Mitigating Potential Condo Conversion and Renovation Construction Defect Liabilities

Part 1

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Part 1 of this article discusses potential liabilities that construction professionals may face when undertaking condominium renovations and conversions.

Following the 2007–09 Great Recession, many developers constructed rental apartment units in lieu of for-sale condominiums (condos) and townhomes.[1] As the home ownership market has improved, converting and selling these apartments as condo units has become an attractive investment, but may create potential new construction defect liabilities for developers, builders, and other construction professionals. Many states have adopted statutes addressing a converting developer's (the converter's) disclosure obligations arising from the conversion process.[2] About one-third of all states have adopted statutory warranties for new condo construction (Colorado has not[3]), but these statutory warranties are typically narrowly targeted at new construction and rarely expressly extend to condo conversions.[4]

Part 1 of this article examines these potential liabilities. Part 2 will consider ways construction professionals may mitigate their risks, including related statute of limitations/repose and liability insurance issues. While this article focuses on apartment to condo conversions, it also discusses potential liabilities arising from renovations and converting industrial space into residences. This article does not discuss the related topic of legal prerequisites for creating a common interest community.

Condo Conversion Types

Condo conversions are typically characterized as one of the following types, depending on the circumstances leading to the conversion:

- **direct**, where a developer builds apartments and then decides to convert them to condos at a later date, after leasing the units.
- **successor**, where a developer builds apartments and later sells them to another developer who converts them to condos.
- **distressed property**, where a developer buys a distressed, bank-owned apartment building and then converts it to condos.
- **legacy**, where a developer buys a many-years-old industrial or other structure and then converts it to condos.[5]

Nature and Extent of Renovations

Condo conversions may involve four types of renovations, which are characterized by the nature and extent of the construction work and may give rise to different contract and tort liabilities. The converter may renovate individual units, common elements, or both. The renovation types are:

- no renovations;
- minor renovations, which include updating finishes, adding new appliances, repainting, and similar work, but do not include significant structural or systems changes or repairs;
- major renovations, which include significant structural or systems changes or repairs; and
- like-new rehabilitations, which involve wholesale reconstruction, such as converting industrial space to residential lofts.

In close cases, these designations may be disputed.

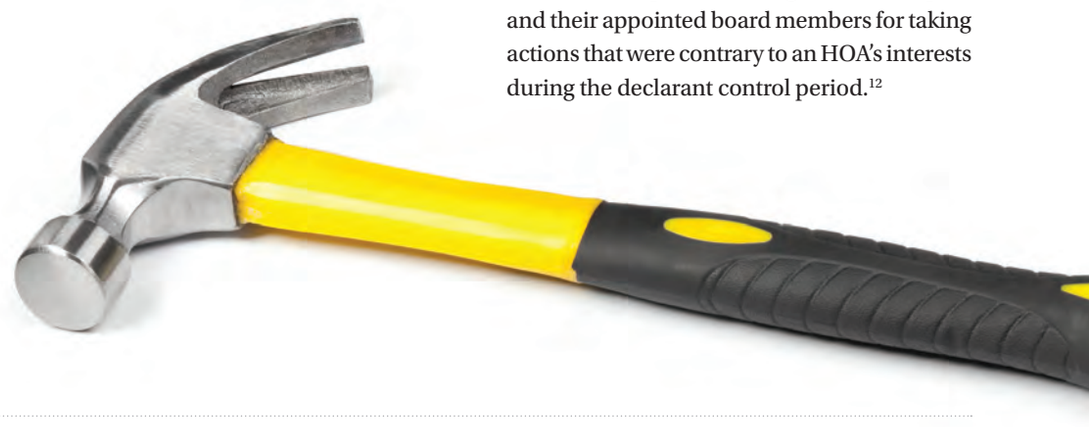
Liabilities Arising from Creating a Common Interest Community

A developer assumes certain responsibilities when it creates a common interest community. In Colorado, these responsibilities apparently apply whether the developer creates the common interest community during original construction or as part of a conversion. A 2002 *Colorado Lawyer* article catalogued developers' potential liabilities arising from creating a Colorado common interest community.[6] Since then, both Colorado and other states have scrutinized the conduct of declarant-developers and their appointed homeowner association (HOA) board members during the declarant control period to ensure that they have adequately reserved funds for reasonably anticipated maintenance and repair and dealt fairly with HOAs and unit owners regarding known construction defects.[7]

The Executive Board's Fiduciary Duties

In Colorado, declarant-appointed HOA board members "are required to exercise the care required of fiduciaries of the unit owners."[8] One commentator described the liabilities attached to this level of care: "To the extent that a declarant-developer fails to timely investigate, or fails to timely pursue viable claims against those responsible for the construction defects, liability may attach for its breach of fiduciary duty and negligence."[9]

In an unpublished case, *Countryside Community Association v. Pulte Home Corp.*, the Colorado Court of Appeals found that declarants may be liable for (1) declarant-appointed board members' tortious conduct, including breaches of fiduciary duty under respondeat superior; and (2) annual assessments and assessments for expenses on declarant-owned lots.[10] However, based on the language of the declaration at issue in that case, the Colorado Supreme Court reversed the holding that the declarant was liable for assessments on declarant-owned lots subject to future development rights because the lots at issue did not become part of the community until properly annexed, so no assessments were due before annexation.[11] Outside Colorado, several courts have upheld suits against developers and their appointed board members for taking actions that were contrary to an HOA's interests during the declarant control period.[12]



In addition to any physical changes that may precede conversion, creating a Colorado common interest community requires certain organizational and management changes. While the details of such changes are largely beyond the scope of this article, three significant changes typically occur: creation of an HOA and an executive board, installation of a property manager (often drawn from the declarant's staff or from an independent property management company), and turnover of HOA control from the declarant to the unit owners. As one commentator has noted, "In an effort to increase profitability, a condominium converter could be tempted to manage the project in a manner that is under budget or under reserve[d], which would constitute a breach of a director's fiduciary duty to act in good faith and without conflict of interest."[13] Courts have shown little reluctance to hold declarants and their appointed board members liable for breaching their fiduciary duties when controlling HOAs.[14]

Unit Marketing

As with any marketing effort, declarants marketing converted units must avoid making material misrepresentations, using deceptive trade practices, and failing to disclose material facts.

Misrepresentation and Nondisclosure

A converter marketing converted units faces issues that generally do not exist for newly constructed units. First, existing units have a history of use, complaints, repairs, maintenance, and exposure to environmental conditions. Thus, there may be a detailed record of potential defects and resulting damage that may need to be disclosed to prospective purchasers.[15] Second, a maintenance and repair record, combined with aging construction components, may require the converter to be more forthcoming regarding future anticipated annual maintenance, repair, and capital improvement costs, and therefore more accurate in establishing reasonable financial reserves and annual assessments and dues.[16] Third, if the conversion involves significant structural changes or upgrades, systems replacement (e.g., HVAC, plumbing, electrical, etc.), or reconfigurations and/or layered construction (e.g., turning commercial or industrial space into residential lofts as part of a legacy conversion), the disclosure and code-compliance obligations associated with new residential construction sales may arise. Fourth, legacy conversions, major renovations, and like-new rehabilitations may, in particular, give rise to responsibilities to identify and remediate safety hazards.[17]

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Finally, some commercial developers obtain a Property Condition Report based on the investigatory guidelines promulgated by the American Society for Testing and Materials in ASTM E-2018. These guidelines prescribe "good commercial and customary practice . . . for conducting a baseline property condition assessment." The prescribed due diligence inspection is nonintrusive; the level of due diligence may vary depending on the property type and age of improvements; and the guidelines permit inspectors to reasonably extrapolate their observations to similar areas.

Separately, because converted properties frequently have high insurance loss histories, securing adequate and affordable liability, errors and omissions, and directors and officers insurance may be challenging.[18] Commentators have noted that different expectations between apartment renters and homeowners,[19] and different experiences and competencies between commercial and residential builders, subcontractors, and design professionals, contribute to greater apartment conversion loss histories.[20] In particular, commercial and industrial space loft conversions require more specialized design and care expertise and experience than new residential construction and ordinary renovation.

Because converted condo units compete against new construction, marketing communications may tout them as "like new," "newly refurbished," "completely overhauled," "just renovated," "updated," and the like. These statements, if they do not qualify as permissible "puffing," could lead to misrepresentation and nondisclosure exposures if buyer expectations reasonably conflict with actual property conditions. Failing to disclose the actual age of the structure or the need for substantial capital improvements, or underfunding reserves and low-balling assessments, could result in serious risk exposures. Finally, advertising more substantial changes to a structure increases the risk that unit sales will be viewed as the sale of "new," rather than "used" (or "previously owned") property, with attendant liabilities.

Property Disclosure Statement

For property marketed as previously owned rather than new construction, prospective purchasers may request or reasonably expect to receive a uniform property disclosure statement containing a detailed description of the property's (including its components') current condition and repair history.[21] Although the statement may be limited to the specific unit being marketed, HOAs, management companies, and prospective purchasers sometimes request

a general statement regarding a development's common elements as well.

Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act (ILSFDA), enacted to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose certain information to potential buyers, may apply to certain condo conversion sales.[22] ILSFDA also contains anti-fraud and rescission provisions with an accompanying private right of action.[23]

Colorado Consumer Protection Act

The Colorado Consumer Protection Act (CCPA) applies to deceptive trade practices accompanying the sale of property, including new home sales.[24]

Construction Professional Negligence Liability

Generally, construction professionals, such as developers, general contractors, and design professionals, owe independent tort duties to use reasonable care when performing home construction and repair.[25] Colorado's appellate courts have held that construction professionals owe this duty to the initial and later residential property buyers who would be foreseeably harmed by construction professionals' negligence.[26] Colorado appellate courts have not addressed whether this duty of care extends to purchasers of rental units later converted and sold as condos and townhomes. Few decisions outside Colorado have addressed this question.

In *Orange Grove Terrace Owners Association v. Bryant Properties*, a California court found an HOA had standing to sue a converter for damages arising from faulty roof repairs.[27] The court found that the converter could reasonably foresee that the HOA would be damaged by the converter's negligent repairs during the conversion process where the covenants obligated the HOA to maintain and repair the property.[28] The court added that the converter incurred liability by electing simply to repair, rather than replace, the roof and piping.[29] One commentator compared this result to holding the converter to the "standard of care applicable to a developer of newly constructed condominiums."[30]

Economic Loss Rule and Duty of Care

Generally, Colorado courts have held that the economic loss rule (independent duty rule) does not apply to construction professionals involved in the construction of new residential property.[31] The rule provides that a party suffering only economic loss (defined generally as damages other than physical harm to persons or property) from the breach of an express or implied contractual duty may not assert a tort claim absent an independent tort duty of care.[32] In such cases, the parties' contractually expressed risk allocation controls, so that damages for any breach are limited to the contract remedies.[33]

> "Failing to disclose the actual age of the structure or the need for substantial capital improvements, or underfunding reserves and low-balling assessments, could result in serious risk exposures."

However, courts recognize the existence of a tort duty, independent of the contract for new residential construction.[34] This duty arises from a number of public policy considerations:

- "Preventing 'overreaching' by a builder, which is 'comparatively more knowledgeable' and 'is in a far better position to determine the structural condition of a house than most buyers,'"
- "An 'ordinary purchaser of a home is not qualified to determine when or where a defect exists,'"
- "A purchaser of a home 'rarely has access to make any inspection of the underlying structural work, as distinguished from the merely cosmetic features,'"
- "The magnitude of the investment made when purchasing a home,"
- "The foreseeability that a house will be sold to someone who is not the original owner,"
- "The foreseeability that a construction professional's work on a house 'is, ultimately, for the benefit of homeowners and that harm to homeowners from negligent construction is foreseeable,'" and
- "An independent duty 'discourage[s] misconduct and provide[s] an incentive for avoiding preventable harm.'"[35]

Colorado appellate courts have also allowed tort claims arising from negligent home repairs to proceed.[36]

When faced with a tort claim, Colorado construction professionals who construct or develop new rental units will likely argue that, because they cannot control how the developer or its successor might alter the use or ownership of such units, it would be unfair to impose on them negligence liability for a later changed use or ownership for which they have no knowledge or control, and thus courts should not impose an independent duty of care in conversion cases. Homeowners can be expected to counter that construction professionals can best ensure non-negligent construction initially and can protect themselves by allocating risk contractually and with insurance.[37] It is unlikely that courts would impose liability for later defects that do not arise from the construction professional's original work. Moreover, statutes

of repose may offer a safe harbor to construction professionals involved in a structure's original construction.[38]

Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.[39] may provide insight into construction professionals' potential liability. In that case, the Colorado Court of Appeals held that the undefined term "residential" in Colorado's Homeowner Protection Act (the HPA) is unambiguous and means "an improvement on a parcel that is used as a dwelling or for living purposes."[40] The Court found that the HPA uses "residential" to describe the property owned, not to limit its applicability to any specific type of owner, and held that "the receipt of income does not transform residential use of property into commercial use."[41] The Court then held that the HPA applies to a construction contract with an owner of a senior living facility, voiding a provision limiting the time during which construction defect claims could accrue.[42]

As our courts grapple with the relative rights, obligations, and liabilities among construction professionals involved in a converted building's construction, their analyses may turn on the scope of the conversion, ranging from no physical renovations to like-new rehabilitations. Courts may rule that distinctions among the timing and nature of various construction professionals' involvement in designing or constructing the particular construction element in a converted structure affects that construction professional's duty of care or extent of liability. One obvious distinction will be between those involved in the original construction and those involved in any later changes to that construction.

Express and Implied Warranties

Ordinarily, the sale of a newly constructed single-family home, condo, townhome, or other residence creates implied warranties of habitability, workmanlike construction, building code compliance, and suitability for reasonably intended purposes.[43] Moreover, any new home purchase contract likely contains express warranties, perhaps limited in scope and time, pertaining to the use, condition, and durability of the structure and appurtenant improvements.

"While Colorado has not squarely addressed the issue, many courts outside Colorado considering the question have found that converting rental units into condos and selling them gives rise to new home warranties if 'significant' renovation or rehabilitation occurred."

While Colorado has not squarely addressed the issue, many courts outside Colorado considering the question have found that converting rental units into condos and selling them gives rise to new home warranties if "significant" renovation or rehabilitation occurred.[44] These courts have held that such warranties arise, either under common law or a statutory warranty scheme, regardless of whether the new construction involves a multi-family structure or a single-family home.[45] A few courts refused to allow implied warranty relief arising from conversion efforts on the unique facts before them.[46] Colorado's resolution of this issue may turn on the extent and type of the renovations undertaken.

Two Nevada cases involving "rent to own" condos are instructive, although decided under that state's unique statutory scheme. In *Oxbow Construction v. Eighth Judicial District Court*, the Nevada Supreme Court considered Nevada's construction defect statute, which applies to construction defects found in limited common elements assigned to multiple units in a building containing at least one new residence. The statute limits claims to "defects in 'new residence[s]' or in alterations or additions to existing residences."[47] Many of the units were contracted on a "lease to sell" basis, meaning the prospective owner first leased the unit *before* the sales transaction was consummated. It appears that this "lease to sell" structure was intended to insulate the developer from construction defect liability under the statute.

The Court would not consider the fact that some owners originally leased their condos, the construction's age, or the duration of occupancy before sale, holding that (1) under the statute, a residence is new if it is "a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of its *original sale*"; and (2) the construction defect statute governed the defects at issue because the appurtenant limited common elements need not be new for the statute to apply.[48]

In a second case, the Nevada Supreme Court held that a condo conversion does not constitute "new residential construction," so Nevada's statutory remedial scheme did not apply. In *Westpark Owners' Association v. Eighth Judicial District Court*, an HOA gave statutory notice of construction defects to the developer and contractor. The developer and contractor filed a preemptive declaratory relief action, seeking a determination that the HOA could not sue them under the statute.[49] They argued that the statute did not apply because the condo units did not meet the definition of a "new

residence." The Court found that the statute applies only to defects in the construction of a "new residence" or for defects in the "alteration of or addition to an existing residence."[50] The Court determined that the legislature intended "new residence" to mean a product of original construction that has been unoccupied as a dwelling before the sale.[51] Because the condos had been occupied as apartments before their conversion, the Court found the units did not meet the statutory definition, but held that the HOA could nevertheless sue under the statute if the developer and contractor had made alterations or additions to the units before selling them and any of the alleged defects arose from those alterations.[52]

CDARA and CIOA

Colorado statutes may affect a construction professional's liability for condo conversions. Colorado's Construction Defect Action Reform Act (CDARA) and Common Interest Ownership Act (CIOA)[53] govern claim procedures, available remedies, and recoverable damages. In *Land-Wells v. Rain Way Sprinkler and Landscape, LLC*, the Court of Appeals held that CDARA does not change the substantive elements of a property owner's negligence claim arising from a construction defect, and a plaintiff is not required to plead or prove compliance with CDARA's notice of claim process or that his or her alleged damages arose from a construction defect.[54]

Homeowner Protection Act

The HPA[55] looms over many issues addressed in this article, particularly the risk mitigation measures to be discussed in Part 2. The HPA provides that "any express waiver of, or limitation on, the legal rights, remedies, or damages provided by" CDARA[56] or the CCPA[57] "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."[58] The HPA is limited to "legal rights, remedies, or damages of claimants asserting claims arising out of residential property."[59] Thus, the HPA prevents a construction professional from contractually limiting a homeowner's or HOA's time to sue for a construction defect by making it shorter than the applicable statute of limitations or repose.[60]

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Conclusion

Courts recognize various liabilities arising from the condo conversion process, which often turn on the nature and extent of any accompanying renovations, the substance of any marketing representations, and the adequacy of pre-sale disclosures.

Part 2 will examine how construction professionals can mitigate their liability risks for conversion of rental properties to condos and other "for sale" residential units. CL

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NOTES

1. *See* CLM 2016 National Construction Claims Conference, "Conversion Conundrums—Challenges of Handling CD Claims on Projects Built as Apartments Later Converted to Condominiums" at 1 (Sept. 28–30, San Diego, Cal.). Such conversion waves occur periodically. *See* Hess, 2A *Colorado Methods of Practice* § 73:44 Condominium conversions (Thomson Reuters 6th ed. 2018) ("The conversion of apartments to condominiums was a substantial money-making activity for condominium declarants in the mid-1980s. After a lull because of an abundance of unsold, newly constructed condominium units, the practice gained new life in the late-1990s with the upswing in the housing market.").

2. *See generally* Hyde, "Rethinking Roth: Why the Florida Legislature Should Empower Local Governments to Regulate Condominium Conversions," 42 *Stetson L. Rev.* 751 (Spring 2013) (comparing several states' condo conversion regulations).

3. CRS § 38-33-112 governs notifications to tenants in apartments slated for conversion and requires that notices to such tenants describe their lease termination rights. CRS §§ 12-61-401 et seq., the Subdivision Developer's Act, pertains to the division of real property and explicitly applies to the "conversion of an existing structure into a common interest community of twenty or more residential units." In addition, qualifying developments must register with the Colorado Real Estate Commission before a unit is sold or transferred and are subject to the Commission's rules and regulations, including certain disclosure requirements. *See* 4 Colo. Code. Reg. 725-6, Subdivisions and Timeshares (especially §§ 2.7(c) and (m)(2) to (5)). 4 Colo. Code. Reg. 725-6 § 4.6 provides, "[n]o developer will make misrepresentations regarding

the future availability or costs of services, utilities, character, or use of real property for sale or lease of the surrounding area of the subdivision." As will be discussed in Part 2, several Colorado municipalities and counties have adopted their own conversion-specific ordinances providing for mandatory inspection and disclosure reports to local authorities regarding building code compliance.

4. *See generally* Pridgen and Alderman, *Consumer Protection and the Law* § 18:26 (Thomson Reuters Nov. 2018) (about one-third of states have enacted legislation mandating that condo developers provide certain express and implied warranties); Davis, "Corrosion by Codification: The Deficiencies in the Statutory Versions of the Implied Warranty of Workmanlike Construction," 39 *Creighton L. Rev.* 103, 123 (2005) (states codifying implied warranties generally limit coverage to new construction).

5. *See* Hall et al., "Risk Management Strategies for Apartment-to-Condo-Conversions" (IRMI Construction Risk Conference 2013) (listing four common condo conversion types), www.irmi.com/docs/default-source/crc-handouts/2013-crc-handouts/w4-risk-management-strategies-for-apartment-to-condo-conversions.pdf?sfvrsn=4.

6. *See generally* Sandgrund and Smith, "When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?" 31 *Colorado Lawyer* 91 (Jan. 2002).

7. *See, e.g., Summit View Subdivision Homeowners Ass'n v. Summit View Dev., LLC*, Nos. 11CA0753 & 11CA0754 (Colo. App. July 12, 2012) (not selected for official publication) (affirming judgment against declarant-appointed board members for breach of fiduciary duty for failing to file lien against lots owned by co-defendant, a related entity); *Semler v. Hellerstein*, 2016 COA 122, ¶ 37 (declarant-appointed HOA board members owe fiduciary duties to both the HOA and its members), *rev'd in part on other grounds sub nom. Bewley v. Semler*, 432 P.3d 592 (Colo. 2018).

8. CRS § 38-33.3-303(2)(a).

9. Levin, "Condo Developers and Fiduciary Duties: An Unlikely Pairing?," 24 *Loy. Consumer L. Rev.* 197, 213–15 (2011).

10. *Countryside Cmty. Ass'n v. Pulte Home Corp.*, No. 12CA1568, 2013 WL 6511687 (Colo. App. Dec. 12, 2013) (not selected for official publication), *rev'd in part on other grounds*, 382 P.3d 821 (Colo. 2016).

11. *Pulte Home Corp. v. Countryside Cmty. Ass'n*, 382 P.3d 821.

12. *See Governors Grove Condo. Ass'n v. Hill Dev. Corp.*, 414 A.2d 1177, 1184 (Conn.Super.Ct. 1980) (allegations that builder conspired with developer to conceal roof defects in violation of the developer's fiduciary duty stated claim against builder); *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 764 S.E.2d 203, 218 (N.C.Ct.App. 2014) (both developer-declarant and its appointed directors obligated to disclose to HOA material facts about any known construction defects); *Bd. of Managers of Weathersfield Condo. Ass'n v. Schaumburg Ltd. P'ship*, 717 N.E.2d 429, 436 (Ill.App.Ct. 1999) (HOA board stated breach of fiduciary duty claim against declarant-appointed managers for determining if adequate funds were reserved for repair costs); *Ocean Club Condo. Ass'n v. Gardner*, 723 A.2d 623, 625–26 (N.J.Super.Ct.App.Div. 1998) (developer unit owner liable for replacement reserves); *Larson v. Lakeview Lofts, LLC*, 804 N.W.2d 350 (Minn.Ct.App. 2011) (because declarant's representatives served as HOA directors, their statutorily-imposed fiduciary duties apply to all matters affecting the HOA, and declarant's representatives cannot evade fiduciary obligations when arranging unit sales), decision vacated and appeal dismissed upon parties' stipulation, No. A10-2031, 2011 WL 7983339 (Minn. Nov. 15, 2011); *Blanchard v. PHP Props., Inc.*, Nos. CV-04-281 & CV-04-319, 2005 WL 375484 at *2 (Me.Super.Ct. Jan. 24, 2005) (declarant may be statutorily liable to unit owners or HOA for declarant's or its agents' wrongful acts or omissions during declarant control); *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 246–47 (Utah 2009) (developer owed HOA common law fiduciary duty to use reasonable care in managing and maintaining common property, collecting assessments, and maintaining maintenance and repair reserves, and disclosing all material facts affecting HOA property); *Wis. Ave. Assocs., Inc. v. 2720 Wis. Ave. Coop. Ass'n*, 441 A.2d 956, 963 (D.C. 1982) (developer-affiliated board members breached fiduciary duties by failing to inform cooperative members about maintenance obligations); *Bd. of Managers of Fairways at N. Hills Condo. v. Fairway at N. Hills*, 603 N.Y.S.2d 867, 870 (N.Y.App.Div. 1993) (developer-appointed members of condo board owed fiduciary duties to eventual unit owners); *Maercker Point Villas Condo. Ass'n v. Szymski*, 655 N.E.2d 1192, 1193–94 (Ill.App.Ct. 1995) (imposing fiduciary duty on declarant-controlled condo boards to act in unit owners' best interests). *See also Restatement (Third) of Property (Servitudes)* § 6.20(2) (Am. Law Inst. 2000) (declarant-controlled board obligated to maintain adequate reserves to cover repair and replacement costs); *id.* at § 6.20(7) (declarant-controlled board has duty to "disclose all material facts and circumstances affecting the financial condition of the association"); 8 Powell et al., *Powell on Real Property* § 54A.04 (LexisNexis Supp. 2018) (declarant-appointed directors held "to a higher standard of care than unit-owner elected directors.").

13. Marks, "Conversion Experience," 30 *Los Angeles Lawyer* 22, 26 (Nov. 2007).

14. *See* cases collected at *supra* notes 7 and 9–12.

15. *See* Marks, *supra* note 13 at 25–26 (condo converter-vendor in better position than buyer "to know material factors such as the age of the building, the nature and extent of any refurbishment, and the current condition of the structure."); *Cohen v. Vivian*, 349 P.2d 366 (Colo. 1960) (residential property vendor has duty to disclose latent defects). *Cf. Iverson v. Solsberry*, 641 P.2d 314 (Colo. App. 1982) (knowledge that a home does not comply with applicable building codes may give rise to a duty to disclose). Neither direct communications nor privity is required to support a misrepresentation claim. *See Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 237 (Colo. 1995); *Ballow v. PHICO Ins. Co.*, 841 P.2d 344, 350 (Colo.App. 1992) ("[A] representation need not always be made to the party seeking recovery. It is necessary only that the plaintiff be in the class of persons that defendant intended to be influenced by the misrepresentation."), *rev'd on other grounds*, 875 P.2d 1354 (Colo. 1993); *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1168 (Colo.App. 2010).

Some states require converters to disclose defects in reports distributed to prospective purchasers. *See, e.g.*, Rolando, "Making and Encouraging Pre-Sale Disclosures: Disclosures Don't Invite Problems. They Avoid Them," 23 No. 4 *Prac. Real Est. Law.* 57 (Am. Law Inst. 2007) (cataloguing states that have adopted mandatory disclosures of defects, malfunctions, hazards, and other matters affecting the value of residential property). California requires developers to disclose a written list of "all substantial defects or malfunctions in the major systems" in units or common areas, or a written disclaimer of such knowledge. Cal. Civ. Code § 1134(a).

16. Whether such knowledge gives rise to a duty to investigate is an open question in Colorado. *Cf. Metropolitan Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 318 (Colo. 1980) (jury question whether repair contractor should have inspected boiler safety systems ancillary to replacing pump motor); Geier and Lightner, eds., 1 *Miller & Starr Cal. Real Est.* § 1:158 (Thomson Reuters 4th ed. 2018) (seller living on property who reasonably should have noticed "red flags" owes duty to disclose them or to investigate to determine if problems exist).

17. For example, as will be discussed further in Part 2, in some localities the model 2018 International Existing Building Code at iii "establishes minimum requirements for existing buildings" and is "intended to encourage the use and reuse of existing buildings while requiring reasonable upgrades and improvements."

18. *See generally* Hickman, "Construction Defect Crisis Produces Coverage-Restricting Endorsements" (International Risk Management Institute Expert Commentary, Aug. 2003), www.irmi.com/articles/expert-commentary/construction-defect-crisis-produces-coverage-restricting-endorsements.

19. *See* Marks, *supra* note 13 at 26 ("underwriters view condominium conversions as a greater insurance risk . . . in part due to the age of converted structures and the mistaken perception of buyers that converted structures are either brand new or completely renovated.").

20. *See* 2 Bruner and O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 7:29.50 (Thomson Reuters Supp. 2018), citing Jones,

Jr., "Risk Management in Condominium Development: The Insurer's View of Design and Construction" at 4–5 (American Bar Association, Forum on the Construction Industry Apr. 7–9, 2005), and Kennedy, "Discovery of Construction Defects in Planned Unit Developments: The Role of the Homeowners Association" at 16 (American Bar Association, Forum on the Construction Industry Apr. 7–9, 2005).

21. *See* Bergmann, "Disclosure Issues in Residential Real Estate Transactions," Boulder Bar Ass'n Newsletter (Apr. 1999). *Cf. Albright v. McDermond*, 14 P.3d 318, 323 (Colo. 2000) (discussing genesis and purpose of the standardized residential real estate purchase contract property inspection provision).

22. 15 USC §§ 1701 et seq. comprises ILSFDA. For a general discussion of ILSFDA's scope and its exemptions for condo sales, *see* Sandgrund et al., *Residential Construction Law in Colorado*, § 5.2.8—Statutory Disclosure Duties (CLE in Colo., Inc. 6th ed. 2018) and Lubinski, "The Interstate Land Sales Full Disclosure Act and Condominiums," Solo in Colo. Blog (Dec. 18, 2015), http://soloincolo.com/the-interstate-land-sales-full-disclosure-act-and-condominiums.

23. *See Keefe v. Base Vill. Owner, LLC*, No. 09CV273, 2011 WL 1807962 (Pitkin Cty. Dist. Ct. Mar. 30, 2011) (unit square footage was "material fact" subject to ILSFDA's anti-fraud and rescission provisions; holding, as a matter of law, developer's property report falsely stated square footage).

24. *See People ex rel. MacFarlane v. Alpert Corp.*, 660 P.2d 1295, 1297 (Colo.App. 1982) (CCPA applies to real estate transactions), cited with approval in *Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998) (CCPA suit against developers); CRS § 6-1-105(1)(a), (b), (c), (e), (g), (r), (u), and (z) (prohibiting deceptive trade practices); and CRS § 6-6.5-101 (requiring developers and builders to provide new home purchasers with "[soil] analysis" and "site recommendations").

25. *See generally* Sandgrund et al., *supra* note 22 at § 5.1.1—The Independent Duty (Economic Loss) Rule. An unpublished decision held this duty to be nondelegable, *9300 E. Fla. Ave. Homeowners Ass'n v. Metro. Homes, Inc.*, No. 16CA1759, ¶ 4 (Colo.App. Nov. 16, 2017) (not selected for official publication) (holding general contractor owed HOA nondelegable independent tort duties of reasonable care). Vicarious or imputed liability may sometimes be imposed as well, although this is not settled law. *See generally* Sandgrund et al., *supra* note 22 at § 5.1.1—Homebuilder Liability for Subcontractor Negligence.

26. *See, e.g., Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1042–45 (Colo. 1983); *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 868 (Colo. 2005); *Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 641-42 (Colo. App. 2003); *Andrews v. Picard*, 199 P.3d 6, 10 (Colo.App. 2007). *See also* cases collected in Sandgrund et al., *supra* note 22 at § 5.1.1—Homebuilder Liability For Subcontractor Negligence. In *S K Peightal Eng'rs, Ltd. v. Mid Valley Real Estate Sols. V, LLC*, 342 P.3d 868 (Colo. 2015), the Colorado Supreme Court noted that builders owe "subsequent purchasers" a duty to build non-negligently. Some question if this dicta limits the independent duty doctrine to later, versus original, home purchasers.

27. *Orange Grove Terrace Owners Ass'n v. Bryant Props.*, 222 Cal. Rptr. 523 (Cal.Ct.App. 1986). *See also Wyman v. Ayer Props.*, 11 N.E.3d 1074 (Mass. 2014) (treating modifications to preexisting building same as new construction and holding developer liable for negligent construction).

28. *Id.* at 1223.

29. *Id.*

30. *See* Marks, *supra* note 13 at 24.

31. *Cosmopolitan Homes, Inc.*, 663 P.2d at 1042–45; *A.C. Excavating*, 114 P.3d at 868. *Cf. Bay Garden Manor Condo. Ass'n, Inc. v. James D. Marks Assocs., Inc.*, 576 So.2d 744 (Fla.Dist. Ct.App. 1991) (condo purchasers could sue engineering firms that negligently inspected apartment building and improvements before condo conversion despite no privity between them).

32. In *Town of Alma v. Azco Constr.*, 10 P.3d 1256, 1262–64 (Colo. 2000), the Court clarified that the focus of the analysis is the source of the duty and not the nature of the resulting harm; however, some commentators suggest that the economic loss rule may not apply where negligence causes actual property damage. *See* Friedman and Brenner, "The Current Status in Colorado of the Economic Loss Rule," 30 *Colorado Lawyer* 51, 52–53 (Nov. 2001); *accord* Phelan, "Avoiding Tort Liability in Design, Construction, and Inspection of Commercial Projects," 34 *Colorado Lawyer* 81, 83 (Jan. 2005).

33. *See BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004).

34. *Cosmopolitan Homes, Inc.*, 663 P.2d at 1042–45, cited in *Town of Alma*, 10 P.3d at 1266.

35. *In re Estate of Gattis*, 318 P.3d 549 (Colo. App. 2013) (collecting cases). *See also S K Peightal Eng'rs, Ltd.*, 342 P.3d at 868, 872, 874, 875–77. While some argue that dicta in *S K Peightal* suggests a builder's independent duty applies only to secondary home purchasers, the above policy reasons appear to apply to all homeowners.

36. *See, e.g., Consol. Hardwoods, Inc. v. Alexander Concrete Constr., Inc.*, 811 P.2d 440, 443 (Colo.App. 1991), cited with approval in *Town of Alma*, 10 P.3d at 1262; *Lembke Plumbing & Heating v. Hayutin*, 366 P.2d 673, 675 (Colo. 1961), cited with approval in *Town of Alma*, 10 P.3d at 1265; *Metro. Gas Repair Serv. v. Kulik*, 621 P.2d at 317, cited with approval in *Town of Alma*, 10 P.3d at 1265. *Cf. Collard v. Vista Paving Corp.*, 2012 COA 208, ¶ 52 (holding Colorado has rejected "completed and accepted" rule; Colorado has consistently held contractors owe a duty of care to third parties who could foreseeably be injured by negligent construction, installation, repair, or performance on service contracts, even after the contractors' work has been completed and accepted).

37. Part 2 of this article will compile risk allocation means available to those involved in apartment construction.

38. Part 2 will also analyze the repose statute as a risk mitigation measure.

39. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d 219, 225 (Colo. App. 2017), *cert. denied*, No. 17SC351, 2017 WL 3868161 (Colo. Sept. 5, 2017).

40. *Id.* at 225. The concurrence found support for the same result in the HPA's legislative history. *Id.* at 229–30.

41. *Id.* at 225.

42. *Id.* at 226.

43. *See generally* Sandgrund et al., *supra* note 22 at § 4.3—Breach of Implied Warranties.

44. *See generally American Law of Products Liability, 3d* § 38:11 (Thomson Reuters Supp. Nov. 2018).

45. *See Wyman*, 11 N.E.3d 1074 (developer liable for breach of implied warranty and negligence for damage to common areas and individual units; modifications to preexisting building should be treated as new construction, permitting recovery for defects); *Riverfront Lofts Condo. Owners Ass'n v. Milwaukee/ Riverfront Props. Ltd. P'ship*, 236 F.Supp.2d 918, 928 (E.D.Wis. 2002) (implied warranties arise from renovation and conversion of commercial warehouse space to condos; liability not limited to portions developer worked on); *Council of Unit Owners of Breakwater House Condo. v. Simpler*, 603 A.2d 792, 793 (Del. 1992) (implied warranty claim may arise where "older structures . . . have been substantially renovated or reconstructed" and may lie against "vendor-developers" that do not actually perform construction work); *Towers Tenant Ass'n v. Towers Ltd. P'ship*, 563 F.Supp. 566, 576 (D.D.C. 1983) (allowing negligence and implied warranty claims to proceed where defendants extensively renovated apartment buildings and converted condos' "new" construction contained extensive defects). *Cf. Licciardi v. Pascarella*, 476 A.2d 1273, 1276 (N.J.Super.Ct. Law Div. 1983) ("where an existing home is so substantially reconstructed . . . that the end product . . . is the functional equivalent of a new house, then an implied warranty runs from the reseller to the purchaser . . ."; status of rebuilder-reseller is "tantamount to that of a builder-vendor of a new house."); *VonHoldt v. Barba & Barba Constr., Inc.*, 677 N.E.2d 836, 839–40 (Ill. 1997) (allowing breach of implied warranty claim for "latent defects caused in the construction of a . . . multilevel addition increasing the size of the original house by almost 40% . . . ."). *But see Marina Condo. Homeowner's Ass'n v. Stratford at Marina, LLC*, 254 P.3d 827, 830–31 (Wash.Ct.App. 2011) (where defects arose from original construction rather than from converter's improvement work, Washington Condominium Act's implied warranty of quality does not apply).

46. *See E. Hilton Drive Homeowners' Ass'n v. W. Real Estate Exch.*, 186 Cal. Rptr. 267 (Cal. Ct.App. 1982) (original developer's successor-in-interest, who bought eight never-occupied

condos out of foreclosure four years after their original construction, and who performed various repairs and rehabilitation, not liable under California's statutory implied warranties for water damage caused by defects that it did not create). *But see* Miller & Starr, *supra* note 16 at § 33:59 (decisions after *East Hilton* "may depend on the extent to which the converter has renovated the project, and whether the defect was created in the renovation work . . . or was one that a reasonable converter should have discovered."); *9300 E. Fla. Ave. Homeowners Ass'n*, No. 16CA1759,at ¶ 4 (general contractor hired by a receiver to perform work on a partially completed common interest development owed the plaintiff HOA independent tort duties of care despite the contractor's argument that it made "no representation or warranty of any kind or nature concerning" the project or the project services).

47. *Oxbow Constr. v. Eighth Judicial Dist. Ct.*, 335 P.3d 1234, 1238 (Nev. 2014).

48. *Id.* at 1239–40 (emphasis added; citations omitted).

49. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Ct.*, 167 P.3d 421 (Nev. 2007), followed in *Anse, Inc. v. Eighth Judicial Dist. Ct.*, 192 P.3d 738, 746 (Nev. 2008) (to extent homes remained unoccupied as dwellings from construction completion until their first sale, homes are "new residences," and subsequent owners may pursue Chapter 40 actions for construction defects).

50. *Id.* at 360.

51. *Id.*

52. *Id.* at 361.

53. CDARA comprises CRS §§ 13-20-801 to -807, 13-80-104, and 38-33.3-303.5. CIOA comprises CRS §§ 38-33.3-101 et seq.

54. *Land-Wells v. Rain Way Sprinkler and Landscape, LLC*, 187 P.3d 1152 (Colo.App. 2008). *See also Hildebrand*, 252 P.3d at 1163 (holding CDARA "does not alter the substantive elements of any common law claims.").

55. CRS § 13-20-806(7).

56. CDARA, as originally passed in 2001 (CDARA I), adopted CRS §§ 13-20-801 through -807 and amended Colorado's Real Property Improvement Statute of Limitations (CRS § 13-80-104) and CIOA (CRS § 38-33.3-303.5). CDARA II (2003) and the HPA (2007) revised and expanded Title 13, Article 20. The Construction Professional Liability Insurance Act (2010) again expanded Article 20 and revised the Colorado Insurance Code (CRS § 10-4-110.4). CDARA III (2017) amended a part of CIOA (CRS § 38-33.3-303.5).

57. CRS §§ 6-1-101 et seq.

58. CRS § 13-20-806(7)(a).

59. *Id. Cf. Alpine Bank v. Hubbell*, 506 F.Supp.2d 388, 409 (D.Colo. 2007) (CDARA "creates remedies" against "construction professionals"), *aff'd*, 555 F.3d 1097 (10th Cir. 2009).

60. CRS § 13-20-806(7)(a).

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