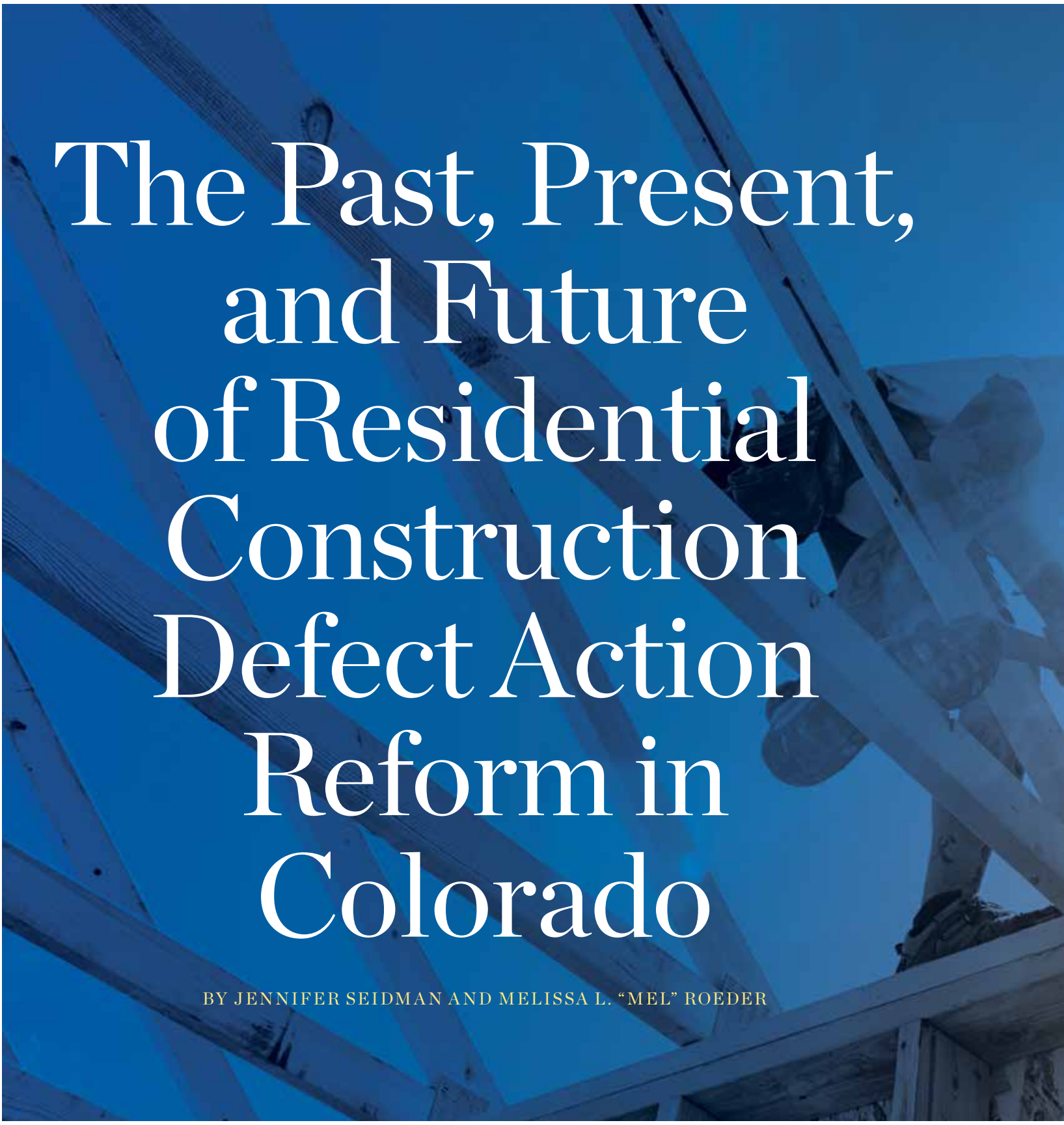

The Past, Present, and Future of Residential Construction Defect Action Reform in Colorado

BY JENNIFER SEIDMAN AND MELISSA L. "MEL" ROEDER

This article examines the evolution of Colorado's Construction Defect Action Reform Act and related legislation and their relationship to construction professionals' liability insurance premiums and affordable housing development.

Colorado's General Assembly passed the Construction Defect Action Reform Act (CDARA), CRS §§ 13-20-801 et seq., in 2001. The Act[1] evolved as the legislature amended CDARA and enacted other laws affecting CDARA's scope and application in 2003, 2007, 2010, and 2017. The amendments limited builders' construction defect (CD) liability, clarified and codified homeowners' rights and protections, and addressed insurance coverage for the benefit of both builders and homeowners.[2] Legislators propose amendments to the Act nearly every year, typically premised on assumptions that proposed amendments will (1) encourage needed residential housing development by increasing the availability, and reducing the cost, of builders' liability insurance, usually by limiting builders' construction defect liability exposure; or (2) protect rights and remedies for homeowners affected by defective construction.[3]

This article broadly describes the Act's purpose, approach, and evolution.[4] It examines assumptions supporting the Act's framework and assesses how well the Act achieves its goals. It also considers how other factors influencing housing development trends may affect this analysis.

The Act's History, Purpose, and Approach

The Act, initially comprised of only CDARA I, arose in 2001 from the joint drafting and negotiating efforts of four lawyers, two representing homebuilding industry interests and two representing homeowner interests. It sought to limit CD actions while also preserving property owners' "adequate rights and remedies."[5] It was narrowly tailored to address specific claims by building industry advocates that CD actions had caused an insurance crisis that deterred affordable housing development.[6] While the Act constrained homeowners' claims, it did not incentivize quality construction, attempt to prevent CDs, or limit builders' defenses.[7]

Both before and throughout the nearly quarter century since the Act's passage, building industry advocates have sought expansive CD action reform, warning that allegedly frivolous CD actions prevent builders from obtaining adequate and reasonably priced insurance, which slows or prevents needed, and particularly more-affordable,[8] housing development.[9] Homeowner advocates have challenged the alleged causal connection between CD actions and housing development, asserting that limiting builders' liability and homeowners' rights encourages shoddy construction, and that homeowners need more, not fewer, protections to safeguard what is often their largest financial investment—their homes.[10] Meanwhile, the legislature continues to grapple with the undeniable fact that Colorado lacks sufficient new housing to meet Coloradans' current and anticipated needs.[11]

The legislature repeatedly amended the Act to attempt to lower builders' liability insurance rates and encourage more-affordable housing development without impairing homeowners' rights and remedies by (1) encouraging early CD dispute resolution; (2) limiting wasteful or frivolous CD claims and homeowners' recoverable damages; (3) preserving homeowners' adequate rights, remedies, and damages; and (4) clarifying how builders' insurance policies should be interpreted and applied to protect both builders and homeowners from unreasonable insurance industry practices.[12] The accompanying chart summarizes the laws that comprise the Act and their respective goals. The Act's overall approach is described in more detail below.

Encouraging Early Dispute Resolution

To encourage early CD dispute resolution, the Act imposes on homeowners extensive

pre-suit conditions (PSCs) that typically must be completed months before pursuing a CD action.[13] Generally, all homeowners must complete CDARA II's Notice of Claim process (NCP) before filing suit; homeowner associations (HOAs) must typically satisfy the CD Action Approval Act's (CDAAA's) additional PSCs.

PSCs for all homeowners. Since 2003, the Act has required homeowners to provide a written notice of claim (NOC) to builders at least 75 days before pursuing a CD action.[14] The NOC must describe 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."[15] The NCP provides builders with a right to inspect CDs and to offer to repair the CDs or settle the claim.[16] The Act prohibits the pursuit of a CD action before the NCP is complete.[17]

PSCs in common interest communities. The Act imposes additional PSCs on HOAs.[18] Since 2001, the Act has required HOAs to provide notice to their owner members of the CD action's nature, the relief sought, and the expenses and fees the board anticipates incurring by pursuing the action.[19] In 2017, the Act was amended to significantly expand the required scope of HOAs' disclosures to owners, mandate that HOAs hold a meeting to provide builders an opportunity to address owners regarding alleged defects and any repair proposals, and require that owners approve or disapprove a proposed CD action within a 90-day voting period.[20]

Limiting Claims

Reflecting the legislature's intent to both limit CD actions and preserve homeowners' adequate rights and remedies, the Act imposes significant restrictions on some but not all CD claims. Since 2001, the Act has prohibited negligence claims based solely on a building code or industry standard violation, unless the violation results in a specifically enumerated harm.[21] As of 2003, these harms are (1) actual damage to property; (2) actual loss of use of property; (3) wrongful death or bodily injury; or (4) a risk of death or bodily injury to occupants of residential real property, or a threat to their life, health, or safety.[22]

These restrictions do not apply to non-negligence claims, such as fraud, misrepresentation, and breach of contract or warranty, which are more limited in scope, arise from legal duties owed by fewer than all construction professionals to fewer than all homeowners, involve different damages measures and different degrees of culpability, and/or enforce important public policies protecting homeowners from overreaching by comparatively more knowledgeable and sophisticated builders.[23] Additionally, because homeowners may have a duty to disclose CDs to prospective purchasers and may either absorb the cost of repairing the CDs or discount the home's sale price accordingly,[24] the Act limits, but does not eliminate, builders' liability for such CDs.

Limiting Damages

Since 2003, the Act has generally limited homeowners' recovery to "actual damages," which means:

> the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less, together with relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law.[25]

This limit constitutes a significant departure from long-standing common law recognizing the importance of protecting homeowners' right to recover damages sufficient to repair their homes.[26]

Prejudgment interest. In 2008, the Colorado Supreme Court held that homeowners cannot recover prejudgment interest (PJI) on repair costs not previously incurred.[27] Because ordinary homeowners and HOAs typically cannot afford to properly and permanently repair CDs before settlement or a final damages judgment,[28] the elimination of PJI in most CD actions has significantly reduced awards against builders since 2008.

Treble damages. In 1999, the Colorado Consumer Protection Act (CCPA) was amended to preclude treble damages awards except when a defendant's bad faith conduct is proven by clear and convincing evidence.[29] Since 2003, the Act has prohibited a treble damages award when a builder's NCP offer is at least 85% of a homeowner's damages award.[30] The Act imposes a $250,000 cap on treble damages and attorney fees awarded under the CCPA.[31]

Time Limits for Asserting Claims

The CD statutes of limitations (SOL) and repose (SOR), CRS § 13-80-104, require that a homeowner assert a CD claim (1) within two years after a homeowner discovers or reasonably should have discovered "the physical manifestations of a defect" that causes the injury; and (2) no later than six years after the real property improvement's substantial completion.[32] Before 2010, some Colorado courts held that a claim accrues under the SOL when a homeowner discovers both damage caused by a CD *and* the CD's cause.[33] However, in 2010, the Colorado Supreme Court held that CD claims accrue when "the homeowner first discovers or should have discovered the defect," even if the injury has not occurred and the cause is unknown.[34]

Before 2001, these limitations also applied to all builders' "pass-through" claims, such as contribution and indemnity.[35] As a result, builders would protectively sue numerous subcontractors to prevent the limitations periods on their claims from expiring before homeowners' CD claims against builders were resolved.[36] To discourage such "shotgun" litigation, in 2001, the Act extended the time limits that apply to builders' pass-through claims to ensure they can assert such claims after homeowners' claims are resolved.[37]

Barring Adhesive Waivers of Rights and Remedies

To address builders' widespread practice of imposing broad waivers of, and limitations on, homeowner rights and remedies in new home purchase contracts and HOA governing documents,[38] the legislature passed the Homeowner Protection Act (HPA) in 2007. The HPA prohibits as void against public policy "any express waiver of, or limitation on, the legal rights, remedies, or damages" in CDARA or the

COLORADO'S CONSTRUCTION DEFECT ACTION REFORM ACT AS OF 2024

General Goals:

- Increase availability and reduce premiums of builders' general liability insurance
- Encourage more-affordable housing development
- Limit frivolous or wasteful CD actions while preserving homeowners' rights and remedies

POPULAR NAME AND BILL NUMBER	CODIFIED AT	YEAR	APPROACH
Construction Defect Action Reform Act I (CDARA I) HB 01-1166	▪ CRS §§ 13-20-801 to -804 ▪ CRS § 13-80-104 ▪ CRS § 38-33.3-303.5	2001	▪ Requires that negligence claim based on code violations result in enumerated harm ▪ Requires homeowner to provide initial defect list ▪ Requires HOA to disclose CD action-related information to homeowners ▪ Extends limitation periods on builders' pass-through claims until 90 days following resolution of the underlying CD claim
Construction Defect Action Reform Act II (CDARA II) HB 03-1161	▪ CRS § 13-20-802 ▪ CRS § 13-20-802.5 ▪ CRS § 13-20-803 ▪ CRS § 13-20-803.5 ▪ CRS § 13-20-804 ▪ CRS § 13-20-805 ▪ CRS § 13-20-806 ▪ CRS § 13-20-807	2003	▪ Establishes Notice of Claim process requiring notice of defects to the construction professional and an opportunity to inspect and offer to repair or settle ▪ Further limits scope of negligence claims ▪ Limits recoverable damages, including treble damages under the Colorado Consumer Protection Act (CCPA)
Homeowner Protection Act (HPA) HB 07-1338	▪ CRS § 13-20-806(7) ▪ CRS § 13-20-807	2007	▪ Prohibits limitations on residential property owners' rights and remedies under CDARA or the CCPA and on their right to pursue CD actions within statutory time limits
Construction Professional Liability Insurance Act (CPLIA) HB 10-1394	▪ CRS § 10-4-110.4 ▪ CRS § 13-20-808	2010	▪ Codifies and supplements long-standing insurance contract interpretation rules to eliminate uncertainty created by a 2009 Colorado Court of Appeals case ▪ Requires insurers to defend a construction professional when an NOC describes a potentially covered claim ▪ Confirms that unintentional property damage caused by CDs is presumed an "accident" that may trigger coverage ▪ Limits the scope of certain types of "loss in progress" and "known loss" exclusions
CD Action Approval Act (CDAAA) HB 17-1279	▪ CRS § 38-33.3-303.5	2017	Before pursuing a CD action, requires an HOA to: ▪ hold a meeting to provide construction professionals with an opportunity to address CD concerns; ▪ disclose potential risks and benefits of CD action to owners; and ▪ obtain owner approval to pursue claim.

Source: Chart compiled by Mel Roeder (updated Nov. 2024).

CCPA and on homeowners' "ability to enforce such legal rights, remedies, or damages" during the applicable SOL or SOR periods.[39]

Builders' Liability Insurance Coverage

After a 2009 Colorado Court of Appeals decision risked depriving builders of liability insurance coverage they reasonably expected to receive in exchange for their premium payments, builders and homeowners joined together in 2010 to support the Construction Professional Liability Insurance Act (CPLIA).[40] The CPLIA simply codified and supplemented long-standing insurance contract interpretation rules to eliminate the short-lived but concerning uncertainty created by the 2009 case.[41] Specifically, the CPLIA requires insurers to defend construction professionals when an NOC describes a potentially covered claim, confirms that property damage caused by CDs is generally presumed to be an "accident" that may trigger coverage, and limits the scope of certain types of "loss in progress" and "known loss" exclusions.[42]

Evaluating the Act's Effectiveness and Future

After nearly a quarter century, there is little evidence that the Act has reduced insurance rates or encouraged needed housing development. This apparent incongruity raises many questions about whether limits on CD actions that do not impair homeowners' adequate rights and remedies can lower insurance rates to levels that trigger needed housing development, including:

- What real-world data and analytics are needed to critically evaluate the Act's approach and effectiveness?
- Does the Act's approach significantly increase early CD dispute resolution?
- Does the Act effectively limit frivolous and wasteful CD actions?
- Does the Act reasonably preserve property owners' adequate rights and remedies?
- Does the Act reduce insurance premiums?
- To what extent do other factors, such as the prevalence of CDs, general market and industry-specific economic forces, zoning regulations, and demographic and attitudinal changes toward home ownership impact insurance rates or housing development?

These questions are considered below.

"After nearly a quarter century, there is little evidence that the Act has reduced insurance rates or encouraged needed housing development."

Incomplete, Unavailable, Unreliable, or Misleading Information

Although data regarding the number of more-affordable housing units constructed since 2001 is available, this information alone cannot establish a causal connection between Colorado's CD laws and housing development trends. To the contrary, much information about CD actions and insurance rates needed to critically evaluate the Act's impact on housing development is not available, and some available information is severely misleading.[43] Missing information includes (1) specific information about the PSC process, including whether and why CD disputes are or are not resolved; (2) comprehensive data concerning the Act's impact on the nature, scope, and cost of CD actions, and the extent to which current CD actions involve predominantly meritorious or frivolous claims; (3) detailed information about insurance availability, coverage, and premium rate calculations; and (4) well-supported analyses establishing whether or how CD actions affect insurance rates and housing development.

Confidentiality restrictions may limit access to some information.[44] Detailed information about insurance rates, coverage, and rate calculation is known to insurers, but they generally refuse to disclose it.[45] Other data may be available, but various methods for obtaining and analyzing it have not been implemented.[46]

CD disputes and CD actions. Detailed information about CD disputes and CD actions is needed to evaluate the Act's effectiveness.

CD disputes. Scant quantifiable and verifiable evidence exists regarding the nature and scope of CDs alleged during the PSC process, the alleged problems PSCs are intended to address, and the reasons why dispute resolution efforts succeed or fail. Data that could help determine whether, how, and why PSCs are or are not effective includes (1) whether homeowners' NOCs adequately apprise builders of the alleged problems, including the nature of alleged problems, and the expert and investigatory expenses homeowners are likely incurring assembling such information; (2) builders' efforts to investigate CDs, including the timing and extent of builders' inspections, whether and how concerns regarding potential damage resulting from invasive inspections or the potential destruction of evidence are addressed, and whether homeowners typically cooperate with reasonable inspection requests; (3) the incidence, timing, and nature of builders' repair or settlement offers, including whether such offers are adequate or conditioned on broad releases of unrelated or undiscovered CDs; (4) the nature and extent, if any, of builders' insurers' substantive involvement in the PSC process, the reasons why insurers do or do not approve particular PSC offers, and how insurers' coverage positions affect PSC offers; (5) repair offers homeowners accept or reject and their reasoning, including the likelihood of

the proposed repair properly and permanently correcting the defect; (6) information about CD disputes in common interest communities, including whether any widespread problem exists with owners lacking information about or an opportunity to vote for or against a proposed CD action; and (7) whether homeowners and builders attempt to resolve CD disputes before and during the PSC process, why such efforts fail, and the percentage of CD disputes resolved during the PSC process.

CD actions. If many current CD actions are frivolous, then the Act has had minimal if any impact, and detailed information about CD actions might support limited Act amendments narrowly tailored to address specific, quantifiable issues without impairing homeowners' adequate rights and remedies. If many current CD actions are not frivolous, then the Act has generally achieved its goal of limiting frivolous actions, and further limitations could unreasonably restrict meritorious claims and impair homeowners' adequate rights and remedies. Information needed to assess the Act's approach and effectiveness includes the number of CD actions; the nature, prevalence, cause(s), and repair costs of alleged and proven or disproven CDs; alleged and proven claims and defenses; alleged and awarded damages; and the parties' respective attorney fees and costs.

Detailed information about CD disputes and CD actions could also help establish whether focusing on preventing CDs through more comprehensive training, education, supervision, inspection, quality control, materials testing, licensing requirements, or building code enforcement might limit or moot the need for more amendments to the Act's claim and damages limits.[47] Inevitably, if construction is better, there will be fewer CDs and related disputes, and if there are fewer disputes, there will be fewer CD actions.

Insurance and housing development. General insurance industry trends underscore the importance of obtaining and critically analyzing detailed information about builders' insurance availability, premium rates, and rate calculation, including the extent to which any premium rate changes reflect the cost to defend and resolve meritorious or frivolous claims or other factors such as inflationary pressures on insurers' business-related expenses, investment fluctuations, or insurance industry-wide rate increases.[48] Similarly, more information about how insurance rates versus other factors influence development decisions is needed to assess the extent to which insurance premium reductions could trigger significant housing development.

Insurance rates. Personal property and casualty (P&C) insurance premiums increased by 9.5% in 2022–23, and commercial P&C insurance premiums increased by an average of 8% annually in the past five years.[49] Homeowners' insurance, which typically does not cover CDs, is the sixth highest expense for multifamily homeowners; from late 2019 to mid-2024 it was responsible for 17% of their total increase in expenses.[50] S&P Global reports that the cumulative rate increase between 2018 and 2023 from nine of the ten largest homeowner insurers ranged from 31.8% to 55.3%.[51] Notably, the insurance industry itself is booming.[52] Despite a recent increase in natural catastrophes, property and casualty insurers' "net investment income increased 69.5% [in 2023] compared to [2022] to $120.5 billion" and their net income more than doubled.[53]

Premium increases may reflect significant construction cost increases that, while unrelated to CD actions, increase the cost of repairing CDs and necessarily result in higher premiums. Construction wages alone rose 20% between 2021 and 2023.[54] During the same period, the cost of most types of construction materials significantly rose, with those jumps averaging roughly 19% per material.[55] Some suggest that builders' insurance premiums covering for-sale multifamily properties have increased significantly during recent years, but these conclusions appear to be based on interviews with builders and insurance brokers, not quantifiable data.[56] It is also unknown how differences in commercially sophisticated and knowledgeable builders' approach to constructing apartments, which they typically own for extended periods of time and must maintain and repair, versus for-sale units, which they typically transfer to less sophisticated and less knowledgeable homeowners soon after completion, and need not maintain and repair over extended time periods, impact construction quality and builders' general liability insurance premium rates.

More than 20 years ago, the Colorado Department of Regulatory Agencies' Division of Insurance published a list of only three general liability insurers willing to insure construction professionals, including two that appeared not to insure residential construction and one that did not specifically identify the scope of available coverage.[57] The Colorado Legislative Council staff published a memorandum nearly 10 years ago concluding that "commercial general liability insurance options for construction professionals have been limited for a significant time period."[58]

Housing development. Prior to 2008, between 40% and 45% of new homes were built for sale (as opposed to for rent); following the Great Recession, however, builders nationwide reduced their new for-sale home production to 5% or less.[59] The National Association of Homebuilders (NAH) recently described various factors impairing affordable housing development, including land and material costs, skilled labor shortages, and higher costs arising from regulatory requirements; the NAH did not reference rising insurance costs or CD actions.[60] Indeed, Colorado's largest builders recently reported record profits and represented that "construction defect litigation will not have a material effect on their profits, operations, or cashflow."[61] Consistently, multiple economists have determined that the most significant factors contributing to the national decline in new for-sale condominium construction include land availability and zoning laws, favorable builder financing and greater profit margins for rental housing development, higher mortgage interest rates, higher down payment requirements, inflation, local regulations, higher land acquisition costs, higher material and labor costs, skilled labor shortages, and demographic changes that impact buyers' purchasing abilities, such as higher student loan debt.[62]

Monopolization through consolidation also appears to drive new home shortages and price increases, including insurance premium increases. The top five builders' profits tripled between 2005 and 2023 while their home

production dropped by approximately 50%.[63] Nationwide, far fewer builders presently control significantly larger portions of the housing market: the market share controlled by large publicly traded homebuilders spiked to 51% in 2023 nationally (from roughly 37% in 2019), and their market share in Denver in late 2024 was an astounding 78%.[64] These large builders serve primarily as investors and subcontract nearly all construction work to others.[65] Through consolidation, they have amassed the capital and bargaining power to control the supply of land available for development.[66] It has been estimated that homebuilder consolidation keeps approximately 150,000 homes from being built each year, which equates to roughly $100 billion of construction.[67] Significantly, insurance rates typically increase when economies of scale drop.[68]

To determine whether or how CD reform efforts might possibly reduce insurance premium rates to a level that would incentivize builders to develop housing sufficient to meet Colorado's needs, the following information is needed: (1) concrete data about builders' liability insurance premiums, including how such premiums are calculated, and whether, how, and why insurance availability and rates changed after the Act and each Act amendment was passed; and (2) the extent to which insurance premium rate changes reflect the cost of defending and resolving frivolous CD actions versus other factors, including defending and resolving meritorious CD claims, investment trends, and other market-related conditions.

CD actions' impact on insurance and housing development. If there is a causal relationship between state CD laws and housing development, housing development data from other states should reveal consistent trends among states, with more robust development in states with more builder-friendly CD laws and insufficient housing development in states with more homeowner-friendly CD laws. However, housing development trends in other states do not appear to consistently correlate with whether a state's CD laws provide more protection to builders or to homeowners; this suggests there is no causal relationship between CD laws and multi-family residential development.[69]

The Act's Approach and Impact

Even without the information described above, certain conclusions regarding the Act's approach and effectiveness can be reasonably and logically drawn.

> "Ultimately, direct efforts to understand and regulate insurance rates may more effectively guide identification and implementation of policies that reduce them."

Early Settlement of Disputes

Extensive PSCs were added to the Act in 2003 and in 2017.[70] Logically, if homeowners routinely pursue CD actions without providing builders with sufficient notice and an opportunity to offer to perform reasonable repairs or, in the HOA context, pursue CD actions without obtaining owner members' informed consent, these PSCs should have significantly decreased the number, scope, and cost of CD actions. However, as the Act's PSCs have increased, insurance rates have also allegedly increased, and condominium construction has indisputably decreased. It appears that building industry advocates' predictions regarding the impact of each Act amendment imposing PSCs were wrong.[71]

Possible explanations and alternatives. PSCs may, in some instances, unreasonably delay, complicate, or deter CD dispute resolution. Logically, a rational homeowner will first report CDs to a builder, not a lawyer, and a builder's reasonable repair offer will typically resolve the dispute. If homeowners retain legal counsel and initiate the PSC process after these informal efforts fail, PSCs may be redundant and simply delay the CD action's commencement.[72] PSCs that impose financial costs on homeowners, including investigatory or expert expenses or costs associated with insufficient or improper builder-imposed repairs, may prevent homeowners who cannot afford to comply with the PSCs from pursuing meritorious claims or may complicate early resolution efforts when homeowners must either recoup these costs from builders or absorb the expenses themselves.[73]

Other factors may also discourage early resolution. For example, before 2008, PJI typically accrued on homeowners' total repair cost damages and logically would have incentivized builders and their insurers to resolve CD disputes early.[74] Without exposure to a potentially significant PJI award, builders and their insurers may benefit financially from delaying CD dispute resolution and instead investing funds ultimately paid to resolve the claim.

In the context of other legal disputes, Colorado requires state-funded pre-suit mediation before a claimant pursues legal action.[75] In the CD context, similarly requiring parties to work with a specially trained and neutral third party with knowledge of relevant construction factual and legal issues, in a manner that does not increase pre-suit delays or costs to homeowners, may address some shortcomings described above.

Claim Limitations

The Act's 2001 negligence claim limitations represented a "historic compromise between the home builders, the insurance companies

and the trial lawyers [that] reduces lawsuits that were based on technical insufficiencies while retaining protections for homeowners . . . ."[76] The 2003 Act amendments further restricted negligence claims and also limited the damages homeowners may recover in CD actions.[77] Additionally, Colorado's Rules of Civil Procedure authorize sanctions, including attorney fees awards, against homeowners and attorneys who assert frivolous or substantially unjustified claims.[78] Logically, these limits and sanctions should prevent assertion of frivolous claims based on "technical" defects without impairing homeowners' adequate rights and remedies. However, despite these limits, builders' liability insurances premiums have allegedly continued to increase exponentially, which raises questions about the factors that contribute to such increases.

Possible explanations and alternatives. Although comprehensive information regarding the defects commonly alleged in CD actions has not been compiled, a recently proposed Act amendment may provide insight. Premised on assumptions that current law does not prohibit unreasonable claims based on "technical" defects, this amendment sought to reduce insurance rates by prohibiting all claims (not only negligence claims) based on building code defects that pose non-imminent threats to homeowners' life, health and safety.[79] This limitation might potentially reduce insurance rates by eliminating costs associated with defending and resolving claims based on life-threatening CDs that do not pose an imminent risk of harm; however, by immunizing builders from liability for such life-threatening CDs, it would deprive homeowners of adequate rights and remedies by shifting responsibility from builders to homeowners to repair CDs that pose non-imminent life-threatening risks.

This bill underscores the importance of understanding why the Act's existing limitations have allegedly failed to reduce insurance rates in the nearly quarter-century since the Act's passage. Alternatively, instead of shifting more responsibility for repairing CDs from builders to homeowners, the Act might instead authorize an attorney fees award to the prevailing party, as defined by Colorado law,[80] which could help address concerns about both frivolous claims and frivolous defenses.

Damages Limitations

The Act's "actual damages" and treble damages[81] limits, coupled with the elimination of PJI and the general unavailability of attorney fee awards in CD cases, typically prevent homeowners from recovering *net* funding (after paying litigation expenses) sufficient to repair all CDs.[82] Overall, these limits, by their terms, reduce awards against builders and the cost of CD actions. Perhaps reflecting the severity of existing limits, few proposed Act amendments have directly attempted to further limit recoverable damages.

Preserving Adequate Rights and Remedies for Homeowners

Homeowner advocates have supported various measures they contend would better preserve homeowners' adequate rights and remedies and also might reduce the number, scope, or cost of CD actions.[83] However, "[t]he HPA represents [the only] portion of CDARA that is intended to preserve adequate rights and remedies for residential property owners who bring construction defect actions."[84] While building industry advocates opposed the HPA, alleging that it would increase insurance rates, increase housing prices, and detrimentally impact affordable housing,[85] the HPA does not increase homeowners' rights or remedies or restrict the Act's previously imposed claim and damages limits.[86] Rather, it codifies prior decisional law holding that, in the home sale context, "contractual waiver clauses are void as against public policy because of the imbalance of knowledge, sophistication, and bargaining power between [parties to the sale]."[87] Thus, the HPA eliminates the need for parties and courts to litigate builders' contractual waiver and limitation provisions' validity, thereby simplifying CD actions.

Insurance

Although reducing insurance costs is the Act's primary goal, the CPLIA is the *only* part of the Act directed at liability insurance. Ultimately, direct efforts to understand and regulate insurance rates may more effectively guide identification and implementation of policies that reduce them. While a comprehensive analysis of such approaches is outside this article's scope, such efforts might include:

- revisiting the 2024 proposal to authorize Colorado's Division of Insurance to study the factors that contribute to builders' liability insurance costs and issue a factual report, which could help guide efforts to establish reasonable insurance premium rates and coverage provisions;[88]
- requiring rate review by the Commissioner of Insurance to help support more thoughtful and targeted policies, possibly including consideration of certain factors, such as whether builders use skilled labor and higher quality materials, and perform periodic inspections, when setting rates;[89]
- requiring that all construction professionals carry liability insurance that meets certain minimum standards, which might increase the demand for insurance and entice more insurers into the market, increasing the availability of insurance at more-affordable rates;[90] and
- encouraging insurers to (1) require periodic third-party inspections to identify and correct errors before construction is complete; (2) impose materials-related performance standards; (3) require worker training and education; and (4) implement myriad other practices that could significantly decrease the likelihood of CDs and therefore reduce the number, scope, and cost of CD claims.[91]

Conclusion

A complete and accurate understanding of the relationship, if any, between the Act's approach, builders' liability insurance rates, and development of more-affordable housing is needed to evaluate whether and how the Act has generally limited or failed to limit wasteful and frivolous CD actions and preserve homeowners' adequate rights and remedies. This understanding cannot be achieved unless builders and their insurers nationwide provide information that permits a reasoned analysis and a fair comparison among states' construc-

tion liability insurance rates, housing development trends, and respective construction defect laws. More information is also needed to determine how the nature, scope, and cost of CD actions affects these rates, including the extent to which CD claims are predominantly frivolous or meritorious.

Available information does not suggest that legislative efforts reflecting the Act's approach have significantly impacted more-affordable housing development because of the inevitable trade-off between further limiting CD actions and preserving homeowners' adequate rights and remedies. A more effective and economical solution may lie in creating incentives for, and regulations demanding, better quality and longer-lasting construction techniques and materials, thereby reducing the incidence of CDs; relaxing regulatory and zoning requirements to encourage more residential construction, thereby increasing supply and lowering sales prices; and prosecuting anti-trust violations that limit supply, thereby driving up housing costs. CL


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NOTES

1. "The Act" refers to HB 01-1166 (CDARA I), codified at CRS §§ 13-20-801, -802, -803, and -804, 13-80-104, and 38-33.3-303.5; HB 03-1161 (CDARA II), codified at CRS §§ 13-20-802, -802.5, -803, -803.5, -804, -805, -806, and -807; HB 07-1338 (Homeowner Protection Act), codified at CRS §§ 13-20-806(7) and -807; HB 10-1394 (Construction Professional Liability Insurance Act), codified at CRS §§ 10-4-110.4 and 13-20-808; and HB 17-1279 (CD Action Approval Act), codified at CRS § 38-33.3-303.5.

2. Unless the context suggests otherwise, this article's references to "builders" and "homeowners" includes, respectively, all "construction professionals" and residential "claimants" to which CDARA applies. *See* CRS § 13-20-802.5(3)–(4) (defining these terms).

3. *See* Sandgrund et al., *Residential Construction Law in Colorado* § 13.3 at 565–66 (8th ed. CBA-CLE 2024).

4. For a more thorough analysis of the Act, see Sandgrund et al., "The Construction Defect Action Reform Act," 30 *Colo. Law.* 121 (Oct. 2001); Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *Colo. Law.* 89 (July 2003); Sandgrund et al., "The Homeowner Protection Act of 2007," 36 *Colo. Law.* 79 (July 2007); Sandgrund and Sullan, "House Bill 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims," 39 *Colo. Law.* 89 (Aug. 2010); and Sandgrund et al., "House Bill 17-1279: New Prerequisites to Homeowner Association Construction Defect Lawsuits," 46 *Colo. Law.* 36 (Aug./Sept. 2017).

5. Sandgrund et al., "The Construction Defect Action Reform Act," *supra* note 4. *See also generally* CDARA I; CRS § 13-20-802.

6. *See, e.g.*, Hearing on HB 01-1166 Before the House Business and Labor Commission, 2001 Leg., 1st Reg. Sess. 63d Gen. Assemb. at 13 (Colo. Mar. 6, 2001) (insurance industry representative testifying that because of CD actions "we can't price [insurance] high enough to stay in the market . . . this Bill is our legislative fix and will allow us to continue to write insurance in this market"); *id.* at 11 (insurance industry representative testifying that CD actions have caused companies to withdraw from the market, limit the types of companies or work they will insure, or exponentially increase premiums); *id.* at 22–23 (Metropolitan Builders CFO testifying that due to insurance rate increases, he advises "get[ting] out of multi-family end which is actually our affordable product and . . . concentrat[ing] on single-family area where the risk is much [lower]."); *id.* at 28 (homebuilder attorney testifying that "the crisis that we are trying to address is multi-family . . . residential construction"). All page citations to House and Senate hearings are to transcripts of these proceedings, which are on file with the authors and available on request.

7. *See generally* CDARA I.

8. The phrase "more-affordable housing," as used in this article, does not refer specifically to any legal definition of "affordable housing," but also includes middle-income housing (i.e., the types of housing needed in Colorado).

9. *See* Hearing on HB 01-1166, *supra* note 6. *See also* Hearing on HB 03-1161-2 Before the House Committee on Business and Labor, 2003 Leg., 1st Reg. Sess. 64th Gen. Assemb. 2:5–3:22, 48:13–22 (Colo. 2003) (IMA representative testifying that, because of "frivolous" CD actions, many insurers "no longer are willing to write residential risks for fear of litigation"; pricing is "astronomical"; "affordable housing [will not be built] going forward."). *See also* Ferrier, "Construction Defects Bill Seeks to Create Affordable Housing Options," *Coloradoan* (Feb. 12, 2015, updated Feb. 13, 2015) ("Developers say the ease with which homeowners can sue and the threat of litigation ha[ve] made it prohibitively expensive to insure, build and sell condominiums"). More recently, some building industry advocates suggest that CDARA I is the primary cause of allegedly frivolous CD actions, even though CDARA I limited CD claims. *Compare* Goodland, "Colorado Lawmakers Begin Work on 'Construction Defects' in Efforts to Jumpstart Condo Development," *Denver Gazette* (Mar. 10, 2024) (general counsel and vice president of homebuilder stating, "The single biggest issue his company faces as a home builder is the current litigation climate created under the 2001 law . . . .") *with* the Act.

10. *See, e.g.*, Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," *supra* note 4 at 89. *See also id.* at 97 n.5 ("During debate on [2003 CDARA amendments], the causes of instability in the contractors' and developers' liability insurance market were hotly debated."); "What's the Big Deal About Construction Defects?," Build Our Homes Right (2020), https://www.buildourhomesright.com/whats-the-big-deal-about-construction-defects ("Colorado's laws are among the most builder-friendly laws in the country, [and] some big developers are asking for even more changes to Colorado's construction defects laws which will make it harder than ever for homeowners to hold builders accountable. Shoddy construction negatively impacts our communities by causing blighted areas, putting Colorado's homeowners in harm's way, and increasing housing costs for homeowners who are never made whole").

11. *See, e.g.*, Affordable Housing Transformational Task Force and Subpanel (Colo. 73d Gen. Assemb. 2022), *Affordable Housing Transformational Task Force Recommendation Report* ii (Jan. 2022), https://leg.colorado.gov/sites/default/files/affordable_housing_report_final_0.pdf ("For decades, the lack of affordable housing has upended the lives of thousands who face homelessness in the Metro area and across the state, shuttered Colorado businesses and hindered working-class jobs due to a lack of workforce housing, and exacerbated inequities for communities of color . . . .").

12. *See* CRS § 13-20-802 (legislative declaration); *CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 664 (CDARA intended to "streamlin[e] construction defect litigation") (Colo. 2005); *Gimme Shelter Roofing v. Greene*, No. 2011CV1829, 2012 Colo. Dist. LEXIS 3002, *4 (El Paso Cnty.Dist.Ct. Jan. 11, 2012) (CDARA intended to "limit wasteful and frivolous . . . construction defect litigation,

and reduce the costs of insuring construction professionals."); *Khattak v. Reconstruction Experts*, No. 2022CV30058, 2023 Colo. Dist. LEXIS 142, *5 (Denver Cnty.Dist.Ct. Jan 13, 2023) ("The statute was promulgated, in large part, to provide construction professionals with an opportunity to cure defects, maintain insurance, and streamline litigation."); *Kanaly v. Snake River Bldg. & Dev.*, No. 2018CV30053, 2019 Colo. Dist. LEXIS 4776, *5 (Summit Cnty.Dist.Ct. June 21, 2019) (CDARA "intended to limit frivolous and wasteful lawsuits, while preserving adequate remedies for property owners."). *See also supra* notes 1 and 4.

13. *See* CRS §§ 13-20-803 (2001); 13-20-803.5 (2003); 38-33.3-303.5 (2001) and (2017).

14. CRS § 13-20-803.5(1).

15. CRS §§ 13-20-802.5(5).

16. CRS § 13-20-803.5(2)–(3).

17. CRS § 13-20-803.5(9).

18. CRS § 38-33.3-303.5.

19. CRS § 38-33.3-303.5 (2001).

20. CRS § 38-33.3-303.5(1)(c)(II)–(III), (d).

21. CRS § 13-20-804(1) (2001).

22. CRS § 13-20-804(1) (2003).

23. *See* CRS § 13-20-804(2). *See also, e.g., W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (contract claim limited to parties with contractual privity and damages caused by non-performance of a contractual obligation); *Cosmopolitan Homes v. Weller*, 663 P.2d 1041, 1045 (Colo. 1983) (implied warranties arise from contract between builder-vendor and homeowner, reflect important public policies protecting homeowners from overreaching by more knowledgeable, sophisticated builder-vendors and, generally, may be asserted only against the builder-vendor by the home's first purchaser). *But see Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC*, 479 P.3d 86, 95 (Colo.App. 2020) (finding contractual privity sufficient to support HOA's breach of implied warranty claim against builder that created a developer entity to sell units but sold no units itself). *See Nielson v. Scott*, 53 P.3d 777, 779–80 (Colo.App. 2002) (misrepresentation claim requires proof that defendant affirmatively misrepresented a material fact, the plaintiff justifiably relied on the misrepresentation, and such justifiable reliance caused damages). *Cf.* Hearing on HB 01-1166, *supra* note 6 at 2 (bill sponsor Rep. Stengel confirming that exception preserved actions based on "a warranty or a contract to do a specific job."); *id.* at 26 (homebuilder attorney explaining, "the parties rights to contract aren't impaired by this bill and I don't think we could do that constitutionally.").

24. *See Gattis v. McNutt*, 318 P.3d 549, 554 (Colo.App. 2013) (home sellers owe purchasers a duty to disclose latent defects). *Cf.* CRS § 38-33.3-303.5(1)(c)(III) (Act requires HOAs to advise unit owner members that they "may owe prospective buyers a duty to disclose known defects" before owners may vote on pursuing a CD action).

25. CRS § 13-20-802.5(2).

26. *See Bd. of Cnty. Comm'rs v. Slovek*, 723 P.3d 1309, 1317–18 (Colo. 1986) (holding that the reasonable cost to repair a home may be awarded, even if it exceeds the home's original value, when "payment of market value likely will not adequately compensate the property owner for some personal or other special reason").

27. *See Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 829 (Colo. 2008).

28. *Cf., e.g., Wright v. Beauvallon Condo Ass'n*, No. 2018CV30145, 2018 Colo. Dist. LEXIS 4067, *21–22 (Denver Cnty.Dist.Ct. Dec. 20, 2018) (recognizing HOA plaintiff could not afford to fund repairs and "any expectation of permanent repairs prior to the conclusion of the litigation . . . simply is not realistic").

29. CRS § 6-1-113(2)(a)(III) (1999).

30. CRS § 13-20-806(1).

31. CRS § 13-20-806(3) (2003).

32. CRS § 13-80-104(1). In limited circumstances, the SOR may be between six and eight years. CRS § 13-80-104(2).

33. *See, e.g., Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 641 (Colo.App. 2003) (claims under CRS § 13-20-104 accrue "when the plaintiff knew or should have known of the damage and its cause.").

34. *See Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1192 (Colo. 2010). *See also, e.g., United Fire Grp. v. Powers Elec., Inc.*, 240 P.3d 569, 571–73 (Colo.App. 2010) (CD claim accrued under CRS § 13-80-104 when fire caused by defect occurred, not when plaintiff later determined the cause of the defect).

35. *Nelson, Haley, Patterson & Quirk, Inc. v. Garney Cos.*, 781 P.2d 153, 156 (Colo.App. 1989) (historically, CD SOL could "bar an indemnitee's cause of action even before the indemnitee's liability for compensation is finally determined and before the indemnitee makes any payment for the loss."); CRS § 13-80-104(1)(b) (2000).

36. *See* Hearing on HB 01-1166, *supra* note 6 (insurance representative testifying that, in response to claimant's allegations, builders assert claims against "every subcontractor that ever touched the job and sometimes some that didn't"). Because builders are typically liable for their subcontractors' mistakes, *see 9300 E. Fla. Ave. Homeowners Ass'n v. Metro Homes, Inc.*, No. 16CD1959 (Colo.App. Nov. 16, 2017) (NSFOP), homeowners generally do not assert claims against subcontractors unless the builder is underinsured or impecunious. *See* Sandgrund et al., *Residential Construction Law in Colorado, supra* note 3 § 12.2.20 at 472 (advising attorneys to "consider whether even an impecunious construction professional defendant with no obvious coverage under its own liability policies may assert viable third-party" claims, and to "[i]dentify insured subcontractors whose negligent work damaged work performed by others").

37. *See* CRS § 13-80-104(1)(b)(II) (2001); *CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 664 (Colo. 2005) (CDARA I intended to "end shot gun lawsuits . . . only the subcontractors that are responsible for the defects will be entered in the action."). The Colorado Court of Appeals initially held the Act did not prevent the SOR from barring pass-through claims asserted after the six-year SOR period expired, *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo.App. 2008), which limited the Act's initial impact on shotgun litigation. Ultimately, the Colorado Supreme Court held in 2017 that the Act's extended time limits protect a builder's right to pursue pass-through claims within 90 days after a judgment or settlement, even if it occurs after the general CD SOL or SOR would otherwise expire. *See Goodman v. Heritage Builders, Inc.*, 2017 CO 13M, ¶¶ 10–11 (overruling prior cases holding that CRS § 13-80-104(1)(b)(II) does not apply to the SOR).

38. *See, e.g.*, Hearing on HB 07-1338 Before the House Judiciary Committee, 2007 Leg., 1st Reg. Sess., 66th Gen. Assemb. 45:25–46:7 (Colo. Mar. 21, 2007) (Rep. Carroll opining that "having a one-sided contract where [homeowners] are forced into waiving very significant rights for remedy in the event that their home basically loses all kinds of value has problems. I think that's unconscionable . . . . [W]e're expecting them to waive habitability."); *id.* at 12:7–20 (Rep. Pommer explaining: "This is a brand new home . . . and [the builder-developer] is saying that they will not even take responsibility for it being habitable.").

39. CRS § 13-20-806(7)(a). The HPA does not apply to waivers in settlement agreements executed after a claim has accrued, certain bona fide charitable organizations' donations or sales of services or property, or pre-claim mediation requirements. CRS § 13-20-806(7)(a)–(c), (e).

40. *See Gen. Sec. Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co.*, 205 P.3d 529, 532, 535 (Colo.App. 2009); Witt and Achenbach, "Insuring the Risk of Construction Defects in Colorado: The Tenth Circuit's Greystone Decision," 90 *Denv. U. L. Rev.* 621, 634 (2012) ("Representatives of policyholders complained that the decision departed from established Colorado precedent, went against the intent of the ISO drafters, rendered portions of the CGL policy superfluous, and created uncertainty as to what construction damages were covered."); *id.* ("Lobbyists for the insurance industry, in turn, testified that *General Security* and related cases 'took it too far,' came as a 'shock' to the insurance industry, and were 'not the way courts have ruled in other jurisdictions.'") (quoting Sandgrund and Sullan, "H.B. 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims," *supra* note 4 at 90).

41. *See* Witt and Achenbach, *supra* note 40.

42. CRS § 13-20-808(3), (7); CRS § 10-4-110.4(1).

43. *See supra* note 11 at 20 (Affordable Housing Transformational Task Force considered "[r]ecognizing that Construction defect laws are an existing policy issue that many developers indicate adds to for-sale costs. Support any examination underway of existing Construction Defect laws to determine if more market-provided for-sale affordable housing opportunities exist while still providing consumer protections."). *See also infra* note 69. *Cf.* Hearing on SB 24-106 Before the Senate Local Government and Housing Committee, 2024 Leg., 1st. Reg. Sess. 74th Gen. Assemb. at 12:51:41 p.m. (Colo. Mar. 21, 2024) (SB 24-106 sponsor Sen. Zenzinger explaining that "[i]f the problem that is standing in the

way of [affordable housing] is unaffordable construction insurance, even if you don't believe that's part of the problem, it doesn't hurt to try and solve for it.").

44. *See* CRS § 13-22-307 (generally prohibiting disclosure of mediation communications but excepting information gathered for research purposes if "the parties or the specific circumstances of the parties' controversy are not identified or identifiable"). Purchase agreements and HOA declarations (typically provided to homeowners by builders on a take-it-or-leave-it basis) often require that CD disputes be resolved in arbitration proceedings and may require that some or all information relevant to these issues remains confidential or shielded from disclosure by nondisclosure agreements.

45. Although most insurers are required to disclose rate-related information, *see* CRS §§ 10-4-401 ("every insurer shall file with the commissioner every manual of classifications, rules, and rates, every rating plan, and every modification of any of the foregoing which it proposes to use in this state"), certain commercial entities and insurers are exempt from state rate regulation requirements, CRS §§ 14-4-1401 et seq. *Cf.* CRS § 8-44-103 (workers' compensation insurers required to "file with the commissioner of insurance its classification of risks, any premiums relating thereto, and any subsequent proposed classification of risks and premiums, together with all rates and systems of rating"). *See also* Pacey Economics, Inc., *Housing Market Analysis—Supply and Demand* 18 (Jan. 6, 2015), https://static1.squarespace.com/static/5b15986d2487fd2f51e69986/t/5b1ada26352f539420c0fc0b/1528486446943/Housing-Market-Analysis-1-6-15-Not-Embargoed.pdf ("Increased insurance premiums, whether arising from construction defect litigation (litigation costs, costs to repair, costs to mitigate, i.e. third-party quality assurance, etc.) or other factors, will increase costs to the builders/developers. However, [our research efforts] have been unable to obtain reliable empirical data due to the highly guarded information from both builders and insurance companies. Therefore, the trends in these costs cannot be ascertained and cannot be analyzed until such information is forthcoming."); Pacey Nehls Economic Consulting, *Condominium Development (Supply) Policy Analysis* 4 (Feb. 2024), https://www.paceyecon.com/_files/ugd/7e91f3_aafa37bfa4084f58bbb5a8880c16147e.pdf (noting that "insurance companies and builders have highly guarded this information from policy makers and the general public and the limited information that has been spread throughout local news outlets in recent months is not empirical data and was sourced by special interest groups").

46. Relevant information could be obtained by (1) judicial designation of CD as a case type to consolidate information; (2) cataloguing claim notices, repair offers, settlements, and verdicts by the Division of Insurance as part of annual rate filings; and (3) enactment of legislation similar to HB 24-1083, "Construction Professional Insurance Coverage Transparency," which, if passed, would have tasked the insurance commissioner with gathering and analyzing data about builders' insurance availability, rate calculation, and cost. Building industry advocates opposed HB 24-1083. Colorado Capitol Watch, "Lobbyist Filings for Bill: HB24-1083" (2024), https://app.coloradocapitolwatch.com/lobbyists/1/HB24-1083/2024/0 (identifying numerous lobbyists opposing bill on behalf of building industry clients).

47. Analogously, after property damage claims from natural disasters increased insurers' expenditures, Florida strengthened building codes, which encouraged higher quality building product development, more frequent and effective building inspections, and fewer insurance claims. *See* Kaste, "Tougher Building Codes Contribute to Florida Mitigating Damage From Latest Hurricanes," NPR (Oct. 15, 2024), https://www.npr.org/2024/10/15/nx-s1-5151844/tougher-building-codes-contribute-to-florida-mitigating-damage-from-latest-hurricanes. To increase insurance availability for wildfire risks, the wildfire mitigation program in Boulder County, Colorado offers rebates to residents who install wildfire mitigation materials. *See* "Wildfire Partners Announces Countywide Wildfire Mitigation Rebate Program" (June 18, 2024), https://bouldercounty.gov/news/wildfire-partners-announces-countywide-wildfire-mitigation-rebate-program.

48. *See* O'Connell, "2023 Outlook on the Construction Industry and Liability Insurance," Construction Executive (Jan. 16, 2023), https://www.constructionexec.com/article/2023-outlook-on-the-construction-industry-and-liability-insurance (explaining that "key premium influencers like high inflation, soaring interest rates, ongoing supply chain issues, and rising economic volatility continue to drive construction industry liability insurance costs, and those costs likely won't decline until those issues finally recede").

49. McKinsey & Company, *Global Insurance Report 2025: The Pursuit of Growth* (Nov. 19, 2024), https://www.mckinsey.com/industries/financial-services/our-insights/global-insurance-report.

50. CBRE, "Insurance Costs Suppress Multifamily Values Most in Certain Sun Belt Markets" (July 18, 2024), https://www.cbre.com/insights/briefs/insurance-costs-suppress-multifamily-values-most-in-certain-sun-belt-markets.

51. Woleben, "US Homeowners Insurance Rates Jump by Double Digits in 2023," S&P Global (Jan. 25, 2024), https://www.spglobal.

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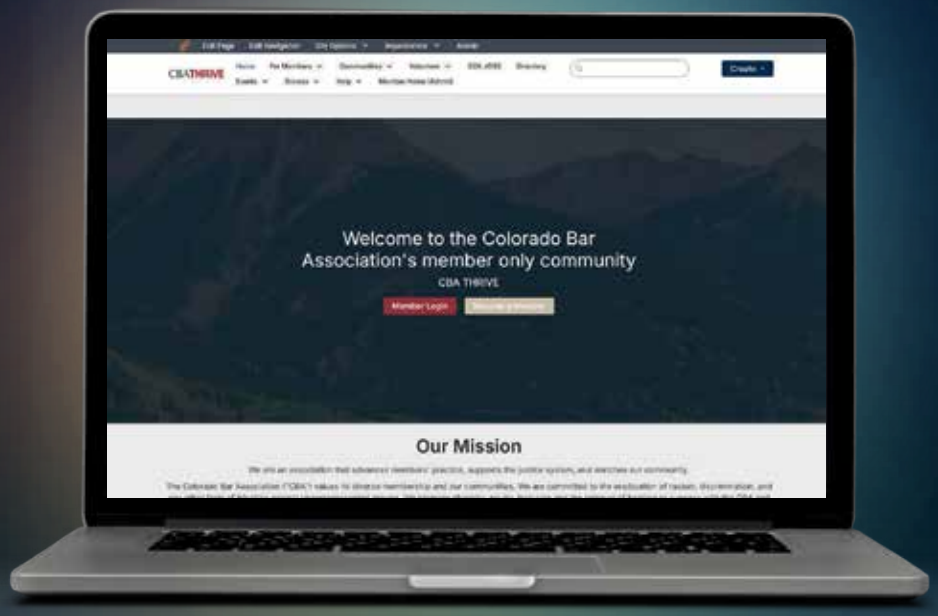

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com/marketintelligence/en/news-insights/latest-news-headlines/us-homeowners-insurance-rates-jump-by-double-digits-in-2023-80057804.

52. In 2021, worldwide premiums surpassed $6.8 trillion, with US insurers collecting $2.7 trillion of that total. *See* Jimenez, "Insurance Accounts for More Than 7% of the Global Economy," MAPFRE (Sept. 23, 2022), https://www.mapfre.com/en/insights/insurance/insurance-accounts-for-more-than-seven-percent-the-global-economy.

53. National Association of Insurance Commissioners, Financial Analysis and Examination Department, *2023 Annual Report on the U.S. Property & Casualty and Title Insurance Industries* 7–8 (2024), https://content.naic.org/sites/default/files/inline-files/2023 Annual Property %26 Casualty Insurance Industries Analysis Report.pdf.

54. Structural Building Components Association, "New Study Looks at Impacts to Construction Labor Wages" (Feb. 14, 2024), https://www.sbcacomponents.com/media/new-study-looks-at-impacts-to-construction-labor-wages.

55. Obando, "Higher Material Prices Here to Stay," *Construction Dive* (June 1, 2023), https://www.constructiondive.com/news/falling-material-prices-expected-reverse-course/651744.

56. *See Denver Metro Area Housing Diversity Study* 38–42 (prepared by Economic & Planning Systems, Inc. Oct. 29, 2013), http://scribd.com/document/186390471/DRCOG-Report). Although a 2013 economic study concluded, based on an economic model using solely builder- and insurance-broker-provided information as inputs, that insurance costs in Colorado would likely discourage development of multifamily units in Colorado priced below $450,000, other economists criticized this study for relying only on information from those with a vested interest in CD action reform and failing to adequately consider other relevant factors. *Compare* Denver Metro Area Housing Diversity Study, *id.* at 38, 42 (opining, assuming that all other factors remained constant and based *only on information provided in interviews with builders and insurance brokers*, that insurance costs in Colorado would likely discourage development of multifamily units in Colorado priced below $450,000 per unit) *with* Pacey Economics, Inc., *supra* note 45 at 28 (EPS study has "no basis, empirically or methodologically," inappropriately relies on subjective interviews with builders who have a vested interest in legislation that limits builders' liability, and fails to recognize multiple other reasons for lack of condominium construction in the Denver area).

57. *See* Department of Regulatory Agencies, *Contractor's Liability Insurance Comparison* (Colo. Div. of Ins. 2005), http://hdl.handle.net/10176/co:4891_reg42c762005internet.pdf; Reid, "Builders Pack a Punch," Colo. Builder Forum 12–13 (May/June 2003) (reporting that only two or three insurers offer builders' liability insurance in Colorado in 2003).

58. *See* Kiszka, *Construction Defect Laws and Issues Memorandum* 5 (Colorado Legislative Council Staff 2015), https://leg.colorado.gov/sites/default/files/construction_defect_laws_and_issues_2015.pdf.

59. *See* Hearing on SB 24-106 Before the Senate Local Government and Housing Committee, 2024 Leg., 1st Reg. Sess. 74th Gen. Assemb. at 2:55:58 p.m. (Colo. Mar. 5, 2024) (testimony of Jeff Nehls representing Pacey Nehls Economic Consulting).

60. National Association of Home Builders, *Housing Affordability: Creating Housing for All Toolkit* (2019), https://www.nahb.org/advocacy/top-priorities/solving-the-housing-affordability-crisis/housing-affordability.

61. Pacey Nehls Economic Consulting, *supra* note 45 at 2, 5.

62. *See, e.g.*, Freddie Mac, Housing Supply: A Growing Deficit (May 7, 2021), https://www.freddiemac.com/research/insight/20210507-housing-supply; Pacey Economics, Inc., *supra* note 45 at 1. *See also id.* at 2, 5 (concluding that builders develop more rental properties than for sale properties because they can realize greater profits from rental than from for-sale properties).

63. Stoller, "It's the Land, Stupid: How the Homebuilder Cartel Drives High Housing Prices," BIG (Aug. 15, 2024), https://www.thebignewsletter.com/p/its-the-land-stupid-how-the-homebuilder.

64. *See* Lambert, "Giant Homebuilders Tighten Their Grip on the Housing Market—Just Look at This Map," ResiClub (Oct. 17, 2024), https://www.fastcompany.com/91210557/housing-market-giant-publicly-traded-homebuilders-tighten-grip-map (citing housing data-tracking firm Zonda).

65. *See* Hearing on SB 24-106, *supra* note 59 at 3:25:10 p.m. (Colorado Association of Home Builders CEO confirming that "builders and developers, at least those that run and own the companies and take on the risk to build these housing units, they're not the folks that are building the housing. It's the trade professionals.").

66. Lambert, *supra* note 64.

67. Stoller, *supra* note 63.

68. *See* O'Connell, *supra* note 48.

69. *See* Pacey Nehls Economic Consulting, *supra* note 45 at 2 ("The fact that the shortage of for sale multi-family housing is occurring all across the country, despite significant variations in each state's construction defect laws (Colorado's are among the most builder-friendly), provides strong evidence that construction defect laws are not to blame and that changing them will not fix the problem. Plus, the decline in the construction of for sale condominiums across the country occurred while states' construction defect laws were largely held constant or had minor changes. The root cause of the decline cannot be construction defect laws."). A 2024 Common Sense Institute (CSI) Colorado report, LiFari, *The Decline of Condominium Construction in Colorado: Addressing Litigation Reform to Alleviate the Housing Affordability Crisis* (Feb. 6, 2024) ("CSI Colorado Report"), https://www.commonsenseinstituteus.org/colorado/research/housing-and-our-community/the-decline-of-condominium-construction-in-colorado-addressing-litigation-reform-to-alleviate-the-housing-affordability-crisis, underscores the importance of critically analyzing the presumed connection between CD actions or laws and multifamily housing development. The report concludes, based only on builders' assertion that they do not build because of litigation risks, that CD action reform is needed to lower insurance rates and trigger condominium development. *See generally* CSI Colorado Report. However, the report shows that condominium unit starts in Houston and Dallas-Fort Worth, Texas, are more than 70% lower than they were between 2002 and 2008, and condominium starts in Austin, Texas, are more than 116% higher than they were between 2002 and 2008. *See id.* If CD laws significantly impact condominium development, then similar development trends should exist in all three Texas metropolitan areas, which are all governed by Texas CD law. The report also concludes that the 2017 Act amendments caused a *temporary* "uptick" in condominium development followed by continued decline, but economists who examined the issue concluded that the "slight uptick" occurred before the 2017 Act amendments were enacted and was consistent with national trends. *See* Pacey Nehls Economic Consulting, *supra* note 45 at 11. Finally, the report recommends that developers collaborate with a governmental organization to obtain various benefits provided to governmental organizations, including "governmental immunity" to "boost[] developer and insurer confidence by reducing exposure to frequent and costly litigation" without regard to how providing immunity relieves developers from obligations to properly construct homes and unreasonably shifts the cost of repairing builders' mistakes to homeowners. CSI's organizational and board members are primarily building industry advocates. *See*, separately, CSI, *2023 Annual Report* 55, 57, https://www.commonsenseinstituteus.org/filesimages/Annual%20Reports/CSI-CO-2023-Annual-Report_webFINAL.pdf. Interestingly, the Common Sense Institute Oregon summarily concluded, without citing any supporting data and contradicting its Colorado counterpart's report, that the 2017 Colorado Act amendments "reduc[ed] the number of costly and time-consuming lawsuits." *See* McMullen and Kirsch, *Oregon's Construction Defect Liability Laws: A Barrier to Homeownership? (*Oct. 2024), https://www.commonsenseinstituteus.org/ResearchUploads/CSI%20Report%20-%20OR%20CLD-4.pdf.

Colorado's CD municipal ordinances similarly suggest that there is no correlation between CD laws and housing development trends. Between 2015 and 2017, at least 17 municipalities throughout Colorado adopted CD ordinances with varying PSCs and substantive claim limits, many of which impose more limits on CD actions than the Act. *See* Sandgrund et al., "Construction Defect Municipal Ordinances: The Balkanization of Tort

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and Contract Law: Part 3," 46 *Colo. Law.* 27 (Apr. 2017). It is unknown whether or to what extent homeowners and builders have relied on or complied with ordinance requirements; some practitioners suggest that the ordinances impose requirements that are inconsistent with CDARA and/or Colorado's Common Interest Ownership Act, and that, where inconsistent, these statutes preempt the ordinances, *see id.* Ultimately, no empirically sound data or studies establish that the ordinances have significantly increased development of needed housing in these municipalities.

70. *See* HB 03-1161 and HB 17-1279. *Cf.* Hearing on HB 03-1161-3 Before the House Committee on Business and Labor, 2003 Leg., 1st Reg. Sess., 64th Gen. Assemb. 73:19–25 (Colo. 2003) (Rep. Rippy explaining the NCP's intent: "Right now a number of construction professionals . . . are not even aware that the homeowner or the building owner has an issue with something in the building until they're served with a lawsuit. What 1161 does, is it says that prior to all that litigation going, you must give the construction professional notice of the defect."). *See also* Senate 3d Reading on HB 17-1279, 2017 Leg., 1st Reg. Sess. 71st Gen. Assemb. 5:17–20 (Colo. May 4, 2017) (Sen. Tate explaining that "[w]hat [the legislature is] addressing is how people access [the complicated law surrounding CDs] and how claims are initiated and thus hopefully making sure claims [that] move forward from an HOA are valid and are made with a strong level of informed consent."); Hearing on HB 17-1279 Before the House State Affairs Committee, 2017 Leg., 1st Reg. Sess. 71st Gen. Assemb. 6:11–22 (Colo. Apr. 19, 2017) (Rep. Wist explaining that HB 17-1279 limits "the ability of a small group, an HOA board, to bind a large community in litigation").

71. *Compare* Reid, *supra* note 57 (predicting 2003 Act amendments will increase insurance availability within a few months); Hearing on HB 17-1279 Before the Senate Business, Labor and Technology Committee 2017 Leg., 1st Reg. Sess. 71st Gen. Assemb. 17:12–17 (Colo. May 1, 2017) (Homeownership Alliance Opportunity representative predicting insurance industry will likely respond to 2017 Act amendments within two years by reducing rates, which will cause a "ramping up" of affordable housing development and "really open the floodgates . . . ."); *with* Hearing on SB 24-106, *supra* note 59 at 4 (SB 24-106 sponsor Zenzinger explaining that condominium development between 2018 and 2022 was 76% lower than between 2002 and 2008). Before 2017, the Act included fewer PSCs and imposed no meeting or voting PSCs on HOAs.

72. In the authors' experience, builders generally offer no repairs or insufficient repairs during the NCP.

73. In the authors' experience, builders typically complain both that homeowners provide vague NOCs that do not comply with the Act, *see* CRS § 13-20-802.5(5), and/or conduct unreasonably extensive investigations, incurring substantial expenses to provide the detail the Act requires, and that both preclude early settlement.

74. *See Holmes v. Goodyear Tire & Rubber Co.*, No. 04CA2177 at 19 (Colo.App. 2007) (NSFOP) (homeowner entitled to PJI on repair cost from date defective hose was installed, which was the date he was wronged), *rev'd by Goodyear Tire & Rubber Co.*, 193 P.3d 821; *Scott v. Matlack, Inc.*, 1 P.3d 185, 191–92 (Colo.App. 1999) (finding that PJI "serves not only the purpose of compensating a party for loss of use of money, but is also used to encourage the settlement of cases both before and after trial" and holding that "these purposes constitute rational bases for imposing pre-judgment interest on future damages."), *rev'd on other grounds by Scott v. Matlack, Inc.*, 39 P.3d 1160 (Colo. 2002).

75. *See, e.g.*, HB 23-1120, codified at CRS § 13-40-110 (2023).

76. *See* Hearing on HB 01-1166, *supra* note 6 at 40 (Sponsor Sen. Fitz-Gerald describing CDARA I's approach).

77. *See* CRS § 13-20-804(1) (2003).

78. *See, e.g.*, CRS § 13-17-102(2) ("court shall award . . . reasonable attorney fees against any attorney or party who has brought . . . a civil action, either in whole or in part, that the court determines lacked substantial justification"); CRS § 13-17-201 (court shall award attorney fees for dismissal of frivolous tort claim pursuant to CRCP 12(b)). *Cf.* CRCP 121 § 1-15(6) (court may award attorney fees for frivolous motion or frivolous opposition); CRCP 11(a) (authorizing sanctions against attorney or party for filing pleading not "well grounded in fact").

79. *See* Senate 2d Reading on SB 24-106, Amendment L.102, 2024 Leg., 1st. Reg. Sess. 74th Gen. Assemb. (Colo. Apr. 10, 2024) (lost). *See also* Hearing on SB 24-106 Before the Senate Local Government and Housing Committee, 2024 Leg., 1st Reg. Sess. 74th Gen. Assemb., *supra* note 59 at 8:30:34 p.m. (Colo. Mar. 5, 2024) (testimony of Scott Wilkinson, insurer attorney, that "[a] lot of the suits we have to deal with have what we call technical code violations with no resultant damage and no real safety risk").

80. *See* CRCP 54(d).

81. Any alleged impact of treble damages on insurance rates has never been substantiated. *See* Hearing on HB 03-1161 Before the House Committee on Business and Labor, 2003 Leg., 1st Reg. Sess., 64th Gen. Assemb. 73:19–25 (Colo. 2003) (Rep. Larson: "The homebuilders in my district have been prompting my support of the Bill because they are saying that treble damages [are] causing insurance rates to go skyrocket. In a conversation that you and I had the other day, you indicated that treble damages [are] not paid by insurance companies." Attorney Sullan: "That's correct.").

82. In the authors' experience, building industry advocates have suggested that homeowners sometimes recover damages not used to fund repair work, implying that homeowners are awarded excessive damages, even though homeowners often lack sufficient funds after accepting a significantly discounted settlement due to a builder's liability insurance coverage deficiencies or the builder's own impecuniousness. Homeowner advocates counter that builders' failure to properly construct a home or resolve disputes without the need for legal action forces homeowners to incur legal expenses, ultimately leaving them without sufficient funds to perform all repairs, and requiring that they prioritize and stagger repair work, or abandon certain work altogether.

83. *See, e.g.*, HB 24-1230 "Protections for Real Property Owners" (restoring PJI, which could encourage early settlement, and ensuring that the SOL does not begin to run before a homeowner discovers a CD's cause, which could help homeowners identify potentially responsible parties before the SOL expires) (lost).

84. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 413 P.3d 219, 224 (Colo.App. 2017).

85. Ashby, "Homebuyers' Protection Bill Narrowly Clears Committee," *Pueblo Chieftain* (Apr. 4, 2007). *See also* Sandgrund and Seidman, "The Homeowner Protection Act of 2007," 36 *Colo. Law.* 84 (July 2007).

86. *See* sources cited *supra* note 85.

87. *See Broomfield*, 413 P.3d at 230 (J. Davidson concurring).

88. *See* HB 24-1083 ("Construction Professional Insurance Coverage Transparency").

89. *Cf.* CRS § 10-1-101 (the purpose of regulating insurance "is to promote the public welfare by regulating insurance to the end that insurance rates shall not be excessive, inadequate, or unfairly discriminatory, to give consumers thereof the greatest choice of policies at the most reasonable cost possible, to permit and encourage open competition between insurers on a sound financial basis . . . .").

90. Colorado's Health Insurance Affordability Act adopts a similar approach. *See* CRS § 10-16-1202 ("the general assembly finds and declares that . . . the state, carriers, and hospitals share a common commitment to ensuring all Coloradans have access to affordable health care coverage because access to coverage improves health outcomes and provides financial security for Coloradans"; the health insurance availability act aims to "[o]ffset the costs carriers would otherwise pay for covered persons' high medical costs so that premiums are set at more affordable levels," to "reduc[e] the need of providers to shift costs of providing uncompensated care to other payers," and to "expand[] access to high-quality, affordable health care for low-income and uninsured Coloradans.").

91. *See* Pacey Nehls Economic Consulting, *supra* note 45 at 13.

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