Recovering Actual Damages Under Colorado's Construction Defect Action Reform Act—Part II

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This two-part article analyzes the meaning of "actual damages" as used in Colorado's Construction Defect Action Reform Act and its provisions limiting damages in construction defect actions.

Colorado's Construction Defect Action Reform Act's (CDARA)[1] multi-part definition of "actual damages"[2] describes and limits the recoverable damages for property damage and personal injury claims arising from construction defects. Colorado's appellate courts have not yet interpreted CDARA's definition of actual damages or applied its damages limitations.

This two-part article provides an issues checklist for construction defect practitioners and examines several unanswered substantive and procedural questions related to CDARA's actual damages definition and limits. Part I of this article, which was published in the May 2008 issue of *The Colorado Lawyer*, discussed who bears the burden of proving which of CDARA's property damage limitations applies, whether and to what extent CDARA preempts common law construction defect damage principles, when recovery of more than actual damages is proper, and which questions a judge or jury must decide. Part II discusses the evidence admissible to prove actual damages under CDARA; recovery of prejudgment interest; attorney fees and costs; and whether CDARA prohibits exemplary (punitive) damages in construction defect actions.

Proving Each Component of the Actual Damages Definition

Regardless of who bears the burden of proof regarding application of the "whichever is less" aspect of CDARA's actual damages definition, questions remain about what evidence is admissible to prove the amount of each of the three actual damages limits. The discussion below examines these limits and how to prove the amount of each.

Fair Market Value Without the Alleged Construction Defect

Under common law, repair cost damages typically were measured as of the trial date when those repairs had not yet been made, and diminution in value damages were measured by the difference in value before and after the date of injury.[3] CDARA does not state when to measure the "fair market value without the alleged construction defect." The date these actual damages are measured may be crucial to determining the right to prejudgment interest.[4]

"Market value" alone typically is defined as "the price the property could have been sold for on the open market under the usual and ordinary circumstances. . . ."[5] However, courts may find that the statutory language "fair market value without the alleged construction defect" should not be equated with the traditional definition of fair market value. For example, some claimants have argued that this value is the sum of the property's salvage value plus repair costs, less any reduction in value due to stigma. Other formulas may be proffered.

Parties may dispute the date for measuring this value depending on how real estate values are changing. If repair cost is measured as of the trial date, this amount may be capped under CDARA by the property's value without the alleged construction defect, and defendants may argue that the property value as of trial controls. Alternatively, if the purpose of CDARA is to make the property owner whole, claimants may argue that the highest property value during the ownership period should control, to restore the claimant's personal interest in seeing the property repaired under *Slovek*.[6]

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The original sale price of property is competent, non-conclusive evidence of its current market value.[7] Early Colorado decisions did not permit admission of a property's assessed value for tax purposes as evidence of its market value.[8] However, because the assessment laws have been amended to base assessments on actual value, such assessments have been held admissible evidence of market value, subject to attack on the weight of the evidence.[9] Such attack might include evidence that the assessment does not establish: (1) whether it accounted for adverse conditions; (2) whether it has been challenged; (3) the accuracy of the assessor's data collection; or (4) whether comparable sales occurred before or after public disclosure of damage to the subject property.[10]

An owner may testify about his or her estimate of the property's value if the owner had the means to form an intelligent opinion, derived from adequate knowledge, of the nature, kind, and value of the property.[11] No Colorado court has ruled on whether an owner can testify to the diminution in his or her property's value from defects and resulting property damage; however, trial courts likely have discretion under C.R.E. 701 to admit or limit such opinion testimony.[12]

Fair market value of land and its improvements. CDARA does not state whether improvements should be considered together with the underlying land in determining fair market value without the defect. Claimants argue that CDARA does not contemplate severing the land from the improvements for valuation purposes because, although CDARA does not define "real property," other statutes define the term to include both land and its improvements.[13] Dictionary definitions also support this conclusion.[14] Moreover, defendants may face difficulty obtaining admissible evidence of a home's valuation separate from the land on which it is built, because no market generally exists for selling homes without land.[15]

Fair market value not reasonably ascertainable. Fair market value may not be reasonably ascertainable for unique or historical properties or the common elements in a common interest community. Damages for injuries to hard-to-value property hypothetically could be zero if the "whichever is less" part of CDARA's actual damages limitation applies and the property's value cannot be determined. This result, however, obviously contradicts CDARA's purpose of making claimants whole and providing them with adequate remedies.[16]

Valuing common elements presents challenges. Colorado's Common Interest Ownership Act (CCIOA)[17] generally prohibits "any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer" of common elements.[18] Because common elements cannot be severed and bought and sold, arguably no market exists to determine their value. No Colorado appellate court has addressed this issue. However, one Colorado district court found that no market value exists for common elements because they lack any separate value or functional purpose other than as a complement to each individual unit.[19]

In *Redbud Cooperative Corp. v. Clayton*,[20] the Tennessee Court of Appeals held that the damages measure should be the repair cost for correcting common area drainage problems, rather than the value of the residences diminished as a result of the inadequate drainage. That court explained that, because the common areas will be held in perpetuity, any damages measure predicated on market value was inapplicable.[21] This court's reasoning suggests that, by analogy, where no market value can be ascertained, such value need not be considered in applying CDARA's "whichever is less" provision.

Moreover, at common law, where residential property has no fair market value, repair cost generally is the appropriate measure of damages.[22] Where the market value is not determinable, defendants will argue the actual damages limitation means the lower of the replacement cost or the reasonable cost to repair the alleged construction defect.[23] CCIOA homeowner associations have a statutory duty to maintain and repair common elements.[24] Using CDARA's valuation or replacement cost damages limitation may conflict with this statutory duty and with CDARA's express purpose if applying such limitation will not provide enough money to effect statutorily mandated repairs.[25]

Some argue that one approximation of common elements' fair market value is the aggregate value of all the common interest community's individual units and their appurtenant common elements combined, because an undivided interest in the common elements is included in the legal description and accompanies the conveyance of each unit.[26] CCIOA provides that each unit, together with its interest in the common elements, must be separately assessed and taxed; that the value of the common elements must be assessed proportionate to each unit; and that common elements shall not be separately assessed or taxed. However, CCIOA does not explain how to value the common elements alone.[27] Other unanswered questions exist regarding application of CDARA's "whichever is less" limitation to common interest communities consisting of separate buildings, especially when served by common surface grading, utilities, or other common areas or elements.

Replacement Cost

"Replacement cost" generally means the cost to rebuild rather than repair defectively constructed property.[28] CDARA does not indicate the date on which the replacement cost should be measured. The discussions above concerning which date controls in determining market value and whether the value of the home should be severed from that of the land apply equally here to determining replacement cost.

Claimants argue that case law historically has distinguished between replacement cost and reproduction cost. "Reproduction cost" is:

> [the] estimated cost to construct, at current prices, an exact duplicate or replica of the building being appraised, using the same materials, construction standards, design, layout, and quality of workmanship, and embodying all the deficiencies, superadequacies, and obsolescence of the subject building.[29]

In contrast, "replacement cost" is:

> [the] estimated cost to construct, at current prices, a building with utility equivalent to the building being appraised, using modern materials and current standards, design, and layout.[30]

Replacement cost might be measured, in part, by a qualified appraiser's or contractor's estimate of the per-square-foot cost of new home construction or by a contractor's binding bid to rebuild the structure. Claimants sometimes argue for the sum of the original land purchase, development, and construction costs adjusted for inflation or deflation since that date.[31]

Claimants often argue that replacement cost includes, in addition to reconstruction costs, costs to demolish and dispose of the existing structure, permitting fees, costs of moving and storing furnishings during the work, temporary living and home office ex-

penses during reconstruction, costs to finance the rebuild, and any other consequential expenses associated with replacement. Also, claimants frequently argue that the replacement cost must be the retail cost to a non-construction professional who will have to arrange for such replacement, rather than the wholesale cost a construction professional could obtain.

Cost of Repair

Sometimes cost-estimating experts come to widely varying conclusions regarding the scope and cost of needed repairs. A party may rely on: (1) an "estimate"—an opinion as to what one should reasonably expect to pay, on average, in the open market for the proposed repairs; or (2) a binding "whole work bid"—a legally binding offer (bid) to perform the remedial repairs.[32]

Parties frequently argue whether allegedly necessary repairs are making the property owner whole or are resulting in a "betterment." Colorado apparently allows recovery of repair costs for an improved component where the improvement meets the replaced or repaired component's original purpose and replacement of damaged or defective elements with like kind elements would not perform their reasonably intended purpose, provide the benefit of the original bargain or comply with current building code requirements.[33]

Practice Pointer—Preparing Alternate Actual Damages Evidence

All parties should consider seeking pretrial rulings on how the court will define and measure the three alternate actual damages limitations, on which date(s) they should be measured, and who bears the burden of proof. Without such guidance, a party may unnecessarily endorse experts whose testimony is not needed or may prove harmful. Depending on the court's rulings, claimants may present evidence only of cost of repair, leaving defendants to prove that a lower limitation applies, with claimants focusing their attack on defendants' experts' testimony. Conversely, defendants should consider that (1) the jury may reject their alternate damages evidence and, as a result, (2) they may need to present their own repair cost evidence, even though this dollar amount exceeds their market value or replacement cost estimates.

Practice Pointer—Damages vs. Costs

Claimants often argue that forensic engineering and related expenses constitute a part of the repair cost because repairs cannot be completed without first investigating the defects and prescribing a proper repair.[34] These expenses resemble necessary pretreatment medical costs in a personal injury action, such as diagnostic testing. The parties should consider that these expenses may be characterized as damages or costs, or may be considered a hybrid of both.[35]

Many general liability insurance policies provide separate coverage for taxable costs in their Supplementary Payments provisions, without reduction of the policy's liability limits. Thus, for insurance coverage purposes, the best interests of both sides may militate in favor of having expert investigation expenses taxed as costs rather than damages.

Although Colorado has adopted a liberal view of what expenses may be taxed as costs, some uncertainty exists as to expert expenses charged for the services of an expert's forensic investigatory team members.[36] Also, claimants should recognize that although prejudgment interest may be available on damages, it typically is not available for taxed costs. All of these considerations, as well as whether a judge or jury would be more receptive to awarding such amounts, need to be evaluated when deciding whether an expert's expenses should be claimed as costs or damages.

Other Actual Damages

In addition to the three alternate actual damages limitations discussed in Part I, CDARA permits recovery of relocation costs.[37] 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.[38]

Loss of use. Under the common law, economic damages for loss of use of a home destroyed or rendered unusable by another's fault may include the fair rental value of a house of like kind and quality for the length of time necessary to reconstruct or repair a comparable house.[39] Also at common law, noneconomic damages for the loss of use and enjoyment of property was considered a personal injury and recoverable.[40] Thus, because CDARA's definition of actual damages separately permits recovery for personal injury, claimants argue that the phrase "other direct economic costs related to loss of use" allows recovery of economic loss of use damages, in addition to those available as noneconomic personal injury damages. Defendants' counter-arguments are discussed below in "Personal and Bodily Injury."

Interest as provided by law. The Colorado Supreme Court recently held that prejudgment interest on property damage tort claims accrues from the date the damages are measured, typically the trial date.[41] Claimants argue that this holding does not extend to breach of contract or implied warranty damage claims, especially where the damages are measured as of the date of the breach.[42] Where a party makes temporary repairs before or during litigation, prejudgment interest on the amount spent on the temporary repairs accrues from the repair dates.[43]

Costs and attorney fees. Under some theories, such as the common law "wrong of another" doctrine, a claimant may sometimes recover attorney fees as damages.[44] Colorado's Consumer Protection Act (CCPA) and CCIOA each permit recovery of attorney fees for successful claims brought under those laws.[45] CDARA allows recovery of actual damages consisting of "such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law." Construction professionals will argue that recovery of such costs and attorney fees (as well as prejudgment interest) is limited to claims relating to "residential property," as defined by CDARA.[46]

No appellate court has determined whether costs of suit and attorney fees awardable under CDARA constitute damages awardable during trial or are to be assessed by the court post-trial pursuant to C.R.C.P. 121 § 1-22. Historically, courts rather than juries have made most cost and attorney fee factual findings and awards post-trial subject to the simplified procedures of C.R.C.P. 121 § 1-22. Courts typically resolve attorney fee awards even when those fees are treated as damages during jury trials.[47]

If all claims for costs and fees are deemed damages provable during trial, many issues arise, including: (1) the need for expert and other testimony as to the fees' reasonableness, including

claimant and defense counsel testimony,[48] blurring the line between advocate and witness; (2) the need to protect from disclosure and discovery attorney work product, settlement negotiations, and other confidential matters necessary to establish the fees' reasonableness; (3) the confusion arising from injecting into trial collateral evidence relevant only to the costs and fees issue; and (4) the claimant's quandary of proving all its costs and fees during its case-in-chief, when additional costs and fees will be incurred during the balance of the proceedings. Moreover, proving the fee amount may be a waste of time and resources if the claimant does not prevail.

Many of these concerns could be addressed by bifurcating and staying all cost and fee disclosures and discovery until after the merits trial, then resolving them in a later proceeding. Courts may simply construe CDARA as maintaining a party's pre-CDARA ability to seek its costs and fees as post-trial awards using traditional procedures, because presenting these issues during trial would undermine CDARA's purpose of streamlining construction defect claims, and may conflict with the requirement that some statutory fee awards be decided by the court.[49]

CRS § 13-20-806(3) provides:

> [the] aggregate amount of treble damages . . . and attorney fees awarded to a claimant [under the CCPA] . . . shall not exceed two hundred fifty thousand dollars in any action against a construction professional.

Courts have not decided on what basis this amount applies: per claimant, per construction professional, per real property improvement, per transaction or occurrence, per lawsuit, or other basis. A statutory interpretation that encourages the filing of separate lawsuits to avoid the limitation—for example, if the limitation is applied on a per action basis—may not be desirable, because CDARA was adopted, in part, to reduce the number of construction lawsuits.

Other compensable losses. No Colorado appellate court has addressed the meaning of "other direct economic costs related to loss of use." Arguably, if a plaintiff has a duty to mitigate damages, any expenses incurred for mitigation, if not independently recoverable, could be sought as direct economic costs. The lead sponsor for CDARA's 2003 amendments adding the actual damages definition, Representative Greg Rippy, testified repeatedly during the legislative hearings that nothing in CDARA was intended to prevent a homeowner from being made whole after construction defects have been found in his or her home.[50] Given this legislative history and CDARA's stated intent to "preserve[e] adequate rights and remedies for property owners,"[51] claimants may argue that other unspecified expenses related to the construction defects are compensable under this provision, because economic costs could include anything other than noneconomic costs.

For example, claimants may assert that this provision includes the loss of use of property as collateral, allowing recovery of "stigma damages"—a resulting loss in value even after repairs are complete.[52] This argument seeks damages because the property can only secure a loan in a lesser amount due to stigma, so that the difference constitutes a compensable loss of use. Conversely, construction professionals will counter that losses not specifically enumerated by CDARA, including lost profits, delay damages, and liquidated damages, are no longer recoverable, even if provided for by contract or statute.

Personal and Bodily Injury

Under CDARA, damages for personal and bodily injury consist of those damages recoverable by law, except as limited by CRS § 13-20-806(4).[53] At common law, homeowners may recover damages for "annoyance, inconvenience, aggravation and discomfort" arising from injury to their homes, as well as for the loss of the "use and enjoyment" of their home.[54]

Claimants will urge that CDARA's damages limitations, in derogation of the common law, must be narrowly construed, and that "if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication."[55] Therefore, claimants will argue that CDARA preserves these common law recoveries, but limits damages for such noneconomic loss or injury or derivative non-economic loss to $250,000.[56] The district courts have taken different views on whether annoyance, inconvenience, aggravation, and discomfort and noneconomic loss of use damages are recoverable under CDARA.[57]

Construction professionals argue that homeowner associations cannot recover noneconomic loss or injury damages because corporate bodies cannot physically suffer annoyance, aggravation, inconvenience, discomfort, or loss of enjoyment.[58] Homeowner associations counter that they can recover such damages in their representative capacity on behalf of unit owners,[59] based on evidence of, for example, the disruptive effects of past problems and future repairs.[60] These associations also argue that they may recover repair costs as "direct economic costs related to loss of use"[61] where such repairs relate to their unit owners' loss of use.

CCPA Treble Damages and Attorney Fee and Litigation Expense Claims

As noted in Part I, CDARA permits claimants to recover more than actual damages where a claimant prevails on a CCPA claim under some circumstances.[62] Thus, CDARA's actual damages "whichever is less" limitation, among others, may not apply to a CCPA claim if a claimant prevails on that claim and the construction professional has failed to make a pre-suit settlement offer of at least 85 percent of the damages recovered at trial. No case has decided whether these additional damages are recoverable only as to the CCPA claim itself or for all claims once a CCPA violation is proven.[63]

Claimants will argue that lifting the actual damages limitation as to all claims when a complying offer is not made will further CDARA's notice of claim process purposes of encouraging good faith early settlement offers, and will burgeon the CCPA's deterrent effect. Defendants will argue that CDARA's text does not, on its face, justify such a broad interpretation of this provision.

CDARA contains a fixed $250,000 cap on recoverable treble damages and related fees and expenses under the CCPA.[64] Claimants may seek to recover attorney fees in excess of this $250,000 cap by pursuing such fee claims under the terms of a construction or purchase contract or under other statutes, such as CCIOA.[65] CDARA does not allow the trebling of personal and bodily injury claims under the CCPA.[66]

Availability of Exemplary (Punitive) Damages

Generally, where a jury assesses damages for a wrong attended by circumstances of fraud, malice, or willful and wanton conduct, the jury may award exemplary (punitive) damages.[67] CDARA's definition of recoverable actual damages does not include exemplary damages. CDARA's text does not specify whether CDARA preempts application of Colorado's exemplary damages statute to construction defect claims. Construction professionals frequently argue that CDARA precludes recovery of exemplary damages, and at least two district courts have accepted this argument.[68]

However, claimants argue that exemplary damages remain available based on Colorado statutes that expressly provide that claimants are entitled to exemplary damages in "addition to" any actual damages.[69] Moreover, Colorado historically has distinguished actual from exemplary damages because of their wholly different purposes: actual damages compensate victims of another's wrong, and exemplary damages punish the wrongdoer and deter similar conduct.[70] Thus, claimants argue that the legislature did not intend to immunize construction professionals from exemplary damages,[71] and that doing so would constitute a denial of Equal Protection.[72] The Texas Court of Appeals, construing a similar Texas Act,[73] has held that the Act does not bar recovery of exemplary damages, despite the Act's limits on damages for construction defects.[74]

Conclusion

From when the pleadings are framed until the jury instructions are tendered, the cautious practitioner must analyze and anticipate the many uncertainties created by CDARA's "actual damages" definition. Al-

though Colorado's appellate courts have not yet ruled on most of these issues, CDARA's legislative history, analogous Colorado appellate court decisions, decisions from other jurisdictions with similar construction defect legislation, and Colorado district court decisions shed some light on the direction Colorado's appellate courts may take if asked to resolve these questions.

Notes

1. CRS §§ 13-20-801 *et seq*.

2. The phrase "actual damages" appears in the following sections of Colorado's Construction Defect Action Reform Act (CDARA): CRS §§ 13-20-802.5, -803.5(12), and -806(1).

3. *See Airborne, Inc. v. Denver Air Ctr., Inc.*, 832 P.2d 1086, 1092 (Colo. App. 1992) (cost of repair); *Fed. Ins. Co. v. Ferrellgas*, 961 P.2d 511, 513 (Colo.App. 1997) (injured party entitled to prejudgment interest on diminution in value measured as of date of injury).

4. *See generally Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821 (Colo. 2008) (generally, date of accrual of prejudgment interest under CRS § 5-12-102(1)(b) depends on date damages measured).

5. C.J.I. Civ. 36:3 (4th ed. 2008).

6. *Bd. of County Comm'rs v. Slovek*, 723 P.2d 1309, 1316 (Colo. 1986).

7. *Karakehian v. Boyer*, 900 P.2d 1273 (Colo.App. 1994), *aff'd in part, rev'd in part*, 915 P.2d 1295 (Colo. 1996).

8. *See, e.g., Bankers Trust Co. v. Int'l Trust Co.*, 113 P.2d 656, 660 (Colo. 1941), *relying on Ft. Collins Dev. Ry. v. France*, 92 P. 953, 956 (Colo. 1907).

9. *See Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007), *cert. denied*.

10. *Id.*

11. *See Baker Metro. Water & Sanitation Dist. v. Baca*, 331 P.2d 511 (Colo. 1985); *Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.*, 117 P.3d 60 (Colo.App. 2004); *In re Marriage of Plummer*, 709 P.2d 1388 (Colo.App. 1985).

12. *Cf. Vista Resorts, Inc., supra* note 11.

13. *See, e.g.*, Colo. Const. art. X, § 3(1)(b) (defining "residential real property" to include the land); CRS § 39-1-102(14)(c) (defining "real property" as including "improvements," which, pursuant to CRS § 39-1-102(7), include all "structures, buildings, and fixtures erected upon or affixed to land").

14. *Black's Law Dictionary* (8th ed., 2004) defines "real property" as land and anything erected on it.

15. If a court adopts the argument that residential property value should be determined separate from the land's value, the claimant should identify which repairs are to be made to the land rather than to the home—such as slope stabilization measures and regrading—to reduce the effect of the statutory cap on the land versus structural repair values, and then seek recovery of both.

16. *See, e.g.*, House testimony on H.B. 1161 at 44:5-13 ("Intent of the legislation is to make aggrieved homeowners whole. . . . I do not believe in any instance that if a homeowner suffers a construction defect that they should be made anything less than whole. That is the intent of how the bill works."). *See also* CRS § 13-20-802 (CDARA's purpose is to "preserve[e] adequate rights and remedies for property owners").

17. CRS §§ 38-33.3-101 *et seq*.

18. CRS § 38-33.3-207(6).

19. *See Townhomes at Coal Creek Homeowners Ass'n, Inc. v. Club Homes Dev. Corp.*, No. 99 CV 1936 at *2 (Boulder County Dist. Ct. Oct. 4, 2002). *But see Central Park Townhomes Condo. Ass'n, Inc. v. Central Park Townhomes, L.L.C.*, No. 2006CV4013 (Arapahoe County Dist. Ct. Oct. 16,

2007) (ruling that, because common elements are taxable and their value is tied to the value of the individual units, court would use aggregate unit value as the value of the common elements, *citing Manor Vail Condo. Ass'n v. Bd. of Equalization*, 956 P.2d 654, 660 (Colo.App. 1998)).

20. *Redbud Cooperative Corp. v. Clayton*, 700 S.W. 2d 551, 561 (Tenn.App. 1985).

21. *Id.* at 561.

22. *See, e.g., Slovek, supra* note 6 at 1314.

23. *Cf. Five Mining Co. v. Left Hand Ditch Co.*, 216 P. 719 (Colo. 1923) (repair or restoration cost appropriate damages measure where the property has no market value).

24. CRS § 38-33.3-307 ("the association is responsible for maintenance, repair, and replacement of the common elements").

25. *See* CRS § 13-20-802 (CDARA's purpose is to "preserve adequate rights and remedies for property owners.").

26. *See Central Park Townhomes Condo. Ass'n, Inc., supra* note 19.

27. *See* CRS § 38-33.3-105(2); CRS § 39-1103(1) (providing that common elements shall be appraised and valued pursuant to CRS § 38-33.3-105(2)).

28. *See Black's Law Dictionary* (8th ed., 2004) (Replacement cost: "The cost of a substitute asset that is equivalent to an asset currently held. The new asset has the same utility but may or may not be identical to the one replaced."). Construing the statute to measure replacement cost by the cost to construct property with the same defects makes little sense where the other two parts of CDARA's "whichever is less" provision place the property owner in a better position than having to endure the same defective construction. CDARA was intended to provide an adequate remedy. *See* CRS § 13-20-802 (legislative declaration). *Cf.* CRS § 2-4-201(1) (statutes should be construed to achieve "just and reasonable result").

29. *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1031 (Colo.App. 2002).

30. *Id.* (because insurance policy's replacement cost coverage did not limit insured's recovery to cost of restoring house to its pre-fire condition, post-fire repair upgrades needed to bring home into code compliance were covered).

31. McGraw-Hill Construction Engineering News Record (ENR) Cost Indices® and RS Means & Reed Construction Cost Indices® generally are considered reasonably reliable sources for various geographic regions' average construction costs.

32. *See Heritage Greens at Legacy Ridge Homeowners Ass'n, Inc. v. Heritage Greens at Legacy Ridge, LLP*, No. 06CV713 (Adams County Dist. Ct. June 10, 2008) (discussing both).

33. *See Worthen Bank & Trust Co. v. Silvercool Serv. Co.*, 687 P.2d 464, 466-67 (Colo.App. 1984) (permitting damages for replacement of defective roof with more expensive one). *Cf. City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472 (Colo.App. 2003) (city not allowed to recover damages from contractor for cost to repair defective work because city failed to segregate costs attributable to remedying defective design not attributable to contractor). *See also Camino Real Mobile Home Park P'ship v. Wolfe*, 891 P.2d 1190, 1197-99 (N.M. 1995) (upholding breach of warranty damages for sewage plant capable of intended service); *Bd. of Educ. v. Plymouth Rubber Co.*, 569 A.2d 1288, 1296-97 (Md.Ct.Spec.App. 1990) (school entitled to more expensive roof than original as only means to ensure watertightness for the promised ten years); *Pinellas County v. Lee Constr. Co.*, 375 So.2d 293, 294 (Fla.App. 1979) (approving more expensive installation of overhead electrical system replacing unusable underground system). For additional discussion of the "betterment doctrine," *see* Benson, ed., *Colorado Construction Law* § 14.5.1.j ("The 'Betterment' Doctrine") (1st ed., CLE in Colo., Inc., 2007).

34. At least one district court has permitted such forensic engineering expenses to be enumerated in jury instructions as an element of recoverable damages under CDARA. *See Heritage Greens at Legacy Ridge Homeowners Ass'n, supra* note 32.

35. *Cf. Westchester Enterprises, L.P. v. Grand Homes, Inc.*, No. 05-98-01829, 2001 WL 953237 at *3 (Tex.App. Aug. 23, 2001) (not selected for official publication) (explaining that expenses incurred investigating claims against developer and engineer could constitute litigation expenses (costs) and/or expenses attributable to attempts to remedy the problem (damages)); *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 925 (Cal. 1997) (investigation expenses may do "double duty" as "response costs" and "defense costs" under CERCLA).

36. *Compare Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 389 (Colo. 1994) (expert witness costs properly include all costs for the expert's opinion formulation and testimonial preparation), *In re Estate of Breeden v. Gelfond*, 87 P.3d 167, 174-75 (Colo.App. 2003) (awarding costs for expert's assistant), *and Moore v. W. Forge Corp.*, 192 P.3d 427 (Colo.App. 2007) (*accord*), *with Western Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570 (Colo.App. 2006), *and Perkins v. Flatiron Structures Co.*, 849 P.2d 832 (Colo.App. 1992) (both precluding award of expert's assistants' expenses as taxable costs under different cost statute). *See also Heritage Greens at Legacy Ridge Homeowners Ass'n, supra* note 32 (testimonial expert witness "support team" expenses recoverable).

37. CRS §§ 13-20-806 and -802.5(2).

38. CRS § 13-20-802.5(2).

39. *See Schwalbach v. Antigo Elec. & Gas, Inc.*, 135 N.W.2d 263 (Wis. 1965). *Cf. Atlas Constr. Co. v. Slater*, 746 P.2d 352 (Wyo. 1987) (owner entitled to rental expenditures between time when forced to leave home and purchase of another); *Buchanan v. Leonard*, 127 F.Supp. 120 (D.Colo. 1954) (damages for property destruction include rental value of replacement property), *relying on Parks v. Sullivan*, 104 P. 1035 (Colo. 1909). *See also Airborne, Inc., supra* note 3 (owner may recover for loss of use for time required for repairs); *Butterman v. Turner*, No. 05CV70 (Douglas County Dist. Ct., Oct. 19, 2006) (allowing evidence of mortgage payments attributable to loss of use of basement).

40. *Cf. Antolovich, supra* note 9.

41. *Goodyear Tire & Rubber Co., supra* note 4. It is uncertain how the prejudgment interest statute applies to repair cost claims measured at the time of trial but reduced by CDARA's "whichever is less" limitation, because such reduction arguably no longer renders the claimant whole, and determining the date the claimant was made whole by the damages award underpinned much of *Goodyear*'s discussion. *See, e.g., id.* at 827 (where, for personal purposes, plaintiff wishes to have property repaired, diminution in value damages may not make plaintiff whole).

42. *But see Heritage Greens at Legacy Ridge Homeowners Ass'n, supra* note 32; *Hildebrand v. New Vista Homes II, LLC*, No. 06CV0652 (Arapahoe County Dist. Ct. March 12, 2009) (appeal pending), rejecting this argument based on the trial records before those courts.

43. *Heritage Greens at Legacy Ridge Homeowners Ass'n, supra* note 32 (awarding prejudgment interest from date temporary repairs made).

44. *See Restatement (Second) of Torts* § 914(2) (1979), cited in *Brochner v. W. Ins. Co.*, 724 P.2d 1293 (Colo. 1986). *See also Stevens v. Moore & Co. Realtor*, 874 P.2d 495 (Colo.App. 1994); *Swartz v. Bianco Family Trust*, 874 P.2d 430 (Colo.App. 1993) (first three claims for relief asserted in a complaint could be characterized as a "separate litigation" for purposes of a fee award under the "wrong of another doctrine"); *Elijah v. Fender*, 674 P.2d 946 (Colo. 1984) (not necessary claimant prevail in earlier litigation to recover attorney fees).

45. *See* CRS §§ 6-1-113(2)(b) and 38-33.3-123. CRS § 13-20-806(3) contains $250,000 limit on the aggregate amount of treble damages and attorney fees awarded under Colorado's Consumer Protection Act (CCPA) does not, on its face, apply to taxable costs.

46. *See* CRS § 13-20-802.5(2) ("actual damages" means "*with respect to residential property*, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law." (emphasis added)). Claimants may argue that the limiting language applies only to "other direct economic costs related to loss of use," or that precluding these additional recoveries as to non-residential property denies equal protection of law without a rational basis.

47. *See Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936, 941 (Colo. 1993), *citing* Derfner and Wolf, *Court Awarded Attorney Fees* ¶ 1.02 at 1-9 (1992). *See also Stuart v. North Shore Water & Sanitation District*, No. 08CA1298 (Colo.App. April 30, 2009) NYRFOP (where attorney fee award depends

on successful trial result, the issue is best addressed after the litigation because it is impractical to present issue to jury because litigation is ongoing, the result is unknown, and the extent of remaining services cannot be ascertained).

48. Many cases allow inquiry into the time records of counsel for both sides in attorney fee disputes *See, e.g., Stastny v. S. Bell Tel. & Tel. Co.*, 77 F.R.D. 662, 663 (W.D.N.C. 1978) ("[i]n a contest over what time was reasonably and necessarily spent in the preparation of a case, it is obvious that the time that the opposition found necessary to prepare its case would be probative."); *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, No. 90 C 6247, 1996 WL 66111, *3 (N.D.Ill. Feb. 13, 1996) (finding discovery of defendant's litigation expenses and attorney fees reasonably calculated to lead to admissible evidence regarding reasonableness of plaintiffs' requested attorney fees).

49. *See, e.g.*, CRS §§ 6-1-113 (2)(b) (one who violates CCPA's deceptive trade practices provisions liable for "costs of the action together with reasonable attorney fees *as determined by the court*." (emphasis added)) and 38-33.3-123 (in any action to enforce the provisions of Colorado's Common Interest Ownership Act (CCIOA), "[the] *court shall award* reasonable attorney fees" to prevailing party (emphasis added)). *Cf. BP Am. Prod. Co. v. Patterson*, 185 P.3d 811, 813 (Colo. 2008) (specific statute prevails over more general statute). One district court found that under CDARA a defendant's contractual indemnity attorney fee claim must be proven during trial and not afterward. *See Chamberlin Heights Owners Ass'n, Inc. v. Steel Street Assocs.*, LLC, No. 07CV4890 (Denver Dist. Ct. March 13, 2009). This ruling is consistent with pre-CDARA law regarding contractual indemnity attorney fee damage claims.

50. *See* House testimony on H.B. 1161, *supra* note 16.

51. CRS § 13-20-802.

52. *See McAlonan v. U.S. Home Corp.*, 724 P.2d 78, 79-80 (Colo.App. 1986) (upholding jury instruction to measure damages as cost of repair plus any diminution in market value as repaired). The property's loss of use as collateral also would precede any repairs.

53. Although CRS § 13-20-802.5(2) refers only to personal injury, the statute cross-references CRS § 13-20-806(4), which refers to both personal and bodily injury. *Cf. Serna v. Kingston Enters.*, 72 P.3d 376 (Colo. App. 2002) (physical and mental injury are both personal injury under Workers' Compensation Act).

54. Pre-CDARA cases characterized such damages as personal injury damages. *See Miller v. Carnation*, 564 P.2d 127 (Colo.App. 1977); *Calvaresi v. Nat'l Dev. Co., Inc.*, 772 P.2d 640 (Colo.App. 1988) (following *Slovek, supra* note 6); *Antolovich, supra* note 9. These cases all permit prejudgment interest on such damages under the personal injury prejudgment interest statute, CRS § 13-21-101. The common law definition of "personal injury" should control because these definitions were well-settled before CDARA. For more discussion, *see* Benson, *supra* note 33 at § 14.2.2.b ("The Construction Defect Action Reform Act of 2003—Limitations on Damages").

55. *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1076 (Colo. 1992).

56. CRS § 13-20-806(4)(a). CDARA contains both a fixed cap ($250,000 on personal injury awards, per CRS §§ 13-20-802.5(2) and -806(4)), and a floating, unfixed cap (for non-personal injury awards, per CRS § 13-20-802.5(2)).

57. *Compare Hildebrand v. New Vista Homes II, LLC*, No. 06CV0652 (Arapahoe County Dist. Ct. Jan. 9, 2009) (permitting such damages), *with Brewer v. Gordon*, No. 2007CV215 (Garfield County Dist. Ct., March 6, 2009) (precluding such damages), *and Brown v. Gilliam*, No. 7CV87 (Delta County Dist. Ct., Feb. 5, 2009) (same, without discussion). *Cf. Chamberlin Heights Owners Ass'n, supra* note 49 (court would allow acoustical defect loss of use economic damage claims, but not noneconomic loss of use damage claims under negligence theory; ruling's limitations would not extend to other types of claims, such as misrepresentation).

58. *See Hill v. Boatright*, 890 P.2d 180 (Colo.App. 1994), *aff'd in part, rev'd in part*, 919 P.2d 221 (Colo. 1996) (damages for emotional distress generally are not recoverable by legal entities, such as corporations or trusts).

59. *Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo.App. 2003) (homeowner associations have standing to assert claims on behalf of two or more unit owners), *aff'd, A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862 (Colo. 2005); CRS § 38-33.3-302(1)(d).

60. For how any such recovery should be distributed *see* Benson, *supra* note 33 at § 14.10.3.d ("The Homeowner Association's Exclusive Right to Payments for Common Element Property Damage").

61. *See* CRS § 13-20-802.5(2).

62. CRS § 13-20-806(1) and (2).

63. CDARA provides, "A construction professional otherwise liable shall not be liable for more than actual damages, unless and only if the claimant otherwise prevails on the claim that a violation of the 'Colorado Consumer Protection Act', article 1 of title 6, C.R.S. has occurred. . . ." CRS § 13-20-806(1).

64. CRS § 13-20-806(3). Thus, the $250,000 limitation does not expressly include costs awarded under the CCPA. Whether "costs" as used in the CCPA is limited to taxable costs under CRS §§ 13-16-104 and -122 is an undecided question.

65. CCIOA allows fees to prevailing parties. *See* CRS § 38-33.3-123(1).

66. CRS § 13-20-806(5).

67. CRS § 13-21-102.

68. *See St. Andrews at Plum Creek Condo. Ass'n v. D.R. Horton, Inc.*, No. 04CV1638 (Douglas County Dist. Ct. Jan. 22, 2007) (because not included in CDARA's definition of "actual damages," exemplary damages not recoverable); *Chamberlin Heights Owners Ass'n, supra* note 49 (March 13, 2009, Order) (*accord*).

69. *See* CRS §§ 13-21-102 ("the jury, *in addition to the actual damages* sustained by such party, may award him reasonable exemplary damages" (emphasis added)), 13-21-203(3)(a) ("the trier of fact, *in addition to the actual damages*, may award reasonable exemplary damages" (emphasis added)), and 40-7-102 ("the court, *in addition to the actual damages*, may award exemplary damages" (emphasis added)).

70. *See Ark Valley Alfalfa Mills v. Day*, 263 P.2d 815 (Colo. 1953).

71. Lowering insurance premiums and making insurance more available were the primary justifications for amending CDARA in 2003. *See* Sandgrund *et al.*, "The Construction Defect Action Reform Act," 30 *The Colorado Lawyer* 121 (Oct. 2001). Exemplary damage awards have no significant effect on insurance costs because exemplary damages are uninsurable in Colorado. *See Lira v. Shelter Ins. Co.*, 913 P.2d 514 (Colo. 1996).

72. Other constitutional concerns have been raised regarding CDARA's various damages limitations but have not yet been addressed by Colorado's appellate courts. *See generally* Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *The Colorado Lawyer* 89 (July 2003).

73. Tex. Prop. Code Ann. §§ 27.001 *et seq.*

74. *Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 370 (Tex.App. 2001). ■