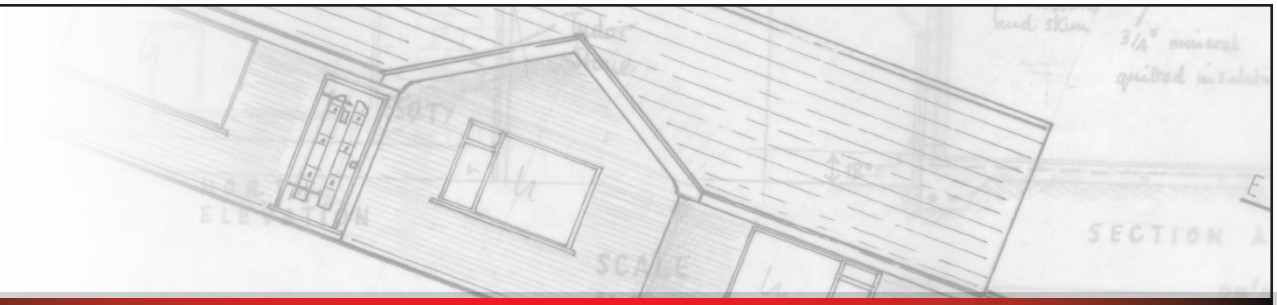

Overview of Construction Law and Construction Defect Litigation in Colorado

(2024 Edition)

Prepared by:

Higgins, Hopkins, McLain & Roswell, LLC

Building A Solid Defense TM

3801 East Florida Avenue, Suite 909
Denver, CO 80210
(303) 987-9870

www.hhmrlaw.com

Higgins, Hopkins, McLain & Roswell, LLC
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I. INTRODUCTION

This comprehensive overview delves into the nuances of construction litigation in Colorado, with a particular focus on the intricacies of construction defect litigation. Tailored for professionals in the fields of insurance, home building, and commercial contracting, this document offers an insightful exploration into the geological challenges posed by Colorado's expansive soils, a historical perspective on construction defect litigation, and a thorough examination of the common causes of action encountered in such cases.

Additionally, it presents a detailed analysis of the affirmative defenses typically employed, the spectrum of damages sought in these disputes, and practical strategies for navigating the complexities of litigation in this domain. While this overview does not encompass every aspect of construction litigation, it aims to equip our readers – insurance carriers, home builders, and commercial contractors – with a deeper understanding of the multifaceted challenges and considerations unique to Colorado construction law and litigation of construction claims in Colorado.

A. Geotechnical Background

In the diverse and complex terrain of Colorado, particularly along the eastern slope and within the Denver metropolitan area, the geotechnical landscape is predominantly characterized by expansive soils. These soils, rich in clay minerals, have a unique propensity to absorb water, leading to significant expansion. This phenomenon poses a critical challenge for construction, as expansion can exert substantial pressure on foundational structures, impacting their integrity and stability.

Expansive soils are not just a geological curiosity but a significant practical concern in construction. The forces exerted by these swelling soils can lead to severe structural damages, making them a central issue in construction defect litigation in Colorado. This has been especially true in residential construction, or other "lightly loaded" structures, where the interaction between these soils and building foundations has frequently led to costly legal disputes and substantial repair expenses.

To mitigate these risks, builders and developers in Colorado engage geotechnical engineers to conduct thorough soil analyses before construction. These reports are crucial, providing detailed insights into the soil conditions and recommending specific construction practices. Key recommendations often include guidance on the slope of soil within the first five to ten feet away from foundations, the choice of foundation systems, and basement floor construction strategies. Notably, many reports call for the use of deep piered foundations and structural flooring systems as the most reliable approach to residential construction. Because of the cost associated with deeper foundations and structural floors, there has been a shift in the homebuilding industry to move toward mass overexcavation to ameliorate the effects of expansive soils, after which, shallow foundations and slab-on-grade basement floors become a viable. It remains to be seen, on a long-term basis, whether the use of overexcavation successfully effectively counters the effects of expansive soils.

The information and recommendations provided in these soil reports are vital, playing a pivotal role in both prosecuting and defending cases related to expansive soil litigation. Understanding and adhering to these guidelines is essential for designers, builders, and developers to navigate the challenges posed by Colorado's unique geotechnical environment.

B. Structural Engineering and Design

During the 1990s, it was a frequent practice in the construction industry to use concrete slab-on-grade for basement floors in residential houses. This method was prevalent even for houses built on piered foundation systems. The rationale behind slab-on-grade floors was to allow them to move independently from the foundation and basement finishes if the underlying soils expanded or contracted. This design aimed to prevent potential damage to the foundation and upper levels of the house, including walls and doors. However, a challenge arose when the movement of these slab-on-grade floors began to affect other house components like framing and drywall. Even in cases where substantial damage had not yet occurred, expert testimony often suggested future movement and potential damages, leading to litigation and compensation claims for these predicted issues.

Expansive soil commonly causes damage in homes through movement in the foundation and flooring systems. Although specialized foundation systems like drilled piers have mitigated foundation movement issues to some extent, litigation still arises. In cases involving piered foundations, plaintiffs frequently contend that the piers are either inadequately long, insufficiently embedded into the bedrock, or generally insufficient for the structural demands.

In response to the surge of construction defect claims associated with slab-on-grade basement floors, the construction industry shifted toward using structural floors in basements, suspended above the expansive soils. However, this change led to a new set of legal challenges, particularly concerning the sealing and ventilation of crawlspaces and the consequent mold issues. The industry's countermeasure involved the adoption of fully sealed vapor barriers and active ventilation systems in crawlspaces to address these concerns.

In multi-family construction, there has been a notable shift away from deep foundations with either slab-on-grade or structural floors toward the use of post-tensioned slab foundations. However, this too has not been without its legal challenges. Plaintiffs' attorneys have adapted their strategies, bringing forth claims regarding the inadequacy of post-tensioned slabs, especially when designed using the PTI method on expansive soils, and issues surrounding the termination and protection of post-tensioned cables.

The evolving landscape of construction litigation underscores a significant trend: Plaintiffs' attorneys continuously adapt their strategies, critiquing and alleging construction defects regardless of the industry's efforts to mitigate the effects of expansive soils and reduce the incidence of construction defects.

II. CONSTRUCTION DEFECT LITIGATION

A. Claims Typically Brought in Construction Defect Cases

Following are several claims typically asserted against builders and general contractors by homeowners in construction defect lawsuits.

1. Breach of Contract

To recover on a claim for breach of express contract, the plaintiff must prove by a preponderance of the evidence that: (1) the defendant entered into a contract with the plaintiff; (2) the defendant failed to perform the alleged promise contained within the contract on which the plaintiff is suing; (3) the plaintiff substantially performed its part of the contract, or was excused from said performance; and (4) the defendant's breach caused the plaintiff's damages. *See* CJI-CIV. 30:10 (2023).

2. Breach of Express Warranty

The elements of a claim for breach of express warranty are: (1) when the builder sold the homeowners their home, the builder included an express written warranty; (2) the builder failed to comply with the provisions of the express written warranty; and (3) this failure was a cause of the homeowners' damages. *See* CJI-CIV. 14:8 (2023).

In most cases, the sale of a new home includes an express written warranty extended from the builder to the purchaser. This warranty contains language warrantying that the home will be free from "defects" for one to two years. Some homes are also sold with warranties containing extended protection, typically for ten years, covering the "structural" elements of the home. If a structural warranty is included, it is most often issued by a company specializing in residential structural warranties. It is the builder that enrolls the homeowner in the structural warranty program. Structural warranty companies have a long history of denying all but the most extreme claims involving homes which are unsafe, unsanitary, or otherwise uninhabitable.

Plaintiffs generally assert that a builder breaches an express warranty when any defect manifests itself during the first year, and/or when a structural defect appears in the first ten years after construction, and the builder or warranty company does not cure such defect. The primary defenses to a claim for breach of express warranty are that there was no express warranty given or that the builder and/or applicable warranty program complied with the terms of the warranty and/or that the warranty expired before the claimed defect arose.

3. Breach of Implied Warranty

a. Claims for Breach of Implied Warranty

In order to recover for breach of an implied warranty, plaintiffs must establish that: (1) the builder entered into a contract with the plaintiffs for the construction and/or sale of a residence; and (2) when the builder gave possession of the residence to the plaintiffs, it did not comply with one or more of the warranties implied by law as part of the transaction. *See* CJI-CIV 30:54 (2023).

In Colorado, when a builder sells a newly constructed home, the law imposes implied warranties of habitability and workmanlike construction. In essence, when a builder sells a home, it implicitly guarantees that the house is habitable, that it was built in a workmanlike fashion, that it complies with applicable building codes, and that it is reasonably suited for its intended use. Carpenter v. Donohoe, 388 P.2d 399, 402 (Colo. 1964).

The rationale commonly cited for these implied warranties is that Colorado law deems a homebuilder to be in a better position than the purchaser to know whether a defect, latent or otherwise, exists in the home at the time of sale. Colorado appellate opinions have likened this implied warranty to "strict liability for faulty construction." Davies v. Bradley, 676 P.2d 1242, 1245 (Colo. App. 1983). Defects which give rise to the application of these implied warranties include, but are not limited to, heaving and cracking basement slab-on-grade floors, improper exterior grade, cracks in surfaces of the home interiors and exterior fascia, tilting or "racking" of doors and windows, reduction of the void space between the foundation and interior walls, and water intrusion. Allegations such as inadequate exterior compaction of soils, improper grades/slope of soils away from foundation walls, and insufficient accommodations for drainage are increasing in frequency. The expense of remediating compaction, grade, and drainage conditions can be substantial. The existence of any one of these alleged defects can be sufficient to establish builder-liability for a breach of the implied warranty of habitability and workmanlike construction where the alleged defect adversely affects the structure's intended use and purpose.

More recently, the Colorado Court of Appeals ruled that builders and developers may be liable to homeowner's associations under the implied warranty doctrine for all damages caused by construction defects in common areas of "common interest communities." Interpretation of "common interest communities" could extend to subdivisions, thus this rule significantly increases risk of liability for builders and developers. Brooktree Village Homeowners Assn., Inc. v. Brooktree Village, LLC, 479 P.3d 86, 97 (Colo. App. 2020).

b. Disclaimer of Implied Warranties

Prior to the enactment of the Homeowner Protection Act in 2007, builders and developers were able to disclaim implied warranties so long as the language in the purchase and sale agreement was clear, unambiguous, and sufficiently particular to provide adequate notice to the purchaser of the implied warranty protections being relinquished. In 2007, the Colorado Legislature enacted the Homeowner Protection Act, which makes void as against public policy any disclaimer of implied warranty or any other waiver or limitation of a legal right afforded to homeowners under the Construction Defect Action Reform Act. C.R.S. § 13-20-806(7)(a).

In a recent decision, the Colorado Court of Appeals held that a senior living facility constitutes "residential property" within the meaning of the Homeowner Protection Act. Specifically, the court held, "in the context of property tax law, the legislature and the Colorado Constitution define 'residential real property' as all residential dwelling units and the land they are situated upon, excluding hotels and motels." Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Company, 413 P.3d 219, 225 (Colo. App. 2017). This, of course, invites further questions as to what other types of properties could potentially fall under that definition. Accordingly, in 2023,

the Third Division of the Colorado Court of Appeals interpreted the Homeowner Protection Act of 2007 so that a senior living community that is located on a parcel zoned "commercial" or "mixed use" constitutes "residential property" protected by the Homeowner Protection Act ("HPA"), regardless of the zoning designation. Heights Healthcare Co., LLC v. BCER Eng'g, Inc., 534 P.3d 939 (Colo. App. 2023). In coming to this decision, the court followed the same reasoning as that followed in Broomfield Senior Living Owner above: If the property is used as a residence, it is a "residential property" regardless of whether it is zoned or otherwise merely identified as something other than a residence. Until the Colorado Supreme Court addresses this issue, the appellate court has opened the door for big businesses to use a special protection meant for individual homeowners as a loophole in contracts for the purchase of any property that current Colorado law may consider "residential."

4. Negligence

The elements for a claim of negligence are: (1) the homeowner incurred damages; (2) the builder breached an applicable duty of care; and (3) the builder's breach of care was a cause of the homeowner's damages. *See* CJI-CIV. 9:1 (2023).

a. Contractor's Liability for its Own Negligence

A builder owes a duty to purchasers to construct homes with reasonable care. Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1043 (Colo. 1983). If it fails to meet that duty, the builder can be deemed negligent. To build a home in a non-negligent manner, the builder must, at a minimum, conform to the industry standards of care in effect when the home was constructed. However, in certain circumstances, including situations where a claimant can establish that an entire industry is performing in a negligent manner, a higher standard is imposed. In other words, the applicable standard of care may be higher than the standard of practice. Namely, the builder must utilize construction techniques and precautions in conformance with the best available technology (*i.e.*, the "state of the art").

The availability of a negligence claim is not limited to the first purchaser of a home. Cosmopolitan Homes v. Weller, 663 P.2d 1041, 1042-43 (Colo. 1983). In the context of the purchase of a used home, an owner asserting a negligence claim against the builder must demonstrate that the defect was latent or hidden at the time of the sale and must show that the builder caused the defect. *Id.* A second or subsequent purchaser of a home assumes the risk of patent and/or obvious defects and cannot successfully sue a builder in negligence for those defects.

b. Contractor's Liability for the Negligence of its Subcontractors

Not only do plaintiffs seek to hold the builder responsible for its own negligence, but they also assert that the builder is responsible for the negligent acts or omissions of its subcontractors based upon the vicarious liability theory of *respondeat superior*. Plaintiffs may argue that the general contractor and/or builder have a non-delegable duty to ensure the proper workmanship of a home. In cases involving homes constructed over steeply dipping bedrock, plaintiffs sometimes assert a builder is liable for the negligence of its subcontractors based on the theory that construction on these soils constitutes an inherently dangerous activity.

c. Non-Delegable Duty Doctrine

In attempting to hold a builder liable for the negligence of its subcontractors, plaintiffs argue that the builder owes a duty of reasonable care to the homebuyer that it cannot delegate. There are some cases which suggest that builders owe a non-delegable duty of reasonable care in the construction of homes sufficiently broad to make them responsible for the negligence of their subcontractors and design professionals also.

Most, if not all, of the cases relied on by plaintiffs impose a non-delegable duty that arises by statute. However, there is no statute in Colorado that imposes a non-delegable duty on builders. To the contrary, C.R.S. § 13-21-111.5(1), the Colorado Contribution Statute, clearly mandates that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss…." Thus, if only tort theories remain in the case at the time the factfinder renders its verdict, it is questionable whether a builder would be held liable for the acts or omissions of subcontractors who have been named as parties or who have been properly designated as nonparties.

d. Inherently Dangerous Activity Doctrine

In general, inherently dangerous activities are those that: (1) present a special or peculiar danger to others that is inherent in the nature of the activity or the particular circumstances under which the activity is to be performed; (2) are different in kind from the ordinary risks that commonly confront persons in the community; and (3) the builder knows or should know the risk is inherent in the nature of the activity or in the particular circumstances under which the activity is to be performed. Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282 (Colo. 1992). It has been our position, on behalf of builders, that building a home, regardless of the type of soil upon which the home is built, is not, as a matter of law, an inherently dangerous activity. In several expansive soil cases, this issue has been the subject of motions *in limine* filed on behalf of the builders. These cases have been resolved prior to a court ruling on the issue.

Where homes are constructed in areas designated as steeply dipping bedrock hazard zones, plaintiffs argue that the construction of the home constitutes an inherently dangerous activity. Steeply dipping bedrock is a type of expansive soil in which underlying bedrock lies at a slant rather than in horizontal planes. When the bedrock in these formations swells, it can cause extreme damage to structures constructed on it, often substantially more severe than the damage otherwise caused by horizontally bedded expansive soils. Traditional methods for site exploration and traditional construction methods utilized to accommodate for expansive soils have proven largely unsuccessful in areas of steeply dipping bedrock. While damage to structures has been noted in these areas for decades, it was not until April 1995 that the first regulations concerning steeply dipping bedrock were adopted in Jefferson County, the areas in which such bedrock is most commonly found in this region. The regulations contain minimum standards and building technique recommendations for construction in the designated hazard zones.

5. Negligent Misrepresentation/Omission

Colorado generally recognizes negligent misrepresentation in two general circumstances: where the misrepresentation causes financial loss in a business transaction (*i.e.*, in the purchase of a new residence); and where the misrepresentation causes physical harm to the plaintiff's property (*i.e.*, methods of construction, materials, etc.).

Plaintiffs pursuing this claim assert that the builder did not provide them with adequate information to allow for an informed decision about the purchase of a home. Typically, this claim manifests itself in a complaint about a home built on expansive soil or a home which contains latent construction defects. To prevail on this claim, the plaintiff must prove three facts: (1) the builder either negligently provided false information or omitted information; (2) plaintiff reasonably relied on the information or lack thereof; and (3) the plaintiff's reliance was a cause of the damage being claimed. *See* CJI-CIV. 9:4 (2023). For the plaintiff to recover from the builder based on financial loss, it must prove that (1) the builder gave false information to the plaintiff; (2) the builder gave such information to the plaintiff in the course of a transaction in which the builder had a financial interest; (3) the builder gave the information to the plaintiff for the plaintiff's use in the transaction; (4) the builder was negligent in obtaining or communicating the information; (5) the builder gave the information with the intent or knowing that the plaintiff would act or decide not to act in reliance on the information; (6); the plaintiff reasonably relied on the information supplied by the builder; and (7) this reliance on the information supplied by the builder caused damage to the plaintiff. *See* CJI-CIV. 9:4 (2023).

When bringing this claim, plaintiffs usually argue that the builder either gave them no information or insufficient information regarding the soils upon which their home was built, the potential effects of such soils, the diverse types of construction materials and techniques employed by the builder, and/or the quality of construction. Plaintiffs must then prove that they relied on the misrepresentation or omission at issue in their purchase of the property and that they experienced damage because of their reliance.

The builder does have a few defenses to this claim. A simple one is that the plaintiff unreasonably relied on the misrepresentation. Such a defense falls under contributory negligence and may be a complete defense but often is only partial. More often a builder's best defense is that the builder did provide sufficient information regarding expansive soils, construction materials and techniques used, or that the information, if given, would not have changed the plaintiffs' decision to purchase the home. It is important to note that where a builder has documentation, signed by the purchaser, acknowledging that purchaser received information about soils conditions or construction specifications prior to closing, a plaintiff's negligent misrepresentation/omission claim may be minimized but not eliminated entirely.

6. Fraud

Actionable fraud against a builder can be based on an intentional misrepresentation or concealment of a past or present fact.

For a plaintiff to recover from a builder for fraud based on an intentional misrepresentation, it must prove by a preponderance of the evidence that: (1) the builder made a false representation of a past or present fact; (2) the fact was material; (3) at the time the representation was made, the builder knew the representation was false, or knew that it did not know whether the representation was true or false; (4) the builder made the representation with the intent that the plaintiff would rely on the representation; (5) the plaintiff relied on the representation; (6) the plaintiff's reliance was justified; and (7) said reliance caused damages to the plaintiff. *See* CJI-CIV. 19:1 (2023). Similarly, for a plaintiff to recover from a builder for fraud based on an intentional concealment, it must prove by a preponderance of the evidence that: (1) the builder concealed a past or present fact; (2) the fact was material; (3) the builder concealed or failed to disclose the fact with the intent of creating a false impression of the actual facts in the mind of the plaintiff; (4) the builder concealed or failed to disclose the fact with the intent that the plaintiff take a course of action that it might not take if it knew the actual facts; (5) the plaintiff took such action or decided not to act relying on the assumption that the concealed or undisclosed fact did not exist or was different from what it actually was; (6) the plaintiff's reliance was justified; and (7) said reliance caused damages to the plaintiff. *See* CJI-CIV. 19:2 (2023).

7. Violation of the Soils Disclosure Statute, C.R.S. § 6-6.5-101

The Colorado Soils Disclosure Statute, C.R.S. § 6-6.5-101(1), provides:

> At least fourteen days prior to closing the sale of any new residence for human habitation, every developer or builder or their representatives shall provide the purchaser with a copy of a summary report of the analysis and the site recommendations. For sites in which significant potential for expansive soils is recognized, the builder or his representative shall supply each buyer with a copy of a publication detailing the problems associated with such soils, the building methods to address these problems during construction, and suggestions for care and maintenance to address such problems.

If, prior to closing, a plaintiff received only a summary soils report from the builder, the plaintiff will typically argue that the summary was inadequate and that it was not provided with sufficient information to make an informed decision. Alternatively, if the plaintiff received the entire soil report prior to closing, the plaintiff would often assert that it received too much complex, technical information that could not be reasonably understood by a lay person.

8. Negligence Per Se

The elements of a claim for negligence *per se* are: (1) the builder violated a state statute or city ordinance; (2) the homeowner suffered damages; and (3) violation of this statute was a cause of the homeowner's damages. When the violation of a statute causes damage to a person who is in the class of persons sought to be protected by the statute and the damage is of the type sought to be protected against by the statute, then the statutory violation constitutes negligence *per se*. *See* CJI-CIV. 9:14 (2023).

As a practical matter, plaintiffs' attorneys have previously brought negligence *per se* claims when there has been a violation of either the Colorado Soils Disclosure Statute, discussed above, or the applicable building codes. However, the Colorado Construction Defect Action Reform Act, C.R.S. § 13-20-801, *et seq.* ("CDARA") prohibit plaintiffs' attorneys from bringing negligence claims based solely on alleged violations of the building code unless such alleged violation results in actual damage, actual loss of use of real or personal property, bodily injury, or a significant risk of bodily injury. *See* C.R.S. § 13-20-804.

It is beyond dispute that initial purchasers of new homes are in the class of people intended to be protected by the Soils Disclosure Statute and the applicable building codes. Further, damage caused by expansive soils or by construction defects generally is clearly the type of injury sought to be protected against by the statute and the applicable building codes. Accordingly, where the plaintiff can establish the builder violated either the Soils Disclosure Statute or the building codes, the plaintiff is likely to prevail on a claim for negligence *per se*.

9. Violation of the Colorado Consumer Protection Act, C.R.S. § 6-1-101, et seq.

In Colorado construction defect litigation, plaintiffs assert Colorado Consumer Protection Act ("CCPA") claims to encourage settlement of cases. The broad language of the CCPA allows for alleged violations of the CCPA to be made in most common business transactions, including the sale of real property. Plaintiffs' attorneys previously used the threat of the harsh civil penalties under the CCPA to place defendants in a position where they were compelled to settle or face paying three times the actual damages and plaintiffs' attorneys' fees. Currently, however, the treble damages and attorneys' fees component allowed are statutorily capped at $250,000 per claimant. C.R.S § 13-20-806(3). Adjusted for inflation, this $250,000 cap may be upward of $614,000 between the years 2020 and 2030. Pursuant to Colorado statute, the Secretary of State for the State of Colorado may adjust maximum and minimum amounts for civil penalties. While there has been no certification that the $250,000 maximum penalty under C.R.S § 13-20-806(3) has adjusted for inflation, that does not mean that adjustment will not be made.

The deceptive trade practices to which the CCPA applies are varied. In addition to many affirmative misrepresentations that the CCPA defines as deceptive trade practices, the CCPA also prohibits the omission of material information that was known at the time of an advertisement or sale if the seller intended such an omission to induce the consumer to enter into a transaction. In construction litigation, plaintiffs' attorneys allege that a seller withheld material information such as information related to expansive soils, construction techniques or materials, or overall construction quality from homebuyers.

A claim for violation of the CCPA requires establishing: (1) that knowingly defendant engaged in unfair or deceptive trade practice; (2) that challenged practice occurred in course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of defendant's goods, services, or property; (4) that plaintiff suffered injury in fact to legally protected interest; and (5) that challenged practice caused plaintiff's injury. C.R.S. §§ 6–1–102(6), 6–1–105, 6–1–113(1); Hall v. Walter, 969 P.2d 224 (Colo. 1998).

Plaintiffs' attorneys usually assert violations of certain subsections of C.R.S. § 6-1-105. These subsections include C.R.S. § 6-1-105 (e), (g), (i), (r), and (u). C.R.S. § 6-1-105 states, in relevant part:

> (1) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person:
>
> * * *
>
> (e) Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;
>
> * * *
>
> (g) Represents that goods, food, services, or property are of a particular standard, quality, or grade . . . if he knows or should know that they are of another;
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> * * *
>
> (i) Advertises goods, services, or property with intent not to sell them as advertised;
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> * * *
>
> (r) Advertises or otherwise represents that goods or services are guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, any material conditions or limitations in the guarantee which are imposed by the guarantor, the manner in which the guarantor will perform, and the identity of such guarantor. . .. Guarantees shall not be used which under normal conditions could not be practically fulfilled or which are for such a period or time or are otherwise of such a nature as to have the capacity and tendency of misleading purchasers or prospective purchasers into believing that the goods or services to guaranteed have a greater degree of serviceability, durability, or performance capability in actual use that is true in fact. The provisions of this paragraph apply not only to guarantees but also to warranties, to disclaimer or warranties, to purported guarantees and warranties, and to any promise or representation in the nature of a guarantee or warranty;
>
> * * *
>
> (u) Fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction; . . .

"[T]he CCPA does not, as a matter of law, make actionable a statement which would otherwise be mere puffery." Park Rise Homeowners Ass'n, Inc. v. Res. Const. Co., 155 P.3d 427, 435 (Colo. App. 2006). "A statement about 'quality construction' . . . represents a statement of opinion, the meaning of which would depend on the speaker's frame of reference, such as mass-produced housing versus a custom-built home. It is not a specific representation of fact subject to measure or calibration." *Id.* at 436.

Despite the limitations set forth in CDARA, the threat of the civil penalties under the CCPA is still a powerful incentive for builders to settle construction defect cases in Colorado. Although the Colorado Legislature has increased plaintiffs' burden of establishing a violation of the CCPA at trial, the changes to the CCPA have not eliminated entirely the threat of the civil penalties. As such, Colorado plaintiffs will continue to assert CCPA violations against builders and construction contractors and use, even with the reduced CDARA amount, the CCPA claims as leverage to negotiate settlement of construction defect claims.

10. Green Building Litigation

In Colorado, "green" building standards began working their way into residential and commercial buildings in 2009 with the adoption of C.R.S. § 38-35.7-106, which requires homebuilders offer prospective homeowners the option of having their home pre-wired for solar energy systems and provide homeowners with a list of solar energy contractors. In 2022, HB22-1362 passed and now enforces "green" building standards by requiring Colorado cities and counties to enact new climate-friendly construction codes for residential and commercial buildings. C.R.S. § 24-38.5-401. By 2025, an energy code board will adopt "model low energy and carbon codes" to be implemented across the state. We are seeing an increasing trend in Colorado of "green building litigation" and should expect more stringent standards in the near future.

B. Defenses Typically Raised in Construction Defect Cases

In addition to the defenses incorporated into the *Claims Typically Brought in Construction Defect Cases* section above, defense counsel should consider the following defenses and affirmative defenses in the arena of construction defect litigation.

1. Statutes of Limitation and Repose

Colorado has both a statute of limitation and a statute of repose that are applicable to construction defect cases. These two statutes differ in that statutes of limitations extinguish, after a specified period of time, a person's right to prosecute an action after it has accrued. Statutes of repose, by contrast, limit potential liability by limiting the time during which a cause of action can even arise. To put it another way, statutes of repose cut off the right to bring an action after a specified period of time measured from the completion of the work, regardless of whether or when the cause of action accrues.

Once a claimant serves a prelitigation notice of claim on a construction professional pursuant to C.R.S. § 13-20-803.5, CDARA automatically tolls the statute of limitations until 60 days after the completion of the notice of claim process. C.R.S. § 13-20-805.

a. First-Party Claims

All actions against a construction professional related to the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within two years after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property. C.R.S. § 13-80-104(1)(a). In case any such cause of action arises during the fifth or sixth year after substantial completion of the improvement to real property, claimants shall bring said action within two years after the date upon which said cause of action arises. C.R.S. § 13-80-104(2)

A first-party claim for relief arises at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury. C.R.S. § 13-80-104(1)(b)(I). For example, in Smith v. Executive Custom Homes, Inc., the Colorado Supreme Court found where a homeowner notices the obvious physical manifestations of what appears to be a construction defect, that homeowner cannot later argue that the resulting injury, particularly one as foreseeable as slipping on ice after the discovery of ice accumulation, served as the first notice of the defect for purposes of commencing the statute of limitations for a claim under CDARA. Smith v. Executive Custom Homes, Inc., 230 P.3d 1186, 1189 (Colo. 2010); *See also* United Fire Group *ex rel.* Metamorphosis Salon v. Powers Elec., Inc., 240 P.3d 569 (Colo. App. 2010).

b. Third-Party Claims

Third-party claims, including, but not limited to claims for indemnity or contribution, by a construction professional against a person who is or may be liable to it for all or part of the its liability to a third person arise at the time the third person's claim against the construction professional is settled or at the time final judgment is entered on the third person's claim against the construction professional, whichever comes first; and must be brought within ninety days after the claims arise, and not thereafter. C.R.S. § 13-80-104(1)(b)(II).

Essentially, the builder can wait until it resolves the underlying suit against it and then it has 90 days from the time of judgment or settlement to bring suit. This will be very beneficial in situations where a defendant does not want to sue a third party, thereby disrupting the business relationship.

More recently, the Colorado Supreme Court insisted that under C.R.S. § 13-80-104(1)(b)(II) a builder's claims against a third party may be tolled beyond the period of the statute of repose as long as the claims are brought during the construction defect litigation or within ninety days following the date of judgment or settlement. Goodman v. Heritage Builders, Inc., 390 P.3d 398 (Colo. 2017).

c. Possession or Control as a Bar to the Running of the Limitations Periods

Neither the statute of limitations or repose can be asserted as a defense by any person in actual possession or control, as owner or tenant or in any other capacity, of such an improvement at the

time any deficiency in such an improvement constitutes the proximate cause of the injury or damage for which it is proposed to bring an action. C.R.S. § 13-80-104(3).

2. Pre-Suit Statutory Procedures

Colorado's "notice of claim process," defined in C.R.S. § 13-20-803.5, mandates a construction professional's right to inspect the real property, the alleged defects, and communicate a monetary settlement offer or offer to repair before the property owner may proceed with litigation. The statute does not compel the construction professional to cure the alleged defects, nor does it provide a right of the construction professional to make repairs before the start of the lawsuit. The property owner is not required to accept an offer to cure or monetary offer.

C.R.S. § 13-20-802.5(5) defines a "notice of claim" as a written notice sent by a claimant to the last known address of a construction professional against whom the claimant asserts a construction defect claim that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect. C.R.S. § 13-20-803.5 requires that a claimant send the notice to the construction professional by certified mail, return receipt requested, or by personal service. Any claimant who files a lawsuit without first going through the notice of claim process faces the possibility that, upon motion by the construction professional or upon the court's own initiative, the litigation will be stayed while the owner and construction professional complete the notice of claim process. *See* C.R.S. § 13-20-803.5(9).

The "notice of claim process" requires a residential claimant to send a notice of claim no later than seventy-five days before filing an action against a construction professional, and no later than ninety days before filing an action against a construction professional in a commercial project. The claimant shall provide the construction professional and its contractors reasonable access to the claimant's property for inspections, which shall be completed within thirty days of service of the notice. Within thirty days after inspections (or forty-five in the case of a commercial property) the construction professional may send to the claimant, by certified mail, return receipt requested a monetary offer to settle or agreement to repair the claimed defect(s). Unless the claimant accepts the offer within fifteen days, the offer is deemed rejected.

A claimant who accepts a construction professional's offer to remedy or settle by payment of a sum certain a construction defect claim shall do so by sending the construction professional a written notice of acceptance no later than fifteen days after receipt of the offer.

A construction professional should keep in mind that an unreasonable offer of settlement during the notice of claim process may trigger exposure to treble damages under the CCPA. If the plaintiff prevails on a CCPA claim, and the construction professional's offer during the notice of claim process is less than 85 percent of the amount awarded to the claimant as actual damages, treble damages, plus attorneys' fees, may be awarded, subject to the statutory cap of $250,000, inclusive of attorneys' fees. C.R.S. § 13-20-806(1). Keep in mind that this $250,000 statutory cap may be subject to adjustment for inflation upward of $614,000 today.

In addition to the notice of claim process mandated by CDARA, numerous municipalities throughout Colorado have passed local ordinances that either mandate their own notice of claim procedures or include specific rights to repair. It remains to be seen whether such ordinances are preempted by CDARA, Colorado's Common Interest Ownership Act ("CCIOA"), C.R.S. § 38-33.3-101, *et seq.*, or are otherwise unenforceable.

3. Failure to Mitigate Damages/Comparative Negligence

Although both doctrines have at least some applicability to almost all construction defect cases, their practical effect is somewhat questionable. Although construction professionals often plead these affirmative defenses, they are seldom, if ever, successful in eliminating the damages paid to homeowners.

a. Failure to Mitigate

A plaintiff has a duty to take reasonable steps to mitigate or minimize its damages. This affirmative defense is proved by showing that some or all of plaintiff's damages were caused by plaintiff's failure to take such reasonable steps. *See* CJI-CIV. 5:2 (2023).

The doctrine of mitigation of damages imposes on the homeowner the duty to exercise reasonable diligence and ordinary care in attempting to minimize the damage to his or her home caused by expansive soil or construction defects. The diligence and care required of the homeowner is the same as that which would be used by a person of ordinary prudence under like circumstances. *See generally* Westec Const. Mgmt. Co. v. Postle Enterprises I, Inc., 68 P.3d 529 (Colo. App. 2002).

If a builder can point to some action or inaction of the homeowner which evidences the homeowner's failure to mitigate the damages associated with expansive soils or construction defects, the builder can seek to have a damage award reduced in an amount that represents the additional damage which the homeowner's mitigation would have avoided. Ballow v. PHICO Ins. Co., 878 P.2d 672, 680 (Colo. 1994).

b. Comparative Negligence

Under the comparative negligence doctrine, negligence is measured in terms of percentage, and any damages awarded to the homeowner are reduced in proportion to the amount of negligence attributable to the homeowner. For example, if the builder is found to be 70 percent negligent and the homeowner 30 percent negligent, the homeowner will be able to recover only 70 percent of his or her actual damages.

In the area of construction defect litigation, acts or omissions on the part of the homeowner which can be considered to rise to the level of comparative negligence include, but are not limited to, failure to landscape the yard in a reasonable amount of time, changing the grade of the yard, cutting downspouts so that water drains within five feet of the home, and landscaping within five feet of the home.

4. Contribution

Colorado's Uniform Contribution Among Tortfeasors Act, C.R.S. § 13-50.5-101, *et seq.*, provides that where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. C.R.S. § 13-50.5-102(1). Intentional, willful, or wanton conduct causing or contributing to the injury negates the right of contribution. C.R.S. § 13-50.5-102(3).

With respect to construction contracts, Colorado's Uniform Contribution Among Tortfeasors Act provides:

> (a) Any public contract or agreement for architectural, engineering, or surveying services; design; construction; alteration; repair; or maintenance of any building, structure, highway, bridge, viaduct, water, sewer, or gas distribution system, or other works dealing with construction, or any moving, demolition, or excavation connected with such construction that contains a covenant, promise, agreement, or combination thereof to defend, indemnify, or hold harmless any public entity is enforceable only to the extent and for an amount represented by the degree or percentage of negligence or fault attributable to the indemnity obligor or the indemnity obligor's agents, representatives, subcontractors, or suppliers. Any such covenant, promise, agreement, or combination thereof requiring an indemnity obligor to defend, indemnify, or hold harmless any public entity from that public entity's own negligence is void as against public policy and wholly unenforceable.
>
> (b) This subsection (8) shall not apply to construction bonds, contracts of insurance, or insurance policies that provide for the defense, indemnification, or holding harmless of public entities or contract clauses regarding insurance. This subsection (8) is intended only to affect the contractual relationship between the parties relating to the defense, indemnification, or holding harmless of public entities, and nothing in this subsection (8) shall affect any other rights or remedies of public entities or contracting parties.
>
> (c) If the indemnity obligor is a person or entity providing architectural, engineering, surveying, or other design services, then the extent of an indemnity obligor's obligation to defend, indemnify, or hold harmless an indemnity obligee may be determined only after the indemnity obligor's liability or fault has been determined by adjudication, alternative dispute resolution, or otherwise resolved by mutual agreement between the indemnity obligor and obligee.

C.R.S. § 13-50.5-102(8).

5. The Economic Loss Doctrine

The Economic Loss Doctrine in Colorado states that, "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach

absent an independent duty of care under tort law." Town of Alma v. Azco Construction, Inc., 10 P.3d 1256, 1264 (Colo. 2000). "'[E]conomic loss,' in this context, is defined generally as damages other than physical harm to persons or property." *Id.* The Economic Loss Doctrine does not preclude negligence claims in residential construction defect cases against homebuilders, subcontractors, architects, engineers, or inspectors because such professionals owe duties of care, independent of any contract, to the property owner. *See*, *e.g.*, A.C. Excavating, *et al.* v. Yacht Club II Homeowners Association, Inc., 114 P.3d 862 (Colo. 2005). The Economic Loss Doctrine still precludes negligence actions between the construction and design professionals that build a commercial project when a series of interrelated, written contracts exist between them. BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 74 (Colo. 2004).

The Colorado Court of Appeals addressed whether the Economic Loss Doctrine applies to intentional torts in a series of cases. The court ruled that the Economic Loss Doctrine generally does not bar intentional torts, however, limited circumstances warrant application of the doctrine to certain intentional torts. Dream Finders Homes LLC v. Weyerhaeuser NR Co., 506 P.3d 108 (Colo. App. 2021); McWhinney Centerra v. Paog & McEwen, 486 P.3d 439 (Colo. App. 2021). As a result of these cases, plaintiffs' attorneys may ramp up efforts to bring intentional tort claims. Still, it is important for defense counsel to know the Economic Loss Rule can serve as a defense to certain fact patterns involving intentional torts.

More recently, the Colorado Court of Appeals held that if a negligence claim is based solely on breach of a contractual duty, it is barred by the Economic Loss Doctrine regardless of whether the negligence was willful or wanton. Mid-Cent. Ins. Co. v. HIVE Constr., Inc., 531 P.3d 427 (Colo. App. 2023). If they did not already know to do so, owners will not likely make the mistake of filing tort claims absent additional/alternative contracts claim after this ruling.

6. Waiver

A waiver is an intentional relinquishment of a known right or privilege. Department of Health v. Donahue, 690 P.2d 243,247 (Colo. 1984). A waiver may be explicit (such as when a party orally or in writing abandons an existing right), or it may be implied (such as when a party's conduct manifests an intent to give up that right or is inconsistent with an assertion of the right). An implied waiver, however, should be unambiguous and clearly manifest the intention not to assert the right.

This defense is proved by showing that the plaintiff knew that the defendant had not performed his or her contractual obligation; the plaintiff knew that this failure of the defendant gave him or her a right; the plaintiff intended to give up this right; and the plaintiff voluntarily gave up this right. *See* CJI-CIV. 30:25 (2023).

7. Equitable Estoppel

A party is estopped if it placed an innocent person in a position in which injury and damage would result if the parties were permitted to assume a position contrary to their misleading actions. Jacobs v. Perry, 313 P.2d 1008 (Colo. 1957). "It is well-established that a party claiming estoppel must show that its reliance on the actions or statements of the other party was justified and reasonable under the circumstances of the case considered as a whole." City of Thornton v. Bijou Irr. Co.,

926 P.2d 1, 76 (Colo. 1996). Under the unclean hands doctrine, a party asserting the defense of equitable estoppel must have acted in good faith and ethically; otherwise, courts may decline to apply the defense. *See* Extreme Construction Co. v. RCG Glenwood, LLC, 310 P.3d 246 (Colo. App. 2012).

8. Special Consideration Related to Second Homeowners

As noted in the *Causes of Action* section above, not all claims are available to the second owners of a home. These unavailable claims include those that are based on the contractual obligations between the builder and original purchaser, namely breach of the implied and express warranties, unless the contract states that it will inure to the benefit of subsequent owners.

Also, it is doubtful whether the builder would have any contact with the second purchaser of a home. Therefore, claims for negligent misrepresentation or omission, violation of the CCPA, and violation of the Soils Disclosure Statute may not be applicable to second homeowners depending on the individual circumstances of the case.

The only cause of action that is always available to second homeowners is the claim of negligence. *See, e.g.,* Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983). The damages for which the builder may become liable because of its negligence are limited to the cost of repairing only the deficiencies which were latent at the time the second homeowner purchased the home. Second homeowners cannot receive attorneys' fees and treble damages under the CCPA and cannot receive damages for emotional distress caused by willful and wanton breach of warranty.

9. Exculpatory Clauses

Although not invalid *per se*, Colorado law has historically disfavored exculpatory clauses. B&B Livery, Inc. v. Riehl, 960 P.2d 134, 136 (Colo. 1998). Courts determine their validity as a question of law, and generally strictly construe them against the party seeking to limit its liability. *Id.* Courts consider four factors in determining whether exculpatory agreements are legally valid and sufficient: (l) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. *Id.* Further, exculpatory clauses insulating a party from its own negligence are permitted in Colorado if one party is not at a significant disadvantage in bargaining. However, an exculpatory clause is against public policy if it enforces a release from willful and wanton conduct. U.S. Fire Ins. Co. v. Sonitrol Management Corp., 192 P.3d 543,548 (Colo. App. 2008).

With respect to limitations on the liability of contractors to residential property owners, under the Homeowner Protection Act of 2007, any express waiver of, or limitation on, the legal rights, remedies, or damages provided by CDARA or provided by the CCPA on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitation or repose, are void as against public policy. C.R.S. § 13-20-806(7). This law does not abrogate or limit an express "repair or replace" warranty provision or the obligations of the warranty provider under C.R.S. § 13-20-807, nor does it apply to releases of construction defect claims. C.R.S. § 13-20-806(7)(b).

The Homeowner Protection Act has no limitation on waivers of liability through settlement agreements. Note that the Homeowner Protection Act is unique to residential construction actions, and no similar limitations on liability exist for commercial projects. Although, courts have recently interpreted "residential" in this context to extend to nursing homes. *See* section (II)(C)(2), *supra*.

10. Indemnification Clauses

"[A]ny provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable." C.R.S. § 13-21-111.5(6)(b).

A construction professional may still require an indemnitor to carry insurance naming the construction professional as an additional insured, "but only to the extent that such additional insured coverage provides coverage to the indemnitee for liability due to the acts or omissions of the indemnitor." C.R.S. § 13-21-111.5(6)(d)(I). Any provision in a construction contract requiring additional insurance coverage for damages from any acts or omissions not caused by the negligence or fault of the party providing such insurance coverage is also void as against public policy. *Id.*

11. Limitation on Consequential Damages Clause

Limitation on consequential damages clauses is enforceable in Colorado regarding a commercial construction contract. C.R.S. § 4-2-719(3) provides that consequential damages in sales contracts may be limited or excluded unless the limitation is unconscionable. The Homeowner Protection Act, discussed above, would prohibit a limitation on consequential damages for residential customers, to the extent such damages are included within the definition of "actual damages" of C.R.S. § 13-20-802.5(2). *See* the discussion below regarding consequential damages, generally.

12. Limitations for Sole Negligence

C.R.S. § 13-21-111.5 makes construction professionals' responsibility for their own negligence non-delegable in almost all instances in Colorado, with certain limited exceptions for contracts on water or railroad projects, and real property leases. After enactment of C.R.S. § 13-21-111.5, it is no longer permissible for a contractor in Colorado to enter into a contract that requires indemnification for its own negligence. The legislature has declared that all such agreements violate public policy of this state and are void and unenforceable.

13. Intervening and Superseding Causes

A "cause" is an act or failure to act that produced the claimed injury, and without which the claimed injury would not have happened. If more than one cause contributed to the damage, then each cause may have been a cause of the injury. A cause does not have to be the only one or last in a

chain of events. It is enough if one cause joins in a natural and probable way with another to produce some or all of the damage. *See* CJI-CIV. 9:20 (2023).

However, the defendant's conduct may not be the cause of the damage or injury if an intervening cause occurs, which combines with the defendant's conduct to result in the damage or injury.

> A defendant's conduct is not a cause of another's injuries if, in order to bring about such injuries, it was necessary that the conduct combine or join with an intervening cause which also contributed to cause the injuries, but which intervening cause would not have been reasonably foreseen by a reasonably careful person under the circumstances.

Moore v. Western Forge Corp., 192 P.3d 427, 436 (Colo. App. 2007).

A superseding cause is one that is substantial enough to cause the injury or damage independently, despite other intervening causes.

14. Exclusive Remedy

The Homeowner Protection Act, C.R.S. §§ 13-20-806(7) and 807, retroactively makes void as against public policy any waiver or limitation of a legal right afforded to homeowners under CDARA. As such, agreements that provide an exclusive remedy that is contrary to those provided by CDARA would not be valid. Note that the Homeowner Protection Act is unique to residential construction actions, and no similar limitations on liability exist for commercial projects.

C.R.S. § 13-20-806(7)(a) provides for protections of homeowners' rights in civil actions and arbitration proceedings. Therefore, a contract providing arbitration as an exclusive form of dispute resolution would not run counter to the Homeowner Protection Act.

"Designated statutory remedies must be followed exclusively if the statute creates legal duties that were unknown at common law and provides a particular means for their enforcement." Double Oak Const., LLC v. Cornerstone Dev. Intern. LLC, 97 P.3d 140, 148 (Colo. App. 2003). "Where a statute creates legal duties and provides a particular means for their enforcement, the designated remedy excludes all others." Silverstein v. Sisters of Charity of Leavenworth Health Serv. Corp., 559 P.2d 716, 718 (Colo. App. 1976).

CDARA is the exclusive remedy for causes of action against construction professionals for defects in construction. C.R.S. § 13-20-802.5 defines an "action" as:

> [A] civil action or an arbitration proceeding for damages, indemnity, or contribution brought against a construction professional to assert a claim, counterclaim, crossclaim, or third party claim for damages or loss to, or the loss of use of, real or personal property or personal injury caused by a defect in the design or construction of an improvement to real property.

Therefore, CDARA is the exclusive remedy for causes of action such as those defined in the statute section above.

15. Implied Warranty of the Adequacy of Plans and Specifications

Also known as the Spearin Doctrine, this implied warranty can be used defensively to avoid responsibility and offensively where defects in the plans and specifications cause prolonged and costly hurdles for the contractor. The Spearin Court ruled that:

> [I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, [] to inform themselves of the requirements of the work, . . . and to assume responsibility for the work until completion and acceptance.

United States v. Spearin, 248 U.S. 132, 136 (1918).

Note that this only applies where the general contractor did not prepare the design/build plans or hire the design professionals.

C. Damages Typically Sought in Construction Defect Cases

Although no case law has yet explicitly determined the issue, the definition of "actual damages" in CDARA may preempt the historical, common law measures of damages in all construction defect litigation in Colorado. Under CDARA, "actual damages" means:

> 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…

C.R.S. § 13-20-802.5(2).

A plaintiff may also recover damages for the loss of the use and enjoyment of his home. *See* Howard v. Wood Bros. Homes, Inc., 835 P.2d 556, 559 (Colo. App. 1992). In addition, a plaintiff may be able to recover for personal injuries, such as discomfort, annoyance, sickness, and/or physical harm, if such injuries are a distinct and separate result of the property damage. *See* Weld County Bd. of County Comm'rs v. Slovek, 723 P.2d 1309, 1317 (Colo. 1986). While the issue of these personal injuries is still in some dispute several recent cases have ruled that such damages are not available for representative plaintiffs such as homeowners' associations. Finally, a plaintiff may be able to recover out-of-pocket expenses that he or she incurred by trying to correct the problems themselves, *e.g.*, by hiring an engineering firm to investigate his problems or to perform

temporary repairs. *See* Hendrie v. Board of County Comm'rs of Rio Blanco County, 387 P.2d 266, 271 (Colo. 1963).

1. Cost of Repair

Unless a claimant prevails on its claim for violation of the CCPA and the construction professional did not make a reasonable offer through the notice of claim process, a construction professional is not liable for more than "actual damages." C.R.S. § 13-20-806(1).

2. Diminution in Value

There is no separate measure of damages in Colorado construction defect cases for diminution in value.

3. Stigma Damages

Stigma damages involve the reduction in the value of the real property after repairs have been completed. Such damages are not recoverable through C.R.S. § 13-20-802.5(2), which defines actual damages to include, "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."

4. Punitive Damages

a. Exemplary Damages Pursuant to C.R.S. § 13-21-102.

Punitive or exemplary damages pursuant to C.R.S. § 13-21-102 are not available in construction defect lawsuits in Colorado. Absent a CCPA violation and an unreasonable offer of settlement during the notice of claim process, CDARA limits a construction professional's damages exposure to actual damages precluding any exemplary damages. *See* C.R.S. § 13-20-806(1).

C.R.S. § 13-20-806 provides that:

> (1) A construction professional otherwise liable shall not be liable for more than actual damages, unless and only if the claimant otherwise prevails on the claim that a violation of the "Colorado Consumer Protection Act," article 1 of title 6, C.R.S., has occurred; and if:
>
> > (a) The construction professional's monetary offer, made pursuant to section 13-20-803.5(3), to settle for a sum certain a construction defect claim described in a notice of claim is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees; or
> >
> > (b) The reasonable cost, as determined by the trier of fact, to complete the construction professional's offer, made pursuant to

> section 13-20-803.5, to remedy the construction defect described in the notice of claim is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees.

b. Treble Damages Pursuant to the CCPA

If a plaintiff is successful in bringing a claim under the CCPA, a court or arbitrator may award treble damages if the plaintiff can demonstrate that the defendant fraudulently, willfully, knowingly, or intentionally engaged in the conduct that caused the injury to plaintiff. *See* C.R.S. § 6-1-113(2)(a)(III) and (2.3). No award of treble damages in a construction defect lawsuit shall ever exceed $250,000. *See* C.R.S. § 13-20-806(3). Adjusted for inflation, this $250,000 cap may be upward of $614,000 between the years 2020 and 2030. Pursuant to Colorado statute, the Secretary of State for the State of Colorado may adjust maximum and minimum amounts for civil penalties. While there has been no certification that the $250,000 maximum penalty under C.R.S § 13-20-806(3) has adjusted for inflation, that does not mean that such adjustments will not be made.

However, any plaintiff in a construction defect lawsuit that successfully argues a case for treble damages under the CCPA will not automatically receive the treble damages award. CDARA only permits an award that exceeds actual damages if, as stated above: (1) the plaintiff prevails on a CCPA claim, and (2) the construction professional's offer during the notice of claim process is less than 85 percent of the amount awarded to the claimant as actual damages. *See* C.R.S. § 13-20-806(1), *supra*. CDARA provision allowing a construction professional to avoid an award of treble damages under the CCPA is a clear incentive for a construction professional to consider making a realistic offer of settlement (at least 85 percent of actual damages) to the claimant during the notice of claim process.

5. Attorneys' Fees

Attorneys' fees in Colorado can only be awarded pursuant to contract or statute. The two statutes most often cited as giving rise to an award of attorneys' fees are the CCPA, C.R.S. § 6-1-101, *et seq.*, and the Colorado Common Interest Ownership Act, C.R.S. § 38-33.3-101, *et seq*. The treble damages and attorneys' fees component awardable pursuant to the CCPA are statutorily capped at $250,000 in any action against a construction professional. C.R.S. § 13-20-806(3).

6. Joint and Several Liability (Specific to Construction Defect)

Generally, joint and several liability for construction defect claims does not exist in Colorado. C.R.S. § 13-21-111.5(1) provides that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss."

However, plaintiffs' attorneys attempt to circumvent this general rule by arguing that the defendants acted in concert as co-conspirators. Pursuant to C.R.S. § 13-21-111.5(4), the law imposes joint liability when "two or more persons … consciously conspire and deliberately pursue

a common plan or design to commit a tortious act." Plaintiffs' attorneys have used this statute to argue that there has been a "concert of action" among contractors and subcontractors which results in the commission of a tort.

As it commonly relates to construction defect claims, if a plaintiff can prove that two or more defendants consciously conspired and deliberately pursued a common plan or design, *i.e.*, to build a home or residential community, and such a plan results in the commission of a tort, *i.e.*, negligence, courts can then hold defendants jointly and severally liable. *See* Resolution Trust Corp. v. Heiserman, 898 P.2d 1049 (Colo. 1995). While parties cannot be said to conspire when they have merely engaged in lawful contracting, "unique factual circumstances" and "detailed factual findings will be necessary" to determine whether any given contractual relationship among construction professionals will rise to the level of conspiracy under C.R.S. § 13-21-111.5(4). *Id.*

7. Consequential Damages

The definition of awardable actual damages under CDARA does not include consequential damages, except for "relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any. . ." C.R.S. § 13-20-802.5(2).

8. Prejudgment Interest

Historically, plaintiffs in construction defect suits were able to recover prejudgment interest in construction defect cases pursuant to C.R.S. § 5-12-102. By this statute, plaintiffs argued, more often successfully than not, that they were entitled to prejudgment interest, running at the statutory rate of interest, compounded annually, on the reasonable cost of repair from the date of closing through payment. However, arguments have long been made that such prejudgment interest should not be available to a construction defect plaintiff who has not paid any money out-of-pocket to make repairs or otherwise mitigate his or her damages. Until the case of Goodyear Tire & Rubber Co. v. Holmes, 193 P.3d 821 (Colo. 2008), this issue was unsettled at the appellate level.

In the Goodyear case, a homeowner brought an action against the manufacturer of a defective hose used in an embedded radiant heating system seeking to recover the cost of replacing the entire system. The rubber hose that was part of an embedded heating system began to leak in 1993. After the hose continued to leak for several years, despite numerous repairs, the homeowner replaced the entire heating system in 2001 and 2002. In a suit against the manufacturer of the hose, the homeowner sought and recovered the costs of replacing the heating system. The homeowner also moved for prejudgment interest under C.R.S. § 5-12-102, as of the date of the installation of the hose in 1991, but the motion was denied. On appeal, the Colorado Court of Appeals held that the homeowner could recover prejudgment interest on replacement costs damages from the installation of the heating system in 1991. On further appeal to the Colorado Supreme Court, it was ultimately determined that prejudgment interest began to accrue on the date the homeowner replaced the defective heating system rather than on the date the defective system was installed.

Since the purpose of prejudgment interest is to compensate a plaintiff for the time value of money, the Goodyear Court logically concluded that one can only recover interest when wronged in such

a way that he or she has lost the benefit of money over time. When, as in most construction defect cases, the plaintiff has made no repairs, and has retained full use of his or her home notwithstanding the alleged defects, there is no monetary loss to the plaintiff that can accrue interest.

D. Defense Strategy and Practical Issues in Construction Defect Cases

1. The Notice of Claim Process

CDARA has added a prelitigation process, commonly known as the "notice of claim" process, the completion of which is a prerequisite for any plaintiff filing a construction defect lawsuit. The notice of claim process is designed to resolve construction defect claims quickly and simply before they proceed to litigation. In practice, however, very few disputes are resolved through the notice of claim process because of its brevity and the practical impossibility of fully evaluating all construction defect allegations pre-suit.

The notice of claim process applies to any claim against a construction professional, including "an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property." *See* C.R.S. § 13-20-802.5(4). No later than 75 days before the lawsuit is filed (or 90 days in acclaim involving commercial construction), a claimant must deliver to the construction professional a written notice that describes the alleged defect "in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect." C.R.S. 13-20-802.5(5); *see also* C.R.S. § 13-20-803.5(1).

The claimant is then obligated to provide the construction professional with access to the allegedly defective construction within 30 days of service of the notice of claim so that the construction professional may inspect. Within 30 days of the completion of the inspection process (or 45 days for a commercial property) the construction professional may make an offer of settlement to the claimant. If the offer is accepted, the matter is considered resolved. If no offer is made or if the offer is rejected, the matter may proceed to litigation. *See generally* C.R.S. § 13-20-803.5. Any claimant who files a lawsuit without first going through the notice of claim process faces the possibility that, upon motion by the defendant or upon the court's own initiative, the litigation will be stayed while the notice of claim process is conducted. *See* C.R.S. § 13-20-803.5(9).

In addition to the notice of claim process mandated by CDARA, numerous municipalities throughout Colorado have passed local ordinances that either mandate their own notice of claim procedures or include specific rights to repair.[1] It remains to be seen whether such ordinances are preempted by CDARA, Colorado's Common Interest Ownership Act ("CCIOA"), C.R.S. § 38-33.3-101, *et seq*., or are otherwise unenforceable.

[1] Municipalities with the right to enter, inspect, and repair include Aurora, Centennial, Colorado Springs, Commerce City, Durango, Littleton, Lakewood, Lone Tree, Loveland, and Wheat Ridge.

2. Certificates of Review – Experts

Within sixty days after service of a claim against a licensed professional, including an architect, engineer, or professional land surveyor, the claimant's attorney must file a certificate of review declaring that the attorney has consulted with a person who has expertise in the area of the alleged conduct, the professional has reviewed the known facts, and based on the review of such facts, has concluded that the filing of the claim does not lack substantial justification. C.R.S. § 13-20-602(1), (3). Failure to file a certificate of review shall result in the dismissal of the claim for which it is necessary. C.R.S. § 13-20-602(4).

3. Third-Party Claims

Philosophies vary widely concerning whether and when a builder should assert third-party claims against subcontractors, design professionals, and others involved in a Colorado construction project. In most cases, for a variety of reasons, the plaintiffs' bar in Colorado seems to be moving away from asserting claims against subcontractors and design professionals. Instead, provided the builder is financially viable and/or has potential insurance coverage, a plaintiff often asserts claims only against the builder vendor and/or developer. While this practice limits the potential resources for settlement, the plaintiff's case is substantially simplified for discovery and trial. The builder must then evaluate the pros and cons of asserting third-party claims. The decision must be made on a case-by-case basis. The trend among the defense bar is to assert third-party claims against financially viable or insured subcontractors as part of the first-party action.

4. Designated Parties

C.R.S. § 13-21-111.5 deals with *pro rata* liability of defendants in civil liability cases. This statute states, in pertinent part:

> (1) In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss, except as provided in subsection (4) of this section.[2]

Thus, according to this statute, a potentially liable party is only responsible for the percentage of damages it caused. Therefore, under certain circumstances a judge or jury can assign a percentage of fault to a nonparty. The negligence or fault of a nonparty can be considered if the plaintiff/claimant entered into a settlement agreement with the nonparty or if the defending party gives notice that the nonparty was wholly or partially at fault. *See* C.R.S. § 13-21-111.5(3)(b). Notice must be in the form of a pleading. This pleading must set forth: (1) the nonparty's name and last known address, or (2) the best identification possible under the circumstances, and (3) a brief statement of the basis for believing the nonparty to be at fault.

For a nonparty's fault or negligence to be considered, the nonparty must not only be properly designated, but that person or entity must have owed a legal duty to the plaintiff/claimant. Miller

[2] Subsection (4) deals with joint liability and is immaterial to the purpose of this discussion.

v. Byrne, 916 P.2d 566, 578 (Colo. App. 1995); C.R.S. § 13–21–111.5. In addition, before a jury instruction regarding apportionment is proper, the defending party must present evidence of the designated nonparty's liability.

It is also important to note that the fault of a nonparty is very rarely a complete defense in a construction defect lawsuit. When claims have been pled that do not depend on the fault of the defendant for their success, such as express and implied warranty claims, the damages awarded to a plaintiff will not be reduced by a defendant successfully making nonparty designations.

5. Choice of Law (Forum Selection Clauses)

In dealing with choice of law or forum selection clauses, Colorado has adopted the Restatement (Second) approach for tort and contract actions. Wood Bros. Homes v. Walker Adjustment Bureau, 601 P.2d 1369, 1372 (Colo. 1979). "Where a conflict of laws question is raised, the objective of the Restatement (Second) is to locate the state having the 'most significant relationship' to the particular issue. In analyzing which state has the most significant relationship, the principles set forth in Restatement (Second) sections 6 and 188 are to be taken into account. Once the state having the most significant relationship is identified, the law of that state is then applied to resolve the particular issue." *Id.* at 1372.

6. Arbitration

Among construction professionals, arbitration has grown in popularity as an alternative to litigation through the court system. At this time, the primary perceived benefit of arbitration over litigation is the fact that an arbitrator will be determining the outcome of the case, rather than a jury. In Colorado, juries have been very receptive to homeowners' construction defect claims. This bias of juries is likely because many of the members of the jury are either homeowners or would like to be homeowners themselves and can therefore sympathize with the claimants.

Furthermore, in indemnity and contribution actions of homebuilders and general contractors against their subcontractors and design professionals, juries are often not likely to impose large verdicts on the subcontractors. The legal community tends to attribute such historical support of subcontractors to a perception that homebuilders and general contractors are "big bad corporations," while the subcontractor is more likely to be the guy next door. Therefore, arbitration of third-party or other indemnity and contribution claims is more likely to yield a satisfactory recovery for a homebuilder or general contractor.

In Colorado, the statutorily adopted Uniform Arbitration Act ("UAA"), codified at C.R.S. § 13-22-206, governs which disputes may be arbitrated. In general, all parties to arbitration must have agreed to arbitrate the dispute either in a contract or other "record:"

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

Id. The UAA allows a party seeking to enforce an arbitration provision to file a motion compelling arbitration. If the responding party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

7. Other Areas of Note

a. Contractor Licensing Requirements

The State of Colorado does not license general contractors. Instead, general contractors must comply with the licensing requirements of the local jurisdictions, either municipalities or counties, in which they operate. The State of Colorado does license professional engineers, architects, professional land surveyors, electricians, and plumbers.

E. Insurance Coverage for Construction Defect Claims

1. The "Work Product" Exclusion

The rationale for the work product exclusion found in most standard general liability policies is to prevent coverage for an insured's liability for a failed "product." Colorado courts generally agree that the intent of the general liability policy is not to provide guarantees or surety regarding an insured's work or products. *See* Bangert Bros. Const. Co., Inc. v. Americas Ins. Co., 888 F.Supp. 1069, 1072 (D. Colo. 1995); McGowan v. State Farm Fire and Cas. Co., 100 P.3d 521,525 (Colo. App. 2004). The same reasoning is applied to the "your work" exclusion, which is the more typically cited and applicable exclusion regarding a coverage analysis of construction-related claims.

2. "Your Work" Exclusion

In general, faulty work is not considered a covered occurrence in Colorado with certain exceptions. In Farmington Cas. Co. v. Duggan, the Tenth Circuit Court of Appeals considered the application of the "your work" exclusion in relation to exclusion (j) of the typical general liability policy:

> Section I(A)(1) of the Commercial General Liability Coverage Form at issue provides coverage for sums the insured becomes legally obligated to pay as damages because of "property damage" caused by an "occurrence" However, the policy does not cover property damage resulting from shoddy work; rather, it excludes from coverage damage to"[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it:' *Id.* § I(A)(2)(j)(6). An exception to this exclusion extends coverage to property damage included in the "products-completed operations hazard" § I(A)(2)(j)(6), but that subsection in turn excludes work that has not yet been completed. *Id.* § V(11)(a)(2). The end result of this exclusion from an exception to an exclusion is that faulty work is covered as property damage only if the work has been completed.

> Work is completed "[w]hen all of the work called for in your contract has been completed" *Id.* § V(11)(b)(1).

Farmington Cas. Co. v. Duggan, 417 F.3d 1141, 1143 (10th Cir. 2005).

It is also important to consider the implications of exclusion (I) found in most general liability policies for "Damage to Your Work." Based upon the same reasoning found in the cases of Bangert Bros., McGowan, and Farmington; coverage is generally understood not to apply to "property damage" damage to "your work" arising out of it or any part of it and included in the "products-completed operations hazard" as described by typical general liability policies. However, the exception to the exclusion for work performed on the insured's behalf by a subcontractor is generally understood in Colorado to provide limited restoration of coverage to an insured. Although this exception to exclusion (I) has not been specifically upheld by any Colorado decisions, a number of cases in other jurisdictions uphold the argument that the exception to this exclusion restores coverage to an insured for work that is both completed and work performed by subcontractors on the insured's behalf. Additionally, the Insurance Services Office published a broad form property damage coverage explanation on January 29, 1979, which supports a finding that the exception to exclusion (I) was intended to restore coverage to a contractor for completed work performed by subcontractors on the insured's behalf.

3. Cost Incurred to Access Repair Areas

Rip and tear damages are awardable to plaintiffs in construction defect cases as part of the cost of repair. At least one appellate court has found that there is coverage for rip and tear damage to nondefective work. Colorado Pool Systems, Inc. v. Scottsdale Ins. Co., *et al.*, 317 P.3d 1262 (Colo. App. 2012).

4. Definition of an "Occurrence"

In interpreting a liability insurance policy issued to a construction professional, a court presumes that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured. Unless provided otherwise in the insurance policy, damage to the insured's own work is not covered under Colorado law. C.R.S. § 13-20-808(3).

An "occurrence" sufficient to trigger coverage under an occurrence policy need not be sudden but must be a specific accident or happening within the policy period. . .. A long-term exposure to a harmful condition that results in damage or injury may be an occurrence. . .. Where property damage is gradual over some period of time, the trial court may make a reasonable estimate of the portion of the damage that is attributable to each year. The trial court may allocate liability to each policy triggered by the damage. Hoang v. Assurance Co. of America, 149 P.3d 798, 802 (Colo. 2007) (internal citations omitted).

The Colorado Court of Appeals once held that a complaint filed in a construction defect action that only alleged poor workmanship did not allege an occurrence sufficient to trigger an insurance carrier's duty to defend under the subject general liability policy. General Sec. Indem. Co. of

Arizona v. Mountain States Mut. Cas. Co., 205 P.3d 529 (Colo. App. 2009). As a result, parties seeking to trigger coverage had to take care to draft their complaint with sufficient specificity to allege a covered "occurrence" as defined by the subject insurance policy. In 2010, the Colorado General Assembly acted to overrule the effect of the General Security case by enacting House Bill 10–1394 which in part states that when considering commercial liability policies issued to construction professionals "a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured." C.R.S. § 13–20–808(3); Cont'l W. Ins. Co. v. Shay Const., Inc., 805 F. Supp. 2d 1125, 1131 (D. Colo. 2011).

5. The Duty to Defend

A broad duty to defend exists in favor of insureds in Colorado; the case of Hecla Min. Co. v. New Hampshire Ins. Co. is often cited in support of this broad duty. The Hecla case explains a carrier's broad duty to defend as follows:

> An insurer seeking to avoid its duty to defend an insured bears a heavy burden. An insurer's duty to defend arises when the underlying complaint against the insurer alleges any facts that might fall within the coverage of the policy. The actual liability of the insured to the claimant is not the criterion which places upon the insurance company the obligation to defend. Rather, the obligation to defend arises from allegations in the complaint, which if sustained, would impose a liability covered by the policy. Where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim.

Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1089 (Colo. 1991) (internal citations omitted).

a. Contractual Indemnity

Under C.R.S. § 13-20-808(7)(a), an insurer's duty to investigate and/or defend a construction professional or other insured under a liability insurance policy issued to a construction professional shall be triggered by a potentially covered liability described in: (I) A notice of claim made pursuant to section 13-20-803.5 (investigate); or (II) A complaint, crossclaim, counterclaim, or third-party claim filed in an action against the construction professional concerning a construction defect (defend).

An insurer must investigate a claim against a construction professional who has received a notice of claim and defend a lawsuit against a construction professional regardless of whether another insurer may also owe the insured a duty to defend the notice of claim unless authorized by law. The insurer must reasonably investigate the claim and reasonably cooperate with the insured in the notice of claims process. The insurer is not required to retain legal counsel for the insured or to pay any sums toward settlement of the notice of claim that are not covered by the insurance policy. C.R.S. § 13-20-808(7).

b. Anti-Indemnity Statutes

Colorado's anti-indemnity statute states that, "…any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable." C.R.S. § 13-21-111.5(6)(b).

However, the next subsection states that the rule cited above does not affect any provision in a construction agreement that allows for indemnity so long as indemnification obligation represents the degree or percentage of negligence or fault attributable to the indemnitor. In other words, if the subcontractor is indemnifying the general contractor for the subcontractor's negligence and not also the general contractor's negligence, then Colorado will enforce the indemnity agreement.

c. Additional Insureds

i. Coverage for Additional Insured's Own Negligence vs. Vicarious Liability for Named Insured

Colorado's anti-indemnity statute does not "apply to contract provisions that require the indemnitor to name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insured coverage provides coverage to the indemnitee for liability due to the acts or omissions of the indemnitor. Any provision in a construction agreement that requires the purchase of additional insured coverage for damage arising out of death or bodily injury to persons or damage to property from any acts or omissions that are not caused by the negligence or fault of the party providing such additional insured coverage is void as against public policy." C.R.S. § 13-21-111.5(6)(d).

ii. Determining Primary and Non-Contributory vs. Excess Position

"In contrast to primary insurance – which. . . covers an injury at the first level before any other insurance is exhausted - excess insurance 'is activated only after the magnitude of the loss exceeds the limits of the applicable 'primary' insurance.'" Lafarge N. Am., Inc. v. K.E.C.I. Colorado, Inc., 250 P.3d 682, 690 (Colo. App. 2010). "A liability policy can be primary or excess, may cover liability on a 'pro-rata' basis, or may contain an 'escape' clause providing that it will not cover any loss that is also covered by another policy." *Id.* "When one insurance policy is 'primary' and the other policy is 'excess,' the primary insurer pays for damages up to the limits of its policy; when that policy is exhausted, the excess insurer covers any remaining damages up to the limits of its policy." Allstate Ins. Co. v. Avis Rent-A-Car Sys., Inc., 947 P.2d 341, 346 (Colo. 1997). "Any ambiguity in the operation of the excess clauses must be resolved against the insurers and in favor of the insured." *Id.* "The general law, . . . is that an 'other insurance' clause which makes a policy excess if there is other insurance will be enforced, so long as there is not a conflicting 'other insurance' clause making both policies excess." Farmington Cas. Co. v. United Educators Ins. Risk Retention Grp., Inc., 117 F.Supp. 2d 1022, 1027 (D. Colo. 1999). "[I]f two or more policies of the same type each contains an excess clause, and they cannot be reconciled with each other, they are declared to be repugnant. As a consequence, each policy is required to make some pro-

rata payment for the loss suffered." Allstate Ins. Co. v. Frank B. Hall & Co. of California, 770 P.2d 1342, 1345 (Colo. App. 1989).

iii. AI Carrier's Rights to Reimbursement for Defense Expenses from Other, Co-Primary Carriers

Equitable contribution is recognized under Colorado law and is "a means of apportioning a loss between two or more insurers who cover the same risk so that each insurer pays its fair share of the common obligation." Cont'l W. Ins. Co. v. Colony Ins. Co., 69 F.Supp. 3d 1075, 1084 (D. Colo. 2014) (*quoting* Allstate Ins. Co. v. W. Am. Ins. Co., 2011 WL 11065655, at *3 (D. Colo. Nov. 21, 2011)).

d. Insured's Right to Independent Counsel and Consequences of Rejecting Defense

The Colorado Supreme Court has declined to define the circumstances under which insurers are obligated to provide independent counsel to insureds. Hartford Ins. Grp. v. Dist. Court for Fourth Judicial Dist., 625 P.2d 1013, 1018 (Colo. 1981). To our knowledge, no Colorado court has addressed whether an insurer has an obligation to provide independent counsel when it has issued a reservation of rights. *See*, *e.g.*, Justice Mularkey's dissent in Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1098 note 7 (Colo. 1991).

e. Additional Insured Endorsements

Colorado general contractors and developers often require their subcontractors to name them as an additional insured on their general liability policies. Although this practice has been common for many years, successfully triggering a carrier's additional insured obligation is far less common. Little case law exists in Colorado specific to carriers' obligations to their additional insureds.

In 2007, Colorado amended C.R.S. § 13-21-111.5, which began the prohibition of a general contractor from requiring additional insured coverage that would protect it from its own negligence. As a result, contractors can only contract for additional insured coverage under their subcontractor's commercial general liability policies to the extent of that subcontractor's negligence. It remains unclear as to whether a gratuitous grant of additional insured coverage provided by most existing additional insured endorsements will be enforced under the statute.

6. Coverage Defenses

a. Policy Defenses

The policy of Colorado favors the interpretation of insurance coverage broadly for the insured. C.R.S. § 13-20-808(1)(b)(I). Nothing contained in C.R.S. § 13-20-808 requires "coverage for damage to an insured's own work unless otherwise provided in the insurance policy; or creates insurance coverage that is not included in the insurance policy." C.R.S. § 13-20-808(3). "If an insurance policy provision that appears to grant or restore coverage conflicts with an insurance policy provision that appears to exclude or limit coverage, the court shall construe the insurance policy to favor coverage if reasonably and objectively possible." C.R.S. § 13-20-808(5).

> If an insurer disclaims or limits coverage under a liability insurance policy issued to a construction professional, the insurer shall bear the burden of proving by a preponderance of the evidence that:
>
> > (a) Any policy's limitation, exclusion, or condition in the insurance policy bars or limits coverage for the insured's legal liability in an action or notice of claim made pursuant to section 13-20-803.5 concerning a construction defect; and
> >
> > (b) Any exception to the limitation, exclusion, or condition in the insurance policy does not restore coverage under the policy.

C.R.S. § 13-20-808(6).

b. Timing for Reservations of Rights or Declinations of Coverage to Additional

"An insurer shall notify any additional insured by endorsement on a general liability policy, whose interests are affected by a liability claim, of the results of the insurer's investigation of such claim and the status of the claim within a reasonable period of time." 3 C.C.R. § 702-5:5-1-15, § 5(A). "'Reasonable period of time' means within ninety (90) calendar days after a liability claim is received, provided the insurer is able to identify the additional insured by endorsement based on a review of the records of the insurance company or information obtained from the named insured." *Id.* at § 4(C).

c. Invalidity of Super Montrose Endorsements

> (1) A provision in a liability insurance policy issued to a construction professional excluding or limiting coverage for one or more claims arising from bodily injury, property damage, advertising injury, or personal injury that occurs before the policy's inception date and that continues, worsens, or progresses when the policy is in effect is void and unenforceable if the exclusion or limitation applies to an injury or damage that was unknown to the insured at the policy's inception date.
>
> (2) Any provision in an insurance policy issued in violation of this section is void and unenforceable as against public policy. A court shall construe an insurance policy containing a provision that is unenforceable under this section as if the provision was not a part of the policy when the policy was issued.
>
> (3) This section applies only to an insurance policy that covers occurrences of damage or injury during the policy period and that insures a construction professional for liability arising from construction-related work.

C.R.S. § 10-4-110.4.

d. Late Notice

"Under the notice-prejudice rule, an insured who gives late notice of a claim to his or her insurer does not lose coverage benefits unless the insurer proves by a preponderance of the evidence that the late notice prejudiced its interests." Mark West Energy Partners, L.P. v. Zurich Am. Ins. Co., 411 P.3d 1080, 1082 (Colo. App. 2016) (internal citations omitted).

e. Failure to Cooperate

An insurance provider has a duty to act in good faith in investigating claims and insureds owe contractual duties of cooperation and reporting. State Farm Mut. Auto. Ins. Co. v. Brekke, 105 P.3d 177, 186 (Colo. 2004).

An insurer is barred from using a failure to cooperate defense in an action regarding the insurer's request for information from the insured about a claim unless:

(1) The insurer has submitted a written request to the insured for the information;

(2) The information necessary for litigation is not available to the insurer without the assistance of the insured;

(3) The request provides the insured 60 days to respond;

(4) The written request is for information a reasonable person would determine the insurer needs to adjust the claim filed by the insured or to prevent fraud; and

(5) The insurer gives the insured an opportunity to cure within 60 days and provides notice to the insured within 60 days, describing, with particularity, the alleged failure to cooperate.

C.R.S. § 10-3-1118.

A failure to cooperate defense only acts as a defense to the portion of the claim that is materially and substantially prejudiced to the extent the insurer could not evaluate or pay that portion of the claim. C.R.S. § 10-3-1118(e)(II)(2).

"An insurer is not liable for a claim in a civil action based upon a bad-faith breach of contract under common law or sections 10-3-1115 and 10-3-1116 because the insurer solely provides the insured with the required amount of time to: (a) to respond to the insurer's written request as specified under subsection (1)(c) of this section; and (b) to cure the alleged failure to cooperate as specified under subsection 1(e) of this section." Any language in a policy that conflicts with C.R.S. § 10-3-1118 is void as against public policy. C.R.S. § 10-3-1118(e).

7. Choice of Law (Forum Selection Clauses)

In dealing with choice of law or forum selection clauses, Colorado has adopted the Restatement (Second) approach for tort and contract actions. Wood Bros. Homes v. Walker Adjustment Bureau, 601 P.2d 1369, 1372 (Colo. 1979). "Where a conflict of laws question is raised, the objective of the Restatement (Second) is to locate the state having the 'most significant relationship' to the particular issue. In analyzing which state has the most significant relationship, the principles set forth in Restatement (Second) sections 6 and 188 are to be taken into account. Once the state having the most significant relationship is identified, the law of that state is then applied to resolve the particular issue." *Id.*

8. Targeted Tenders

Under Colorado law the relative liability of each subcontractor, the respective policy limits of the triggered policies, and the insurers' time on the risk are factors that might be relevant to the ultimate allocation of the defense costs among the insurers. But those are matters to be resolved among the insurers, either by agreement or in a separate suit for contribution from carriers who paid less than a reasonable share.

Prior to the codification of C.R.S. § 13-21-111.5, the duty to defend insureds was joint and several and existed from the moment that a policy is triggered. D.R. Horton, Inc.-Denver v. Mountain States Mut. Cas. Co., 69 F.Supp. 3d 1179, 1195–96 (D. Colo. 2014) (internal citations omitted). While it still holds true that the duty to defend insureds exists from the moment a policy is triggered, the joint and severability aspect is no more. Prior to C.R.S. § 13-21-111.5 and under the doctrine of joint and severable liability, if an insurer owed a defense for anything, it owed a defense for all in any given claim. Thus, a claimant could point a finger at any party at fault and demand payment in full regardless of each party's degree of fault or responsibility.

C.R.S. § 13-21-111.5(6) now prohibits targeting full tender from additional insureds by restricting recoverability to "that represented by the degree or percentage of negligence or fault attributable to the indemnitor or the indemnitor's agents, representatives, subcontractors, or suppliers." *Id.*

9. Consent Judgments

> [W]hen it appears that the insurer—who has exclusive control over the defense and settlement of claims pursuant to the insurance contract - has acted unreasonably by refusing to defend its insured or refusing a settlement offer that would avoid any possibility of excess liability for its insured, the insured may take steps to protect itself from potential exposure to such liability. One way for an insured to protect itself is through the use of an agreement whereby the insured assigns its bad faith claims to the third party, and in exchange the third party agrees to pursue the insurer directly for payment of the excess judgment rather than the insured.

Nunn v. Mid-Century Ins. Co., 244 P.3d 116, 119–20 (Colo. 2010) (internal citations omitted). That said, "the stipulated judgment will not be binding on the insurer until the insurer has had an opportunity to defend itself at trial." *Id.* at 123.

10. Errors and Omissions

As is typical in many jurisdictions, insurance carriers underwriting contractors in Colorado usually exclude coverage in a general liability policy for a contractor's exposure to professional liability. Typical exclusionary endorsements include, but are not necessarily limited to engineering, architectural, surveying, drafting, drawings, reports, specifications, and other related professional liability exposures. Such exclusionary endorsements will often exclude coverage for hiring out such services. If a contractor's work exposes it to professional liability, it should consider obtaining a suitable errors and omissions policy to cover such risk.

III. GENERAL CONSTRUCTION LITIGATION

A. Payment Disputes

Colorado construction liens and material supplier's liens are governed exclusively by the Colorado Mechanic's Lien statutes codified at C.R.S. § 38-22-101, *et seq*. The procedural requirements of the statutes are strictly construed and applied, and any technical failure to meet the requirements of the statute will potentially defeat the lien claim.

1. Construction and Material Suppliers' Liens

a. Notice

i. Timing

The first requirement is that the Notice of Intent to Claim a Lien claim form be properly completed, signed, notarized, and served by certified mail, return receipt requested, or personal delivery on both the owner of the property and the general contractor of the project. Lien claims for labor and materials must generally be filed within four months of the last substantial work performed on the project (or within four months of providing materials in the case of a supplier). C.R.S. § 38-22-109(5). The last substantial work of a subcontractor has been generally understood to be contract work that precedes clean up, equipment removal from the site, and/or completion of an incidental punch list of repairs. Ferguson v. Christiansen, 147 P. 352 (Colo. 1915).

ii. Content of Notice

The Notice of intent to lien must be completed accurately and in detail, referencing the legal description and/or precise street address of the property, the nature and date of the contract for which payment is sought, and the precise amount of the lien amount claimed, and the name, and address of the lien claimant, owner, and general contractor. C.R.S. § 38-22-109. It is a potentially fatal error to overstate the amount of a lien claim, and such actions can result in later forfeiture of the claim. C.R.S. §§ 38-22-128 and 123; Pope Heating & Air Cond. Co. v. Garrett Bromfield Mtg. Co., 480 P.2d 602 (Colo. App. 1971). Mistakes or omissions in address, legal description, the basis for the claim, signatures, notaries, and/or the exact amount owed on the claim can all become issues that jeopardize the lien.

b. Proper Description

The legal description and address can usually be verified through the website of the tax assessor for the county where the subject property is located. It is best to have a knowledgeable attorney review the completed form for technical compliance before serving it by certified mail or by personal service on the general contractor and landowner. It is also important to verify the current name, registered agent for service, and address of the legal owner of the property before sending the lien notice.

Because of the requirements involving service of the notice of intent to lien it is the best practice to file the Notice of Intent to Claim a Lien within 75 days after the last substantial work was done, in order to make sure that time requirements are easily satisfied without creating potential procedural compliance (*i.e.*, timing) issues that could defeat the claim. The certified mail receipts that are returned to the sender must be retained as essential documents to prove that timely and sufficient service was made if it becomes necessary to prove up the claim. Daniel v. M.J. Dev., Inc., 603 P.2d 947 (Colo. App. 1979).

c. Statute of Limitations

The validity of a statutory mechanic's lien is dependent on serving the Notice of Intent to Claim a Lien within the four months allowed under the statute. After this occurs, the claimant must also then record a copy of the completed, signed, and notarized lien notice more than ten days after service, and within the same four month notice period following last substantial work. C.R.S. § 38-22-109(3). If the lienable property is located in multiple counties, the recording should take place in all counties where the land is located. Care must be taken not to record the lien claim notices before the expiration of the ten-day period provided in the statute. During this ten-day period, it is good practice to contact the parties served with the lien directly to attempt resolution of the claims. Once the lien notice has been formally recorded, it serves as public notice of the pending claim.

d. Enforcement of Lien

The viability of the lien claim is also dependent on filing a court case to foreclose the lien and seek formal determination of the lien's validity, compliance with procedure, and amount within six months of the date of the last substantial work on the project by any construction person (not necessarily the lien claimant) or completion of the structure. C.R.S. § 38-22-110. A separate notice of lis pendens also must be filed in the land records when the mechanic's lien foreclosure suit is filed, again within the six-month period from the last lienable work done by anyone on the structure or the completion of the structure. C.R.S. § 38-22-110. The foreclosure process is required to be handled by an attorney if the lien claimant is a corporation or similar business entity. It is once again important to use the services of a knowledgeable attorney with prior experience in handling mechanic's lien claim actions in the foreclosure stage of the lien claim process.

i. Relief Available Under the Lien Claim

The lien bears interest at the rate of 12 percent simple interest, and it is possible to obtain an award of court costs and interest. It is unusual to be awarded attorneys' fees as part of the lien amount,

unless the claim is made under the Mechanic's Lien Trust Fund provisions of the statute (discussed below).

ii. Court Proceedings

All mechanics' lien claimants will typically be joined in the same foreclosure proceeding, and it is important to bring all potential or actual lien claimants into the case. C.R.S. § 38-22-111. While this may result in increased court costs, these costs are generally recoverable in the final order of judgment in the case. The principal challenge for most mechanic's lien claimants is the priority of a commercial lender's deed of trust on the subject property, and whether it will be senior (*i.e.*, have a higher priority) than the mechanic's liens against the property. The date of the deed of trust typically decides this question.

iii. Lien Priority

All mechanic's lien claims are given the same lien priority date, and it will be the first date that any mechanic's lien claimant performed any work on the subject property that could give rise to a lien claim. C.R.S. § 38-22-106 and 108. Thus, even if a mechanic's lien claimant did not perform early work on a project, that claimant's work will still be assigned a uniform priority date identical with the earliest work done by the mechanic's lien claimant that performed the earliest work. In the unusual case, the lien will be foreclosed by formal judicial public sale, and lien claimants (including deed of trust holders) will be paid from the net proceeds of sale according to their priority in time. C.R.S. § 38-22-113.

iv. The Colorado Mechanic's Lien Trust Fund Statute

The Colorado Mechanic's Lien Trust Fund Statute is a provision of the Colorado Mechanic's Lien statute that presents both special problems for general contractors and special opportunities for subcontractors and material suppliers. C.R.S. § 38-22-127. It provides requirements that when general contractors are paid for the work of subcontractors or for the materials supplied by others that the general contractor is required to hold the money sequestered "in trust" for the subcontractor or supplier. Any failure to pay money promptly that is received from the owner and that is owed to the subcontractor or supplier under this "trust" requirement will create potential liability for the general contractor to the unpaid or underpaid subcontractor or supplier. There is potential liability for the general contractor for treble damages and attorneys' fees for intentional nonpayment to the subcontractor or supplier under such circumstances. In re Regan, 2007 WL 1346576 (D. Colo. 2007).

The applicability of the Colorado Mechanic's Trust Fund Statute to a particular case is very fact specific. Most importantly, it is not necessary for the unpaid party to comply with the (four and six-month) time provisions of the general mechanic's lien statute, and an action is available even if the direct lien claim has been lost due to procedural noncompliance or the passage of time. The Mechanic's Lien Trust Fund claim will be available if the criteria of the statute at C.R.S. § 38-22-127 are satisfied (*i.e.*, receipt by the general contractor of payment from the owner, and failure by the general contractor to sequester funds and/or pay subcontractors or suppliers whose work was to be paid with those funds promptly).

2. Sureties and Bonds

Construction companies' bond claims related to mechanic's lien claims are governed by statute. *See* C.R.S. §§ 38-22-129 through 133, as well as general principles of contract common law. C.R.S. § 38-22-129 provides that a statutory mechanic's lien claim is not available where there has been a general surety bond for at least 150 percent of the cost of construction prior to the beginning of construction. The claims are required to be made against the general contractor and the surety, in lieu of a mechanic's lien claim.

a. Performance Bonds/Payment Bonds

i. Notice of Bond

Under the provisions of this statute, complying bonds are required to be recorded with the County Clerk and Recorder where the project is to take place. C.R.S. § 38-22-129(2).

ii. Actions on the Bond

For claims under $2,000, there is an affidavit procedure under C.R.S. § 38-22-130 by which a claim should be presented. The affidavit should contain the same type of information that would be used for an initial mechanic's lien notice, along with all available documentation. If the affidavit is not contested for 45 days after service by certified mail, return receipt requested, or personal service on the general contractor and the surety, the amount is conclusively deemed owed as claimed. Thereafter, if the surety does not pay the claim, it must be enforced by a suit, typically in county court in the county where the project was constructed.

If the claim is over $2,000, the claim is not subject to the above-described affidavit procedure, and the claim must be enforced by filing a suit against both the general contractor and the bond surety. C.R.S. § 38-22-129(2).

iii. Time Limits for Bond Claims

Any action for payment on a surety bond filed to bond over a mechanic's lien claim must be filed within six months of the last work done by anyone (not necessarily the bond claimant) on the project generally, or within six months of completion of the project. C.R.S. § 38-22-133.

Non-mechanic's lien-related bond claims for payment or performance may be filed within three years of the failure of payment or performance, under the Colorado contract statute of limitations. C.R.S. § 13-80-101. However, many bonds have explicit contractual limitations on claim filing deadlines and procedures, with further provisions for preliminary notice of potential claims. These time limits are enforceable as private statutes of limitation, and the notice conditions are binding as conditions precedent for claim purposes. Since bond terms will vary, close attention is needed to ensure that the notice provisions and claim filing requirements are met with time to spare. The provisions of C.R.S. § 13-26-101, *et seq*., generally govern bonds on public works projects.

b. Subrogation

Subrogation is the substitution of one party for another when it comes to rights or claims. Payment of the claim by the surety will typically give rise to a common law subrogation action on the part of the insurer. However, if the claim is settled and compromised, the amount of the subrogation may be limited to the amount paid in compromise, unless the claim is expressly assigned to the surety in full. This is not presently a clearly determined issue under Colorado law as of 2023 in the context of construction defect claims.

2. Pay When Paid and Pay if Paid Clauses

"Pay when paid" clauses are a way by which a general contractor can affect the timing of payment to a subcontractor to mirror payment by the owner to the contractor. Such clauses are not *per se* invalid in Colorado. However, pay when paid clauses are distinguishable from "pay if paid" clauses. In the former, the "when" portion of the clause is not a condition precedent on the general contractor's obligation to pay the subcontractor. Rather, the term infers that payment may be delayed. Main Elec., Ltd. v. Printz Services Corp., 980 P.2d 522,527 (Colo. 1999). To create a pay if paid clause, in which the risk of an owner's nonpayment is shifted from a general contractor to a subcontractor, the language of the clause must clearly express the parties' intent that the subcontractor is to be paid only if the owner first pays the general contractor. Generally speaking, Colorado only enforces such clauses when the contract language clearly and unambiguously makes payment by the owner to the contractor a condition precedent to payment by the contractor to the subcontractor. *Id.* at 528. Pay when paid clauses affect the timing of payment only, and the general contractor is at risk of nonpayment from the owner. With pay if paid clauses, the subcontractor is at risk for such nonpayment.

B. Contract Recission

Generally, courts may rescind a contract if the facts show that there is a substantial breach of contract, that the injury caused is irreparable, or that damages would be inadequate, difficult, or impossible to assess. Wall v. Foster Petroleum Corp., 791 P.2d 1148, 1150 (Colo. App. 1989). A party must rescind a contract within a reasonable time, which depends upon the facts of a particular case and must be determined by the trier of fact. *Id.* at 1151.

C. Damages

1. Quantum Meruit/Unjust Enrichment

Quantum meruit is an appropriate basis for recovery when substantial changes occur, that are not covered by the contract, are not within the contemplation of the parties, and when the effect of such changes is to require extra work or to cause substantial loss to one party. Specialized Grading Enter., Inc. v. Goodland Const., Inc., 181 P.3d 352, 354-355 (Colo. App. 2007).

Whereas the interpretation of a written contract and whether such contract is ambiguous are questions of law for the court, whether a contractor can recover under a quantum meruit claim is a mixed question of law and fact. *Id.* at 355.

2. Delay and Disruption Damages

Delay and disruption may result in damages that are recoverable. Damages may be calculated as the reasonable net rental value, that is, the gross rental value of the property minus all reasonable expenses that normally would be incurred related to the occupancy of the property during the period for which the completion was delayed. *See* CJI-CIV. 30:50 (2023).

3. Contract Damages

The general measure of damages in breach of contract claims is the amount that would place the non-breaching party in the same position had the contract been fully performed. Pomeranz v. McDonald's Corp., 843 P.2d 1378, 1381 (Colo. 1993). In a breach of contract action brought against a construction professional for construction defects, this measure of damages must comport with the definition of "actual damages" of C.R.S. § 13-20-802.5. The amount of damages in a breach by a builder may be calculated as the reasonable cost to the plaintiff of completing the contract, minus any unpaid balance of the contract price. *See* CJI-CIV. 30:43 (2023).

If the owner breached the contract, the builder may be entitled to the agreed upon contract price, minus any payments made by the owner, and minus what it would have cost the builder if it had completed construction according to the contract. *See* CJI-CIV. 30:45 (2023). Where the builder has substantially performed, but not completed, a construction contract and the owner is in breach, the builder may recover the agreed to contract price minus any payments made by the owner, and minus the reasonable cost to the owner of completing the construction had the contract been performed according to its terms. *See* CJI-CIV. 30:46 (2023).

Damages are not recoverable for losses beyond amounts that the plaintiff can establish with reasonable certainty by a preponderance of the evidence. City of Westminster v. Centric-Jones Constructors, 100 P.3d 472 (Colo. App. 2003).

Unless the agreement specifies otherwise, C.R.S. § 5-12-102(l)(a) and (b) provides for pre-judgment interest at 8 percent per year, compounded annually, from the date the money or property is wrongfully withheld. It is important to note that prejudgment interest is not available in construction defect actions unless the damaged party has already spent the money to repair any defects. Goodyear Tire & Rubber Co. v. Holmes, 193 P.3d 821 (Colo. 2008). In Goodyear, the plaintiff paid to repair a leaking hose in an in-floor heating system and the court awarded prejudgment interest accruing from the time of completion of repairs. *Id.* However, if a claimant sues for future costs of repair, there is no wrongful withholding and there will not be an award of prejudgment interest.

In extreme instances, noneconomic damages may be recoverable in a breach of contract cause of action. The breach must be willful and wanton, the noneconomic damages must have been foreseeable when the parties entered into the contract, and the noneconomic damages must be a natural and probable result of the breach. Giampapa v. American Family Mutual Insurance Co., 64 P.3d 230, 243 (Colo. 2003).

The parties to an agreement may stipulate to liquidated damages, so long as the amount is not disproportionate to the anticipated damages arising from the breach. Klinger v. Adams County School Dist. No. 50, 130 P.3d 1027, 1034 (Colo. 2006) (*quoting* Rohauer v. Little, 736 P.2d 403, 410-11 (Colo. 1987)). Further, for liquidated damages to be enforceable, anticipated damages arising from a breach must have been uncer-tain or difficult to prove. *Id.*

D. Worksite Accidents

Virtually all construction-related employers in Colorado are mandated into the Colorado Workers' Compensation Act, and workplace accident claims against a direct employer are covered by workers' compensation insurance under C.R.S. § 8-41-104. Additionally, "upstream" parties who are senior in the construction project hierarchy (including property owners, developers, general contractors, and senior subcontractors) are generally immunized from tort liability by the Workers' Compensation Act pursuant to C.R.S. § 8-41-401 and 402. However, if the employer of the injured worker did not obtain workers' compensation insurance coverage, the injured party may choose to file a tort claim against the non-complying employer. Also, if the worksite injury results from the actions of a parallel subcontractor (*i.e.*, a company not in the direct vertical chain of contracted work above the injured worker), or a junior "downstream" subcontractor, a tort claim will potentially be available to the injured worker against the parallel or junior subcontractor.

E. Delays

In Colorado, a contractor may pursue a claim for damages where acts of the owner or another contractor delayed the performance of its work. "No damages for delay" clauses are valid and enforceable in Colorado but courts will strictly construe them. Tricon Kent Co. v. Lafarge North America, Inc., 186 P.3d 155,159 (Colo. App. 2008).

1. Time Is of the Essence

Many construction contracts contain a "time is of the essence" clause. A contractor's violation of such a clause may entitle the owner to damages caused by the contractor's delay. In the absence of such a clause, time is not a material term of the contract. Kole v. Parker Yale Dev. Co., 536 P.2d 848,850 (Colo. App. 1975).

2. Act of God

In Colorado, the defense of "act of God" is available only to defendants who can prove that the claimed injury resulted solely from an act of God without any contributory negligence on their part. Moore v. Standard Paint & Glass Co. of Pueblo, 358 P.2d 33, 36 (Colo. 1960).

3. Eichleay Formula

The Eichleay formula is used to "equitably determine allocation of unabsorbed overhead to allow fair compensation of a contractor for government delay." Nikon v. US., 331 F.3d 878,882 (C.A. Fed. 2003). The Eichleay formula computes overhead that would have been charged to the project if no delay had occurred, converts it into a daily overhead rate, and then permits the contractor to recover that rate for each day of compensable delay or suspension. Colorado appellate courts have

not expressly adopted the Eichleay formula as an acceptable basis for measuring extended overhead costs.

4. Prompt Pay Act

Colorado's Prompt Pay Act, codified at C.R.S. § 24-91-103, pertains to the payment of contractors for public projects. The Act requires a contractor to make payments to each of its subcontractors of any amounts actually received that were included in the contractor's request for payment to the public entity for such subcontracts. The contractor is required to make such payments within seven calendar days of receipt of payment from the public entity, as long as the subcontractor is satisfactorily performing under its contract with the contractor. Subcontractors are entitled to interest as specified by contract or at the rate of 15 percent per annum (whichever is higher) on the amount of the payment that was not made in a timely manner.

IV. FIRM OVERVIEW

Established in 2001, Higgins, Hopkins, McLain & Roswell, LLC ("HHMR") stands as a beacon of legal expertise, service, and stewardship in the Colorado construction law landscape. With a Denver base and a boutique feel, HHMR has forged a reputation for exceptional legal representation in Colorado's construction sector, delivering personal attention to a diverse array of clients ranging from individuals and small businesses to Fortune 500 companies.

HHMR prides itself on its team of seasoned attorneys, who bring a wealth of experience across various facets of construction law. Specializing in construction defect defense, construction payment claims, and insurance defense, the firm has also made significant contributions to governmental affairs and legislative monitoring, reflecting its commitment to shaping the future of construction defense litigation in Colorado.

The firm's dedication extends beyond conventional litigation, as HHMR's attorneys are also adept in alternative dispute resolution. This flexibility in approach underscores their sensitivity to achieving cost-effective results that align with their clients' best interests. HHMR's prowess has not gone unnoticed, as evidenced by its recognition in the 2024 Best Law Firm® rankings and an AV® Preeminent™ recognition from Martindale-Hubbell, testaments to the firm's unwavering commitment to top-tier legal services.

At the heart of HHMR's ethos is an unwavering dedication to serve our clients to the best of our ability and to act as a steward of their trust and resources. This commitment, coupled with the firm's specialized focus on Colorado construction law, has enabled it to develop an exceptional level of expertise and provide unique perspectives, particularly to those seeking protection from litigation or looking to mitigate risks in construction.

For those interested in learning more about HHMR's services, expertise, or to schedule a consultation, the firm welcomes inquiries and opportunities to discuss how it can assist with legal needs in the construction industry.

V. CONSTRUCTION LAW PRACTICE DESCRIPTION

For over two decades, the attorneys at Higgins, Hopkins, McLain & Roswell, LLC ("HHMR") have dedicated themselves to the intricacies of Colorado construction law and the litigation of construction-related claims. With a deep commitment to serving the construction industry and its insurers, HHMR is at the forefront of legal representation for construction professionals, insurance carriers, and self-insured entities.

The scope of HHMR's expertise in construction law is extensive, encompassing:

- **Contract Negotiation and Dispute Resolution:** HHMR excels in handling the complexities of contract negotiations and resolving disputes that arise in the construction process, ensuring that the interests of its clients are effectively represented and protected;

- **Construction Defect Defense:** The firm has a robust history of successfully defending developers, builders, contractors, and subcontractors against construction defect claims involving residential, commercial, mixed use, institutional, industrial, and heavy civil construction, showcasing its capability to manage high stakes litigation;

- **Construction Payment and Mechanic's Lien Claims:** HHMR's attorneys are well versed in navigating the nuances of construction payment claims and enforcing mechanic's lien rights, a critical aspect for safeguarding financial interests in construction projects;

- **Engineering and Design Failure Cases:** The team is adept in addressing issues related to engineering and design failures, providing comprehensive legal solutions to these technically complex challenges;

- **Surety, Payment, and Performance Bond Claims:** Expertise in handling claims related to surety, payment, and performance bonds is another key area of HHMR's practice, ensuring clients are supported in these vital aspects of construction law.

HHMR's achievements in construction litigation are noteworthy and the firm's attorneys are also well versed in advising clients on critical legislative and regulatory frameworks like the Construction Defect Action Reform Act, the Homeowner Protection Act, and Colorado's statutes on indemnity, limitations, and repose applicable to construction claims.

This comprehensive approach to construction law, underpinned by over two decades of specialized experience, positions HHMR as a formidable ally for those navigating the complex legal landscape of Colorado's construction industry.