

Mealey's Construction Defect SuperConference

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Colorado's Notice of Claim Process – Issues & Analysis

A. Overview of Process.

Colorado's right-to-repair statute is contained within the Construction Defect Reform Act ("the Act"), which was enacted on April 25, 2003 and controls all actions commenced on or after that date. This section will provide an overview of certain provision within the Act that require parties to engage in a "Notice of Claim" process before commencing litigation for construction defects.

The mechanics of the claim process are embodied in Colorado Revised Statutes §§ 13-20-802.5; 13-20-803.5; 13-20-805; and 13-20-806. Seventy-five days before commencing an "action" against a "construction professional", the claimant must provide a written "Notice of Claim" via certified mail or personal service to the respondent's last known address.

Upon receipt of the Notice, the construction professional has thirty days to complete an inspection of the project. The construction professional must make the request in writing, and is entitled to "reasonable access" to complete the inspection.

Thirty days after completion of the inspection, the construction professional must provide a written offer to pay or repair. The offer must be by certified mail or personal service. In addition, if the offer is to repair defective conditions, it must include a report

of the scope of the inspection; the findings; all necessary repairs; and a timetable for completion.

The offer is deemed rejected unless it is accepted, in writing, within fifteen days of receipt. If the offer is accepted, payment or repair must occur according to the terms of the offer. If, however, the offer is rejected, the dispute may proceed to litigation (or other contractually agreed-upon means of resolution). If the case then proceeds to judgment and the claimant fails to recover at least eighty-five percent of the value of the rejected offer, the claimant is not entitled to recover damages under the Colorado Consumer Protection Act (“CCPA”).¹ Finally, if a claim is timely filed, all applicable statutes of limitations and repose are tolled until sixty days after completion of the process.

B. Strategic Considerations.

The Notice of Claim process raises numerous strategic considerations for both claimants and respondents. This section will look at four: 1) required detail in the notice; 2) the definition of reasonable access; 3) factors to consider in making an offer; and 4) factors to consider in accepting an offer.

1. Detail.

The Act requires the notice provide “... 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

¹ The CCPA was also amended pursuant to the Act. See C.R.S. § 13-20-806. Recoveries under the CCPA (which previously allowed for treble damages, costs and attorneys fees) are now capped at \$250,000, including attorneys fees but exclusive of costs.

have been caused by the defect.” *See* C.R.S. § 13-20-802.5. This, of course, leaves room for interpretation concerning the amount of detail necessary to comply with the statute.

Legislative history provides some insight into this issue. When House Bill 03-1161 was first introduced to the House Committee on Business Affairs and Labor by Representative Rippy on January 14, 2003, the definition of “Notice of Claim” was contained in § 13-20-803(3) and stated as follows:

“Notice of Claim” means a written notice . . . that describes the claim in reasonable detail, including the *specific type and location* of the construction that the claimant alleges to be defective.²

This language of specificity, however, was quickly removed. On February 19, 2003, during the Senate’s second reading of the Bill, Senator Tapia proposed amendment L.035, changing numerous aspects of the Engrossed House Bill. According to Senator Tapia, one of the major issues raised by the Engrossed House Bill was what happens “when the list of defects are not specific enough.”³ Senator Tapia’s concern was “when a homeowner is asked to give a list of defects, sometimes the homeowner doesn’t have the expertise to know some of the problems they might have.”⁴ To remedy this problem, Senator Tapia proposed “a simple notice of claim process [in which the homeowner] does a very simple notice.”⁵ To this end, Senator Tapia’s amendment changed, among other things, the definition of a CDARA Notice to state as follows:

² *See* Introduced House Bill 03-1161, emphasis added.

³ Taken from transcript of legislative hearing on HB 03-1161.

⁴ *Id.*

⁵ *Id.*

‘Notice of Claim’ means a written notice . . . that describes the claim in reasonable detail sufficient to determine the *general nature* of the defect.⁶

A majority of the Senate agreed with Senator Tapia and the amendment passed the Senate’s second reading. Moreover, Senator Tapia’s general language remained in the Bill from this point forward. The Bill, which was finally signed into law on April 25, 2003, contains the following definition of “notice of claim”:

‘Notice of Claim’ means a written notice . . . that describes the claim in reasonable detail sufficient to determine the *general nature* of the defect, including a *general description of the type and location*...⁷

The Legislature’s amendments confirm that the notice need not be overly detailed given that a lay homeowner (or board of directors for a common interest community) could not be expected to produce the types of sophisticated reports generated in the typical construction defect case. Moreover, it would not appear to be within the spirit of the Act to require a lay homeowner or board to bear the financial burden of producing such reports.

While the Act requires only “simple” notice, the claimant should consider several factors in preparing the Notice of Claim. A general notice has the advantage of not requiring a layman to become an expert (or expend the resources to hire one). A general notice may also provide flexibility for addressing later-discovered defects. A problem, however, with a general notice is that it may slow the process. This delay can occur

⁶ See Revised House Bill 03-116.

⁷ See C.R.S. Section 13-20-802.5(5), emphasis added.

either from uncertainty as to inspections, and/or as the result of requests by the construction professional to stay litigation pending compliance with the notice process.⁸

Conversely, a more specific notice may have the advantage of speeding the process by streamlining inspections and avoiding possible delay related to later motion practice. However, as noted above, the detail necessary for a specific notice will likely require participation by an expert or team of experts. This is an option most homeowners and homeowners associations cannot afford to pursue.

2. Defining “Reasonable Access”.

Upon receipt of the Notice, the respondent has the option to inspect the project. If that option is pursued, the claimant is required to provide reasonable access for the inspections, which must be completed within thirty days of receipt of the Notice. Reasonable access is not defined in the Act. Accordingly, it is up to the parties to determine the scope and schedule of the inspection.

While access in single-family construction defect cases is relatively straight forward, multi-unit cases present more challenges. Initially, because the scope of the inspections will be larger, the respondent must move quickly if project-wide interior inspections are desired. It is unlikely any court would consider a claimant’s failure to provide access to multiple units a basis to stay an action where the respondent waited until at or near the thirty-day deadline to request such inspections.

Another issue surrounds whether to invite subcontractors to the inspections. While the Act allows for sub participation (*see* C.R.S. § 13-20-803.5(2)), it is not

⁸ *See* C.R.S. § 13-20-803.5. Upon motion, the Court may stay an action if a claimant does not comply with the requirements of the process.

mandatory. Thus, the respondent should carefully consider the impact of more parties. In addition to the extra time that would be required to conduct multi-party inspections, the difficulties presented by organizing those parties and presenting claims to them will always make it difficult to complete inspections within the Act's thirty-day deadline.

3. The Decision to Make an Offer.

Assuming the respondent decides to make an offer to resolve the claim, the respondent must next decide whether the offer should be in the form of payment or repair.

An offer to pay has two obvious advantages: finality and speed. Once the payment is made, the claim is resolved.

An offer to repair may be desired for reasons including customer service, quality control and/or reputation. The respondent should note, however, that this option will require a much greater time commitment. In addition, if repair-related problems arise, the respondent could face the additional claims related to those problems.

4. The Decision to Accept.

With either a payment or repair, the claimant faces the possibility that unknown damages exist for which it may not recover. Again, most notice of claim processes take place pursuant to a general notice. That notice may not identify all defects at the project. Accordingly, the claimant must carefully consider any offer.

In addition, with respect to an offer of repair, the claimant must decide how it will be involved in the management of the repairs. The claimant's resources and experience will almost always dictate the level of this involvement.

The respondent may also request a release of future liability in exchange for payment or repair. It is important for the claimant to be aware that the Act does not require such a release. Moreover, if this situation arises, the claimant should not proceed without legal representation.

C. Issues for Trial.

The notice process raises numerous issues for trial. Further, because the Act is relatively new, there is little guidance as to how the courts will address these issues.

One important issue is the burden of proof at trial for offers of repair exceeding eighty-five percent of the amount recovered. As discussed above, if an offer is rejected; and the claimant fails to recover at least eighty-five percent of the value of the offer at trial, the claimant will be prevented from recovering damages under the CCPA. The Act fails to address, however, who has the burden to prove this issue.

In a construction defect trial scenario, the respondent would be seeking to prevent a claimant's recovery under the CCPA. Accordingly, it is likely that the court would determine that the respondent has the burden of proving the claimant's failure to recover at least eight-five percent of the respondent's earlier offer, just as the respondent would have the burden to prove its affirmative defenses.

The parties must also consider, and be prepared to offer testimony supporting (or refuting) the value of the offer. This will likely take the form of expert testimony, and may require additional disclosures prior to the presentation of such evidence. In addition, counsel (and the court) must determine the appropriate time for submitting this evidence to the jury.

5. Conclusion – Is It Working?

Colorado’s Notice of Claim process attempts to offer parties an opportunity to resolve construction defect claims without litigation. The limitations of the process, however, often weigh against successful resolution, especially in complex construction defect cases. In those situations, the parties may be better served waiving the process and pursuing an alternative means for dispute resolution. In situations where the parties do undertake the process, they must carefully consider the issues discussed above as they navigate the Act.