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I. RESIDENTIAL CONSTRUCTION IN COLORADO

This document is intended to be an overview of construction defect litigation in Colorado. It contains discussions of the geology of expansive soils, the history of construction defect litigation, the causes of action typically found in construction defect cases, the affirmative defenses available in such cases, the types of damages for which recovery is sought, and the practical aspects of litigating construction defect cases in Colorado. Although this document does not exhaustively cover the matters addressed in it, it should provide a better understanding of the complexities and challenges present in construction defect litigation in this state.

There are generally two types of construction defect cases. The first type involves claims brought by individual homeowners arising out of damage allegedly caused to their single-family homes by expansive soils or construction defects. The second type involves claims brought by homeowners associations for damage allegedly caused to multi-family developments, either townhomes or condominiums, by the presence of expansive soils and/or violations of the applicable building codes. This overview will address both types of cases.

A. Geotechnical Background

Much of the soil and bedrock along the eastern slope of Colorado is composed of clay minerals that attract and absorb water. These minerals expand when exposed to water. Hence, the soils and bedrock in which the minerals are found are referred to as expansive soils. Expansive soils are present throughout the Denver metropolitan area. The presence of expansive soils creates significant challenges for designers and builders because of the forces these soils can exert against foundation systems as they become exposed to water and swell. These soils and the damages to residential housing that they have caused have also generated perhaps the most significant and, ultimately, the most costly body of construction defect litigation in Colorado's history.

Before developing a lot or series of lots, the builder or developer obtains a report from a geotechnical engineer. In addition to information concerning underlying soil conditions, the reports typically contain recommendations regarding the grade or slope of soils adjacent to foundation walls, the proper foundation system to be used, and the proper basement floor system to use. The provisions addressing floor systems usually contain boilerplate language indicating that a structural flooring system is the most positive solution for basement floor systems and that the builder or owner assumes the risk of future movement if a concrete slab-on-grade basement floor system is installed. The provisions and recommendations of a soil report, as well as the data it contains about underlying soils, have proven to be important in prosecuting and defending expansive soils litigation.

B. Structural Engineering and Design

In the 1990's, it was customary for builders to install concrete slab-on-grade basement floors in houses, even when the houses were built on piered foundation systems. Slab-on-grade concrete basement floors are designed to move independently of the foundation and independently of basement finishes in the event that soils under the slabs expand or contract. The idea is to prevent movement of the slab from causing damage to the foundation, basement finishes, and upper-level walls and doors. The problem in some instances is that movement of slab-on-grade basement floors is transferred to other elements of the houses such as framing, drywall, and the like. However, even where foundation or floor movement had not, at the time of trial, resulted in substantial damage, plaintiffs' endorsed experts typically testified that additional movement would occur in the future. In many cases, plaintiffs successfully argued they were entitled to recover compensation for those future, probable damages.

Damage caused by expansive soils typically manifests in a home through movement in the foundation and/or flooring systems. The problem of foundation movement has been reduced through the use of various specialized foundation systems, primarily foundations constructed on drilled piers. Regardless, just as homes with more traditional foundation systems such as spread footings are prone to litigation when the foundations move, homes constructed with piered foundations are also often the subject of lawsuits. Where homes have piered foundations, plaintiffs often claim that the piers are not long enough, that the piers do not penetrate sufficiently into underlying bedrock, or that the piers are otherwise inadequate.

At least partially in response to construction defect claims related to the use of slab-on-grade basement floors, the construction industry altered its practices by using more and more frequently structural floors in basements, which are suspended above the expansive soils. Shortly after this change, the plaintiffs' attorneys retooled their claims and we saw an influx of cases involving claims that the crawlspaces were improperly sealed and ventilated, resulting in the growth of, and exposure to, mold. In response, the construction industry began using fully-sealed vapor barriers and active ventilation systems in crawlspaces.

On the multi-family construction side, the construction industry began shying away from deep foundations with either slab-on-grade or structural floors in the basements in favor of using post-tensioned slab foundations. This change resulted in the plaintiffs' attorneys again retooling their cases to bring claims related to the allegedly inadequate design and construction of post-tensioned slabs. These claims range from the claim that it is improper to use post-tensioned slabs using the PTI method of design on expansive soils, to claims arising out of the termination and protection of the post-tensioned cables.

If we have learned anything over the years, it is this: the plaintiffs' attorneys will continually retool and revise their strategies to criticize and make allegations of construction defects regardless of what the industry does to mitigate against the effects of expansive soils and to otherwise reduce the prevalence of construction defects.

II. CLAIMS TYPICALLY BROUGHT IN CONSTRUCTION DEFECT CASES

Following are a number of claims typically asserted against builders and general contractors by homeowners in construction defect lawsuits.

A. Breach of Express Warranty

The elements of a claim for breach of express warranty are: (1) when the builder sold the homeowners their home, the builder included an express written warranty; (2) the builder failed to comply with the provisions of the express written warranty; and (3) this failure was a cause of the homeowners' damages.

In the majority of cases, the sale of a new home includes an express written warranty extended from the builder to the purchaser. This warranty contains language warranting that the home will be free from "defects" for one to two years. Some homes are also sold with warranties containing extended protection, typically for ten years, covering the "structural" elements of the home. If a structural warranty is included, it is most often issued by a company specializing in residential structural warranties. It is the builder that enrolls the homeowner in the structural warranty program. These companies include the Residential Warranty Corporation, National Home Insurance Company, and others. Structural warranty companies have a long history of denying all but the most extreme claims involving homes which are unsafe, unsanitary, or otherwise uninhabitable.

Plaintiffs generally assert that an express warranty is breached when any defect manifests itself during the first year, and/or when a structural defect appears in the first ten years after construction, and such defect is not cured by the builder or applicable warranty program insurer. The primary defenses to a claim for breach of express warranty are that there was no express warranty given or that the builder and/or applicable warranty program complied with the terms of the warranty and/or that the warranty expired before the claimed defect arose.

B. Breach of Implied Warranty

1. *Claims for Breach of Implied Warranty*

In order to recover for breach of an implied warranty, plaintiffs must establish that: (1) the builder entered into a contract with the plaintiffs for the construction and/or sale of a residence; and (2) when the builder gave possession of the residence to the plaintiffs, it did not comply with one or more of the warranties implied by law as part of the transaction.

In Colorado, when a builder sells a newly constructed home, the law imposes implied warranties of habitability and workmanlike construction. In essence, when a builder sells a home, it implicitly guarantees that the house is habitable, that it was built in a workmanlike fashion, that it complies with applicable building codes, and that it is reasonably suited for its intended use.

The rationale commonly cited for these implied warranties is that the homebuilder is deemed to be in a better position than the purchaser to know whether a defect, latent or otherwise, exists in the home at the time of sale. Colorado appellate opinions have likened this implied warranty to “strict liability for faulty construction.” Defects which give rise to the application of these implied warranties include, but are not limited to, heaving and cracking basement slab-on-grade floors, improper exterior grade, cracks in surfaces of the home interiors and exterior fascia, tilting or “racking” of doors and windows, reduction of the void space between the foundation and interior walls, and water intrusion. Allegations such as inadequate exterior compaction of soils, improper grades/slope of soils away from foundation walls, and insufficient accommodations for drainage are increasing in frequency. The expense of remediating compaction, grade, and drainage conditions can be substantial. The existence of any one of these alleged defects can be sufficient to establish builder-liability for a breach of the implied warranty of habitability and workmanlike construction where the alleged defect adversely affects the structure’s intended use and purpose.

2. *Disclaimer of Implied Warranties*

Prior to the enactment of the Homeowner Protection Act in 2007, builders and developers were able to disclaim implied warranties so long as the language in the purchase and sale agreement was clear, unambiguous, and sufficiently particular to provide adequate notice of the implied warranty protections that were being relinquished. In 2007, the Colorado Legislature enacted the Homeowner Protection Act, which retroactively makes void as against public policy any disclaimer of implied warranty or any other waiver or limitation of a legal right afforded to homeowners under the Construction Defect Action Reform Act. The Homeowner Protection Act applies to cases filed on or after April 20, 2007.

C. **Negligence**

The elements for a claim of negligence are: (1) the homeowner incurred damages; (2) the builder breached an applicable duty of care; and (3) the builder’s breach of care was a cause of the homeowner’s damages.

1. *Contractor’s Liability for its Own Negligence*

A builder owes a duty to purchasers to construct homes with reasonable care. If it fails to meet that duty, the builder can be deemed negligent. In order to build a home in a non-negligent manner, the builder must, at a minimum, conform to the industry standards of care in effect when the home was constructed. However, in certain circumstances, including situations where it can be established that an entire industry is performing in a negligent manner, a higher standard is imposed. Namely, the builder must utilize construction techniques and precautions in conformance with the best available technology (*i.e.*, the “state of the art”).

The availability of a negligence claim is not limited to the first purchaser of a home. In the context of the purchase of a used home, an owner asserting a negligence claim against the builder must demonstrate that the defect was latent or hidden at the time of the sale, and must show that the builder caused the defect. A second or subsequent purchaser of a home assumes the risk of patent and/or obvious defects and cannot successfully sue a builder for those defects.

2. *Contractor's Liability for the Negligence of its Subcontractors*

Not only do plaintiffs seek to hold the builder responsible for its own negligence, but they also assert that the builder is responsible for the negligent acts or omissions of its subcontractors based upon the vicarious liability theory of *respondeat superior*. Some plaintiffs argue that the general contractor and/or builder have a non-delegable duty to ensure the proper workmanship of a home. In cases involving homes constructed over steeply dipping bedrock, plaintiffs sometimes assert a builder is liable for the negligence of its subcontractors based on the theory that construction on these soils constitutes an inherently dangerous activity.

a. Non-Delegable Duty Doctrine

In attempting to hold a builder liable for the negligence of its subcontractors, plaintiffs argue that the builder owes a duty of reasonable care to the homebuyer that it cannot delegate. There are some cases which suggest that builders owe a non-delegable duty of reasonable care in the construction of homes sufficiently broad to make them responsible for the negligence of its subcontractors and design professionals also.

Most, if not all, of the cases relied on by plaintiffs impose a non-delegable duty that arises by statute. However, there is no statute in Colorado that imposes a non-delegable duty on builders. To the contrary, C.R.S. § 13-21-111.5(1), the Colorado Contribution Statute, clearly mandates that “no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss. . . .” Thus, assuming that only tort theories remain in the case at the time the fact-finder renders its verdict, it is questionable whether a builder would be held liable for the acts or omissions of subcontractors who have been named as parties or who have been properly designated as nonparties.

b. Inherently Dangerous Activity Doctrine

Where homes are constructed in areas designated as steeply dipping bedrock hazard zones, plaintiffs argue that the construction of the home constitutes an inherently dangerous activity. Steeply dipping bedrock is a type of expansive soil in which underlying bedrock lies at a slant rather than in horizontal planes. When the bedrock in these formations swells, it can cause extreme damage to structures constructed on it, often substantially more severe than the damage otherwise caused by horizontally-bedded expansive soils. Traditional methods for site exploration and traditional construction methods utilized to accommodate for expansive soils

have proven largely unsuccessful in areas of steeply dipping bedrock. While damage to structures has been noted in these areas for decades, it was not until April 1995 that the first regulations concerning dipping bedrock were adopted in Jefferson County, the areas in which such bedrock is most commonly found in this region. The regulations contain minimum standards and building technique recommendations for construction in the designated hazard zones.

In general, inherently dangerous activities are those that: (1) present a special or peculiar danger to others that is inherent in the nature of the activity or the particular circumstances under which the activity is to be performed; (2) are different in kind from the ordinary risks that commonly confront persons in the community; and (3) the builder knows or should know the risk is inherent in the nature of the activity or in the particular circumstances under which the activity is to be performed. It has been our position, on behalf of builders, that building a home, regardless of the type of soil upon which the home is built, is not, as a matter of law, an inherently dangerous activity. In several expansive soils cases, this issue has been the subject of motions in limine filed on behalf of the builders. These cases have been resolved prior to a court ruling on the issue.

D. Negligent Misrepresentation/Omission

Plaintiffs pursuing this claim assert that the builder did not provide them with adequate information to allow for an informed decision about the purchase of a home. Typically this claim manifests itself in a complaint about a home built on expansive soils or a home which contains latent construction defects. To prevail on this claim, plaintiffs must prove three facts: (1) the builder either negligently provided false information or omitted information; (2) plaintiffs relied on the information or lack thereof; and (3) the plaintiff's reliance was a cause that of the damage being claimed.

When bringing this claim, plaintiffs usually argue that the builder either gave them no information or insufficient information regarding the soils upon which their home was built, the potential effects of such soils, the different types of construction materials and techniques employed by the builder, and/or the quality of construction. Plaintiffs must then prove that they relied on the misrepresentation or omission at issue in their purchase of the property and that they experienced damage as a result of their reliance.

The builder does have a few defenses to this claim. A simple one is that the plaintiff unreasonably relied on the misrepresentation. Such a defense falls under contributory negligence and may be a complete defense but often is only partial. More often a builder's best defense is that the builder did provide sufficient information regarding expansive soils, construction materials and techniques used, or that the information, if given, would not have changed the plaintiffs' decision to purchase the home. It is important to note that where a builder has documentation, signed by the purchaser, acknowledging that purchaser received information about soils conditions or construction specifications prior to closing, a plaintiff's negligent misrepresentation/omission claim may be minimized but not eliminated entirely.

E. A Contractor's Violation of the Soils Disclosure Statute, C.R.S. § 6-6.5-101

The Colorado Soils Disclosure Statute, C.R.S. § 6-6.5-101(1), provides:

At least fourteen days prior to closing the sale of any new residence for human habitation, every developer or builder or their representatives shall provide the purchaser with a copy of a summary report of the analysis and the site recommendations. For sites in which significant potential for expansive soils is recognized, the builder or his representative shall supply each buyer with a copy of a publication detailing the problems associated with such soils, the building methods to address these problems during construction, and suggestions for care and maintenance to address such problems.

If, prior to closing, a plaintiff received only a summary soils report from the builder, the plaintiff will typically argue that the summary was inadequate and that it was not provided with sufficient information to make an informed decision. Alternatively, if the plaintiff received the entire soil report prior to closing, the plaintiff will often assert that it received too much complex, technical information that could not be reasonably understood by a lay person.

F. Negligence *Per Se*

The elements of a claim for negligence *per se* are: (1) the builder violated a state statute or city ordinance; (2) the homeowner suffered damages; and (3) violation of this statute was a cause of the homeowner's damages. When the violation of a statute causes damage to a person who is in the class of persons sought to be protected by the statute and the damage is of the type sought to be protected against by the statute, then the statutory violation constitutes negligence *per se*.

As a practical matter, plaintiffs' attorneys have previously brought negligence *per se* claims when there has been a violation of either the Colorado Soils Disclosure Statute, discussed above, or the applicable building codes. However, recent changes to the Colorado Construction Defect Action Reform Act, C.R.S. § 13-20-801, *et seq.* (the "CDARA") prohibit plaintiffs' attorneys from bringing negligence claims based solely on alleged violations of the building code unless such alleged violation results in actual damage, actual loss of use of real or personal property, bodily injury, or a significant risk of bodily injury.

It is beyond dispute that initial purchasers of new homes are in the class of persons intended to be protected by the Soils Disclosure Statute and the applicable building code. Further, damage caused by expansive soils or by construction defects generally are clearly the type of injury sought to be protected against by the statute and the applicable building code. Accordingly, where the plaintiff can establish the builder violated either the Soils Disclosure Statute or the building code, the plaintiff is likely to prevail on a claim for negligence *per se*.

G. Colorado Consumer Protection Act, C.R.S. § 6-1-101, *et seq.*

In Colorado construction defect litigation, plaintiffs assert Colorado Consumer Protection Act (“CCPA”) claims to encourage settlement of cases. The broad language of the CCPA allows for alleged violations of the CCPA to be made in most common business transactions, including the sale of real property. The threat of the harsh civil penalties under the CCPA were previously used to place defendants in a position where they were compelled to settle or face paying three times the actual damages and plaintiffs’ attorney fees. Currently, however, the treble damages and attorney fees component allowed are statutorily capped at \$250,000 per claimant.

The deceptive trade practices to which the CCPA applies are varied. In addition to many affirmative misrepresentations that may be considered deceptive trade practices, the CCPA also prohibits the omission of material information that was known at the time of an advertisement or sale if such an omission was intended to induce the consumer to enter into a transaction. In construction litigation, plaintiffs’ attorneys allege that material information such as information related to expansive soils, construction techniques or materials, or overall construction quality was withheld from homebuyers.

The elements of a claim for violation of the CCPA are: (1) the homebuyer incurred damages; (2) the builder engaged in conduct that violates the CCPA; and (3) the builder’s conduct was a cause of the homebuyer’s damages.

Plaintiffs’ attorneys usually assert violations of certain subsections of C.R.S. § 6-1-105. These subsections include C.R.S. § 6-1-105 (e), (g), (i), (r), and (u). C.R.S. § 6-1-105 states, in relevant part:

(1) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

* * *

(e) Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

* * *

(g) Represents that goods, food, services, or property are of a particular standard, quality, or grade . . . if he knows or should know that they are of another;

* * *

(i) Advertises goods, services, or property with intent not to sell them as advertised;

* * *

(r) Advertises or otherwise represents that goods or services are guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, any material conditions or limitations in the guarantee which are imposed by the guarantor, the manner in which the guarantor will perform, and the identity of such guarantor. . . . Guarantees shall not be used which under normal conditions could not be practically fulfilled or which are for such a period or time or are otherwise of such a nature as to have the capacity and tendency of misleading purchasers or prospective purchasers into believing that the goods or services to guaranteed have a greater degree of serviceability, durability, or performance capability in actual use that is true in fact. The provisions of this paragraph apply not only to guarantees but also to warranties, to disclaimer or warranties, to purported guarantees and warranties, and to any promise or representation in the nature of a guarantee or warranty;

* * *

(u) Fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction; . . .

Despite the limitations set forth in the CDARA, the threat of the civil penalties under the CCPA is still a powerful incentive for builders to settle construction defect cases in Colorado. Although the Colorado Legislature has increased plaintiffs' burden of establishing a violation of the CCPA at trial, the actual pretrial threat of the civil penalties has not been eliminated. As such, Colorado plaintiffs will continue to assert CCPA violations against builders and construction contractors and use, even with the reduced CDARA amount, the CCPA claims as leverage to negotiate settlement of construction defect claims.

III. DEFENSES TYPICALLY RAISED IN CONSTRUCTION DEFECT CASES

In addition to the defenses incorporated into the *Claims Typically Brought in Construction Defect Cases* section above, the following defenses and affirmative defenses are also typically analyzed in the arena of construction defect litigation.

A. Statutes of Limitation and Repose

Colorado has both a statute of limitation and a statute of repose that are applicable to construction defect cases. These two statutes differ in that statutes of limitations extinguish, after a specified period of time, a person's right to prosecute an action after it has accrued. Statutes of repose, by contrast, limit potential liability by limiting the time during which a cause of action can even arise. To put it another way, statutes of repose cut off the right to bring an action after a specified period of time measured from the completion of the work, regardless of when the cause of action accrues.

The statutes of limitations and repose that specifically relate to the building industry can be found within C.R.S. § 13-80-104. This statute regulates the time within which any action, whether in contract or tort, can be brought, and is distinct from Colorado's general statute of limitations, C.R.S. § 13-80-102. This statute was designed to protect the construction industry from claims brought well after the completion of a job.

The statute consists roughly of two parts, a statute of limitations and a statute of repose. Generally, the statute of limitations for bringing an action is two years from the time the defect or problem manifests itself. However, because the time the defect manifests itself could potentially be indefinite, the legislature included a six-year statute of repose that mandates any action shall be brought within six years from the date of substantial completion.

The security provided by C.R.S. § 13-80-104 is somewhat elusive given various courts' interpretation of the statute. Factual questions such as the accrual dates of certain claims have watered down the statute so that even if a defendant has a valid defense, it is difficult to dismiss the claim through pretrial motions.

Essentially, the statute lays out a two-year window within which a claim must be brought. This time period does not begin to run until the claim arises, which the statute defines to mean the time when the claimant discovers or should have discovered, in the exercise of reasonable diligence, the physical manifestation of the defect. This definition creates an issue of fact that has the effect of watering down the two-year statute.

The statute also creates a six-year conditional statute of repose. This should act as an absolute bar to any claim being brought six years after substantial completion of the improvement to the real property. However, if the defect arises in the fifth or sixth year, then the claimant has two more years in which to bring the action. This creates what is sometimes referred to as an eight-year absolute bar.

C.R.S. § 13-80-104(1)(b)(II) applies to third-party suits by the defendant, and it changes the time required for bringing such suits. Under a prior version of the statute, a defendant was under the same statute of limitations as the plaintiff within which to bring a suit against a third-party.

Under the current statute, a builder does not have to initially decide whether or not to sue a subcontractor or design professional which may be liable for the defects because the statute of limitations is running. Instead, the builder can wait until after the underlying suit against it is resolved and then it has 90 days from the time of judgment or settlement to bring suit. This will be very beneficial in situations where a defendant does not want to sue a third-party, thereby disrupting a business relationship. The statute of repose is not tolled until 90 days following the resolution of the underlying dispute with the homeowner.

Once a claimant serves a pre-litigation notice of claim on a construction professional pursuant to C.R.S. § 13-20-803.5, the statute of limitations is automatically tolled until 60 days after the completion of the notice of claim process. *See* C.R.S. § 13-20-805; § VI(A), *below*.

B. Failure to Mitigate Damages/Comparative Negligence

Although both of these doctrines have at least some applicability to almost all construction defect cases, their practical effect is somewhat questionable. Although they are always pled as affirmative defenses, they are seldom, if ever, successful in reducing the damages paid to homeowners.

1. Failure to Mitigate

The doctrine of mitigation of damages imposes on the homeowner the duty to exercise reasonable diligence and ordinary care in attempting to minimize the damage to his or her home caused by expansive soils or construction defects. The diligence and care required of the homeowner is the same as that which would be used by a man of ordinary prudence under like circumstances.

If a builder can point to some action or inaction of the homeowner which evidences the homeowner's failure to mitigate the damages associated with expansive soils or construction defects, the builder can seek to have a damage award reduced in an amount that represents the additional damage which the homeowner's mitigation would have avoided.

2. Comparative Negligence

Under the comparative negligence doctrine, negligence is measured in terms of percentage, and any damages awarded to the homeowner are reduced in proportion to the amount of negligence attributable to the homeowner. For example, if the builder is found to be 70% negligent and the homeowner 30% negligent, the homeowner will be able to recover only 70% of his or her actual damages.

In the area of construction defect litigation, acts or omissions on the part of the homeowner which can be considered to rise to the level of comparative negligence include, but are not limited to, failure to landscape the yard in a reasonable amount of time, changing the grade of the

yard, cutting downspouts so that water drains within five feet of the home, and landscaping within five feet of the home.

C. The Economic Loss Rule

For years, the Economic Loss Rule was an effective defense to claims of negligently performed construction or design work. The Economic Loss Rule states that, “a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.” Several recent Colorado Court of Appeals decisions have made clear that the Economic Loss Rule no longer precludes negligence actions in residential construction defect cases against homebuilders, subcontractors, architects, engineers, or inspectors because such professionals owe duties of care, independent of any contract, to the property owner. The Economic Loss Rule still precludes negligence actions between the construction and design professionals that build a project when a series of interrelated, written contracts exists between them.

D. Special Consideration Related to Second Homeowners

As noted in the *Causes of Action* section above, not all claims are available to the second owners of a home. These unavailable claims include those that are based on the contractual obligations between the builder and original purchaser, namely breach of the implied and express warranties, unless the contract states that it will inure to the benefit of subsequent owners.

Also, it is doubtful whether the builder would have any contact with the second purchaser of a home. Therefore, claims for negligent misrepresentation or omission, violation of the CCPA, and violation of the soils disclosure statute may or may not be applicable to second homeowners depending on the individual circumstances of the case.

The only cause of action that is always available to second homeowners is the claim for negligence. The damages for which the builder may become liable because of its negligence are limited to the cost of repairing only the deficiencies which were latent at the time the second homeowner purchased the home. Second homeowners cannot receive attorneys’ fees and treble damages under the CCPA, and cannot receive damages for emotional distress caused by willful and wanton breach of warranty.

E. Additional Insured Coverage and A.I. Carrier Participation in a General Contractor’s Defense

Many general contractors and developers require that their subcontractors name them as an additional insured on their policies of commercial general liability (“CGL”) insurance. Although the practice of obtaining additional insured coverage has been common in Colorado for many years, the practice of triggering it once litigation arises has not been so common. Very little case law exists in this state specific to carriers’ obligations to their additional insureds. Today, some law firms that represent general contractors tender the defense of their clients to the

subcontractors' CGL carriers based upon the general contractor's status as an additional insured under the subcontractors' policies. By extracting these policy benefits, general contractors and homebuilders (and their primary and excess carriers) have been successful in spreading the financial burden of defending construction defect lawsuits amongst multiple parties. In Colorado, it is still uncommon for additional insured carriers to make indemnity payments to or on behalf of their additional insureds. However, several firms (ours included) are working to eliminate the traditional differences in how carriers treat their named insureds versus their additional insureds.

IV. DAMAGES

Although no case law has yet explicitly determined the issue, the definition of "actual damages" in the CDARA may pre-empt the historical, common law measures of damages in all construction defect litigation in Colorado. Under the CDARA, "actual damages" means:

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, together with relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law.

A plaintiff may also recover damages for the loss of the use and enjoyment of his home. In addition, a plaintiff may be able to recover for personal injuries, such as discomfort, annoyance, sickness, and/or physical harm, if such injuries are a distinct and separate result of the property damage. While the issue of these personal injuries is still in some dispute several recent cases have ruled that such damages are not available for representative plaintiffs such as homeowners associations. Finally, a plaintiff may be able to recover for out-of-pocket expenses that he incurred in trying to correct the problem themselves, *e.g.*, by hiring an engineering firm to investigate his problems or to perform temporary repairs.

A. Punitive Damages

1. Exemplary Damages Pursuant to C.R.S. § 13-21-102.

Punitive or exemplary damages pursuant to C.R.S. § 13-21-102 are not available in construction defect lawsuits in Colorado. Absent a CCPA violation and an unreasonable offer of settlement during the notice of claim process, CDARA limits a construction professional's damages exposure to actual damages precluding any exemplary damages. *See* C.R.S. § 13-20-806(1). C.R.S. § 13-20-806 provides that:

(1) A construction professional otherwise liable shall not be liable for more than actual damages, unless and only if the claimant otherwise prevails on the claim

that a violation of the “Colorado Consumer Protection Act”, article 1 of title 6, C.R.S., has occurred; and if:

(a) The construction professional’s monetary offer, made pursuant to section 13-20-803.5(3), to settle for a sum certain a construction defect claim described in a notice of claim is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees; or

(b) The reasonable cost, as determined by the trier of fact, to complete the construction professional’s offer, made pursuant to section 13-20-803.5, to remedy the construction defect described in the notice of claim is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees.

2. *Treble Damages Pursuant to the Colorado Consumer Protection Act*

If a successful claim is brought by a plaintiff under the CCPA, treble damages may be awarded if the plaintiff can demonstrate that the defendant fraudulently, willfully, knowingly, or intentionally engaged in the conduct that caused the injury to plaintiff. *See* C.R.S. § 6-1-113(2)(a)(III) and (2.3). No award of treble damages in a construction defect lawsuit shall ever exceed \$250,000. *See* C.R.S. § 13-20-806(3).

However, any plaintiff in a construction defect lawsuit that successfully argues a case for treble damages under the CCPA will not automatically receive the treble damages award. CDARA only permits an award that exceeds actual damages if, as stated above: (1) the plaintiff prevails on a CCPA claim, and (2) the construction professional’s offer during the notice of claim process is less than eighty-five percent of the amount awarded to the claimant as actual damages. *See* C.R.S. § 13-20-806(1), *supra*. The CDARA provision allowing a construction professional to avoid an award of treble damages under the CCPA is a clear incentive for a construction professional to consider making a realistic offer of settlement (at least 85% of actual damages) to the claimant during the notice of claim process.

Many juries have found violations of the CCPA in construction defect cases that have gone to trial in Colorado during the years past. Over defense objections, these juries have not been advised prior to their deliberations that the finding of a violation of the CCPA will result in an increased damages award. We are also aware of at least one arbitration proceeding in which the arbitrator, a retired judge well-versed in the treble damage implications of the CCPA, entered a finding that the CCPA had been violated, thereby trebling the actual damages.

B. Prejudgment Interest

Historically, plaintiffs in construction defect suits were able to recover prejudgment interest in construction defect cases pursuant to C.R.S. § 5-12-102. By this statute, plaintiffs argued, more

often successfully than not, that they were entitled to prejudgment interest, running at 8% per year, compounded annually, on the reasonable cost of repair from the date of closing through payment. However, arguments have long been made that such prejudgment interest should not be available to a construction defect plaintiff who has not paid any money out of pocket to make repairs or otherwise mitigate his or her damages. Until the case of Goodyear Tire & Rubber Co. v. Holmes, 193 P.3d 821 (Colo. 2008), this issue was unsettled at the appellate level.

In the Goodyear case, a homeowner brought an action against the manufacturer of a defective hose used in an embedded heating system seeking to recover the cost of replacing the entire system. The rubber hose that was part of an embedded heating system began to leak in 1993. After the hose continued to leak for several years, despite numerous repairs, the homeowner replaced the entire heating system in 2001 and 2002. In a suit against the manufacturer of the hose, the homeowner sought and recovered the costs of replacing the heating system. The homeowner also moved for prejudgment interest under C.R.S. § 5-12-102, as of the date of the installation of the hose in 1991, but the motion was denied. On appeal, the Colorado Court of Appeals held that homeowner could recover prejudgment interest on replacement costs damages from the installation of the heating system in 1991. On further appeal to the Colorado Supreme Court, it was ultimately determined that prejudgment interest began to accrue on the date the homeowner replaced the defective heating system rather than on the date the defective system was installed.

Since the purpose of prejudgment interest is to compensate a plaintiff for the time value of money, the Goodyear Court logically concluded that one can only recover interest when wronged in such a way that he or she has lost the benefit of money over time. When, as in most construction defect cases, the plaintiff has made no repairs, and has retained full use of his or her home notwithstanding the alleged defects, there is no monetary loss to the plaintiff that can accrue interest.

The Goodyear case has drawn a good deal of attention from the plaintiffs' bar in Colorado. As recently as the 2009 legislative session, advocates for a statutory overturning of the Goodyear case attempted, though unsuccessfully, to enact legislation to counter the Supreme Court's holding. We expect to see additional attempts in future legislative sessions to undo the Goodyear ruling.

V. DEFENSE STRATEGY AND PRACTICAL ISSUES

A. The Notice of Claim Process

The CDARA has added a pre-litigation process, commonly known as the "notice of claim" process, the completion of which is a prerequisite for any plaintiff filing a construction defect lawsuit. The notice of claim process is designed to resolve construction defect claims quickly and simply before they proceed to litigation. In practice, however, very few disputes are resolved through the notice of claim process because of its brevity and the practical impossibility of fully evaluating all construction defect allegations pre-suit.

The notice of claim process applies to any claim against a construction professional, including “an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property.” *See* C.R.S. § 13-20-802.5(4). No later than 75 days before the lawsuit is filed (or 90 days in a commercial case), a claimant must deliver to the construction professional a written notice that describes the alleged defect “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.” C.R.S. 13-20-802.5(5); *see also* C.R.S. § 13-20-803.5(1).

The claimant is then obligated to provide the construction professional with access to the allegedly defective construction within 30 days of service of the notice of claim so that the construction professional may make an inspection. Within 30 days of the completion of the inspection process (or 45 days for a commercial property) the construction professional may make an offer of settlement to the claimant. If the offer is accepted, the matter is considered resolved. If no offer is made or if the offer is rejected, the matter may proceed to litigation. *See generally* C.R.S. § 13-20-803.5. Any claimant who files a lawsuit without first going through the notice of claim process faces the possibility that, upon motion by the defendant or upon the court’s own initiative, the litigation will be stayed while the notice of claim process is conducted. *See* C.R.S. § 13-20-803.5(9).

Overall, defendants limit their exposure to plaintiffs by following the mandates of the CDARA, because defendants can assure that they are not exposed to treble damages. *See* the discussion in § V(A)(2), *above* for more detail.

B. Third-Party Claims

Philosophies vary widely concerning whether and when a builder should assert third-party claims against subcontractors, design professionals, and others involved in a Colorado construction project. In most cases, for a variety of reasons, the plaintiffs’ bar in Colorado seems to be moving away from asserting claims against subcontractors and design professionals. Instead, provided the builder is financially viable and/or has potential insurance coverage, a plaintiff often asserts claims only against the builder-vendor and/or developer. While this practice limits the potential resources for settlement, the plaintiff’s case is substantially simplified for discovery and trial. The builder must then evaluate the pros and cons of asserting third-party claims. In some instances where third-party claims are not asserted in the underlying case, counsel for the builder may wish to consider seeking a tolling agreement from one or more subcontractors. Clearly, the decision must be made on a case-by-case basis. The trend among the defense bar in single-family home and HOA cases is to assert third-party claims against financially viable or insured subcontractors as part of the first-party action.

C. Designated Nonparties at Fault

C.R.S. § 13-21-111.5 deals with *pro rata* liability of defendants in civil liability cases. This statute states, in pertinent part:

(1) In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss...

Thus, according to this statute, a potentially liable party is only responsible for the percentage of damages it caused. Therefore, under certain circumstances a judge or jury can assign a percentage of fault to a nonparty. The negligence or fault of a nonparty can be considered if the plaintiff/claimant entered into a settlement agreement with the nonparty or if the defending party gives notice that the nonparty was wholly or partially at fault. *See* C.R.S. § 13-21-111.5(3)(b). Notice must be in the form of a pleading. This pleading must set forth:

- The nonparty's name and last known address, or
- The best identification possible under the circumstances, and
- A brief statement of the basis for believing the nonparty to be at fault.

In order for a nonparty's fault or negligence to be considered, the nonparty must not only be properly designated, but that person or entity must have owed a legal duty to the plaintiff/claimant. In addition, before a jury instruction regarding apportionment is proper, the defending party must present evidence of the designated nonparty's liability.

It is also important to note that the fault of a nonparty is very rarely a complete defense in a construction defect lawsuit. When claims have been pled that do not depend on the fault of the defendant for their success, such as express and implied warranty claims, the damages awarded to a plaintiff will not be reduced by a defendant successfully making nonparty designations.

D. Joint and Several Liability

As a general rule, there is no joint and several liability for construction defect claims in Colorado. C.R.S. § 13-21-111.5(1) clearly mandates that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss."

Plaintiffs' attorneys try to circumvent this general rule, however, by arguing that the defendants were acting in concert, as co-conspirators. Pursuant to C.R.S. § 13-21-111.5(4), "[j]oint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act." This statute has been used by plaintiffs' attorneys to show that there has been a "concert of action" among contractors and subcontractors which results in the commission of a tort.

Therefore, if a plaintiff can prove that two or more defendants consciously conspired and deliberately pursued a common plan or design, *i.e.*, to build a home or residential community, and such a plan results in the commission of a tort, *i.e.*, negligence, the defendants may be held jointly and severally liable.

E. Arbitration

Amongst construction professionals, arbitration is rapidly growing in popularity as an alternative to litigation through the court system. At this time, the primary perceived benefit of arbitration over litigation is the fact that an arbitrator will be determining the outcome of the case, rather than a jury. Historically in this state, juries have been very receptive to homeowners' construction defect claims. This bias of juries is likely due to the fact that many of the members of the jury are either homeowners or would like to be homeowners themselves, and can therefore sympathize with the claimants.

Furthermore, in indemnity and contribution actions of homebuilders and general contractors against their subcontractors and design professionals, juries are often not very likely to impose large verdicts on the subcontractors. The legal community tends to attribute such historical support of subcontractors to a perception that homebuilders and general contractors are "big bad corporations," while the subcontractor is more likely to be the guy next door. Therefore, arbitration of third-party or other indemnity and contribution claims is more likely to yield a satisfactory recovery for a homebuilder or general contractor.

VI. FIRM OVERVIEW

Higgins, Hopkins, McLain & Roswell, LLC (“HHMR”) is a Denver-based, AV® Preeminent™ peer review rated law firm with eight attorneys devoted to construction law and the litigation of construction-related claims.¹ While HHMR is seemingly a small firm, significant attorney know-how allows us to effectively manage complex, high exposure cases and our track record is without compare in the Denver legal community.

HHMR exists to embody and exemplify the principles of service and stewardship. In everything we do, we focus on serving our clients selflessly and to the best of our ability. In doing so, we always have in the forefront of our minds our obligation to act as the stewards of our clients’ trust, confidences, and resources. We are highly regarded for our expertise in construction law and the litigation of construction claims. We represent a wide variety of clients, from individuals, to small businesses, to Fortune 500 companies.

HHMR’s attorneys literally wrote the book on Colorado construction litigation when they served as the authors for the Colorado chapter of DRI’s Construction Litigation Desk Reference, published in 2010. Founding Member David McLain is editor and contributing author for the firm’s widely read blog (www.ColoradoConstructionLitigation.com).

Founding Members David McLain and Sheri Roswell, both AV® rated by Martindale-Hubbell, are well known in the Colorado construction community. They maintain active roles in the state’s leading construction and legal associations, including the Colorado Association of Home Builders, the Home Builders Association of Metro Denver, the Associated General Contractors of Colorado, and the Colorado Defense Lawyers Association.

VII. CONSTRUCTION DEFECT PRACTICE DESCRIPTION

HHMR’s attorneys have been focused on Colorado construction law and the litigation of construction-related claims for over 20 years. We serve the legal needs of construction professionals, insurance carriers, and self-insureds in matters involving:

¹ AV®, BV®, AV Preeminent® and BV Distinguished® are registered certification marks of Reed Elsevier Properties Inc., used under in accordance with the Martindale-Hubbell certification procedures, standards, and policies.

- Contract negotiation and disputes
- Defense of class action claims
- Construction payment claims
- Engineering and design failures
- Mechanic's lien claims
- Surety/payment and performance bond claims
- Water damage claims
- Structural damage and failure claims
- Construction defect litigation defense

HHMR's attorneys have defended developers and builders in several of Colorado's largest class action and HOA lawsuits. Our experience in construction defect litigation includes expansive soils, steeply dipping bedrock, grading, drainage, interior slab-on-grade and exterior flatwork, streets and roads, waterproofing and building envelope, and stressed concrete in both commercial and residential settings, including single-family and multi-family (both for sale and for rent) construction.

We have obtained cash settlements, performance-based settlements, and buy-out settlements in cases involving thousands of structures. HHMR's attorneys routinely advise clients on the Construction Defect Action Reform Act, the Homeowner Protection Act, Colorado's anti-indemnity statute, and the statutes of limitation and repose applicable to construction claims.

VIII. CONTACT INFORMATION

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