



## UNDER CONSTRUCTION

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### **Recent Developments under Colorado's Homeowner Protection Act of 2007**

By Jonathan M. Allen

Effective April 25, 2007, the Colorado General Assembly enacted the Homeowner Protection Act (HPA) "[i]n order to preserve Colorado residential property owners' legal rights and remedies." C.R.S. § 13-20-806(7)(a). The General Assembly incorporated the HPA into Colorado's Construction Defect Action Reform Act (CDARA), C.R.S. § 13-20-801 *et seq.* Under the HPA, "any express waiver of, or limitation on, the legal rights, remedies or damages provided by [CDARA] . . . or on the ability to enforce such legal rights, remedies, or damages . . . are void as against public policy." C.R.S. § 13-20-806(7)(a). The General Assembly was careful to note that the HPA "applies only to the legal rights, remedies or damages of claimants asserting claims arising out of residential property," not property constructed for commercial endeavors. C.R.S. § 13-20-806(7)(c).

One of the most significant disputes that has arisen under the statute is whether the HPA invalidates contractual damage limitations between developers of residential property and their subcontractors or design professionals. Developers and general contractors argue that the statute does not draw any distinction as to who the contracting parties must be in order for the HPA to apply — only that "residential property" be involved. They further argue that invalidating limitations on liability in their subcontractor or design professionals' agreements furthers the intent of the legislature because it provides a larger pot of money for developers to remedy defects

for homeowners. At least two trial courts in Colorado have agreed with the developers and invalidated limitations on liability in a geotechnical engineer's contract with the developer. See *Central Park Townhomes Condo. Ass'n, Inc. v. Aggregate Indus.*, 2006cv4013, Order Regarding Plaintiff's Motion for Determination of Law Regarding Defendant Terracon Consulting, Inc.'s Limitation of Liability (Arapahoe Co. Dist. Ct. Sep. 29, 2010); *Thacker v. Gallery Homes, Inc.*, 2007cv1195, Order Denying Terracon's Motion for Partial Summary Judgment Regarding Limitation of Liability (Larimer Co. Dist. Ct., Apr. 7, 2010).

Subcontractors and design professionals, on the other hand, argue that the legislative intent behind the HPA was to prevent developers from limiting a homeowner's remedy for defective construction. They argue the HPA should only apply to contracts between a homeowner and developer and not to agreements between the developer and its subcontractors or design professionals. Subcontractors and design professionals further argue that invalidating their limitations on liability to contracts entered into before the HPA's effective date amounts to an unconstitutionally retrospective application of the statute. At least one Colorado trial court has agreed and refused to apply the HPA to invalidate a liability limitation in a contract between a developer and a subcontractor. See *Caribou Ridge Homes, LLC v. Zero Energy, LLC*, 2010cv1094, Ruling and Order re: Plaintiff's Motion for Determination of Question of Law Pursuant to C.R.C.P. 56(h) on Issue of Damages (Boulder Co. Dist. Ct. June 14, 2011).

No Colorado appellate court has yet to address the scope of the HPA. But, the issue is currently before the Colorado Court of Appeals on Terracon's cross-appeal in the *Thacker* case. Briefing is not yet complete in that case and it will likely be many months before the issue is ultimately decided. Regardless of how the Colorado Court of Appeals rules, and assuming it rules, the decision likely will have a significant impact on the way residential developers, general contractors, subcontractors and design professionals structure their contractual relationships.

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