	Yes	Yes	No	Yes	Yes
Douglas County	Plat Note	Yes	No	No	No	No
Fort Collins	Ordinance	Yes	Yes	No	Yes	Yes
Lakewood	Ordinance	Yes	Yes	Yes	No	No
Littleton	Ordinance	Yes	Yes	Yes	No	No
Lone Tree	Ordinance	Yes	Yes	Yes*	No	No
Loveland	Ordinance	Yes	Yes	Yes*	No	No
Parker	Plat Note	Yes	No	No	No	No
Parker	Ordinance	Yes	Yes	No	Yes	Yes
Wheat Ridge	Ordinance	Yes	Yes	Yes	No	No

* Builder shall not make repairs while an objection is pending without the written consent of the claimant.

the land and is not subject to unilateral amendment by homeowners.

Informed Consent >> Often, homeowners are not the ones who decide to pursue construction defect litigation; the members of the homeowners association board are talked into it, or threatened into it, by plaintiff's attorneys. To combat this problem, many local ordinances require that an HOA provide certain disclosures to its homeowners and permit an action to proceed only after it has been approved by a majority of the homeowners. We have found this to be an effective tool in preventing unnecessary lawsuits.

Right to Repair >> While it is sometimes thought that Colorado's Construction Defect Action Reform Act (CDARA) includes a right to repair, it does not. Rather, the statute provides only that homeowners must provide a notice of claim and that the home builder has a right to make an offer to repair, which can be accepted or rejected by the homeowners without consequence if they reject a reasonable offer. Now, in a few jurisdictions, home builders have an absolute right to repair any construction defects prior to the institution of a claim, and the homeowners or HOA cannot interfere with those repairs. Unfortunately, two of the jurisdictions provide home builders a right to repair only when the homeowners consent, which is not truly a right to repair.

Restriction on Claims for Technical Building Code Violations >> A provision within the CDARA states that a technical violation of a building code does not give rise to a negligence claim unless the violation causes: (a) actual damage to real or personal property; (b) actual loss of the use of real or personal property; (c) bodily injury or wrongful death; or (d) a risk of bodily injury or death to, or a threat to the life, health, or safety of, the occupants of the residential real

property. Unfortunately, technical code violations do give rise to other claims, particularly breach of implied warranty, which Colorado appellate courts have likened to strict liability for construction defect claims regardless of whether they actually cause damage. Now, at least four local jurisdictions have broadened to all claims the restriction on the ability to bring claims for technical code violations. These jurisdictions have gone one step further by making clear that construction that substantially complies with code shall not be considered defective for purposes of proving any construction defect claim, regardless of whether the construction causes damage. When questioned about the reasonableness of this last restriction at the public hearing on the ordinance, the Denver city attorney said home builders need to be able to rely on the building code and should not be held liable when they substantially comply with it. He said that if homes can be built in conformance with the building code and have damage result anyway the city should amend the building code.

The Question of Preemption Remains Untested

Despite the adoption of local construction defect ordinances, the number of condominiums and townhomes being built has not substantially increased. Home builders and their financial backers are worried that a court might later rule that state law preempts the local ordinances. While there were a number of bill drafts circulated during the 2016 legislative session that would have provided protection for local ordinances from a preemption attack, none of those became law.

It has been exciting to watch one local jurisdiction after another enact construction defect reform, particularly since it has been done in the face of the same opposition that has frustrated attempts to achieve reform at the state level. We are working on strategies to give the construction industry certainty that it can rely on these local ordinances for protection from construction defect claims. ■

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Rulemakers

Regulatory and Legislative Actions

COLORADO The Durango City Council will reconsider in July an ordinance that will protect condo builders from frivolous construction defect lawsuits. The ordinance would give developers the right to repair defects and mandate that a majority of homeowners approve a lawsuit before it can be filed in court. The council pulled a provision requiring HOAs to abide by mediation or arbitration processes and retained HOA rights to amend their governing documents, allowing for lawsuits over other settlement means.

UTAH Gov. Herbert in March signed a law to stop "double dipping" by asbestos claimants. HB 403 requires certain plaintiff disclosures and proper use of materials in discovery to prevent lawyers from seeking money from multiple asbestos trusts for a single client while also filing a personal injury lawsuit. The law additionally specifies when the court should stay an asbestos action, how it should sanction failures to provide information, and rules on valuations of asbestos trust claims, among other details. The law applies to asbestos actions filed on or after May 10, 2016. Arizona, Ohio, Oklahoma, Tennessee, Texas, West Virginia and Wisconsin previously enacted similar transparency laws for asbestos compensation.

FEDS GRANT $400K TO COLORADO FOR CONTRACTOR TRAINING

The $1.2 billion widening of Interstate 70 in northeast Denver will bring new employment opportunities to the region, and the federal government has allocated $400,000 to train local residents for those jobs. The Colorado Department of Transportation in partnership with Emily Griffith Technology College and the Community College of Denver will provide the training, which will include English as a second language and math classes as well as more advanced training. About 300 local residents are slated to be hired out of the thousands who will be employed on the project. Federally funded projects are typically not permitted to set geographical requirements for hiring. The I-70 endeavor was one of nine countrywide that received a local-training grant. CDOT hopes to begin training classes by the end of 2016, which puts qualified workers on the worksites when construction begins in 2017. The Sierra Club has filed a federal lawsuit to block the project from starting, but that will not affect the training program, according to officials. ■