



The Construction Defect Action Reform Act

by Ronald M. Sandgrund, Scott F. Sullan, and Marci Achenbach

In early 2001, real estate development and insurance industry interests sat down with homeowner representatives in an attempt to address concerns arising from a spate of recently filed multi-family residential construction defect lawsuits. Casting aside competing drafts of “curative” legislation that was more Draconian than palliative, the Construction Defect Action Reform Act (“CDARA”)¹ was crafted. Underscoring the depth of the consensus that led to its origin, CDARA was unanimously passed by the General Assembly, clearing both House and Senate committees without objection and only minor, technical amendments.² CDARA was signed into law by Governor Owens on April 19, 2001, and became effective as to all actions filed on or after August 8, 2001.

Two of the authors, giving voice to Colorado’s homeowners’ needs, along with experienced counsel drawn from the defense bar, worked with the sponsoring legislators to identify the development and insurance industries’ worries and fashion a narrowly drawn law designed to address specific concerns relating to multi-family construction defect legislation. Although intended to curb certain perceived abuses and to limit the incurrence of unnecessary defense costs, this new law ultimately was shaped to “preserv[e] adequate rights and remedies for property owners who bring and maintain such actions.”³

This article addresses the four broad concerns that CDARA was intended to address: creating a preliminary list of construction defects, limiting negligence claims founded solely on purely “techni-

cal” violations of a building code, amending the statute of limitations for reimbursement claims, and providing notice to homeowner association members of certain construction defect lawsuits. Further, the article discusses issues raised by CDARA and provides a case preparation checklist for practitioners.

Initial List of Construction Defects

One problem that CDARA addressed was the long delays that frequently occurred between the time multi-family construction defect suits were filed and the time that the plaintiffs identified the construction defects at issue. This delay sometimes led to uncertainty on the part of defendants as to the need to join third parties, conduct certain discovery, or retain particular experts. In addition, some insurers had difficulty evaluating and setting aside accurate and adequate “reserves.”

The first part of CDARA § 1, CRS § 13-20-803(2), addresses these concerns by requiring that the claimant file and serve an initial list of construction defects within sixty days after the commencement of the action or within such longer period as the court may allow in its discretion.⁴ The claimant may amend the initial list to identify additional construction defects as they become known.⁵ In no event may the court allow the case to be set for trial before the initial list of construction defects is filed and served.⁶ This disclosure requirement applies to any civil action or arbitration proceeding for

damages, indemnity, or contribution asserting a claim, counterclaim, cross-claim, or third-party claim for injury or loss to, or the loss of use of, any real property caused by an alleged defect in the construction of an improvement to the real property.⁷

This section applies to both residential and commercial construction activities.

The initial list of construction defects must contain a description of the construction that the claimant alleges to be defective.⁸ The purpose of the initial list is to apprise the sued parties of those aspects of construction at issue in the lawsuit and to provide them a starting point in identifying potentially liable persons for third-party joinder or nonparty designation. On the other hand, the statute is written in general terms, expressly permitting amendment of the initial list so that deficiencies in the list will not serve as a basis to dismiss or significantly delay the resolution of meritorious claims.

If a subcontractor or supplier is added as a party, the claimant making a claim against such a subcontractor or supplier similarly must file and serve an initial list of construction defects within sixty days after service of the claim on the subcontractor or supplier or within such longer period as the court may allow in its discretion.⁹ However, in no event may the filing of a defect list relating to claims against

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additional parties, such as subcontractors or suppliers, delay the setting of a trial date.¹⁰

Building Code Violations

Some multi-family construction defect negligence claims were grounded on what was perceived to be purely “technical” building code violations that gave rise to nothing other than speculative issues of ensuing injury, damage, or loss. Significant defense expenditures were incurred on matters that some in the building industry considered mere technical code violations that should not provide the basis for an extensive and expensive lawsuit.

This concern is addressed by the second part of CDARA § 1, CRS § 13-20-804(1), which provides that a negligence claim seeking damages for a residential construction defect may not be asserted if such claim arises solely from the failure to construct a residential improvement to real property in substantial compliance with an applicable building code or industry standard.¹¹ However, such a negligence claim may be asserted if such failure results in either: (1) actual or probable damage to, or the loss of use of, real or personal property, or actual or probable bodily injury or wrongful death; or (2) 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. CRS § 13-20-804(1)(a)-(d) was adopted in light of leading decisions handed down in Colorado and California relating to the “economic loss” and “independent duty” doctrines. These cases rejected negligence claims when, in the absence of an independent duty of care, only economic loss resulted from a breach of contractual duty without any accompanying property damage, loss of use of property, or bodily injury.¹²

Nothing in the second part of CDARA § 1, CRS § 13-20-804(1), is to be construed to prohibit, limit, or impair any of the following: (1) tort claims other than claims for negligence; (2) contract or warranty claims; or (3) claims that arise from the violation of any statute or ordinance other than claims for violation of a building code.¹³ This provision is important insofar as it recognizes that parties voluntarily may contract for broader circumstances of recovery than the common law permits. Also, it acknowledges that claims arising from statutory violations (such as Colorado’s Consumer Protection Act) or from misrepresentations or nondisclosures will not be barred simply because the resulting harm consists solely of mere economic loss. The second part of CDARA § 1, CRS

§ 13-20-804, applies only to residential, not commercial, structures.¹⁴

Changes to Statute Of Limitations for Reimbursement Claims

CDARA affects application of the statute of limitations for reimbursement claims in two ways. First, CDARA § 1, CRS § 13-20-803, provides for the early identification of the general areas of construction that are the subject of criticism (to the extent they are reasonably capable of identification early in the proceedings). Second, CDARA § 2, CRS § 13-80-104, amends the statute of limitations as it applies to reimbursement claims.

Builder-developers often deemed it prudent to implead all subcontractors as early as possible because of uncertainty as to which aspects of construction were the subject of the plaintiff’s claims. This was because Colorado’s real property improvement statute of limitations had been construed to negate the common law rule that a cause of action for contribution, indemnity, and reimbursement arising from construction defects did not accrue until settlement of or judgment on the underlying claim.¹⁵ The provision of an initial list of defects early in the case should help narrow the universe of potentially liable third-party defendants.

The amendment to the statute of limitations provides that with regard to all claims by a claimant against a person who may be liable to the claimant for any part of the claimant’s liability to a third person, including indemnity and contribution claims, the claim for relief arises at the time the third person’s claim against the claimant is settled or at the time final judgment is entered on the third person’s claim against the claimant, whichever comes first.¹⁶ The amendment further provides that such reimbursement claims shall be brought within ninety days after the claims arise and not thereafter.¹⁷

This ninety-day period appears to constitute a remarkably short limitation period for a defendant to investigate and commence a reimbursement claim and may, at first blush, raise due process concerns. However, the extended period effectively “piggy-backs” onto the two-year limitation period afforded an owner to commence suit against the party seeking reimbursement. Furthermore, the amendment allows an additional ninety days following settlement of or a final judgment on the owner’s claim for a defendant to commence a reimbursement suit. The defendant seek-

ing reimbursement presumably has control over when such a settlement will become effective and should have plenty of advance knowledge of the impending entry of a final judgment. Thus, from a practical standpoint, the ninety-day limitation period should afford a reasonable time for a party to analyze and commence a reimbursement lawsuit.

Notice to Homeowner Association Members

Some developers perceived that homeowner associations were precipitously instituting suit. The correctness of this assumption was challenged by homeowner association executive boards. CDARA § 3, CRS § 38-33.3-303.5, requires an executive board instituting an action asserting defects in the construction of five or more units under CRS § 38-33.3-302(1)(d) to mail or deliver written notice of the commencement or anticipated commencement of such action to each unit owner at the last known address described in the association’s records.¹⁸ This written notice should be sent before service of process on any defendant with respect to an action governed by CRS § 38-33.3-302(1)(d).

The notice should state a general description of the nature of the action and the relief sought, as well as the expenses and fees that the executive board anticipates will be incurred in prosecuting the action.¹⁹ The description of information to be included in the notice was substantially reduced from its original conception because of serious concerns about the following, among other issues: (1) the potential inadvertent waiver of confidentiality relating to litigation strategy and legal advice; (2) improper interference with the U.S. Supreme Court’s prerogative to control the form and content of contingency fee agreements and related disclosures; and (3) undue restraint on the ability of a duly elected Colorado Common Interest Ownership Act²⁰ (“CCIOA”) executive board to act take legal action that it deems to be in the best interests of its unit owner members.

The executive board must substantially comply with the provisions of CDARA § 3, CRS § 38-33.3-303.5(1)(b). The final draft of the bill eliminated the provision of any specific consequences resulting from a failure to comply with the disclosure requirement. The bill’s silence on this issue underscores the legislative consensus that was reached relating to the adoption of this section: while the disclosure requirement is designed to improve the level of

awareness on the part of CIOA unit owners as to litigation brought by the executive board, it is not intended to provide a defense to, or reason to stay, such a lawsuit by a defendant.

Further underlining the desire that the disclosure requirement be read narrowly so as to avoid unintended consequences, the new law provides that it is not to be construed to: (1) require the disclosure in the notice or to a unit owner of attorney-client or other confidential communications; nor (2) permit the notice to serve as a basis for any person to assert the waiver of any applicable privilege or right of confidentiality resulting from, or to claim immunity in connection with, the disclosure of information in the notice; nor (3) limit or impair the authority of the executive board to contract for legal services, or limit or impair the ability to enforce such a contract for legal services.²¹

Issues Raised by CDARA

Despite its near unanimous approval from both political parties and the various interest groups affected by this legislation, CDARA represents a compromise of competing concerns. This compromise is

reflected in certain limitations on its reach and its inclusion of some new and undefined terms. Among the many issues that the courts and practitioners will need to address under this new law are:

- 1) the retroactive effect of the Act's provisions, particularly its amendment to the statute of limitations for reimbursement claims;
- 2) equal protection concerns with regard to the limited application of the second part of CDARA § 1, CRS § 13-20-804, to the construction of residential, but not commercial, improvements to real property; and
- 3) whether experts will be needed to establish (a) the "probability" of damage to or the loss of use of real or personal property, bodily injury, or wrongful death, or (b) the existence of 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, under CDARA § 1, CRS § 13-20-804.²²

Practitioner's Checklist

Both plaintiff and defense counsel should incorporate the following into their

construction defect lawsuit case preparation checklists:

- 1) timely and proper notice to unit member owners in a common interest community of anticipated construction defect litigation before service of the complaint;
- 2) proper calendaring, preparation, and timely filing and service of an *initial* "List of Construction Defects";
- 3) timely amendment or supplementation of the "List of Construction Defects";
- 4) reference to compliance with CDARA in the "Case Management Order," particularly as to the trial setting;
- 5) early review of the initial "List of Construction Defects" and the identification and joinder or designation of others potentially liable for such defects, if appropriate;
- 6) calendaring, preparing, filing, and serving reimbursement claims against those potentially liable for such defects;
- 7) recognizing the potential ninety-day trigger for the statute of limitations on reimbursement claims on the set-

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tlement or entry of a final judgment on the underlying claims, and the uncertainty of the retroactive effect of the amendment on pre-existing reimbursement claims; and

- 8) careful attention to the pleading and proof of construction defect claims founded on building code violations that have not yet resulted in actual physical harm or loss of use.

While this checklist is neither exhaustive nor applicable to all cases, it should provide a starting point in creating a case-specific checklist.

Conclusion

The CDARA reflects several important and fundamental changes in Colorado's procedural and substantive law primarily relating to multi-family residential construction defect litigation. Court interpretation of CDARA likely will seek to fulfill the Act's manifest intent to effect "limited changes . . . necessary and appropriate [to] actions claiming damages, indemnity, or contribution in connection with alleged construction defects . . . while preserving adequate rights and remedies for property owners who bring and maintain such actions."²³

NOTES

1. H.B. 01-1166 (Colo. 2001), codified at CRS §§ 13-20-801 to -804, 13-80-104, and 38-33.3-303.5.

2. State Representative Joe Stengel and State Senator Joan Fitz-Gerald each sponsored H.B. 01-1166. Stengel; Fitz-Gerald; State Senator Tambor Williams, Chair of the House Business Affairs and Labor Committee; and State Senator Mark Paschall, member of the House Business Affairs and Labor Committee, were instrumental in encouraging interested parties in working toward the bill's amicable passage.

3. CRS § 13-20-802.

4. CRS § 13-20-803.

5. In crafting this law, the drafters recognized that: (1) it is not reasonably possible to identify all construction defects early in the litigation; (2) previously unknown defects may be discovered or arise during the course of the lawsuit; (3) destructive testing or invasive inspection intended to uncover certain kinds of defects often does not occur until after the suit is filed and opposing counsel is given an opportunity to attend; and (4) new or different "causes" of observed problems will be revealed as the parties' forensic investigation develops. In addition, most homeowner associations have limited funds available to them. Thus, they often choose to marshal their monies such that the bulk of a forensic investigation occurs closer in time to trial (such as when expert reports become due) rather than earlier, or even before suit is filed, when the results of the investigation may be later perceived as stale. Also, many types of damage resulting from construction defects are progressive, such as those that flow from expansive soils, slope instability, inadequate moisture-barrier controls, and prematurely deteriorating building products. It often is most economical to conduct the most thorough evaluation of these kinds of problems closer to the date that the expert disclosures are due. Finally, in some cases, the cost of the forensic investigation may be advanced by counsel retained pursuant to contingency fee agreement, so that investigation cannot begin much before suit is instituted, and the investigation may take several months to complete.

6. CRS § 13-20-803(3).

7. CRS § 13-20-803(1).

8. CRS § 13-20-803(2).

9. CRS § 13-20-803(4).

10. *Id.*

11. CRS § 13-20-804.

12. See *Town of Alma v. Azco Constr.*, 10 P.3d 1256 (Colo. 2000), adopting the "economic loss rule," now to be known as the "independent duty rule," and holding that a party suffering only economic loss damages *other than physical harm to persons or property* from the breach of an express or implied contractual duty may not assert a negligence claim for such breach absent an independent duty of care under tort law. *Town of Alma* distinguished the case be-

fore it from earlier cases, such as *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983), which recognized the existence of such an independent duty on the part of a builder who constructs a new home, and *Lembke Plumbing and Heating v. Hayutin*, 366 P.2d 673 (Colo. 1961) and *Consolidated Hardwoods, Inc. v. Alexander Concrete Constr., Inc.*, 811 P.2d 440 (Colo. App. 1991), both of which recognized similar independent duties of care on the part of subcontractors performing work on a home.

Compare *Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000) (homeowner associations and individual homeowners do not have private right of action in negligence against developers, general contractors, and subcontractors for recovery of purely economic losses sustained as a proximate result of construction defects in mass-produced housing, including violations of governing building codes that have not yet caused personal injury or physical damage to property other than the defectively constructed portions of the residential structures themselves), with *Kennedy v. Columbia Lumber & Manuf. Co., Inc.*, 384 S.E.2d 730 (S.C. 1989) (new home purchaser may hold builder responsible in negligence and warranty although builder did not sell home and damages suffered were of economic nature). Cf. *Iverson v. Solsbery*, 641 P.2d 314 (Colo.App. 1982) (costs expended by subsequent owners in bringing building into compliance with building code provided basis for establishing cause of action based on a breach of duty to subsequent owners not to construct or remodel in such a way that property was in direct violation of applicable code) and *Roper v. Spring Lake Dev. Co.*, 789 P.2d 484 (Colo.App. 1990) (breach of implied warranty damages allowed due to presence of foul odor; actual property damage not shown, but some loss of use assumed).

13. CRS § 13-20-804(2).

14. CRS § 13-20-804(1).

15. The Colorado Court of Appeals has construed the statute of limitations for indemnity and contribution claims arising from the construction of improvements to real property to be triggered at the time of manifestation of the defect that gives rise to such claims. This is true despite the fact this "may bar an indemnitee's cause of action even before the indemnitee's liability for compensation is finally determined and before the indemnitee makes any payment for the loss." *Nelson, Haley, Patterson & Quirk, Inc. v. Ganey Cos., Inc.*, 781 P.2d 153, 156 (Colo. App. 1989). In practice, some reimbursement claims were time-barred *even before* process was served providing first notice of the underlying claim to a defendant.

16. CRS § 13-80-104.

17. *Id.*

18. CRS § 38-33.3-303.5.

19. *Id.*

20. CRS §§ 38-33.3-101 *et seq.* CCOIA applies to the creation and operation of common interest communities in Colorado.

21. CRS § 38-33.3-303.5(3).

22. CRS § 13-20-804(a)-(c).

23. CRS § 13-20-802. ■

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