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

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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 discusses who bears the burden to prove 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, which will be published in the June issue of *The Colorado Lawyer*, will discuss the evidence admissible to prove actual damages under CDARA, recovery of prejudgment interest, attorney fees and costs, and whether CDARA prohibits punitive damages in construction defect actions.

Definition of "Actual Damages"

CDARA governs claims against construction professionals arising from construction defects.[3] In most cases, CDARA limits damages available in such actions to actual damages.[4]

"Actual damages" means:

> the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less, together with relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law. "Actual damages" as to personal injury means those damages recoverable by law, except as limited by the provisions of section 13-20-806(4).[5]

This definition applies to both residential and commercial construction defect claims.[6]

The Burden of Proving CDARA's Actual Damages Limits

CDARA does not expressly state whether its "actual damages" definition is meant to serve as: (1) a monetary cap on damages (limiting the dollar amount); (2) a quantitative damages measure (a means of measuring damages); (3) a qualitative or generic description of the kinds of recoverable damages; or (4) a mixture of these things.

Construction professionals argue that the "whichever is less" provision restricts recoverable damages so that the claimant bears the burden of proving: (1) the market value of the property without the construction defect; (2) the replacement cost of the property; and (3) the reasonable cost to repair the defect, to establish the lowest measure. Claimants conversely argue that this provision merely caps the dollar amount of certain recoverable damages, and the defendant bears the burden to prove this affirmative defense. Thus, claimants argue they need to prove only the common law damages measure, typically the repair cost.[7]

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The correct interpretation affects the timing and types of expert witness endorsements, and may be needed to avoid summary judgment or a directed verdict as to part or all of a claimant's recoverable damages. The discussion below examines the various arguments supporting each position and how Colorado's district courts have responded to these arguments to date.

Arguments That Claimants Bear the Burden of Proof

Construction professionals argue that claimants bear the burden of proving all three prongs of the "whichever is less" provision. In support of this argument, construction professionals rely on several alternative grounds.

➢ **Claimant bears the burden of proving the fact and amount of damages.** Under well-settled law, claimants have the burden of proving the fact and amount of their claimed damages. For example, in *Westminster v. Centric-Jones Constructors*,[8] the Colorado Court of Appeals explained that to recover breach of contract damages, a "plaintiff must . . . provide the fact finder with a reasonable basis for calculating actual damages in accordance with the relevant measure." Construction professionals argue that, because CDARA limits damages to the lowest alternative, claimants must prove the three alternatives set forth in the actual damages definition to prove which is least. Thus, if a claimant fails to present evidence to determine the three alternatives, the claimant fails to meet its burden of proof and no damages may be recovered under CDARA.

➢ **CDARA does not identify the actual damages provision as an affirmative defense.** Nowhere in CDARA did the general assembly characterize the actual damages limits as an affirmative defense. In contrast, the general assembly has specifically identified other statutory provisions as affirmative defenses to be pled and proven by defendants.[9] Accordingly, the general assembly's failure to identify CDARA's actual damages limits as an affirmative defense renders the Act unambiguous,[10] general burden of proof rules control, and claimants bear the burden to prove which of the three alternate limits applies.

➢ **Other statutory damage caps are not affirmative defenses.** Some courts have held that certain statutory damage caps are not affirmative defenses. For example, in *Leprino Foods Co. v. Industrial Claim Appeals Office*,[11] the Colorado Court of Appeals held that a statutorily fixed $60,000 benefits cap in a workers' compensation proceeding was not an affirmative defense that the employer/defendant had to plead. In some cases construing statutory exceptions to the application of certain kinds of damages caps, courts have held that where the claimant seeks to avoid application of a cap he or she has the burden to prove the cap does not apply.[12]

➢ **Construing actual damages as an affirmative defense would hinder trial efficiency.** Construction professionals argue that if claimants do not bear the burden of proof to show which of the three alternative damages limits applies, trial time will be extended because claimants will offer only evidence of the repair costs during the case-in-chief. Then, defendants will offer evidence of the lower fair market value or replacement costs, so that claimants will require additional trial time to respond to defendants' evidence in a rebuttal case. Conversely, if claimants bear the burden of proof, all of a claimant's evidence relevant to the issue will be presented during the claimant's case-in-chief, and the defendant will offer any counter evidence during its case, eliminating the need for a rebuttal case.

Arguments That Defendants Bear the Burden of Proof

Claimants argue that defendants bear the burden of proving any damages recovery limitation imposed by the "whichever is less" provision. In support of this argument, claimants rely on several alternate bases.

➢ **CDARA's three alternative damages limitations are caps, not measures.** Damages are the means by which the fact finder measures a legal injury.[13] Claimants argue that CDARA's reference to the "fair market value of the real property without the defect" does not measure a claimant's legal injury; rather, it measures the property's value absent any legal injury. In other words, this phrase merely describes a cap (or monetary limit) on a claimant's recoverable damages, as do the other two alternative actual damages limits—replacement and repair cost.

In *O'Donnell v. Roger Bullivant of Texas*,[14] the Texas Court of Appeals examined Texas's similar Residential Construction Liability Act (TRCLA). That court held that TRCLA contained both qualitative and quantitative damages limitations, where certain provisions limit the types of damages available, while other provisions, which the court labeled damage caps, limit the amount of damages.[15]

O'Donnell held the statutory language, "[t]he total damages awarded in a suit subject to this chapter may not exceed the claimant's purchase price for the residence" constituted a cap on the amount of damages.[16] Claimants argue that CDARA's "whichever is less" damages limitation similarly imposes caps that restrict the amount of damages available, but do not constitute the measure of those damages.

➢ **CDARA's legislative history shows that the actual damages definition merely codifies a variation on the common law economic waste doctrine, an affirmative defense.** During the legislative debates regarding adoption of CDARA's actual damages limits, sponsoring legislator Senator McElhany testified that these statutory provisions were intended to codify the common law principle that a damages award should avoid economic waste. He explained:

> [t]hat's why that provision is in the Bill, simply because of the matter of economic waste and the idea that it doesn't make sense to spend $400,000 dollars on a home that's only worth $300,000. . . .[17]

The common law economic waste doctrine holds that "[d]amages for defective construction are to be measured by the cost to place the defective structure in its intended condition, unless to do so would cause unreasonable economic waste."[18] In that event, damages "should be measured by the reduction in the structure's market value."[19]

The legislature provided in CDARA that the property's value in a nondefective condition limits the recoverable damages—a variation on the common law economic waste doctrine that limits recovery to the property's diminution in value due to the defect. Courts treat the economic waste doctrine as an affirmative defense, to be proven by the defendant.[20] One Virginia state court noted that most authorities "regard a contractor's attempt to limit damages to a difference in value because of a deficiency on his part as an affirmative defense," so the contractor must prove the limit applies because "the use of the 'value' rule to avoid unreasonable economic waste is really an application of the rule of minimiza-

tion/mitigation of damages."[21] Following this reasoning, claimants argue that, because Colorado deems mitigation of damages to be an affirmative defense,[22] it would treat similarly a defense founded on a variation of the economic waste doctrine.

Before CDARA's 2003 amendments, the economic waste doctrine applied more to commercial property, but, under *Board of County Commissioners v. Slovek*,[23] less so as to residential property. *Slovek* approved the recovery of repair costs that doubled the value of residential property due to the unique, "personal" characteristics of a home. Although construction professionals may argue that CDARA's actual damages cap reflects the general assembly's intent to limit *Slovek*'s holding, claimants will argue that CDARA did not overrule *Slovek* on the proper measure of damages for injury to real property. Rather, CDARA simply limits the amount of recovery as to some types of recoverable damages, and circumscribes the recovery of other kinds of common law consequential damages.[24]

➢ **CDARA does not preempt common law elements of a construction defect claim.** Construction professionals frequently argue that CDARA was intended to provide the statutory framework within which to litigate construction defect claims, thereby supplanting preexisting common law.[25] Claimants, conversely, argue that CDARA does not change the substantive elements of construction defect claims, but merely caps aspects of some recoverable damages.

The Colorado Court of Appeals in *Donna Land-Wells v. Rain Way Sprinkler and Landscape, LLC*,[26] held that CDARA does not change the substantive elements of a negligence claim arising from a construction defect, so that an injured party must neither plead nor prove compliance with CDARA's notice of claim process or that the damages arose from a construction defect. This holding supports the argument that a claimant need not prove anything more post-CDARA than pre-CDARA and, thus, the "whichever is less" CDARA actual damages limitation is not an element of proof, but a limitation on one aspect of a claimant's damages recovery that construction professionals must raise and prove.

Similarly, Texas courts have held that TRCLA only preempts manifestly inconsistent common law.[27] These Texas cases reasoned that TRCLA itself does not provide a complete structure for or elements of liability.[28] Therefore, "[t]he statute does not create a cause of action, but instead simply limits and controls causes of action that otherwise exist."[29] Thus, the preexisting common law remains, except to the extent it conflicts with TRCLA.

➢ **Historically, damages limitations constitute affirmative defenses.** Colorado generally requires defendants to prove limitations on or reductions in recoverable damages. Once a claimant provides *prima facie* proof of recoverable damages, the defendant must justify a reduction in damages or rebut the claimant's evidence of recoverable damages.[30] For example, defendants must prove failure to mitigate or comparative negligence defenses.[31] C.R.C.P. 8(c) requires that "[a]ny mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded" by a party in its answer to the complaint.

Damage caps sometimes consist of statutory monetary limits, which can be applied without extrinsic evidence. Courts hold that

defendants need not plead and prove such fixed caps. Construction professionals cite cases involving these types of caps in arguing CDARA is not an affirmative defense.[32] Claimants distinguish these cases by arguing that CDARA's "whichever is less" provision involves caps that require extrinsic proof of their amount and applicability. The First, Fourth, Fifth, and Tenth federal appeals courts all have held that defendants must plead and prove that these kinds of damages caps apply.[33] Thus, claimants argue, defendants bear the burden to prove that CDARA applies to limit otherwise recoverable damages.

➢ **There is a need to expressly denominate certain affirmative defenses.** The general assembly has denominated certain statutory provisions as affirmative defenses. However, these provisions typically are part of regulatory schemes involving public policy laws concerning matters such as abortion, child pornography, prostitution, and debt collection.[34] However, liability and damages limitations contained in other statutes constitute affirmative defenses, even though the legislature did not so identify them.[35]

➢ **Construing the actual damages provision as an affirmative defense promotes trial efficiency.** Claimants counter the argument that trial time will be wasted if claimants do not bear the burden to prove each component of CDARA's actual damage limitations by arguing the opposite approach will instead increase judicial efficiency and reduce litigation costs. Applying CDARA's damage caps requires evidence regarding "whichever is less" of the property's nondefective market value, replacement cost, or reasonable cost to repair.[36] If no one contends that the repair cost exceeds the property's replacement cost or its value in a nondefective condition, no practical reason exists to present evidence of these amounts. As one Colorado district court noted:

> [i]t would appear to be a terrible waste of resources . . . for the plaintiff, in every construction case, to go forward with potentially tedious and even uncontested evidence of all three levels of damage—particularly in the great majority of cases where the *lesser* level of damages is not in dispute.[37]

Similarly, where the parties dispute whether the repair cost is lowest, claimants argue that no extra "net" trial time is consumed whether the issue is presented during a claimant's case in chief or in the rebuttal case.

➢ **Colorado's district courts have taken varying approaches applying CDARA's "whichever is less" provision.** Colorado's appellate courts have not yet determined which party bears the burden of proving application of CDARA's actual damages limitations. However, there are at least eight Colorado district court rulings on the issue. Two of these courts placed the burden to prove the amount of damages on the claimant, although both decisions used significant qualifying language in doing so.[38]

One court held that CDARA's damage limitation is an affirmative defense, which construction professionals bear the burden to prove.[39] Two courts held that CDARA's "whichever is less" provision constitutes the measure of the claimant's damages, and that each party may present evidence on any or all of the measures. Then, the fact finder must determine the amount of each damages measure before applying "whichever is less" of the proven measures in awarding damages.[40] One of these two courts reasoned that the legislature did not intend the "absurd result" of claimants recovering nothing, "even if they produced evidence of the cost to repair," but no evidence of the alternate damages measures.[41]

Finally, three of these courts held that CDARA does not require a claimant to prove more than the substantive elements of the claim, and that defendants may raise CDARA's actual damages provision as a defense, although not necessarily an affirmative defense that must be pled or waived.[42] These three rulings held that claimants need not present evidence of all three components of the actual damages limit.[43] Rather, if the defendant elects to present evidence that one of the alternate limits applies to reduce the claimant's recoverable damages, it may do so in its own case.[44]

These last six rulings arguably save time and money in developing expert testimony before and during trial regarding all three actual damages values in cases where defendants do not dispute which value is the least. As discussed above, *Donna Land-Wells v. Rain Way Sprinkler & Landscape*[45] also supports the position that claimants need not prove anything more post-CDARA than pre-CDARA.

Practice Pointer—Burden of Proof

Until the Colorado Supreme Court decides this issue, the careful practitioner should consider seeking a court ruling on the burden of proof question soon after filing suit, to determine the need to timely develop, disclose, and present expert testimony or similar evidence on the three alternative values. In addition, claimants should seek discovery or admissions directed at these values, including information relating to the original development and construction costs and property sales pricing.

Practice Pointer—Does the Jury or Judge Decide?

No court has decided whether the court or jury applies CDARA's "whichever is less" damages limitation. Nothing in CDARA prevents this factual determination from being made by the jury under proper instruction, like any other factual dispute.[46] Of course, where the facts are undisputed, the issue may become a question of law for the court.[47]

Claimants often seek to bar evidence that the defectively constructed property at issue has appreciated in value as irrelevant to determining damages in a construction defect case.[48] However, CDARA may make evidence of the property's market value without defects relevant.

Because a jury may accept none, some, or any portion of the parties' experts' valuation, replacement cost, and repair cost testimony, courts rarely will be able to determine as a matter of law whether the repair cost exceeds the replacement cost or the property's fair market value without the alleged construction defect. Defendants may argue the claimant has endorsed repair, replacement, and/or valuation experts whose opinions, when measured against one another and if offered at trial, might establish the lowest measure.

Claimants could counter in one of the following ways: (1) they may not present certain evidence at trial, and the defense's valuation or replacement cost evidence may be rejected, discredited, or discounted by the jury; or (2) if claimant presents valuation or replacement cost evidence and the defense presents contrary evidence, the jury must resolve these factual disputes. In addition to such expert testimony, nonexpert testimony, and other evidence regarding repair and replacement cost and valuation, including the owner's own testimony regarding the property's value without the defect, could be presented.[49] Thus, courts may be reluctant to decide as a matter of law which of the property's repair cost, fair market value without the defect, or replacement cost is least.

Even when the repair cost indisputably exceeds the property valuation or replacement cost, the scope and cost of repair may remain relevant to proof of other issues. These issues could include establishing misrepresentation liability; the materiality of a builder/vendor's failure to disclose the existence of defects and the cost to remedy those defects; and the evaluation of various affirmative defenses, such as failure to mitigate.

Consumer Protection Act Claims

CDARA expressly permits claimants to recover more than actual damages in cases where a claimant prevails on a Colorado Consumer Protection Act (CCPA) claim and (1) the value of the construction professional's pre-suit statutory settlement or repair offer[50] was less than 85 percent of the actual damages awarded; (2) the construction professional failed to respond to the claimant's pre-suit notice of claim; or (3) the construction professional failed to substantially comply with the terms of an accepted statutory settlement offer made during the notice of claim process.[51] Thus, where CCPA claims are presented at trial, if the claimant rejected a pretrial settlement or repair offer and then fails to recover at least 85 percent of the value of the offer at trial, the claimant cannot recover additional damages. Part II of this article will discuss whether this CDARA provision regarding recovering more than actual damages applies to non-CCPA claims, as well.

CDARA and the CCPA do not address who has the burden to prove the value of a pretrial repair offer nor whether this is a question for the judge or the jury. Thus, both parties should be prepared to offer testimony regarding the offer's value until this issue is resolved by our appellate courts. This evidence may take the form of expert testimony and may require additional pretrial disclosures. In addition, the court must determine the appropriate time for submitting this evidence, as discussed more fully below.

Practice Pointer—Admissibility of Pre-Suit Settlement Offers

Under CDARA, the parties may not disclose to the jury the existence of any unaccepted settlement offers made under CDARA's notice of claim process.[52] However, CDARA does not explain how a jury can determine whether the reasonable cost of the statutory repair offer is less than 85 percent of the actual damages sustained, or how the jury can determine if a construction professional failed to substantially comply with a settlement offer, if the jury is unaware of the offer.[53]

Although carefully crafted jury instructions, interrogatories, or special verdict forms may resolve some of these issues, the factual questions and evidence inherent in such determinations make it possible that a jury will become aware of CDARA notice of claim communications despite the § 13-20-806(6) disclosure prohibition.[54] In such a case, the parties may need to stipulate that the court rather than the jury decide this question, or the court may need to bifurcate the question for later resolution, perhaps to be decided by the same jury after it returns its initial verdict,[55] assuming the issue is a jury question.

Conclusion

As Part I of this article has shown, CDARA's actual damages definition raises many unanswered questions regarding burden of proof, preemption, evidence admissibility and jury trial rights. Part II will show how the careful practitioner should consider and prepare for these uncertainties at every step of a legal proceeding.

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. CRS § 13-20-802.5 covers most actions involving claims against a "construction professional," which is broadly defined in CRS § 13-20-806(4).

4. CRS §§ 13-20-803.5(12) and -806.

5. CRS § 13-20-802.5(2).

6. *See* CRS § 13-20-806(4).

7. The presumed common law measure of tort damages for injury to residential property is the cost to repair the defects and resulting property damage. *Bd. of County Comm'rs v. Slovek*, 723 P.2d 1309, 1316 (Colo. 1986). The usual common law measure of contract damages for injury to nonresidential property is the cost to put the defective structure in its warranted condition, unless to do so would cause unreasonable economic waste, in which case the damages measure is the difference in market value between the structure contracted for and the imperfect structure received. *See Sanford v. Kobey Bros. Constr. Corp.*, 689 P.2d 724 (Colo.App. 1984); *Summit Constr. Co. v. Yeager Garden Acres Inc.*, 470 P.2d 870 (Colo.App. 1970).

8. *Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 477 (Colo. App. 2003). *See also, e.g., Husband v. Colo. Mtn. Cellars, Inc.*, 867 P.2d 57 (Colo. 1993) (*accord*); *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (to recover on breach of contract claim, claimant must prove elements of claim, including fact and amount of damages); *Schon-Klingstein Meat & Grocery Co. v. Snow*, 96 P. 182, 182 (Colo. 1908) ("the burden of proof is upon him who seeks to recover to show that he has been damaged and the amount of such damages. . . .").

9. *See, e.g.*, CRS §§ 12-6-119.5, 12-6-522(1)(c)(III), 12-14-105, 12-14-109, 12-14-113, 12-25.5-111, 12-37.5-106, 13-21-1002, and 14-6-101.

10. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("in interpreting a statute . . . [c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *Moody v. Corsentino*, 843 P.2d 1355, 1370 (Colo. 1993) (courts must give effect to general assembly's intent by looking to statute's plain language).

11. *Leprino Foods Co. v. Industrial Claims Appeals Office*, 134 P.3d 475 (Colo.App. 2005). *See also, e.g., Wagner v. SFX Motor Sports, Inc.*, 522 F.Supp.2d 1330 (D.Kan. 2007) (fixed $250,000 statutory damages cap not an affirmative defense); *Clark County Sch. Dist. v. Richardson Constr., Inc.*, 168 P.3d 87 (Nev. 2007) (fixed, statutory $50,000 governmental immunity damages cap not affirmative defense); *Snyder v. Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989) (fixed $200,000 statutory punitive damages cap not affirmative defense); *Seminole Pipeline v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 759 (Tex.App. 1998) (statutory punitive damages cap that automatically applied not affirmative defense; "[b]ecause the defendants had nothing to prove, they had nothing to plead").

12. *See, e.g., Wallbank v. Rothenberg*, 140 P.3d 177 (Colo.App. 2006) (plaintiffs in medical malpractice action had burden to prove they qualified for "good cause" exception to damages cap).

13. Actual damages are an "amount awarded to a complainant to compensate for a proven injury or loss." *Black's Law Dictionary* (8th ed., 2004).

14. *O'Donnell v. Roger Bullivant of Texas*, 940 S.W.2d 411 (Tex.App. 1997), *overruled in part on other grounds, Perry Homes v. Alwattari*, 33 S.W.3d 376 (Tex.App. 2000).

15. *Id.* at 421.

16. *Id.*

17. *See* Senate testimony on House Bill (H.B.) 1161 at 12:13-19 (April 16, 2003) (copy of transcript available from authors).

18. *Gold Rush Inv., Inc. v. G.E. Johnson Constr. Co.*, 807 P.2d 1169, 1174 (Colo.App. 1990).

19. *Id.*

20. *See, e.g., Pennington v. Rhodes*, 929 S.W.2d 169, 175 (Ark.App. 1996) ("once [plaintiff] presented sufficient proof to go to the jury on the cost-of-repairs measure, the burden shifted to [defendant] to produce evidence showing (a) either that repairing the defects was unreasonable . . . or (b) that the repair costs would have been disproportionate to the probable increase in value"). *See also Andrulis v. Levin Constr. Corp.*, 628 A.2d 197, 208 (Md. 1993); *Carter v. Quick*, 563 S.W.2d 461, 465 (Ark. 1978); *Stangl v. Todd*, 554 P.2d 1316, 1320 (Utah 1976); *Erney v. Freeman*, 84 S.W.3d 529, 536 (Mo.App. 2002); *Ken Cucchi Constr., Inc. v. O'Keefe*, 973 S.W.2d 520, 527 (Mo.App. 1998); *Willie's Constr. Co. v. Baker*, 596 N.E.2d 958, 962 (Ind.App. 1992); *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 603 P.2d 513, 525 (Ariz.App. 1979); *Shell v. Schmidt*, 330 P.2d 817, 827 (Cal.App. 1958).

21. *Marple v. Kerns*, Chancery No. 5814, 1984 WL 276232 (Va.Cir.Ct. Feb. 28, 1984) (citations and footnote omitted).

22. *See, e.g.*, C.R.C.P. 8(c) (mitigating circumstances must be affirmatively pled); C.J.I. Civ-4th 5:2, Notes on Use (4th ed., 2008) ("instruction should not be given unless the party asserting the duty to mitigate has properly pleaded the duty"; "[s]ince mitigation is an affirmative defense, the burden of proof on the issue is on the party who asserts it").

23. *Slovek, supra* note 7 at 1316.

24. At least one Colorado district court has made this finding. *See Sundown Villas Townhomes Homeowners Ass'n v. RBJ Enters., LLC*, No. 05CV935 at *1 (El Paso County Dist. Ct., Jan. 14, 2008) (section 802.5(2) is "a codification of the well established common law principle" that a damages award "should avoid economic waste"). Copies of all cited unpublished district court cases can be obtained from the authors.

25. *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). Construction professionals raising a CDARA preemption argument risk the loss of various common law and other defenses, such as comparative negligence and nonparty liability. *See Vigil Hill v. Franklin*, 103 P.3d 322, 325-31 (Colo. 2004) (CRS § 13-21-115, Landowner Liability Act (LLA), intended to establish comprehensive landowner duties, and eliminated common law affirmative defenses to such duties); *Martin v. Union Pac. R.R. Co.*, 186 P.3d 61 (Colo.App. 2007) (LLA also preempts comparative negligence and nonparty liability defenses), *cert. granted*, No. 07SC913, 2008 WL 2580564 (Colo. June 30, 2008); *Lombard v. Colo. Adult Outdoor Educ. Ctr., Inc.*, 187 P.3d 565 (Colo. 2008) (negligence *per se* claims abrogated by LLA). *But see DeWitt v. Tara Woods, LP*, No. 06CA2006, 2008 WL 4592122 (Colo.App. Oct. 16, 2008) (NYRFOP) (LLA does not preempt comparative negligence defense).

26. *Donna Land-Wells v. Rain Way Sprinkler and Landscape, LLC*, 187 P.3d 1152 (Colo.App. 2008).

27. *See Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 370 (Tex.App. 2001) (*Sanders I*); *Sanders v. Constr. Equity, Inc.*, 45 S.W.3d 802, 804

(Tex.App. 2001) (*Sanders II*) (statutory language does not express an intent to bar all claims, but only to the extent that an element of the claim conflicts with the Texas Residential Construction Liability Act (TRCLA)); *Kinney v. Palmer*, No. 04-07-00091-CV, 2008 WL 2515696 at *4 (Tex.App. 2008) (TRCLA does not create a cause of action, but only preempts a cause of action if a conflict arises with TRCLA); *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121 (Tex.App. 1997) (common law fraud claim neither conflicts with, nor is preempted by, TRCLA).

28. *Sanders I, supra* note 27 at 370.

29. *Id.*

30. *See, e.g., Gen. Ins. Co. of Am. v. City of Colo. Springs*, 638 P.2d 752, 759 (Colo. 1981) (where plaintiff establishes damages, defendant has burden of proving damages reduction); *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 298 P.2d 950, 955 (Colo. 1956) (after plaintiff's *prima facie* damages, burden shifted to defendants to overcome such evidence).

31. *See, e.g., City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472 (Colo.App. 2003) (defendant has burden of showing damages limitation of failure to mitigate); *Valdez v. Pringle*, 143 P.3d 1069 (Colo.App. 2005) (defendant has burden of proving damages should be reduced because of comparative negligence).

32. *See, e.g., Leprino Foods, supra* note 11 at 481 ($60,000 cap); *Wagner, supra* note 11 at 1345 ($250,000 cap); *Ortega-Guerin v. City of Phoenix*, No. CV 04-0289, 2006 WL 2403511 (D.Ariz. 2006) ($300,000 cap); *Oliver v. Cole Gift Ctrs., Inc.*, 85 F.Supp.2d 109 (D.Conn. 2000) ($300,000 cap); *Snyder, supra* note 11 ($200,000 cap); *Clark County School Dist., supra* note 11 ($50,000 cap).

33. *See, e.g., Craddock Int'l Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1105 (5th Cir. 1997) (damages cap); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Co.*, 15 F.3d 1222, 1226 (1st Cir. 1994) (contractual liability limitation); *Bentley v. Cleveland County Bd. of County Comm'rs*, 41 F.3d 600 (10th Cir. 1994) (tort limitation); *Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst.*, 846 F.Supp. 439, 440 (D.Md. 1993) (tort limitation), *aff'd* 66 F.3d 669 (4th Cir. 1995).

34. *See, e.g.*, CRS §§ 12-25.5-111 (escort service), 12-37.5-106 (abortion), 13-21-1002 (child pornography), 12-14-105, -106, -113 (fair debt collection), and 14-6-101 (child support).

35. *See, e.g.*, (1) comparative negligence or fault [CRS §§ 13-21-111, to -111.5(1)]; (2) comparative fault (product liability action) [CRS § 13-21-406]; (3) nonparty fault [CRS § 13-21-111.5(3)(a) and (b)]; (4) product misuse [CRS § 13-21-402.5]; (5) product manufacture "state of the art" [CRS § 13-21-403]; (6) statutes of limitations [*e.g.*, CRS §§ 13-80-101 to -109], (7) statutes of repose [*e.g.*, CRS § 13-80-104(1)(a)]; (8) assumption of the risk [CRS §§ 13-21-111.7 to -111.8]; (9) avoidance of settlements and releases [CRS § 13-21-301]; (10) limitations (caps) on noneconomic injury recovery [CRS § 13-21-102.5]; (11) reduction of damages due to payment from certain collateral sources [CRS § 13-21-111.6]; (12) statutes of frauds [CRS §§ 4-2-201 (sale of goods exceeding $500), 4-2.5-201 (leases exceeding $1,000), 13-80-113 (assumption of debt), and 13-10-108 (conveyance of land)]; (13) "Good Samaritan" damages immunity [CRS §§ 13-21-108 (generally), -108.1 (use of defibrillator), -108.2 (sports injury treatment), -108.3 (architects), -108.5 (hazardous waste clean-up), -113 (donated food), -114 (mine rescue participants), -115.5 (volunteer services), -115.6 (school crossing guards), -115.7 (nonprofit directors and officers), -115.8 (youth organizations), -117 (mental health providers failure to warn third-parties of dangers), -117.5 (developmental disability service providers), -117.7 (foster care providers)]; and (14) waiver or disclaimer of warranties [CRS §§ 4-2-316 (excluding warranties on goods) and 4-2.5-214 (excluding warranties on leases)].

36. CRS § 13-20-802.5(2).

37. *Sundown Villas Townhomes Homeowners Ass'n, supra* note 24 at *1.

38. *Central Park Townhomes Condo. Ass'n, Inc. v. Central Park Townhomes, L.L.C.*, No. 2006CV4013 (Arapahoe County Dist. Ct. Oct. 16, 2007) (plaintiff must establish "the smallest of three possible damage calculations"; but after plaintiff has established damages, defendant may present evidence to reduce them, so "CDARA . . . only limits the methodology of determining the actual damages in a construction defect case. The traditional burdens of proof remain unchanged"; and juries determine actual damages); *Blair v. Oakwood Building and Dev. Co.*, No. 2006CV290 (Fremont County Dist. Ct. Nov. 26, 2008) (refusing to treat "whichever is less" provision as an affirmative defense, and holding plaintiff has burden to prove actual damages, but that if defendant disagrees, defendant must prove its theory of the statutory actual damages as an affirmative defense).

39. *Brewer v. Gordon*, No. 2007CV215 (Garfield County Dist. Ct. Feb. 24, 2009).

40. *Hildebrand v. New Vista Homes II, LLC*, No. 2006CV6052 (Arapahoe County Dist. Ct. Nov. 12, 2008) (jury instruction no. 33; Special Verdict Form E); *Chiappinelli v. Klomhaus & Watkins, Inc.*, No. 97CV159 (Garfield County Dist. Ct. Jan. 5, 2009).

41. *Chiappinelli, supra* note 40.

42. *Sundown Villas Townhomes Homeowners Ass'n, supra* note 24; *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); *West End Lofts Condo. Owners Ass'n v. West End Lofts, LLC*, No. 06CV12520 (Denver County Dist. Ct. June 19, 2008).

43. *Id.*

44. *Id.*

45. *Donna Land-Wells, supra* note 26.

46. *See generally* C.R.C.P. 38(a), providing that in "actions for the recovery of . . . money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, all issues of fact shall be tried by a jury."

47. *See generally Buchanan v. Brandt*, 450 P.2d 324, 326 (Colo. 1969) (where facts are undisputed and reasonable minds could draw only one inference, question of party's negligence may become issue of law).

48. *See Heritage Vill. Owners Ass'n, Inc. v. Golden Heritage Investors, Inc.*, 89 P.3d 513 (Colo.App. 2004) ("increase in market values was arbitrary and attributable to the overall 'astounding growth' in the local real estate market.").

49. *See Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.*, 117 P.3d 60 (Colo.App. 2004) (owner may testify to his or her home's value without being qualified as an expert witness under certain circumstances).

50. *See* CRS § 13-20-803.5.

51. CRS § 13-20-806(1) and (2). It is unclear whether CDARA's actual damages limitation in personal injury (including bodily injury) cases is vitiated by proof of a Colorado Consumer Protection Act (CCPA) violation alone, because CDARA's notice of claim process is designed to address only the repair of defects, not the treatment of personal injury victims.

52. CRS § 13-20-806(6).

53. *Cf. Perry Homes, supra* note 14 (because jury found contractor's settlement offer was unreasonable, TRCLA's damages limits inapplicable).

54. Other issues, however, may render such evidence admissible, such as matters relating to application of statute of limitations (and related tolling questions) and failure to mitigate defenses.

55. In addition, many courts hold that it generally is not proper to inform a jury of the potential trebling of its damages award pursuant to statute. *See, e.g., Heritage Vill. Owners Ass'n, Inc., supra* note 48 (CCPA trebling); *Vista Resorts, Inc., supra* note 49 (*accord*); *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972) (anti-trust statute trebling). ■