

# The Construction Defect Action Reform Act of 2003

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**In 2003, the Colorado legislature amended and expanded the Construction Defect Action Reform Act to accelerate its effect, decrease construction defect litigation, and reduce the costs of insuring construction professionals. The amendments restrict damages available to property owners against construction professionals arising from construction defects and false, misleading, and deceptive business practices under Colorado's Consumer Protection Act.**

In 2001, the General Assembly passed the Construction Defect Action Reform Act ("CDARA I"), which was intended to limit wasteful and frivolous lawsuits.<sup>1</sup> CDARA I was the result of a historic compromise involving homeowners, developers, and insurance companies. The development and insurance industries subsequently worked to amend and expand substantial portions of CDARA I.

As part of a wave of "construction defect" legislation in the United States,<sup>2</sup> amendments to CDARA I went into effect with the passage of House Bill 03-1161 ("CDARA II" or the "Act").<sup>3</sup> CDARA II applies to residential, commercial, and government property owners, and is effective as to all actions filed on or after April 25, 2003.<sup>4</sup> The primary goals of CDARA II are to: (1) limit litigation, while preserving property owners' rights; and (2) stabilize the cost of insurance products for construction professionals.<sup>5</sup>

This article reviews the significant changes wrought by CDARA II, including pre-suit "notice of claim" procedures, limitations on remedies that may negate negotiated contractual provisions, and restrictions on recoverable damages. The article also examines potential problems that may arise as a result of the new legislation.

## CDARA II Definitions

CDARA II contains many definitions critical to applying its provisions, including some unique concepts not adopted or explored by other states. Because many CDARA II provisions contravene the common law, they may be narrowly construed and restricted to their specific terms.<sup>6</sup> Such a cautious construction of CDARA II makes sense because an expansive reading of its limitations on the rights of property owners and others injured by construction defects could have unexpected and unintended consequences.<sup>7</sup> In construing CDARA II, courts likely will be mindful of its overriding intent to "preserv[e] adequate rights and remedies for property owners who bring and maintain [construction defect] actions."<sup>8</sup>

The newly defined terms are set out in CRS § 13-20-802.5. Following is a discussion of those terms, as well as an analysis of several important issues arising from the definitions.

## Construction Professional

CRS § 13-20-802.5(4) defines a "construction professional" as an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the

construction of any improvement to real property.<sup>9</sup>

In the case of commercial property, a construction professional also includes any prior *owner* of the commercial property at the time the work was performed, excluding the claimant. "Commercial property" is any property zoned to permit commercial, industrial, or office uses.<sup>10</sup>

### Action

"Action" means a civil action or arbitration for damages, indemnity, or contribution brought against a construction professional that asserts any claim for damages, loss to or loss of use of real or personal property, or personal injury caused by a design or construction defect in an improvement to real property.<sup>11</sup> Historically, undeveloped land, including subdivided lots, has not been considered an "improvement to real property."<sup>12</sup> It is not clear whether CDARA II applies to a failure to repair or maintain real property if it results in the creation or maintenance of a defective condition.<sup>13</sup>

### Actual Damages

As defined in CRS § 13-20-802.5(2), "actual damages" means *the lesser of the*: (1) fair market value of the real property without the alleged construction defect; (2) replacement cost of the real property; or (3) reasonable cost to repair the alleged construction defect, together with "relocation costs." For residential property only, actual damages also include

other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law.<sup>14</sup>

CDARA II does not address how to assess damage to property that has no reasonably ascertainable fair market value. For example, this might include claims brought by governmental entities for repairs to historical or similarly unique properties damaged by construction defects or by homeowner associations ("HOAs") as to repairs to common elements.<sup>15</sup> Where the fair market value is not readily determinable, courts likely will be asked to set the "actual damages" cap at the lower of the replacement cost of the real property or the reasonable cost to repair the alleged construction defect, plus any "relocation costs" and other statutorily-recoverable damages. This result would be consistent with the stated purpose of CDARA II: to preserve "adequate rights and remedies

for property owners who bring and maintain" construction defect actions.<sup>16</sup>

CRS § 13-20-802.5(2) also defines "actual damages" as to "personal injury," which are damages recoverable by law, except as limited by CRS § 13-20-806(4). This latter statute limits damages for noneconomic loss or injury or derivative noneconomic loss in an action asserting personal injury (and, presumably, bodily injury)<sup>17</sup> to \$250,000, if the action arose as a result of a construction defect.<sup>18</sup> This cap is to be adjusted for inflation as of July 1, 2003, and as of July 1 of each year thereafter, until 2008, when the adjustment inexplicably ends.<sup>19</sup> Claims for personal or bodily injury as a result of a construction defect may not be trebled under the deceptive and misleading trade practices prohibition contained in the Colorado Consumer Protection Act ("CCPA").<sup>20</sup>

The definition of "actual damages" raises a number of issues. The following discussion addresses some of those matters.

**Punitive Damages:** Construction professionals may argue that punitive damages no longer are available against them because such damages are not expressly included within the definition of "actual damages." Such an interpretation of CDARA II raises equal protection concerns and tends to subvert the public policies underlying CRS § 13-21-102, Colorado's exemplary damages statute.<sup>21</sup> Punitive damages are not insurable in Colorado. Thus, construction professionals likely will face an uphill battle arguing that one of the primary purposes of CDARA II, which was to open insurance markets to construction professionals, is served by exempting them from the application of the punitive damage statute.<sup>22</sup>

**Additional Damages:** Because the Act makes a clear distinction in the definition of "actual damages" as to the specific, additional damages recoverable "with respect to residential property [only],"<sup>23</sup> construction professionals may argue that their liability for both tort and contract damages for commercial property is limited to the least of the amounts set out in CRS § 13-20-802.5(2), plus "relocation costs." As such, construction professionals may assert that other losses (including loss of profits, delay damages, pre-judgment interest, and attorney fees) no longer are recoverable—even if such damages are provided for by contract or applicable statute.<sup>24</sup>

**Damage to Improvements Under Construction:** CDARA II does not address whether its provisions apply to claims involving real property improve-

ments damaged during the course of construction work, if such damage is discovered before the work is substantially completed.<sup>25</sup> Disputes may arise as to whether CDARA II applies to structures under construction. The purchase of builder's risk coverage may help limit such disputes where the parties to a construction project have mutually agreed to insure the risk of such damage and waive all claims among them relating to the loss.<sup>26</sup> Builder's risk insurance will not eliminate these types of disputes because the policies typically contain exclusions for poor workmanship and contractual noncompliance.

### Claimant

"Claimant" is defined as a "person other than the attorney general or the district attorneys of the several judicial districts of the state who asserts a claim against a construction professional that alleges a defect in the construction of an improvement to real property."<sup>27</sup> (*Emphasis added.*) "Person" should be interpreted to include legal entities; otherwise, the reach of CDARA II could be avoided simply by taking title in the name of a holding entity or through a trust.

The attorney general and district attorneys of Colorado were specifically excluded from CDARA II in the definition of a "claimant"<sup>28</sup> so as to allow them to pursue civil and criminal enforcement actions under the CCPA without subjecting them to the "notice of claim" and related provisions of CDARA II that may delay the action or limit recoverable damages.<sup>29</sup>

### Notice of Claim

"Notice of Claim" means a claimant's written notice sent to the "last known address" of a construction professional that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the [alleged, defective] construction . . . and any damages claimed. . . .<sup>30</sup>

Because there are no details in CDARA II regarding "last known address," the cautious property owner and practitioner will send the notice of claim to all addresses that might qualify as the "last known address" of the construction professional.

The requirement that the notice describe the claim in reasonable detail raises a number of issues.<sup>31</sup> Claimants frequently cannot identify all construction defects during the course of a pre-suit investigation or early in a lawsuit because additional defects or damages may be discovered

or arise during the course of a lawsuit. Destructive testing or invasive inspection intended to uncover certain kinds of defects and damages often does not occur until after suit is filed and opposing counsel has an opportunity to be present.

Moreover, as the parties' forensic investigation develops, new or different "causes" of observed problems may be revealed. Many types of damage from construction defects are progressive, such as those that flow from expansive soils, slope instability, inadequate moisture-barrier controls, and prematurely deteriorating building products. Conducting the most thorough evaluation of these problems closer to the expert disclosure deadlines often is most economical, which is especially appealing to property owners and HOAs with limited funds. Even if the cost of the forensic investigation will be advanced by counsel under a contingency fee agreement, that investigation cannot begin before suit is filed, and the investigation may take several months to complete.<sup>32</sup>

Actual receipt of any notice required by CDARA II by any means of a written notice, offer, or response within the time pre-

scribed for delivery or service is deemed sufficient delivery or service.<sup>33</sup> This portion of CDARA II elevates substance over form by permitting delivery of required papers by means other than certified mail or personal delivery, as long as there is proof such papers are actually received by the other party. This "actual receipt" requirement also may satisfy any need for a claimant to meet the service requirement on the construction professional's responsible principals,<sup>34</sup> employees, subcontractors, and design professionals, if the construction professional shares notice with, or forwards it to, a third party.

Such transmittal of the claimant's notice, or the substantive sharing of that information by the construction professional, may become routine practice in the industry. That would help safeguard a construction professional from facing a lawsuit by a claimant while not being able to join potentially liable third parties, such as subcontractors, because the construction professional failed to provide the requisite pre-suit notice of its own to the third party. Moreover, by providing notice, the construction professional can take advantage

of the statute of limitations and repose tolling provisions of CRS § 13-20-805 against the third party.

### **Notice of Claim Process Is Mandatory Pre-Suit**

CRS § 13-20-803.5 sets forth a detailed pre-suit notice of claim process ("NCP"). The NCP requires that before filing an action against a construction professional, the claimant must send or deliver a written notice of claim to the construction professional (1) no later than seventy-five days for residential property; or (2) no later than ninety days in a case involving commercial property. Such notice may be sent by personal service or by certified mail, return receipt requested.<sup>35</sup>

The NCP requires property owners and construction professionals to confer, exchange information, and attempt to resolve potential defect claims before suit is filed. If an action is filed before the NCP is completed, or the process itself is not substantially satisfied, the court may stay the action until the NCP is satisfied.<sup>36</sup> Failure to comply with the NCP is not a jurisdic-

tional prerequisite, so failing to comply with the NCP should not extinguish otherwise meritorious claims.

### **Property Inspection**

Following the mailing or delivery (presumably "delivery" refers to personal service) of the notice of claim, the construction professional may request reasonable access to the claimant's property during normal working hours to inspect the claimed defect.<sup>37</sup> Whether such "reasonable access" has been provided may be a contested issue, particularly if relations between the parties already are strained or if providing access is complicated due to a homeowner's schedule or security concerns.

Where someone other than the property owner gives notice of claim, he or she may have no practical ability to allow or arrange for access to the property. For example, if a general contractor gives notice to a potentially liable subcontractor of an indemnity claim, the general contractor does not have authority to provide access to the property. However, this problem may be partially alleviated by a CDARA II provision that requires the claimant to provide access to "the construction professional and its contractors and other agents."<sup>38</sup> The Act does not address whether more than one inspection is permitted or whether invasive or destructive testing is allowed.

### **Response to Notice of Claim: Offer to Pay or Make Repairs**

Within thirty days after completion of the inspection process for residential property (forty-five days for commercial property), a construction professional may submit an offer to resolve the claim by paying a sum certain or by agreeing to "remedy" the claimed defect described in the notice of claim. Such offer may be delivered by personal service or sent by certified mail, return receipt requested.<sup>39</sup> A written offer to remedy the construction defect must include: (1) a report of the scope of the inspection; (2) the findings and results of the inspection; (3) a description of additional construction work necessary to remedy the defect described in the notice of claim, as well as to remedy all damage to the improvement to real property caused by the defect; and (4) a timetable for completing the remedial construction work.<sup>40</sup> As set forth below, a number of issues may arise.

**Warranty Issues:** Situations involving "ordinary warranty service" are excluded from the NCP.<sup>41</sup> CDARA II offers courts little guidance on how to determine what

matters involve "ordinary warranty service," as that phrase is used in the Act. This could prove problematic if a construction professional later argues that such warranty work was intended to constitute an "offer" to make repairs<sup>42</sup> and the performance of the work should constitute: (1) settlement of a "claim," rather than simply the performance of "ordinary warranty service"; or (2) performance of a statutory responsibility to make the repair once the offer to do the work is agreed to by the property owner.

It also is unclear whether courts will recognize an implied warranty that the offered repair will solve the problem at hand. Residential property owners may argue that many justifications for implying certain warranties with regard to the sale of a new home apply equally to repairs under CDARA II. Under such reasoning, property owners may contend that a "warranty of adequate repair" should be recognized.<sup>43</sup>

**Investigation Issues:** Where a construction professional fails to disclose adequately to a claimant material information gleaned from an investigation conducted pursuant to the NCP, the efficacy and reach of any ensuing release may be called into question. For example, suppose that during an investigation an unscrupulous construction professional discovers serious or latent deficiencies and damages requiring significant repair costs, but fails to reveal this information to the claimant. He or she then could offer to pay a minimal monetary amount rather than an amount adequate to cure the problem.

CDARA II does not address whether a construction professional owes a duty to disclose the findings of the investigation to the claimant if only an offer to make a monetary payment is made, as opposed to an offer to remedy. This lack of clarity is troubling, due to the frequent disparity in knowledge and sophistication between the parties.<sup>44</sup> Property owners are almost certain to argue that the benevolent purposes of CDARA II are best served if a construction professional is required to disclose the findings of the investigation to the claimant when an offer to settle by monetary payment is extended. They also may argue that every construction professional who receives the findings of another construction professional's investigation pertaining to the structure must disclose such findings to the claimant.

To enhance the chances that the purposes of CDARA II will be fulfilled, the investigation needs to be reasonably adequate in scope and depth to determine the

cause of the observed or reported defect and needs to be reasonably understandable. However, CDARA II is sure to result in more, not less, construction defect litigation if construction professionals unduly truncate their investigations, fail to perform necessary diagnostic tests, deliver reports that are misleading or contain material omissions, fail to discuss the pros and cons of various repair alternatives, or deliver reports that are not written in a way that a typical homeowner can understand them.

Because of the critical role the investigation report likely will play in a claimant's decision whether to accept the payment, the homeowner will foreseeably rely on the report.<sup>45</sup> It is unknown whether the lack of contractual privity between the claimant and an investigating engineer (who is not the construction professional in question) would bar a claim by the property owner against the investigating engineer.<sup>46</sup>

**Release of Claims:** The courts must determine whether the payment by a construction professional releases all claims arising from defects "generally" described by a homeowner in the notice of claim or serves as an accord and satisfaction of a disputed debt. In other contexts, Colorado courts have refused to construe a release broadly without some evidence that the injured party knowingly intended to provide such a release.<sup>47</sup>

Property owners may seek judicial protection from unanticipated consequences flowing from their acceptance of an offer to pay. This would apply if the construction professional had reason to believe that serious defects underlie the notice of claim but, instead, simply makes an ostensibly "reasonable" offer to pay so as to avoid being charged with actual knowledge of problems that are significantly costlier to repair.<sup>48</sup>

Property owners can seek this protection by asking courts to void or reform unduly broad releases. A construction professional may seek protection from such liabilities by drafting and presenting to the property owner papers that describe in plain English the scope of the released claims that are the subject of the payment, after making full disclosure of all the facts relevant to the release.

CDARA II appears to offer the construction professional and claimant the ability to modify the NCP if

*after* the sending of a notice of claim, a claimant and a construction professional . . . by written mutual agreement, al-

ter the procedure for the notice of claim process. . . .<sup>49</sup> (*Emphasis added.*)

However, a construction professional who attempts to subvert the purposes of CDARA II may be exposed to liability under the Colorado Consumer Protection Act ("CCPA"). Similarly, a written release may be voided or limited on public policy grounds. The courts likely will scrutinize practices and policies that tend to undermine the NCP, particularly if grounded in misrepresentation or nondisclosure.

### ***Claimant's Response***

A claimant's acceptance of a construction professional's offer to repair a construction defect or to resolve the claim by payment of a sum certain, must send a written acceptance no later than fifteen days after receipt of the offer.<sup>50</sup> If the claimant fails to accept an offer in writing within fifteen days of the delivery, the offer is deemed rejected.<sup>51</sup>

If an offer to pay is accepted, the payment must be made in accordance with the offer.<sup>52</sup> If the claimant accepts an offer to remedy, the repairs are to be completed in accordance with the timetable set forth

in the offer, unless the delay is caused by events beyond the reasonable control of the construction professional.<sup>53</sup>

If the construction professional makes no offer or the claimant rejects an offer, the claimant may bring an action against the construction professional for the construction defect described in the notice of claim. However, such an action cannot be brought if the parties have contractually agreed to a mediation procedure. In such case, that procedure must be satisfied before the claimant may file suit.<sup>54</sup>

### ***Noncompliance with Accepted Offers***

If the construction professional does not comply with the accepted offer, without further notice, the claimant may file an action against the construction professional for claims arising out of the defect or damage described in the notice of claim.<sup>55</sup> CDARA II suggests that the claimant may choose between suing for breach of the promise to repair or for all claims for relief available had no promise to repair been extended.<sup>56</sup> Frequently, disputes arise during the repair process. Thus, in litigation

relating to partial or defective performance of the accepted offer, construction professionals are likely to allege noncooperation on the part of property owners.

### ***Amendment of Notice of Claim***

A claimant may amend a notice of claim (presumably as often as necessary) to include construction defects discovered after service of the original notice of claim. However, the claimant must comply with the NCP as to amended claims.<sup>57</sup> With such amendments, it is unclear whether the process must start anew, or just apply to the newly added claims. Efficiency and common sense suggest the latter; construction professionals may argue the former. If notices of claim are not construed broadly once litigation is commenced, greater court delays may occur as the parties litigate the technical issue of the sufficiency and breadth of the notice and ancillary NCPs are ordered with regard to "straggler" claims.

### ***Vertical Party Problems***

A homeowner who gives notice of a claim to a developer automatically trig-

gers the NCP and its associated deadlines as to the developer. If the developer then gives notice to the general contractor, this will again trigger the NCP and its attendant deadlines as to the general contractor. The number of notices, and associated deadlines, cascades if the general contractor then gives notice to some of its subcontractors and they, in turn, give notice to their respective sub-subcontractors. In such a situation, various deadlines will expire at different times for the parties involved.

If the notice involved is given by an HOA on a large, multi-family project involving phased construction, with numerous subcontractors providing services over time, the NCP could create an expensive and time-consuming headache. If suit follows and all potentially liable parties are to be joined in one action, the automatic stay provisions of CDARA II will require that certain claims be stayed pending completion of the NCP as to such claims. This may result in significant delays in moving cases through the system, the refusal to allow the joinder of third parties if it will significantly delay the main action, or the severance of claims against the third parties.

## Limitations on Bringing Negligence Claims

CDARA II amended CRS § 13-20-804 to provide:

No negligence claim seeking damages for a construction defect may be asserted in an action if such claim arises from the failure to construct an improvement to real property in substantial compliance with an applicable building code or industry standard; except that such claim may be asserted if such failure results in one or more of the following: (a) Actual damage to real or personal property; (b) Actual loss of use of property; (c) Bodily injury or wrongful death; or (d) A risk of bodily injury or death to, or a threat to the life, health, or safety of, the occupants of the residential real property.

Before CDARA II, CRS § 13-20-804 applied only to residential structures. Its scope was expanded so that it now applies to both residential and commercial improvements to real property, at least as to claims for actual damage to or the actual loss of use of real or personal property. However, although CDARA II generally eliminated the distinction between residential and commercial property,<sup>58</sup> it did not make this distinction in CRS § 13-20-

804(1)(d). Thus, it is unclear whether leaving the word "residential" in that subsection was an oversight or intentional. If intentional, such distinction could give rise to an equal protection challenge by commercial property owners.

CDARA I allowed recovery in negligence for "actual or probable damage to" and "actual or probable loss of the use of" real or personal property arising from a failure to construct an improvement to real property in substantial compliance with a building code or industry standard.<sup>59</sup> CDARA II eliminated the modifier "probable," presumably to prevent proof of a defect and damage in one multi-family unit from substituting for proof of an actual defect and damage in similarly constructed units.<sup>60</sup> This change likely will be read in conjunction with the Act's addition of the definition of "actual damages," which references a property owner's ability to recover "the reasonable cost to repair the alleged construction defect."<sup>61</sup>

Exceptions to the narrow prohibition of CRS § 13-20-804 on the assertion of certain negligence claims exist in several situations. These include: (1) negligence claims not arising out of a failure to build in conformance with an applicable building code or industry standard; (2) tort claims other than negligence claims; (3) contract or warranty claims; and (4) claims arising from the violation of any statute or ordinance other than violation of a building code.

## Tolling of Statutes Of Limitations

If a notice of claim is sent to a construction professional in accordance with the NCP within the prescribed time for filing an action under any applicable statute of limitations or repose, the statute is tolled until sixty days after the completion of the NCP.<sup>62</sup> The NCP may drag on while promised repairs are being arranged and made or due to delays caused by forces outside the construction professional's control. The NCP also may be delayed because multiple or amended notices of claim are submitted or simply because the parties have agreed to extend the process. Thus, the tolling period may significantly extend both the statutes of limitations and repose.

Existing Colorado case law expressly approves of the tolling of limitations periods when a builder, contractor, or other construction professional gives assurances to homeowners about remedying alleged construction defects.<sup>63</sup> Under CDARA II,

handwritten notes left at construction trailers, e-mails, and other forms of delivery may satisfy initiation of the notice of claim provisions of CDARA II sufficient to toll the statute of limitations.<sup>64</sup> As mentioned earlier, there must be proof of actual receipt of such notice by the construction professional.<sup>65</sup>

A construction defect often may involve an owner-claimant, developers, builders/general contractors, various subcontractors, and each of their respective liability insurers. To further the legislative intent of limiting premature, cumulative, and otherwise unnecessary litigation, courts may interpret the CDARA II tolling provisions to toll *all* claims until all aspects of the NCP have run their course, whether the NCP was instituted by the claimant, construction professional, or others in the construction-defect chain.

## Limitation on Damages

A claimant generally may not recover more than actual damages in an action.<sup>66</sup> Further, an "action" is limited to proceedings against "construction professionals." Others who may be liable for injuries to real property improvements likely are not afforded the procedural protections of CDARA II and cannot assert its "actual damage" limitation on their liability. These persons may include material suppliers, neighboring landowners, HOA board members, service companies, and product manufacturers.

A construction professional is liable only for actual damages, unless the claimant prevails on a claim that a CCPA violation has occurred. Following a CCPA violation, to recover an amount in excess of actual damages, the claimant must establish that, exclusive of costs, interest, and attorney fees, any one of the following has occurred:

1. The construction professional's monetary offer to settle a claim for a sum certain (made pursuant to CRS § 13-20-803.5(3)) is less than 85 percent of the amount awarded to the claimant as actual damages.
2. The reasonable cost (as determined by the trier of fact) to complete the construction professional's offer to remedy (pursuant to CRS § 13-20-803.5(3)) is less than 85 percent of the amount awarded to the claimant as actual damage sustained.
3. The construction professional did not substantially comply with the terms of an accepted offer to remedy or to settle the claim, or the construction

professional failed to respond to a notice of claim.<sup>67</sup>

When a court decides that a jury must determine whether a CCPA violation has occurred, the court may not allow disclosure to the jury that an offer of settlement or offer to remedy was made under CDARA II that the claimant did not accept.<sup>68</sup> CDARA II does not explain how a jury can determine whether the reasonable cost of the statutory offer to repair is less than 85 percent of the actual damages sustained if the jury is not told of the offer to remedy. The aggregate amount of treble damages and attorney fees awarded under the CCPA<sup>69</sup> may not exceed \$250,000 against a construction professional.<sup>70</sup>

In cases involving personal and bodily injury, the common law definitions of "personal injury" and "bodily injury" should control; these definitions were well-settled and known to the General Assembly when it crafted CDARA II.<sup>71</sup> The amount of such personal and bodily injury claims is limited only by CRS § 13-20-806(4). (See "CDARA II Definitions," *above*, which discusses the meaning of "actual damages.")

CDARA II was passed after CRS § 13-21-102.5, a statute that caps noneconomic damage recoveries for personal injuries.<sup>72</sup> Thus, courts may find that the General Assembly intended to supersede some or all of the noneconomic damage caps provided by CRS § 13-21-102.5 in cases of construction defects. There are many differences between the two statutes. Recoverable damages are limited during the first year following passage of CDARA II to \$250,000. In contrast, the original \$250,000 damages limit under CRS § 13-21-102.5 has been adjusted for inflation since January 1, 1998, so it now is significantly higher than \$250,000.

CDARA II applies an inflationary adjustment to the initial \$250,000 cap that ends in 2008, while the inflationary adjustment under CRS § 13-21-102.5 continues indefinitely. The initial \$250,000 cap can be increased by the court to \$500,000 under CRS § 13-21-102.5, if justified by clear and convincing evidence. No similar provision appears in CDARA II. Finally, CRS § 13-21-102.5 provides that it shall not "be construed to limit the recovery of compensatory damages for physical impairment or disfigurement."<sup>73</sup> No such language is found in CDARA II.

Because of CDARA II, the damages recoverable by a personal injury claimant may now differ if he or she slips in a puddle due to rain that was not mopped up, rather than slips in a puddle that accumu-

lated due to defective and dripping pipes. This distinction should be kept in mind by the personal injury lawyer when drafting a premises liability complaint; it also raises equal protection concerns because of the differing treatment certain slip and fall tort victims receive under CDARA II.

In addition, it is not clear how CDARA II will be harmonized with the Landowner Liability Act.<sup>74</sup> Reasonable arguments can be made that CDARA II should be limited to defects arising from the initial construction of an improvement to real property for which the property owner or its representative is legally liable. Nonetheless, although the Landowner Liability Act generally relates to defects arising from a failure to properly maintain or repair land or an improvement to real property, this distinction may not control. In the case of an otherwise irreconcilable conflict between the two laws, some or all of CDARA II may take precedence over the Landowner Liability Act because CDARA II was passed later in time.<sup>75</sup>

### Effect on Written Warranties

The construction and sale of many structures, particularly new homes, frequently is accompanied by the issuance of express, written warranties. CDARA II addresses its inter-relationship with express warranties by providing that its provisions are not intended to abrogate or limit the provisions of any express warranty.<sup>76</sup> Although

CDARA II applies to actions including a claim for breach of warranty, the Act's provisions do not require a claimant who is the beneficiary of an express warranty to comply with the notice provisions of CRS § 13-20-803.5 when requesting "ordinary warranty service in accordance with the terms of such warranty."<sup>77</sup> "Ordinary warranty service" is not defined by the statute. A claimant who requires such warranty service still must comply with the provisions of the express warranty.<sup>78</sup>

### Issues Arising from CDARA II

CDARA II has brought sweeping changes to the long-standing development of common law construction defect claims. As such, the Act raises many questions that may be brought to the courts for resolution. These matters include potential constitutional infirmities and a number of practical problems, discussed below.

#### Constitutionality

The constitutionality of many parts of CDARA II are likely to be challenged. For example, CDARA II treats damages recoverable by residential and commercial property owners differently. The question whether such treatment violates equal protection likely will turn on whether any rational basis exists for this distinction.<sup>79</sup> Similarly, a reasonable basis should be articulated for CDARA II's differing treatment of the liability of construction profes-

signals versus all other persons potentially liable under the CCPA or the common law for causing bodily or personal injury to tort victims. If such a basis cannot be established, an argument that this aspect of CDARA II violates the equal protection clause may succeed.<sup>80</sup>

A statute violates the constitutional prohibition against improper retrospective legislation if: (1) it takes away or impairs vested rights acquired under existing laws; or (2) for transactions or considerations already past, creates a new obligation, imposes a new duty, or attaches a new disability.<sup>81</sup> If intended by the General Assembly, legislation can be given retroactive effect without being unconstitutional; however, statutes are presumed prospective in their application.<sup>82</sup> The retroactive effect of some or all of the provisions of CDARA II, such as its limitation on various damages remedies, may render it unconstitutional under some circumstances.

Courts may be asked to address questions raised by the CDARA II requirement that, as a condition to maintaining suit, property owners must allow the construction professional reasonable access to the property for purposes of inspection. For example, this could result in people being on the property without court supervision. These individuals could be potentially hostile, if not outright dishonest or dangerous, such as the notorious "travelers' repair gangs."<sup>83</sup> Property owners may argue that such requirement is unconstitutional as a denial of due process, an invasion of a person's right of privacy, or a temporary "taking" of their property. The "taking" argument gains more weight if the construction professional wants to conduct a destructive or invasive inspection.

CDARA II simply requires that a construction defect suit that is brought prematurely be stayed. Thus, aggrieved property owners may be able to seek court assistance regarding any objectionable property inspections. They may be able to do so by seeking partial relief from the stay so that the court may supervise the NCP.

### **Insurance Carriers**

Other potentially perplexing issues raised by CDARA II include the Act's effect on the obligations of an insured construction professional to provide timely notice of claims to its liability or errors and omissions insurance carrier. In addition, it is not clear how the NCP interacts with the standard proscription in a typical insurance policy against voluntarily assuming obligations relating to potential claims for

which the insured may seek indemnity from its insurer. This "notice" problem will grow if the matter involves an owner-claimant, developer, builder/general contractor, various subcontractors, and each of their respective liability insurers.<sup>84</sup> Courts likely will be asked to harmonize the CDARA II NCP with these standardized insurance notice of "occurrence" and claim provisions.

Among other issues, a notice of claim may serve as the functional equivalent of a legal complaint and, thus, may trigger some or all of an insurer's duty to defend, duty to indemnify, and implied covenant of good faith and fair dealing.<sup>85</sup> Even if these notices are not considered complaints, if a liability insurer fails to become involved in the NCP following notice, the ramifications of such conduct are uncertain. At a minimum, an insurer's refusal could undermine the entire NCP because the construction professional may not wish to jeopardize the insurance coverage by taking unilateral action without an insurer's consent.

### **Public and Private Contracts**

Another likely area of dispute may involve the effect of CDARA II on public works contracts, in light of the requirement that only *after* sending a notice of claim may a claimant and construction professional alter the notice of claims process by mutual, written agreement.<sup>86</sup> The "express warranty" exception to the NCP set out in CRS § 13-20-807 in some instances may help mitigate this problem. However, particularly if a construction professional's negligence causes actual property damage, the notice of claim in many situations will include matters that are not covered under express warranty.

CDARA II recognizes the existence of parallel claims processes: one for express warranty claims as provided by contract and a statutory scheme for all other claims.<sup>87</sup> However, where both kinds of claims are asserted, courts may be asked whether the separate notice of claims processes must be followed or, whether to reduce confusion and to foster efficiency, the statutory scheme should control.

### **Contractual Provisions Limiting Recoverable Damages**

It is not clear whether the CDARA II "actual damages" remedy available to a claimant voids a construction professional's contractual limitation on or bar to that remedy. For example, a construction profes-

sional could attempt to disclaim implied warranties or include an exculpatory clause or pre-suit waiver of certain damages in his or her construction contract.

In gauging the efficacy of such a contractual limitation, courts will be asked to consider the fact that CDARA II represents a grand compromise of the longstanding rights and remedies of property owners and construction professionals. The courts likely will do this with an eye toward allowing insurers to more accurately evaluate their risks and exposures, while "preserving adequate rights and remedies for property owners who bring and maintain [construction defect] actions."<sup>88</sup> In light of the background to this legislation, strong arguments exist that any attempt by a construction professional to limit the CDARA II "actual damages" remedy (other than as to express warranty claims), as opposed to augmenting such remedies, is void as violative of Colorado's public policy.

### **Emergencies and Duty to Mitigate**

A particularly troubling problem concerns what actions a claimant must or may properly take where emergency measures are necessary to protect property from further injury before the NCP has been commenced or completed. For example, suppose a fire breaks out in a home due to an electrical wiring error and a claimant extinguishes the fire instead of watching the property burn to the ground (out of fear of jeopardizing a claim against the responsible construction professional). Surely courts will fashion a "necessity" or "reasonable mitigation" exception to blind adherence to the NCP requirements.

However, the above hypothetical presents an easy case. Consider the case where a claimant incurs significant costs to mitigate a toxic mold, a friable asbestos release, or an underground water intrusion problem to protect the claimant or others from imminent or potential health concerns before the NCP has run its course. Further, it is not clear what a claimant should do where an exclusion in its property insurance policy voids coverage when reasonable steps are not taken to mitigate a loss. Prompt, clear guidance on how property owners should react in light of the passage of CDARA II is not found in the Act.

### **Surety Relationships**

The effect of CDARA II on the obligations on parties involved in public and pri-

vate surety relationships is uncertain. The typical construction defect claimant ordinarily does not have direct rights of action on the surety bond. Thus, sureties generally will look first to the principal (construction professional) to address and resolve problems arising from construction defects with the owner or developer, usually with the assistance of their liability or builder's risk insurers.<sup>89</sup>

### **Personal Injury and Bodily Injury Claims**

Other questions that are likely to arise under CDARA II pertain to personal injury and bodily injury claims. These include the following: (1) whether persons claiming personal or bodily injury, such as toxic mold exposure or burns from a fire resulting from faulty wiring, must participate in an NCP; (2) if so, whether they must join their injury and property damage claims in one action; and (3) whether the claimants must defer instituting their injury claims until the NCP is completed as to their property damage claims.

### **Effect on Class Action Suits**

It is not clear what effect the adoption of CDARA II will have on class action cases. Arguably, if strict compliance with the NCP is required on an owner-by-owner basis, a failure of each prospective class member to exhaust the NCP process may serve to defeat class certification, because the NCP creates individualized compliance issues. In analogous contexts, courts are divided on whether certain pre-suit notice or conciliation mechanisms impair the ability of a representative plaintiff to bring a class action.<sup>90</sup>

## **Conclusion**

Colorado residential, commercial, and public property owners, including utility and ditch companies, construction professionals, and their respective legions of attorneys, are entering a brave new world of construction defect litigation. In the short term, CDARA II will weigh down the courts with new issues to resolve. Only experience will reveal whether CDARA II achieves its professed intent of reducing the amount of unnecessary construction defect claims and litigation, and allowing liability insurers greater certainty in setting reasonable premiums.

## **NOTES**

1. For a detailed discussion of CDARA I, see Sandgrund, Sullan, and Achenbach, "The Con-

struction Defect Action Reform Act," 30 *The Colorado Lawyer* 121 (Oct. 2001).

2. See, e.g., California Senate Bill 800, effective Sept. 22, 2002 (often referred to as the "Right to Repair" bill; legislates most aspects of construction defect disputes), Cal.Civ.Code §§ 896 (building standards) and 900 *et seq.* (notice and claim procedures); Stewart and Huchting, "Builders Repair at Your Own Risk: Why California's New Construction Defect Legislation (Senate Bill 800) Makes Alternative Dispute Resolution More Important Than Ever," *Mealey's Litig. Report (Construction Defects)* Vol. 3,

No. 11, pp. 22-26 (Dec. 2002). In 2002, Washington adopted many CDARA I provisions with little change; see, e.g., Wash.Rev.Code §§ 64.50.030 (requiring filing list of construction defects); 64.40.030 (requiring notice to homeowners by HOA's executive board of intent to file construction defect lawsuit). See also Wash.Rev.Code §§ 64.50.020 and 64.50.050 (allowing construction professional "right to offer to cure").

3. H.B. 03-1161, codified at CRS §§ 13-20-802, -802.5, -803, -803.5, -804, -805, -806, and -807; signed by the Governor on April 25, 2003.

4. H.B. 03-1161 at §§ 6 and 7.

5. During debate on H.B. 03-1161, the causes of instability in the contractors' and developers' liability insurance market were hotly debated.

6. See *Ryals v. St. Mary-Corwin Reg. Med. Ctr.*, 10 P.3d 654, 661 (Colo. 2000).

7. See Sullan and Sandgrund, *Residential Construction Defect Litigation* § 13.3 (Seattle, WA: Elton-Wolf, 2000) at 229 ("Legislating the complex area of the law relating to the respective rights and obligations of builders and homeowners, which affects the lives of so many people and industries, almost surely will be ill-conceived with many unfair and unintended results."). Because CDARA II is broadly written, courts may have to deal with creative arguments that claims arising from a plane hitting a defectively constructed power line, or claims arising from seepage from a defectively built underground gasoline tank that pollutes a neighbor's property, are subject to the Act.

8. CRS § 13-20-802 (legislative declaration).

9. CDARA II amended the "initial list of defects" provisions of CRS § 13-20-803. The term "construction professional" slightly broadens the categories of persons that previously were the subject of § 803 by adding the words "sub-contractor" and "developer." For CRS § 13-20-803 to apply, however, the underlying claim still must arise from the "design, supervision, inspection, construction or observation of the construction of an improvement to real property." CDARA II also effectively amended the word "action" as used in CRS § 13-20-803 by replacing it with the slightly broader defined term "action," which includes claims for damages, loss to, or the loss of use of personal property as well as real property.

10. By defining the term "construction professional" in CDARA II, the General Assembly probably did not intend to broaden the types of defendants for whom a "certificate of review" must be obtained, pursuant to CRS § 13-20-602, before suit may be brought against them. CRS § 13-20-602 applies only to claims against "licensed professionals" that require expert testimony; the definition of "construction professional" includes many persons who need not be licensed or against whom claims may be asserted that do not require expert testimony. See CRS § 13-20-802.5(4) (defining "construction professional"); *Baumgarten v. Copping*, 15 P.3d 304 (Colo. 2000) (scope of CRS § 13-20-602).

11. CRS § 13-20-802.5(1).

12. *Calvaresi v. Nat'l Dev. Co.*, 772 P.2d 640, 643 (Colo.App. 1988) (*cert. denied*) (developer's subdivision and sale of lots not activity within scope of construction of improvements to real property statute of limitations).

13. In analogous circumstances, courts are divided on whether statutes of limitations applicable to new construction also apply to repairs. See generally Sullan and Sandgrund, *supra*, note 7 at § 9.1.9, 110-11 n.410. Cf. *Hersh Cos. v. Highline Village Assocs.*, 30 P.3d 221 (Colo. 2001) (contractors' statute of limitations does not apply to claim for breach of express warranty to repair or replace defective work;

CRS § 13-80-101, the statute of limitations for contract actions, applies because repairs done pursuant to "warranty of repair" not within scope of CRS § 13-80-104).

14. CRS § 13-20-802.5(2). Although some portions of the definition of "actual damages" describe a "cap" that likely needs to be raised as an affirmative defense to a construction defect damage claim, other portions contain descriptive limitations on the types of recoverable damages (e.g., "other direct economic costs related to loss of use"), which may or may not constitute an affirmative defense.

15. Applying "diminution of value" to claims brought by an HOA for damage to common elements presents serious conceptual problems. An HOA owns the common elements under the Colorado Common Interest Ownership Act ("CCIOA"), CRS §§ 38-33.3-101 *et seq.* However, the HOA has no practical right or ability to sell damaged "common elements" because it holds this property in trust for the benefit of its unit owners. Moreover, the HOA is legally obligated to maintain and repair the common elements. See CRS §§ 38-33.3-302(1)(f) and -307(1). The courts likely will be called on to harmonize the HOA's statutory duty to maintain and repair with the CDARA II "value of the property" damage cap. Placing a "fair market value" on common elements arguably contradicts the entire "common ownership" scheme under CCIOA. One district court found this argument compelling, holding that no market value exists for the HOA's common areas because these elements lack any separate value or functional purpose other than as a complement to each individual unit. See *Townhomes at Coal Creek Homeowners Ass'n, Inc. v. Club Homes Dev. Corp. et al.*, No. 99 CV 1936 (Boulder Cty. Dist. Ct. Oct. 4, 2002), Ruling and Order, at 2. Public entities and utilities may argue the impracticality of applying the CDARA II "value of the property" damage cap to unique improvements, such as power lines, roads, and historic buildings.

16. CRS § 13-20-802 (legislative declaration).

17. Although CRS § 13-20-802.5(2) refers only to "personal injury," the statute cross-references CRS § 13-20-806(4), which refers both to "personal" and "bodily" injury.

18. CRS § 13-20-806(4)(a). The \$250,000 cap does not appear to apply to economic loss because the statute says that "such damages" shall not exceed \$250,000, and the phrase "such damages" modifies the phrase "noneconomic loss or injury or derivative noneconomic loss or injury." Personal injury counsel should note that CRS § 13-20-806(4)(a) cross-references CRS § 13-21-102.5(2), which latter statute distinguishes damages for noneconomic loss or injury or derivative noneconomic loss or injury from "damages for physical impairment or disfigurement." CRS § 13-21-102.5(5).

19. CRS § 13-20-806(4)(b) through (d).

20. CRS § 13-20-806(5).

21. "... [T]he jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages." (*Emphasis added.*) CRS § 13-21-102. Property owners

could harmonize CDARA II with the exemplary damages statute by arguing that CDARA II provides a restricted definition of "actual damages" as to claims against construction professionals for use in conjunction with CRS § 13-21-102, but that the jury retains the ability to award exemplary damages "in addition to the actual damages."

22. See *Lira v. Shelter Ins. Co.*, 913 P.2d 514 (Colo. 1996).

23. CRS § 13-20-802.5(2).

24. "Commercial property" is defined in CRS § 13-20-802.5(4). Although the definition may be limited in application to that subsection, it may be argued that such definition should be applied whenever the distinction between commercial and residential property is relevant to the application of CDARA II.

25. The interaction of CDARA II with various persons' rights and obligations under the Colorado mechanics' lien statute, CRS §§ 38-22-101 *et seq.*, is beyond the scope of this article.

26. The form of builder's risk policies most commonly employed in Colorado insures the interests of the property owner, general contractor, and subcontractors on the project under construction. Often, these policies dovetail with waivers of claim or subrogation provisions in both the policy and construction contract. Cf. *1700 Lincoln, Ltd. v. Denver Marble & Tile Co.*, 741 P.2d 1270 (Colo.App. 1987) (public policy prohibits builder's risk insurer from subrogating against own insured); *Town of Silverton v. Phoenix Heat Source Sys.*, 948 P.2d 9 (Colo.App. 1997) (waiver of subrogation provisions placed defendants essentially in position of co-insureds on town's property insurance policy only with respect to damages to work).

27. CRS § 13-20-802.5(3).

28. *Id.*

29. Cf. CRS §§ 6-1-107 to -112 (discussing such enforcement actions and recoveries). CCPA enforcement actions may be brought in the name of the state of Colorado or the local county employing the person who brought the action, rather than the attorney general or a district attorney. Therefore, courts may be asked to construe CRS § 13-20-802.5(3) broadly to effectuate the General Assembly's intent.

30. CRS § 13-20-802.5(5).

31. See CRS § 13-20-803, which requires service of an initial defect list early in a lawsuit.

32. During the drafting of CDARA II, one reason given for adopting its pre-suit notice of claim process was to lessen the need for homeowners to consult with lawyers by allowing a construction professional the chance to "do the right thing" during the notice of claim process ("NCP"). However, the complicated NCP provisions in CDARA II may have the opposite effect. Moreover, CDARA II will not dissuade sophisticated builders from consulting with experienced counsel to develop practices and documents for use during the NCP that seek to limit or impair an unwary consumer's rights and claims.

33. CRS § 13-20-803.5(11).

34. Cf. *Hoang v. Arbess*, 32 Colo.Law. 173 (Colo.App. No. 02CA0417, *ann'd* 4/10/03) (June

2003) (circumstances when builder's principal may be held personally liable for negligent construction, negligent misrepresentation, and violation of Soils Disclosure Statute and Consumer Protection Act).

35. CRS § 13-20-803.5(1).

36. *Cf.* CRS § 13-20-803.5(9).

37. CRS § 13-20-803.5(2).

38. *Id.*

39. CRS § 13-20-803.5(3).

40. *Id.*

41. CRS § 13-20-807.

42. *E.g.*, an "offer" under CRS § 13-20-803.5(3).

43. *See, e.g., Cosmopolitan Homes, Inc. v. Well-er*, 663 P.2d 1041, 1045 (Colo. 1983) ("The ordinary purchaser of a home is not qualified to determine when or where a defect exists. . . . [A]n experienced builder who erected and sold many houses is in a far better position to determine the structural condition of a house. Even if a buyer is sufficiently knowledgeable to evaluate a home's condition, he rarely has access to make any inspection of the underlying structural work, as distinguished from the merely cosmetic features.").

44. *Id.*

45. Investigating engineers and others would be wise to insist that if another construction professional retains them to conduct an authorized investigation under CDARA II and prepare a statutorily-required report of findings and conclusions, certain things should be spelled out. At a minimum, the other construction professional should clearly state the scope and purpose of, and cost authorization for, the investigation, and agree to indemnify and hold harmless the investigator against claims arising from alleged deficiencies in and claims arising from such work. *See* C.J.I.4th 9:3A and 9:3B (pattern jury instructions describing elements of negligent misrepresentation resulting in property damage and economic loss, respectively). *Cf. Kellogg v. Pizza Oven, Inc.*, 402 P.2d 633 (Colo. 1965) (architects who made negligent misrepresentations regarding cost to construct building were liable in negligence for economic damages).

46. On one hand, requiring such privity would reduce litigation against investigating engineers, furthering one purpose of CDARA II. On the other hand, requiring investigating engineers to stand behind their investigations and reports would significantly enhance the benevolent purposes of the Act's NCP and settlement processes, and also reduce the chances of later litigation due to an inadequate investigation or repair plan. Courts will need to weigh these opposing considerations in deciding whether an investigating engineer bears potential liability to a property owner for deficient or misleading investigatory reports.

47. *See Cingoranelli v. St. Paul Fire and Marine Ins. Co.*, 658 P.2d 863 (Colo. 1983) (scope of release determined primarily by intent of parties as expressed in release instrument, considered in light of nature of claim and objective circumstances underlying execution of instru-

ment), *superseded on other grounds by statute as stated in Neves v. Potter*, 769 P.2d 1047 (Colo. 1989).

48. This scenario is most likely to occur with regard to a particular defective construction element or product believed or known to be common to many homes.

49. CRS § 13-20-803.5(8).

50. CRS § 13-20-803.5(5).

51. CRS § 13-20-803.5(4).

52. *Id.*

53. CRS § 13-20-803.5(5).

54. CRS § 13-20-803.5(6) provides that suit cannot be brought before satisfying the contractually prescribed mediation procedure. If such an action is prematurely brought, a stay of the action, rather than dismissal, is proper under CDARA II, CRS § 13-20-803.5(9). Such a stay tolls any statutes of limitations or repose in the interim and is consistent with the overall legislative intent to preserve "adequate rights and remedies for property owners who bring and maintain" construction defect actions. CRS § 13-20-802.

55. CRS § 13-20-803.5(7).

56. *Id.*

57. CRS § 13-20-803.5(10).

58. CRS § 13-20-804(1).

59. CRS § 13-80-804(1)(a) and (b), as effective before April 25, 2003.

60. Builders and insurers complained during the hearings on H.B. 03-1161 that certain lawyers were bringing "tear-down" suits, that is, suits based on tearing down the interior drywall and exterior cladding on a single, multi-family living unit, identifying defects and damage in the exposed construction elements, and then having their expert witnesses "extrapolate" from this evidence that all units "probably" suffer from the same defect and damage.

61. CRS § 13-20-802.5(2).

62. CRS § 13-20-805.

63. If an owner establishes that a defendant undertook to repair a defect and, either expressly or impliedly, promised or represented that such repairs would remedy the defect, and the owner reasonably relied on the same and did not file suit, the limitations period of the statute is tolled until the date the defendant abandoned its repair efforts. *See Highline Village Assocs. v. Hersh Cos.*, 996 P.2d 250 (Colo.App. 1999), *rev'd in part, aff'd in part, Hersh Cos., supra*, note 13 (rationale underlying repair doctrine endorsed; requiring party to initiate suit while repairs being made "would promote unnecessary litigation, in turn compromising business relationships and burdening the courts with unripe claims filed by parties seeking to comply with the contractors' statute of limitations"). *Cf. Curragh Queensland Mining Ltd. v. Dresser Indus., Inc.*, 55 P.3d 235 (Colo.App. 2002) (no rejection of repair doctrine in *Hersh Cos.*; endorsement of its underlying purposes). *See also Kniffin v. Colorado W. Dev. Co.*, 622 P.2d 586 (Colo. App. 1980) (*cert. denied*) (where developer promised to perform obligations within reasonable time, statute of limitations did not run until efforts abandoned). For a detailed and thoughtful discussion of the many doctrines (*e.g.*, equitable estoppel, equitable tolling, repair doctrine, and extended repair doctrine) that may serve to extend the limitations period in Colorado, *see Village Point Townhomes at Breckenridge v. Wooden Ski Corp.*, No. 99 CV 188 (Summit Cty. Dist.Ct. April 23, 2002), Order.

64. CRS § 13-20-803.5(11).

65. *Id.*

66. CRS § 13-20-806.

67. CRS § 13-20-806(1) and (2).

68. CRS § 13-20-806(6). Many courts hold that a jury is not to be informed of the potential trebling of its damages award pursuant to

statute. *See, e.g., Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972) (trial court erred in informing jury damages trebled pursuant to anti-trust statute). Public policies underlying the CCPA and deterrent effect of its treble damages and attorney fees provisions resemble effect of similar provisions in U.S. anti-trust laws; *see Lexicon-Ancira Real Estate Fund 1972 v. Heller*, 826 P.2d 819, 822 (Colo. 1992) (public policies underlying CCPA treble damages and attorney fee awards).

69. CRS § 6-1-113(2)(a) and (b).

70. Property owner counsel may seek to recover attorney fees in excess of this \$250,000 cap by pursuing such fee claims under the terms of the construction or purchase contract or other statutes, such as the CCIOA, CRS § 38-33.3-123(1) ("For each claim . . . to enforce the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award to the party prevailing on such claim the prevailing party's reasonable collection costs and attorney fees and costs incurred in asserting or defending the claim.").

71. *See, e.g.,* CRS § 13-21-101 (prejudgment interest statute applicable to claims for "personal injury"). *See also Miller v. Carnation*, 564 P.2d 127 (Colo.App. 1977) (*cert. denied*) (types of "personal injury" subject to pre-judgment interest from date of filing of the complaint under CRS § 13-21-101).

72. CRS § 13-21-102.5 applies to claims for "noneconomic loss or injury," meaning "nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life." *See* CRS § 13-21-102.5(2) (b).

73. *See* CRS § 13-21-102.5(2), (3), and (5). The provisions of subsection CRS § 13-21-102.5(4), limiting disclosure of the caps to the jury, are absent from CDARA II.

74. CRS § 13-21-115 (Landowner Liability Act).

75. *Id.* "In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances exist-

ing on such property, the landowner shall be liable only as provided in . . . this section." (*Emphasis added.*) *See Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1221 (Colo. 2002) ("landowners include individuals or entities who are authorized agents or persons in possession, and include individuals or entities who are legally conducting an activity on the property or legally creating a condition on the property"). *See also Dawson v. Reider*, 872 P.2d 212 (Colo. 1994) (special statute preempts general statute; later statute is given effect over earlier statute); *People v. Cooper*, 27 P.3d 348 (Colo. 2001) (fundamental responsibility of Supreme Court to give effect to General Assembly's purpose in enacting statute beginning with statutory language if that language not unambiguous; if statute conflicts with other provisions, court may rely on other factors, such as legislative history or prior law).

76. CRS § 13-20-807.

77. *Id.*

78. *See id.*

79. Generally, a statute will not be found to violate equal protection guarantees if it is reasonable and bears a rational relationship to a legitimate state objective. *See Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (rejecting equal protection challenge to damage caps in Health Care Availability Act as denying equal protection to tort victims). This "rational" basis can include a desire to reduce insurance premiums; *see State v. DeFoor*, 824 P.2d 783 (Colo. 1992); *Allstate Ins. Co. v. Feghali*, 814 P.2d 863 (Colo. 1991); *Charlton v. Kimata*, 815 P.2d 946 (Colo. 1991); *Bloomer v. Boulder Cty. Bd. of Comm'rs*, 799 P.2d 942 (Colo. 1990), *overruled on other grounds by Bertrand v. Bd. of Cty. Comm'rs of Park Cty.*, 872 P.2d 223 (Colo. 1994); *Bushnell v. Sapp*, 571 P.2d 1100 (Colo. 1977).

80. Under the rational basis standard of review for "non-suspect" classifications of persons not involving a fundamental right, a statutory classification will withstand an equal protection challenge if it bears a rational relationship to legitimate governmental objectives and is not unreasonable, arbitrary, or capricious. A classification analyzed under the rational basis standard is presumed constitutional; the party challenging the classification bears the

burden to establish its unconstitutionality beyond a reasonable doubt. If any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist. *See HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879 (Colo. 2002).

81. *Shell Western E&P, Inc. v. Dolores Cty. Bd. of Comm'rs*, 948 P.2d 1002 (Colo. 1997).

82. *See* CRS § 2-4-202.

83. "Travelers' repair gangs" are mobile home repair teams, comprised of hustlers, con artists, grifters, and the like, that show up after natural disasters such as hail storms.

84. Although these notice requirements conceivably could lead to an administrative nightmare for insurers, courts often do not require an insured to give notice of ordinary express warranty and punch-list matters to their liability carriers. *See Traverse, Hoang et al. v. Monterra Homes (Powderhorn), LLC v. Assurance Co. of Amer. et al.*, Case No. 99 CV 2425 (Jefferson Cty. Dist.Ct. Nov. 13, 2002), "Findings of Fact, Conclusions of Law, Order, and Judgment on Plaintiffs' (*appeal pending*). *Cf. Colard v. American Family Mut. Ins. Co.*, 709 P.2d 11, 15 (Colo.App. 1985) (*cert. denied*) (insured's reasonable belief of no coverage based, in part, on insurance agent's statements, excused late notice).

85. *Cf. Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 615 (Colo. 1999) (letter notice to "potentially responsible party" issued by EPA is functional equivalent of complaint against insured).

86. CRS § 13-20-803.5(8).

87. CRS § 13-20-807.

88. CRS § 13-20-802 (legislative declaration).

89. The authors thank Denver attorney Edgar Neel for his thoughts on the effects of CDARA II on surety agreements. A comprehensive discussion of how CDARA II affects public and private surety agreements is beyond the scope of this article.

90. *Cf. 8 Newberg On Class Actions* § 24:87 4th ed. (Eagan, MN: Thomson-West, 2002) at 349 (class representative must exhaust pre-suit administrative remedies, including conciliation process, before bringing discrimination class action claims). ■