



# **construction-defects in Colorado**

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# Overview

- New construction/complete renovations
  - Introduction to CDARA-I and CDARA-II
  - The Notice of Claim Process (NCP)
- Resale of property
  - Broker duties to disclose
  - Obtaining information – the CLUE report
  - Recent case law regarding duty to disclose

# New Construction/Complete Renovation



# Introduction to CDARA

- The construction-defect Action Reform Act
- Two phases of reform in Colorado:
  - 2001 – **CDARA-I** – effective for all actions filed on or after August 8, 2001
  - 2003 – **CDARA-II** – effective for all actions filed on or after April 25, 2003



# CDARA-I

- Designed to curb perceived abuses related to construction-defect litigation
- Stated goal was to “preserv[e] adequate rights and remedies for property owners who bring and maintain such actions.” – C.R.S. §13-20-802.



# **CDARA-I:**

## **Addressed Four Broad Areas of Concern**

- 1. Initial list of construction-defects
  - Problem of long delays between the filing of a suit and the identification of the specific defects at issue
  - CDARA-I required claimants to file and serve the initial list of defects within 60 days of commencing the action (or longer with court permission)
  - Applies to both residential and commercial activities

# CDARA-I – Four Broad Areas (cont'd)

- 2. Building code violations
  - Number of claims based on purely technical violations of building codes or industry standards with only speculative issues of ensuing damage/injury/loss
  - CDARA-I prohibited negligence claims seeking damage arising solely from failure to comply with building code or industry standard UNLESS the failure resulted in:
    - Actual or probable damage to or loss of use of real or personal property or actual or probable bodily injury or wrongful death; or
    - Risk of bodily injury or death or threat to life, safety, or health of occupants of residential real property
  - Applied only to residential, not commercial, properties

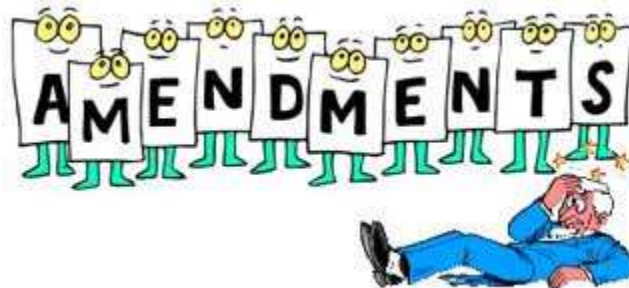
# CDARA-I – Four Broad Areas (cont'd)

- 3. Changes to statute of limitations for reimbursement claims
  - Claims for reimbursement from a 3<sup>rd</sup> party must be brought within 90 days after such claims arise (after date of settlement or final judgment of court)
- 4. Notice to HOA members
  - Required executive board instituting an action asserting defects in 5 or more units to give written notice of the commencement of the action to each unit owner
  - Notice had to include description of the action, relief sought, and anticipated expenses/fees



# CDARA-II

- 2 primary goals
  - Limit litigation while preserving property owners' rights
  - Stabilize the cost of insurance products for construction professionals
- CDARA-II applies to residential, commercial, and government property owners



# CDARA-II

- New definition of “construction professional”
  - 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. – CRS §13-20-802.5(4)
- For commercial property, “construction professional” also includes any prior owner of the commercial property at the time the work was performed.

# CDARA-II

- New definition of “actual damages”
  - The *lesser of*:
    - The fair market value of the real property without the alleged construction-defect;
    - The replacement cost of the real property; or
    - Reasonable costs to repair the alleged construction-defects along with relocation costs
  - For residential property, also includes other economic costs related to loss of use, interest provided by law, and costs and attorney fees. – CRS §13-20-802.5(2)

# CDARA-II

- New definition of “actual damages” – potential issues
  - Does not address how to assess damage to a property with no ascertainable fair market value such as historical or other unique properties
  - Definition does not expressly include punitive damages – are these still allowed?
  - Not clear if CDARA-II applies to damage that occurs during construction work if it is discovered before the work is substantially completed

# CDARA-II and the NCP

- Set forth a Notice of Claim Process (NCP)
- Overview of NCP steps:
  - Delivery of Notice of Claim to construction professional
  - Property inspection by construction professional
  - Response to Notice of Claim by construction professional
  - Claimant's response to construction professional
  - Filing of action against construction professional

# The NCP – Delivery of Notice

- Before filing an action against a construction professional, claimant must deliver a written Notice of Claim, defined as:
  - A claimant's written notice sent to the last known address of a construction professional that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the alleged defective construction and any damages claimed.
  - CRS §13-20-805.5(5)

# The NCP – Delivery of Notice

- Potential issues:
  - Claimants may not be able to identify all defects, additional things might appear during the course of the claim
  - As investigation progresses, new causes of problems may be discovered – damage from construction-defects is often progressive
  - Claimants may not be able to determine all of the responsible parties at the outset of a claim

# **The NCP – Delivery of Notice**

- The Notice of Claim may be amended to include any newly-discovered defects that arise after the initial NCP
- The Notice of Claim must be filed no later than 75 days before filing an action for residential property; no later than 90 days before filing an action for commercial property



# The NCP – Inspection and Response

- After receiving a Notice of Claim, the construction professional may request reasonable access to the property to inspect the claimed defect
- After completing the inspection, the construction professional may submit an offer to the claimant to resolve the claim, either through a payment of a certain amount of money or by agreeing to remedy the claimed defect. The offer must be made within 30 days of the inspection for residential property and within 45 days of the inspection for commercial property.
  - Offer must include: report of the scope of the inspection; findings and results of the inspection; description of additional work needed to remedy the defect and damage caused by the defect; timetable for completing work (if applicable).

# **The NCP – Inspection and Response**

- Does a construction professional owe a duty to disclose the findings of an investigation to a claimant if the professional is offering to make a monetary payment rather than remedying the defect?
- Not addressed by CDARA

# **The NCP – Accepting/Rejecting the Offer**

- To accept the offer from the construction professional, the claimant must submit written acceptance no later than 15 days after receipt of the offer, otherwise the offer is deemed rejected by the claimant.
- If the construction professional does not make an offer or the claimant rejects the offer, the claimant may bring action against the professional for the defect described in the Notice of Claim.

# CDARA and Express Warranties

- Construction and sale of property often includes issuance of express written warranties
- CDARA addresses this by noting that the provisions “are not intended to abrogate or limit the provisions of any express warranty or the obligations of the provider of such warranty.” - CRS §13-20-807
- So – a claimant who is the beneficiary of an express warranty does NOT need to comply with NCP, but must still comply with the provisions of the express warranty



# CDARA - Statutes of Limitation

- In Colorado, the general limitation on bringing a civil action is two years – CRS § 13-80-102
- However, there is a special statute of repose that applies to construction professionals – CRS § 13-80-104
  - A claimant has a cap of **six** years to bring a construction-defect claim against a construction professional
  - In general, the claim arises at the time the claimant or claimant's predecessor in interest discovers or should have discovered the physical manifestation of the defect

# Statutes of Limitations and Tolling

- “Tolling” is a legal doctrine that allows the pausing or delaying of the period of time set forth by a statute of limitations
- Under CDARA, if a notice of claim is sent to a construction professional within the 6 year timeframe of the statute of repose, then the statute of limitations is tolled until 60 days after the completion of the NCP
- Some professional use a Tolling Agreement if there is a need to extend the deadlines for the NCP (sample on next slide)

# Sample Tolling Agreement

## TOLLING AGREEMENT

THIS TOLLING AGREEMENT is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2014 ("Effective Date") between the XX Association, Inc. ("Association") and XYZ Construction ("Developer/Builder"). The Association and Developer/Builder collectively are referred to as the "Parties." For good and valuable consideration, receipt of which is hereby acknowledged, the Parties and each of them, covenant and agree as follows:

## RECITALS

On \_\_\_\_\_, 2014, the Association sent a Notice of Claim Letter to several parties including the Developer/Builder, pursuant to C.R.S. § 13-20-803.5, alleging certain construction-defects at \_\_\_\_\_.

On \_\_\_\_\_, 2014 Counsel for Developer/Builder requested an extension of time to conduct an inspection of the property.

In order to effectuate a meaningful notice of claim process the Parties deem it in their best interest to execute this Tolling Agreement and extend the notice of claim deadlines.

## AGREEMENT

Now, THEREFORE, in consideration of the mutual promises contained herein, the Association and Developer/Builder agree as follows:

Any and all statutes of limitation, statutes of repose, and other time-related defenses, whether equitable or legal, statutory or contractual, including without limitation, the doctrine of laches and any potential applicable periods of limitations or repose, shall be tolled and suspended from \_\_\_\_\_, 2014 until 10 days after one party provides written notice to the other that the party is terminating the notice of claim process (the "Tolling Period").

In any litigation or arbitration between the Association and Developer/Builder, neither party will raise, plead or assert any statute of limitation, statute of repose, laches, contractual limitation, or other time-related defense based upon failure to commence or pursue any such litigation during the Tolling Period.

This Tolling Agreement shall not limit any rights Developer/Builder may have to assert any statute of limitations, statute of repose, laches, contractual limitation, or other time-related defense that may have come into existence prior to \_\_\_\_\_, 2014 or that may come into existence at any time after the termination of the Tolling Period.

The Association and Developer/Builder understand and accept that this Tolling Agreement shall apply to and shall be binding upon themselves and each of their successors, heirs, subsidiaries, parents, affiliates, agents, and assigns.

This Agreement shall be modified only by written agreement signed by each party.

This Tolling Agreement may be executed in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same Tolling Agreement.

All representations, warranties, promises, recitals, and covenants contained herein shall survive the execution and delivery of this Tolling Agreement.

By executing this Tolling Agreement, neither the Association or the Developer/Builder in any way admit any matter relating to any claim or defense that either may have.

Each undersigned individual represents that he has been duly authorized to enter into this Tolling Agreement.

This Tolling Agreement shall be construed under the laws of the State of Colorado.

Signatures:

# Construction Insurance

- A 2010 addition to CDARA changed the scope and interpretation of insurance policies issued to construction professionals
- The amendment was a response to a case that held that complaints in construction-defect actions that alleged only poor workmanship did not allege an occurrence that triggered a duty for insurers to defend in policies issued to sub-subcontractors
- CRS § 13-20-808 clarifies that insurance coverage should be broadly interpreted in favor of the insured
- It further defines “accident” which, by implication, defines what is an “occurrence” under an insurance policy:
  - “In interpreting a liability insurance policy issued to a construction professional, 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.”
- The intention of this section is to provide guidelines on how to interpret insurance policies in a way that favors coverage – providing protection for construction professionals



# The Lack of New Condo Construction and Affordable Housing

**Condo starts in metro Denver (1-year rolling average based on third quarter data)**

**Year / condo starts / % of overall housing starts**

2005 / 3,589 / 18.5

2006 / 3,863 / 21.9

2007 / 2,342 / 22.9

2008 / 1,047 / 18.8

2009 / 281 / 10.1

2010 / 216 / 5.8

2011 / 97 / 2.7

2012 / 86 / 1.8

2013 / 244 / 3.7

2014 / 238 / 3.1

Source: Denver Post, "Colorado lawmakers gear up for construction-defects reform in 2015," 1/4/15.

# New Condo Construction in 2015 Continues to Stall

- Metro Denver reported a 19% increase in total single-family home starts between September 2014 and September 2015
- However, the multi-family market recorded the only over-the year decrease in home starts, falling 4.4% in September 2015 compared with September 2014
  - Most of these home starts are luxury units above \$400,000, further amplifying the Denver Metro area's lack of affordable housing problem

# Possible Reasons for Slowdown in New Condo Construction

- Some believe that CDARA has had a negative impact on new condo and townhome construction, leading to a lack of affordable housing in the state
- HOA suits against builders have driven up the cost of insurance policies, deterring condo and townhome builders from pursuing projects in Colorado
- The rental market is even hotter than the condo market in the Denver Metro area, with average rent now at \$1,254 (12.8% increase from September 2014)
  - Developers are building rental housing instead of condos.

# 2015 Legislation – Statewide Reform Fails Again

## **Senate Bill 15-079 (*affordable housing*)**

- introduced on January 14, 2015 by Sen. Jessie Ulibarri, D-Commerce City, who sponsored 2014's **SB 220**
- would increase the document recording fee charged by each county clerk and recorder by \$1. The new revenue, estimated at \$1.5 million to \$2 million a year, would be put into a fund to be used for affordable housing.

*The bill was postponed indefinitely in Senate committee on Mar. 11, 2015.*

## **Senate Bill 15-091 (*construction-defects*)**

- introduced on January 14, 2015 by Sen. Ray Scott, R-Grand Junction
- would cut in half the statute of limitations for filing construction-defects suits in Colorado, from eight years down to four years.

*The bill passed the Senate by a 18-17 vote but was postponed indefinitely in House committee on Apr. 22, 2015.*

# 2015 Legislation – Statewide Reform Fails Again (cont'd)

Senate Majority Leader Scheffel and Senator Ulibarri introduced **SB 15-177** on Feb. 10, 2015 as an effort at ***comprehensive reform***. The bill, which was functionally similar to 2014's SB 14-220, required:

- Mediation or arbitration if required in an association's original governing documents, even if that requirement was subsequently amended or removed
- That mediation take place before filing of a construction-defect action
- Greater public notice such that association boards would have to provide all unit owners with a disclosure of projected costs, duration, and financial impact of filing a construction-defect claim
- Boards to obtain the written consent of a majority of unit owners before filing
- That purchasers in common interest communities receive prior that binding arbitration may be required for certain disputes.

*The bill passed the Senate by a 24-11 vote but was postponed indefinitely in House committee on April 27, 2015.*

# 2015 Legislation – Statewide Reform Fails Again (cont'd)

- Significant opposition to statewide construction-defect reform
  - Sen. Rollie Heath (D) said the bill effectively shifts the risk of faulty construction from the builder to the homeowner, fails to address affordable-housing issues in the Denver Metro area
  - Sen. Linda Newell (D) objected to the bill's provision that homeowners can't change their condo declarations, which are typically written by builders at the time of construction.
  - “Lack of condo construction is slow due to tighter credit markets, stagnant incomes, and lower marriage rates – not construction-defects.”
    - Build Our Homes Right Coalition
  - Condos will come back when the market calls for it. Right now, apartments and rental properties are commanding top dollar. “Destroying homeowner rights is not the panacea to getting condos built.”
    - Community Association Institute

# 2015 Legislation – Statewide Reform Fails Again (cont'd)

- In support of statewide construction-defect reform:
  - Proponents touted the bill as a necessary step toward helping people, especially young families, afford a home in one of the nation's tightest housing markets
  - Current law makes it too easy for homeowners to sue over construction problems. That in turn has dramatically slowed development of multi-family units in Colorado
  - Sen. Jessie Ulibarri, SB 177's co-sponsor, said the bill would act as a "pressure valve" helping reduce the upward push on rental rates and home prices
  - Denver Mayor Michael Hancock:
    - With 50,000 people expected to move to Denver in the next five years, it is critical that statewide construction-defect reform pass so that builders undertake the condominium projects they are currently forsaking.
    - "construction-defects are severely slowing the construction of for-sale, affordable housing"
  - Kelly Moyer, spokeswoman for the Colorado Association of Realtors:
    - Price of an average attached single family home in metro Denver increased by 12% in 2015 versus a smaller 7.2% gain for detached homes
    - Demand for attached single family homes is rising, yet supply remains restricted
  - Tom Clark, CEO of the Metro Denver Economic Development Corp:
    - 10 year low of inventory for single-family attached homes on the market as of July 2015
  - Stefka Czarnecki Fanchi, Executive Director Habitat for Humanity of Colorado:
    - There is an immense risk factor for builders in the state pursuing condo projects, particularly those in the lower price tier, because of the specter of being dragged into court.

# 2016 Legislation?

- Governor Hickenlooper called for statewide construction-defect reform in his 2016 State of the State address
- It is anticipated a construction-defect reform measure will again be introduced in the 2016 legislative session, but the outcome remains unclear
  - Homebuilders continue to state that class action lawsuits from groups of condominium owners make building condominiums too risky and costly.
  - Community associations believe builders are mounting a lobbying campaign to strip homeowners of their right to sue in court, forcing them into arbitration instead. They believe that the lack of condos has more to do with market forces, not the current construction-defect law:
    - Apartments and rental properties are commanding top dollar
    - Millennials tend to rent due to credit problems, the tightening of the credit market, and student loans



# Municipal construction-defect laws

- In lieu of a statewide measure, several Denver Metro cities have enacted their own construction-defect reform ordinances over the last two years:
  - Denver (2015)
  - Colorado Springs (2015)
  - Littleton (2015)
  - Wheat Ridge (2015)
  - Arvada (2015)
  - Parker (2015)
  - Commerce City (2015)
  - Aurora (2015)
  - Lone Tree (2015)
  - Centennial (2015)
  - Lakewood (2014)

# City of Denver – Reform Legislation Passed

- December 2015 – Denver City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Mandates that plaintiffs must show that construction both violated city building codes and led to either actual property damage or injury or the risk thereof
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Restricts the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration without builder consent

# City of Colorado Springs – Reform Legislation Passed

- December 2015 – Colorado Springs City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair as well as a right to offer a monetary settlement
    - HOA under no obligation to accept the monetary settlement, and the HOA may make its own settlement offer to the builder
  - Does not restrict the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration
  - Provides a safe-harbor for builders who substantially comply with the city's building code
    - Any construction “constructed or installed in substantial compliance with [the city code] shall not be considered defective for purposes of proving any construction-defect claim”

# City of Littleton – Reform Legislation Passed

- May 2015 – Littleton City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair as well as a right to offer a monetary settlement
    - HOA under no obligation to accept the monetary settlement, and the HOA may make its own settlement offer to the builder
  - Limits the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration
    - Subsequent amendments to the declaration, bylaws, or rules and regulations that remove or amend the mediation or arbitration requirement shall not be effective with regard to any construction-defect claim that is based on an alleged act or omission that predates the amendment.

# City of Wheat Ridge - Reform Legislation Passed

- August 2015 – Wheat Ridge City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair faulty work before facing legal action
  - Limits the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration
    - Subsequent amendments to the declaration, bylaws, or rules and regulations that remove or amend the mediation or arbitration requirement shall not be effective with regard to any construction-defect claim that is based on an alleged act or omission that predates the amendment.
  - Plat note mandating binding arbitration:
    - Upon the specific written request of an applicant, a final plat will include the following plat note:
      - The recorded plat of the property within which this lot or unit is situated contains a restriction requiring mandatory, binding arbitration for construction-defect claims, in lieu of seeking redress in a court of law. Purchasers should carefully read the plat and note concerning arbitration, as they are deemed to have accepted and agreed to the terms and conditions of such plate note.

# City of Arvada – Reform Legislation Passed

- October 2015 – Arvada City Council passed an ordinance that reforms construction-defect litigation for common interest communities:
- Plat note mandating binding arbitration:
  - Upon the specific written request of an applicant, a final plat will include the following plat note:
    - The recorded plat of the property within which this lot or unit is situated contains a restriction requiring mandatory, binding arbitration for [construction-defect claims,] in lieu of seeking redress in a court of law. Purchasers should carefully read the plat and note concerning arbitration, as they are deemed to have accepted and agreed to the terms and conditions of such plate note.

# City of Parker – Reform Legislation Passed

- October 2015 – Town of Parker passed an ordinance that reforms construction-defect litigation for common interest communities:
- Plat note mandating binding arbitration:
  - Upon the specific written request of the property owner, a final plat will include the following plat note:
    - construction-defect claims involving the multi-family development area will be submitted to binding arbitration in lieu of submitting any such claim to a court of law. All future purchasers of any interest in the multi-family development area are deemed to have accepted and agreed to this plat note and shall be bound by the plat note
  - Any subsequent amendments or changes to such declaration of covenants, conditions or restriction shall not eliminate the requirement that the claims described in this plat note, including construction-defect claims, shall be submitted to binding arbitration in lieu of submitting any such claim to a judicial proceeding

# Commerce City – Reform Legislation Passed

- August 2015 – Commerce City's City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair faulty work before facing legal action
  - Limits the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration
    - Subsequent amendments to the declaration, bylaws, or rules and regulations that remove or amend the mediation or arbitration requirement shall not be effective with regard to any construction-defect claim that is based on an alleged act or omission that predates the amendment



# City of Aurora – Reform Legislation Passed

- September 2015 – Aurora’s City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair as well as a right to offer a monetary settlement
    - HOA under no obligation to accept the monetary settlement, and the HOA may make its own settlement offer to the builder
  - Limits the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA’s declaration
    - Subsequent amendments to the declaration, bylaws, or rules and regulations that remove or amend the mediation or arbitration requirement shall not be effective with regard to any construction-defect claim that is based on an alleged act or omission that predates the amendment

# City of Lone Tree – Reform Legislation Passed

- February 2015 – Lone Tree's City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair faulty work before facing legal action
  - Limits the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration
    - Subsequent amendments to the declaration, bylaws, or rules and regulations that remove or amend the mediation or arbitration requirement shall not be effective with regard to any construction-defect claim that is based on an alleged act or omission that predates the amendment

# City of Centennial – Reform Legislation Passed

- December 2015 – Centennial's City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair as well as a right to offer a monetary settlement
    - HOA under no obligation to accept the monetary settlement, and the HOA may make its own settlement offer to the builder
  - Limits the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration
    - Subsequent amendments to the declaration, bylaws, or rules and regulations that remove or amend the mediation or arbitration requirement shall not be effective with regard to any construction-defect claim that is based on an alleged act or omission that predates the amendment.

# City of Lakewood – Reform Legislation Passed

- October 2014 – Lakewood's City Council passed an ordinance that reforms construction-defect litigation for common interest communities. The ordinance:
  - Requires a majority of homeowners to agree to file suit over construction-defects, making it more difficult to initiate legal action against developers
  - Provides builders with a right to repair faulty work before facing legal action
  - Limits the ability of HOAs and homeowners to amend mediation and arbitration provisions in the HOA's declaration
    - Subsequent amendments to the declaration, bylaws, or rules and regulations that remove or amend the mediation or arbitration requirement shall not be effective with regard to any construction-defect claim that is based on an alleged act or omission that predates the amendment

# Legal Concerns About Mandatory Mediation and Arbitration provisions in condo declarations

*Vallagio at Inverness Res. Condo Ass'n v. Metro Homes*, 14CA1154 (Colo. App. 2015)

- Builder drafted and recorded the project's original declaration in 2007.
  - The declaration included a mandatory arbitration provision specifically for construction-defect claims.
  - That section stated that its provisions "shall not ever be amended without the written consent of builder and without regard to whether builder owns any portion of the Real Estate at the time of the amendment."
- In 2013, the Project's unit owners voted to amend the declaration to remove the arbitration provision requiring builder's consent.
  - The unit owners did not obtain builder's consent to amend that section
- The court held that the 2007 declaration prohibited the 2013 amendment of the mediation provision. Builder's consent to amend the mediation provision required; otherwise, construction-defect claims must be settled via arbitration

# Legal Concerns About Local Reform Legislation

Are local ordinances preempted by conflicting state statutes?

- statutes of limitations
- amendment of common interest community declarations
- CDARA procedures

## PREEMPTION BY STATE LAW

- Local ordinances will **survive** a preemption challenge:
  - if a court determines they do not conflict with state law or address matters of *purely local concern*
- Local ordinances will **NOT survive** a preemption challenge:
  - if a court determines they address matters of *state or mixed state and local concern*.

Given this *legal uncertainty*, it is not clear how builders, banks, and insurers in communities that have passed local construction reform ordinances will react.

# Resale of Property



# Broker Duties to Disclose

## Broker engaged by seller

- Must disclose to the seller adverse material facts actually known by the broker
- Owes no duty or obligation to the buyer except, subject to limitations of CRS 38-35.5-101 concerning psychologically impacted property, disclose to any prospective buyer all adverse material facts actually known by the broker
- Owes no duty to conduct an independent inspection of the property for the benefit of the buyer
- Owes no duty to independently verify the accuracy or completeness of any statement made by seller or inspector

## Broker engaged by buyer

- Must disclose to the buyer adverse material facts actually known by the broker
- Owes no duty or obligation to the seller except shall disclose to any prospective seller all adverse material facts actually known by the broker including but not limited to adverse material facts concerning the buyer's financial ability to perform the terms of the transaction and whether buyer intends to occupy the property as a primary residence
- Owes no duty to independently investigate buyer's financial condition for the benefit of the seller
- Owes no duty to independently verify the accuracy or completeness of statements made by buyer or inspector



# Seller Duties to Disclose

- Contract to Buy and Sell Real Estate
  - **Section 10.2. - Disclosure of Latent Defects; Present Condition.** Seller must disclose to Buyer any latent defects actually known by Seller. Seller agrees that disclosure of latent defects will be in writing. Except as otherwise provided in this Contract, Buyer acknowledges that Seller is conveying the Property to Buyer in an “As Is” condition, “Where Is” and “With All Faults.”
- Seller’s Property Disclosure
  - “This disclosure should be completed by seller, not by broker.”
  - “Seller states that the information contained in this Disclosure is correct to Seller’s CURRENT ACTUAL KNOWLEDGE as of this Date. **Any changes will be disclosed by Seller to Buyer promptly after discovery.**”

# Seller Duties to Disclose

The printed portions of this form, except differentiated additions, have been approved by the Colorado Real Estate Commission.  
(SPD29-10-11) (Mandatory 1-12)

THIS FORM HAS IMPORTANT LEGAL CONSEQUENCES AND THE PARTIES SHOULD CONSULT LEGAL AND TAX OR OTHER COUNSEL BEFORE SIGNING.

## SELLER'S PROPERTY DISCLOSURE (RESIDENTIAL)

THIS DISCLOSURE SHOULD BE COMPLETED BY SELLER, NOT BY BROKER.

Seller states that the information contained in this Disclosure is correct to Seller's CURRENT ACTUAL KNOWLEDGE as of this Date. Any changes will be disclosed by Seller to Buyer promptly after discovery. Seller hereby receipts for a copy of this Disclosure. If the Property is part of a Common Interest Community, this Disclosure is limited to the Property or Unit itself, except as stated in Section L. Broker may deliver a copy of this Disclosure to prospective buyers.

**Note:** If an item is not present at the Property or if an item is not to be included in the sale, mark the "N/A" column. The Contract to Buy and Sell Real Estate, not this Disclosure form, determines whether an item is included or excluded; if there is an inconsistency between this form and the Contract, the Contract controls.

Date: \_\_\_\_\_

Property Address: \_\_\_\_\_

Seller: \_\_\_\_\_

### I. IMPROVEMENTS

A. STRUCTURAL CONDITIONS	Do any of the following conditions now exist or have they ever existed:	Yes	No	Do Not Know	N/A	Comments
1	Structural problems					
2	Moisture and/or water problems					
3	Damage due to termites, other insects, birds, animals or rodents					
4	Damage due to hail, wind, fire or flood					
5	Cracks, heaving or settling problems					
6	Exterior wall or window problems					
7	Exterior Artificial Stucco (EIFS)					
8	Any additions or alterations made					
9	Building code, city or county violations					

B. ROOF	Do any of the following conditions now exist:	Yes	No	Do Not Know	N/A	Comments
1	Roof problems					
2	Roof material: _____ Age _____ Roof material: _____ Age _____					
3	Roof leak: Past					
4	Roof leak: Present					
5	Damage to roof: Past					
6	Damage to roof: Present					
7	Roof under warranty until _____ Transferable _____					
8	Roof work done while under current roof warranty					
9	Skylight problems					
10	Gutter or downspout problems					

		IN WORKING CONDITION			Age If Known	N/A	Comments
C. APPLIANCES	Are the following now in working condition:	Yes	No	Do Not Know			
1	Built-in vacuum system & accessories						
2	Clothes dryer						
3	Clothes washer						
4	Dishwasher						
5	Disposal						
6	Freezer						
7	Gas grill						
8	Hood						
9	Microwave oven						
10	Oven						
11	Range						
12	Refrigerator						
13	T.V. antenna: <input type="checkbox"/> Owned <input type="checkbox"/> Leased						
14	Satellite system or DSS dish: <input type="checkbox"/> Owned <input type="checkbox"/> Leased						
15	Trash compactor						

		IN WORKING CONDITION			Age If Known	N/A	Comments
D. ELECTRICAL & TELECOMMUNICATIONS	Are the following now in working condition:	Yes	No	Do Not Know			
1	Security system: <input type="checkbox"/> Owned <input type="checkbox"/> Leased						
2	Smoke/fire detectors: <input type="checkbox"/> Battery <input type="checkbox"/> Hardwire						
3	Carbon Monoxide Alarm: <input type="checkbox"/> Battery <input type="checkbox"/> Hardwire						
4	Light fixtures						
5	Switches & outlets						
6	Aluminum wiring (110)						
7	Electrical: _____ Amps						
8	Telecommunications (T1, fiber, cable, satellite)						
9	Inside telephone wiring & blocks/jacks						
10	Ceiling fans						
11	Garage door opener						
12	Garage door control(s) # _____						
13	Intercom/doorbell						
14	In-wall speakers						
15	220 volt service						
16	Landscape lighting						

		IN WORKING CONDITION			Age If Known	N/A	Comments
E. MECHANICAL	Are the following now in working condition:	Yes	No	Do Not Know			
1	Air conditioning:						
	Evaporative cooler						
	Window units						
	Central						
2	Attic/whole house fan						
3	Vent fans						
4	Humidifier						

# Seller Duties to Disclose

5	Air purifier						
6	Sauna						
7	Hot tub or spa						
8	Steam room/shower						
9	Pool						
10	Heating system: Type _____ Fuel _____ Type _____ Fuel _____						
11	Water heater: Number of _____ Fuel type _____ Capacity _____						
12	Fireplace: Type _____ Fuel _____						
13	Fireplace insert						
14	Stove: Type _____ Fuel _____						
15	When was fireplace/wood stove, chimney/flue last cleaned: Date: _____ <input type="checkbox"/> Do not know						
16	Fuel tanks: <input type="checkbox"/> Owned <input type="checkbox"/> Leased						
17	Radiant heating system: <input type="checkbox"/> Interior <input type="checkbox"/> Exterior Hose Type _____						
18	Overhead door						
19	Entry gate system						
20	Elevator						

		IN WORKING CONDITION			Age If Known	N/A	Comments
F.	WATER, SEWER & OTHER UTILITIES Are the following now in working condition:	Yes	No	Do Not Know			
1	Water filter system: <input type="checkbox"/> Owned <input type="checkbox"/> Leased						
2	Water softener: <input type="checkbox"/> Owned <input type="checkbox"/> Leased						
3	Sewage problems: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know						
4	Lift station (sewage ejector pump)						
5	Drainage, storm sewers, retention ponds						
6	Grey water storage/use						
7	Plumbing problems: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know						
8	Sump pump						
9	Underground sprinkler system						
10	Fire sprinkler system						
11	Polybutylene pipe: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know						
12	Galvanized pipe: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know						
13	Backflow prevention device: <input type="checkbox"/> Domestic <input type="checkbox"/> Irrigation <input type="checkbox"/> Fire <input type="checkbox"/> Sewage						
14	Irrigation pump						
15	Well pump						

		IN WORKING CONDITION			Age If Known	N/A	Comments
G.	OTHER DISCLOSURES – IMPROVEMENTS	Yes	No	Do Not Know			
1	Included fixtures and equipment now in working condition						

II. GENERAL						
H.	USE, ZONING & LEGAL ISSUES Do any of the following conditions now exist:	Yes	No	Do Not Know	N/A	Comments
1	Zoning violation, variance, conditional use, violation of an enforceable PUD or non-conforming use					
2	Notice or threat of condemnation proceedings					
3	Notice of any adverse conditions from any governmental or quasi-governmental agency that have not been resolved					
4	Violation of restrictive covenants or owners' association rules or regulations					
5	Any building or improvements constructed within the past one year from this Date without approval by the Association or the designated approving body					
6	Notice of zoning action related to the Property					
7	Other legal action					

I.	ACCESS, PARKING, DRAINAGE & SIGNAGE Do any of the following conditions now exist:	Yes	No	Do Not Know	N/A	Comments
1	Any access problems					
2	Roads, driveways, trails or paths through the Property used by others					
3	Public highway or county road bordering the Property					
4	Any proposed or existing transportation project that affects or is expected to affect the Property					
5	Encroachments, boundary disputes or unrecorded easements					
6	Shared or common areas with adjoining properties					
7	Requirements for curb, gravel/paving, landscaping					
8	Flooding or drainage problems: Past					
9	Flooding or drainage problems: Present					

J.	WATER & SEWER SUPPLY Do any of the following conditions now exist:	Yes	No	Do Not Know	N/A	Comments
1	Water Rights: Type _____					
2	Water tap fees paid in full					
3	Sewer tap fees paid in full					
4	Subject to augmentation plan					
5	Well required to be metered					
6	Type of water supply: <input type="checkbox"/> Public <input type="checkbox"/> Community <input type="checkbox"/> Well <input type="checkbox"/> Shared Well <input type="checkbox"/> Cistern <input type="checkbox"/> None If the Property is served by a Well, a copy of the Well Permit <input type="checkbox"/> Is <input type="checkbox"/> Is Not attached. Well Permit #: _____ <input type="checkbox"/> Drilling Records <input type="checkbox"/> Are <input type="checkbox"/> Are not attached. Shared Well Agreement <input type="checkbox"/> Yes <input type="checkbox"/> No. The Water Provider for the Property can be contacted at: Name: _____ Address: _____ Web Site: _____ Phone No.: _____ <input type="checkbox"/> There is neither a Well nor a Water Provider for the Property. The source of potable water for the Property is [describe source]: _____  SOME WATER PROVIDERS RELY, TO VARYING DEGREES, ON NONRENEWABLE GROUND WATER. YOU MAY WISH TO CONTACT YOUR PROVIDER (OR INVESTIGATE THE DESCRIBED SOURCE) TO DETERMINE THE LONG-TERM SUFFICIENCY OF THE PROVIDER'S WATER SUPPLIES.					
7	Type of sanitary sewer service: <input type="checkbox"/> Public <input type="checkbox"/> Community <input type="checkbox"/> Septic System <input type="checkbox"/> None <input type="checkbox"/> Other _____ If the Property is served by an on-site septic system, supply to buyer a copy of the permit. Type of septic system: <input type="checkbox"/> Tank <input type="checkbox"/> Leach <input type="checkbox"/> Lagoon					

# Seller Duties to Disclose

K.	ENVIRONMENTAL CONDITIONS Do any of the following conditions <b>now exist</b> or have they <b>ever existed</b> :	Yes	No	Do Not Know	N/A	Comments
1	Hazardous materials on the Property, such as radioactive, toxic, or biohazardous materials, asbestos, pesticides, herbicides, wastewater sludge, radon, methane, mill tailings, solvents or petroleum products					
2	Underground storage tanks					
3	Aboveground storage tanks					
4	Underground transmission lines					
5	Animals kept in the residence					
6	Property used as, situated on, or adjoining a dump, land fill or municipal solid waste land fill					
7	Monitoring wells or test equipment					
8	Sliding, settling, upheaval, movement or instability of earth or expansive soils on the Property					
9	Mine shafts, tunnels or abandoned wells on the Property					
10	Within governmentally designated geological hazard or sensitive area					
11	Within governmentally designated flood plain or wetland area					
12	Dead, diseased or infested trees or shrubs					
13	Environmental assessments, studies or reports done involving the physical condition of the Property					
14	Property used for any mining, graveling, or other natural resource extraction operations such as oil and gas wells					
15	Interior of improvements of Property tobacco smoke-free					
16	Other environmental problems					

L.	COMMON INTEREST COMMUNITY – ASSOCIATION PROPERTY Do any of the following conditions <b>now exist</b> :	Yes	No	Do Not Know	N/A	Comments
1	Property is part of an owners' association					
2	Special assessments or increases in regular assessments approved by owners' association but not yet implemented					
3	Has the Association made demand or commenced a lawsuit against a builder or contractor alleging defective construction of improvements of the Association Property (common area or property owned or controlled by the Association but outside the Seller's Property or Unit).					

M.	OTHER DISCLOSURES – GENERAL Do any of the following conditions <b>now exist</b> :	Yes	No	Do Not Know	N/A	Comments
1	Any part of the Property leased to others (written or oral)					
2	Written reports of any building, site, roofing, soils or engineering investigations or studies of the Property					
3	Any property insurance claim submitted (whether paid or not)					
4	Structural, architectural and engineering plans and/or specifications for any existing improvements					
5	Property was previously used as a methamphetamine laboratory and not remediated to state standards					
6	Government special improvements approved, but not yet installed, that may become a lien against the Property					

Seller and Buyer understand that the real estate brokers do not warrant or guarantee the above information on the Property. Property inspection services may be purchased and are advisable. This form is **not** intended as a substitute for an inspection of the Property.

## ADVISORY TO SELLER:

**Failure to disclose a known material defect may result in legal liability.**

The information contained in this Disclosure has been furnished by Seller, who certifies to the truth thereof based on Seller's CURRENT ACTUAL KNOWLEDGE.

Seller \_\_\_\_\_ Date \_\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_

## ADVISORY TO BUYER:

1. Even though Seller has answered the above questions to Seller's current actual knowledge, Buyer should thoroughly inspect the Property and obtain expert assistance to accurately and fully evaluate the Property to confirm the status of the following matters:

- the physical condition of the Property;
- the presence of mold or other biological hazards;
- the presence of rodents, insects and vermin including termites;
- the legal use of the Property and legal access to the Property;
- the availability and source of water, sewer, and utilities;
- the environmental and geological condition of the Property;
- the presence of noxious weeds; and
- any other matters that may affect Buyer's use and ownership of the Property that are important to Buyer as Buyer decides whether to purchase the Property.

2. Seller states that the information is correct to "Seller's current actual knowledge" as of the date of this form. The term "current actual knowledge" is intended to limit Seller's disclosure only to facts actually known by the Seller and does not include "constructive knowledge" or "common knowledge" or what Seller "should have known" about the Property. The Seller has no duty to inspect the Property when this Disclosure is filled in and signed.

3. Valuable information may be obtained from various local/state/federal agencies, and other experts may assist Buyer by performing more specific evaluations and inspections of the Property.

4. Boundaries, location and ownership of fences, driveways, hedges, and similar features of the Property may become the subjects of a dispute between a property owner and a neighbor. A survey may be used to determine the likelihood of such problems.

5. Whether any item is included or excluded is determined by the contract between Buyer and Seller and not this Seller's Property Disclosure.

6. Buyer acknowledges that Seller does not warrant that the Property is fit for Buyer's intended purposes or use of the Property. Buyer acknowledges that Seller's indication that an item is "working" is not to be construed as a warranty of its continued operability or as a representation or warranty that such item is fit for Buyer's intended purposes.

7. Buyer hereby receipts for a copy of this Disclosure.

Buyer \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

# **Seller's Property Disclosure**

- L. 3 - Has the Association made demand or commenced a lawsuit against a builder or contractor alleging defective construction of improvements of the Association Property (common area or property owned or controlled by the Association but outside the Seller's Property or Unit).
- M. 2 - Written reports of any building, site, roofing, soils or engineering investigations or studies of the Property.
- M. 3 - Any property insurance claim submitted (whether paid or not).
- M. 4 - Structural, architectural and engineering plans and/or specifications for any existing improvements.

# Obtaining Information – CLUE Report

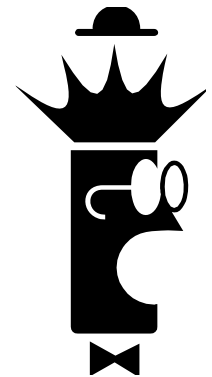
**CLUE =**

**Comprehensive Loss Underwriting Exchange**

- Comprehensive database of property information relating mainly to insurance claims on private property
- Information includes claims history of the individual or of the property – list of all claims made in the past 7 years (can include phone calls made regarding a loss, whether or not a claim is actually filed)
  - Date of claim, name of insurance company, policy and claim numbers, address, cause of loss, amounts paid, status of the claim, name of insured and claimant

# CLUE Reports

- Potential problems for homeowners who have recently purchased a property – may be surprised to be turned down for homeowner's insurance based on claims made on their new property by the previous owner
- Realtors are often requesting CLUE reports as a condition for closing to avoid surprises



# CLUE Report – Sample

Property - [REDACTED] - Clue Details

Page 1 of 1

## Property Quote [REDACTED]

### CLUE Report Details

Reference Number: [REDACTED] Report Order Number: [REDACTED]

#### Incident 1 of 3

##### Policyholder

Name:

SSN:

Hit Type:

Risk Address

Address:

Date of Birth:

Gender:

Policy Type:	Homeowners	Company:	LIBERTY INS CORP	Policy Number:	[REDACTED]
Claim Date:	09/16/2013	Risk/Subject:	Risk	On/Off Premises:	Unknown
Catastrophe Related:	Not related to a recognized catastrophe			Claim Scope:	L - Limited Scope
Claim Type		Amount	Claim Disposition		
WATER - Water		\$0.00	Open and active		

#### Incident 2 of 3

##### Policyholder

Name:

SSN:

Hit Type:

Risk Address

Address:

Date of Birth:

Gender:

Policy Type:	Homeowners	Company:	LIBERTY INS CORP	Policy Number:	[REDACTED]
Claim Date:	09/16/2013	Risk/Subject:	Risk	On/Off Premises:	Unknown
Catastrophe Related:	Claim was related to recognized catastrophe			Claim Scope:	L - Limited Scope
Claim Type		Amount	Claim Disposition		
WATER - Water		\$0.00	Open and active		

#### Incident 3 of 3

##### Policyholder

Name:

SSN:

Hit Type:

Risk Address

Address:

Date of Birth:

Gender:

Policy Type:	Tenant	Company:	USAA CASUALTY INS CO	Policy Number:	[REDACTED]
Claim Date:	08/25/2013	Risk/Subject:	Risk	On/Off Premises:	On premises
Catastrophe Related:	Not related to a recognized catastrophe			Claim Scope:	F - Full Scope
Claim Type		Amount	Claim Disposition		
WATER - Water		\$0.00	Closed		

Sales Office: 0936, WESTMINSTER, CO, Sales Rep: [REDACTED]

Done Cancel



# Special Issues – Expansive Soils

- Expansive soils are a problem in Colorado  
– the General Assembly passed a special provision of the Colorado Consumer Protection Act to specifically address these issues – CRS § 6-6.5-101



# Special Issues – Expansive Soils

- The statute requires that at least 14 days prior to closing on a new residential property, every developer or builder must provide the purchaser with a copy of a “summary report of the analysis and the site recommendations.”
- For sites with significant potential for expansive soils, developer or builder must also provide a copy of a publication detailing the problems associated with such soils, methods to address these problems during construction, and suggestions for care and maintenance
- Does NOT define what analysis needs to be done
- Failure to comply results in a \$500 penalty
- In addition, some cases have allowed for personal liability for damages by the principals of the business (*Hoang v. Arbess*, 80 P.3d 863 (Colo. App. 2003))

# Recent Case Law on Disclosure

*In re Estate of Gattis*, 2013 WL 5947134:

- Entity controlled by Sellers purchased the property for repair and resale
- Seller obtained engineering reports showing structural problems resulting from expansive soils
- Seller conducted repair work then listed the property for sale

# Recent Case Law on Disclosure

- On the Seller Property Disclosure form, someone wrote “Seller has no personal knowledge of property/Seller has never lived at property” across the entire page related to structural conditions
- Trial court found Sellers liable for nondisclosure of material facts

# Recent Case Law on Disclosure

- Sellers appeal – say the tort claim is barred by the Economic Loss Rule
  - “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.”
- The Court of Appeals found such an independent duty:
  - “[A]part from any contractual obligation, home sellers owe home buyers an independent duty to disclose latent defects of which they are aware....[D]isclosure provisions in the standard-form residential real estate contract at issue do not so subsume this independent duty as to trigger the economic loss rule.”

# Recent Case Law on Disclosure

- Buyer got damages and attorney fees for the original trial and the appeal
- Bottom line – Sellers **MUST** disclose known material facts!!!

*when in*  
**DOUBT**  
*tell the*  
**TRUTH**

# Questions?

