

# Mitigating Potential Condo Conversion and Renovation Construction Defect Liabilities

Part 2

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*Part 2 of this article discusses how construction professionals can mitigate liability risks when undertaking condominium renovations and conversions.*

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**P**art 1 of this article examined potential liabilities arising from converting rental units to condos. This Part 2 discusses how to mitigate those risks, including related statute of limitations/repose and liability insurance issues. While this discussion focuses on apartment to condo conversions, it also addresses potential liabilities arising from renovating and selling existing condos as well as turning industrial space into residences. Nothing in this article constitutes legal advice; rather, it offers ideas for practitioners to consider as they apply their independent thought and expertise to the unique circumstances at hand.

This article does not discuss the related topic of legal prerequisites for creating common interest communities.

### **Construction Professional Risk Mitigation**

Construction professionals may find their construction defect risk magnified when converting an apartment complex into condos due to liability exposures “from non-privity owners seeking damages.”<sup>1</sup> Because many construction professionals involved in apartment construction are not involved in the decision to convert, negotiating contract remedies in anticipation of conversion may help mitigate their risk.<sup>2</sup>

Construction professionals building new apartments may wish to consider the suggestions in the checklists<sup>3</sup> herein to reduce their liability risk from a later conversion of those apartments. Construction professionals must also consider that Colorado’s Homeowner Protection Act (HPA), CRS § 13-20-806(7), may restrict or void the effect of some of these provisions for residential property. In *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*,<sup>4</sup> discussed in Part 1, the Colorado Court of Appeals found the HPA voided a contractually shortened limitation period between a construction professional and a property owner because the underlying project involved residential property.

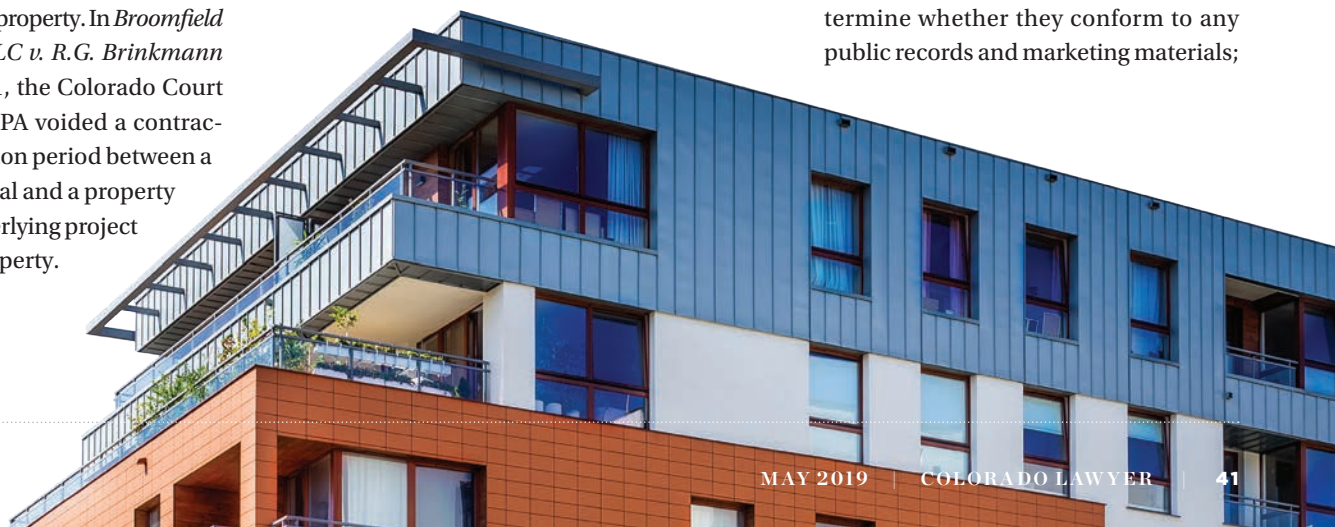
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### **Proactive Measures**

While to err is human,<sup>5</sup> forgiveness may not always follow. Therefore, construction professionals should take risk mitigation measures at the outset to avoid problems later. Of course, conducting due diligence before purchasing an existing structure (the requirements of which are

beyond this article’s scope) is also vital.<sup>6</sup> Once the decision to convert the project has been made, risk mitigation should encompass investigating and remedying existing defects as well as careful planning, design, construction, quality control, and customer satisfaction services. Construction professionals renovating apartments and converting them to condos should<sup>7</sup>

- carefully select the project;
- hire qualified, competent, and experienced construction professionals with successful track records in multi-family housing construction;
- coordinate the work with design document requirements and correctly sequence trades;
- verify that the community’s governing documents are appropriate for the contemplated project;
- have a qualified expert review the conversion plans before beginning construction, and then document ongoing inspections to help ensure quality control and compliance with applicable standards, which may include the International Existing Building Code and Colorado municipal ordinances governing condo conversions;<sup>8</sup>
- survey existing tenants to identify known problems and develop appropriate strategies to address and, if appropriate, disclose those problems;
- ensure the design drawings conform to the governing documents;
- identify and correct existing building code violations<sup>9</sup> and other conditions that create safety threats;<sup>10</sup>
- review final, as-built documents to determine whether they conform to any public records and marketing materials;



- establish an adequate association budget, including proper reserves for foreseeable maintenance obligations (based on reasonable assumptions regarding useful life<sup>11</sup> and the life-cycle costs of various operating and structural systems);
- adopt simple warranty procedures, and maintain an adequate warranty department to address and resolve problems informally;
- revise boilerplate warranty documents to explain the warranties and their requirements in plain English;
- reasonably complete punch lists to avoid lingering warranty items and unhappy owners; and
- maintain good relations and communications with the homeowner association (HOA) and its management personnel, and reasonably address homeowner concerns during the declarant-developer's control of the association.

With regard to the project's construction details, construction professionals should:

- avoid exterior insulating finish systems (EIFS) and other problematic exterior claddings;
- require that any systems involved in the conversion (e.g., waterproofing, foundation, roofing, heating, ventilation, and air-conditioning systems) are appropriately selected and properly designed and constructed, and have understandable maintenance and operation instructions;
- mandate adequate contract administration and inspection services by an experienced design professional;
- where appropriate, employ a water infiltration expert to review design and/or construction; and
- use well-established designs and construction techniques, particularly regarding water infiltration and damage, and adequately tested construction materials.

#### **Contract Protections Generally**

Construction professionals should try to negotiate contract provisions to mitigate their exposure by (1) limiting their liability to those with whom they contract, including other

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construction professionals or purchasers of converted residences; or (2) indirectly minimizing their risk to third parties, by, for example, obtaining indemnity from those with whom they contract, or investigating and purchasing adequate insurance (this includes consulting

with insurance professionals to ensure proper protection).

#### **Contract Provisions with Other Construction Professionals**

To mitigate risks arising from their work (including a potential later condo conversion), construction professionals building apartments should consider including the provisions below in their contracts with other construction professionals.

**Shortened Claim Time Bar.** Generally, a private statute of limitations agreed to between construction professionals is enforceable.<sup>12</sup> However, such provisions may not apply under current law to claims brought by original and successor residential property owners because of Colorado's HPA bar against such provisions.<sup>13</sup> The recent *Broomfield Senior Living Owner, LLC* case<sup>14</sup> held that such contractual time limitations are void against property owners for claims involving “residential property.”

**Liability Limitations.** Construction professionals may consider contractually limiting their liability to the contracted-for fee, a sum certain, or available insurance, and expressly disclaiming third-party beneficiary status to nonparties. Consequential damage waivers, liquidated damages, and exclusive remedy provisions may be useful. However, as explained above, the HPA may limit or bar such provisions' reach and effectiveness as to residential property.

**Indemnification, Insurance, and Additional Insured Status.** While indemnity provisions frequently allocate risk in the construction business, Colorado's anti-indemnity statute seeks to “ensure that every construction business in the state is financially responsible under the tort liability system for losses that a business has caused.”<sup>15</sup> And while requiring additional insured status under another party's liability insurance is advisable, the desired scope of such insurance may be challenging to secure on an additional insured basis, especially for long-term “completed operations” risks (i.e., latent defect risks arising long after the work is completed).<sup>16</sup> Design professionals and general contractors may also demand from owners special indemnity provisions triggered in the event of an apartment to condo conversion.

Requiring the various parties to the inter-related contracts underlying a construction project to maintain “adequate insurance” is advisable, but unless insurance requirements are delineated and confirmed, and completed operations coverage is maintained into the future when property damage from latent defects may first manifest, such coverage offers little benefit after substantial completion. Wrap policies, with completed operations coverage extending through the anticipated repose period, combined with mutual subrogation waivers, should provide helpful protection, although extensions of the repose period under the rare circumstances described below may create problems.<sup>17</sup> Of course, indemnity is only as effective as the indemnitor’s ability to pay, so adequate financial investigation and warranties, with appropriate personal guarantees, may be prudent.

**Site Use Limitations.** While some construction professionals may seek contractual or title limitations precluding conversion, developers may not agree to such a request, which could reduce the value of the land and its improvements, and which title restrictions might be struck down later if not time-limited. While precluding conversions entirely is unlikely, a construction professional might consider contractually voiding warranties upon conversion.

**Attorney Fees Clause.** Requiring the non-prevailing party to pay the prevailing party’s legal costs and fees can serve as a disincentive to asserting weak claims, although such provisions may also have the unintended consequence of discouraging settlement by a party who mistakenly believes it will prevail.

**Maintenance Manual.** A manual obligating the HOA to adequately maintain the property with concomitant liability, damages, and indemnity waivers in favor of potentially liable construction professionals if the maintenance recommendations are not performed may help mitigate liability. But the HPA (and the Common Interest Ownership Act (CIOA), as to declarant-developers) may limit or bar the use and/or effectiveness of such waivers or releases.

**Additional Fees.** Stipulated damages provisions could compensate for insurance deductibles and the time and expense involved in defending a claim.

**Subcontract-Specific Provisions.** From the developers’ and general contractors’ perspectives, subcontracts should include

- a detailed and comprehensive scope of work, requiring that (1) where variations exist between and among contract documents, specifications, and drawings, the most stringent requirements will prevail, and (2) any document inconsistencies or errors must be reported;
- provisions requiring subcontractors to give advance notice of important work activities to allow appropriate inspections and approvals (the subcontract should provide that all work changes be documented and approved, and preclude oral field alterations); and
- requirements that warranties last until the end of the repose period and are extended to benefit any residential end-users.

Subcontracts should parallel the terms of the main contract, including insurance requirements (avoiding residential and multi-family construction coverage exclusions discussed below), and obligate the subcontractors to allow their joinder at the developer’s or general contractor’s discretion in any litigation or arbitration arising from or relating to the subcontractor’s work.

Subcontractors should be required to comply with all applicable laws, codes, and regulations, including environmental laws, as well as construction lender requirements. Reliance on standard-form American Institute of Architects (AIA) contracts or ConsensusDocs may not adequately protect owners and developers.<sup>18</sup>

### *Design Professionals*

The provisions below may prove especially useful to design professionals.

**Contractual Certificate of Merit.** For design professionals, requiring a “certificate of merit” that contains more detail than Colorado’s statutory Certificate of Review,<sup>19</sup> as a condition precedent to asserting a claim, may help foster early settlement.

**Contingency Fund.** A design professional and developer can agree to set aside a fund to address issues arising from possible design drawing ambiguities or inconsistencies.

### **Construction Observation Disclaimer.**

As is common practice with various projects, design professionals should define and limit their responsibilities and obligations during the construction process.

**Condo Conversion and Termination Provisions.** Design professionals may seek to include provisions to allow them to terminate their services without penalty if a project originally intended to be apartments is converted to condos.

### *Special Purpose Entities*

Some suggest that developers who convert existing rental property to condos and other “for purchase” residential property might insulate themselves from some liabilities by creating a special purpose entity (SPE) to perform the conversion and sale of converted units.<sup>20</sup> The merits of this decision depend on a host of variables (e.g., tax considerations) that are beyond the scope of this article. In general, original developers can expect the most benefits by creating the SPE well before conversion. Doing so improves their chances of garnering the benefits of the statute of repose by lengthening the time between their last involvement in the project and when a claim might arise relating to that work and by better separating them from any construction work occurring during the conversion process.

### *Sales Contract and CCR Provisions*

Protective provisions in consumer sales contracts and a common interest community’s Declaration of Covenants, Conditions, and Restrictions (CCR) can reduce a converter’s exposure to loss. While a comprehensive examination of sales contract and CCR provisions is beyond the scope of this article, a brief discussion follows.

Sales contracts and CCRs can include alternative dispute resolution (ADR) procedures, such as mediation and binding arbitration, and waiver of a jury trial. Similarly, the operative documents could require notice of defects to construction professionals and grant a right of access to inspect, test, and repair in conjunction with Colorado’s Construction Defect Reform Act (CDARA) and other laws, if not preempted by these laws. Terms imposing inspection and



maintenance obligations on the unit owners and their HOA could potentially provide additional protection against claims.

ADR mechanisms may reduce construction professionals' liability exposures and insurance costs if designated arbitrators are more likely to render smaller damages awards and fewer adverse liability decisions, and if such proceedings generate less litigation expense. However, construction professional counsel recognize that ADR is not always less costly.<sup>21</sup> In crafting ADR provisions, developers should recall that the legislature adopted the HPA in response to the widespread use of broad claim and liability waivers in home purchase contracts.<sup>22</sup> To the extent converters seek to gain advantage through unfair ADR clauses<sup>23</sup> that, for example, restrict the pool of arbitrators to those aligned with the building industry or those subject to "repeat player" biases, or make arbitration uneconomical for homeowners, they may invite statutory intervention.<sup>24</sup>

Liability limitations, claim waivers and releases, integration clauses, warranty disclaimers, provisions granting developers the option to allow or prohibit consolidating arbitration proceedings, and exculpatory provisions may also offer significant protections if not voided or prohibited by the HPA or public policy.<sup>25</sup>

### Statutes of Repose

Some suggest that developers wait at least eight years before converting apartments to condos and selling them because the statute of repose may have expired and bar claims based on the original construction.<sup>26</sup> However, risk remains in calculating the date the repose period begins to run because it rests on determining when "substantial completion" occurred, a term undefined by the repose statute. Also, the "trigger" date starting the repose period could depend on the nature and timing of a particular entity's or individual's responsibilities and construction activities. In the case of the phased construction of multiple structures in a common interest community, many questions exist regarding when the repose period begins to run as to particular construction professionals.<sup>27</sup> Remodeling activities, super-pad construction, delays in converting declarant

control to the HOA, phased developments, and phased infrastructure completion also may affect determining the trigger date.

Finally, tolling provided for in CDARA and various municipal ordinances, and equitable tolling or estoppel, add more challenges to computing the repose period.<sup>28</sup> One commentator has argued that "to the extent a change in the

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form of ownership from an apartment building to a condo is an improvement to real property, such improvement could not be substantially complete and possessed by the unit owners or open to use by the unit owners until such time as the master deed is recorded.”<sup>29</sup> Although the repose period may have expired for original

construction, the statute may not apply to fraud, misrepresentation, or nondisclosure claims arising upon a converted property's sale.<sup>30</sup>

Certainly, a "wait and sell" approach may be less successful if physical changes have been made to the original structure. Completion of renovations and new real property improvements may trigger new repose and limitations periods as to the construction, including problems related to the work's effect on other construction elements. Moreover, a developer's deficient maintenance and negligent repairs may trigger new limitations and repose periods so that the initial statute of repose may not apply.<sup>31</sup> Even where no improvements or repairs have been made, the "person in actual possession or control" exception to Colorado's statutes of limitations and repose may be triggered,<sup>32</sup> negating or tolling the limitations period.<sup>33</sup>

Conversely, a successor-owner plaintiff generally takes the property with no greater rights than his predecessor, and the limitations period is triggered if "the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury."<sup>34</sup> This imputation of knowledge may not apply, however, where the previous owner is also the original developer (or its alter ego).<sup>35</sup>

Where the converter is aware, or should be aware, of existing defects or of the underfunding or underestimating of future reserves, misrepresentation and nondisclosure liabilities may arise even in the face of disclaimers and integration clauses. Finally, taking a "wait and sell" approach may be impractical from a business standpoint. Changes in market conditions and tax considerations may render the opportunity cost of waiting to convert too great.

### Liability, E and O, and D and O Insurance

A common way to "spread the risk" for construction defect liability is to purchase, or require others to purchase for one's benefit, general liability insurance (including construction project "wrap" policies<sup>36</sup>), errors and omissions (E and O) insurance, and directors and officers (D and O) insurance. Policies that cover the

risks involved in the conversion project and provide coverage in amounts approximating potential damages exposures provide the greatest protection. Practitioners should consult with an experienced risk management professional and insurance coverage attorney to improve the chance of securing insurance affording that protection.

Coverage may turn on whether the project is a direct conversion, successor conversion, distressed property conversion, or legacy conversion,<sup>37</sup> and whether the defendant is the original developer, the converting developer, or the selling developer. In addition, because most liability insurance policies are written on an “occurrence” basis, meaning that resulting property damage must occur during the policy period, developers should ensure that coverage is in place at all times when a risk of liability exists, which could be eight or more years after work is substantially completed.<sup>38</sup> Two typical Insurance Services Office (ISO) Commercial General Liability (CGL) insurance exclusions discussed below may present significant hurdles to coverage and should be avoided if possible.

### **Residential Development/Multi-Unit Construction Exclusions**

A broadly written New Residential Exclusion generally bars coverage for “property damage’ arising out of or in any way connected with your work performed in connection with the construction, reconstruction or remodeling of any ‘residential building.’”<sup>39</sup> A variation of this exclusion bars coverage for “[n]ew Construction or any part thereof, of any new residential single-family dwelling, townhouse, condo, co-operative or multi-track housing development,” and provides that, “[f]or purposes of this [exclusionary] endorsement, new construction includes, but is not limited to, any total gut renovation of any existing structure or building that will be converted into a new single-family dwelling, townhouse, or condo, co-operative or multi-track housing.”<sup>40</sup> Another variation bars coverage for “property damage’ . . . arising out of any ‘construction operations’ whether ongoing operations or operations included within the products-completed operations hazard that involve a . . . ‘multi-unit residential building.’”<sup>41</sup>

A Colorado district court held that such exclusion barred coverage for alleged defects in a condo project’s common areas, common elements, and residential dwelling units.<sup>42</sup> A California court held that a “condominium project” exclusion barred coverage for an individual homeowner’s claims related to his “free-standing” unit against a project developer where the home was part of a statutory condo project.<sup>43</sup> Construction professionals whose work involves or may be converted to residential property should avoid policies containing these types of exclusions.

### **Owned Property and Alienated Premises Exclusions**

The typical Owned Property Exclusion, exclusion (j)(1), excludes coverage for property damage to property the insured owns, rents, or occupies. The typical Alienated Premises Exclusion, exclusion (j)(2), bars coverage for property damage to premises the insured sells, gives away, or abandons, if the property damage arises out of any part of those premises. This latter exclusion generally does not apply if the premises are the insured’s work and were never occupied, rented, or held for rental by the insured. This exclusion was originally intended to apply to “deal with situations where an insured failed to repair property prior to transferring it to another.”<sup>44</sup> The exclusion has been held inapplicable to property damage arising after the insured’s operations have been completed under a liability policy’s products-completed operations hazard coverage.<sup>45</sup> There is little useful case law applying these exclusions to the conversion and sale of condos.

### **Misrepresentation Claims**

Whether misrepresentation or nondisclosure claims are covered may depend on the specific facts of the case, the liability insurance contract language, and whether the misrepresentation or nondisclosure constitutes an occurrence that caused property damage.<sup>46</sup> E and O policies may afford coverage for this risk as well.

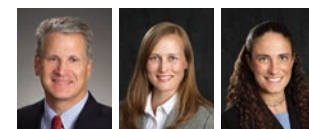
### **Conclusion**

As discussed in Part 1, various potential liabilities arise from conversion and renovation activities,

which often turn on the nature and extent of any work accompanying that process, as well as representations and disclosures made while marketing and selling the converted property. But construction professionals can try to mitigate their liability risk through prudent construction planning and management, and careful drafting of contracts among construction professionals and with consumer buyers.

The HPA presents challenges to the effectiveness of some important mitigation provisions that practitioners may seek to add to development, construction, and residential purchase contracts for converted property. A violation of the HPA might lead to CCPA liability exposure to condo purchasers under CRS § 6-1-105(r), which prohibits misleading warranty limitations and disclaimers. Careful selection of liability insurance offers an extremely important avenue for mitigating risk. Effective after-sale warranty and customer service can also help preempt many claims. [CL](#)

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### **NOTES**

1. See Schneier, “Design Professional Liability: Strategic Moves to Minimize Risk in Condo Conversions,” 32 No. 9 *Constr. Litig. Rptr.* 317 (Sept. 2011). CRS § 13-20-806(7)(b) provides

that “[a] waiver, limitation, or release contained in a *written settlement of claims*, and any recorded notice of such settlement, between a residential property owner and a construction professional *after such a claim has accrued* shall not be rendered void by this subsection (7).” (Emphasis added.) While some have sought to bind non-privity owners by recording liability limitations against the real property, § 806(7) may limit or void such efforts for residential property, especially as to the purported release of unknown, future claims.

2. Schnier, *supra* note 1 (suggesting contract protections for design professionals, such as reserving veto power over conversion, which may be unrealistic).

3. Drawn, in part, from Bruner and O’Connor, Jr., *2 Bruner & O’Connor on Construction Law* § 7:29.50 (Thomson Reuters Supp. 2018), and Cavignac, “Professional Liability Update—Condominium Projects—Insurance Implications for Design Professionals,” Cavignac & Associates Blog (Mar. 2004), [www.cavignac.com/publications/professional-liability-update-condominium-projects-insurance-implications-for-design-professionals](http://www.cavignac.com/publications/professional-liability-update-condominium-projects-insurance-implications-for-design-professionals).

4. *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).

5. See Stark and Cook, “Pay It Forward: A Proactive Model to Resolving Construction Defects and Market Failure,” 38 *Val. U. L. Rev.* 1, 6 (Fall 2003) (opining that construction defects are inevitable).

6. The ASTM E-2018 guidelines described in Part 1 prescribe “good commercial and customary practice . . . for conducting a baseline property condition assessment.” Such due diligence investigation could lead to potential liability if it uncovers latent defects that are not later disclosed or remedied. If future court decisions impose liability for a converter’s failure to adequately inspect and disclose defects, converters might rely on inspectors to conduct more thorough inspections, thereby exposing inspectors to greater liability. Prudent prospective converted condo buyers, and pre-turnover, unit-owner controlled association boards should request a copy of any such investigative reports.

7. See Bruner and O’Connor, Jr., *supra* note 3 at § 7:29.50 for more details on this proactive measures checklist.

8. While some municipalities may require inspections or approval from a building official or other municipal representative, the Existing Building Code provides (as do most predecessor codes) that “[a]pproval as a result of an inspection shall not be construed to be an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction.” See 2018 International Existing Building Code, § [A] 109.1.

9. Converted apartment buildings sometimes have lower quality systems and materials and a higher risk of code violations than newer buildings, and may need significant work to ensure ADA compliance in common areas.

See “Conversion Conundrums—Challenges of Handling CD Claims on Projects Built as Apartments Later Converted to Condominiums” at 2, CLM 2016 Nat’l Claims Conf. (Sept. 28–30, San Diego, Cal.).

10. Several Colorado municipalities require that condo conversions comply with the current building code and impose minimum safety requirements. See, e.g., Pagosa Springs, Colorado Code of Ordinances, Ch. 21, § 2.4.3.E.3.a. (before “recording a subdivision plat that would convert an existing development to condominium units, the owner of such property shall . . . demonstrate that the project complies with the adopted building code and [that] . . . [a] minimum one-hour fire wall may be required between units as a condition of Town approval of any condominium plat involving a condominium conversion”); City of Cortez, Colorado Land Use Code § 6.12(a) (requiring condo conversions to “comply with the currently adopted city construction codes”). *Accord* Mancos, Colorado Municipal Code § 16-18-830; Buena Vista, Colorado Municipal Code § 17-26. Some municipalities require “a condominium conversion inspection report from the Building Official on the condition of the building, listing all building and fire code violations which are detrimental to the health, safety and welfare of the public, the owners and the occupants of the building.” Cripple Creek, Colorado Municipal Code § 17-9-30(b). *Accord* Alma, Colorado Municipal Code § 17-9-30(b). See also Fairplay, Colorado Municipal Code § 16-23-40(B) (“A subdivider proposing a condominium conversion shall provide a[n] . . . inspection report illustrating the building’s and all individual unit’s compliance with all building and fire code regulations.”).

11. See generally Sandgrund and Sullan, “Useful Life Evidence in Construction Defect Cases,” *The Construction Lawyer* (ABA Forum on the Construction Industry), vol. 27, no. 3 at 27-31, 50-51 (Summer 2007).

12. *Hepp v. United Airlines, Inc.*, 540 P.2d 1141, 1143 (Colo.App. 1975) (contractually-shortened statute of limitations enforceable if prescribed time period for bringing claim is reasonable).

13. CRS § 13-20-806(7)(a) (any limitation on a residential property owner’s ability to enforce certain legal rights, remedies, or damages “within the time provided by applicable statutes of limitation or repose are void as against public policy.”).

14. *Broomfield Senior Living Owner, LLC*, 413 P.3d 219.

15. CRS § 13-21-111.5(6)(a)(I).

16. See generally *Weitz Co. v. Mid-Century Ins. Co.*, 181 P.3d 309, 312-15 (Colo.App. 2007) (discussing history of and limitations on additional insured provisions).

17. See generally Blum, Annot., “Construction and Application of ‘Wrap-up’ Insurance Policies and Exclusions,” 24 *A.L.R.7th* 4 (Thomson Reuters 2017); Nolan and Lahiri, “Wrapping Up Conflicts: Avoiding Conflicts Under Wrap Policies,” 56 No. 6 *DRJ For Def.* 56 (June 2014).

18. Regarding such subcontracts, see generally Dow, “Mitigation of Construction Defect Liti-

gation—Top 10 Construction Contract Issues,” Holland & Hart Construction Law Blog (Apr. 18, 2017), [www.hhconstructionlaw.com/2017/04/mitigation-of-construction-defect-litigation-top-10-construction-contract-issues.html](http://www.hhconstructionlaw.com/2017/04/mitigation-of-construction-defect-litigation-top-10-construction-contract-issues.html).  
19. CRS § 13-20-602.

20. For SPEs, strict compliance with corporate formalities, bulk sale, and capitalization requirements is necessary to mitigate potentially lingering alter ego, corporate veil piercing, and similar exposures. Moreover, SPE principals and employees may be subject to personal liability for their own tortious acts and omissions under *Hoang v. Arbess*, 80 P.3d 863 (Colo.App. 2003). And critically, where a parent company exercises significant control over, or acts in concert with, a subsidiary SPE, the parent company risks a court imposing joint and several liability for the subsidiary’s tortious conduct. See *Resolution Tr. Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995) (CRS § 13-21-111.5(4) imposes joint and several liability on tortfeasors who act in concert); *Gold Peak Homeowners Ass’n v. Gold Peak at Palomino Park, LLC*, No. 2010CV3106, 2012 WL 8898470 (Douglas Cty. Dist. Ct. Feb. 15, 2012) (denying summary judgment against claim that parent company and subsidiary-developer entity acted in concert negligently).

21. See Magee et al., “Surge in Apartment Construction Fuels Condo Conversions, Liability Concerns in Denver,” [www.mondaq.com/unitedstates/x/751952/Building+Construction/Surge+In+Apartment+Construction+Fuels+Condo+Conversions+Liability+Concerns+In+Denver](http://www.mondaq.com/unitedstates/x/751952/Building+Construction/Surge+In+Apartment+Construction+Fuels+Condo+Conversions+Liability+Concerns+In+Denver).

22. See generally Sandgrund et al., “The Homeowner Protection Act of 2007,” 36 *Colorado Lawyer* 79 (July 2007). Similarly, passage of Colorado’s anti-indemnity statute occurred partly because large developers and general contractors were requiring broad boilerplate indemnity from their subcontractors, causing the legislature to conclude that “[c]onstruction businesses in recent years have begun to use contract provisions to shift the financial responsibility for their negligence to others, thereby circumventing the intent of tort law,” necessitating an anti-indemnity law “[to] ensure fairness among businesses.” CRS § 13-21-111.5(6)(a).

23. Some ADR provisions include claim forfeitures if arbitration is not initiated shortly after a failed mandatory mediation. This strategy may run afoul of the HPA’s statute of limitation and remedies/damages waiver protections and CIOA’s unconscionability prohibitions, and be preempted by CDARA III, CRS § 38-33.3-303.5.

24. Various versions of “arbitration fairness laws” have been offered in the legislature over the years.

25. Some counsel have tried to shift responsibility in the CCR to individual unit owners for certain maintenance normally deemed a common expense, such as for a roof spanning multiple townhome units, in an attempt to defeat direct legal action by the HOA on standing grounds. This approach may conflict with CIOA’s common ownership scheme and its unconscionability prohibitions.



26. See, e.g., McClain, "Risk Management for Condominium Conversions," Colorado Construction Litigation Blog (June 12, 2013), [www.coloradoconstructionlitigation.com/2013/06/risk-management-for-condominium.html](http://www.coloradoconstructionlitigation.com/2013/06/risk-management-for-condominium.html).
27. See Sandgrund et al., *Residential Construction Law in Colorado* § 9.1.2, "Shaw Construction, LLC v. United Builder Services, Inc.: Multi-Building, Multi-Party Construction" (CLE in Colo., Inc. 6th ed. 2018) (discussing whether repose statute should be applied on a contractor-by-contractor, unit-by-unit, building-by-building, project-as-a-whole, or other basis in multi-family developments).
28. See Rhody, "Defining 'Substantial Completion' in Construction Defect Actions," 27 *Colorado Lawyer* 73 (Oct. 1998) (discussing difficulties in determining substantial completion date for rehabilitated and renovated structures and "superpads"); *Shaw Constr., LLC v. United Builder Servs., Inc.*, 296 P.3d 145 (Colo.App. 2012) (under case-specific facts, repose period began when builder asserted indemnity claims against subcontractors that worked on the last building in a multi-building project, after that building's certificate of occupancy issued), *overruled on other grounds by Goodman v. Heritage Builders, Inc.*, 390 P.3d 398 (Colo. 2017).
29. Moriarty and Bielan, "Litigating Residential Real Estate Disputes in Massachusetts Part II: Claims Involving Real Estate Transactions" § 8.2.1 (Mass. CLE, Inc. 2014) ("As such claim is not premised on an improvement to real property, but is instead premised on the declarant's unilateral decision to change the form of ownership of real property (most likely from an apartment to a condominium), the statute of repose should not apply.").
30. See, e.g., *Fairways at Buffalo Run Homeowners Ass'n v. Fairways Builders, Inc.*, No. 2016CV30393, slip op. at 7-8 (Adams Cty. Dist. Ct. Apr. 17, 2017) (repose statute does not apply to misrepresentation and Colorado Consumer Protection Act claims based on developer's failure to disclose information relating to construction defects upon sale).
31. See *Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001) (claim for breach of warranty of repair not subject to real property improvement statute of limitations); *Horosz v. Alps Estates, Inc.*, 642 A.2d 384 (N.J. 1994) (performance of negligent repairs starts statute of limitations anew as to damages arising from the repair).
32. See CRS § 13-80-104(3), which provides that the statute's limitations "shall not be asserted as a defense by any person in actual possession or control, as owner or tenant or in any other capacity" of the real property improvement when its deficiency proximately causes injury or damage. Cf. *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 764 S.E.2d 203, 215 (N.C.Ct.App. 2014) (discussing substantially similar North Carolina law, explaining that "the purpose of the exclusion is to impose a continuing duty to inspect and maintain on persons who, after having constructed an improvement, remain in possession and control over that improvement" (citations and internal quotations omitted)).
33. See *Muirfield at Lone Tree Homeowners Ass'n v. Summit Invs., Inc.*, No. 07CV1607 (Douglas Cty. Dist. Ct. May 15, 2008) (because developer held title to a multi-family development through a certain date, CRS § 13-80-104(3) precluded statutes of limitations and repose beginning to run before that date); *Muirfield at Lone Tree Homeowners Ass'n v. Summit Invs., Inc.*, No. 2011CV1178 (Douglas Cty. Dist. Ct. Jan. 26, 2012) (CRS § 13-80-104(3) precludes application of real property improvement limitations period where defendant had possession of property "at the time any deficiency in such an improvement constitutes proximate cause of the injury"), *aff'd in part, rev'd in part and remanded on other grounds, Muirfield at Lone Tree Homeowners Ass'n v. Summit Invs., Inc.*, No. 12CA2396, slip op. at 3-4 (Colo.App. Jan. 23, 2014) (not selected for official publication) (evidence concerning "ownership, possession and control" under CRS § 13-80-104(3) raised disputed fact question); *Dakota Ridge Vill. Condo. Ass'n v. Dakota Ridge Vill., LLC*, No. 09CV615 at \*6-7 (Boulder Cty. Dist. Ct. July 8, 2011) ("plain language" of CRS § 13-80-104(3) "bars Defendants from using the statute of repose until such time as the Project was formally turned over to the Plaintiff [HOA]"); *Cook v. Ironbridge Homes, LLC*, No. 10CV142 (Garfield Cty. Dist. Ct. Apr. 22, 2015) (statute of repose tolled pursuant to CRS § 13-80-104(3) while developer owned defective real property improvement alleged to have damaged plaintiffs); *Fairways at Buffalo Run Homeowners Ass'n*, No. 2016CV30393, slip op. at 15-16 (statute applied to a developer-declarant who controlled HOA before turning it over to its unit owners, but not to a general contractor who performed the construction work, because the contractor was not in actual possession or control of the property).
34. See CRS § 13-80-104(b)(1). Cf. *Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC*, 169 A.3d 473 (N.J. 2017) (if prior owner knew or reasonably should have known of basis for a construction-defect action, six-year limitations period began then, but factual disputes existed as to when those in the building complex's chain of ownership first knew or should have known of a cause of action).
35. Cf. *Vail Nat'l Bank v. Finkelman*, 800 P.2d 1342, 1344-45 (Colo.App. 1990) (agent not presumed to communicate his or her knowledge to principal when acting in agent's own interests and against principal's interests, citing *Am. Nat'l Bank v. Miller*, 229 U.S. 517 (1913)). Estoppel principles may apply under these circumstances as well.
36. A "wrap" policy, also known as an owner-controlled construction insurance program, "enables a construction company owner or contractor to protect his or her business and various other contractors involved in a construction project under one policy." Aligned Insurance, *Construction Insurance: The Advantages & Disadvantages of an Owner Controlled Construction Insurance Program (OCIP)*, [www.alignedinsuranceinc.com/construction-insurance](http://www.alignedinsuranceinc.com/construction-insurance). Such programs have their own strengths and weaknesses.
37. These terms are described more fully in Part 1 of this article, Sandgrund et al., "Mitigating Potential Condo Conversion and Renovation Construction Defect Liabilities: Part 1," 48 *Colorado Lawyer* 28, 29 (Apr. 2019).
38. See generally Handfinger and Evans, "Managing Construction Risk Through Commercial General Liability Insurance," *Practical Law Practice Note* 8-574-8645 (Thomson Reuters 2019).
39. Order on Pending Motions, *Gold Peak at Palomino Park LLC v. Westchester Surplus Lines Ins. Comp.*, No. 2012CV112 at 3 (Douglas Cty. Dist. Ct. Feb. 3, 2014).
40. Complaint, *Allied World Assurance Co. v. Gemini Ins. Co.*, Index No. 655878/2018 at 112 (N.Y.App.Div. Nov. 27, 2018).
41. See, e.g., *Am. States Ins. Co. v. Delean's Tile & Marble, LLC*, 319 P.3d 38, 41 (Wash.App. 2013).
42. *Gold Peak at Palomino Park, LLC*, No. 2012CV113 at \*3.
43. *Cal. Traditions, Inc. v. Claremont Liab. Ins. Co.*, 127 Cal. Rptr. 3d 451 (Cal.App. 2011). See also *Atain Specialty Ins. Co. v. N. Bay Waterproofing, Inc.*, No. 14-cv-04056-RMW, 2015 U.S. Dist. LEXIS 11404 (N.D.Cal. Jan. 30, 2015) ("Total Residential Construction" exclusion applied, eliminating coverage for property damage to "any condominium, townhome, single family dwelling and other residential or tract housing project."); *W. Heritage Ins. Co. v. Jacobs Dev. Corp.*, No. 12-CV-5718, 2014 WL 297792 at \*5 (E.D.N.Y. 2014) (condo exclusion eliminates coverage because insureds were constructing a new condo building).
44. Bruner and O'Connor, Jr., *supra* note 3 at § 11:253.
45. *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co.*, 27 Cal. Rptr. 2d 841 (4th Dist. 1994) (under 1973 CGL policy, exclusion was inapplicable to developer's construction defect liability where it purchased property after construction was completed and then converted property to condos and transferred common area ownership to condominium association).
46. See, e.g., *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 307 (Colo. 2003) (where a negligent misrepresentation is made to the buyer of a mine, and the buyer becomes liable for clean-up costs associated with pollution from a mine, the misrepresentation is sufficiently connected to the property damage caused by the pollution to trigger coverage under a CGL policy); *Hoang v. Monterra Homes (Powderhorn), LLC*, 129 P.3d 1028 (Colo.App. 2005) (builder's negligent misrepresentation and nondisclosures constitute an "occurrence"), *rev'd on other grounds, Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo. 2007).



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