Construction Defect Municipal Ordinances: The Balkanization of Tort and Contract Law (Part 3)

by Ronald M. Sandgrund, Jennifer A. Seidman, Leslie A. Tuft, and Nelson Boyle

This is Part 3 of a three-part article discussing the many recently enacted construction defect municipal ordinances, including their "right-of-repair" and "consent-to-sue" procedures and arbitration provisions. Potential pitfalls in the construction and application of the ordinances are noted.

At least 17 Colorado home-rule cities have adopted ordinances governing construction defect claims (CD ordinances): Arvada, Aurora, Broomfield,[1] Castle Rock, Centennial, Colorado Springs, Commerce City, Denver, Durango, Fort Collins, Lakewood, Littleton, Lone Tree, Loveland, Parker, Westminster,[2] and Wheat Ridge. More cities are expected to pass similar ordinances in the future. Four general categories of CD ordinances have been adopted:

- notice-repair ordinances—comprehensive ordinances that include pre-suit notice to construction professionals, with rights of entry, inspection, and repair;[3]
- disclosure-voting ordinances—ordinances that mandate specified pre-suit disclosures to homeowner association (HOA) members and lawsuit approval voting requirements;[4]
- substantive law ordinances—ordinances that may limit the type or scope of construction defect claims a claimant may assert;[5] and
- plat note ordinances—ordinances that allow construction professionals to record plat notes generally mandating construction defect arbitration (CD arbitration).[6]

Many cities have adopted ordinances with a combination of these features.

This Part 3 examines multifamily development pre-suit unit owner approval requirements and surveys substantive and evidentiary issues that CD ordinances implicate, including building codes, strict liability, negligence per se, standards of care, and evidence spoliation. Part 3 also addresses liability insurance complications, preemption issues, and state and federal constitutional concerns. A streamlined practitioner's issues checklist for claimant and construction professional attorneys is also included.

Property owners, construction professionals, their attorneys, and judges must analyze the effects of applicable local ordinances on construction defect claims (CD claims) in conjunction with Colorado's Construction Defect Action Reform Act (CDARA),[7] Homeowner Protection Act (HPA),[8] Common Interest Ownership Act (CIOA),[9] Uniform Arbitration Act (UAA),[10] and common law. Claimants can be expected to argue that many CD ordinances expressly or impliedly conflict with CDARA, HPA, CIOA, and UAA, making them a challenge to harmonize and creating potentially conflicting obligations.[11]

Potential pitfalls are highlighted under "Practice Pointers," which raise some issues litigators and courts should be prepared to address. Because ongoing legislative action at both the home-rule city and state levels may affect CD ordinances, practitioners should always

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check for relevant ordinance and statutory updates. This Part 3 contains an extensive sidebar highlighting various bills pending in the Colorado legislature at the time of this article's submission, many of which, if adopted, may preempt significant parts of the CD ordinances.

As in Parts 1 and 2, the CD ordinances are generally described in terms of common key features that are summarized, and some significant differences are compared. An ordinance comparison chart providing additional details, encompassing all 17 ordinances adopted to date, and incorporating and updating the charts published with the first two parts of this series is available at www.burgsimpson.com/wp-content/uploads/sites/9/2017/01/Burg-Simpson-CD-Municpal-Chart.pdf.

Pre-Suit Unit Owner Approval Requirements

Most CD ordinances require HOAs to provide specified pre-suit disclosures to their unit owners. Additionally, HOAs must obtain at least a majority of the homeowners' written consent to bring a CD action or to start the CDARA notice of claim procedure (NCP).[12]

CD Ordinance Categories

Notice-Repair Ordinances

These ordinances include pre-suit defect notice to construction professionals, with rights of entry, inspection, and repair. Cities with notice-repair ordinances:

Aurora	Commerce City	Lone Tree
Broomfield	Durango	Loveland
Centennial	Lakewood	Wheat Ridge
Colorado Springs	Littleton	

Disclosure-Voting Ordinances

These ordinances mandate specified pre-suit disclosures to HOA members and lawsuit approval voting requirements. Cities with disclosure-voting ordinances:

Aurora	Lakewood
Centennial	Littleton
Colorado Springs	Lone Tree
Commerce City	Loveland
Denver	Parker
Durango	Westminster
Fort Collins	Wheat Ridge

Substantive Law Ordinances

These ordinances may limit the type or scope of construction defect claims a claimant may assert. Cities with substantive law ordinances:

Broomfield	Fort Collins
Colorado Springs	Parker
Denver	Westminster

Plat Note Ordinances

These ordinances allow construction professionals to record plat notes generally mandating construction defect arbitration. Cities with plat note ordinances:

Arvada	Parker
Castle Rock	Wheat Ridge

Practice Pointer: These provisions impose preconditions not found in CIOA or CDARA and create the potential for limitations and repose periods to expire before suit can be authorized. Moreover, because most ordinances apply to *all* CD claims, even small claims are subject to potentially expensive and onerous suit-approval procedures.

While most CD ordinances exclude the declarant from their definition of homeowner, fewer CD ordinances exclude declarant-owned units from the calculation used to determine the majority.[13] The vote may be held directly or through a signed written ballot and must be obtained within 60 days after the required notice or the unit owners will be deemed not to have given their consent. If approval is not obtained, later unit owner votes to commence CD legal action—perhaps due to changed circumstances—appear permissible as long as the disclosure requirements are again met.

Practice Pointer: The CD ordinances' "consent to sue" requirements potentially conflict with CIOA's limited pre-suit disclosure scheme, executive board litigation powers, and unit owner vote approval percentages. CIOA generally allows a democratically-elected HOA executive board to act representatively on behalf of the HOA and its unit owners in deciding to file a lawsuit or initiate arbitration.[14] CIOA sets some maximum unit owner vote approval percentages depending on the action contemplated.[15]

The CD ordinances' unit owner informed consent requirements are also much more extensive than, and thus may conflict with, the pre-suit notice and unit owner voting requirements of CDARA, Colorado's Revised Nonprofit Corporation Act (CRNCA), and especially CIOA. For instance, CIOA simply requires that before a CD lawsuit is served, the HOA send written notice to each unit owner generally describing the nature of the suit and relief sought, and the kind, but not the specific amount, of lawsuit expenses that may be incurred.[16]

Wheat Ridge includes the potentially problematic requirement that if the HOA governs units that are located in more than one building, written consent must be obtained from a majority of the unit owners with voting rights *only in the buildings in which the construction defect is alleged to be present*.[17]

Practice Pointer: Wheat Ridge's requirement may conflict expressly with, and arguably undermine, CIOA's mandatory common interest community (CIC)-wide voting process.[18] It also does not appear to consider the facts that all unit owners own an *undivided interest* in the common elements contained in all buildings in a condominium development, and that, typically, each is individually liable pro rata for the cost of necessary common element repairs through assessments.[19]

It is unclear whether some CD ordinances intend to preclude proxy voting, which CIOA expressly allows, and where it is not expressly prohibited, whether an implied prohibition on proxy voting would be valid. The Lakewood, Lone Tree, and Wheat Ridge ordinances expressly allow proxy voting,[20] while the Aurora, Littleton, and Commerce City ordinances expressly do not prohibit it.[21]

Some CD ordinances exclude the declarant from voting (Denver, Fort Collins, Lone Tree, and Parker), while others exclude the declarant from the definition of "homeowner" (Aurora, Centennial, Colorado Springs, Commerce City, Durango, Lakewood, Littleton, Lone Tree, Loveland, and Wheat Ridge). Lone Tree does both. Some CD ordinances provide for a simplified unit

owner consent, assuming all necessary pre-suit unit owner disclosures have been made.[22]

Practice Pointer: For expediency purposes, an HOA board might consider simultaneously supplying the requisite pre-suit notice with its consent-to-sue and proxy forms (if proxy voting is permitted). Also, the board might consider delivering an explanatory notice ahead of that paperwork advising unit owners to expect the disclosure and consent forms, warning them of the narrow time limits most notice-repair CD ordinances impose for obtaining suit approval, and cautioning owners about potentially applicable suit filing deadlines. Careful, timely, and personal follow-up with unit owners may be critical to obtaining effective and timely consent, particularly if the ordinance requires disclosure of potentially incomplete or confusing information.

Substantive and Evidentiary Issues

Several CD ordinances contain substantive law limitations different from those in Colorado state statutes and the common law, as well as unique evidentiary rules.

Building Code Violations

The Broomfield, Denver, Fort Collins, Parker, and Westminster ordinances provide that with respect to multifamily developments, local building code violations shall not "create a private cause of action" or

> be used to support or prove any construction defect claim, regardless of the statutory or common law theory under which the claim is asserted, unless the violation or failure to substantially comply results in one or more of the following: (1) Actual damage to real or personal property; (2) Actual loss of use of such property; (3) Bodily injury or wrongful death; or (4) A risk of bodily injury or death to, or a threat to the life, health or safety of, the occupants of residential real property.[23]

Fort Collins adds to this list, "(5) To the extent permitted under Colorado law, other financial losses or damages directly caused by the violation or substantial failure."[24] Colorado Springs has adopted a similar provision.[25]

Parts (1) through (4) of this provision roughly track CDARA's four alternative evidentiary preconditions to establishing a *negligence* claim founded on a building code or industry standard violation. But the provision expands the preconditions to all CD claims (assuming the ordinance is not preempted by CDARA). Part (5) of the Fort Collins ordinance expands the basis for bringing a negligence claim beyond that permitted by CDARA. Broomfield defines "actual damage" to real or personal property as including the cost to bring into compliance any construction not built to code at the time of construction.[26]

Strict Liability and Negligence Per Se

Broomfield, Colorado Springs, Denver, Fort Collins, Parker, and Westminster provide that a violation of or failure to substantially comply with the building code will not under any circumstances support or prove any construction defect claim based on strict liability or the common law doctrine of negligence per se. To date, Colorado has not recognized application of its strict product liability statutory or common law doctrines to real property improvement construction.[27]

Practice Pointer: If "strict liability" within these CD ordinances is broadly construed to mean contract or express or implied warranty liability, such application may run afoul of the parties' freedom to contract and Colorado's new home implied warranty requirement that construction satisfy the applicable building code.[28] It does not appear that this provision precludes the introduction of code provisions to establish how a reasonable construction professional should construct a real property improvement, as opposed to establishing that professional's negligence per se.

Standards of Care

The Denver, Colorado Springs, Fort Collins, and Parker ordinances state that their building codes are "intended to establish a minimum standard for safe and sound construction."[29] This is consistent with most building codes, which typically state that they simply provide minimum construction standards, and with Colorado's long-standing common law holding that applicable government codes and standards are generally to be construed as minimum standards, but that if circumstances demand additional care, such additional care should be taken.[30]

These CD ordinances also state that "any particular element, feature, component or other detail of any improvement to real property that is specifically regulated [by the code] and is constructed or installed in substantial compliance with such codes shall not be considered defective for purposes of proving a construction defect claim."[31] Westminster has adopted a rebuttable presumption that a construction element that is regulated by and built in

substantial compliance with its building code is presumed not to be defective when a CIC offers proof of a CD claim.[32] Colorado Springs has a nearly identical provision but adds that it does not preclude imposing higher standards that may be imposed by express warranty or contract.[33]

Practice Pointer: Property owner counsel may argue that these aspects of the CD ordinances contradict the building code and prior case law by purporting to establish the code as a "maximum" rather than a "minimum" standard of care, effectively treating code compliance as the equivalent to being state of the art.[34] In other instances, property owner counsel may argue that particular items, such as engineering and design, are not specifically regulated by the applicable code and fall outside the CD ordinances' scope.

Evidence Spoliation

Spoliation of evidence can give rise to dismissal of a defense or a claim or support a jury instruction regarding certain inferences or presumptions that may arise following a party's accidental or purposeful destruction of evidence.[35] Under most notice-repair ordinances, nothing that occurs during the defect notice inspection process may be used or introduced as evidence to support a spoliation defense by a party in later litigation.[36]

Practice Pointers:

- Because this provision appears to supply a substantive rule governing evidence admissibility in state courts, it raises the question whether some cities have exceeded their home-rule authority or violated Colorado's separation of powers by attempting to dictate the admission of evidence and limit construction professional liability. It is also unclear whether claimants may introduce evidence tending to show alteration or destruction of evidence by construction professionals during the defect notice and inspection process, where that information is necessary to explain other facts.
- Construction professionals may argue that these spoliation provisions impinge on a court's ability to manage its evidence rules. These provisions potentially eliminate consequences for the rare circumstance when someone willfully or negligently destroys material construction defect evidence, or alters evidence related to resulting damage caused during an inspection. Subcontractors and other third parties may object to general contractor or builder-vendor inspections that confirm defects allegedly attributable to these third parties that simultaneously destroy or damage evidence during the inspection process, where these ordinances preclude these third parties from offering the lost evidence to prove a failure of proof establishing their liability. These concerns may multiply if different construction professionals involved in a particular project inspect and test various areas at different times. If courts find this part of the CD ordinances unenforceable, construction professionals who rely on the CD ordinances to alter or destroy evidence could face consequences for such spoliation.

Liability and Property Insurance Complications

Analyzing the interplay between liability and property insurance and the CD ordinances can be complicated. (This concern applies similarly to CDARA's NCP, but to a lesser extent.) For example, as discussed in Part 2, the "defect notice" and "right of repair" time frames and procedures provide little opportunity for construction professionals and their liability insurers to coordinate and comply with their respective contractual obligations. Without the funding for repairs or claim settlement that is often supplied by liability insurance proceeds, the litigation-reduction purposes of these right-to-repair laws may be significantly impeded.

Pending Construction Defect Legislation

Several senate bills related to construction defects were pending when this Part 3 was published that could affect the local CD ordinances discussed in this article. Where the subject matter of the senate bill (SB) overlaps with a particular CD ordinance, this would support an argument that the ordinance is preempted, at least in part, by state law. If these bills become law, substantial tension will exist between CD ordinances and these new state laws. If a particular home-rule city is satisfied with the new state laws, it may choose to repeal its CD ordinance to eliminate potentially conflicting obligations and preemption disputes arising under a two-tiered statutory scheme.

These bills are subject to further amendment or may be withdrawn and additional CD-related bills may be introduced after this article's submission date. Counsel should frequently verify the status of each pending bill and determine the status of any additional bills. A house bill (HB) failed during committee hearing that sought to codify a right to repair similar to that described in several CD ordinances. Because the legislature may consider a similar bill at a later date, this sidebar briefly discusses this bill.

SB 17-045. This bill amends CRS § 13-20-808(6) of CDARA and adds CRS § 13-20-808(7)(b) to create an expedited evidentiary hearing at which courts would allocate the duty to defend construction defect actions among liability insurers when the insurers cannot agree on such allocation within 45 days of the action's filing. It is unclear whether the hearing must be held within 60 days of the action's filing or at the end of the 45-day informal agreement period. Any statements made during the hearing are inadmissible in any later proceeding (it is unclear whether this prohibition includes statements made at other times during the action). The district court must "promptly" resolve the allocation dispute unless the parties agree to an alternative dispute resolution process. The court may order an accelerated briefing schedule, preclude discovery, and handle other matters appropriate to an expedited hearing. Following the hearing, the court must enter an interim allocation defense cost contribution order that is equitable under the circumstances. After the underlying CD action becomes final, any insurer may apply for a final, equitable apportionment of defense costs that takes into account the damages liability arising from an additional insured's work, as well as the record, the verdicts, and the evidence in the underlying action.

The bill also provides that any insurer's defense cost contribution claim may be

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Practice Pointer: Property insurers have contractual, common law, and statutory duties to promptly adjust and pay property-loss claims. Given the complexity and cost of significant CIC construction defect claims and the practical inability to comply with "defect notice" and "right of repair" time frames under many circumstances,[37] property insurers may be unable to investigate and approve significant first-party claim payments without jeopardizing their subrogation rights. And payment delays caused by trying to protect those rights could expose insurers to double damages and attorney fee claims under Colorado's Prompt Payment law.[38] Thus CD ordinances may unintentionally slow and complicate resolution of small property insurance claims, while delaying and impeding resolution of major claims by placing additional hurdles in the path of claimants whose properties wait in disrepair. This situation contradicts the stated intent of CD ordinances to expedite claim settlement and repairs.[39]

Preemption Issues

In addition to the practical matter of construing and applying these new CD ordinances to harmonize them with state statutes and common law, challenges may be made to the validity of some or all of these ordinances. Potential bases for these challenges involve home-rule authority and state law preemption. Notable problem areas that may create operational conflicts include provisions regarding notice, inspection, entry, and repair; pre-suit disclosure and approval; arbitration prescriptions and declaration amendment prohibitions; and limits on substantive CD claim rights.

Home-Rule Authority and State Law Preemption

When analyzing the effectiveness of local home-rule ordinances in the face of overlapping or contradictory state laws, Colorado applies a three-part test:

1. Do they address a matter of "solely local concern"? If so, they will be given effect.
2. Do they address a matter of "statewide concern"? If so, they will not be given effect.
3. Do they address a matter of "mixed state and local concern"? If so, can the two laws be harmonized?[40] If not, they will not be given effect.

Courts further consider whether there is an express, implied, or operational conflict between state and local law, and if so, if it is of such an extent or nature to warrant state law preemption of local law.[41]

In *Webb v. City of Black Hawk*,[42] the Colorado Supreme Court held that whether a particular issue is one of local, state, or mixed concern is a legal issue requiring courts to consider both fact and policy, including "(1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of local regulation; (3) whether the matter has traditionally been regulated at the state or local level; and (4) whether the Colorado Constitution specifically commits the matter to state or local regulation."[43] "Although not conclusive in itself, a determination by the General Assembly that a matter is of statewide concern is relevant."[44] Thus, Colorado courts weigh the relative state and municipal interests in regulating a particular issue, "making the determination on a case-by-case basis considering the totality of the circumstances based on the enumerated factors and any other factors" they deem relevant.[45] Courts "analyze an operational conflict by considering whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will necessarily satisfy this standard."[46]

In whole or in part, CDARA, HPA, CIOA, and UAA help create a uniform, statewide statutory framework governing mat-

Pending Construction Defect Legislation (*cont.*)

assigned, and that such contribution claim does not limit any insurer's duty to defend. Another provision arguably contradicts this non-limitation language by providing that an insurer may seek contribution against any insured or additional insured who did not procure liability insurance during a period implicated by the underlying action (presumably for part of the defense costs, although this is unclear). Colorado common law presently affords no such right of contribution or reimbursement by an insurer from an insured for defense costs before a final judgment in the underlying action,[1] because if an insurer's duty to defend was triggered under any one policy, it owes its insured a full defense.[2] The bill does not address whether, if an insurer seeks to avoid its defense obligation entirely, the insured must be made a party to the action to bind it to the ruling, or the proper scope of the expedited proceeding if underlying coverage issues become bound up in the contribution determination.

Apparently, one purpose behind the bill is to encourage construction professionals to maintain continuous coverage until applicable limitations and repose periods have expired, leaving no uninsured gaps. The bill deletes from CRS § 13-20-808(6) the insurer's statutory duty to defend a CDARA NOC under CRS § 13-20-803.5, but this change should not affect an insurer's contractual obligation to defend an NOC, if one exists under the policy, pursuant to *Melssen v. Auto-Owners Ins. Co.*[3] If passed, the bill will apply to all actions filed on or after its July 1, 2017 effective date, although it is unclear if this date references the underlying CD action or the later contribution action. The bill does not appear to directly affect CD ordinances, but it may have an indirect effect by adding another layer of litigation to disputes governed by some ordinances.

SB 17-155. This bill amends CRS § 13-20-802.5 of CDARA by clarifying CDARA's definition of an "action," and by separately defining the phrase "construction defect." If the clarification of the definition of "action" is construed to narrow the definition, some types of construction defect claims may no longer be governed by CDARA, but only by the common law. If passed, this law appears to become effective August 10, 2017. The bill does not directly affect CD ordinances, but may indirectly affect those ordinances whose scope is expressly delimited by CDARA's scope. Because several CD ordinances contain provisions that are similar, but not identical, to CDARA's current definition of "action," additional inconsistencies between these ordinances and CDARA may

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ters within their scope. CIOA's legislative declaration states that it is intended to "establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities."[47] CDARA appears to occupy the entire CD claim field: its legislative declaration "finds, declares, and determines that changes in the law are necessary and appropriate concerning actions claiming damages . . . in connection with alleged construction defects," and that its intent is to preserve "adequate rights and remedies for property owners who bring and maintain such actions."[48] Likewise, HPA provides statewide protections of CD claimant rights under CDARA, rendering "void any pre-dispute waiver of, or limitation on, a residential property owner's or homeowners association's ability to recover the damages" available under CDARA.[49] UAA governs all arbitration agreements subject to Colorado law.[50]

Practice Pointer: A need for statewide uniformity, or the potential for a "patchwork of regulation" that could inhibit efficient development, may support a finding of sufficient state interest in regulating CICs, CD claims, and arbitrable dispute claims, as well as the extraterritorial impact of CD ordinances, so as to void parts or all of those ordinances.[51] Construction professionals will likely counter that localities have a long history of regulating building code requirements and compliance and other matters relating to construction. Property owners may respond that CD ordinances do not regulate construction so much as they regulate CICs and CD disputes, and that the state has traditionally regulated both these areas.

Several CD ordinances expressly recognize the statewide reach and effect of CDARA, HPA, and CIOA. For example, the Denver and Fort Collins ordinances disclaim the intention to compromise the rights and remedies that condominium HOAs and individual condominium owners currently enjoy under state law.[52] The Colorado Springs ordinance states it "is to be construed harmoniously" with CIOA and CDARA "unless the context of this [CD ordinance] specifically indicates otherwise."[53]

Practice Pointer: Despite those express reservations, courts may struggle to harmonize the substantive CD claim limits in the Broomfield, Colorado Springs, Denver, Fort Collins, Parker, and Westminster ordinances that are more restrictive than CDARA's requirements. Loveland's city attorney expressly raised these concerns, stating that state preemption concerns pervade Loveland's CD ordinance, and that "it is important that the ordinance does not conflict with existing State laws that govern the legal relationships between homebuilders and homebuyers," while noting several points of potential conflict between the ordinance and state law.[54]

Thus, while nearly all of the CD ordinances recite legislative findings and rely on their authority under Colorado's Constitution as home-rule municipalities to enact laws governing areas of local concern,[55] many aspects of CD ordinances appear to create potential, if not actual, operational conflicts with CDARA, HPA, CIOA, and UAA by contradicting them, arguably undermining their purposes, potentially adding layers of regulatory red tape, and making already complicated state laws trickier and more expensive to navigate.

Notice, Inspection, Entry, and Repair

CD ordinances that allow a construction professional to enter and alter a home over an owner's objections cause concerns that, for example, subcontractors could lien the property for potentially inadequate repairs; CD ordinances may undermine the responsibilities that CIOA imposes on HOAs to manage common element maintenance, repair, and replacement;[56] and CD ordinances potentially conflict with CDARA's detailed NCP, which expressly

Pending Construction Defect Legislation (*cont.*)

emerge if the bill passes, such as the tolling of the limitations period as to certain claims under an ordinance, but which claims are now beyond CDARA's scope.

SB 17-156. This bill amends CRS § 13-22-223 of Colorado's UAA; CRS §§ 38-33.3-103, -124, and -303.5 of CCIOA; and CRS § 38-35.7-102 of the Real Property Conveyance Disclosure statute. Because many of the bill's provisions parallel or are drawn from CD ordinances, and in some cases arguably conflict with the ordinances, these provisions may preempt the ordinances.

The CRS § 13-22-223 amendment requires that CD claim arbitrators follow the law applicable to the parties' claims, defenses, and remedies, and if the remedy is substantially affected by a failure to do so, the arbitrator's ruling may be vacated or remanded. Because this change only applies to this subclass of arbitrable disputes, claimants may seek to challenge it on equal protection grounds. This change may increase the cost, duration, and uncertainty associated with arbitrating CIC CD claims because of the significant specter of lengthy appeals. The bill also permits the insertion of a mandatory CD claim arbitration provision in a CIC's bylaws, rules, regulations, and other unrecorded governing documents, even if arbitration is not provided for in a CIC's recorded declaration.

The bill adds definitions in CCIOA for "construction defect claim," "construction professional," and "governing documents"; declares that CCIOA governing documents providing for mediation or arbitration of CD claims represent a commitment by the HOA and its unit owners upon which development parties are entitled to rely; and declares that a later governing document amendment to the mediation or arbitration requirement should not apply to, and is ineffective regarding, CD claims described in the original governing documents. The bill provides for the selection or appointment of qualified, neutral mediators and arbitrators under state law, a broader category of persons than described in some CD ordinances. It is unclear whether CD ordinances providing for arbitration in recorded plats can be harmonized with this new law.

The bill provides for a detailed CD claim unit owner pre-suit notice, disclosure, and approval process applicable only to CICs. It mandates mediation as a condition precedent to any CD claim, but does not explain when this is to occur or how it is to be coordinated, if at all, with CDARA's NOC process. The bill in its current form also does not explain how the running of any limitations or repose period is to be treated while the mediation process

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allows claimants to reject construction professionals' repair offers and to proceed with suit following the offer's rejection.

Practice Pointer: Claimant counsel may argue that an operational conflict exists because CD ordinances prohibit what state statute allows, thus state statutes preempt the CD ordinances. Counsel may also argue that any work performed without a property owner's permission conflicts with Colorado's mechanic's lien statutory scheme, voiding liens arising from the work. In response, construction professionals may urge that state statutes do not expressly prohibit the additional requirements imposed by CD ordinances, which therefore are not preempted.

Pre-Suit Disclosure and Approval

CIOA identifies the specific disclosures that HOAs must provide to unit owners before filing suit, and CDARA prescribes a pre-suit NCP, but neither bars the filing of suit.[57] The CD ordinances' mandatory notices, repair process, and disclosures are much more extensive, and construction professionals may argue that they bar suit if not satisfied. Additionally, in contrast to many CD ordinances, which generally require that the HOA disclose certain information 60 days before serving a notice of claim (NOC) or pursuing legal claims, and do not prevent the statutes of limitation or repose from expiring during the disclosure period, CDARA and CIOA allow the HOA to file suit to prevent limitations periods from expiring and require less onerous disclosures before service of a summons and complaint. CDARA also provides for tolling during its NOC process. Thus, state statutes (to date) uniformly protect HOAs from the risks of their claims expiring while they satisfy conditions precedent to legal action. Many CD ordinances do not explicitly offer these protections.

CDARA's NCP is also intended to encourage informal resolution of CD disputes before either party incurs costly expenses associated with litigation.

Practice Pointer: Because the CD ordinances' disclosure requirements may force HOAs to hire costly experts and incur other expenses before attempting to informally resolve disputes, courts may find that the disclosure requirements frustrate CDARA's NCP. Claimant counsel may argue that HPA expressly supports preemption because it provides that most "limitation[s] on, the legal rights, remedies, or damages provided by [CDARA] . . . are void as against public policy."[58]

CIOA also authorizes HOAs, subject only to a CIC's declaration and CIOA itself, to "[i]nstitute . . . litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community."[59]

Practice Pointer: Claimant counsel may argue that CDARA, HPA, and CIOA define the conditions precedent to asserting legal claims, and that some of the CD ordinances' more onerous disclosure requirements may impede or preclude what state law allows. CIOA may preempt CD ordinances that condition an HOA's ability to commence litigation on individual unit owner approval. Construction professionals may counter that no state statute expressly prohibits the CD ordinances' voting and disclosure requirements and that neither of these requirements categorically prevents an HOA from pursuing CD claims.

Arbitration Prescriptions and Declaration Amendment Prohibitions

UAA prohibits parties from agreeing to vary or waive various UAA requirements before a controversy arises,[60] including mandatory neutral arbitrator disclosures.[61]

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is exhausted. Currently, practitioners facing looming statutes of limitation or repose deadlines can commence suit by filing, but delaying service, until any needed investigation, mediation, or other action can be completed. This potential safe harbor may conflict with the proposed law's provision that mediation must be completed as a "condition precedent" to a CD claim.

There is no monetary threshold on the CD claims subject to this proposed new law. Thus, even claims amenable to small claims court resolution may be subject to the bill's potentially expensive, cumbersome, and time-consuming procedures.

The bill prescribes the content of a pre-suit notice, which must be sent to the unit owners at least 60 days before service of a CDARA NOC. The confusion and delays associated with sending such notice before the CDARA NOC is described in Part 2, "CIC Pre-suit Disclosures." The general nature of many of the bill's mandatory disclosures (which roughly parallel many CD ordinance disclosures), the potential confusion engendered by those disclosures, and potential tension with the First Amendment rights of HOAs and unit owners are described in Part 2, "CIC Pre-Suit Disclosures," and Part 3, "First Amendment and Commercial Speech Conditions." The bill generally tracks the unit owner lawsuit vote approval requirements of some CD ordinances, but not all; excludes the declarant's votes from being considered; allows the governing documents to require a supermajority approval (probably limited by CRS § 38-33.3-217's 67% cap on super-majority voting requirements); and requires that contracts for the purchase and sale of common interest residential property disclose that the declaration, bylaws, or rules may require certain disputes be resolved by mandatory binding arbitration. If passed, the bill's effective date is January 1, 2018.

SB 17-157. This bill amends CRS §§ 38-33.3-102 and -303.5 by creating a new procedure for approving CD actions by CIC HOAs. The bill overlaps and conflicts with many parts of SB 17-156 relating to CD claim unit owner pre-suit notice, disclosure, and approval processes. The bill expressly provides that it addresses a matter of statewide concern and supersedes any CIC governing provision to the contrary. The proposed law applies to CD claims seeking damages, valued in good faith, exceeding $100,000, intended to be brought against a "development party," a defined term that may be broader than CDARA's definition of a construction professional. As to CD claims where the HOA was the contracting party for the work, the executive board must give an unprescribed notice

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Practice Pointers:

- Because some CD ordinances prohibit HOAs from amending or modifying a declaration's arbitration requirements, these ordinances may create operational conflicts with UAA. Significantly, not only does Fort Collins prohibit such declaration amendments, it imposes criminal penalties on those who attempt to amend a declaration's ADR requirement under certain conditions.[62] The CD ordinances' requirement that HOA/developer-declarant arbitration provisions may not be amended also potentially runs headlong into CIOA's and CRNCA's prescribed amendment procedures. However, under *Vallagio at Inverness Residential Condominium Association v. Metropolitan Homes, Inc.*,[63] a declarant's reservation of veto power over such amendments currently is enforceable.
- Construction professionals may themselves find some of the CD ordinances objectionable and seek to void them. One common provision divides arbitration expenses equally among all construction professionals, without regard to the extent of their involvement, the size of the claim against them, or their ultimate liability. Third-party contractors from whom indemnity is sought, based on spoliation of their work by another's inspection and repair, may challenge the CD ordinances' spoliation immunity and inadmissibility provisions on preemption and separation of powers grounds.

Limits on Substantive CD Claim Rights

Colorado Springs, Denver, Fort Collins, Parker, and Westminster each substantively limit all CD claims. The limits echo, but in many ways are much more restrictive than, CDARA's limits on negligence claims.[64] Commentators have noted that the reason CDARA did not apply these pre-conditions to non-negligence claims was because the legislature did not want to extend a similar, limited liability immunity to construction professionals where they breached a contractual promise or warranty, or committed a misrepresentation, fraud, or consumer protection act violation regarding building code compliance.[65]

Practice Pointer: These CD ordinances and CDARA squarely conflict on this point, and the CD ordinances' attempt to restrict tort and contract law brings into sharp relief the question whether home-rule authority permits such local legislation, even if prompted by legitimate local business, development, and insurance considerations.

State and Federal Constitutional Concerns

The CD ordinances may be alleged to raise due process, equal protection, separation of powers, unconstitutional conditions, and First Amendment and commercial speech concerns. Generally, a high bar must be met to establish a law's unconstitutionality.

Due Process

Due process is implicated where the government authorizes damage to or the destruction of a citizen's property and does not provide a mechanism for review *beforehand*.[66] The notice-repair ordinances thus raise due process concerns where as a condition precedent to filing suit to obtain compensation for injury to one's property or person, the CD ordinances allow construction professionals and other third parties to enter into private dwellings, potentially altering or destroying portions of the property.

Practice Pointer: Property owners may argue that such requirement is an unconstitutional denial of due process and an invasion of their right of privacy and property rights.[67]

Other due process concerns are whether the CD ordinances' short time limits might be construed as unconscionably short,

Pending Construction Defect Legislation (*cont.*)

to the unit owners before serving the suit papers, and then may commence suit without further notice or approval.

As to CD actions where the HOA was the contracting party for the work, or where the damages are not less than $100,000, the HOA must provide a prescribed written notice to the unit owners of the anticipated action no later than 180 days before filing the CD action, hold a unit owner meeting to discuss and approve the CD action, and supply a pre-meeting written reminder of relevant information, including development party-unit owner communications described in the protocol below. The HOA need not repeat the disclosure and approval process as to "joined parties" in an action previously approved by the unit owners. Any applicable statutes of limitation and repose are tolled during the voting period, and this tolling does not alter CDARA's NCP tolling provisions.

The general subject matter of the required notice, and the later approval process, generally tracks the pre-suit disclosures and approval processes mandated by some of the CD ordinances discussed in Part 2, "CIC Pre-Suit Disclosures," and in Part 3, "Pre-Suit Unit Owner Approval Requirements," and some of the Practice Pointers in those discussions remain applicable. The disclosures, although more neutrally-stated than the CD ordinances, may still raise some of the same concerns described in Part 3, "First Amendment and Commercial Speech Conditions."

The bill appears to allow the HOA up to 180 days from the date of the unit owner meeting to accept votes for and against initiating the CD action, although it seems that the necessary approval votes can be collected at the meeting itself. While the bill requires majority unit owner approval in written format, it is unclear if a printout of an electronic vote is acceptable. For purposes of calculating the vote, votes allocated to development parties, active status military, banking institutions, owners of non-defective units in certain planned communities, and court-denominated nonresponsive owners are excluded, except that votes of military service members and banks actually received must be counted.

The bill prohibits any development party from trying to gain abstentions or "no" votes by any threat or inducement described in a lengthy and complicated development party-unit owner communication protocol, which protocol permits a court to adjust the voting due to development party violations.

The protocol controls the timing, length, delivery, content, and record retention of the HOA-unit owner suit-approval communications; allows a development party to

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"mini" statutes of limitation, and whether a CD ordinance can facilitate attachment of a mechanics' lien to private property over an owner's objections to the work performed.

Equal Protection

Equal protection violations occur when a statute unreasonably distinguishes between classes of people or claims and the distinction does not bear a rational relationship to a legitimate state objective.[68] CD ordinances impose procedural, substantive, and evidentiary limitations, and mandatory arbitration through plat notes, most of which provisions apply only to CIC communities.

Practice Pointer: HOAs and their unit owners may raise equal protection challenges because the CD ordinances do not apply to owners of commercial properties or single-family or non-CIC homes and do not apply to non-CIC related arbitration agreements.[69] For example, Westminster's presumption that CIC code-compliant construction is not defective may be subject to an equal protection challenge unless the city can offer a rational explanation why this construction liability standard properly differs from that afforded non-CIC construction, including single-family homes, identically constructed townhomes not located in CICs, and commercial structures. Construction professionals may argue that the CD ordinances' legislative statements of purpose provide a rational basis for the ordinances, because the reduced volume of affordable multifamily housing since 2008 is rationally related to Colorado's existing construction defect laws. In response, claimants may present empirical data establishing an insufficient nexus between any alleged condominium construction decline and Colorado's CD laws.

Separation of Powers

Many of the CD ordinances confer spoliation immunity on construction professionals and impose no obvious limits on their ability to alter, damage, or destroy allegedly defective work. The CD ordinances also generally permit, but do not require, documentation of the construction professional's inspection and testing efforts. This potentially allows them to destroy or cover up important evidence, even though they are obligated to restore the home's condition afterwards. This raises the question whether a separation of powers analysis applies to local legislative action that overlaps with or conflicts with the state's judicial powers.

State legislative policy and judicial rulemaking powers may properly overlap if a state legislative rule or statute does not substantially conflict with a court rule.[70] When a substantial conflict exists, courts must decide whether the state legislative rule regulates substantive or procedural matters.[71] If the rule is substantive, state law prevails, but if the rule purports to regulate the court's procedural functions, state law violates separation of powers.[72] One test that distinguishes procedural from substantive matters asks whether the purpose of a rule's promulgation "is to permit a court to function and function efficiently," or whether the rule "conflict[s] with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of business."[73] Adverse inference instructions and sanctions for evidence spoliation derive from the court's authority "to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective."[74] Accordingly, adverse inference spoliation instructions serve a court's procedural, administrative, and remedial needs.[75] Thus CD ordinances arguably may invade the province of the court's rulemaking authority.

Pending Construction Defect Legislation (*cont.*)

submit a position statement or summary (plus a potentially lengthy attachment) to the unit owners through the board during the voting period, which statement must be supplied to the board within five business days of the end of the CDARA NCP or rejection of a CDARA NOC or amended NOC; and contains provisions shifting the HOA costs for distributing a development party's statements and attachments to the development party. If the unit owners approve the CD action, the HOA must file all documentation of development party statements and mailings under seal with the court for in camera review.

If passed, the bill's effective date will be September 21, 2017, and will apply to CD actions as to which the cause of action accrued on or after the applicable effective date.

HB 17-1169 (failed in committee on March 1, 2017). This bill would have amended CRS § 13-20-803.5 of CDARA by allowing a construction professional to elect to repair defects described in the NOC. Thus, CDARA's "offer to remedy defective construction" would have been replaced with a construction professional's "right to remedy defective construction" in whatever manner it chooses, with a concomitant and unfettered right to enter and alter the claimant's property over the claimants' objections (including, apparently, objections to inadequate repairs). If passed, the bill might have created significant tension with several CD ordinances, especially those requiring their own form and timing of a claimant's defect notice.

The bill did not address many of the practical and constitutional concerns claimants may raise as described in Part 2, "Rights of Entry and Repair," and in Part 3, "Constitutional Concerns." Several of the representatives voting against the bill expressed concerns about its constitutionality and that it forced homeowners to allow construction professionals to enter and alter their private property over their objections.

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1. *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1092 (Colo. 1991) (insurer who believes it owes no duty to defend should defend the insured under a reservation of its right to seek reimbursement if the facts at trial prove that the incident resulting in liability was not covered by the policy, or file a declaratory judgment action after the underlying case has been adjudicated).

2. *See, e.g.*, *Signature Dev. Cos., Inc. v. Royal Ins. Co.*, 230 F.3d 1215, 1219 (10th Cir. 2000).

3. *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Colo.App. 2012).

Practice Pointer: To the extent construction professionals alter construction conditions, destroy evidence, and fail to produce reliable and complete documentation of original conditions, courts may have inherent authority over spoliation matters, despite contrary provisions in the CD ordinances.

Unconstitutional Conditions

The unconstitutional conditions doctrine provides that "even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."[76] In the context of individual rights, the doctrine provides that on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the constitution.[77] Courts have applied the doctrine to laws that limit a person's "meaningful access to courts," a right derived from the First Amendment right to petition for redress of grievances.[78] Colorado recognizes a citizen's right of court access as well.[79]

Practice Pointer: HOAs and unit owners may argue that conditioning their access to Colorado courts on allowing construction professionals access to the HOA's and its member unit owners' private property, and granting the construction professional the right to alter the condition of, damage, or destroy parts of that property, constitutes an unconstitutional condition. Construction professionals may counter that there is no constitutional right to assert a CD claim, and that the cities' interest in encouraging construction defect repair and reducing CD litigation outweighs any competing concerns.

First Amendment and Commercial Speech Concerns

Generally, commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.[80] As noted in Part 2's discussion about satisfying pre-suit disclosure requirements, tension may arise between certain mandatory pre-suit disclosures that an HOA must make to its unit owners under a CD ordinance, which disclosures may be misleading or incomplete in light of the facts surrounding a particular claim, and the HOA's desire to offer clarifying or additional information.

Practice Pointer: Construction professionals may challenge any deviation from the required disclosures as tainting or voiding the pre-suit disclosure and approval process, which position may induce resistance from HOAs on First Amendment grounds.

Practitioners' Checklists

Checklist for HOA and Other Property Owner Counsel

- For every dispute concerning any loss or injury potentially arising in a city that has adopted a CD ordinance, review that ordinance in its entirety carefully.
- Consider the pros and cons of filing a declaratory judgment or other action early to obtain clarification of your client's

rights and responsibilities; to challenge the ordinance on preemption, constitutional, or other bases; and to prevent potentially applicable limitations deadlines from expiring. If unfamiliar with this area of the law, associate with more experienced counsel.
- Determine whether the construction problems at issue likely fall within the CD ordinance's definition (if any) of construction defect, or are potentially outside the ordinance's scope, and assess the risk of a later determination that the ordinance applies.
- Try to satisfy the CD ordinance's procedural requirements while simultaneously reserving the right to challenge the ordinance or avoiding some or all of its requirements.
- Simultaneously try to satisfy any parallel or overlapping procedural provisions in CDARA, CIOA, HPA, UAA, the declarations, and other applicable laws or agreements.
- Consider the CD ordinance's spoliation and tolling provisions (if any) and what might happen later if those provisions are deemed void.
- Calendar relevant ordinance deadlines, and make a checklist of the parties' respective obligations under the ordinance.
- Simultaneously calendar relevant CDARA, CIOA, HPA, UAA, declaration, and other applicable law or agreement obligations, and make a checklist of the parties' respective obligations under these other laws and agreements.
- Coordinate inspections and testing by different construction professionals to minimize finger-pointing among potentially liable parties at a later date.
- Take steps to ensure that construction professionals strictly meet all their obligations under CD ordinances, while making a contemporaneous record as to any unreasonable or non-conforming conduct on their part.
- Photograph, videotape, or otherwise document any repair efforts by construction professionals.
- Preserve and pursue affirmative claims, beyond any underlying CD claims, arising under the ordinances for any costs, damages, losses, compensation, and reimbursement that the ordinance may allow your client, or as a result of a construction professional's improper or unfair conduct.
- Carefully analyze how to handle any proffered written settlement and release of claims if repairs are offered and made, or if a monetary offer is extended, and whether such proffer may properly be declined because of unauthorized conditions it attempts to impose.
- Check for any recently-enacted CD legislation that may preempt or supplement property owner rights and obligations under local CD ordinances, comply with such laws as appropriate, and consider the pros and cons of filing a declaratory judgment or other action early to obtain clarification of your client's rights and responsibilities.

Checklist for Construction Professional Counsel

- For every dispute concerning any claimed loss or injury potentially arising in a city that has adopted a CD ordinance, review that city's ordinance in its entirety carefully.
- Decide whether to invoke the CD ordinance's inspection and repair provisions in light of uncertain monetary liabilities and loosely defined obligations that may arise under them.
- Consider the CD ordinance's spoliation and tolling provisions (if any) and what might happen later if those provisions are deemed void.
- Calendar relevant ordinance deadlines, and make a checklist of the parties' respective obligations under the CD ordinance.
- Simultaneously calendar relevant CDARA, CIOA, HPA, UAA, declaration, and other applicable law or agreement deadlines, and make a checklist of the parties' respective obligations under these other laws and agreements.
- Analyze and assert as appropriate potential statutes of limitation and repose defenses, and avoid taking any action that might extend these deadlines.
- Decide whether to pursue enforcement of the CD ordinance's less defensible requirements, considering whether doing so might precipitate judicial action that could make bad law or result in significant parts of the CD ordinance being voided.
- Carefully analyze how to handle the settlement and release of claims when repairs are offered and made, or if a monetary offer is extended.
- Analyze the effect, if any, of the CD ordinance on your rights and obligations vis-à-vis other construction professionals and your and their liability insurers.
- Carefully consider how to protect and pursue third-party claims against subcontractors and others in light of the CD ordinance and its lack of tolling provisions applicable to such third-party claims.
- Carefully analyze, with the assistance of coverage counsel when necessary, how to protect and pursue liability insurance claims in light of the CD ordinance.
- Check for any recently-enacted CD legislation that may preempt or supplement construction professional rights and obligations under local CD ordinances, comply with such laws as appropriate, and consider the pros and cons of filing a declaratory judgment or other action early to obtain clarification of your client's rights and responsibilities.

Conclusion

Many CD ordinance provisions overlap with CDARA, CIOA, HPA, and UAA. Conflicts create uncertainty and the potential for protracted litigation. CD ordinances may reduce CD litigation, but also may expose construction professionals to new and unexpected obligations while hamstringing their liability insurers.

The CD ordinances also raise novel practical, substantive, and constitutional concerns. The CD ordinances likely will receive close scrutiny from our courts, and this Balkanization of construction defect law at the local level may lead to unanticipated consequences. Recent state legislative activity may further complicate the analysis, raising new preemption and state-local harmonization issues, along with some of the same procedural and constitutional concerns elicited by parallel CD ordinance provisions.

Notes

1. Because the authors did not become aware of Broomfield's CD ordinance until after article was in process, discussion of it is omitted from Parts 1 and 2. Broomfield's requires that any notice by a builder to repair a construction defect "shall offer to compensate the claimant for all applicable damages within the timeframe set for repair," a potentially open-ended liability not limited by CDARA. The ordinance became effective on or about October 23, 2016.

2. Because Westminster's CD ordinance passed while this article was in process, analysis of its provisions is more limited than other ordinances, and discussion of it may be omitted from some parts.

3. Aurora Code Ord. §§ 22-701 et seq.; Broomfield Mun. Code § 15-25-010, et. seq.; Centennial Mun. Code §§ 18-10-10 et seq.; Colorado Springs Code Ord. §§ 6.14.101 et seq.; Commerce City Code Ord. Ch. IX §§ 5-19001 et seq.; Durango Code Ord. art. XI §§ 6-1 et seq.; Lakewood Mun. Code §§ 14.26.010 et seq.; Littleton City Code §§ 4-7-1 et seq.; Lone Tree Mun. Code §§ 18-12-10 et seq.; Loveland Mun. Code §§ 15.58.010 et seq.; Wheat Ridge Code L. §§ 26-1301 et seq.

4. Aurora Code Ord. §§ 22-701 et seq.; Centennial Mun. Code §§ 18-10-10 et seq.; Colorado Springs Code Ord. §§ 6.14.101 et seq.; Commerce City Code Ord. Ch. IX §§ 5-19001 et seq.; Denver Code Ord. §§ 10-201 et seq.; Durango Code Ord. art. XI §§ 6-1 et seq.; Fort Collins City Code art. VIII §§ 5-350 et seq.; Lakewood Mun. Code §§ 14.26.010 et seq.; Littleton City Code §§ 4-7-1 et seq.; Lone Tree Mun. Code §§ 18-12-10 et seq.; Loveland Mun. Code §§ 15.58.010 et seq.; Parker Mun. Code §§ 11.20.100 et seq.; Westminster Ord. No. 3867, §§ 11-15-1 et seq. (2017); Wheat Ridge Code L. §§ 26-1301 et seq.

5. Colorado Springs Code Ord. §§ 6.14.101 et seq.; Broomfield Mun. Code § 15-03-045, et. seq.; Denver Code Ord. §§ 10-201 et seq.; Fort Collins City Code art. VIII §§ 5-350 et seq.; Parker Mun. Code §§ 11.20.100 et seq.; Westminster Ord. No. 3867, §§ 11-15-2,-3 (2017).

6. Arvada Land Dev. Code § 3.8.3(D); Castle Rock Mun. Code § 17.24.050; Parker Mun. Code § 13.07.130; Wheat Ridge Code L. § 26-420. Aurora adopted Resolution 2015-92 as a companion to its notice-repair ordinance to express a "policy to honor the request of the builder or developer of a condominium or multi-family project to include a restriction or limitation on a subdivision plat" as expressed in the resolution and as further discussed below.

7. CRS §§ 13-20-801 et seq.

8. HB 07-1338, codified as CRS §§ 13-20-806(7) and -807.

9. CRS §§ 38-33.3-101 et seq.

10. CRS §§ 13-22-201 et seq.

11. For a comprehensive discussion of CDARA, HPA, CIOA, and UAA in the CD claim setting, *see* Benson, ed., 2 *The Practitioner's Guide to Colorado Construction Law*, §§ 14.1 et. seq. (CBA-CLE 2d ed. 2015); and Sandgrund et al., *Residential Construction Law in Colorado* (CBA-CLE 5th ed. 2015).

12. Aurora Code Ord. § 22-711(b); Centennial Mun. Code § 18-10-110(b); Colorado Springs Code Ord. § 6.14.105; Commerce City Code Ord. § 5-19010(b); Denver Code Ord. § 10-203(c); Durango Code Ord. § 6-9(c); Fort Collins Mun Code. § 5-353(c); Lakewood Mun. Code § 14.26.100(D); Littleton City Code § 4-7-10(D); Lone Tree Mun. Code § 18-12-100(4); Loveland Mun. Code § 15.58.110(B); Parker Mun. Code § 11.20.120(c); Westminster Ord. No. 3867, §§ 11-15-3(B) and (C); Wheat Ridge Code L. § 26-1310(D).

13. Aurora Code Ord. §§ 22-702(f) and -711(b); Centennial Mun. Code §§ 18-10-20(7) and -110(b); Colorado Springs Code Ord. §§ 6.14.103 and 105; Commerce City Code Ord. §§ 5-19002 and -19010(b); Denver Code Ord. § 10-203(c); Durango Code Ord. §§ 6-2 and -9(c); Fort Collins Mun Code. § 5-353(c); Lakewood Mun. Code §§ 14.26.020 and 100(D); Littleton City Code §§ 4-7-2 and -10(D); Lone Tree Mun. Code §§ 18-12-20 and -100(4); Loveland Mun. Code §§ 15.58.020 and 110(B); Parker Mun. Code § 11.20.120(c); Westminster Ord. § 11-15-3(C); Wheat Ridge Code L. §§ 26-1302 and -1310(D).

14. CRS §§ 38-33.3-302(1)(d), -303(1)(a), and -303.5.

15 CRS § 38-33.3-217.

16. CRS § 38-33.3-303.5.

17. Wheat Ridge Code L. § 26-1310(D).

18. *See* CRS § 38-33.3-103(2)(a) (unit owners have an undivided interest in the association's votes); -207(1)(a) (declaration must allocate votes to units on a percentage basis).

19. CRS 38-33.3-103(2)(a) and -315.

20. Lakewood Mun. Code § 14.26.100(D); Lone Tree Mun. Code § 18-12-100(4); Wheat Ridge Code L. § 26-1310(D).

21. Aurora Code Ord. § 22-711(b); Commerce City Code Ord. § 5-19010(b); Littleton City Code § 4-7-10(D).

22. Denver Code Ord. § 10-203(c); Fort Collins Mun. Code. § 5-353 (c); Parker Mun. Code § 11.20.120(c).

23. Denver Code Ord. § 10-202(a); Broomfield Mun. Code § 15-03-045(A); Fort Collins Mun. Code. § 5-532(a); Parker Mun. Code § 11.20.110(a); Westminster Ord. § 11-15-1(C).

24. Fort Collins Mun. Code. § 5-532(a)(5).

25. Colo. Springs Code § 6.14.301.

26. Broomfield Mun. Code § 15-03-045(A)(1).

27. *See* Benson, *supra* note 11 at § 14.4.3, Strict Product Liability.

28. *See Carpenter v. Donohoe*, 388 P.2d 399, 401–02 (Colo. 1964).

29. Denver Code Ord. § 10-202(c); Colorado Springs Code Ord. § 6.14.301(B); Fort Collins Mun. Code. § 5-532(c); Parker Mun. Code § 11.20.110(c).

30. *Restatement (Second) of Torts* § 288C (1965).

31. Denver Code Ord. § 10-202(c); Fort Collins Mun. Code § 5-352 (c); Parker Mun. Code § 11.20.110(c).

32. Westminster Ord. § 11-15-2(C).

33. Colo. Springs Ord. § 6.14.301(B).

34. Whether home-rule cities can effectively alter Colorado tort common law and whether Westminster's presumption that CIC code-compliant construction is not defective may be subject to an equal protection challenge, are discussed more fully below.

35. *See generally Aloi v. Union Pacific R.R. Corp.*, 129 P.3d 999, 1002 (Colo. 2006).

36. Aurora Code Ord. § 22-705(d); Centennial Mun. Code § 18-10-1050(d); Colorado Springs Code Ord. § 6.14.202(D); Commerce City Code Ord. § 5-19005(d); Durango Code Ord. § 6-5(c); Lakewood Mun. Code § 14.26.050(B)(5); Littleton City Code § 4-7-5(B)(5); Lone Tree Mun. Code § 18-12-050(d); Wheat Ridge Code L. § 26-1310(B)(5).

37. *See KB Home Greater Los Angeles, Inc. v. Super. Ct.*, 223 Cal.App.4th 1471 (Cal.App. 2014) (subrogated insurer's failure to satisfy California's "right to repair" law concerning burst pipe water damage required claim's dismissal).

38. *See* CRS §§ 10-3-1115 and -1116.

39. Ironically, a lawsuit's discovery period, including expert disclosures and depositions, often provides the necessary opportunity for completion of the liability insurer's claim adjustment process, permitting substantial insurance contributions to be made.

40. *See generally Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013).

41. *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 582 (Colo. 2016).

42. *Webb*, 295 P.3d at 486 (citing Colo. Const. art. XX, § 6 (2013)).

43. *Id.*

44. *Id.*

45. *Id.* at 486–87.

46. *City of Longmont*, 369 P.3d at 583. *See also Bd. of Cty. Comm'rs v. Martin*, 856 P.2d 62, 67 (Colo.App. 1993) (state law generally regulating collectors' cars preempted county policy where state law did not limit the number of vehicles allowed in outdoor storage and authorized multiple methods for screening cars and county policy limited outdoor storage to one car and prescribed particular screening method).

47. CRS § 38-33.3-102(1)(a).

48. CRS § 13-20-802.

49. Sandgrund et al., "The Homeowner Protection Act of 2007," 36 *The Colorado Lawyer* 79 (July 2007) (summarizing CRS §§ 13-20-806(7) and -807). *See also* Benson, *supra* note 11 at § 14.2.5, Colorado's Homeowner Protection Act of 2007 (HPA).

50. CRS § 13-22-203(1).

51. *See City of Longmont*, 369 P.3d at 581 (need for statewide uniformity and regulatory patchwork that could inhibit efficient development supported finding of state interest).

52. Denver Bill No. 15-0811, as amended Nov. 23, 2015, at 2 (10th whereas clause); Fort Collins Ord. No. 030, 2016 (7th and 11th whereas

clauses). The Fort Collins City Council's staff recommendation regarding the city's adoption of its CD ordinance observed that "[m]any municipal legal experts have suggested that local construction defect ordinances altering builder or unit owner remedies would not survive a preemption challenge by the State in view of the legislative intent of the General Assembly in enacting CCIOA and CDARA." Mar. 1, 2016 Fort Collins City Council Agenda Item Summary, Attachment 1 at 8, http://citydocs.fcgov.com/?cmd=convert&vid=72&docid=2662843&dt=AGENDA+ITEM&doc_download_date=MAR-01-2016&ITEM_NUMBER=13.

53. Colo. Springs Code § 6.14.103.

54. Yellico, Mar. 15, 2016 Memorandum to Loveland City Council, Attachment A (Construction Defect Ordinance Staff Report).

55. See, e.g., Colorado Springs Ord. No. 15-93, whereas clauses 1–4 (citing to Colo. Const. art. XX, the Charter of the City of Colorado Springs, CRS § 31-15-401 (defining general police powers of municipalities), and CRS § 31-23-301 (granting municipalities power to enact zoning ordinances); and referring generally to the city's power to regulate land use, planning, building codes, business, zoning, and its comprehensive plan). See also Aurora Ord. Nos. 2015-35 and 2015-92; Castle Rock Ord. No. 2015-59; Centennial Ord. No. 2015-O-29; Commerce City Ord. No. 2060; Denver Ord. No. 15-0811; Durango Ord. No. O-2016-13; Fort Collins Ord. No. 030, 2016; Lakewood Ord. No. O-2104-21; Littleton Ord. No. 25 (Series 2015); Lone Tree Ord. No. 15-01; Loveland Ord. No. 6004; Wheat Ridge Ord. No. 1580.

56. CRS §§ 38-33.3-302(1)(f) and -307(1).

57. CRS § 38-33.3-303.5.

58. CRS § 13-20-806(7)(a).

59. CRS § 38-33.3-302(1)(d).

60. These include, for example, applications for judicial relief, the validity of arbitration agreements, provisional remedies, witness subpoenas, jurisdiction, appeals, and several other matters.

61. CRS § 13-22-204.

62. Fort Collins Mun. Code § 5-354(b).

63. *Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes, Inc.*, 2015 COA 65, *cert. granted*, June 20, 2016. The authors' firm is counsel for the plaintiff homeowners association in *Vallagio*.

64. *See* CRS § 13-20-804.

65. *See* Sandgrund et al., "The Construction Defect Action Reform Act," 30 *The Colorado Lawyer* 121 (Oct. 2001); Sandgrund and Sullan,"The Construction Defect Action Reform Act of 2003," 32 *The Colorado Lawyer* 89 (July 2003).

66. *Cf. City of Adams v. Hibbard*, 918 P.2d 212, 221 (Colo. 1996) (County's anti-blight ordinance procedures); Colo. Const. art. II, § 25 (Colorado due process clause, similar to that in the U.S. Constitution).

67. *See* Colo. Const. art. II, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."); art. II, § 7 ("The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures"); and art III, § 25 ("No person shall be deprived of life, liberty or property, without due process of law."), all similar to clauses in the U.S. Constitution.

68. *See generally Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (rejecting equal protection challenge to damage caps in Health Care Availability Act as denying equal protection to tort victims).

69. CDARA applies to all residential and commercial properties, but treats residential and commercial properties differently in some respects. *See, e.g.*, CRS 13-20-802.5(2).

70. *See People v. McKenna*, 585 P.2d 275, 279 (Colo. 1978) (discussing contours of separation of powers). *See also* Sandgrund et al., "Crossing the Separation of Powers Threshold: Legislative and Regulatory Control of Expert Witness Testimony," 37 *The Colorado Lawyer* 27 (May 2008).

71. *People v. Montoya*, 942 P.2d 1287, 1294 (Colo.App. 1996).

72. *Id.*

73. *McKenna*, 585 P.2d 275, 277 (quoting Joiner and Miller, "Rules of Practice and Procedure: A Study of Judicial Rule Making," 55 *Mich. L.Rev.* 623, 629–30 (1957)).

74. *Aloi*, 129 P.3d 999, 1002 (quoting *Pena v. Dist. Court*, 681 P.2d 953, 956 (Colo. 1984)).

75. *Id.*

76. *Univ. of Colo. ex rel. Regents of the Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 949 (unconstitutional conditions doctrine applied where student denied opportunity to participate in state university's athletic program if student did not consent to drug test), and 953–54 (Colo. 1993), Justice Rovira, dissenting (quoting Epstein, "Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, The Supreme Court 1987 Term," 102 *Harv. L. Rev.* 5, 6–7 (1988)).

77. *Id.*

78. *See generally* Yoder, "Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services," 6 *Wm. & Mary Bill Rts. J.* 827 (1998).

79. *See Firelock Inc. v. Dist. Ct. In and For the 20th Jud. Dist. of State of Colo.*, 776 P.2d 1090, 1096 (Colo. 1989) (relying on Colo. Const. art. II, § 6, which provides, "[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.").

80. *See Zauderer v. Office of Disciplinary Counsel, Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985). *See also Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo. 1988) (statute regulating commercial speech must satisfy a four-part test to pass constitutional scrutiny: (1) Is the expression protected by the First Amendment? (For commercial speech, it must concern a lawful activity and not be misleading.); (2) Is the asserted governmental interest substantial? If yes to (1) and (2), then (3) Does the regulation directly advance the governmental interest asserted, and (4) Is it more extensive than necessary to serve that interest? (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)). ■