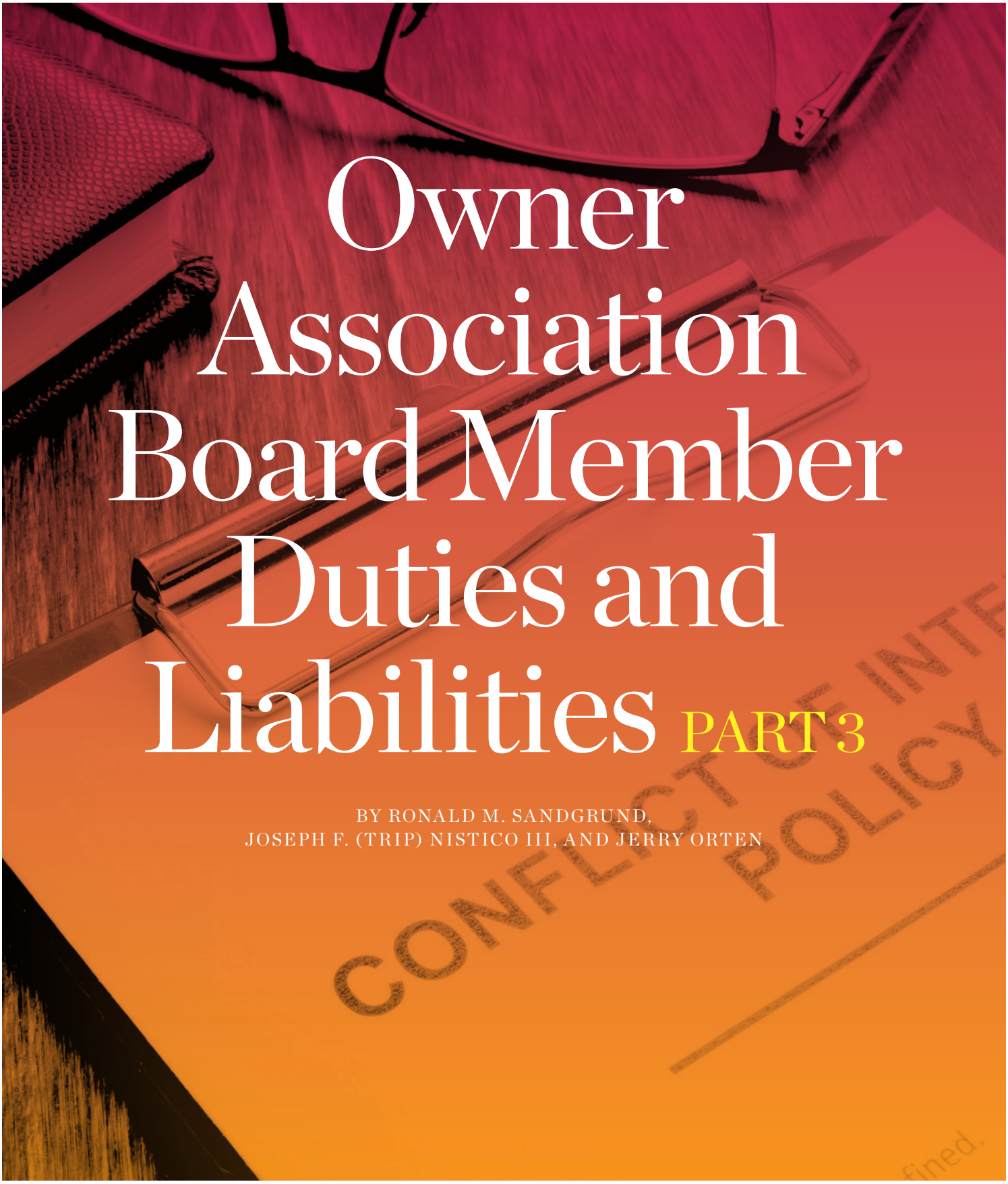

Owner Association Board Member Duties and Liabilities PART 3

BY RONALD M. SANDGRUND,
JOSEPH F. (TRIP) NISTICO III, AND JERRY ORTEN

This three-part article examines the relationships among developers, owner association board members, owner associations, and unit owners. This part 3 focuses on developers' potential liability for their own and their appointed association board members' misconduct, and proactive and mitigative measures available to limit developer-appointed and owner-elected board members' liability exposure.

In common interest communities[1] subject to Colorado's Common Interest Ownership Act (CCIOA), all owner association (association) board members owe legal duties to both the association and its owner-members (owners).[2] Courts carefully examine the conduct of association board members that the community's developer appoints while the developer controls the board (declarant control period)[3] because conflicts of interest may exist between the developer and its appointed board members and the association and its current and future owners.

This three-part article examines case law and articles addressing the relationships among developers, developer-appointed board members, owner-elected board members, associations, and owners that have been generated during the nearly 20 years since publication of an earlier *Colorado Lawyer* article on this topic.[4] Part 1 examined owner association board members' legal duties and potential liabilities, including how courts treat developer-appointed board members who serve during the declarant control period. Part 2 examined how courts have treated recurring board member conflicts of interest that may arise during the declarant control period.

This part 3 examines a developer's potential liability for its appointed board members' wrongful conduct. It explains how developers and appointed board members might carefully monitor and manage the community's development to recognize and address typical conflicts of interest. It also explores how to mitigate or limit board members' liability exposures through insurance and indemnity.

Developers' Roles and Responsibilities

A developer may wear many different hats, often simultaneously, while developing a community.[5] Initially, under CCIOA, the developer acts as "declarant," which is defined as "any person or group of persons acting in concert who: (a) As part of a common promotional plan, offers to dispose of to a purchaser such declarant's interest in a unit not previously disposed of to a purchaser; or (b) Reserves or succeeds to any special declarant right."[6]

The developer or its agent may create or promote the association or other entity created pursuant to CCIOA to manage the community's affairs.[7] The developer or affiliated entities may directly, or collaboratively with one or more other construction professionals, also provide design, construction, supervisory, inspection, and/or other services necessary for the planning, development, and construction of the community's real property improvements.[8] In conjunction with this development and construction, the developer may market and sell the units directly or through an affiliate or agent. The developer may also maintain and repair community improvements, either directly or through affiliated entities or agents. Further, a developer-controlled board may cause the association to contract with a third-party management company or agent to assist in association governance and operations, or the developer's staff may perform these services. The developer may also own, occupy, or use homes as display models or for other purposes, and qualify as an owner. Sometimes developer-appointed board members own units as well.

The developer typically controls the board during the initial buildout and sales phase.[9] The developer also usually appoints some or all of the initial board members, or effectively controls their actions, during the declarant control period.[10] As a practical matter, the developer often appoints board members who are its own employees or representatives and who were involved in the community's development, construction, and/or unit sales. However, the developer may also relinquish control over the board pursuant to CCIOA.[11]

A developer's disparate roles as promoter, developer, builder, marketer, vendor, manager, maintainer, appointor of directors, and owner implicate potential legal duties and liabilities. These varying roles also present opportunities to mitigate these risks.

Potential Liability of Developers Who Appoint Board Members

A developer's liability may attach directly to the developer for its own wrongful conduct. Liability may also be imputed to the developer for its appointed board members' wrongful conduct under various legal theories, including vicarious liability, statutory joint liability, and civil conspiracy liability.

Direct and Vicarious/Imputed Liability

In one unpublished case, *Countryside Community Ass'n v. Pulte Home Corp.*, a developer conceded that its employees who were serving as developer-appointed board members owed fiduciary duties to the owners,[12] yet it maintained that developers themselves do not owe such a duty and could not be held liable for its employees' violations of such duties. However, the Colorado Court of Appeals found "nothing to suggest that [CCIOA] section 303(2)(a) eliminated the doctrine of respondeat superior in this context"[13] and found the developer vicariously liable for its appointed board members' tortious conduct.[14]

Outside Colorado, several courts have imposed liability on developers and their appointed board members for acting against an association's interests during the declarant control period. The California Court of Appeal observed that, where a developer dominates

the association, fiduciary duty principles support holding "those exercising actual control over the group's affairs to a duty not to use their power in such a way as to harm unnecessarily a substantial interest of a dominated faction."[15] The court also imposed liability on a developer for its appointed board members' "failure to . . . exercise supervision which permits mismanagement or non-management . . . ."[16]

The Superior Court of Connecticut similarly held that a developer with the power to control the association's board members had a fiduciary duty to disclose roof defects to the association.[17] The court also held that the homeowners' allegations that the builder conspired with the developer to conceal roof defects—a violation of the developer's fiduciary duty to the association—were legally sufficient to present a claim for relief against the builder, even though the association did not allege that the builder was itself in a fiduciary relationship with the association.[18]

Statutory Joint ("Acting in Concert") Liability

CRS § 13-21-111.5(4) provides that "[j]oint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act." This statute has been construed to impose joint and several liability on two or more defendants under broader circumstances than where defendants engage in a civil conspiracy,[19] and it preserves common law acting-in-concert joint and several liability despite Colorado's adoption of the pro rata liability statute.[20]

In *Resolution Trust Corp. v. Heiserman*, the Colorado Supreme Court held that if two persons expressly or impliedly agree on a course of conduct, they are jointly liable for any damages flowing from conduct that results in a tortious act.[21] *Heiserman* further held that two or more tortfeasors may be jointly liable for their negligence *or breach of fiduciary duty* where an express or implied plan or design to act or refrain from acting results in injury to another, even if they did not intend to act tortiously.[22] Thus, joint liability under CRS § 13-21-111.5(4) can be based on wrongful conduct, including breaches of fiduciary duties, where two tortfeasors simply agree to pursue a common plan or design.

While an employer and employee generally may not engage in a civil conspiracy when the employee acts on the employer's behalf, Colorado courts have not yet addressed whether this rule applies to developers' and developer-appointed board members' acting-in-concert liability.[23] As explained in the following section, there are several reasons the general rule may not apply in this particular context. If this general rule limiting liability does not apply, developers and their appointed board members may be jointly liable for their tortious conduct if they expressly or impliedly agree on a course of conduct that adversely affects an association or its owners. Similarly, joint and several liability may be imposed on board members who act tortiously in concert with each other, or with a third party other than the developer.

Civil Conspiracy Liability

A civil conspiracy claim is distinct from statutory joint liability under CRS § 13-21-111.5(4).[24] To establish a civil conspiracy between a developer-appointed board member and the developer, an association must prove each of the following elements:

> (a) The board member and the developer expressly or tacitly agreed to accomplish either an unlawful goal or a goal through unlawful means;
>
> (b) One or more acts were performed to accomplish the goal, and either the goal or an act furthering the goal was unlawful; and
>
> (c) These acts caused the plaintiff injuries, damages, or losses.[25]

Again, while an employer or principal generally cannot conspire with an employee or agent, this rule does not apply if the employee or agent also acts for his or her own benefit.[26] An example of this might be a board member's improper consent to (or tacit approval of) a deviation from the community's architectural covenants for that board member's unit/home.

Moreover, it is an open question whether the relationship between a developer and a developer-appointed board member who is also the developer's employee is sufficiently analogous to an employer-employee relationship for purposes of applying this rule. There may also be policy reasons for not applying this rule to developer-appointed board members due to the members' independent statutory and common law fiduciary duties to the association. These independent duties may negate the notion that an employer cannot conspire with itself (i.e., with its own employee), because a developer-appointed board member is supposed to act as an independent board member with fiduciary duties directly to the association, not simply as the developer's employee.[27]

Ultimately, if a developer is vicariously liable for its appointed board members' tortious conduct,[28] acting-in-concert and civil conspiracy theories may provide no additional liability or practical litigation benefit.[29]

Best Practices to Mitigate Liability

All board members can take steps to mitigate their potential exposure to legal liability, including[30]

- educating themselves regarding their legal responsibilities by attending seminars, reading guidebooks, talking to more experienced board members, consulting with counsel, and joining professional organizations such as the Community Associations Institute (CAI).[31] The board may reimburse board member expenses for attending certain educational meetings and seminars on responsible association governance as a common expense.[32] This step helps board members understand and evaluate the legal risks they may encounter or assume and how best to manage their risks through appropriate actions, best practices and policies, and mindful decision-making.
- engaging an independent third-party professional community association management company, manager, or agent to assist in governing and operating the community.
- thoughtfully considering their actions rather than simply doing what has been done in the past. Board members must understand their fiduciary responsibilities, especially when handling and spending association monies, calculating needed reserves and assessments, collecting owner debts (such as unpaid or late assessments),

maintaining the community's value and appearance (especially on a limited budget), dealing with potential conflicts of interest, managing interpersonal relations with owners, governing and operating the association, and adopting reasonable rules and regulations.

- resigning if board member responsibilities become too overwhelming, time-consuming, or complex. While board members may feel honored to have been selected by the developer or by their neighbors, they must ensure they have the competencies and experience necessary to help run the association and manage the community. For example, a board member who lacks emotional intelligence and communication skills may find it difficult to handle criticism, manage interpersonal conflicts, and resolve disputes to avoid litigation. The larger the association, the more important these interpersonal skills become.
- familiarizing themselves with the scope of indemnity afforded by the association's governing documents, state statutes, their personal insurance, and the association's directors and officers (D&O) and errors and omissions (E&O) insurance, and ensuring such insurance is adequate in its coverage scope, benefits, and liability limits. Consulting with a knowledgeable D&O and E&O broker and insurance coverage attorney can help board members navigate these policies' technicalities.
- securing and relying on the guidance of qualified professionals, such as association counsel, professional management companies, accountants, experienced maintenance personnel, engineers, and reserve advisors.
- exercising good judgment. Developer-appointed board members must never lose sight of their fiduciary obligations to the association and unit owners. Board members who are unaffiliated with the developer must take care not to cede their individual judgment to the developer-appointed board members and, if appropriate, consult with independent counsel regarding their responsibilities.

Addressing Conflicts of Interest

In addition to heeding the best practices above, board members—especially developer-appointed board members—must exercise particular care in managing conflicts of interest. The following is a suggested protocol for limiting exposure to legal liability in this area.[33]

If a board member has a potential interest in a contemplated board transaction, the board member should disclose that interest to the board before taking any action. Following disclosure, the other board members may still decide to move forward. If the matter needs owner approval, the conflict should be timely disclosed and referred to them. An updated reminder disclosure should be made to both the board and the owners before either takes any formal action, such as a vote. The disclosure should describe all matters a reasonable board member or owner might want to know in evaluating any action on the matter. Board members with an interest in the transaction may need to exclude themselves from the discussion and the vote on the matter, except to the extent further information is requested from them. The disclosure is best made in writing and recorded in the association's board or member minutes, including memorializing the disclosing board members' participation in or exclusion from the discussion and vote.

Any board member unable to fully disclose the nature of a conflict due to confidentiality or other obligations owed to others should, at a minimum, disclose that a conflict exists. Board members in this position should also seriously consider removing themselves from any discussion about the matter, refrain from any vote relating to the matter, and, depending on the conflict's nature and the scope, consider resigning from the board. If a later dispute arises regarding a board member's conflict of interest, the board member who failed to make the necessary disclosure, and possibly other members who supported the complained-of action, will have to establish that the transaction was fair. Because of the many risks arising from a failure to disclose a conflict, board members should make full and timely disclosure of potential conflicts, even when in doubt about the need to make a disclosure. Any potential conflict of interest should always be handled in a manner that is "fair" to the association.[34]

Recurrent Developer-Appointed Board Member Conflicts

Developer-appointed board members face a vexing problem: many of their decisions directly implicate potential conflicts that may exist between the developer's profit-making goals and the board's duty to maintain reasonable assessments and preserve the community's long-term financial health. While these interests sometimes dovetail, other times they do not.[35]

A developer's goals or conduct during the declarant control period may conflict with the community's best interests because the developer may

- prefer to keep budgets, assessments, and reserves as minimal as possible to attract prospective purchasers to the community's low monthly fees and to avoid draining the developer's working capital.[36]
- be more amenable to deviations from construction specifications or tolerances than homeowners.
- be tempted to save money by cosmetically repairing a deficiency rather than rooting out its underlying cause and making an appropriate repair (e.g., patching a crack in a wall rather than repairing a deficient foundation system that's causing structural movement).
- prefer to characterize an adverse construction condition as ordinary maintenance to be remedied through owner assessments rather than as a construction defect requiring repair or replacement for which the developer (or its affiliated construction professionals) should bear the ultimate financial responsibility.[37] Moreover, what the developer chooses to characterize as ordinary maintenance might justify, in its view, not disclosing the condition to prospective home purchasers, while, in contrast, Colorado law requires latent construction defects to be disclosed.[38]
- rely on the judgment of its stable of subcontractors or design professionals as to how to address a construction defect, which they are responsible for creating

and remedying, rather than seeking the judgment of an independent expert who might analyze differently the problem's cause and appropriate remedy.

- attempt to avoid a construction defects lawsuit brought by the association through its appointed board members by agreeing to allow impermanent cosmetic repairs while the statutes of limitations and repose continue to run.
- devalue future risks that pose little near-term danger. For example, a developer may incorrectly view a building designed to withstand a destructive 100-year flood as suggesting a de minimus 1% chance of the event occurring and dismiss the risk, when an appropriate mathematical analysis establishes about a 23% chance of such a flood occurring during the first 25 years of the community's existence. Such risk devaluation may lead to a shortening of the useful life of certain construction elements, catastrophic infrastructure failure, inadequate property insurance, underfunded reserves, and misleading sales representations.
- prefer to hire a management company that charges lower fees or relies on the developer for future business, even if the company may be less attentive to the community's needs as a result.
- prefer that closely affiliated companies provide management, engineering, and other services to the association, where the close affiliation may impair the exercise of their independent judgment.[39]
- prefer that the association's agents, including its management company, not investigate problems that may be caused by defective construction, or seek to influence the manager's selection of an inspector whose criteria for deficient construction is parsimonious.
- prefer not to collect assessments on unfinished or unsold homes. For example, if permitted by CCIOA or the declaration, a developer could delay obtaining certificates of occupancy for such homes, thereby reducing the funds available to sustain the community while incentivizing purchasers with lower dues.
- be less conscientious in retaining defect documentation, such as emails and maintenance and repair records.
- prefer to appoint employees to the board who are unfamiliar with the scope of their fiduciary duties and who have limited or no construction knowledge and thus will be disposed to taking fewer or less robust actions to remedy defects.
- delay or fail to comply with CCIOA's turnover obligations (e.g., financial and reserve fund audits, and a property condition assessment), increasing the likelihood that the incoming owner-elected board will unknowingly fail to follow up on the matter, to fund its own audit, or to timely file an applicable claim.
- be more inclined to allow itself deviations from covenant control measures than other unit owners.

> "Because of the many risks arising from a failure to disclose a conflict, board members should make full and timely disclosure of potential conflicts, even when in doubt about the need to make a disclosure. Any potential conflict of interest should always be handled in a manner that is 'fair' to the association."

Both developer-appointed and owner-elected board members face difficult choices under these scenarios.[40] Moreover, depending on how developer-appointed board members are compensated and their other legal and financial entanglements with the developer, they may be required to disclose these additional conflicts before any action is taken on the above-described matters. They also may be obligated to disqualify themselves from approving or voting on any action pertaining to these topics.

A board that comprises solely developer-appointed members could address a conflict of interest issue by bringing in conflict-free persons, such as owners unaffiliated with the developer, disinterested independent counsel, or another professional, to recommend a proper course of action. But even ostensibly independent management companies or professionals may be influenced by long-standing business relationships with the developer or the development industry at large. An alternative is to seek owner approval through a vote, assuming some homes have been sold and the owners are not affiliated with the developer.

Because no developer-appointed board member is disinterested when it comes to decisions affecting the declarant-developer's interests, the above decisions likely constitute a "conflicting interest transaction" under CRS § 7-128-501(1). Thus, until at least one owner is elected to the board, these transactions must be disclosed and approved by a majority of the non-affiliated owners or be found to be "fair as to the nonprofit corporation."[41] For example, a developer-appointed board member may become aware of suspected or actual construction defects but, out of loyalty to the declarant, not disclose the defects to the

owners, not take action to correct the problems at the responsible party's expense, or fail to ensure that adequate reserves are set aside to address the defects and any resulting damage.[42]

Suing Board Members

Except as provided for by the community's governing documents,[43] including governance policies required by CCIOA, there are no statutory prerequisites for the association or its owners to sue board members for their wrongful conduct *unrelated to construction defects*. CDARA's and CCIOA's prerequisites to suit apply only to claims against construction professionals involving alleged damages caused by a construction defect, although CCIOA's prerequisites apply also to any "related, ancillary, or derivative claim, and any claim for breach of fiduciary duty or an act or omission of a member of an association's executive board, that arises from an alleged construction defect or that seeks the same or similar damages."[44] Thus, the steps necessary to pursue claims for wrongful conduct depend on the nature of the alleged conduct and resulting harm.

Multifamily Apartment Conversion Issues

Some developers initially build, hold, and rent newly constructed multifamily homes as apartments. Later, they or a successor may seek to convert these units into a common interest community. Typically, three important events occur upon conversion: creation of an owner association and an executive board; installation of a community manager, who is often drawn from the developer's staff or from an independent management company; and turnover of association control from the developer to the owners.[45] A conversion of an existing structure into a common interest community consisting of 20 or more common interest units is subject to a required subdivision and conversion approval by Colorado's Real Estate Commission.[46] Certain qualifying "small planned communities" (SPCs), consisting of 20 or fewer newly constructed or converted residential units with no development rights reserved, are exempted from much of CCIOA's provisions.[47] Developers should consider their varying legal liability exposures when converting apartments (or other existing spaces) to "for purchase" residential units.

Insuring against Risks

Purchasing and maintaining reasonably adequate insurance can provide association board members protection against legal liability and peace of mind.

D&O insurance policies typically provide a legal defense to and indemnity against covered claims against board members for their allegedly wrongful acts or omissions.[48] D&O policies generally limit coverage to association board members' management decisions and errors.[49] E&O coverage generally applies to the actions and liability of the association itself.[50] Both types of policies may extend coverage to the association's agents and volunteers. These coverages tend to be limited to wrongful acts or omissions someone commits while acting in the capacity of an officer or director, and they often exclude conduct resulting in bodily injury or property damage.[51] The policies should be carefully reviewed for coverage limitations, and they typically exclude malicious, dishonest, illegal, or criminal acts.[52]

Additional insurance coverages are available to insure against other classes of risks, such as a board member taking action that causes property damage or bodily injury,[53] engaging in or approving discriminatory acts or practices, and so on. An association should consult with competent legal, insurance, and accounting advisors to identify appropriate coverages, and those coverages should then be obtained and maintained. Board members should recognize that they may bear personal liability for their decisions and conduct that physically injures others or their property, even if these activities occur during their board duties.[54] Most liability policies issued to an association automatically include its board members as additional insureds. Many general liability policies, however, contain exclusions for association board members' real estate development and construction activities.

Evaluating Coverage

Developers and association board members should carefully consider the following when evaluating insurance policies:

- **Insurer reputation.** Is the insurer highly rated by A.M. Best Company's insurance company financial ratings? What is the insurer's claim management track record? Usually, the most readily accessible source for this information is a seasoned and informed insurance broker. An association should remember that "surplus lines" carriers not licensed in Colorado are not subject to Colorado's insurance guaranty fund, which may respond if the insurer becomes insolvent.[55]
- **Coverage scope, limitations, and exclusions.** The best policies afford coverage for both monetary and nonmonetary claims relating to issues like covenant enforcement, discrimination, architectural control, and discrimination.[56] One of the most important policy features is the insurer's "duty to defend"—that is, its obligation to pay for a legal defense. Associations should confirm whether the duty to defend extends to arbitration, administrative, and regulatory proceedings. Sometimes it makes sense not to make a claim under a policy for nuisance matters to avoid later premium increases and nonrenewal.[57] Competent association counsel may be able to step in on an hourly or retainer basis to handle smaller, everyday claims. Coverage exclusions for claims arising from residential construction, earth movement, and construction defects should be avoided, if feasible.
- **Who qualifies as an insured.** The policy's definition of who qualifies as an insured should include not just the association, but also its directors, officers, committee members, volunteers, and, if possible, the association's management company and other agents, as well as developer-appointed board members.[58] It is critical to include the association's managing agent as a named or additional insured if the management contract requires the association to provide indemnification, which is typical in most management contracts.[59]
- **Eroding limits.** Most insurers offer a choice of limits on monetary liability

and a choice on whether legal defense payments will be deducted from and reduce (erode) those liability limits.[60] Each choice will significantly affect the premium charged and the association's litigation strategy if a lawsuit is filed.

- **Deductibles or self-insured retention.** Most policies contain a deductible or self-insured retention (SIR) limit, which are amounts the insured must pay before the insurer is obligated to start paying certain benefits.[61]
- **Notice of claim.** Nearly all D&O and E&O policies are written on a claims-made basis, meaning that coverage will arise only if the insured receives notice of a potentially covered claim during the policy period.[62] Sometimes an extension of the reporting period can be purchased, and doing so may be prudent because claims against board members usually can be brought at any time until the statute of limitations has run.[63] Breach of fiduciary duty claims are typically subject to a three-year limitations period, and such claims accrue when they are "discovered or should have been discovered by the exercise of reasonable diligence."[64] Therefore, a board member is best protected if the association continues its D&O coverage through the end of the limitations period and ensures such coverage includes former board members, or if it purchases an "extended reporting period" (ERP) option affording coverage to claims for which notice is first received during a specified time after the original policy's term has expired.
- **Prior acts/proceedings coverage.** D&O and E&O policies often have a retroactive date, which cuts off coverage for claims/proceedings arising from wrongful acts that occur before that date.[65] For an extra premium, a "no prior acts" endorsement often can be obtained, meaning that the coverage does not exclude claims/proceedings arising from conduct predating the policy's inception date.

The association should consult with an insurance coverage professional before purchasing coverage to review the proposed policy's terms to ensure it provides the benefits the association desires.

Indemnity

Most association governing documents contain provisions indemnifying board members to the fullest extent allowed by law.[66] CCIOA provides that, generally, "subject to the provisions of the declaration, the association, without specific authorization in the declaration, may . . . [p]rovide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance. . . ."[67] Other Colorado statutes affect the scope and circumstances under which an association may indemnify board members and others if the association is incorporated as a Colorado nonprofit corporation.[68] CCIOA's unconscionability and good faith requirements[69] should be considered in evaluating the validity of a declaration's indemnity provisions.[70]

Conclusion

Developers may be directly liable for their wrongful conduct that affects the community and for violating their obligations under CCIOA, the declaration, and other governing documents. Developers may also be vicariously or jointly liable for their appointed board members' tortious or otherwise wrongful conduct.

Both developer-appointed and owner-elected board members can mitigate their liability exposures by engaging in best practices, including educating themselves about their legal responsibilities and consulting with competent and experienced professionals. They must also identify and manage conflicts of interests appropriately, including making timely and adequate disclosures and recusing themselves, as necessary, from the decision-making process concerning matters in which they are conflicted. Obtaining appropriate and adequate insurance and ensuring that the community's governing documents afford appropriate indemnity can further mitigate a board member's liability exposure. CL



Ronald M. Sandgrund (of counsel) and **Joseph F. (Trip) Nistico, III** (associate) are part of Burg Simpson Eldridge Hersh Jardine PC's Construction Defect Group. The firm represents commercial and residential property owners, homeowner associations and unit owners, and construction professionals and insurers in construction defect, product liability, and insurance coverage disputes. The firm also handles mass tort, class action, personal injury, workers compensation, premises liability, and wrongful death litigation, among other practice concentrations—rms.sandgrund@gmail.com; jnistico@burgsimpson.com. **Jerry Orten** is a founder of and special counsel to Orten Cavanagh Holmes & Hunt, LLC, which firm serves as general counsel to common interest community developers and owner associations. The firm advises developers in the creation of common interest communities, owner associations, and executive boards. The firm also advises developers, board members, owner-members, and managers concerning the governance and operation of owner associations, including compliance with the governing documents, state and federal laws, and regulations. Orten also serves as an expert witness—jorten@ochhoalaw.com.

Coordinating Editors: Leslie Tuft, ltuft@burgsimpson.com; Jennifer Seidman, jseidman@burgsimpson.com

NOTES

1. Common interest communities are established where owners are obligated to pay assessments related to real estate other than their own property. *See generally* CRS § 38-33.3-103 (8) (defining "common interest community"); Hess, ed., 2A *Methods of Practice, Colorado Practice Series* §§ 73:1, 73:9 (Thomson West 7th ed. June 2020 update) (describing types and creation of common interest communities).

2. CCIOA became effective July 1, 1992, and is codified at CRS §§ 38-33.3-101 et seq. CCIOA's provisions concerning the duties of board members are found in CRS § 38-33.3-303(2). In addition, Colorado's Revised Nonprofit Corporation Act's (Nonprofit Act) general standards of conduct for directors and officers, as set forth in CRS § 7-128-401, generally apply to owner association board member conduct as well. *See, e.g.*, *Greens at Buffalo Run Homeowners Ass'n v. Cotton*, No. 15-CV-71, 2016 Colo. Dist. LEXIS 2007 at *21–22 (Adams Cty. Dist. Ct. Mar. 4, 2016).

CCIOA uses the following terms, which the authors have simplified for ease of reference as shown in parentheses: unit owners association

(association or owners association); common interest community (community); declarant (developer); executive board (board); unit (home or property); and unit owners (owners). *See* CRS § 38-33.3-103(3), (8), (12), (16), (30), and (31), respectively. The authors sometimes use the terms declarant and developer interchangeably for ease of reference, although not all declarants may be involved in the community's physical construction or other, typical development activities, and not all developers qualify as statutory declarants.

A number of out-of-state cases are cited in which the developer may be known by other designations, such as sponsor, incorporator, etc. Similarly, the association board may be referred to in other states as the board of trustees, board of managers, board of directors, executive board, property regime, council of co-owners, council of unit owners, and so forth. Communities formed as cooperatives are typically managed by a board of directors. For ease of reference, all these governing bodies are referred to as boards, and the persons comprising these boards as board members.

3. CRS § 38-33.3-303(5)(a)(II) through (7) define the "declarant control period" and "turnover."

4. Sandgrund and Smith, "When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?," 31 *Colo. Law.* 91 (Jan. 2002).

5. For example, one district court applied Colorado's Construction Defect Action Reform Act (CDARA) to claims against certain defendants arising out of their acts and omissions as construction professionals, but not to breach of fiduciary duty claims arising out of their acts and omissions as developer-appointed association board members. *Gold Peak Homeowners Ass'n v. Gold Peak at Palomino Park, LLC*, No. 2010CV3106 (Douglas Cty. Dist. Ct. Mar. 14, 2012) (trial verdicts).

6. CRS § 38-33.3-103(12).

7. In *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 439 (Colo.App. 1992), the Colorado Court of Appeals observed that corporate promoters are in a fiduciary relationship to the later-formed corporation. The Court found that the defendant corporation and the association's corporate officer did not breach fiduciary duties to the association when the declaration adequately disclosed the developer's reservation of 10% of gross receipts from guest rooms. *See also Richard Gill Co. v. Jackson's Landing Owners' Ass'n*, 758 S.W.2d 921, 924 (Tex.Civ.App. 1988) (under declaration, developers assumed responsibility for managing condominium until owners' association formed, and therefore owed fiduciary duties to owners). CCIOA requires an association to be formed no later than the date the first unit is conveyed. CRS § 38-33.3-301.

8. *See* CRS § 38-33.3-103(1) (defining "affiliate of a declarant").

9. *See* CRS § 38-33.3-303(5)–(8) (defining and prescribing declarant control period and conditions necessary for its termination and transfer of control to unit owners other than the developer).

10. *Id.* The developer may exercise this control through its power to appoint and remove directors. The developer can also exert significant economic and practical control over the directors' conduct if the directors are the developer's employees.

11. *See* CRS § 38-33.3-303(5)(b) (describing developer's right to surrender right to appoint and remove officers and board members). A developer who relinquishes its right to appoint and remove board members before the statutory declarant control period ends may still choose to retain veto power over certain matters, such as architectural control and assessments or any other matters specified in the recorded instrument executed by the declarant. CRS § 38-33.3-303(5)(b).

12. *Countryside Cmty. Ass'n v. Pulte Home Corp.*, No. 12CA1568, 2013 WL 6511687, slip op. at 23 (Colo.App. Dec. 12, 2013) (not selected for official publication), *rev'd in part on other grounds*, 382 P.3d 821 (Colo. 2016). *Countryside* also held that the developer was liable for annual assessments and assessments for expenses on developer-owned lots. However, based on the declaration's language, the Colorado Supreme Court reversed this second holding because the lots at issue did not become part of the community until the properly was annexed, so no assessments were due before annexation. *Pulte Home Corp.*, 382 P.3d 821.

13. *Countryside Cmty. Ass'n*, No. 12CA1568, slip op. at 20–21 (citing *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468, 472–73 (Colo. 1995) (noting the doctrine of respondeat superior applies to claims for breach of fiduciary duty in the master-servant context)).

14. *Countryside Cmty. Ass'n*, No. 12CA1568, slip op. at 21. Counsel should note that while CCIOA provides that a successor developer who is affiliated with the original developer may be liable for the predecessor developer's or its appointed board members' breaches of fiduciary duties, this liability does not extend to unaffiliated successors. CRS § 38-33.3-304(5).

15. *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 171 Cal. Rptr. 334, 343 (Cal.Ct.App. 1981) (internal citation omitted).

16. *Id.* at 344.

17. *Governors Grove Condo. Ass'n v. Hill Dev. Corp.*, 414 A.2d 1177, 1184 (Conn.Super.Ct. 1980) ("Just as a majority shareholder is a fiduciary for his corporation, so was [the developer], by virtue of its power to control the association's board of directors, a fiduciary for the association."). *See also Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 764 S.E.2d 203, 218 (N.C.App. 2014) (both developer and its appointed directors "have an obligation to disclose [to the association] material facts regarding the existence of any construction defects of which they were aware").

18. *Governors Grove Condo. Ass'n*, 414 A.2d at 1184.

19. *See Church v. Dana Kepner Co.*, No. 11-cv-02632-CMA-MEH, 2012 U.S. Dist. LEXIS 132002 at *11–13, 2012 WL 4086517 at *3–4 (D.Colo. Sept. 16, 2012) (plaintiff need not prove civil conspiracy to establish liability under CRS § 13-21-111.5(4); evidence of an express agreement to act jointly is unnecessary); *Gold Peak Homeowners Ass'n*, No. 2010CV3106, 2012 WL 8898470 at *2 ("acting in concert" liability under CRS § 13-21-111.5(4), as construed in *Resolution Tr. Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995), and civil conspiracy liability, as described in *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995), are separate and distinct legal theories).

20. *Resolution Tr. Corp.*, 898 P.2d at 1054 (a year after abrogating the joint and several liability doctrine for joint tortfeasors, the "General Assembly reinstated the application of joint and several liability to its original domain at common law, i.e., actions in concert").

21. *Id.* at 1057.

22. *Id.* at 1054–57 (holding that "both negligent and intentional acts are sufficient to give rise to joint liability" under CRS § 13-21-111.5(4) 1056). *See also Jones v. Estate of Brady ex rel. Brady*, No. 10-CV-00662-WJM-BNB, 2011 U.S. Dist. LEXIS 140731 at *18, 2011 WL 6096303 at *5 (D.Colo. Dec. 7, 2011) (noting that *Heiserman* held that a defendant can be jointly liable under CRS § 13-21-111.5(4) for negligent conduct and need not conspire to do something wrongful to be liable under the statute).

23. For further discussion, see *infra* notes 26 and 27.

24. *See Church*, No. 11-cv-02632-CMA-MEH, 2012 U.S. Dist. LEXIS 132002 at *11–13, 2012 WL 4086517 at *3–4 (plaintiff need not prove civil conspiracy to establish liability under CRS § 13-21-111.5(4)); *accord Ziegler v. Inabata of Am., Inc.*, 316 F.Supp.2d 908, 918 (D.Colo. 2004). *See also Gold Peak Homeowners Ass'n*, No. 2010CV3106, 2012 WL 8898470 at *2 (statutory "acting in concert" liability under CRS § 13-21-111.5(4) and civil conspiracy are separate and distinct legal theories).

25. CJI-Civ. 27:1 (2020).

26. *See, e.g.*, *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1390 (Colo.App. 1986) (holding the general rule that a corporation and its employees do not constitute "two or more persons" as required for a civil conspiracy did not apply to this action against a corporation and two of its employees because the evidence supported an inference that alleged co-conspirators' real purpose for changing plaintiff's contract was to "put him in his place" relative to one co-conspirator and not to serve a legitimate corporate objective). *Cf. Semler v. Hellerstein*, 428 P.3d 555, 563 (Colo.App. 2016) (suggesting that general rule would not apply to attorneys who act for their personal gain or who act outside the scope of their legal representation).

27. *See Lockwood Grader Corp. v. Bockhaus*, 270 P.2d 193, 196 (Colo. 1954) (in rejecting a civil conspiracy claim, finding that a corporate employee cannot conspire with a corporate employer because "one person cannot conspire with himself").

28. *Countryside Cmty. Ass'n*, No. 12CA1568, slip op. at 21–24. *See also Kilbride Invs. Ltd. v. Cushman & Wakefield of Pa., Inc.*, 294

F.Supp.3d 369, 378–79 (E.D.Pa. 2018) (employer may be vicariously liable for its employee's participation with a third party in a civil conspiracy); *Hamm v. Thompson*, 353 P.2d 73, 76 (Colo. 1960) (holding that a principal/employer's liability is joint and several with an agent/employee tortfeasor if the agent/employee is the sole actor and the liability has as its sole basis respondeat superior, citing *Granquist v. Crystal Springs Lumber Co.*, 1 So.2d 216, 218 (Miss. 1941)).

29. Because insurance coverage may be excluded for a civil conspiracy claim due to the harm's "intentional" nature, it may be wise to avoid a superfluous civil conspiracy claim.

30. *See generally* Hess, *supra* note 1 at § 74:40 (discussing recommendations for persons considering board service).

31. https://www.caionline.org/LearningCenter/Education-for-Managers/state-credit/Pages/Colorado.aspx.

32. CRS § 38-33.3-209.6. Sometimes an association's D&O insurance program will include such educational programs or reimbursement for their costs.

33. *See generally* Hess, *supra* note 1 at § 74:39 (discussing a "best practices" approach when dealing with conflicts).

34. *See* CRS § 7-128-501(3)(c) (if a conflicting transaction is "fair" to association, it is not void, voidable, or sanctionable if certain conditions are met).

35. Many of these possible conflicts are catalogued in Sandgrund et al., *supra* note 4.

36. *See* Sapakoff, "Liability During Development and the Period of Declarant Control," in 6A *Home Owner Associations and PUDs* § 9A.07[2] (Matthew Bender 1999) (describing multiple conflicts relating to assessments).

Similarly, board members not appointed by the developer may prefer to not budget adequately or to not increase assessments as association expenses and maintenance needs increase, so as to protect owners from this financial burden, especially owners on fixed incomes. This problem was highlighted in news coverage of the recent collapse of the Champlain Towers South in Surfside, Florida, noting that:

> For years, industry insiders have pointed out that although directors and officers are responsible for maintaining the property, most unit owners are notoriously unwilling to see their housing costs go up now to sock away funds for repairs in the future. Why, they ask, should they pay today so someone else can have a new roof long after they've moved out? Yet that is precisely what they are expected to do. Somehow, dozens, hundreds or even thousands of owners are supposed to overcome their self-interest and collective-action problems and commit to maintaining their private infrastructure in perpetuity.

McKenzie, "Climate change could cost condo boards billions. They aren't ready for it.," *Wash. Post* (July 2, 2021), https://www.washingtonpost.com/outlook/surfside-condo-climate-change-cost/2021/07/01/b6699a98-da76-11eb-9bbb-37c30dcf9363_story.html.

37. For example, a developer could fail to ensure that windows are properly flashed during construction per the plans, specifications, and/or building code, and then address the defective work by temporarily caulking the joints, leaving the association the responsibility and expense of inspecting and repairing the caulking annually as it weathers and deteriorates.

38. A board not appointed by the developer may defer the cost of needed maintenance, repairs, replacement, and improvements to subsequent owners.

39. Management companies and their personnel should note *Caprer v. Nussbaum*, 825 N.Y.S.2d 55, 70 (N.Y.App.Div. 2006), where the court held, "One who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered 'substantial assistance' to the fiduciary in the course of effecting the alleged breaches of duty." (internal citations omitted).

40. Consider, for example, when and whether a developer-appointed board member should disclose to the developer information helpful to the developer's litigation interests, but adverse to the association's interests—for example, providing the developer notice of a defect manifestation, which the developer could potentially later use as evidence to support a statute of limitations (SOL) defense under CRS § 13-80-104(1)(a) and (b), if the SOL was not tolled.

41. CRS § 7-128-501(3)(b)–(c).

42. The Colorado Court of Appeals, in an unpublished opinion, affirmed a judgment for the plaintiff owner association arising from a claim that the developer-appointed board breached its fiduciary duties to collect assessments and fund adequate reserves from the developer and affiliated entities and persons, including by failing to assess lots owned by a related entity. *Summit View Subdivision Homeowners Ass'n v. Summit View Dev., LLC*, Nos. 11CA0753 and 11CA0754, slip op. at 7–8, 2012 Colo. App. LEXIS 1113, 2012 WL 2855617 (Colo.App. July 12, 2012) (not selected for official publication).

43. *See* CRS § 38-33.3-209.5(1)(b)(VII) and (VIII) (authorizing associations to adopt "policies, procedures, and rules concerning . . . [p]rocedures for addressing disputes arising between the association and unit owners," among other matters). Generally, internal dispute mechanisms adopted by private organizations must be exhausted before initiating litigation, even if membership in the organization is involuntary. *See, e.g.*, *Bd. of Cty. Comm'rs of La Plata Cty. v. Moga*, 947 P.2d 1385, 1391 (Colo. 1997) (noting that, generally, party must exhaust administrative remedies to prevent piecemeal application for judicial relief, avoid unwarranted interference by the judiciary in the administrative process, and conserve judicial resources). *See also Christensen v. Mich. State Youth Soccer Ass'n*, 553 N.W.2d 638, 640 (Mich.App. 1996) (noting that where a private association provides reasonably effective means of resolving controversies, and there is no evidence of an association's fraudulent treatment of the complaining member by association, courts should not interfere).

44. CRS § 38-33.3-303.5(1)(a) and (b). The statute is unclear whether it applies to claims against both current and former executive board members. *Cf. Gold Peak Homeowners Ass'n*, No. 2010CV3106 (declining to apply CDARA to claims against certain defendants arising out of their capacities as developer-appointed board members) (trial verdicts).

45. For an extensive discussion of the legal issues attendant to such conversions and suggestions for mitigating related legal risks, *see* Sandgrund et al., "Mitigating Potential Condo Conversion and Renovation Construction Defect Liabilities—Part 1," 48 *Colo. Law.* 28 (Apr. 2019) and —Part 2, 48 *Colo. Law.* 40 (May 2019).

46. CRS §§ 12-10-501(3)(b)(I)(A), -502, and -504.

47. CRS § 38-33.3-116(2).

48. A D&O policy may define a wrongful act as "any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty or neglect," but such policies generally exclude coverage for wrongful employment practices (for which separate coverage is available) or for the violation or breach of a collective bargaining agreement. *See, e.g.*, *Hale v. Travelers Cas. And Sur. Co. of Am.*, 2015 WL 6737904 at *2 (M.D.Tenn. 2015) (quoting such a policy).

49. *See* Grund et al., 8 *Colorado Personal Injury Practice: Torts and Insurance* 3d at § 54:11 (Thomson West 3d ed. Dec. 2020 update).

50. D&O and E&O coverages vary greatly. In general, D&O coverage indemnifies directors and officers against certain wrongful acts and may reimburse employing entities who themselves are required to indemnify these directors and officers, while E&O coverage protects the employing entity directly against liability for its own conduct and that of its directors, officers, and employees. *See generally* Fera, ed., *Investment Management Compliance Guide*, "Directors and Officers/Errors and Omissions Liability Insurance," 2018 WL 7983129 at ¶ 472 (June 2018 Supp.).

51. *Id.*

52. *Id.*

53. Insurance against bodily injury includes policy limits protection against not just the common trip-and-fall liability, but also against more profound disasters such as the recent collapse of the Champlain Towers South in Surfside, Florida. This catastrophe has already turned into a finger-pointing affair among the former and current board members, consulting design professionals, and others revolving around earlier disputes regarding the cost and scope of recommended remediation of structural distress and resulting unit owner assessments. *See* Baker and de Freytas-Tamura, "Infighting and Poor Planning Leave Condo Sites in Disrepair," *N.Y. Times* (July 1, 2021) ("The deferred maintenance and inadequate savings at the Champlain

Towers building are common dilemmas at condo associations across the country, where volunteer board members, sometimes with little expertise in financing or maintenance, find themselves dealing with vicious infighting with neighbors and pressures to keep dues low."), https://www.nytimes.com/2021/07/01/us/condo-associations-surfside-collapse.html?action=click&module=Top%20Stories&pgtype=Homepage.

54. *See* CRS § 7-128-402(2) ("No director or officer shall be personally liable for any injury to person or property arising out of a tort committed by an employee unless such director or officer was personally involved in the situation giving rise to the litigation or unless such director or officer committed a criminal offense in connection with such situation."); *Snowden v. Taggart*, 17 P.2d 305, 307 (Colo. 1932) ("To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations."); *accord Hoang v. Arbess*, 80 P.3d 863 (Colo.App. 2003). *Cf. Bowery 263 Condo. Inc. v D.N.P. 336 Covenant Avenue LLC*, 95 N.Y.S.3d 35, 36 (N.Y.App.Div. 2019) (breach of fiduciary duty claim properly asserted against developer-controlled board's sole member if he either participated, directed, controlled, approved, or ratified the challenged conduct where he "received notice of defects, failed to address them properly, and concealed known defects, which resulted in the creation of hazardous conditions").

55. *See* 3 CCR § 702-2:2-4-1 (special regulations applicable to surplus lines carriers).

56. *See* Hess, *supra* note 1 at § 74:46 (discussing studies of the frequency of monetary versus non-monetary D&O claims).

57. Such decisions warrant consultation with insurance and legal counsel because sometimes seemingly innocuous claims later blow up, and a failure to timely report the claim may bar coverage.

58. *See* Hess, *supra* note 1 at § 74:46 (discussing who should qualify as an insured under a D&O policy and other coverage aspects).

59. *Id.*

60. *Id. See also* Appleman et al., 13-100 *Appleman on Insurance Law & Practice Archive* § 100.3(C) (LexisNexis 2d ed. 2011).

61. *See id.*

62. *Id.* at § 100.3(A).

63. The limitations period may sometimes be equitably extended under the adverse domination theory, among other grounds. *See, e.g.*, *Wing v. Buchanan*, 533 F. App'x 807, 811 (10th Cir. 2013) (applying Utah law, noting "adverse domination" doctrine may bar statute of limitations defense where culpable directors and officers dominated an aggrieved corporation as they "can hardly be expected to sue themselves or to initiate any action contrary to their interests" (quoting *FDIC v. Appling*, 992 F.2d 1109, 1115 (10th Cir.1993))); *Alexander v. Sanford*, 325 P.3d 341, 359 (Wash. App. 2014) (applying adverse domination doctrine to homeowners' concealment claims against former board members for failing to advise homeowners of "consistently reported construction problems" and related investigation).

64. *See* CRS § 13-80-101(1)(f) (three-year limitations period for breach of trust or fiduciary duty); CRS § 13-80-108(6) (accrual of cause of action for breach of trust). *See also Colburn v. Kopit*, 59 P.3d 295, 296–97 (Colo. App. 2002) (breach of fiduciary duty claim accrues when the claimant knows of facts that would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by another's wrongful conduct, citing *Jones v. Cox*, 828 P.2d 218, 223–24 (Colo. 1992)). In an unpublished opinion, the Colorado Court of Appeals affirmed a district court's application of the statute's three-year limitations period in CRS § 13-80-101(1)(f) to a claim that the developer-appointed board members breached their duties to collect assessments and reserves from themselves and affiliated entities and persons. *Summit View Subdivision Homeowners Ass'n*, Nos. 11CA0753 and 11CA0754, 2012 Colo. App. LEXIS 1113, 2012 WL 2855617. *See also Vill. W. at Centennial Owners Ass'n v. KB Home Colo., Inc.*, No. 2013CV31232, slip op. at 7–8 (Arapahoe Cty. Dist. Ct. Sept. 14, 2015) (rejecting argument that breach of fiduciary duty claims arising from condominium's development are necessarily subject to the real property limitations period, CRS § 13-80-104); *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) (finding that breach of contract claims based on alleged failures to levy and collect assessments are not subject to CRS § 13-80-104's statute of repose and that breach of fiduciary duty claims were only subject to this repose statute to the extent they related to alleged deficiencies in design, planning, supervision, inspection, construction, or observation of construction).

65. Appleman et al., *supra* note 60 at § 100.3(A)(2).

66. *See generally* Lockwood, *Law of Corporate Officers and Directors: Indemnification and Insurance* at § 3:18 (Thomson Reuters Nov. 2020 update) (discussing "accepted general practice today" of indemnifying board directors against liabilities arising from their service). *See also* CRS § 7-129-108 (nonprofit corporation may purchase and maintain insurance on behalf of a person who is or was a director/board member, officer, employee, fiduciary, or agent).

67. CRS § 38-33.3-302(m).

68. *See generally* the Nonprofit Act: CRS §§ 7-129-101 (indemnification definitions), -102 (authority to indemnify directors), -103 (mandatory indemnification of directors), -104 (advance of expenses to directors), -105 (court-ordered indemnification of directors), -106 (determination and authorization of indemnification of directors), -107 (indemnification of officers, employees, fiduciaries, and agents), -108 (insurance), -109 (limitation of indemnification of directors), -110 (notice to voting members of indemnification of director). *See also* the Corporation Act, CRS §§ 7-109-101 et seq. (addressing corporate indemnification of directors and others); *and see* CRS § 7-40-104 (nonprofit board members have the benefit of the limitations on personal liability as provided for in CRS § 7-108-403).

69. CRS §§ 38-33.3-112 and -113.

70. *Cf. Bd. of Trs. of the Gates of Greenwood Home Owners' Tr. v. Gates of Greenwood, LLC*, 2014 Mass. Super. LEXIS 12 at *1, 2014 WL 861307 at *1 (Mass.Sup.Ct. Feb. 6, 2014) (condominium developer's third-party claims against unit owners based on declaration's indemnity provisions properly stricken as void as a matter of public policy where developer drafted the governing documents while serving as community's sole trustee).