

CONSTRUCTION CLAIMS

BUILDING
BETTER
OUTCOMES

The CLM's *Construction Claims* magazine features articles on all aspects of construction-related claims, including construction defect, site accidents/injuries, insurance coverage, subcontractor issues, and new technologies that address both national and regional/statewide audiences. Articles are written by some of the top leaders in the industry, and the publication is distributed to more than 7,000 professionals in the construction claims industry—all of whom are members and fellows of the CLM.



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CONSTRUCTION CLAIMS BUILDING BETTER OUTCOMES

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Editor has final approval on all material.

GOLD LEVEL SAMPLE:

Multifamily Owners Get Greater Say
The process for resolving disputes arising out of construction defects will enter a new phase in Colorado.

By Tom Iuliano

Multifamily development in Colorado has been called for years. The industry has sought various options for balancing the risks of litigation versus the economic benefits of undertaking construction. The threat of litigation led to an unwillingness of many general liability carriers to underwrite multifamily projects.

Recently, the Colorado legislature enacted a bipartisan measure, supported by affordable housing advocates, construction developers, governmental entities and insurers. The new law is intended to promote more cooperation between all parties, while at the same time providing homeowners who have legitimate issues an alternative to litigation.

At the same time, the construction and development industries have long sought clarification on forum selection clauses. Following the public policies of many states, arbitration has been the favored forum. The Colorado court recently endorsed forum selection clauses.

Informed Consent
Existing Colorado law allowed a homeowners association to retain counsel and file a lawsuit without any direct input or involvement from its members. H.B. 17-179 amends the provisions of Colorado's Common Interest Ownership Act (CICOA), C.R.S. §§ 38-3.1-302, et seq. by amending §§ 38-3.1-303(3), repealing (2) and adding (4). The gist of the new law is to provide fair notice to individual unit owners prior to the commencement of a construction defect action. It also brings the construction professional more substantively into the process and into the definition of an "owner" to include:

By an related, ancillary or derivative claim, and any other claim or benefit of liability that may be asserted or otherwise is a member of an association executive board that arises from an alleged construction defect or that seeks the cure or remedial damages to the commencement of a construction defect action. It also brings the construction professional more substantively into the process and into the definition of an "owner" to include:

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The new disclosure requirements mandate that prior to the filing of a lawsuit the executive board must read and deliver written notice of the anticipated lawsuit to each unit owner containing the following information:

A description of the nature of the construction defect action, identifying alleged defects with reasonable specificity, the relief sought, a good faith estimate of the benefits and risks involved, and any other pertinent information.

Notice that the alleged construction defects might result in increased costs to the association in maintenance or repair or special assessments or special assessments to cover the cost of repairs.

A warning that if the association does not file a claim before the applicable legal deadline, the claim will expire.

Notice that, until the alleged defects are repaired, unless the units within the common interest community might own units beyond a checkbook known defects.

Notice that the executive board intends to enter (has entered) into a an arrangement with the attorney representing

the association, under which the attorney will be paid a contingency fee equal to _____ percent of the net (gross) recovery of the amount the association receives from the defendant(s) and the association attorneys will be paid (an hourly fee of \$_____) (a fixed fee of \$_____).

Notice that, in addition to attorneys fees, the association may incur up to _____ of legal costs, including expert witnesses, deposition and filing fees. The amount will not be exceeded unless the executive board's further written authority. If the association does not prevail on its claim, the association may be responsible for paying those legal expenses.

A warning that, if the association does not prevail on its claim, the association may be responsible for paying its attorney fees.

Notice that if the association does not prevail on its claim, a court or arbitrator commission awards costs and attorney fees to the opposing party. Should that happen in this case, the association may be responsible for paying the opposing party's costs and fees as a result of such award.

_____ Clarification that there is no guarantee that the association will receive enough funds to repair the claimed construction defect(s). If the claimed defects are not repaired, additional damage to property and a reduction in the market value of the common elements might occur.

A warning that, until the claimed construction defect is repaired, until the construction defect claim is concluded, the market value of the units in the association might be adversely affected.

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In addition, certain federal underwriting standards or regulations prospect buyers might be difficult to obtain by proceeding with a construction defect claim, and certain lenders as a matter of policy will not refinance or provide a new loan to properties where a construction defect claim is filed.

The construction professional must also receive notice that he can subcontractly participate in the process.

Following delivery of the notice a meeting of the unit owners to consider proceeding with the lawsuit occurs. The meeting must appear as a public notice, failure to do so by will result in the void. After the initial meeting, a 90-day waiting period begins. If no action is taken by the unit owners during this period, supplemental information can be given, but it won't void the meeting. At the end of the meeting, a vote is taken as to whether to proceed with a lawsuit. The construction professional owns the vote.

The new procedure offers the potential for the parties to benefit by resolving the disputes regarding alleged issues and approaches to resolving them. By requiring informed consent from the unit owners, a reasonable relation that protects their

rights without the time and uncertainty of litigation may occur. It may also entice builders and developers and their insurers to measure the market and time, and with the economic growth required to keep construction hot.

Forum Selection
There are three forums for the resolution of construction defect disputes: (1) litigation before a jury; (2) litigation in front of a judge in a bench trial; and (3) arbitration. Each has pros and cons. Litigation before a jury is proffers more expertise, witnesses and time to consider. Experience teaches that outcomes in construction defect trials tend to favor plaintiffs. If a matter must be litigated in the courtroom, a bench trial may be a better option. Whether by jury or bench trial, the litigant's right to appeal is preserved. Arbitration is private and can be processed in less time. Unlike the parties the ability to select an arbitrator who are process the specialized knowledge that is required to understand the complex issues involved in a construction defect action, however, arbitrators can be costly, and there is no right to appeal. Whether a developer could retain a right to remain in any jurisdiction designed to resolve binding arbitration. There are two homeowners associations generating documents cents to the fine, that in litigation or through Arbitration Commission. See, for example, *Marathon Homes, Inc. et al.* (Oct. 2017). Prior to litigation, associations, the governing documents at issue in *Village* did not allow the association to enter into arbitration in any way that would waive the industry and government entity first level in arbitration of the dispute.

In upholding the requirement of informed consent, the Supreme Court's pronouncement in *Village*, it appears that the process for resolving disputes arising out of construction defect will enter a new phase in Colorado. Whether

these measures will spur an increase in the construction and development of new multifamily projects is yet to be seen. Likewise, whether insurers will enter the Colorado market, is an unknown. However, given wide support from industry for these issues, the various construction claims should have a more positive outlook for the future.

The construction professional must also receive notice to be an arbitrator to participate in the process.

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For more information on how *CLM Magazine* can help you achieve greater awareness in the market and increased sales, contact your sales representative:

Harry Rosenthal

CLM Executive Group Publisher, VP
513.608.4221 (direct)
Harry.Rosenthal@TheCLM.org

Bryan Pifer

Publisher
513.444.4560 (office)
513.340.6369 (direct)
Bryan.Pifer@TheCLM.org

Jeremy Campbell

VP Partnerships
513.377.7228
Jeremy.Campbell@TheCLM.org

Megan Josd

Account Executive
954.393.0710
Megan.Josd@TheCLM.org

Dreamma Mendoza

Director, Client Services
321.926.3769 (office)
386.457.2244 (direct)
mendoza@theinstitutes.org

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