Making Up Your Own Rules for Resolving Residential Construction Defect Disputes

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This article examines whether Colorado statutes or public policy constrain construction professionals from creating their own rules for resolving residential construction defect claims. It also explores the nature and extent of construction professionals' and homeowners' freedom to contract around these laws.

Construction professionals sometimes include provisions in their residential construction contracts, purchase agreements, and declarations of covenants, conditions, and restrictions (declaration) that are arguably inconsistent with Colorado's Construction Defect Action Reform Act (CDARA), Colorado's Common Interest Ownership Act (CCIOA), Colorado's Revised Uniform Arbitration Act (CRUAA), Colorado's Rules of Evidence (CRE), and/or Colorado construction defect common law.[1] Such provisions may present procedural, substantive, evidentiary, or economic barriers that make a homeowner's or homeowners association's pursuit of construction defect (CD) claims more difficult, expensive, and time-consuming; less likely to result in a negotiated settlement before suit or arbitration is commenced; and, in some cases, less likely to result in a fair consideration of the claim by the arbitral or judicial tribunal.

In these circumstances, the question arises whether some or all of these provisions are void in whole or in part because they conflict with Colorado statutes or public policy. This article describes and analyzes these kinds of provisions. Practitioners should consider whether such provisions, if void, may also violate Colorado's Consumer Protection Act (CCPA).[2]

Framing the Issue

A client tells you that they and their 25 neighbors are each facing the loss of the single largest investment they have ever made—their condominiums—due to significant and widespread structural damage caused by the pressures exerted by underlying expansive soils. They explain that the builder has assured them over the past year that their many progressive drywall cracks and sticky windows are simply cosmetic issues, and that the builder even came in and patched and painted the cracks and adjusted the windows after the one-year warranty expired.

They provide you their boilerplate unit purchase contract and condominium declaration, and two provisions catch your eye. The first is embedded in the declaration's CD arbitration clause and cross-referenced in the purchase contracts. It provides that (1) claims must be specified with particularity as to the location, repair methodology, supporting evidence, and repair costs in advance of any mediation or arbitration proceedings; (2) in any such proceedings, it is rebuttably presumed that any construction done by the builder is not defective, the builder performed its obligations adequately under the contract, and the builder was not negligent, provided the builder's performance was in accordance with *any one of* certain local trade standards, builder association construction guidelines, or the building code; and (3) in any such proceedings, evidence of repairs made by the builder and evidence of industry advancements or knowledge discovered after the date of the declaration are inadmissible. You view compliance with this language as potentially onerous and unduly expensive, and possibly inconsistent with the statutorily required pre-suit notice of a CD claim and traditional proof of defective construction.

The second provision you flagged is located in the purchase contracts' CD arbitration clause. It says that, in arbitration proceedings, expert testimony offered to establish the builder's breach of any contract, tort, or statutory obligation, or as proof of damages, such as reasonable repair costs, is *only allowed* if offered through a homebuilder licensed by the building department in the city or county in which the home is located, and who has built and sold at least 10 homes for over $200,000 in the two years before the claim. You wonder whether this provision is enforceable if it is inconsistent with CDARA, CCIOA, CRE, or Colorado's construction defect common law, or otherwise violates Colorado public policy. You question how feasible it is to locate expert witnesses who meet these criteria who would be willing to provide opinions that might criticize the very practices the witnesses have engaged in. And you are curious whether experts would be willing to testify against someone in their industry living and working in the same community, who was perhaps an acquaintance or friend. In fact, you wonder if such potential homebuilding expert witnesses might consider that, without their testimony, there might be fewer, if any, CD claims made, resulting in lower liability insurance premiums for themselves and their colleagues.

Beginning the Analysis

Analyzing the enforceability of contract provisions that impose different or additional conditions to bring and prove a CD claim than those required by law requires measuring the contract language's effect against applicable statutes and cases and determining whether it is consistent with or undermines the policies underlying the law. If the purpose of the law is to create a *uniform* framework for enforcing rights and claims governed by the law and to create and preserve *consistent standards* for CD rights and claims, then arguments exist for voiding the contractual language. However, if the purpose of the law is simply to create a *general* framework for enforcing CD rights and claims yet preserve the right to contractually modify this framework without impairing these rights and claims, then arguments exist for giving effect to the contract language.

If the former analysis prevails, then the tribunal's work may be limited to simply striking the nonconforming provision if it imposes

conditions different from or in addition to those imposed by law. If the latter analysis applies, then tribunals must examine and weigh, on a case-by-case basis, the burdens imposed by the contract language in light of the law's amelioratory purposes. Thus, tribunals may adopt a bright-line, balancing, or other test when employing these analyses.

Freedom of Contract and Caveat Emptor (Buyer Beware)

Colorado has a long history of supporting parties' freedom to contract regarding how to allocate risks of loss[3] and employ alternative dispute resolution (ADR) mechanisms, including ADR and decisionmaker-selection procedures.[4] Moreover, for many years, real and personal property purchasers were subject to the rule of caveat emptor—buyer beware.[5] However, Colorado has also historically limited or voided certain contractual provisions if they serve an illegal purpose, are unconscionable, violate statute, or arise from an unfair take-it-or-leave-it bargaining position, such as with adhesion contracts.[6] Moreover, if someone is fraudulently induced to enter into a contract to their detriment, a court may void some or all of the contract and award money damages.[7] In these cases, generally the burden rests with the party seeking to limit or void the contractual provision to prove these exceptions apply to the typical rule that parties have broad freedom to negotiate and contract on mutually acceptable terms.

Public Policy and Contract Avoidance

Statutes "by their nature are the most reasonable and common sources for defining public policy."[8] When the legislature defines certain persons' rights and responsibilities, contract provisions that "dilute, condition, or limit" matters mandated by statute violate public policy and are generally void and unenforceable.[9] One prominent area where courts have voided or rewritten contract provisions to comport with statutes concerns insurance contracts, which are highly regulated. Based on public policy concerns, courts have struck down clauses in insurance contracts,[10] employment manuals, and lift ticket agreements.[11] In one case, the Colorado Court of Appeals voided construction contract terms shortening the applicable statute of limitations because they contradicted the Homeowner Protection Act (HPA) prohibition against such provisions.[12] In light of the many times Colorado's legislature has enacted laws governing or relating to CD claims,[13] both substantively and procedurally, the question arises whether, when, and if ever a construction professional, developer, or common interest property declarant may impose contract terms that impair homeowner rights or a construction professional's, developer's, or common interest property declarant's obligations.

Residential Construction and Colorado Public Policy

Colorado's courts and legislature have narrowed the general rules of freedom to contract and caveat emptor in home sales, including newly constructed homes, condominiums, and townhomes. Colorado was one of the first states to recognize implied warranties of habitability, workmanlike construction, compliance with applicable building codes, and suitability of purpose arising as a matter of law from a builder-vendor's sale of a new home.[14]

Colorado also imposes a tort duty on residential real estate sellers to disclose latent defects.[15] And Colorado imposes a tort duty of reasonable care in home construction and design, separate and independent from any contractual duties, on builder-vendors, general contractors, and subcontractors, among others. Courts have ascribed this independent tort duty to various factors, including:

- the home buyer's relative lack of knowledge and sophistication regarding home construction;
- the home buyer's lack of access to the underlying structural work;

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- the home buyer's inability to detect latent defects that, by their nature, are hidden or slow to manifest;
- the significant financial risk that a latent defect poses to what is typically the home buyer's largest single investment;
- the mobility of most potential home buyers, which means any structural defects present a highly foreseeable harm to subsequent purchasers;
- the home buyer's typical exclusion from the process of selecting the responsible subcontractors, including design professionals, and most building materials and products; and
- the twin goals of discouraging misconduct and providing an incentive for avoiding preventable harm.[16]

Colorado's legislature has also addressed the subject, empowering local jurisdictions to adopt building codes imposing minimum construction standards.[17] Moreover, the legislature, in crafting the "grand compromise" between property owner and construction professional rights and liabilities embodied by CDARA,[18] made clear its intent of "preserving adequate rights and remedies for property owners who bring and maintain [construction defect] actions."[19] Critically, in 2007 the legislature adopted the HPA (a part of CDARA), which provides that any "express waiver of, or limitation on, the legal rights, remedies, or damages provided by" CDARA "are void as against public policy."[20] CDARA also amended CCIOA, prescribing detailed preconditions to a homeowner association or unit owner commencing a CD lawsuit or arbitration,[21] and CCIOA itself declares that it is intended to create a "clear, comprehensive, and uniform framework for the . . . operation of common interest communities."[22]

Should Courts Balance Benefits and Burdens?

As noted above, some contract provisions that dilute, condition, impair, or limit certain statutory rights and obligations are void as violative of public policy. However, there are also circumstances where interrelated statutory schemes allow parties to contract for rights and obligations that ostensibly vary from a particular statute. For example in *Triple Crown at Observatory Village Ass'n v. Village Homes of Colorado, Inc.*, the Colorado Court of Appeals (1) enforced a declarant's contractually created veto power over a declaration amendment by harmonizing arguably conflicting sections of CCIOA and Colorado's Revised Nonprofit Corporation Act, and (2) allowed CD claims to be submitted to arbitration despite language in both CCIOA and the CCPA that the claimant argued should relegate such claims to court actions.[23]

While a regulatory scheme may be overarching and strictly govern all disputes that fall within its scope,[24] if a contract provision falls outside the public policy the statute supports, then in some instances courts may enforce the provision even while holding other portions of the contract invalid. For example, in *Johnson Family Law, P.C. v. Bursek*, the Colorado Court of Appeals held that a contract requiring a flat fee payment to a law firm for each client an attorney continued to represent after leaving the firm violated a rule of professional conduct because the fee was unreasonable and the provision unenforceable as against public policy.[25] However, the court held that violation did not void the rest of the contract, including a separate confidentiality and nondisclosure agreement.[26]

A contractual provision is void if the interest in enforcing the provision is clearly outweighed by a contrary public policy.[27] Courts typically look at a statute's scope, its text, whether the statute contains nonwaiver language, and the underlying public policies the law serves, and then compare these against the contract provision at issue to determine if the contract dilutes, conditions, impairs, and/or limits the statute's intended effect.[28] The following discussion considers whether, in the context of CD disputes, CDARA and/or CCIOA are preemptive, voiding or limiting conflicting contract provisions.

"Bright-Line" Versus Balancing Test

Instead of the balancing tests used in the cases above, in some instances courts could adopt a bright-line test voiding any private contract provisions that dilute, condition, impair, or limit CDARA's or CCIOA's provisions if the court determines the statute occupies the entire range of the dispute. This test could apply to provisions for CD claims regarding pre-suit requirements, evidentiary standards, and recoverable damages, among others.

Such a test offers the simplest resolution of a conflict between these statutes and relevant contract provisions. The tribunal would simply compare the contract provision to CDARA, CCIOA, or other potentially applicable statutes; decide whether the provision dilutes, conditions, impairs, or limits the statute; and, if so, declare the provision void. But, of course, the tribunal must first be convinced that the statute is intended, either expressly or by implication, to fully occupy this discrete area of otherwise private contracting. Thus, while judicial efficiencies may arise from employing a bright-line test that a statute does or does not occupy an entire range of dispute, such as those at issue in residential CD claims, a tribunal must still analyze the threshold question whether a particular statute or regulatory scheme supports applying such a rule to a particular disputed issue.

Arguments for and Against CDARA's and CCIOA's Precedence Over Conflicting Contractual Terms

There are arguments for and against voiding or limiting contract provisions that conflict with CDARA and CCIOA. In some instances, the analysis is straightforward and simple—the statute states expressly that its provisions may not be varied by contract and that noncomplying contract provisions are void. Still, difficulties may arise in determining the scope of the statute, which parts of a contract violate the statute, and which parts may not impair the statute's purpose and, thus, may be enforced.

Arguments for CDARA's Precedence

Homeowner counsel typically rely on the HPA as strong evidence that the legislature intended to create a bright line directing courts and arbitrators to enforce CDARA's provisions as written and not permit *any variation* by contract. CDARA's express legislative purpose is to preserve "adequate rights and remedies for property owners" who bring and maintain CD

actions.[29] The HPA provides that "any express waiver of, or limitation on, the legal rights, remedies, or damages provided by" CDARA or the CCPA is void as against public policy.[30]

Based on this language, residential property owners argue that any contract purporting to add to or vary CDARA's procedural or substantive provisions is void as against public policy.[31] Thus, they argue, procedural provisions in purchase contracts and declarations that may potentially chill or burden the assertion of substantive rights, such as by imposing additional pre-suit CD notice conditions, or onerous, complex, or expensive lawsuit-approval notice and voting requirements that conflict with CDARA (or as CDARA is expressed within CCIOA),[32] are void if they impair to any extent a property owner's or association's pursuit of their CD legal rights and remedies.

CDARA also restricts certain kinds of CD negligence claims[33] and establishes some evidentiary presumptions and rules,[34] but it does not explicitly reference the CRE. Still, homeowner counsel may argue that CDARA necessarily implicates the CRE because the CRE govern evidentiary issues in court proceedings and are often employed in arbitration proceedings, and the HPA voids purported contractual changes to the CRE if such changes materially impair or limit pursuit of the legal "rights" CDARA affords.

While CDARA references arbitration, it makes no changes to the CRUAA.[35] Arguments that CDARA precludes contractual modification of the CRUAA and the CRE are more complicated than arguments that CDARA precludes contractual variations from CDARA and the CCIOA. For this reason, homeowner counsel tend to rely on unconscionability arguments to avoid evidentiary provisions like the one described at the beginning of this article where the declaration limited whose expert testimony could be offered to support a CD claim.[36] However, if this sample provision appears in a common interest community declaration, it is also subject to CCIOA's potential limitations on its enforcement. The discussion below addresses potentially applicable sections of CCIOA concerning unconscionability and good faith to such testimonial limitations.

Arguments for CCIOA's Precedence

In challenging contract provisions, including those in declarations,[37] homeowner counsel often rely on CCIOA's express purpose to establish a "clear, comprehensive, and uniform framework for the . . . operation of common interest communities."[38] CCIOA provides that its "provisions . . . *may not be varied by agreement*, and rights conferred by this article *may not be waived*."[39] Thus, homeowner counsel argue that because CCIOA contains legislatively approved and detailed CD pre-suit notice, voting, and suit approval requirements,[40] contracts that vary from these pre-suit requirements violate the law and are void.

In addition, CCIOA provisions relating to unconscionability and good faith may apply where a homeowner or homeowners association challenges a contract provision, including parts of a declaration.[41] First, pursuant to CCIOA, a court may refuse to enforce, in whole or in part, any contract or contract clause to avoid an unconscionable result. In this regard, CCIOA provides factors for courts to consider when evaluating whether a contract or clause is unconscionable, including the commercial context of the negotiations; physical or mental infirmity, illiteracy, or similar factors;[42] the effect and purpose of the contract or clause; and any gross disparity between a sale price and market value for similar properties.[43] CCIOA's test of unconscionability is broader than Colorado's common law test[44] and appears to leave much to the tribunal's discretion, including arbitrators whose rulings are generally unreviewable.[45]

Second, CCIOA provides that "[e]very contract or duty governed by this article imposes an obligation of good faith in its performance or enforcement."[46] Colorado has not yet defined the meaning of "good faith" as used in CCIOA. In other contractual contexts, the "good faith" doctrine has been held to effectuate the intention of the parties or to honor their reasonable expectations.[47] "Good faith" includes "honesty in fact" and "observance of reasonable standards of fair dealing."[48]

Third, "[a] declarant may not . . . use any other device to evade the limitations or prohibitions of this article or the declaration."[49] Comment 5 to § 1-104 of the Uniform Common Interest Ownership Act (UCIOA) notes that the Act recognizes freedom of contract and that variation of the Act by agreement is available as to discrete matters, but that such freedom does not extend "to permit parties to disclaim obligations of good faith," or "to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms."

For purposes of this discussion, this article assumes that one or more of the three CCIOA sections described above apply to declaration provisions alleged to be unconscionable, not made in good faith, or designed to evade CCIOA's limitations or prohibitions. Caselaw and CCIOA's unconscionability and good faith provisions appear to recognize that declarants and associations do not negotiate the declaration's terms at arms-length, if at all.[50] Declarants and others may argue that, in contrast, *individual* homeowners assume ownership in a common interest community with actual or constructive knowledge of the declaration's terms and that their membership in the community is a voluntary act.

Associations and individual owners may seek to apply CCIOA's unconscionability, good faith, and evasion prohibitions to the type of expert witness qualification and CD liability proof restrictions in the sample provisions described at the beginning of this article. (They may also seek to apply the HPA's proscription against *any* contractual "limitation on . . . the ability to enforce legal rights [under CDARA]," and the common law concerning unconscionable contract provisions, in an effort to negate such witness qualification and proof restrictions.[51])

Arguments for Statutory Precedence Where Balancing Test Favors Homeowners

If, after examining all of the statutory provisions and underlying public policies described above, a tribunal concludes that the statutory scheme does not fully occupy the discrete area of dispute addressed by the parties' contract, they must then engage in the difficult task of balancing the statute's language, scope, and purpose against the contract's terms to determine whether the two can be reasonably harmonized so as not to impair the statute's purpose.[52] If not, then the

statute should prevail. If such harmonization is feasible and reasonable, then the court or arbitrator must determine how and to what extent the two can be harmonized, keeping in mind the specter of other alleged conflicts that may develop or be asserted during the litigation or arbitration.

Arguments Against Statutory Precedence

Where a contract provision squarely falls within an express statutory prohibition, such as the shortening of the statute of limitations in *Broomfield Senior Living Owner*, it will be held unenforceable.[53] However, where the property owner argues that the statute, *by implication*, renders a provision unenforceable, the debate thickens, and construction professionals may assert some of the following arguments.

Where a statute describes a process to be followed but does not expressly preclude specific contractual provisions, such as CDARA's notice of claim process (NCP), construction professionals may argue that parties may freely negotiate some changes to that process. Such arguments are common especially when changes are purportedly intended to make the process more effective and informative, including features that are claimed to enhance mediation efforts.

Alternatively, construction professionals may argue that even if the contract provision encroaches on a statute's subject matter, it does not impose an *unreasonable* burden and, therefore, is enforceable. If a claimant contends that compliance with more detailed contractual pre-suit disclosures would cost more than simply complying with CDARA's NCP, construction professionals may argue that the additional expense is not great, would need to be incurred later in the proceedings anyway, does not alter the burden of disclosure, and would facilitate settlement, and that CDARA is intended to encourage settlement through its NCP and approval of mediation.[54]

Relying on arbitration caselaw, construction professionals may also urge that so long as pre-dispute contractual modifications do not prevent residential property owners from effectively vindicating their statutory rights, they should be enforced.[55] Owners may respond that while the CRUAA affords disputants leeway in crafting arbitration procedures, CDARA's NCP is a *predicate* to court litigation or arbitration, not a part of either. And they might say that CDARA's detailed and legislatively negotiated NCP, combined with the HPA's express prohibition against a waiver of CDARA's benefits (such as its streamlined NCP), voids any contractual provision that varies from this process.

Judicial and Arbitral Approaches

The authors are aware of no published Colorado state or federal court appellate opinions squarely addressing the issues discussed in this article. However, one unpublished opinion and several arbitration rulings, including two issued by former judges, offer some insight into possible ways to analyze these issues.

In an unpublished decision, the Colorado Court of Appeals affirmed a trial court's dismissal of claims concerning the declarant's and its principals' alleged failure to set adequate reserves and pay adequate assessments.[56] The court dismissed the claims based on the homeowners association's failure to comply with the declaration's "prelitigation requirements," including 80% unit owner approval of litigation and completion of mediation and binding arbitration before filing suit. Because the claims did not involve CD allegations, neither CDARA nor CCIOA's less demanding pre-suit unit owner approval procedures applied.

Had the case involved dismissal of an association's *CD claims* due to its failure to engage in mediation/arbitration before filing suit, it would have raised serious concerns if the dismissal was made with prejudice, resulted in impairment of a CD claim or waiver, or led to an intervening limitations deadline barring the CD claims. In such circumstances, association counsel might have asserted various defenses to

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the validity or enforcement of such provisions based on unconscionability, violation of the HPA's anti-waiver provisions, disproportionate forfeiture,[57] or otherwise.

In another case, an arbitrator considered a declaration provision providing that

> [i]f any claim is made regarding defects in construction . . . , each claim shall be specified with particularity. Each location of any claimed defect must be identified and all evidence supporting the claim, along with all repair methodologies and costs of repair, must be provided by the claimant *in advance of* any mediation and/or arbitration hereunder . . . .[58]

The builder argued that these disclosure requirements were "essentially the same" as those prescribed by CDARA's NCP. The builder also argued that both CDARA and the HPA encourage mediation, and such mediation has a greater chance of success if the prescribed disclosures had been made.

The homeowners argued they had complied with the NCP and that further defect investigation and compliance with the declaration's disclosure requirements would involve significant and undue expense, especially expert witness fees (which essentially would be doubled by the need for the experts to conduct pre- and post-arbitration filing investigations and write extensive reports), without advancing the mediation process. Moreover, part of the extra expense would be due to the experts not having access to the builder's job files and other material information to be disclosed during the later arbitration.

The arbitrator found that CDARA's mandated NCP did not require the specificity or detail required by the declaration. The arbitrator then held that the enhanced disclosure requirements unduly limited the homeowners' rights under CDARA and were therefore void as violative of public policy in light of the HPA's prohibition against any "express . . . limitation on, the legal rights, remedies, or damages" provided by CDARA.

In another case, an arbitrator considered an identical declaration disclosure requirement involving the same builder.[59] The builder again argued that the costs to be incurred in meeting the enhanced disclosure requirements would be incurred in any event and would "mirror" what would happen during arbitration and/or "emulate" what has already occurred during the NCP. The arbitrator, a former Colorado district court judge, found that the pre-mediation disclosures violated the HPA and were void and unenforceable.

The arbitrator held that the HPA barred "any limitation" on residential homeowner legal rights and remedies or on the enforceability of such rights and remedies. The arbitrator also noted that the homeowners had submitted affidavits attesting that the pre-mediation disclosures would result in an *additional* $50,000 in expert expense. The builder argued that the homeowners' experts' high fees and required tests accounted for these alleged additional expenses; incurrence of these costs was simply a matter of timing; and the mediation was less likely to succeed without the additional disclosures. The arbitrator was not persuaded, concluding that the pre-mediation disclosures constituted an improper "limitation" to enforce rights under CDARA and the HPA.

In a third case, the arbitrator, a former Indiana judge, enforced a declaration provision altering the "notice requirements" for a CD action, holding that CRS § 13-20-803.5(7) permits parties to agree to such alterations, and the declaration reflected such a clear and unambiguous agreement.[60] Moreover, even if "onerous," the arbitrator held that the homeowners association "chose" to contractually obligate itself to the disclosure requirement. However, the arbitrator appears to have miscited and misread CDARA because CDARA expressly allows such an agreed-upon change to its pre-suit notice and disclosure requirements only *after* a notice of claim has been sent, *not before* (such as when the declaration at issue was adopted).[61]

The arbitrator further ruled that the pending arbitration hearing date would not be continued because the parties had adequate time to comply with the declaration's inspection, disclosure, and mediation requirements, which were all "consistent with" CDARA's NCP. The arbitrator also held that the claimants need not satisfy certain time-sensitive disclosure requirements, and that other disclosure requirements could be satisfied during the ongoing arbitration process since they would "typically be obtained through the discovery process."

Conclusion

CDARA, CCIOA, common law, or public policy may void or render unenforceable contracts, including residential purchase agreements and common interest community declarations, that dilute, condition, impair, or limit residential property owner protections, rights, and claims, and related statutory procedures. If there is uncertainty whether a contractual provision implicates the statute's subject matter, then a tribunal may need to determine the scope of the statute and, if there is a conflict between it and the contract, determine whether some portions of the contract can be harmonized and enforced without impairing the statute's purpose. CL


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NOTES

1. *See generally* CRS §§ 13-20-801 et seq. (CDARA); CRS §§ 38-33.3-101 et seq. (CCIOA); CRS §§ 13-22-201 et seq. (CRUAA).

2. *See, e.g.*, CRS § 6-1-105(1)(r) (prohibiting representing property as "guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, [and] any material conditions or limitations in the guarantee which are imposed by the guarantor "); CRS § 6-1-105(1)(rrr) (prohibiting "knowingly or recklessly engag[ing] in any unfair, unconscionable, deceptive,

deliberately misleading, false, or fraudulent act or practice"). Whether a construction professional's reliance on counsel's advice about the propriety of a contract provision is a defense to a CCPA violation is uncertain. *Cf. People v. Terranova*, 563 P.2d 363, 366–67 (Colo.App. 1976) (reliance on counsel's advice is not an absolute defense to Securities Act violation, but merely a factor to be considered).

3. *See Ravenstar, LLC v. One Ski Hill Place, LLC*, 401 P.3 552, 555 (Colo. 2017) (Colorado recognizes a "strong policy of freedom of contract."); *Constable v. Northglenn, LLC*, 248 P.3d 714, 718 (Colo. 2011) ("Strong policy considerations favoring freedom of contract generally permit business owners to allocate risk amongst themselves as they see fit."). *Cf. BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004) (interrelated commercial construction contracts afford construction professionals opportunity to allocate risks).

4. *See generally Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1254 (Colo.App. 2001) (valid arbitration agreements generally will be enforced as written).

5. *See Blackwell v. Del Bosco*, 558 P.2d 563, 563 (Colo. 1976) (declining to adopt a residential lease implied warranty of habitability relying, in part, on common law rule of caveat emptor, even if the rule developed under "social and economic conditions which no longer prevail").

6. *See Amedeus Corp. v. McAllister*, 232 P.3d 107, 112 (Colo.App. 2009) (corporation acting as unlicensed broker not entitled to arbitrate entitlement to finder's fee because agreement was an illegal contract and unenforceable); *Rademacher v. Becker*, 374 P.3d 499, 500 (Colo.App. 2015) (promissory note given to influence criminal proceeding void; contract that violates public policy cannot be enforced); *Univ. Hills Beauty Acad. v. Mountain States Tel. & Tel. Co.*, 554 P.2d 723, 726 (Colo.App. 1976) (discussing unconscionability); *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981) (adhesion contract is a contract drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere). Several HPA sponsors noted that many home purchase contracts have the earmarks of adhesion contracts, as reflected in the HPA's extensive legislative history. *See* Sandgrund et al., "The Homeowner Protection Act of 2007," 36 *Colo. Law.* 79, 81, n.50 (July 2007). *See also Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d 219, 230 (Colo.App. 2017) (J. Davidson, concurring) (HPA is a codification of the policy principles rendering contractual waiver clauses void as against public policy because of the imbalance of knowledge, sophistication, and bargaining power between residential property seller and buyers). Like insurance contracts, declarations are "not ordinary bilateral contracts" and are "not the result of bargaining." *See Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1049 (Colo. 2011) (discussing insurance contract formation).

7. *See Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 19, n.6 (Colo.App. 2010) (courts may void contracts induced by fraud).

8. *Rocky Mtn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996).

9. *Meyer v. State Farm Mut. Auto. Ins. Co.*, 689 P.2d 585, 589 (Colo. 1984), *superseded by statute on other grounds as recognized in Schlessinger v. Schlessinger*, 796 P.2d 1385, 1389 (Colo. 1990). *See also Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999) (generally, contracts in contravention of public policy are void and unenforceable); *In re Marriage of Ikeler*, 161 P.3d 663, 667 (Colo. 2007) (contract clause inimical to strong public policy against a particular practice will likely be declared unconscionable and unenforceable).

10. *E.g.*, *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 345 (Colo. 1998).

11. *See Cummings v. Arapahoe Cnty. Sheriff's Dep't*, 440 P.3d 1179, 1187 (Colo.App. 2018) (approving avoidance of part of department manual that violated statutory mandate requiring deputy sheriffs receive timely notice of reason for termination: "Parties may not contract to abrogate statutory requirements and thereby contravene the public policy of this state."); *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982, 987 (Colo.App. 1983) (trial court properly excluded purported agreement on lift ticket altering parties' statutory duties under Ski Safety Act: "Statutory provisions may not be modified by private agreement if doing so would violate the public policy expressed in the statute.").

12. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d 219, 226 (Colo.App. 2017).

13. This occurred in 1999, 2001, 2003, 2007, 2010, and 2017. *See* Benson, ed., *Prac.'s Guide to Colo. Constr. Law* §§ 14.2.3 at 14-5, nn.14–16; 14.6.2.a (CBA-CLE 2020) (discussing legislation).

14. *See generally Carpenter v. Donohoe*, 388 P.2d 399, 402 (Colo. 1964) (recognizing several implied warranties that accompany a builder-vendor's sale of a newly constructed home); *Rusch v. Lincoln-Devore Testing Lab., Inc.*, 698 P.2d 832, 834 (Colo.App. 1984) (recognizing that when "a commercial developer improves and sells land for the express purpose of residential construction," an implied warranty "arises that the property is suitable for the residential purpose for which it is sold"); *Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC*, 479 P.3d 86, 102 (Colo.App. 2020) (public policy giving rise to implied warranty of habitability is to protect "purchasers of new houses upon discovery of latent defects, by requiring that such defects be cured by the builder or developer who had created them") (quoting *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 454 N.E.2d 363, 366 (Ill.App.Ct. 1983)). To date, no published Colorado opinion has enforced an implied warranty disclaimer, and the HPA may now effectively render such disclaimers void. *See* Benson, *supra* note 13 at § 14.4.3.g at 14-109, nn.931, 939 (discussing HPA's effect on implied warranty disclaimers).

15. *Cohen v. Vivian*, 349 P.2d 366, 367 (Colo. 1960); *Gattis v. McNutt*, 318 P.3d 549, 557 (Colo. App. 2013).

16. *See generally Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1045 (Colo. 1983); *Gattis*, 318 P.3d at 557; *Yacht Club II Homeowners Ass'n v. A.C. Excavating*, 94 P.3d 1177, 1181 (Colo. App. 2003), *aff'd*, 114 P.3d 862 (Colo. 2005). *See also* Benson, *supra* note 13 § 14.5.1.b at 14-281, n.1221.

17. CRS § 30-28-201(1).

18. *See* Benson, *supra* note 13 §§ 14.2.3 at 14-29, n.239; 14.2.4 at 14-41, n.352; 14.2.7 at 14-61, n.574; 14.5.1.j at 14-156, n.1387 (discussing CDARA's origins and characterizing the statute as a "grand compromise"; citing Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *Colo. Law.* 89, 96 (July 2003)).

19. CRS § 13-20-802 (legislative declaration).

20. CRS § 13-20-806(7)(a).

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

22. CRS § 38-33.3-102(1)(a).

23. *Triple Crown at Observatory Vill. Ass'n v. Vill. Homes of Colo., Inc.*, 328 P.3d 275 (Colo. App 2013).

24. *See Broomfield Senior Living Owner*, 413 P.3d at 230 (Davidson, J., specially concurring) (because HPA applied, conflicting contract language void).

25. *Johnson Fam. Law, P.C. v. Bursek*, 515 P.3d 179, 187–89 (Colo.App. 2022).

26. *Id.* at 189–91.

27. *Cf. FDIC v. Am. Cas. Co. of Reading, Pa.*, 843 P.2d 1285, 1290–95 (Colo. 1992) (insurance policy's regulatory coverage exclusion unenforceable as being contrary to public policy as expressed in state banking laws). *But see Calvert v. Mayberry*, 440 P.3d 424, 432 (Colo. 2019) (contract violating Colo. RPC 1.8(a) is presumptively void; however, because it is possible to enter into a contract that violates the rule without that contract offending public policy, the presumption can be rebutted with a showing that the contract does not offend the public policy considerations underlying the rule).

A separate and independent analysis to determine if a contract is void because it violates a statute suggests that a statute preempts a contract when (1) the statute's express language indicates such preemption, (2) preemption may be inferred because the statute implies a legislative intent to completely occupy a given field in light of the public policy served by the statute, or (3) the operational effect of the contract would conflict with the statute's application. These hypothetical tests are drawn by analogy from the extensive caselaw addressing when a Colorado state statute preempts a local regulation. *See*, *e.g.*, *Bd. of Cty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1056–57 (Colo. 1992).

28. Courts will look to the particular case facts when determining if a contract violates public policy. *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1045 (Colo. 2011).

29. CRS § 13-20-802 (legislative declaration).

30. CRS § 13-20-806(7)(a).

31. CDARA, while consisting primarily of CRS

§§ 13-20-801 et seq., also includes changes to the real property statutes of limitations and repose (HB 01-1166, codified at CRS § 13-80-104), CCIOA (HB 17-1279, codified at CRS § 38-33.3-303.5), and the Colorado Insurance Code (HB 10-1394, codified at CRS § 10-4-110.4). Thus, these statutory schemes interrelate and may need to be read together and harmonized.

32. *See* CRS § 38-33.3-303.5 (CCIOA's voting requirements for association members' approval to pursue CD claims). *Cf. Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1192 (Colo. 2010) (common law repair doctrine was inapplicable because it could frustrate operation of CRS § 13-20-803.5's detailed notice of claim procedure and result in tolling the limitations period for repairs outside of the limited circumstances and specific durations set forth by the General Assembly in this statute).

33. CRS § 13-20-804.

34. CRS § 13-20-808(3)–(6) (pertaining to the construction of insurance policies).

35. *See* CRS §§ 13-20-802.5(1), -806(7)(a), (e); CRS § 38-33.3-303.5(1)(b)(I)(A) (CCIOA sections referencing ADR).

36. A clause is unconscionable when one side to an agreement "is to be penalized by the enforcement of the term of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of the profound sense of injustice that equity will deny the use of its good offices in the enforcement of such unconscionability." *Univ. Hills Beauty Acad.*, 554 P.2d at 726 (quoting *Carlson v. Hamilton*, 332 P.2d 989 (Utah 1958)). The doctrine of "unconscionability" protects against "one-sidedness, oppression or unfair surprise" in contract enforcement. CRS § 4-2-301 (official comments to Unif. Commercial Code as adopted in Colorado). *See also* UCIOA § 1-112, cmt. (Unif. L. Comm'n 2008) (comments to Unif. Commercial Code regarding "unconscionability" are "equally applicable to this section").

37. A declaration is a contract governed by ordinary contract principles. *See Parry v. Walker*, 657 P.2d 1000, 1002 (Colo.App. 1982) (general contract principles apply to interpreting condominium declarations). *Cf. McDowell v. United States*, 870 P.2d 656 (Colo. App. 1994) (finding suit for violation of building restriction contained in bylaws is a suit for breach of contract).

38. CRS § 38-33.3-102(1)(a).

39. CRS § 38-33.3-104 (emphasis added). A declarant also may not "use any other device to evade the limitations or prohibitions of this article or the declaration." *Id.*

40. CRS § 38-33.3-303.5.

41. *See* CRS §§ 38-33.3-112 and -113 (addressing unconscionability and good faith).

42. While subsection (b) refers to some incapacities on the part of the second party (such as a homeowner or homeowners association) to reason effectively, its reference to "similar factors" may embrace the second party's inability to reasonably protect its interests because it is dominated and controlled by the first party (such as a declarant-developer) in drafting and accepting the declaration or other contract, and during the period of declarant control. *Cf. Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 171 Cal. Rptr. 334, 343 (Cal.Ct.App. 1981) (stating that where developer dominates the association, fiduciary duty principles may support holding "those exercising actual control over the group's affairs to a duty not to use their power in such a way as to harm unnecessarily a substantial interest of a dominated faction") (internal citation omitted).

43. CRS § 38-33.3-112(2)(a)–(d).

44. For a discussion of the common law unconscionability test, see sources cited *supra* note 36.

45. *See Treadwell v. Vill. Homes of Colo., Inc.*, 222 P.3d 398, 400–01 (Colo.App. 2009) (discussing courts' limited review of arbitration rulings).

46. CRS § 38-33.3-113.

47. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995).

48. UCIOA, *supra* note 36 § 1-113, cmt.

49. CRS § 38-33.3-104.

50. *See, e.g.*, *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1231 (Cal.Ct.App. 2012) (noting that the homeowners "[a]ssociation did not bargain with [declarant-developer] over the terms of the Project CC&R's or participate in their drafting").

51. CRS § 13-20-806(7)(a). *See also Leprino v. Intermountain Brick Co.*, 759 P.2d 835, 836 (Colo.App. 1988) ("Contract terms, *particularly in a transaction involving a consumer*, will be found unconscionable when they defeat the reasonable expectations of the parties.") (emphasis added).

52. *See In re Marriage of Ikeler*, 161 P.3d at 667 (contract clause detrimental to public policy is unenforceable unless policy clearly outweighed by provision's beneficiary's legitimate interest).

53. *Broomfield Senior Living Owner*, 413 P.3d at 230.

54. *See* CRS § 13-20-806(7)(e) ("Nothing contained in this section shall be deemed to render void any requirement to participate in mediation prior to filing a suit or arbitration proceeding.").

55. *See generally Rains*, 23 P.3d at 1253 (enforcing arbitration agreement under Colorado arbitration law despite allegedly onerous arbitration fee-splitting and limited discovery provisions). *But see Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (arbitration agreement's onerous arbitration fee-splitting provisions rendered agreement unenforceable under federal arbitration law).

56. *Jordan Crossing Homeowners Ass'n v. Taylor Morrison of Colo.*, Nos. 16CA0593 & 16CA1236 (Colo.App. Aug. 3, 2017) (not selected for official publication).

57. Colorado has refused to enforce inequitable or disproportionate forfeitures/penalties arising from a failure to satisfy a contract condition. *See Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 230 (Colo. 2001) (quoting *Restatement (Second) of Contracts* § 229 (Am. L. Inst. 1981)). A tribunal might view staying the association's claims or dismissing them without prejudice, while affording the association a reasonable time to satisfy the declaration's conditions, as a more equitable resolution of its alleged noncompliance with the declaration.

58. *In re Arb. of Embree v. Keller Homes, Inc.*, AAA No. 01-21-0018-1530, slip op. at 3 (Feb. 21, 2022) (Ramming, Arb.) (emphasis added).

59. *In re Arb. of Zbylski Fam. Tr. v. Keller Homes, Inc.*, JAG No. 2019-1919A (Apr. 27, 2020) (Meyer, Arb.).

60. *9300 E. Fla. Ave. Homeowners Ass'n v. Fla. Beeler, LLC*, JAG No. 2014-0561A (May 15, 2015) (Brook, Arb.).

61. CRS § 13-20-803.5(8) ("*After* the sending of a notice of claim, a claimant and a construction professional *may, by written mutual agreement, alter the procedure* for the notice of claim process described in this section.") (emphasis added).