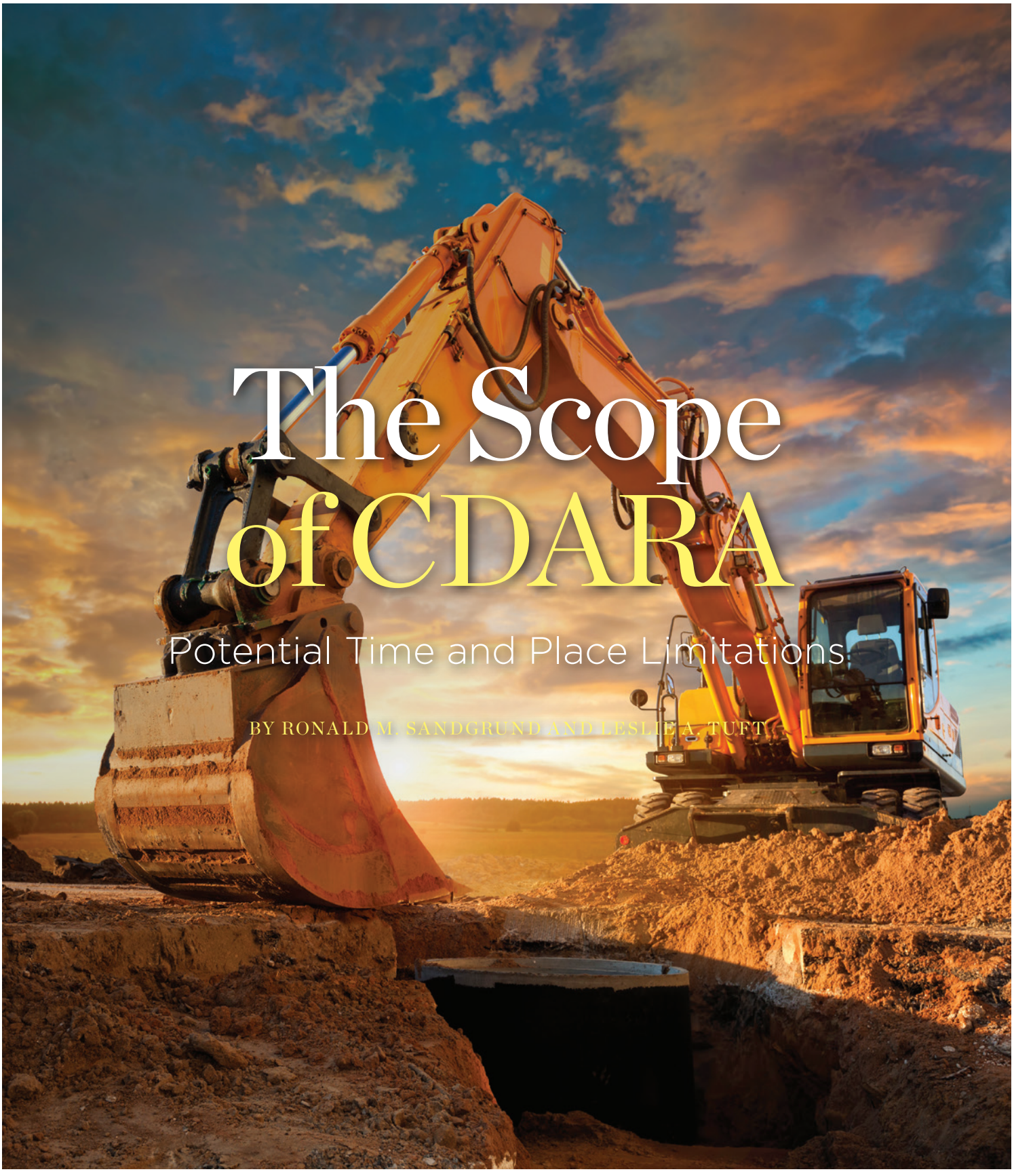

The Scope of CDARA

Potential Time and Place Limitations

BY RONALD M. SANDGRUND AND LESLIE A. TUFTI

This article examines whether Colorado's Construction Defect Action Reform Act applies to all construction defect claims or whether it contains inherent time and place limitations.

Colorado's Construction Defect Action Reform Act (CDARA)[1] expressly applies to defined legal actions, claims, potentially liable parties, and activities. While it does not include explicit time or place limitations, certain circumstances give rise to the question whether such limitations are inherent in the statutory scheme. For example, does CDARA apply to construction defects observed early in the construction process, before the work-in-progress becomes a substantially completed real property improvement? And does CDARA apply to construction defects located on one property that cause damage or injury on another property? This article explores these two questions, which continue to bedevil lawyers and their clients.

The Scope Problem

Because CDARA's scope is currently debatable, practitioners face uncertainty when analyzing and pursuing certain claims.

For example, consider a multistory residential structure whose owner notices a potential construction defect during its early construction. The subcontractor denies the work is defective, arguing that the plans are not clear. The architect responds that the plans are clear and, even if they are not, industry custom and practice informed the subcontractor how to build the disputed detail. Is the owner required to initiate CDARA's 75-day notice of claim process (NCP)[2] before beginning repairs or otherwise face waiving its right to recover the cost to repair the defect? If the disputed work must be corrected before other significant work commences, must that other work be delayed at significant cost while the NCP proceeds? What if the subcontract provides its own notice and repair process and timeline? While the owner hashes out these issues with its lawyers, interest accrues on the owner's construction loan and winter fast approaches, threatening the construction's tight timeline.

Now consider a grass fire caused by a construction defect in an outbuilding that spreads to a neighbor's house, or an underground waterline leak beneath a home that migrates below a neighbor's house. Each of these defects causes serious damage to the neighboring property, but not to the property where the defect is located. Must the injured neighbors initiate CDARA's 75-day NCP to preserve their legal rights? If so, how do they learn the names of the potentially responsible parties on whom to serve their notice of claim and describe in reasonable detail the nature of the construction defect as CDARA requires? Can the injured claimants force the other house's owner to allow the potentially responsible parties access to the owner's property to inspect the alleged defects as CDARA requires? If the grass fire or water leak occurs on defectively constructed property worth $250,000, but destroys a neighbor's property worth $750,000, could the destroyed property owner's actual damages be capped at the fair market value of the defective property as CDARA seems to provide? What rational connection exists between that damages cap and the resulting harm?

Actions, Claims, Persons, and Activities Subject to CDARA

CDARA 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 . . . 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*."[3] It defines a "claimant" as "a person . . . who asserts a claim against a construction professional *that alleges a defect in the construction of an improvement to real property*."[4] And a "construction professional" is

> 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*. If the improvement to real property is to a commercial property, the term "construction professional" shall also include any prior owner of the commercial property, other than the claimant, at the time the work was performed.[5]

Finally, CDARA's legislative declaration states that it applies to "actions claiming damages, indemnity, or contribution *in connection with alleged construction defects*."[6]

Thus, at first blush, it appears that CDARA applies to any claim against a construction professional seeking damages in connection with, or caused by, a real property improvement construction defect. However, this conclusion runs up against other parts of CDARA that suggest reasonable limitations on such a broad reading. While Colorado's appellate courts have not yet defined the contours of CDARA's scope, its district courts have reached divergent conclusions.

Must the Construction Defect Exist in a Substantially Completed Real Property Improvement for CDARA to Apply?

The question of substantial completion has significant implications. Halting a construction project midstream for a minimum of 75 to 90[7] days to satisfy CDARA's NCP *each time* a dispute regarding defective construction work arises may cause enormous delays, interest charges, consequential losses, and other problems.

CDARA's "actual damages" limitation precludes many common law damages recoveries, which likely include consequential damages for delays, loan interest, and other resultant losses.[8] Thus, stalling construction for 75 to 90 days each time a defect dispute arises during construction could cause a significant imbalance between a claimant's actual financial losses and a construction professional's potential liability. Substantially and timely completing the construction work greatly minimizes the specter of delay damages, liquidated damages, accruing loan interest, and other consequential damages compounded during one or more NCPs and restores some of the balance.

To date, Colorado district court decisions seem to recognize this potential imbalance, but they have struggled to reconcile those portions of CDARA's apparently plain statutory language that render it applicable to work-in-progress claims with this perceived unfairness in potential remedies. Nevertheless, in holding that the real property improvement statute of limitations may bar a personal injury claim *even before the claimant suffers the injury*, the Colorado Supreme Court has noted that "a harsh or unfair result will not render a literal interpretation absurd."[9]

Conflicting District Court Rulings

Two district courts have held that CDARA's NCP applies to claims against a construction professional arising during the course of construction, while a third district court reached the opposite conclusion. In *Thone v. Favela*, the plaintiff-homeowner acted as his own general contractor.[10] During the course of construction, he sued a subcontractor, among others, for alleged construction defects. The district court stayed the claims against the subcontractor because the plaintiff did not complete the NCP before filing suit. The court rejected arguments that CDARA's NCP only applies to substantially completed work and complying with the NCP mid-construction would be impractical. The court also found that purported conflicts between the NCP and the parties' contract did not change the result.

In *RJB Development, Inc. v. Saylor*, the plaintiff-homeowners fired their contractor before the contractor's work was complete and hired a new contractor to correct alleged substandard work.[11] The district court held that CDARA'S NCP applied to claims arising from substandard work, but not to claims for overpayment, as the latter did not arise from alleged defective construction.[12] The court also held, however, that the NCP's timetable may be equitably shortened where "urgent" action is necessary to prevent further damage.[13] The court reserved the right upon presentation of evidence at a bench trial to fashion other equitable remedies for defective work repaired before the NCP was completed, including pursuant to damages mitigation and evidentiary spoliation doctrines.[14]

In contrast, in *Harvey v. Fletcher*, the district court refused to stay a construction defect lawsuit for failure to complete CDARA's NCP, holding that it "does not apply to projects where construction has not reached substantial completion at the time deficiencies are discovered."[15] The court stated that because the defendants had "abandoned the Project here long before substantial completion, CDARA does not apply . . . ."[16]

Analyzing CDARA

Various CDARA provisions offer some direction regarding whether CDARA applies to certain work-in-progress claims.

The "ordinary warranty service" carve-out. Some construction professionals argue that CRS § 13-20-807's exception from the NCP for "ordinary warranty service" means CDARA does not apply to typical on-site construction contract disputes. Section 807 provides that CDARA is "not intended to abrogate or limit the provisions of any express warranty or the obligations of the provider of such warranty," and it "shall not be deemed to require a claimant who is the beneficiary of an express warranty to comply with the notice provisions of section 13-20-803.5 to request ordinary warranty service in accordance with the terms of such warranty."[17] A "warranty" is a contractual promise.[18] "Ordinary" means "of a kind to be expected in the normal order of events."[19] Thus, "ordinary warranty service" may encompass most kinds of promises found in construction contracts, and this provision arguably excludes most course-of-construction contract disputes from CDARA's reach. (CRS § 13-20-807 does not appear to apply to tort claims, but the economic loss (independent duty) rule would bar many such claims in disputes between construction professionals.)

Construction disputes not involving defective work. CDARA applies only to "actions claiming damages, indemnity, or contribution in connection with alleged construction defects,"[20] that is, actions alleging a "defect in the design or construction of an improvement to real property."[21] Claims arising from a failure to perform or a failure to complete construction may fall outside CDARA's scope.[22] Such claims may arise, for example, when a construction professional walks off or fails to return to a jobsite (perhaps due to an owner's failure to pay), or when an owner refuses a construction professional entry onto a jobsite for reasons unrelated to defective work. In a dispute where the contractor allegedly walked off the job during construction, the Idaho Supreme Court noted that Idaho's construction defect notice of claim statute was "not intended to apply to claims for *non-performance*," but, without addressing the timing of the claims, it applied the statute to *construction defect* claims arising before substantial completion.[23] Some developers try to avoid CDARA's NCP by couching their claims against defaulting contractors as claims for incomplete work rather than claims for defects.

"Improvement to real property" requirement. Some claimants rely on CRS § 13-20-802.5's multiple references to the term "improvement to real property" to limit CDARA's scope. They argue that "improvement to real property" refers only to *substantially completed* real property improvements, and a work-in-progress is not a real property improvement. These claimants may rely, in part, on the fact that the statute of repose for most construction defect claims begins to run upon "substantial completion" of the allegedly defective real property improvement.[24] Thus, CDARA arguably recognizes two classes of improvements: those that are substantially completed, and those that are not.[25] The argument continues that CDARA's overall statutory scheme applies only to substantially completed improvements so as to

best harmonize its various parts and legislative intent. This argument implicitly raises the question whether a real property improvement even "exists" before "substantial completion." The argument also raises the related question whether a discrete construction element or component, such as a building foundation, may be substantially complete before completion of the whole improvement, which is the entire building in this example.

Harmonizing CDARA's plain meaning with its purposes. A basic statutory construction tenet requires courts to reasonably harmonize all parts of a statute, and if "the statutory language is unclear" to examine the legislative intent, including the law's object and "the consequences of a particular construction."[26] Claimants sometimes argue that the unwieldiness of interrupting an ongoing construction project with multiple NCPs suggests a mismatch between CDARA's statutory scheme and cases involving defects in a work-in-progress. At a minimum, each NCP takes 75 days (for residential projects) or 90 days (for commercial projects) to complete.[27] If CDARA applies to defects in works in progress, each newly identified defect arguably would cause delays of equal length. These delays could give rise to additional damage claims (if not barred by CDARA's damages limitations), multiplying construction defect litigation rather than limiting it, thereby undermining CDARA's goal of reducing such litigation.[28]

Possible Solutions

To address the open question of how to deal with potential construction defects identified during a work in progress under CDARA, many commercial construction professionals enter into detailed contracts with their own defect notice and cure provisions, often using American Institute of Architects (AIA) contract forms, either ignoring CDARA's NCP or assuming it does not apply.[29] They may also rely on long-standing business relationships and the specter of reputational injury for enforcement of these agreements despite the argument that CDARA controls.

Some practitioners include contract language expressly waiving CDARA's NCP in favor of the contract's notice and cure provisions. These practitioners advise their clients to send the notice immediately and pursue it aggressively to either obtain a prompt remediation agreement, which is the pressing goal, or an express refusal to repair that would open the door to a futility argument if the respondent later raises the failure to comply with the NCP. It is possible that commercial parties may be able to waive some or all of CDARA's provisions. However, in a case involving a mutually agreed upon change to the limitations period applicable to construction of a residential living facility, the Colorado Court of Appeals held that CDARA's provisions may not be waived for residential construction defect claims.[30]

In addition, some claimants might simply make repairs without complying with the NCP, reasoning that a common law duty to mitigate damages or an emergency circumstances equitable exception excuses their noncompliance. However, CDARA recognizes neither excuse expressly. Still, some district courts have excused such noncompliance as reasonably justified under the circumstances.[31]

Must the Construction Defect be Located on the Property Where the Damage or Injury Occurs for CDARA to Apply?

It is unsettled whether CDARA applies to claims for:

- a defectively constructed electrical system that starts a fire that spreads to and burns offsite properties and injures people in nearby developments;
- a defectively constructed impoundment pond or dam that fails, flooding offsite properties and killing downstream neighbors;
- a defectively constructed hazardous storage tank or piping system that fails, polluting distant properties and groundwater and poisoning offsite persons who drink contaminated water;
- a defectively constructed natural gas or propane storage tank or piping system that fails, resulting in an explosion that damages other people's homes and businesses and injures or kills persons located offsite;[32]
- a defectively constructed bridge that collapses onto a road owned by someone else, resulting in a motor vehicle accident, property damage, and/or bodily injury on the other road;
- a defectively constructed fence, barn door, or other enclosure that allows cattle to escape and damage nearby properties or injure neighbors, including persons hurt in car–livestock crashes;
- a defectively performed excavation that undermines a house on an adjacent parcel, causing it to partially collapse; or
- a defectively constructed warning-light system on a radio tower or skyscraper that disorients a small plane pilot resulting in the plane crashing into a nearby property.

Based on portions of CDARA's text, it could be argued that each of these scenarios falls within its scope. However, this interpretation may be inconsistent with other CDARA provisions and its overall statutory scheme.

District Court Rulings

In *Smokebrush Foundation v. City of Colorado Springs*, a Colorado district court found CDARA inapplicable to nuisance and trespass claims brought by a property owner against a construction professional who had worked on an adjoining property. The court concluded that the claimant did not have the requisite beneficial interest in the allegedly defectively constructed real property improvement for the claims to fall within CDARA's scope.[33] The court noted that the claimant had no contractual relationship with the alleged wrongdoer and sought neither indemnity nor contribution for losses flowing from the defects.[34] The court based its conclusions in part on CDARA's "right to inspect" protocol, because the allegedly defective work was located on property other than the claimant's and the claimant could not make the property accessible for inspection or negotiate a settlement to repair the defective condition.[35]

In *Suncor Energy U.S.A. Inc. v. Public Service Co. of Colorado*, the district court adopted *Smokebrush*'s legal analysis and held that CDARA did not apply to a refinery owner/operator's claims against a contractor who allegedly dis-

rupted power to the refinery through negligent work on high tension wires located above adjacent property.[36] The court found that the owner/operator had no interest in the property where the defective work was performed and no contractual relationship with the contractor, and the defective work was not an improvement to the owner/operator's property.[37] Alternatively, the court held that the power lines constituted personal property rather than a real property improvement.[38]

In *Davis v. Poudre Valley Rural Electric Ass'n*, a district court held that CDARA did not apply to claims arising from the defendant's power line construction on neighboring property where the plaintiff did not allege that defects in the power lines' design or construction caused her damages.[39] Instead, groundwater intrusion caused by the defendant's trenching and boring ancillary to the power line construction caused the damages. The court found that the trenches themselves were not a real property improvement (they were not permanent, essential, or integral to the power lines or considered by the owner to be such an improvement) and that puncturing an underground aquifer during construction was not intended to create an improvement to real property. The court rejected the defendant's contention that CDARA should apply to "all aspects of the construction process," rather than only to "an alleged defect in an improvement to real property."[40]

Because of some similarities between language in the real property improvement statute of repose and CDARA regarding their application to real property improvement construction defect claims, examining decisions determining when the statute of repose applies may shed light on the questions here. However, the different purposes of the statutes may serve to undermine this analogy.

In *Hawkins v. Vista Ridge Development Corp.*, a district court held that CRS § 13-80-104 applied to homeowners' claims against adjacent golf course owners regarding defects in the course that allegedly caused groundwater migration that damaged the homes.[41] The court also held that even though certain defendants were sued in their capacity as "developers" and the statute does not expressly apply to "developers," the statute applied because the plaintiffs alleged the defendants negligently supervised and approved subcontractors' and design professionals' construction work.

> "It also seems illogical to consider the fair market value of, or the cost to repair or restore, a neighboring, defectively constructed property to determine the actual damages sustained by a plaintiff arising from injury to his or her own separate property. This suggests that CDARA was not intended to apply to offsite damages claims."

In an unpublished opinion in a different case, the Colorado Court of Appeals held that CRS § 13-80-104(1)(c)'s statute of repose applied to a developer's claims against a builder for improperly grading adjacent lots, causing flooding and damage to the developer's property, and that the repose statute operates independently from CDARA.[42] The Court noted that the property owner could have avoided the statute of repose by suing the adjacent lot owners to enforce its alleged natural drainage easement instead of suing the builder for construction defects.

Analyzing CDARA

CDARA defines recoverable actual damages to include "the fair market value of the real property without the alleged construction defect."[43] This definition supports the conclusion that CDARA's damages caps pertain to the value of the defectively constructed property, not the value of a separate, nearby property.[44] It also seems illogical to consider the fair market value of, or the cost to repair or restore, a neighboring, defectively constructed property to determine the actual damages sustained by a plaintiff arising from injury to his or her own separate property. This suggests that CDARA was not intended to apply to offsite damages claims.[45]

Trying to apply CDARA's NCP to offsite defective construction similarly gives rise to difficulties. CRS § 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.

It would be impractical, if not effectively impossible, for a Colorado homeowner whose house is damaged or who suffers personal injury

to determine, pre-suit, the precise nature of any construction defects on neighboring or distant properties that could have caused such damage or injury. It would be similarly difficult to identify those contractors and subcontractors responsible for the other property's defective condition. Short of invoking a court process allowing discovery, including physical inspection of another's property and examination of the owner's business records, such claimants have no realistic way of obtaining the information necessary to create a written notice of claim pursuant to CDARA.

The mismatch between CDARA's statutory scheme and its application to offsite defect claims also becomes evident when trying to apply CRS §§ 13-20-803.5, -803, and -805 to such claims. CRS § 13-20-803.5 requires a claimant to engage in a pre-suit NCP with an allegedly responsible construction professional. The NCP requires the claimant to (1) identify the construction professional, (2) provide the construction professional "reasonable access to the claimant's property . . . to inspect the property and the claimed defect," and (3) provide the construction professional an opportunity to offer to settle or repair the construction defect and any resulting damage.[46] A claimant damaged by a defect located on someone else's property has no right or ability to allow entry onto that property for purposes of inspecting or repairing the alleged construction defect. This prevents the NCP from proceeding. The adjacent property's owner may even be advised to deny entry for liability, security, insurance, and other reasons.

Similarly, an incongruity appears to exist between offsite construction defect claims and CRS § 13-20-803's requirement that a claimant file an initial list of construction defects within 60 days of commencing suit and serve it on the sued construction professionals. Filing such a list would be extremely challenging where the claimant has no right to enter the offsite property pre-suit to search for and identify such defects. And a claimant's inability to identify who performed defective work on another's property and serve a timely notice of claim also frustrates CRS § 13-20-805's tolling of the limitations and repose periods for claims against construction professionals who receive a notice of claim.[47] The unavailability of CDARA's tolling could invite "shotgun" lawsuits naming everyone and anyone so as to protect against the running of the limitations period. As discussed below, eliminating such shotgun lawsuits was a major reason for CDARA's enactment.

Thus, many of the NCP's purposes, including property inspection, defect listing, tolling, and pre-suit settlement discussions are difficult if not impossible to fulfill in cases of offsite defects causing injury. This supports the argument that CDARA's entire statutory scheme was not intended to apply to a stranger's defective construction that damages or causes the loss of use of a claimant's offsite property.

Construction professionals may respond that CDARA applies by analogizing to secondary property owners and residential and commercial tenants who suffer damage due to construction defects. Such parties similarly face the challenge of identifying unknown potentially responsible construction professionals involved in the original construction and accessing pertinent records. Further, CDARA's damages caps, the lesser of "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," likewise do not fit well with damage to a residential or commercial tenant's leasehold finishes and fixtures,[48] but such mismatches do not justify excluding these parties' defect claims from CDARA's reach.

Claimants might respond that secondary purchasers' difficulties identifying potentially liable construction professionals do not rise to the same level presented by offsite damages claims, which latter problems wholly undermine the multiple purposes of CDARA's NCP. They might also argue that there is no damages mismatch where the leasehold estate and tenant finishes and fixtures are all a part of the allegedly defective real property improvement.[49]

Possible Solutions

There is rarely any practical way for a property owner to control construction that occurs on a neighbor's property. Remaining alert for early signs of damage caused by construction on another's property may be a property owner's best defense. Theoretically, a prophylactic action might be brought where a condition on a neighbor's property, such as an underground leak or changes in natural surface drainage, could support a nuisance claim or injunctive relief if some harm has occurred or is imminent, so as to prevent later, greater harm. None of these potential solutions, however, addresses the significant mismatch between many of CDARA's provisions and damages caused by offsite construction defects.

Policy Considerations

Two significant public policies drove CDARA's adoption: streamlining construction defect lawsuits by making "shotgun" lawsuits unnecessary, and reducing liability insurance premium volatility.[50] Each is discussed below and neither demands that CDARA must apply to work-in-progress or offsite claims. In addition, the effects of risk allocation are considered below.

"Shotgun" Litigation

As noted above, CDARA was adopted, in part, to reduce "shotgun" litigation in which a claimant "protectively" sues every conceivably liable construction professional to avoid suit deadlines from expiring while a claimant engages in discovery to determine the actual liable parties. This concern is very low, however, when a construction defect is observed in ongoing work. The potentially liable party or parties are currently working, so the risk of the statute of limitations running before identifying those parties is almost, but not entirely, nil.

For example, when a claimant seeks delay damages, the defendant might blame others for contributing to the delay and later designate potentially liable nonparties that were not obvious to the claimant. This risk may be remote in cases regarding commercial properties, however, because the economic loss (independent duty) rule bars many tort claims in commercial cases, and the non-party statute probably does not apply to contract claims.[51]

Insurance Premium Predictability

CDARA was also adopted, in part, to provide liability insurers with greater certainty about the

risks they insure and to help stabilize the insurance marketplace. Nearly all liability insurance policies issued to construction professionals generally distinguish between their premiums and coverages for "ongoing" construction operations versus those for "completed" operations.[52]

Because insurance policies distinguish between liability for construction defects occurring and identified during the construction process as opposed to latent defects not discovered until after the work is complete, insurance policy premiums can account for these differences. Of course, if Colorado courts determined that CDARA does not apply to defects discovered during ongoing operations, CDARA's damages caps and other damages limitations would not apply, and insurance premiums for this risk might increase as a result. However, the vast majority of ongoing operations claims involve an observed defect that has not yet caused property damage or bodily injury, and without one or the other, coverage generally is not triggered under nearly all business liability policies.[53] Thus, insurers could readily adjust their premiums and coverage to account for however Colorado's courts might construe CDARA's scope.

The effect on insurance premiums of excepting offsite property damage and bodily injury from CDARA's scope is less clear. Common sense and experience suggest that such claims likely comprise a minute portion of the construction defect risk insured by liability policies because the incidence of damage to property containing a construction defect, or injury to persons on that property, is likely orders of magnitude higher than offsite damage or injury. But the risk is not zero. For example, it is possible for structure or grassland fires, dam or reservoir leaks, and other incidents to affect surrounding land and people. Again, however, insurers could adjust their premiums to account for however Colorado courts might construe CDARA's scope in this regard.

Risk Allocation

Obtaining liability insurance is part of the larger issue of risk allocation. Complex building projects are typically defined by "networks of interrelated contracts" that seek to allocate risks among the owner, general contractor, subcontractors, and their respective insurers.[54] Where construction work is performed on the claimant's property, the property owner (and potential future claimants) can

- negotiate the details of and factors of safety built into the work (such as when building a new home or other structure);
- inspect the work if it has already been completed (such as when buying an existing home or other structure);
- rely on independent tort duties arising from new home construction[55] and construction quality controls imposed by law, such as Colorado's new home implied warranties of workmanlike construction, habitability, building code compliance, and suitability of use;[56] and/or
- negotiate appropriate warranties.

> "As a result, CDARA's 'grand compromise' and resulting statutory scheme, intended to fix the rights between property owners and those who built their real property improvements, has no obvious bearing on the rights and liabilities between property owners and their neighbors (and their neighbors' contractors)."

Offsite property owners have no contractual involvement with, legal interest in, control over, and/or practical ability to modify or prevent the construction of a real property improvement on adjacent or distant properties they do not own or control. Therefore, they have no opportunity to negotiate any sort of contractual risk allocation concerning how the nearby owner's construction might affect or damage their person or property. As a result, CDARA's "grand compromise" and resulting statutory scheme, intended to fix the rights between property owners and those who built their real property improvements, has no obvious bearing on the rights and liabilities between property owners and their neighbors (and their neighbors' contractors).

As noted above, the analysis becomes more complicated in the case of residential or commercial tenants who suffer damage or injury due to a defect in the structure's original construction. In theory, they could negotiate the transfer or management of such risk in their lease, although this is likely more a theoretical rather than a practical solution for most residential and small business tenants.[57]

Personal and Bodily Injury Claims

While CDARA encompasses personal and bodily injury claims, these are subject to different damages limitations. Still, the Colorado Supreme Court has recognized that CDARA's NCP applies to injury claimants.[58] However, the policies relating to streamlining construction defect suits and managing insurance premium volatility are less relevant to injury claims. While *property damage* coverage distinguishes between ongoing and completed operations and contains many separate exclusions applicable to both types of operations,[59] *bodily and personal injury* coverages contain no similar distinctions. And the

NCP, although applicable to injury claims, was not really written with such claims in mind, as is evident from its property inspection protocol and "offer to repair" option. A claimant injured due to a construction defect while visiting someone else's property has no authority to allow for the property's inspection, little stake in seeing the construction defect repaired, and no standing to authorize the proposed repair.[60]

Conclusion

Colorado's appellate courts have yet to address the thorny issue whether CDARA applies to construction defects found in works-in-progress, before the improvement to real property has been substantially completed. Similarly, Colorado courts have not decided whether CDARA applies when construction defects in one person's real property improvement cause damage to someone else's property or person. While discrete portions of CDARA's plain text appear to support applying it in both circumstances, other portions do not. Applying the NCP to these situations may be unwieldy, if not impossible. Moreover, it is debatable whether extending CDARA's reach to these circumstances is consistent with CDARA's underlying purposes. Colorado's appellate courts will no doubt eventually grapple with what, if any, limiting principles apply to CDARA's scope regarding the time and place of the alleged damage or loss caused by a construction defect. CL


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NOTES

1. CRS §§ 13-20-801 et seq.
2. CRS § 13-20-803.5 contains CDARA's notice of claim process.
3. CRS § 13-20-802.5(1) (emphasis added).
4. CRS § 13-20-802.5(3) (emphasis added).
5. CRS § 13-20-802.5(4) (emphasis added).
6. CRS § 13-20-802 (emphasis added).
7. CDARA provides that the NCP must begin no later than 75 days before filing an action regarding residential property, and no later than 90 days before filing an action regarding commercial property. CRS § 13-20-803.5.
8. *See* CRS §§ 13-20-806 (damages limitations); -802.5(2) (defining "actual damages").
9. *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1191 (Colo. 2010) ("A plain reading of section 104 clearly indicates that a homeowner's claims under the CDARA may accrue and be forever barred by the statute of limitations before a personal injury occurs."). *Id.* at 1191–92.
10. *Thone v. Favela*, No. 18CV30739 (Weld Cty. Dist. Ct. Nov. 26, 2018).
11. *RJB Dev., Inc. v. Saylor*, No. 11CV311, 2012 Colo. Dist. LEXIS 2540 (Summit Cty. Dist. Ct. Aug. 12, 2012).
12. *Id.* at *10–13.
13. *Id.* at *20–21.
14. *Id.* at *25–27.
15. *Harvey v. Fletcher*, No. 2018CV30922, slip op. at 1 (Boulder Cty. Dist. Ct. Dec. 13, 2018).
16. *Id.*
17. CRS § 13-20-807.
18. *Forest City Stapleton Inc. v. Rogers*, 393 P.3d 487, 490 (Colo. 2017) (citing *Black's Law Dictionary* (10th ed. 2014)). Most ongoing construction work is done pursuant to a contract, the terms of which may fairly be characterized as express warranties. These warranties consist of promises to do certain things in a certain way, such as to perform the construction pursuant to plans and specifications, with reasonable care, in conformity with the project documents, product specifications, and applicable building code, and/or to remedy or repair noncompliant or defective work.
19. www.merriam-webster.com/dictionary/ordinary.
20. CRS § 13-20-802.
21. CRS § 13-20-802.5(1).
22. Some disputes may involve a combination of CDARA and non-CDARA claims.
23. *Mendenhall v. Aldous*, 196 P.3d 352, 355 n.2 (Idaho 2008) (dicta; construing I.C. § 6-2503 (emphasis added)). *But see AMI Mech. Inc. v. Hadji & Assocs.*, No. 16CV33051, 2017 Colo. Dist. LEXIS 1131 at *5 (Denver Cty. Dist. Ct. May 24, 2017) (holding that claims for delayed construction progress are "injuries resulting from deficiencies in the design, planning, supervision, or observation of construction.").
24. *See* CRS § 13-80-104 ("all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall . . . in no case . . . be brought more than six years after the *substantial completion* of the improvement to real property, except" for certain circumstances extending the repose period for an additional two years) (emphasis added).
25. One case construing a predecessor statute of repose found damages arising from ongoing construction operations to be subject to the statute. *Sharp Bros. Contracting Co. v. Westvaco Corp.*, 817 P.2d 547, 550 (Colo.App. 1991), held that the predecessor real property improvement statute of limitations applied to "any and all actions" resulting from a "deficiency" in the design or construction processes, including a deficiency in "supervision" of those processes. The Court concluded that the statute applied to an explosion and fire that allegedly resulted from the defendants' removal of the lining of a carbon storage tank using a highly flammable substance.

Differences in the wording, purpose, and structure of the repose statute and CDARA may lessen the weight given cases interpreting the repose statute when construing CDARA. However, part of one bill encompassing the several, integrated laws comprising CDARA amended the statute of limitations/repose, and this may support the notion that the statutes should be read together harmoniously. *See* HB 01-1166, § 2, amending CRS § 13-80-104 (l) (b). For a more complete discussion of what constitutes an "improvement to real property," *see* Benson, ed., *Practitioner's Guide to Colorado Construction Law* § 14.9.1.b at 14-422 (Applicable Claims and Activities) (CBA-CLE 2020) (hereinafter *Practitioner's Guide*).
26. *See Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166, 1168 (Colo.App. 2008) (holding CDARA's extensive provisions should not be read "in isolation," but together to give effect to the entire statute), *overruled in part on other grounds by Goodman v. Heritage Builders*, 390 P.3d 398 (Colo. 2017).
27. CRS § 13-20-803.5.
28. The General Assembly enacted CDARA to streamline and reduce construction defect litigation. *CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 664 (Colo. 2005).

29. This comment is based on multiple anecdotal communications between the authors and Colorado construction counsel. These AIA contracts often afford the contractor a "right to cure" defective work as opposed to CDARA's opportunity to offer a repair. *Cf. Ranta Constr., Inc. v. Anderson*, 190 P.3d 835, 844 (Colo.App. 2008) (where window vendor was not a subcontractor but a supplier of goods, Colorado's Uniform Commercial Code applied to determine homeowner's rights and remedies regarding defective windows; the terms of the standard AIA contract would be enforced between the residential property owner and general contractor; but the effect of CDARA was not discussed).

30. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d 219, 230 (Colo.App. 2017).

31. *See Practitioner's Guide* at § 14.2.3 at 14–58 (Emergencies and Duty to Mitigate) (collecting cases).

32. Applying CDARA to offsite damages and losses caused by ultrahazardous activities also raises the question whether the General Assembly intended CDARA to limit or bar application of common law and statutory strict liability for ultrahazardous activities. *See* CJI-Civ. 9:7A (2020) (ultrahazardous activity elements of liability).

33. *Smokebrush Found. v. City of Colo. Springs*, No. 13CV1469 (El Paso Cty. Dist. Ct. Aug. 2, 2013) (order on motion to stay).

34. *Id.*, slip op. at 7.

35. *Id.* Some argue that because compliance with the NCP is not a substantive element of a construction defect claim, compliance with the NCP is inapposite to evaluating CDARA's scope. *See, e.g.*, *Land-Wells v. Rain Way Sprinkler and Landscape, LLC*, 187 P.3d 1152, 1153–54 (Colo.App. 2008). However, even if one views such compliance as a procedural condition precedent to maintaining a defect action, it is still relevant to understanding and applying the statutory framework.

36. *Suncor Energy U.S.A. Inc. v. Public Serv. Co. of Colo.*, No. 2019CV34388 (Denver Cty. Dist. Ct. Aug. 7, 2020), *pet. for interlocutory appeal granted*, No. 2020CA1549 (Colo.App. Sept. 30, 2020) (case subsequently settled and appeal dismissed) (The authors were preparing an amicus brief supporting Suncor Energy's position when the case settled.).

37. *Id.*, slip op. at 5–6.

38. *Id.*, slip op. at 6–7. The claimant relied on CRS § 39-1-102(11), which defines utility lines installed through an easement, right-of-way, or leasehold for the purpose of commercial or industrial operation, and not for the enhancement of real property, as personal rather than real property, to support its argument that the utility line at issue was not an improvement to real property.

39. *Davis v. Poudre Valley Rural Elec. Ass'n*, No. 2017CV30108, 2018 WL 9440698 (Weld. Cty. Dist. Ct. July 11, 2018). *But see MCI Commc'ns Servs., Inc. v. B&F Co. Inc.*, No. 19-cv-01546-STV, 2020 U.S. Dist. LEXIS 123111, 2020 WL 3971641 (D.Colo. July 13, 2020) (magistrate's recommendation) (holding contractor who damaged fiber-optic cable while performing directional bore in public right-of-way was acting as a construction professional because cable's installation would have increased public right-of-way's utility; because allegedly negligent excavation occurred in furtherance of an improvement to real property, CRS § 13-20-802.5(1) governed the contractor's work).

40. *Davis*, 2018 WL 9440698 at *1.

41. *Hawkins v. Vista Ridge Dev. Corp.*, No. 12CV727 (Weld Cty. Dist. Ct. June 26, 2014), *aff'd in part, rev'd in part on other grounds*, No. 15CA1779 (Colo.App. Mar. 9, 2017) (not selected for official publication).

42. *Michael B. Enters., Inc. v. K B Home Colo., Inc.*, No. 17CA1339, slip op. at ¶ 35 (Colo.App. June 7, 2018) (not selected for official publication).

43. CRS § 13-20-802.5(2).

44. It is appropriate to examine CDARA's legislative history to better understand its intent. *See CLPF-Parkridge One, L.P.*, 105 P.3d at 661. One purpose of CDARA's damages caps was to alter the common law rule approved in *Bd. of Cty. Comm'rs v. Slovek*, 723 P.2d 1309, 1316–17 (Colo. 1986), ratifying the recovery of repair costs exceeding the value of the damaged residential property. *See* testimony of HB 03-1161 co-sponsor Sen. McHelany, Senate Consideration Conference Comm. Report, 65th Gen. Assemb., 1st Reg Sess., audio tape at 00:15:50–00:16:05 (Apr. 16, 2003) (bill intended to avoid economic waste by denying property owner $400,000 repair on a $300,000 home). *See also* Sandgrund et al., "Recovering Actual Damages Under Colorado's Construction Defect Action Reform Act—Part I," 38 *Colo. Law.* 41, 42, n.17 (May 2009) (accord). *And see* testimony of attorney Sullan, Hearings on HB 03-1161 before House Bus. Affairs and Labor Comm., 65th Gen. Assemb., 1st Reg Sess., Third Reading, audio tape at 00:20:13–00:21:25 (Jan. 16, 2003) (discussing HB 03-1161's application only to defects causing damage occurring on the same property where defects are located: "one of the far-reaching impacts of this Bill that has been overlooked in the debate because it focuses so much on homeowners is that this Bill covers all claims by owners of property against contractors who make improvements *to that property*.") (emphasis added).

45. *See* CRS § 13-20-802.5(2) (capping "actual damages" at the least of the fair market value of the defectively constructed property in a

non-defective condition, the replacement cost of the real property, or the cost to repair the property). One of HB 03-1161's cosponsors, Rep. Rippey, testified that the "[i]ntent of the legislation is to make aggrieved homeowners whole . . . . I do not believe in any instance that if a homeowner suffers a construction defect that they should be made anything less than whole. That is the intent of how the bill works." Hearings on HB 03-1161 before House Bus. Affairs and Labor Comm., 65th Gen. Assemb., 1st Reg. Sess., Third Reading, audio tape at 00:03:17–00:03:37 (Jan. 16, 2003).

46. The NCP also triggers a construction professional's liability insurer's duty to defend. CRS § 13-20-808(7). An insurer's involvement is often critical "to encourage [] resolution of potential defect claims before suit is filed," one of the General Assembly's purposes in enacting CDARA. *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 334–35 (Colo.App. 2012).

Under CRS § 38-33.3-303.5(1)(c)(II)(B)'s parallel notice of claim process for multifamily community associations, the construction professional also must be "invited to attend" a meeting to consider the commencement of a construction defect action and permitted to "address the unit owners concerning the alleged construction defect . . . ."

47. CRS § 38-33.3-303.5(1)(d)(II) also provides for statutory tolling of common interest community association claims.

48. The addition of a fixture to a leased space may render it part of a real property improvement. *Andrews v. Williams*, 173 P.2d 882, 883 (Colo. 1946) (while there are "no fixed and universal tests, by application of which the status of improvements as fixtures can be determined," there are "recognized guides for determination, such as the nature and character of the thing annexed, the manner of annexation and resultant injury by its removal, the intent of the party in making the annexation, the purpose of annexation, the adaptability of the thing attached to the use of the land, and the relation of the party making it to the freehold."). *See also Mining Equip. Inc. v. Leadville Corp.*, 856 P.2d 81, 85 (Colo.App. 1993) ("The general tests for determining whether a particular object has become a fixture are: (1) annexation to the real property; (2) adaptation to the use to which the real property is devoted; and (3) intention that the object become a permanent accession to the freehold.") (citation omitted).

49. Other tenant damages, such as to personal property, inventory, and non-fixture tenant finishes, and even claims for lost rents or profits, may not be recoverable at all under CDARA and, thus, not the subject of the NCP. *See* CRS § 13-20-802.5(2) (defining recoverable "actual damages," and not including damage to personal property, inventory, or non-fixture tenant finishes, nor lost rents or profits). A number of district courts have ruled that lost profits and lost rents are not recoverable under CDARA. *See McCoy v. Garza*, No. 08CV3272, 2009 WL 6690678 (El Paso Cty. Dist. Ct. May 18, 2009) (lost profits); *Reinke Bros. Playhouse v. Statewide Roofing Consultants*, No. 17CV31500, 2019 Colo. Dist. LEXIS 461 at *6 (Jefferson Cty. Dist. Ct. June 26, 2019) (lost profits); *Opus One, LLC v. Stepneski*, No. 16CV33858, slip op. at 3, 6–8 (Denver Cty. Dist. Ct. Nov. 9, 2017) (lost rentals); *Layton Constr. Co. v. Barclays Capital Real Estate Inc.*, No. 2009CV606 (Eagle Cty. Dist. Ct. Nov. 30, 2010) (CDARA prohibits recovery of consequential damages arising from construction defects); *Cheyenne Plains Gas Pipeline, LLC v. Ranger Plant Constructional Co.*, No. 09CV910, slip op. at 3 (Weld Cty. Dist. Ct. June 25, 2012) (barring evidence of damages resulting from defective non-residential construction "other than actual damages" as "irrelevant" under CDARA).

50. *CLPF-Parkridge One, L.P.*, 105 P.3d at 664; *accord*, *Fire Ins. Exchange v. Monty's Heating & Air Conditioning*, 179 P.3d 43, 46 (Colo.App. 2007). *See generally* Sandgrund et al., "The Construction Defect Action Reform Act," 30 *Colo. Law.* 121, 123 (Oct. 2001) (describing CDARA as a "compromise of competing concerns"); Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *Colo. Law.* 89 (July 2003). CDARA limits a damaged property owner's common law rights, remedies, and damages. *Id.* All such limitations should be narrowly construed because they are in derogation of the common law. *See generally Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008) (the legislature must state clearly and expressly any intent to change the common law).

51. *Cf. Resolution Tr. Corp. v. Heiserman*, 898 P.2d 1049, 1055 (Colo. 1995) (holding "tortious conduct" as used in CRS § 13-21-111.5(4) does not include contract claims); *Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 300 P.3d 963, 976 (Colo.App. 2012) ("because a breach of contract is not a tortious act, such a breach does not fall within the meaning of 'fault' as used in [CRS § 13-21-111.5] (1) and (3)"). *See also generally Practitioner's Guide* at § 14.9.4 at 14-502 (Non-Party Liability).

52. Business liability policies typically charge separate premiums for insuring against hazards classified as arising from "premises-operations" versus "products-completed operations."

53. *See, e.g.*, *Samuelson v. Chutich*, 529 P.2d 631, 634–35 (Colo. 1974) (date of resulting injury, not negligent act, triggered liability insurance coverage); *Am. Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 956 (Colo. App. 1990) (hidden but progressive and continuous roof deterioration affected structure's integrity, causing actual property damage during policy periods).

54. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004).

55. *See Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1042–45 (Colo. 1983) (discussing such independent tort duties).

56. *See generally* CJI-Civ. 30:54-55 (2020).

57. Whether CDARA governs damage to one tenant's property due to defective construction of tenant improvements on another tenant's property is an interesting question; that is, should such resulting damage be viewed as offsite property damage beyond CDARA's scope?

58. *Smith*, 230 P.3d at 1192–93. *Compare Land-Wells*, 187 P.3d 1152, 1154, which held that CDARA did not change the substantive elements of plaintiff's negligence claim arising from a fall on an icy sidewalk, but which did not address whether plaintiff was required to satisfy CDARA's NCP to establish a prima facie case. Still, *Land-Wells* acknowledged that "CDARA creates a special notice process." *Id.* at 1154. Moreover, while some argue that *Land-Wells* applied CDARA to a contractor who installed sprinklers on property distinct from but adjacent to the property where the claimant slipped and fell, the opinion is unclear on this point, and equally suggests that the irrigation contractor blocked a drainpipe that day-lighted on the opposite side of the sidewalk, causing it to backup and create an icy surface, meaning that the property at issue included all of the sidewalk and the land on either side of it. *Id.* at 1153.

59. The standard liability insurance "business risk" exclusions j, k, l, and m (Coverage A) apply only to property damage claims.

60. The facts of *Smith*, 230 P.3d 1186, were highly unusual. There, the personal injury claimant's husband noticed and reported the allegedly defective construction more than two years before the claimant's injury. Presumably, in the vast majority of cases, someone injured by defective construction would not be aware of the defect until after he or she was injured. While CDARA's NCP could then be invoked to remedy the defect, it is not designed to address and resolve a personal injury claim.