The 2025 Colorado American Dream Act

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This article summarizes and analyzes the recently enacted Colorado American Dream Act, which amended Colorado's Construction Defect Action Reform Act, Colorado's Common Interest Ownership Act, and Colorado's Housing Fund Act.

In 2025, Colorado's General Assembly passed the Colorado American Dream Act (CADA).[1] CADA's goals are (1) promoting affordable housing; (2) increasing access to high-quality, well-constructed homes; (3) preserving protections for homeowners who purchase homes with construction defects (CDs); (4) reforming CD litigation to decrease costs of entry-level home development; (5) strengthening Colorado's housing market by increasing opportunities for first-time home purchasers; and (6) ensuring that Coloradans can access "the American dream of homeownership."[2]

CADA amended Colorado's Construction Defect Action Reform Act (CDARA), Colorado's Common Interest Ownership Act (CCIOA), and Colorado's Housing Fund Act (CHFA). This fourth iteration of CDARA amendments expanded CDARA's pre-suit notice of claim process (NCP), clarified the duty to mitigate, modified certain damages limitations, and created the Multifamily Construction Incentive Program (the Program).[3] The CCIOA amendments modified preconditions to CD claims by unit owner associations and imposed conditions on their use of settlement or judgment funds. The CHFA amendment provided that for-sale condominium projects are subject to fast-track financial assistance approval.

This article discusses how Colorado courts may interpret and apply CADA's key sections and describes issues Colorado practitioners should consider when representing parties whose claims or defenses are subject to CADA.

CDARA Amendments

CDARA amendments that apply to both non-Program and Program claims (described in detail below) (1) require construction professionals to provide certain documents and information to claimants, typically during the NCP; (2) clarify a claimant's duty to mitigate; (3) modify CDARA's damages limitations; and (4) regulate liability insurer involvement in dispute resolution efforts. The remaining CDARA amendments create the Program and apply only to Program claims.[4] Although this article describes the Program's main features, a more thorough analysis must await evidence of its performance over time, which will reveal any issues that arise in implementing those features.

Construction Professional Disclosure Requirements

To encourage pre-suit settlement of CD claims, a construction professional must provide a claimant with certain documents and information, if within the construction professional's "possession, custody, or control," by the earlier of the date a construction professional offers to settle a claim or 60 days after receiving "actual notice of claim."[5] While construction professionals may charge the claimant reasonable copying costs for the provided documents, the statute does not expressly require construction professionals to provide hard paper copies, as opposed to electronic copies.[6] As explained below, the pre-suit disclosure requirements and the consequences for failing to comply with them depend on whether the construction professional is either (1) a contractor, subcontractor, developer, builder, builder-vendor, or inspector; or (2) an architect or engineer.

Construction professionals other than architects and engineers must provide:

> (I) Copies of all plans, specifications, and soils reports related to the claim; (II) Maintenance and preventative maintenance recommendations related to the claim; (III) The name, last-known address, and scope of work of each construction professional who contracted to perform work or provide services and did perform work or provide services related to the claim; (IV) All documents related to the third-party inspection of the property and the name and last-known address of the inspector who performed the third-party inspection; and (V) Copies of each insurance policy purchased by the construction professional and related to the claim through the date of the notice of claim and from the earlier start date of: (A) the date the construction of the alleged defect was substantially completed; or (B) the date the construction professional substantially completed work on the alleged defect.[7]

CRS § 13-20-802.5(7) defines the term "third-party inspection" referenced in subsection (IV). CADA presumes that construction professionals can identify the relevant dates for insurance policy production described by subsections (V)(A) and (B), and that architects and engineers can also determine these dates.

In contrast to other construction professionals, architects and engineers must provide:

> (I) Copies of all approved construction documents and specifications, including addendums issued during construction, prepared by the architect or engineer, or consultants; (II) The name, last-known address, and scope of work of each architect or engineer who performed work or provided services as a consultant related to the claim and on the claimant's property; (III) Copies of each insurance policy purchased by the architect or engineer and related to the claim through the date of the notice of claim and from the earlier start date of: (A) the date the construction of the alleged defect was substantially completed; or (B) the date the architects and engineers substantially completed work related to the alleged defect.[8]

Timing. The disclosure due date depends on what constitutes "actual notice of claim" and an "offer[] to settle a claim."[9] When the construction

professional admits, or the claimant can prove, actual receipt of a notice of claim pursuant to CRS § 13-20-803.5(1)(a) (NOC), the NOC date clearly establishes the disclosure deadline. However, if the claimant properly sent the NOC in accordance with the NCP, but the construction professional claims it did not receive "actual notice of claim," the construction professional might argue it is not obligated to provide the required documents and information within 60 days of the NOC on grounds it was unaware its disclosure obligation had been triggered. Conversely, a claimant might establish the construction professional's actual receipt of the NOC by proof of certified, return-receipt mailing or by some form of personal service.[10]

Separately, both claimant and construction professional counsel may dispute whether and when a construction professional "offers to settle the claim." CDARA states that within 30 days after completing a residential property inspection, or within 45 days after completing a commercial property inspection,

> a construction professional may send or deliver to the claimant, by certified mail, return receipt requested, or personal service, an offer to settle the claim by payment of a sum certain or by agreeing to remedy the claimed defect described in the notice of claim. A written offer to remedy the construction defect shall include a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction work necessary to remedy the defect described in the notice of claim and all damage to the improvement to real property caused by the defect, and a timetable for the completion of the remedial construction work.[11]

CADA requires any NCP offer to be sent or delivered in the manner prescribed, offer to pay a specific amount or to remedy the CD and any resulting damage, and include a CDARA-compliant report. Thus, if the offer does not comply with the NCP's requirements, the construction professional arguably must provide the required disclosures within 60 days after receipt of actual notice of claim.

In addition, because both this section and the new document and information disclosure requirements refer to "defect" and "claim" in the singular, an offer could be directed to fewer than all claimed defects. If a construction professional makes an offer to settle a claim relating to a particular defect less than 60 days after receiving actual notice of claim, the construction professional arguably must provide the required disclosures, at least as to that particular defect, when it makes the NCP offer. Regardless of the required timing, the construction professional must provide the required disclosures as to *all* the NOC's claimed defects.

Scope. CADA limits most, but not all, disclosure requirements to documents and information "related to the claim" and in the construction professional's "possession, custody, or control."[12] The disclosure obligations likely include electronic data, data compilations, photographs, videos, recordings, and so forth, and may include intangible information such as the names of potential witnesses.[13] To the extent the disclosure requirements apply to intangible information, this may require the construction professional to affirmatively describe and provide information that is not contained in documents.

Construction documents, plans, and specifications. CADA requires a different scope of disclosures related to plans and specifications for different construction professionals. Because CADA limits the disclosure requirements for architects and engineers to *approved* "construction documents and specifications," and CADA does not similarly qualify the disclosure obligations for other construction professionals (which also include "plans" and "soils reports"),[14] construction professionals other than architects and engineers may need to provide drafts, marked-up copies, and plans and specifications that were never formally approved.

Maintenance and preventative maintenance recommendations. CADA does not specify whether the required disclosures include only maintenance recommended to a claimant at the time of sale, or, if different, maintenance recommended since the sale date; nor whether "information" to be disclosed includes unwritten recommendations.[15] Defense counsel may rely on a homeowner's failure to perform maintenance recommendations disclosed pursuant to this subsection to support a failure to mitigate or comparative fault defense.[16] Homeowner counsel may argue that a construction professional has waived the right to rely on (or is estopped or otherwise precluded from relying on) information it fails to disclose pursuant to CADA to support either defense.

Information known to construction professionals. Construction professionals often have access to information regarding the identities and scopes of work of other construction professionals that performed work relating to a claim. Because the disclosure obligations include *information* in construction professionals' possession, custody, or control, they may have an affirmative obligation to provide such information, even if not included in relevant documents.

Third-party inspections. CADA adds "third-party inspection" to CDARA's defined terms.[17] When a construction professional facilitates a CDARA-compliant "third-party inspection," the construction professional must disclose all documents relating to the third-party inspection performed through the date the construction professional contends it or others corrected any noncompliant design or construction. These disclosures must include documents about all inspected components, systems, or improvements, all identified violations, and all efforts to correct identified violations.[18] Construction professionals may argue that CADA's inclusion of this newly defined term applies only to third-party inspections adopted and implemented as part of the CADA Program.[19]

If a construction professional performs its own quality control "inspections" that do not qualify as "third-party inspections" within CDARA's new definition, the new third-party inspection disclosure requirements arguably may not apply. Homeowner counsel may argue that a construction professional who fails to disclose documents and information pursuant to this requirement concedes that no third-party inspection was performed and, therefore, the Program does not apply.[20]

Alternatively, homeowner counsel may assert that if a residential construction professional creates a "program of inspections . . . designed to assist the construction professional performing the construction" to identify and rectify work that "deviates from applicable building codes or construction standards," the construction

professional must disclose all information relating to such inspections.[21]

The "third-party inspection" definition contains CDARA's only reference to "noncompliant design or construction."[22] CADA does not make clear whether the term "noncompliant construction" means something other than the term "defect" used elsewhere in CDARA or is encompassed by that term.[23]

Insurance. A construction professional must disclose all insurance policies that it purchased that relate to the claim from *the earlier of* "the date the construction of the alleged defect was substantially completed" or "the date the construction professional substantially completed work on the alleged defect" through the NOC.[24]

Insurance policies purchased by others often cover a construction professional's work. Construction professional counsel may argue that construction professionals have no obligation to disclose such policies purchased by third parties. However, the result may be different if the disclosing construction professional contractually required the third party to purchase an "additional insured" endorsement or other insurance coverage for its benefit, since the construction professional "caused" such purchase.

Notably, a construction professional's insurance policy disclosure obligations under CRCP 26 are different and perhaps broader.[25] CADA does not distinguish between design professionals' and other construction professionals' insurance disclosure obligations[26] even though design professionals often carry claims-made insurance in addition to occurrence-based policies, in which coverage scopes and triggers differ significantly.

Consequences of Noncompliance With Disclosure Requirements

CADA provides no mechanism for enforcing pre-suit disclosure obligations before the claimant files an action. CDARA requires that a court stay a proceeding when a *claimant* fails to comply with its NCP obligations.[27] When a construction professional asserts claims against other construction professionals, it is a "claimant" under CDARA.[28] Thus, when a homeowner asserts claims against a construction professional and that construction professional asserts claims against other construction professionals, the case may need to be stayed until the claimant construction professional complies with its NCP disclosure obligations. However, this statutory interpretation might permit a recalcitrant construction professional to inordinately delay a case by failing to meet its NCP disclosure obligations. Courts may protect against such abuse by staying only the claimant construction professional's claims and not the case as a whole, and also might consider bifurcating those claims if the construction professional does not promptly take corrective action.[29]

> "CADA does not distinguish between design professionals' and other construction professionals' insurance disclosure obligations even though design professionals often carry claims-made insurance in addition to occurrence-based policies, in which coverage scopes and triggers differ significantly."

CADA expressly imposes post-suit filing consequences for noncompliance with two discrete disclosure obligations. First, CADA precludes construction professionals from designating any construction professional "who contracted to perform work or provide services and did perform work or provide services related to the claim" and is not identified by the nonparty designation deadline as a nonparty at fault.[30] Parties typically must designate nonparties at fault within 90 days after commencement of an action.[31]

Separately, a claimant need not comply with the Program-specific certificate of review requirements when a construction professional fails to produce copies of "all plans, specifications, and soils reports related to the claim" within its possession, custody, or control.[32] Because the Program-specific certificate of review must be filed with a claimant's complaint,[33] this production presumably must occur before the claimant files its complaint.

Insurer and Insurance-Related NCP Amendments

CADA added a provision to CDARA's NCP providing that

> an insurer, as defined in section § 10-1-102(13), shall not cancel, deny, or reduce coverage based on any claim for benefits covered by an existing liability insurance policy issued to a construction professional based on the construction professional making an offer to repair or settle a construction defect claim pursuant to this section.[34]

Most construction defect counsel would likely agree that construction professionals often hesitate to offer to settle claims before a claimant files an action based on concerns that such offers may violate "consent to settle" and "voluntary assumption of obligations" provisions typically included in liability insurance policies. This new NCP provision may preempt or negate such provisions by empowering construction professionals to *offer* to settle claims without concurrently risking loss of coverage for such

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claims due to a breach of these policy conditions. It is unclear whether CADA has the effect of prohibiting insurers from considering a settlement arising from an *accepted offer* in determining an insured's loss history when renewing the construction professional's insurance.

CADA also amended CDARA to provide that "[a]ny settlement or repair agreement affecting coverage is subject to insurer approval."[35] Thus, while a construction professional may offer to settle a claim without insurer approval, and a claimant may accept that offer, construction professionals would normally desire insurer approval before finalizing the agreement where the insurer may dispute coverage. A prudent construction professional might make any offer to settle expressly contingent on the insurer's future consent and agreement to pay if the construction professional intends to fund the settlement with insurance proceeds.

Modification of "Actual Damages" Limitation

Generally, a claimant may not recover more than "actual damages" in an action.[36] CDARA defines "actual damages" as:

> the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less, together with relocation costs, and, with respect to residential property, 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. "Actual damages" as to personal injury means those damages recoverable by law, except as limited by the provisions of section 13-20-806 (4).[37]

Before CADA, CDARA excepted from its "actual damages" limitation only certain damages for claims for violation of Colorado's Consumer Protection Act (CCPA).[38] CADA expands this exception to provide that the "actual damages" limitation also does not apply "as provided in [CRS § 13-20-803.5]."[39] The scope of this new exception is unclear.

The CCPA claim-related exception to the "actual damages" cap applies when a construction professional's monetary settlement offer or the value of its repair offer during the NCP does not equal at least 85% of the actual damages award excluding costs, interest, and fees.[40] Moreover, a claimant may obtain treble damages (subject to a limit of $250,000) when they prevail on a CCPA claim and "a construction professional does not substantially comply with the terms of an accepted offer to remedy or an accepted offer to settle a claim for a construction defect made pursuant to section 13-20-803.5 or if a construction professional fails to respond to a notice of claim . . . ."[41] Thus, this exception incentivizes construction professionals to make reasonable CD settlement offers early during the NCP, meaningfully participate in the NCP, and fulfill the terms of any accepted settlement offer.

Section 803.5 does not expressly authorize specific damages beyond the pre-CADA "actual damages" definition. However, when interpreting a statute's language, courts "give effect to every word and render none superfluous because [courts] 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'"[42] Courts also strive to "construe statutory provisions as a whole, giving effect to the entirety of the statute."[43] CADA amended the statutory NCP to address circumstances when a construction professional fails to comply with the terms of an accepted proposal (the new language is italicized for ease of reference):

> If an offer by a construction professional is made and accepted *or if a proposal made by a claimant is accepted*, and if thereafter the construction professional does not comply with its offer to remedy or settle a claim for a construction defect *or with the claimant's proposal*, 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 without further notice.[44]

Property owner counsel may argue that construing this provision in conjunction with CRS § 13-20-803.5(12) as an exception to the "actual damages" cap is consonant with CDARA's statutory scheme, which would mean that the "actual damages" cap applies only when neither party has accepted the other's monetary settlement offer or repair proposal. Property owner counsel may further argue that removing the actual damages limitations on "claims arising out of the defect or damage described in the notice of claim" when a construction professional has failed to fulfill its promise to pay an agreed-upon sum certain or repair a defect and its resulting damage creates a significant incentive for construction professionals to fulfill their promises. Removing the actual damages limitation may also disincentivize unscrupulous construction professionals from

offering a seemingly satisfactory pre-suit claim resolution, then pulling the rug out from underneath claimants, forcing them into expensive, time-consuming, and uncertain litigation after having spent time and resources engaging in the NCP in good faith. Construction professional counsel may counter that CRS § 13-20-803.5 does not expressly authorize damages and no additional exception to the "actual damages" definition can be reasonably inferred.

CCIOA Amendments

Pursuant to CCIOA, an association may, "subject to the provisions of the declaration, . . . [i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community."[45] In 2017, the General Assembly significantly expanded the pre-suit process an association's executive board must complete before it pursues a construction defect action "pursuant to section 38-33.3-302(1)(d)."[46] CADA amends and clarifies this process.

Unit Owner Approval of Construction Defect Action

Before CADA's passage, CCIOA provided that an association's executive board "may" pursue a construction defect action "only if" approved by unit owners holding more than 50% of allocated votes not subject to the section's vote exclusions.[47] CADA increased the required percentage to "at least sixty-five percent" of allocated votes not subject to the section's exclusions.[48]

Associations and construction professionals sometimes disputed whether satisfaction of this provision alone permitted an association to pursue a construction defect action on behalf of itself or two or more unit owners, notwithstanding other preconditions to suit described in a community's governing documents or local municipal ordinances. The effect of these other potentially inconsistent or more onerous conditions was uncertain and subject to litigation.[49]

CADA may have resolved this uncertainty by amending CCIOA to provide that, "[n]otwithstanding any provision of law or any requirement in the governing documents," a homeowners association "has the right" to pursue a construction defect action "if" approved by the requisite percentage of unit owners.[50]

Because "the rights conferred by [CCIOA] may not be waived[,]"[51] unit owners and their associations will argue that CADA confirms associations have the unfettered right to pursue a construction defect action on either their own behalf or on behalf of two or more unit owners after obtaining the requisite number of votes following any required pre-vote disclosures.[52] Further, if the requisite percentage of owners approve the CD action, reasonable arguments exist that any inconsistent provisions in governing documents or municipal ordinances cannot limit an association's right to pursue either direct or representative claims. Such inconsistent provisions might include non-statutory pre-suit disclosures, expert report requirements, and other onerous and expensive procedures inconsistent with CDARA's statutory NCP and the Homeowner Protection Act that have found their way into various governing documents.[53]

Use of Recovered Funds

CADA requires that "an executive board that is successful under a construction defect claim or settlement shall first use net monetary damages or net proceeds received pursuant to the claim to repair the construction defect."[54] In the authors' extensive experience, association executive boards typically use recovered funds to repair CDs, and their net recovery rarely provides enough funds to repair all the community's CDs. This is because (1) the recovery, whether by settlement or judgment, often represents a serious discount from the actual repair costs due to litigation risks and insurance coverage limitations or uncertainties; and (2) attorney fees, litigation expenses, and other transactional costs significantly reduce the net recovery. This hamstringing of how CD settlement funds may be used adds to the challenges association boards face following CD litigation.

Moreover, additional complexities may arise, such as when, to repair CDs for which an association recovered funds, other repair work must reasonably also be performed, and perhaps performed first in time. For example, consider a scenario where pervasive construction defects exist in a building's foundation, windows, siding, and roofs, but Colorado's two-year statute of limitations bars the foundation-related claims. However, ongoing foundation movement will continue to damage the building's windows, siding, and roofs until the association repairs the foundation defects, and will severely compromise the effectiveness of any repairs to these other construction elements. If the association does not recover funds to repair the foundation defects, and if courts construe the new provision to require the association to prioritize the window, siding, and roof CD repairs over foundation defect repairs it cannot otherwise fund, this statutorily prioritized repair effort would result in economic waste.

In similar circumstances, associations may argue that properly repairing the CDs for which they recovered damages requires them to prioritize reasonably necessary prerequisite work to avoid economic waste. If the unit owners agree with this approach, it is unlikely that a settling construction professional would have standing ex post facto to object to the association's repair process, since this new CADA provision most obviously benefits unit owners rather than construction professionals. Furthermore, nothing in CADA prohibits an association from (1) using other funds, including loaned funds, to make critical and time-sensitive repairs that were not the subject of a CD verdict, arbitration award, or settlement; or (2) deferring spending the net monetary damages or net proceeds to a later date.

The Multifamily Construction Incentive Program

CADA created the Multifamily Construction Incentive Program, which applies only to cases in which a claimant asserts a "Program claim" relating to multifamily housing constructed after January 1, 2026.[55] Whether this deadline applies to a project whose construction is commenced by this date, as opposed to its construction being completed, is not clear. Realistically, the Program may not apply to

litigated cases for several years due to delays in implementing the program and completing construction and sales. Thus, this article provides only a basic overview of the Program.

Consistent with CADA's legislative purpose, the Program is intended to improve multifamily home construction quality control, and to reduce defective and noncompliant construction and ensuing litigation.[56] However, it does not address what building industry proponents have identified as significant drivers of unaffordable construction: labor costs and government regulation.[57]

The Program applies when each of the following conditions is met:

1. the claimant asserts a "Program claim,"[58] and
2. "a builder of multifamily, attached housing of two or more units":
   a. "[r]ecord[ed] a notice of election to participate in the [Program] in the real property records of the county in which the property is located for the project intended to be covered before the unit is offered for sale" and did not "withdraw from the [P]rogram . . . before the issuance of the last certificate of occupancy for the project";[59]
   b. provided a warranty that strictly complies with CADA's requirements;[60] and
   c. had a qualifying "third-party inspection," as defined by CADA, performed.[61]

As described below, whether a claim is a Program claim determines the applicable pre-suit NCP, the applicable scope of and timing for filing a certificate of review, the nature of the resulting harm needed to support noncontractual claims, and the scope of available affirmative defenses.

Pre-Suit NCP for Program Claims

CDARA's initial NCP notice and inspection provisions also apply to Program claims.[62] However, additional and unique NCP processes apply in Program cases as described below.

Construction professional's NCP obligations. "[A] construction professional and the insurer, as defined in section 10-1-102(13), providing coverage related to the claim" must respond to a claimant's NOC within the statutorily defined time frames by either offering to settle the claim or by providing a written response that (1) identifies the standards that apply to the claimed defect's construction or performance and explains why the claimed defect does not require repair, or (2) explains the construction professional's scope of work and why the claimed defect is not within the work and responsibility of the construction professional.[63]

> "Consistent with CADA's legislative purpose, the Program is intended to improve multifamily home construction quality control, and to reduce defective and noncompliant construction and ensuing litigation."

Moreover,

> [a] written offer to remedy a construction defect must include a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction work necessary to remedy the defect described in the notice of claim and all damage to the improvement to real property caused by the defect, and a timetable for the completion of the remedial construction work.[64]

The reasonableness of a construction professional's settlement offer determines which other Program provisions apply.[65] Additionally, CADA authorizes a court to award attorney fees and costs to a construction professional when a claimant rejects a reasonable written offer of settlement made pursuant to the Program's NCP, and to award fees and costs to a claimant when a construction professional fails to make a reasonable written offer of settlement pursuant to the Program's NCP.[66] Whether an offer of settlement is reasonable depends on whether the amount offered or the value of the repair offered is more or less than a final judgment the claimant recovers.[67]

Claimant's proposal. If a claimant rejects a construction professional's NCP-compliant offer, the claimant must, within 30 days of rejecting the offer, "provide a construction professional with a written proposal to have the construction defect repaired at the construction professional's expense or to settle the claim."[68] A proposal that is not accepted in writing within 15 days after delivery is considered rejected.[69]

Certificate of Review in Program Cases

CADA requires a Program claimant to file with its complaint[70] a certificate of review (COR) that complies with both CRS § 13-20-602, the generally applicable certificate of review statute, and CRS § 13-20-803.3(2), a more detailed Program-specific provision, to support a claim against a licensed architect or engineer.[71] A defendant who designates an engineer or architect as a nonparty at fault pursuant to CRS § 13-21-111.5(3)(b) must also file a COR that complies with Program claim requirements at least 45 days before trial.[72] If a claimant does not file the required COR, "the court shall dismiss the complaint against the defendant unless the claimant shows good cause for the failure."[73] If a construction professional who is not an architect or engineer fails to

disclose all plans, specifications, and soils reports related to the claim during the NCP, a claimant need not comply with the Program's expanded COR requirement.[74] CADA does not expressly impose similar limitations on architects or engineers.

Actionable Claim Standards

CADA provides:

> A person shall not assert a program claim [that is not a contractual claim] unless the defect has resulted in one or more of the following:
>
> (a) Actual damage to real or personal property;
>
> (b) Actual loss of the use of real or personal property;
>
> (c) Actual bodily injury or wrongful death;
>
> (d) An unreasonable reduction in the capability of, or an actual failure of, a building component to perform an intended function or purpose; or
>
> (e) An unreasonable risk of bodily injury or death to, or a threat to the life, health, or safety of, the occupants of the residential property.[75]

Because CDARA does not alter the elements of a claimant's claim, this provision probably constitutes an affirmative defense upon which the construction professional bears the burden of proof.[76]

Affirmative Defenses to Program Claims

CADA codifies multiple affirmative defenses that may be asserted only by a construction professional who makes a reasonable offer through the Program's NCP. These defenses apply "only with respect to the portion of the claimant's damages, if any, the construction professional can demonstrate by a preponderance of the evidence were proximately caused or increased" by one or more of the specifically enumerated defenses "and not by the construction defect."[77]

These defenses include:

1. a natural phenomenon, such as a weather condition or earthquake, that exceeds the design criteria in the applicable building codes, regulations, and ordinances that applied during original construction;[78]
2. an event caused by humans, such as vandalism, war, or terrorism;[79]
3. "a homeowner's unreasonable failure to mitigate damages" pursuant to CRS § 13-20-803.5(1);[80]
4. a homeowner's, or a homeowner's employee's, construction professional's, or agent's failure to perform certain maintenance;[81] or
5. after the claimant assumes ownership, alterations, ordinary wear and tear, misuse, abuse, or neglect of the structure or component, or use of the component or structure for something other than its intended purpose.[82]

Additionally, a construction professional who makes a reasonable settlement offer may assert as an affirmative defense that:

1. the damage resulted from a specific violation subject to a valid and enforceable release executed with the claimant's knowledge of the specific violation and which does not violate Colorado's Homeowner Protection Act, CRS § 13-20-806(7);[83] or
2. the construction professional successfully corrected a particular violation and damage caused by violation of a particular standard during the NCP.[84]

The meaning of "violation" is unclear. The term may be construed to mean a violation of the applicable building code or other applicable standard.

These Program-specific affirmative defenses "are in addition to, and shall not limit, impair, replace, or otherwise affect any other defense available to a construction professional under statute or common law."[85] Because these provisions generally appear to codify common law affirmative defenses, prior case law interpreting such defenses may help guide their application.

Program-Specific Statute of Repose

CADA's Program-specific statute of repose applies to claims against certain construction professionals in limited circumstances.[86] When a construction professional has provided the claimant with a Program-compliant warranty, a claimant must first "pursue all reasonable remedies available under the warranty process before bringing an action for damages."[87] Thereafter, the statute of limitations and repose are "tolled from the date the claimant first pursued a remedy available under the warranty for no more than one year or until the completion of the warranty process, whichever is longer."[88] This statute of repose contains the same exceptions set forth in CRS § 13-80-104(2) and (3), the statute of repose that applies to most construction defect claims.

Clarification of "Duty To Mitigate"

CADA added a subsection to CDARA's NCP that codifies the duty to mitigate. It begins by stating that "*[b]efore filing a claim* pursuant to subsection (1) *for program claims*, a claimant shall mitigate the damage caused by the alleged construction defect."[89] Because this new section does little more than restate the preexisting common law regarding mitigation of damages, its inclusion may have little, if any, effect on this defense. It may, however, serve to limit the bases for a failure to mitigate defense to Program claims, preempting the contraction or expansion of this defense by courts beyond its common law formulation.

The common law duty to mitigate damages requires a claimant to act reasonably under the circumstances.[90] Although case law generally holds that homeowners are not required to undertake extensive and cost-prohibitive repair efforts to mitigate damages,[91] neither CDARA nor Colorado's pattern jury instruction expressly address this issue. CADA's new mitigation language clarifies that "[a] claimant does not breach the duty to mitigate if the cost to mitigate is unreasonable under the circumstances or was beyond the claimant's financial ability to perform."[92] Like CDARA's other provisions, presumably CADA's statutory clarification of a claimant's duty to mitigate is not an element of a claimant's claim,[93] but a defense upon which the construction professional bears the burden of proof.[94]

Limitations on the Program's Effect

The Program does not (1) affect Colorado's Governmental Immunity Act, CRS §§ 24-10-101 et seq.; (2) affect Colorado's Homeowner

Protection Act, CRS § 13-20-806(7); (3) impair, limit, or prohibit a contractual claim; or (4) expand the meaning of "action" as defined by CRS § 13-20-802.5(1).[95]

Statewide Affordable Housing Fund Amendments

In 2022, the General Assembly created the Statewide Affordable Housing Fund, which conditions receipt of financial assistance under the fund or for affordable housing projects in specified areas on a local or tribal government, other than a local affordable housing authority, establishing a "fast-track approval process" to provide final decisions on certain applications.[96] CADA clarifies that "a for-sale multifamily condominium project" is included among the types of applications subject to the fast-track approval process requirement.[97] CADA does not impose any additional standards to ensure the quality of construction in multifamily condominium projects subject to fast-track approvals.

Conclusion

CADA significantly changes the procedures that apply to CD claims, particularly during the pre-suit NCP. CADA's amendments to CDARA's NCP require more active participation by claimants, construction professionals, and insurers in dispute resolution efforts before suit is filed, which may increase resolution of CD disputes without the need for legal action. By confirming that associations have the *right* to pursue a CD action when approved by the requisite percentage of owner votes, CADA may now foreclose disputes regarding the enforceability of onerous requirements in a community's governing documents or in local ordinances. This may decrease the cost, burden, and complexity of CD actions pursued by associations.

The success of CADA's Program in reducing litigation relating to certain multifamily developments likely will take years to properly assess because Program creation and project construction take time, and the real-life performance, testing, and a reasoned evaluation of the Program's features will be an evolving and lengthy process. CL


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NOTES

1. HB 25-1272 (codified at CRS § 13-20-802.5(4.5), (6), (7); CRS § 13-20-803.3; CRS § 13-20-803.5(1)(b)–(d), (3), (3.5), (3.7), (7), (12), (13); CRS § 13-20-805(2), (3); CRS § 38-33.3-305(1)(d)(I)(A), (1)(d)(III), (5); and CRS § 29-32-105). Colorado's Anti-Discrimination Act, which has also been referred to as CADA, is unrelated to the Colorado American Dream Act.

2. HB 25-1272, § 1, (2)(f)(I)–(VI).

3. Only builders of attached, multifamily housing of two or more units may elect to participate in the Program, if they meet certain requirements. The Program imposes additional requirements and limits on CD claims and defenses.

4. *See* CRS § 13-20-802.5(6) ("'Program claim' means all actions for damages, indemnity, or contribution brought against a construction professional to assert a claim, counterclaim, cross-claim, or third-party claim for damages or loss to, or the loss of use of, real or personal property for which the builder is a participant in the program or for personal injury caused by a defect in the design or construction of an improvement to real property for which the builder is a participant in the program.").

5. *See* CRS § 13-20-803.5(3.5)(a), (3.7)(a).

6. CRS § 13-20-803.5(3.5)(b), (3.7)(b).

7. CRS § 13-20-803.5(3.5)(a)(I)–(V).

8. CRS § 13-20-803.5(3.7)(a)(I)–(III).

9. *See* CRS § 13-20-803.5(3.5)(a), (3.7)(a).

10. *See* CRS § 13-20-803.5(1)(a).

11. CRS § 13-20-803.5(3).

12. CRS § 13-20-803.5(3.5)(a), (3.7)(a).

13. This is consistent with CRCP 26(a)(1)(B), which requires disclosure of "all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party" as long as the documents are "reasonably calculated to lead to admissible evidence." *Kerwin v. Dist. Ct. & Judges Thereof for First Jud. Dist.*, 649 P.2d 1086, 1088 (Colo. 1982). *See also* CRCP Form 20 (pattern interrogatories) (defining "documents" to include "electronically stored information (including emails)").

14. *Compare* CRS § 13-20-803.5(3.7)(a)(I) *with* CRS § 13-20-803.5(3.5)(a)(I) (distinguishing different construction professionals' respective production obligations).

15. If the construction professional did not consider a recommendation important enough to memorialize in writing, the fact finder may deem it immaterial.

16. *See* CJI-Civ. 5:2 (2025) (failure to mitigate affirmative defense). *See also generally* Sandgrund and Seidman, "Unique Construction Defect Damages Mitigation Issues," 44 *Colo Law*. 33 (Feb. 2015).

17. *See* CRS § 13-20-802.5(7) (defining "third-party inspection").

18. *Id.*

19. *See id.* (referring to "a program of inspections"). *See also* CRS § 13-20-803.3(1)(b) (builder must have a third-party inspection performed to qualify for the Program).

20. The Program does not apply to projects in which the unit's certificate of occupancy issued before January 1, 2026. CRS § 13-20-803.3(1)(c).

21. Homeowner counsel, relying on CRS § 13-20-802.5(7), may also argue that a construction professional who creates such a program of inspections must also file with the applicable building department a broad certification concerning the performed inspections as to (1) the qualifications of the inspectors; (2) the quality of the inspections, the construction, and various constructed components; (3) the repair and resolution of every instance of noncompliant design and construction discovered during inspection; and (4) the granular details concerning locations where work was not inspected. Residential property owner counsel should note that some "wrap" liability insurance policies contain a provision requiring "quality assurance peer review," or words to this effect, requiring third-party independent inspections, evaluations, and verifications of building systems and components, including observations at critical construction stages, and verification of compliance with approved plans, applicable building codes, and industry standards.

22. *See* CRS § 13-20-802.5(7)(b)(III).

23. *See* CRS §§ 13-20-802 (legislative declaration regarding "actions . . . in connection with alleged construction defects"), -802.5(1), (2), (5) (defining "action," "actual damages," and "notice of claim" based on alleged "defect" or "construction defect"), -803(1)–(4) (requirements for "initial list of construction defects"), -804(1) (limitation on negligence claims for a "construction defect"), -805(2) (limitations periods tolled during "construction defect" mitigation), -806(1)(a)–(b), (2), (4), (5)

(damages available for a "construction defect" claim), -808(1)(a)(III), (4)(b)(II), (6)(a), (7)(a)(II) (interpretation of insurance policies that may apply to a "construction defect"). CDARA's new Program-related provisions repeatedly use the phrase "construction defect." *See* CRS § 13-20-803.3(2)(a), (8)(a), (9)(b), (10)(a).

24. CRS § 13-20-803.5(3.5)(a)(V), (3.7)(a)(III).

25. Pursuant to CRCP 26(a)(1)(D), construction professionals must disclose "any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34."

26. *Compare* CRS § 13-20-803.5(3.5)(a)(V) *with* -803.5(3.7)(a)(III).

27. CRS § 13-20-803.5(9).

28. *See* CRS § 13-20-802.5(3).

29. *See* CRCP 42(b) (court may separate third-party claims "in furtherance of convenience, or to avoid prejudice, or when separate trials will be conducive to expedition or economy").

30. CRS § 13-20-803.5(3.5)(a)(III), (3.5)(c).

31. CRS § 13-21-111.5(3)(b).

32. CRS § 13-20-803.5(3.5)(c).

33. CRS § 13-20-803.3(2).

34. CRS § 13-20-803.5(13).

35. *Id*.

36. *See* CRS §§ 13-20-803.5 (2024), -806(1)–(5).

37. CRS § 13-20-802.5(2).

38. CRS § 13-20-803.5(12) (2024).

39. CRS § 13-20-803.5(12).

40. CRS § 13-20-806(1)(a), (b).

41. CRS § 13-20-806(2).

42. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) (quoting *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005)).

43. *Id*. at 570.

44. CRS § 13-20-803.5(7) (emphasis added).

45. CRS § 38-33.3-302(1)(d).

46. HB 17-1279, codified at CRS § 38-33.3-303.5.

47. *See* CRS § 38-33.3-303.5(1)(d)(I)(A) (2017).

48. CRS § 38-33.3-303.5(1)(d)(I)(A) (2025).

49. *See generally* Sandgrund and McDaniels, "Making Up Your Own Rules for Resolving Residential Construction Defect Claims," 52 *Colo. Law.* 36 (May 2023), https://cl.cobar.org/features/making-up-your-own-rules-for-resolving-residential-construction-defect-disputes.

50. CRS § 38-33.3-303.5(1)(d)(I)(A) (2025).

51. CRS § 38-33.3-104. *See Lambdin v. Dist. Ct. in & for 18th Jud. Dist. of Cnty. of Arapahoe*, 903 P.2d 1126, 1130 (Colo. 1995) (where statute prohibits "waiver or modification of [a statute's] substantive and procedural rights," those rights cannot be waived).

52. CRS § 38-33.3-303.5(1)(d)–(e).

53. *See* Sandgrund and McDaniels, *supra* note 49.

54. CRS § 38-33.3-303.5(5). Whether state law can limit how individuals may use or apply settlement proceeds, a form of private property, is an unanswered question with potential constitutional implications.

55. *See generally* CRS § 13-20-803.3(1). *See also* CRS § 13-20-802.5(6) (defining "Program claim").

56. *See supra* note 2.

57. *See generally* McLain, "If We Want Affordable Housing, Local Governments Must Look In The Mirror," Mondaq newsletter (Nov. 20, 2025), https://www.mondaq.com/unitedstates/real-estate/1708328/if-we-want-affordable-housing-local-governments-must-look-in-the-mirror (arguing while construction defect litigation may affect home affordability, other factors, including labor availability, land use policy, and government fees drive up housing costs in the Denver Metro area) (citing *Metro Denver: Development Fee Study, Executive Summary*, Home Builders Association of Metro Denver (June 2025)), https://www.hbadenver.com/assets/pdf/HBA+Development+Fee+Study_Executive+Summary_June2025). McLain describes "staggering local government fees, often exceeding $60,000 per home," that raise the price of new housing, "making attainable homeownership ever more elusive." *Id.* He says, "the average total of development-related fees, including building permit fees, use taxes, impact fees, and utility development charges, ranges from roughly $52,000 for attached homes to $68,000 for detached homes," and that these costs are imposed "upfront, before construction begins, and are baked directly into the sales price of each home." *Id*.

58. *See* CRS § 13-20-802.5(6) (defining "Program claim").

59. CRS § 13-20-803.3(1)(c).

60. CRS § 13-20-803.3(1)(a). This includes a warranty against any defect and damage at no cost to the homeowner for (1) one year for workmanship and materials; (2) two years for plumbing, electrical, and materials; and (3) six years for major structural components. *Id*. at (I)–(III). CADA does not further define any of these warranties.

61. CRS § 13-20-803.3(1)(b).

62. *See generally* CRS § 13-20-803.5(1)(a), (2).

63. CRS § 13-20-803.3(9)(a)(I)–(III), (9)(c).

64. CRS § 13-20-803.3(9)(b).

65. CRS § 13-20-803.3(9)(d)–(e).

66. CRS § 13-20-803.3(9)(f)(I)–(II).

67. *Id*.

68. CRS § 13-20-803.3(10)(a).

69. CRS § 13-20-803.3(10)(b).

70. CADA extends the deadline for filing the certificate of review when the statute of limitations or repose will expire within 10 days of the date the complaint is filed. CRS § 13-20-803.3(3)(b). Additionally, the requirement that the COR be filed with the complaint may not apply in federal court. *See Berk v. Choy*, 146 S. Ct. 546, 551–54 (2026) (holding state statute that required filing of an affidavit of merit with a complaint to support claims against medical professional did not apply in federal court because Federal Rules of Civil Procedure applied and imposed no such requirement).

71. CRS § 13-20-803.3(2). CADA exempts from Program COR requirements a claim "for construction in which a governmental entity contracted with a single entity to provide both design and construction services for the construction, rehabilitation, alteration, or repair of a facility, building or an associated structure, a civil works project, or a highway project[.]" CRS § 13-20-803.3(3)(a).

72. CRS § 13-20-803.3(4).

73. CRS § 13-20-803.3(2)(c).

74. CRS § 13-20-803.5(3.5)(c).

75. CRS § 13-20-803.3(6).

76. *See Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1163, 1171 (Colo.App. 2010) (holding CDARA does not alter the substantive elements of a claim; construing CDARA damages limitation as affirmative defense).

77. CRS § 13-20-803.3(8).

78. CRS § 13-20-803.3(8)(b)(I).

79. CRS § 13-20-803.3(8)(b)(II).

80. CRS § 13-20-803.3(8)(b)(III).

81. CRS § 13-20-803.3(8)(b)(IV).

82. CRS § 13-20-803.3(8)(b)(V).

83. CRS § 13-20-803.3(8)(c)(I).

84. CRS § 13-20-803.3(8)(c)(II). This defense states that it applies when the repair is conducted pursuant to CDARA's general NCP, not its Program-specific NCP.

85. CRS § 13-20-803.3(8)(d).

86. CRS § 13-20-803.3(7)(a).

87. CRS § 13-20-803.3(7)(b).

88. *Id*.

89. CRS § 13-20-803.5(1)(b) (emphasis added).

90. CJI-Civ. 5:2 (2025).

91. *See generally* Sandgrund and Seidman, *supra* note 16. *See also Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064, 1068 (Colo. App. 1990).

92. CRS § 13-20-803.5(1)(d).

93. *See Land-Wells v. Rain Way Sprinkler & Landscape, LLC*, 187 P.3d 1152, 1154 (Colo. App. 2008) ("CDARA . . . does not alter the substantive elements of a plaintiff's claim."). CRS § 13-20-803.5(1)(c) provides that if the claimant and construction professional cannot agree on whether the claimant has satisfied its duty to mitigate, "the claimant may proceed with the action but does not recover any damages that the construction professional proves were caused by the claimant's unreasonable failure to mitigate."

94. *See Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997) (failure to mitigate is an affirmative defense that the defendant bears the burden to prove).

95. CRS § 13-20-803.3(11).

96. *See* CRS § 29-32-105 (2022).

97. *See* CRS § 29-32-105 (2025).