

LAW WEEK COLORADO

Surge in Apartment Construction Fuels Condo Conversions, Liability Concerns in Denver

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Colorado's Front Range has seen a dramatic increase in apartment construction over the past 10 years. The Downtown Denver Partnership reported that in 2007, 112 apartments were built compared to 870 condos in Denver's central neighborhoods. By July 2013, the ratio was reversed — 78,100 apartments were planned or under construction compared to 145 condos. This surge in apartment construction will likely result in condominium conversions.

COLORADO'S STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

Colorado's two-year statute of limitations applies to all claims against "construction professionals." The period runs from the date the claimant discovers or should have discovered the physical manifestations of the defect in property.

A statute of repose bars all lawsuits regardless of whether the claimant knew of the alleged defect or had actual injury. Colorado's repose bars all construction claims brought over six years "after substantial completion of the improvement to the real property." An exception allows for claims to be filed up to eight years, if the action arose during the fifth or sixth year after substantial completion. "Substantial completion" is not defined, but occurs, at least, when a certificate of occupancy is issued.

COLORADO'S COMMON OWNERSHIP INTEREST ACT

Colorado's Common Interest Ownership Act is based on the Uniform Common Interest Ownership Act and governs common interest communities. Some authors representing plaintiffs — such as Ronald Sandgrund and Joe Smith in the Colorado Lawyer article, "When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?" — suggest CCIOA tolls statutes of limitation for developers and contractors, at least during the period of "declarant control."

CCIOA's section "Tort and Contract Liability" arguably applies to third party suits against the association, but does contain express language tolling any statute of limitations. The pertinent section reads, "Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates." Left unanswered are questions including:

- Does this also apply to "toll" the statute of repose against an original developer?

- Are other parties (architects, engineers, contractors, subcontractors) subject to tolling?

The Sandgrund and Smith article does not address tolling a repose. What effect, if any, may a statute of repose have in a condo conversion?

LIABILITY EXPOSURE UNDER THE STATUTE OF REPOSE

Subsequent purchasers can sue the original builder for latent defects

in residential construction, as cited in *Weller v. Cosmopolitan Homes*. But even *Weller* recognized limitations. ("An additional limitation on ... a negligence action against a builder for latent defects ... is the statute of limitations ...").

Would a homeowner's association be able to pursue claims against the original developer and others after the expiration of the statute of repose? No Colorado appellate court directly addresses this, but decisions from other jurisdictions suggest the repose may serve as a bar to such claims.

A Nevada state district court found in *Sun City Summerlin Community Ass'n, Inc. v. Del Webb Communities, Inc.*, that a similar provision of CIOA did not toll the statute of repose against the developer.

A California appellate court held in *Sandy v. Superior Court* that a condo conversion occurring after the repose prevented the developer responsible for the conversion from seeking indemnity from the original architect ("The legislature has decreed that even as to latent defects, 10 years is long enough for there to be liability exposure."). The *Sandy* decision noted the original architect was not involved with any condo conversion or renovation.

PLANNING A DEFENSE STRATEGY

Any conversion of apartments to condominiums involves complex real estate transactional issues beyond the scope of this article. However, some points to consider when addressing li-

ability concerns include:

- Using a different entity to process the conversion;

- Properly insuring all those involved in the conversion process. Insurance issues must be addressed by those facing exposure in conversions. For instance, alleged sound transmission code defects may not be an issue with apartments, but historically have resulted in multi-million dollar claims in condo projects. Sound transmission defect claims are typically not covered by standard insurance policies;

- Recent case law allows declarants to require all future disputes be subject to mandatory arbitration instead of jury trials (see *Vallagio at Inverness Residential Condo. Ass'n, Inc. v. Metropolitan Homes, Inc.*). But while requiring arbitration may be a best practice, it is not always less costly, and does not always reduce or eliminate defect claims;

- Some designers and builders of apartments have included contract language and filed property notices stating their contracts and warranties are void upon any conversion or change in use. This may help defend and possibly defeat a future lawsuit over a conversion.

Converting apartments to condominiums is a complex process. Uncertainties remain about the scope of legal liability for those involved in any aspect of a conversion. Therefore, consulting with legal and insurance experts is essential for any person or entity involved in the process. •

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