# The Homeowner Protection Act of 2007

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*This article discusses the terms and effect of the Homeowner Protection Act of 2007, House Bill 07-1338, which clarified and amended parts of Colorado's Construction Defect Action Reform Act and applies to actions filed on or after April 20, 2007.*

The Homeowner Protection Act of 2007 (HPA or Act) clarifies and amends two subsections of Colorado's Construction Defect Action Reform Act (CDARA).[1] The HPA's primary purpose is to render void any pre-dispute waiver of and many limitations on a residential property owner's or homeowner association's ability to recover in tort or contract the damages described by CDARA. This article discusses the events leading to the Act's passage, its scope and purpose, exceptions from its reach, its relationship to pre-existing statutory and common law, and questions relating to its application to contracts entered into before the Act's April 20, 2007 effective date.

## Events Leading to Passage

In 2003, Colorado's legislature, in response to building industry concerns regarding construction defect litigation and liability insurance premiums, amended and expanded CDARA, placing limits on the kind and amount of damages recoverable in such lawsuits.[2] Despite these statutory limitations, many builders attempted to incorporate even broader restrictions on new home buyers' rights and remedies in their purchase contracts by inserting, on a take-it-or-leave-it basis, broad waivers, disclaimers, and liability limitations. Legislative hearings disclosed that these homebuilder contracting practices were undercutting the intent of CDARA, which, as set forth in CDARA's legislative declaration, was to preserve "adequate rights and remedies for property owners who bring and maintain [construction defect] actions."[3] Substantial testimony showed that these clauses were present in many home-purchase agreements, and that the vast majority of homeowners lacked the negotiating power to modify them.[4] The HPA's sponsors concluded that homeowners either had to adhere to such waivers, disclaimers, and liability limitations or be shut out of large segments of the new housing market.[5]

## General Scope and Provisions

The HPA "preserve[s] Colorado residential property owners' legal rights and remedies" in any civil action or arbitration proceeding for damages caused by a defect in the design or construction of an improvement to residential real property.[6] The HPA provides that "any express waiver of, or limitation on, the legal rights, remedies, or damages provided by" CDARA[7] or Colorado's Consumer Protection Act,[8] "or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitation or repose, are void as against public policy."[9] Thus, among other things, the HPA prevents a construction professional from contractually limiting a homeowner or homeowner association's time to sue for a construction defect to a period shorter than that provided under the statute of limitations or repose applicable to each claim for relief asserted.[10] The HPA applies only to "legal rights, remedies, or damages of claimants asserting claims arising out of residential property."[11]

### *Liability and Damages Under CDARA*

CDARA recognized the many types of claims potentially available to aggrieved homeowners under both statutory and common law, such as negligence, breach of express and implied warranty, misrepresentation, and violations of Colorado's Consumer Protection Act and Soils and Hazard Analyses of Residential Construction Act. However, in myriad ways, CDARA limited the assertion of some of these causes of action while also capping or eliminating damages previously recoverable at common law.[12] CDARA also

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Tort and Insurance Law articles provide information concerning current tort law issues and insurance issues addressed by practitioners representing either plaintiffs or defendants in tort cases. They also address issues of insurance coverage, regulation, and bad faith.

created an approved, statutory procedure for giving notice to owners in common interest communities of a homeowner association's board's intent to bring a construction defect lawsuit.[13]

The HPA does not enlarge or remove any of CDARA's damages limitations or caps applicable to construction defect or consumer protection act claims, "including the limitations on treble damages and attorneys fees."[14] Rather, the HPA preserves existing common law and statutory causes of action against construction professionals, and continues to limit damages to those provided for in CDARA.[15]

CDARA provides for the recovery of "actual damages." Actual damages under CDARA are the least of the: (1) fair market value of the real property without the alleged construction defect; (2) replacement cost; or (3) reasonable cost to repair the alleged construction defect, together with "relocation costs." For residential property only, actual damages also include "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."[16]

CDARA similarly describes and limits personal injury[17] and treble damage[18] recoveries. Colorado's appellate courts have not addressed whether exemplary damages still are recoverable against construction professionals after the 2003 amendments to CDARA, which amendments did not expressly include exemplary damages in their definition of "actual damages."[19]

### *HPA Exceptions*

Concerns about the HPA's scope led to the incorporation of specific provisions relating to:

- settlement agreements
- certain charitable donations
- express warranties
- arbitration and mediation proceedings.

Although the HPA's effect on mixed-use developments was not explicitly addressed by H.B. 1138, its practical impact was the subject of a significant part of the legislative hearings. Each of these aspects of the HPA is discussed below.

The HPA excepts from its application:

> [a] waiver, limitation or release contained in a written settlement of claims, and any recorded notice of such settlement, between a residential property owner and a construction professional after such a claim has accrued.[20]

Also exempted are claims arising from sales or donations of property or services by a statutorily compliant *bona fide* charitable organization.[21]

The HPA also does not abrogate or limit any express warranty provisions or the obligations of a warranty provider.[22] H.B. 1338's legislative history tracks the importance of this exception to the building industry. When a draft of H.B. 1338 first was circulated and discussed, industry representatives expressed concern that it might be misconstrued to void limitations on the scope of and remedies provided by home builder and third-party "repair or replace" express warranties. However, in its final form, the HPA specifically allows a warrantor to limit the rights, remedies, and damages available under such express warranties, as long as the express warranty provisions do not purport to waive or limit claims for relief other than for breach of the express warranty.[23] Thus, the nonwaiver provisions of the HPA do not apply to any limitations on breach of express warranty claims applicable and limited to the express warranty itself.[24]

By its terms, the HPA does not bar or dilute the effect of provisions requiring participation in arbitration or mediation.[25] Also, as its legislative history and incorporation within CDARA make clear, the HPA does not apply to claims that do not arise from construction defects, such as claims relating to restaurant odors or light rail noise in mixed-use developments where residential units are constructed in proximity to commercial units or railroad tracks, or other conflicting "uses" that are better dealt with by the community's use covenants or zoning laws.[26]

## The HPA and Pre-Existing Law

The HPA was effective "upon passage" and applies to actions filed on or after April 20, 2007.[27] It is unclear whether the HPA's provisions preserve or restore remedies and damages purportedly voided by contractual waivers and liability limitations entered into before the HPA's effective date and raised as a defense in a lawsuit filed after that date. The U.S. and Colorado Constitutions prohibit the passage of certain kinds of retroactive, retrospective legislation.[28]

Courts need not address the HPA's constitutionality if they find that the contract provision at issue is void, unenforceable, or inapplicable for some other reason, such as being unconscionable or violative of pubic policy under the common law. For example, although specifically reserved for later examination by the Colorado Supreme Court,[29] many courts outside Colorado,[30] and some Colorado district courts,[31] have held disclaimers of new home implied warranties void as against public policy.

Accordingly, homeowners may argue that certain waivers and limitations in home purchase contracts pre-dating the HPA's passage are unenforceable exculpatory or limitation of liability provisions, or otherwise void because they are unconscionable or violative of public policy. Such conclusion could be premised on the HPA's sponsors' statements that many home-purchase contracts have the earmarks of adhesion contracts, as reflected in the HPA's extensive legislative history.[32] Conversely, construction professionals may argue that CDARA, including the HPA, provides an all-encompassing, statutory framework within which to litigate construction defect claims intended to supplant pre-existing common law.[33] A summary of Colorado's pre-HPA law regarding exculpatory clauses, unconscionable contract provisions, and adhesion contracts follows.

### *Exculpatory and Limitation of Liability Provisions*

Depending on the activity at issue, public policy considerations may limit or bar application of an unfair exculpatory or limitation of liability clause, and such provisions are closely scrutinized by courts.[34] Generally, under the common law existing before the HPA's passage, the validity of an exculpatory agreement (a clause that "exculpates" or relieves one party from liability) depended on four factors: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties was expressed in clear and unambiguous language.[35] The codification of a legal standard of conduct often confirms that a matter is an issue of public concern.[36] Thus, conduct governed by Colorado's Consumer Protection Act,[37] Colorado's Common Interest Ownership Act (CCIOA),[38] local ordinance (such as building codes), or other

statute or regulation, may indicate that the conduct at issue is a matter of public concern and subject to strict judicial scrutiny. Moreover, in Colorado, exculpatory clauses generally cannot limit liability for one's own willful and wanton negligence.[39]

Some contracts, in addition to limiting a party's claims, also may provide a specified and limited remedy. Such a provision may be void if the remedy fails of its essential purpose.[40] Under Colorado's Commercial Code, "Failure of the essential purpose of a remedy is measured by whether the buyer is deprived of the substantial value of his bargain."[41] A limitation of remedy has been held to fail of its essential purpose when applied to property containing latent defects that are not discoverable on delivery and reasonable inspection.[42] Similarly, the action or inaction of the seller may cause a limited remedy to fail of its essential purpose.[43]

### *Common Law Unconscionability and Adhesion Contracts*

To support a finding of unconscionability, there must be evidence of some overreaching by one of the parties, such as that which results from unequal bargaining power or other circumstances where there is an absence of meaningful choice on the part of the second party, together with contract terms unreasonably favorable to the first party.[44] Contract terms, particularly in transactions involving consumers, may be found unconscionable if they defeat the reasonable expectations of the parties.[45]

An "adhesion contract" may be unconscionable. An adhesion contract is:

> drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot be obtained elsewhere. It is generally not bargained for but imposed on a take-it-or-leave-it basis.[46]

An "unconscionable" contract provision is one that "shocks the conscience," taking into consideration the following factors:

> (a) a standardized agreement executed by parties of unequal bargaining strength; (b) lack of opportunity to read or become familiar with the document before signing it; (c) use of fine print in the portion of the contract containing the provision; (d) absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; (e) the terms of the contract, including substantive unfairness; (f) the relationship of the parties, including factors of assent, unfair surprise and notice; (g) and all the circumstances surrounding the formation of the contract, including its commercial setting, purpose and effect.[47]

Courts are reluctant to enforce adhesive provisions unless they are objectively fair as written and as applied,[48] and generally will not enforce unconscionable provisions.[49] The HPA's legislative hearings included both witness testimony and legislator comment regarding the potential unconscionability of broad waivers in home-purchase contracts under the common law.[50]

## Statutory Unconscionability and Colorado's Common Interest Ownership Act

Just as courts need not analyze the HPA's constitutionality if the contract provision at issue is unenforceable under the common law,

such analysis similarly is unnecessary if the provision is unenforceable under statutory law. For example, such a clause may be unenforceable under CCIOA,[51] which contains its own unconscionability provision. This provision provides that a court:

> upon finding as a matter of law that a contract or contract clause relating to a common interest community *was unconscionable at the time the contract was made*, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.[52]

In determining whether such a contract is unconscionable, the parties should have a reasonable opportunity to present evidence as to several nonexclusive factors described in CCIOA.[53] Most homeowner association governing documents, such as the declaration of covenants, bylaws, and articles of incorporation, are deemed "contracts" under the law and, thus, their enforcement may be subject to CCIOA's unconscionability provisions.[54]

> Analogously, under Colorado's Commercial Code, a court:
> in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.[55]

Courts may apply this or an analogous standard when construing CCIOA's unconscionability provisions, especially because CCIOA is substantively similar to the Uniform Common Interest Ownership Act (UCIOA), and because the term "unconscionable" as used in the UCIOA is intended to have a comparable meaning to "unconscionable" as used in the Uniform Commercial Code, from which Colorado's Commercial Code heavily draws.[56]

## Retroactive and Retrospective Legislation and Impairment of Contracts

Assuming that a home-purchase contract provision otherwise is enforceable under common law and state statute, whether the HPA can constitutionally and retroactively void or limit such provision depends on a complicated analysis. A statute is presumed constitutional unless proven otherwise beyond a reasonable doubt.[57] If alternative, reasonable statutory constructions exist, a court will adopt the construction that avoids constitutional infirmities.[58]

### *Retroactive and Retrospective Legislation*

The general prohibition against retrospective legislation aims to prevent any unfairness that could be caused by the application of a new law to rights already in existence.[59] However, retroactive application may be permitted if the law effects a procedural or remedial change.[60] Unless the legislature indicates an intent to apply legislation retroactively, legislation is presumed to operate prospectively.[61] To distinguish permissible retroactive legislation from impermissible retroactive legislation, Colorado uses the term "retrospective" to describe retroactive legislation that impermissibly "impairs vested rights acquired under existing laws, or creates a new obligation, im-

poses a new duty, or attaches a new disability, in respect to transactions or considerations already past."[62]

## A Two-Step, Constitutional Analysis

In accord with *City of Golden v. Parker*,[63] Colorado courts use a two-step inquiry to determine whether a law applies retrospectively. First, courts look to the legislative intent to determine whether the law is intended to operate retroactively. A clear legislative intent that the law apply retroactively is required to overcome the presumption of prospectivity. However, express language of retroactive application is not necessary.[64] Here, an amendment to limit the HPA to prospective effect was defeated.[65]

If the court finds retroactive application intent, which can be inferred from the legislature's refusal to limit the HPA to prospective application, the second step is to determine whether the law operates retrospectively. A law is retrospective if it either: "(1) impairs a vested right, or (2) creates a new obligation, imposes a new duty, or attaches a new disability. . . ."[66]

**Impairs a vested right:** A vested right may be derived from statute or common law, but "once it vests it is no longer dependent for its assertion upon the common law or statute under which it may have been acquired."[67] Colorado courts do not employ a bright-line test to determine whether a vested right is impaired. Instead, three factors are considered: (1) whether the public interest is advanced or retarded; (2) whether the statute gives effect to or defeats the *bona fide* intentions or reasonable expectations of the affected individuals; and (3) whether the statute surprises individuals who have relied on a contrary law.[68]

A finding that retroactive application of a law impairs a vested right is not determinative, because such a finding "may be balanced against public health and safety concerns, the state's police powers to regulate certain practices, as well as other public policy considerations."[69] However, retroactive application of a law that implicates a vested right is permissible only if rationally related to a legitimate government interest.[70] In the past, Colorado has "appl[ied] a balancing test that weighs public interest and statutory objectives against reasonable expectations and substantial reliance."[71]

**Creates a new obligation:** If a vested right is not implicated, the next step of the analysis is to determine whether retrospectivity results "from the creation of a new obligation, imposition of a new duty, or attachment of a new disability with respect to" past transactions or considerations.[72] Generally, procedural changes that do not affect pre-existing rights or obligations may be applied retroactively.[73] Thus, waivers or limitations found in homeowner association governing documents that existed before the HPA's adoption should be scrutinized to determine whether they address procedural matters.[74]

A law is not retrospective, however, "merely because the facts upon which it operates occurred before" its adoption.[75] In Colorado, legislation is presumed constitutional; as a result, Colorado appellate courts rarely have found a law retrospective.[76] When a statute is found to be retroactive, the Colorado Supreme Court has prohibited retrospective application of the statute when the reasonable ex-

pectations and substantial reliance of a party vested before the enactment of the statute.[77]

### *Contract Impairment Analysis*

Statutes that impair existing contract provisions may violate the Contract Clauses of the Colorado and U.S. Constitutions.[78] However, a finding that a law impairs a contract does not end the inquiry. Despite such finding, a court "should uphold a challenged statute if it is reasonable and appropriately serves a significant and legitimate public purpose when considered against the severity of the contractual impairment."[79] In assessing an alleged Contract Clause violation, "the inquiry is 'whether the change in state law has operated as a substantial impairment of a contractual relationship.'"[80]

> Answering this inquiry involves consideration of three factors: First, the court must ascertain whether there is a contractual relationship; to establish this component, a party must demonstrate that the contract gave him a vested right. Second, a court must determine whether a change in the law impairs that contractual relationship. Third, a court must decide whether the impairment is substantial. The second two components are often considered together: To prove substantial impairment of a contractual relationship, a party must show that the law was *not foreseeable* and thus disrupts the parties' *reasonable expectations*. . . .[81]

When the state is not a party to the contract, a court should defer to the general assembly's judgment regarding the necessity and reasonableness of the law, even where the statute imposes a financial hardship on the contracting parties.[82] Additionally, courts should consider whether the statute addresses an area that the legislature historically has regulated; if so, the statute is less likely to violate the Contract Clause.[83]

### *Reasonable Expectations and Highly Regulated Transactions and Businesses*

As noted above, retrospective application of a statute and statutory contract impairment may not be permitted when the reasonable expectations and substantial reliance of a party vested before the enactment of the statute. However, an important factor in this analysis is whether a change in the law was "reasonably foreseeable at the time of contracting," especially if the business or transaction at issue is highly regulated by Colorado statute.[84]

Home sale disclosures and deceptive trade practices, along with construction defect disputes, have been regulated areas of Colorado law.[85] The legislature also previously regulated warranty limitations and disclaimers.[86] Homeowners will argue that this statutory history and framework shows that this change in law was reasonably foreseeable and renders the sale and construction of homes a highly regulated activity, appropriately susceptible to retrospective legislation. Homebuilders will argue that the level of regulation is neither broad nor mature enough to permit retrospective legislation, and that they relied on the enforceability of the broad disclaimers they incorporated in their purchase contracts before the HPA's passage.[87] Clearly, the question of whether the HPA may properly and retrospectively void pre-existing disclaimers will be a hotly contested issue.

## Conclusion

The HPA must be considered when analyzing the effectiveness of all past and future contractual waivers, releases, exculpatory clauses, and limitations of liability and remedies implicated in property damage or personal injury claims arising from a residential construction defect dispute filed on or after April 20, 2007. Prudent attorneys representing construction professionals will consider the ramifications of continuing to insert broad rights waivers in home purchase contracts, and whether such provisions might form the basis of or otherwise support claims resting on misleading or deceptive trade practices under Colorado's Consumer Protection Act or other laws. The HPA does not expand homeowner and homeowner association rights, remedies, or damages beyond those described by CDARA; it merely preserves and renders those rights, remedies, and damages inviolate under most circumstances.

### Notes

1. CRS §§ 13-20-806(7) and -807.

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

3. CRS § 13-20-802.

4. Hearing on House Bill (H.B.) 07-1338 before the House Judiciary Comm., 69th Gen. Assemb., 1st Sess. (March 21, 2007) (Transcript of House Hearings) at 11-13 (statement of bill co-sponsor Rep. Pommer). *See also id.* at 194-95 (testimony of homeowner attorney, describing national homebuilders' form contracts offered on a "take-it-or-leave-it" basis); Hearing on H.B. 07-1338 before the Senate Business, Labor & Tech. Comm., 69th Gen. Assemb., 1st Sess. (April 3, 2007) (Transcript of Senate Hearings) at 1 (statement of bill co-sponsor Sen. Veiga that in overwhelming majority of cases, new homebuyers cannot ask for changes in contract terms); Second Reading of H.B. 07-1338 before the Senate, 69th Gen. Assemb., 1st Sess. (April 9, 2007) (Second Senate Reading) at 3 (statement of bill co-sponsor Sen. Veiga that legal rights waivers now regularly appear in both single-family home purchase contracts and homeowner association governing documents), 7 (statement of Sen. Gordon that homeowners have no bargaining power). *Note:* All page citations to the House and Senate hearings and readings are to transcripts of those proceedings, which are on file with the authors and available on request.

5. *See id.*

6. CRS § 13-20-806(7)(a). *See also* CRS § 13-20-802.5(1) (defining actions to which the Construction Defect Action Reform Act (CDARA) applies).

7. CRS §§ 13-20-801 to -807 and 38-33.3-303.5. When CDARA was passed in 2001, H.B. 01-1166, 63rd Gen. Assemb., 1st Reg. Sess. (Colo. 2001), it included an amendment to Colorado's Common Interest Ownership Act (CCIOA), CRS §§ 38-33.3-101 to -319, which provides that a homeowner association suing for damages due to construction defects in five or more units must send written notice to each unit owner before the lawsuit is served, generally describing the nature of the suit and relief sought, and the expenses and fees that the executive board anticipates will be incurred in prosecuting the action. *See* CRS § 38-33.3-303.5.

8. CRS §§ 6-1-101 *et seq*.

9. CRS § 13-20-806(7)(a).

10. *Id.*

11. CRS § 13-20-806(7)(c).

12. *See generally supra* note 2.

13. *See generally* Sandgrund, Sullan, and Achenbach, *supra* note 2.

14. CRS § 13-20-806(7)(d).

15. *See, e.g.*, Second Senate Reading, *supra* note 4 at 3 (statement of bill co-sponsor Sen. Veiga that CDARA was intended to allow homebuyers "to be able to recover actual damages"), 34-35 (bill co-sponsor Sen. Veiga's statement that CDARA was intended to afford a "right of remedy to actual damages" and noting CDARA's original sponsor's statement that "[a]ggrieved homeowners should be made whole"), 42-43 (bill co-sponsor Sen. Veiga's statement that CDARA involved a "trade-off" between a statutory limitation on a builder's damages exposure in exchange for a

statutory damages remedy). *Accord* Transcript of House Hearings, *supra* note 4 at 10 (statements of bill co-sponsor Rep. Pommer). *See also id.* at 46-47 (statement of bill co-sponsor Rep. M. Carroll, noting that CDARA intended to "strike [a] balance").

16. CRS § 13-20-802.5(2).

17. CRS § 13-20-806(4) and (5).

18. CRS § 13-20-806(5).

19. Colorado's exemplary damages statute expressly provides that a jury may award exemplary damages "*in addition to* the actual damages." CRS § 13-21-102 (emphasis added). One Colorado District Court has held that because exemplary damages are not included within CDARA's definition of "actual damages," exemplary damages are not recoverable from construction professionals. *See* Amended Order, *The St. Andrews at Plum Creek Condominium Ass'n v. D.R. Horton, Inc.*, No. 04CV1638 (Douglas County Dist. Ct., Jan. 22, 2007), *vacating* Order, *The St. Andrews at Plum Creek Condominium Ass'n v. D.R. Horton, Inc.*, No. 04CV1638 (Douglas County Dist. Ct., Jan. 19, 2007) (finding adequate factual basis supporting homeowner association's motion to amend to add exemplary damage claim against construction professional pursuant to CRS § 13-21-102(1.5)(a)). In contrast, the Texas Court of Appeals has held that Texas's Residential Construction Liability Act, V.T.C.A. §§ 27.001–27.007, which has limits on the "damages" recoverable for construction defects similar to those contained in the Colorado Homeowner Protection Act (HPA), does not bar recovery of exemplary damages. *Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364 (Tex.App. 2001), *rehearing overruled*, 45 S.W.3d 802 (Tex.App. 2001).

20. CRS § 13-20-806(7)(b).

21. CRS § 13-20-806(7)(c).

22. CRS § 13-20-807.

23. *Id.*

24. *Id.*

25. CRS § 13-20-806(7)(e).

26. *See* Transcript of House Hearings, *supra* note 4 at 91 (statement of bill co-sponsor Rep. Levy, noting that concerns about HPA's effect on mixed-use developments confuse "nuisance claims" with "construction defect" claims; the former are not within the scope of the HPA, the latter are). *See also* Second Senate Reading, *supra* note 4 at 25 (statement of Sen. Romer, noting that CDARA and HPA address alleged construction defects, as distinguished from nuisance issues that might arise in a mixed-use development), 30-31 (statement of bill co-sponsor Sen. Veiga, distinguishing construction defects from mixed-use development regulations).

27. H.B. 07-1338 § 4.

28. *See* U.S. Const. art. I, § 10, cl. 1; Colo. Const. art. II, § 11.

29. *Sloat v. Matheny*, 625 P.2d 1031, 1034 (Colo. 1981) (specifically declining to address issue).

30. *See Nastri v. Wood Bros. Homes, Inc.*, 690 P.2d 158, 161-62 (Ariz.Ct.App. 1984) (disclaimer of implied warranties as to secondary purchasers, concerning latent defects, void as against public policy); *Buchanan v. Scottsdale Envtl. Constr. & Dev. Co.*, 787 P.2d 1081, 1083-84 (Ariz.Ct.App. 1989) (any attempt by seller of land for use as a home site to contractually disclaim liability imposed by law is void as against same public policy applicable to homebuilders) (following *Nastri*, 690 P.2d at 161); *Glasser v. Am. Homes*, 535 N.Y.S.2d 208, 209 (N.Y.App.Div. 1988) (waiver of implied warranty void as against public policy); *Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987), *extended by Buecher v. Centex Homes*, 18 S.W.3d 807, 811 (Tex.Ct.App. 2000), *aff'd in part, holding limited in part, Centex Homes v. Buecher*, 95 S.W.3d 266, 274 (Tex. 2002):

> It would be incongruous if public policy required the creation of an implied warranty, yet allowed the warranty to be disclaimed and its protection eliminated merely by a preprinted standard form disclaimer or an unintelligible merger clause;

*Albrecht v. Clifford*, 767 N.E.2d 42, 47 (Mass. 2002) (implied warranty "cannot be waived or disclaimed, because to permit the disclaimer of a warranty protecting a purchaser from the consequences of latent defects would defeat the very purpose of the warranty").

31. *See, e.g.*, Order, *Terrace at Columbine II v. Vision Homes*, No. 99CV2632 (Jefferson County Dist. Ct., May 11, 2001); Order, *Cedar Heights Cmty. Ass'n v. N. Colo. Video, Inc.*, No. 97CV3360 (El Paso County Dist. Ct., Dec. 7, 1999); Order, *Fairways Homeowners Ass'n, Inc. v. Trimark Cmtys., LLC*, No. 96CV677 (Jefferson County Dist. Ct., Oct 25, 2001); Ruling, *Heritage Vill. Owners Ass'n v. Golden Heritage Investors, Ltd.*, 97CV1730 (Jefferson County Dist. Ct., March 27, 2003).

32. *See supra* note 4 (collecting testimony).

33. *Cf. Silverstein v. Sisters of Charity of Leavenworth Health Servs. Corp.*, 559 P.2d 716, 718 (Colo.App. 1976) (where statute creates legal duties and provides particular means for their enforcement, designated remedy preempts all others). The danger to construction professionals of prevailing on such an argument may include the loss of various common law defenses. *See Vigil Hill v. Franklin*, 103 P.3d 322, 325-31 (Colo. 2004) (adoption of Landowner Liability Statute, CRS § 13-21-115, evidenced general assembly's intent to establish comprehensive and exclusive specification of duties a landowner owes to those injured on his or her property, rendering common law affirmative defenses to such duties, such as the "open and obvious danger" defense, no longer applicable).

34. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).

35. *Id.* at 376.

36. *Stanley v. Creighton Co.*, 911 P.2d 705, 707 (Colo.App. 1996).

37. CRS §§ 6-1-101 *et seq*.

38. CRS §§ 38-33.3-101 *et seq*.

39. *See Jones, supra* note 34. Homeowner counsel may wish to consider pleading willful and wanton negligence where such claim is supported by the facts, because such a claim may survive application of an exculpatory clause.

40. *See Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736, 745-48 (Colo. 1991) (applying UCC); *J.A. Balistreri Greenhouses v. Roper Corp.*, 767 P.2d 736, 739 (Colo.App. 1988) (same).

41. *Wenner Petroleum Corp. v. Mitsui & Co.*, 748 P.2d 356, 357 (Colo.App. 1987) (applying UCC).

42. *See Cooley, supra* note 40 at 741-48 (applying UCC).

43. *Id.* at 745.

44. *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986).

45. *Id.*

46. *Batterman v. Wells Fargo Ag. Credit Corp.*, 802 P.2d 1112, 1116 (Colo.App. 1990).

47. *See Davis, supra* note 44 at 991 (internal citations omitted).

48. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 344, 347 (Colo. 1998).

49. *See Davis, supra* note 44 at 991.

50. A homebuilder attorney, applying an "unconscionability" analysis, testified that he doubted the legal effectiveness of broad waivers in residential purchase contracts under the common law and, thus, that adoption of the HPA was unnecessary. *See* Transcript of House Hearings, *supra* note 4 at 147, 157-59 (testimony of Colorado Defense Lawyers Association representative member and counsel for construction professionals that "most exculpatory provisions are going to be found void by the Colorado Supreme Court" and agreeing that waivers of basic statutory rights would be void as against public policy and "probably are not enforceable"). *Cf. id.* at 29 (testimony of building industry counsel that waiver of fraud claims is unconscionable), 120 (statement of bill co-sponsor Rep. Levy that it is "not reasonable under any circumstances to require a consumer to waive an action for negligence"). During the HPA hearings, a well-known homebuilder admitted surprise at the breadth of the legal rights waiver that his own company's attorneys had inserted in its contracts. *See* Transcript of House Hearings, *supra* note 4 at 42-43, 45 (testimony of Oakwood Homes Chief Executive Officer).

51. CRS §§ 38-33.3-101 *et seq*.

52. CRS § 38-33.3-112 (emphasis added). Colorado's Common Interest Ownership Act (CCIOA) also provides that its "provisions . . . may not be varied by agreement, and rights conferred by this article *may not be waived*." CRS § 38-33.3-104 (emphasis added). Furthermore, "[a] declarant may not . . . use any other device to evade the limitations or prohibitions of this article or the declaration."

53. Those factors are:

> (a) the commercial setting of the negotiations; (b) whether the first party has knowingly taken advantage of the inability of the second party

reasonably to protect such second party's interests by reason of physical or mental infirmity, illiteracy, or inability to understand the language of the agreement or similar factors; (c) the effect and purpose of the contract or clause; and (d) if a sale, any gross disparity at the time of contracting between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions. A disparity between the contract price and the value of the property measured by the price at which similar property was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

CRS § 38-33.3-112(2)(a) to (d).

54. *See Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc.*, 98 P.3d 915, 917 (Colo.App. 2004) (provision in homeowner association bylaws "is a contract between the corporation and its shareholders"), *cert. granted on other grounds*, No. 04SC273, 2004 WL 2335189 (Oct. 18, 2004), *cert. denied as improvidently granted* (Sept. 30, 2005); *Paulek v. Isgar*, 551 P.2d 213, 215 (Colo.App. 1976) (same).

55. CRS § 4-2-302, cmt. 2.

56. *See* CRS § 38-33.3-112, Historical and Statutory Notes ("This section is similar to § 1-112 of the Uniform Common Interest Ownership Act."); § 1-112 of the Uniform Common Interest Ownership Act (1982 and 1994 editions), cmt (official comments to Uniform Commercial Code regarding unconscionability are "equally applicable to this section").

57. *Watso v. Colo. Dept. of Soc. Servs.*, 841 P.2d 299, 304 (Colo. 1992).

58. *Fields v. Suthers*, 984 P.2d 1167, 1172 (Colo. 1999).

59. *City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006).

60. *Id.*

61. *Id.*

62. *Id.* at 290.

63. *Id.*

64. *Id.*

65. *See* Second Senate Reading, *supra* note 4 at 5-7 (statement of bill opponent, Rep. Weams, offering amendment to negate bill's retroactive effect), 35 (recording of vote defeating proposed amendment). Much of the Senate debate concerned the ramifications of retroactive application of the HPA to pre-existing purchase contracts.

66. *Parker, supra* note 59 at 290.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See generally Continental Title Co. v. District Court*, 645 P.2d 1310, 1315 (Colo. 1982) (procedural change did not violate constitutional prohibition against retroactive, retrospective legislation); *Johnson v. Colo. State Bd. of Agric.*, 15 P.3d 309, 313 (Colo.App. 2000) (same).

74. Procedural provisions found in homeowner association documents, such as onerous lawsuit-approval voting requirements that conflict with CRS § 38-33.3-303.5 and that are intended to chill the assertion of substantive rights, may be at risk of being voided if they impair a unit owner's or association's pursuit of legal rights and remedies.

75. *Parker, supra* note 59.

76. *Id.*

77. *Id.*

78. *See* U.S. Const. art. I, § 10, cl. 1; Colo. Const. art. II, § 11.

79. *In re Estate of DeWitt*, 54 P.3d 849, 855 (Colo. 2002). Outside Colorado, courts have upheld, on the facts before them, laws retrospectively voiding contractual rights in highly regulated industries. *See, e.g., Alliance of Auto Mfrs. v. Gwadosky,* 304 F.Supp.2d 104, 114-17 (D.Me. 2004) (applying retrospectively, statute enacted to address imbalance of power in the highly regulated manufacturer-dealer automobile industry that impaired party's pre-existing contractual rights); *State of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804 (9th Cir. 2003) (change in water rights administration law given retrospective effect).

80. *DeWitt, supra* note 79, *quoting Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (internal quotation omitted).

81. *Id.* at 855 (internal citations omitted) (emphasis added) (change in the law was foreseeable, given that the insurance industry, as well as the transfer of assets on death, are highly regulated by statute).

82. *Id.* at 859.

83. *Id.* at 859-60.

84. *Id.* at 860 (applying new law retrospectively because insurance industry and probate process both highly regulated by statute). *Cf. Gwadosky, supra* note 79 at 115:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them . . . courts look long and hard at the reasonable expectations of the parties [and] . . . examine whether the parties operated in a regulated industry.

(internal citations and quotations omitted).

85. *See, e.g.*, Colorado's Consumer Protection Act, CRS §§ 6-1-105 and -113 (adopted in 1975 and 1986 respectively), held applicable to new home sales in *MacFarlane v. Alpert Corp.*, 660 P.2d 1295, 1297 (Colo.App. 1982), cited with approval in *Hall v. Walter*, 969 P.2d 224, 234 (Colo. 1998); Colorado's Soil and Hazard Analyses of Residential Construction statute, CRS § 6-6.5-101 (adopted in 1984); Colorado's statutory authority for local governments to adopt Uniform Building Codes, CRS § 30-28-201(1) (adopted in 1984); Colorado's Natural Hazards Area Statute, CRS §§ 24-65.1-101 to -502 (adopted in 1974); amendments to Colorado's Consumer Protection Act, CRS § 6-1-113 (advanced by homebuilding industry in 1999); CDARA, CRS §§ 13-20-801 to -807 (adoption jointly advanced by homebuilding industry and homeowners in 2001); amendments to CDARA (amendments advanced by homebuilding industry in 2003); further amendments to CDARA—the HPA, H.B. 1338, codified in CRS §§ 13-20-806(7) and -807 (amendments advanced by homeowners in 2007).

86. *See, e.g.*, CRS §§ 6-1-105(1)(r) (a person may not advertise or otherwise represent that property is "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") and 4-2-316 (limiting scope and manner of disclaiming warranties accompanying sale of goods).

87. *But see supra* note 50 (building industry witness testimony regarding expectations relating to enforceability of broad waivers). ■