

HOA Standing Revisited: Strategic Considerations in Construction Defect Suits

By Jesse Howard Witt, Esq.

While there is no doubt that an individual homeowner can sue a builder for construction defects under Colorado law, the last three decades have witnessed bitter debate over whether a homeowners association (“HOA”) has standing to assert such claims. Early decisions held that HOA’s had no standing to bring any defect claims against a builder, but the courts have gradually retreated from this position. Today, HOA’s in Colorado clearly do have standing to institute construction defect suits on their members’ behalf, but the wise plaintiffs’ attorney should still consider the underlying issues carefully before invoking this right.

Background: Summerhouse, Villa Sierra and CCIOA

When neighbors discover that any problem repeats throughout their community, they naturally look to their HOA to take action. If the same construction defects recur in numerous homes, residents will often expect their HOA to pursue the builder for repair work or money damages. If the HOA does file a lawsuit, the builder will inevitably challenge the HOA’s standing.

The requirement of standing exists to protect defendants from multiple proceedings.¹ The courts have held that

the proper inquiry is whether the plaintiff has suffered injury-in-fact to a legally protected interest.² The first reported ruling to address an HOA’s standing to sue for construction defects in Colorado was *Summerhouse Condominium Owners Association v. Majestic Savings & Loan Association*, a 1980 decision from the court of appeals.³ In *Summerhouse*, a condominium association sued its developer for construction defects under theories of breach of contract, breach of warranty and breach of fiduciary duty. After first ruling that the developer had no contractual or fiduciary duty to the HOA itself, the court then considered whether the association could assert claims on behalf of its members. Although the community’s covenants had appointed the HOA as the homeowners’ attorney-in-fact and authorized it to “maintain, repair and reconstruct” any damage to the condominiums, the court ruled that this provision only empowered the HOA to bring suit for events occurring subsequent to the original construction. The court therefore affirmed dismissal of the HOA’s case for lack of standing.⁴

Ten years later, the court of appeals revisited the issue in another construction defect dispute, *Villa Sierra Condominium Ass’n v. Field Corp.*⁵ Although the facts of the two cases were similar, the court declined to apply

Summerhouse as controlling precedent. Instead, the court ruled that its intervening decision in *Conestoga Pines Homeowners’ Ass’n v. Black* had recognized that an HOA, as a voluntary organization, could bring claims on behalf of its members if the individual homeowners would otherwise have had standing to sue in their own right, the interests sought to be protected were germane to the association’s purpose, and neither the claim asserted nor the relief requested required the participation of individual members in the litigation.⁶ The *Villa Sierra* court observed that any litigation designed to obtain damages on the individual homeowners’ behalf would normally require their presence, but it saw no obstacle since the case only concerned damage to the common elements.⁷ In practice, the trial courts interpreted this dictum as giving HOA’s standing to sue for defects in the common elements of a community but not for defects in individual units.

In 1992, the general assembly rewrote nearly every aspect of community association law with its passage of the Colorado Common Interest Ownership Act (“CCIOA”). In an effort to make Colorado law more recognizable to out-of-state investors, the drafters closely modeled CCIOA on the Uniform Common Interest Ownership Act already followed in a number of other

states.⁸ As pertinent here, CCIOA's legislative declaration observed that

. . . the continuation of the economic prosperity of Colorado is dependent upon the strengthening of homeowner associations in common interest communities financially through . . . more certain powers in the association to sue on behalf of the owners.⁹

To effectuate this objective, CCIOA bestowed upon HOA's the right to

Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community.¹⁰

In hearings before the House Judicial committee, CCIOA's drafters explained that the latter provision was specifically intended to help HOA's represent its members more effectively in construction defect suits, noting that the cities and counties did not have enough inspectors to keep up with the burgeoning pace of construction in the state.¹¹ Commentators at the time predicted that CCIOA would thus end the confusion in construction defect cases arising under *Summerhouse* and *Villa Sierra* and avoid the cumbersome necessity of assignments, powers of attorney and class actions.¹²

While such simplification may have been one of CCIOA's goals, it took more than a decade for it to be realized. Litigants immediately disagreed over the meaning of CCIOA's terms, and several trial courts were therefore unwilling to deviate from *Summerhouse* and *Villa Sierra*. Relying on this precedent, these courts continued to hold that HOA's lacked standing to bring claims for defects within the units of a community, even though the history of CCIOA manifested a clear intent to supersede *Summerhouse* and *Villa Sierra*, and even though the legislature later amended CCIOA to include specific procedures to be followed when an HOA "institutes an action asserting defects in the construction of five or more units."¹³ Despite

such unambiguous statutory language, these courts insisted that CCIOA did not allow an HOA to institute claims for construction defects in the units of a community.

Relief at Last: Yacht Club and Heritage Village

The Yacht Club II Homeowners Association was one such association that saw its claims limited by a trial court's erroneous determination of standing.¹⁴ The HOA, which manages a large condominium community in Westminster, had filed suit in 1998 to recover the cost of repairing damage from extensive construction defects in both the common elements and the individual units. Citing *Villa Sierra*, the trial court dismissed all claims relating to the units for lack of standing. To sidestep the resultant conflict with CCIOA, the court ruled that the units were not part of the common interest community and therefore not subject to the act.¹⁵

In 2003, the court of appeals reversed. Noting that CCIOA expressly defines a unit as "a physical portion of the common interest community," the court rejected the notion that the units were not part of the community. The court then ruled that CCIOA does confer standing upon HOA's to pursue damage claims on behalf of its members for construction defects in individual units and that the only limit on this standing is that the matter be one affecting the overall community.¹⁶

Several months later, another division of the court reached the same result in *Heritage Village Owners Ass'n v. Golden Heritage Investors Ltd.*¹⁷ The court began its analysis with the *Yacht Club* decision but then expanded this holding in two subtle respects. First, the court expressly recognized that CCIOA prevailed over any conflicting terms in an HOA's governing documents, dismissing the argument that an HOA lacked standing if its declaration provided rights more narrow than those

found in CCIOA.¹⁸ Second, the court held that an HOA could bring suit for breach of the implied warranty of habitability under CCIOA, explicitly overruling *Villa Sierra* and implicitly rejecting *Summerhouse*.¹⁹

In upholding the HOA's breach of implied warranty claim, the *Heritage Village* court notably declined to draw a distinction between condominiums and townhomes. In a condominium community (such as Yacht Club), the HOA possesses no real property; each homeowner owns an undivided interest in the common elements.²⁰ By contrast, in a single-family or a townhome development (such as Heritage Village), the HOA actually holds title to the common elements.²¹ In a direct departure from the logic of *Summerhouse*, *Heritage Village* appears to find that a builder-vendor now gives an implied warranty of habitability to the HOA itself when it surrenders the common elements.²²

The Future: Proceed with Caution

Yacht Club and *Heritage Village* should be dispositive of any further challenges to an HOA's standing to bring suit for construction defects in the units of a multifamily or single-family community.²³ If any doubt about these holdings lingered, it evaporated when the Colorado Supreme Court cited *Yacht Club*'s interpretation of CCIOA with approval while affirming other aspects of the case.²⁴ Nevertheless, the fact that an HOA has the legal right to bring such claims on behalf of its members does not mean that it will always be prudent to do so. As discussed below, casting an association's standing too wide can lead to problems legal, logistical and ethical, and the HOA's attorney should therefore remain mindful of the legal theories that underlie an association's right to sue on behalf of its members.

Subsequent purchasers and patent defects

The most immediate pitfall for the plaintiff's attorney arises from the different theories of liability which may

apply to original and subsequent purchasers in a construction defect suit. An original purchaser faced with construction defects can recover for both negligence and for contractual claims such as a breach of the implied warranty of habitability.²⁵ A subsequent purchaser, however, may only recover for negligence or other torts.²⁶ Distinguishing these two causes of action, the Colorado Supreme Court has likened the implied warranty of habitability to strict liability:

Proof of a defect due to improper construction, design, or preparation is sufficient to establish liability in the builder-vendor. Negligence, however, requires that a builder or contractor be held to a standard of reasonable care in the conduct of its duties to the foreseeable users of the property.²⁷

More importantly, an owner may recover in negligence only to the extent that the construction defects were latent at the time of purchase.²⁸ Although this is rarely a concern for the first purchaser of a home, a subsequent owner may not acquire a house with obvious damage at a discount and then sue the original builder for repairs.

Claims for defects in the common elements, by contrast, are less affected by turnover in a community. In a town-home project, the number of first purchasers is irrelevant, since the HOA itself owns the common elements and can sue as an original owner. Likewise, in a condominium community, every owner holds an undivided share of the common elements, and the HOA can bring claims on behalf of *any* two of these owners pursuant to CCIOA; thus, so long as the common element defects were latent as to at least two homeowners, then a court should recognize the HOA's standing to bring both negligence and implied warranty claims for these issues.

The broad rights to recover for damages to the common elements, coupled with the more limited relief available for defects in subsequent

purchasers' homes, can create a result not unlike *Villa Sierra's* limits on standing: in a community with few original owners, the HOA may only be able to recover for defects in the common elements.

Owen, Olivia and Oscar buy new condominiums in the Blackacre Ranch community. Plumbing leaks destroy drywall inside the units, and soils movement cracks the foundations. The HOA sues the developer, but Oscar sells his home to Sally before trial. What claims survive?

In this example, the HOA can recover the cost of repairing plumbing leaks in Owen's unit and Olivia's unit, but Sally's leaks should be excluded if the water damage was patent when she bought her home. The HOA can still recover the cost of repairing all three foundations, however, since Owen and Olivia each own an undivided share of Sally's foundation. Owen and Olivia cannot be made whole unless the entirety of the common elements is repaired.

In sum, practitioners should not lose sight of the fact that an HOA's standing to recover for defects in individual units does not revive claims that may have been extinguished by an original owner's sale. Given that most construction defect cases take two or more years to resolve, it may thus be imprudent to devote time and money to documenting defects in units if the HOA is not prepared to offer evidence that such defects were latent at the time the current owners (*i.e.*, those who own the units at the time of trial) purchased their homes.

Alternatively, the attorney may wish to counsel the HOA and potential buyers in a community to obtain assignments from any owners who sell their homes during the pendency of a lawsuit. Although claims for breach of the implied warranty of habitability are not transferable,²⁹ tort claims resulting from original purchase of a home can generally be assigned to the new owner at the

time of resale.³⁰ An individual seller could also assign his or her tort claims to the HOA itself, as was required before passage of CCIOA.³¹ Following these steps may allow the HOA to preserve claims that would otherwise be lost when a unit is sold.

Unit Claims Are More Likely Subject to Arbitration

The dichotomy between unit and common element claims may also raise its head in situations where a developer seeks to compel arbitration, as it is more likely that unit-specific claims will be subject to enforceable arbitration clauses. Colorado courts have repeatedly held that public policy favors the resolution of disputes through arbitration—despite concerns over the fairness of requiring consumers to proceed in a forum with no public record, no right to discovery and no opportunity for appeal.³² Thus, the ubiquitous arbitration clauses found in new home contracts have been found to be enforceable under nearly all circumstances, even where the document containing the arbitration clause itself was procured by fraud.³³

This draconian rule will not necessarily apply, however, to claims for defects in the common elements of a community. While one could argue that an HOA alleging such damage is only bringing claims on behalf of its members, the courts appear to be moving toward recognition that the HOA also has the right to recover for its own injuries, to wit the cost of repairing common elements the HOA has an obligation to maintain.³⁴ Although many builders are now inserting arbitration provisions into the governing documents of new HOA's, these clauses, unlike those in individual purchase contracts, may not be enforceable.

CCIOA provides that its remedies are to be liberally administered, that rights and obligations arising under the act are enforceable by judicial proceeding and that said rights may not be varied or waived by agreement.³⁵ Considering

identical language, a court of appeals in Washington ruled that a builder could not enforce a clause in an HOA's declaration that required arbitration of disputes.³⁶ This holding, coupled with our own courts' determination that CCIOA controls over any inconsistent terms in an HOA's declaration,³⁷ should discourage a finding that such a clause could prevail over a Colorado HOA's statutory right to institute litigation on behalf of two or more owners on matters affecting the community.³⁸

A wise HOA, furthermore, may be able to amend its governing documents to remove any arbitration clauses prior to filing suit. In *Eagle Ridge v. Metropolitan Builders*, the developer created bylaws for the association with a special section devoted to "Construction Litigation Procedures," which required any allegations of construction defects to be submitted to binding arbitration.³⁹ After discovering widespread defects in the community, the HOA amended its bylaws to delete the foregoing section and filed suit in court three weeks later. The court of appeals upheld the trial court's finding that the arbitration clause, once deleted, could no longer be enforced.

The court in *Eagle Ridge* observed, however, that individual claims asserted by the HOA on behalf of its members might still be subject to arbitration clauses in the homeowners' sales contracts.⁴⁰ Thus, the practitioner must again weigh the value of invoking CCIOA's grant of standing to bring claims for defects in the individual units; claims for defects in common property are more likely to be exempt from arbitration, whereas claims for defects in the units may still be subject to enforceable arbitration clauses. Notably, turnover in a community may benefit the HOA in this instance, since subsequent purchasers will not have signed any contracts with the developer.

Based on provisions in both the declaration and the original purchase contracts, the developer

of Blackacre Ranch moves to compel arbitration of the HOA's allegations of foundation damage and plumbing leaks in Owen's, Olivia's and Sally's homes. Will the motion be granted?

Here, a court would likely compel the parties to arbitrate issues relating to Owen's and Olivia's plumbing but deny the remainder of the motion, finding that the arbitration clause in the declaration is unenforceable under CCIOA and that Sally never signed a contract with the developer.

In this example, the HOA might, of course, be able to escape arbitration altogether if it can establish that the nonarbitrable claims are sufficiently intertwined with the arbitrable claims such that it would be impractical to separate them.⁴¹ Notwithstanding such arguments, however, most arbitration clauses are difficult to overcome, and orders compelling arbitration are not immediately appealable (unlike orders *refusing* to compel arbitration).⁴² Counsel should therefore remain cognizant that the assertion of unit-specific claims can increase the likelihood that a court will force an HOA to arbitrate its case.

Will the HOA Become Obligated to Repair the Units?

On a more practical level, the HOA and its attorney should also consider whether any new maintenance obligations will arise upon assertion of claims for defects in individual units. Typical association covenants make each homeowner responsible for upkeep on his or her own unit and only require the HOA to maintain and repair the common elements. This was one of the factors which prompted several trial courts in previous years to deny HOA's standing to bring claims on behalf of their members for construction defects. While the holdings in *Yacht Club* and *Heritage Village* reject this theory, they leave unanswered whether the HOA gains any new responsibilities by invoking standing to assert claims for defects inside the units.

After bringing suit for both plumbing leaks and cracked foundations, the Blackacre Ranch HOA settles with the developer before trial. Owen and Olivia then ask the HOA to fix their plumbing, despite covenants that only require the HOA to maintain the common elements. Must the HOA agree?

Under the above scenario, the HOA likely does have some obligation to take action on Owen's and Olivia's plumbing problems. Although it has no contractual responsibility for the units, the HOA received a benefit from the developer in consideration of these defects, and the HOA's settlement would likely preclude the individual owners from later suing over the same issues.⁴³ Principles of unjust enrichment and simple fairness would therefore seem to mandate that the HOA now address the defects.⁴⁴

That said, the specific action to be taken would be subject to the discretion of the HOA's officers, who are protected by the business judgment rule,⁴⁵ CCIOA's limitation on personal liability,⁴⁶ and the reality that the members of the community have invariably agreed to be bound by the HOA's decisions. Thus, while equity may demand that individual owners receive *something* for their claims, it would be up to the HOA to determine, for instance, how much of any settlement should be earmarked for individuals. The HOA in the foregoing example, might, for instance, choose to pay Owen and Olivia a stipend to be used toward fixing any damage inside their units. Even if the stipend was less than the repair cost, it would be difficult for the owners to challenge this decision.

Should Homeowners Have the Opportunity to Opt-Out?

An HOA's statutory right to litigate and settle claims belonging to its members also begs the question of whether homeowners should have the opportunity to opt-out of a construction

defect suit filed by their association. In the analogous context of a class action, the court must provide notice to all potential class members of the suit and allow each member an opportunity to exempt himself or herself from the suit.⁴⁷ CCIOA, however, contains no comparable provision; although recent amendments require the HOA to notify its members of its intent to file any suit alleging construction defects in five or more units, the act does not contain any mechanism by which an objecting homeowner could exclude his or her unit from litigation.⁴⁸

In *Heritage Village*, the trial court addressed this concern by ordering the HOA to notify its members of his finding that the HOA had standing to bring claims on their behalf, thereby giving the owners an opportunity to intervene. The issue arose again after the builder challenged the HOA's standing on appeal, when Judge Webb wondered aloud during argument whether CCIOA's grant of standing might be rendered defective by the absence of an opt-out provision in the statute. Although each court ultimately upheld CCIOA's conferral of standing, the fact that both the trial and appellate judges expressed concern over this subject suggests that practitioners should also remain well aware of it. It may, for instance, be prudent to advise all homeowners of the nature of the HOA's claims at the outset of a suit and suggest that any members who object to the HOA's initiation or management of the action either seek to intervene in the case or agree to exclude their unit from the lawsuit.

Logistical Costs of Pursuing Damages in Units May Outweigh Any Recovery

An HOA and its attorney should also be careful not to underestimate the amount of time and effort required to provide access to units and owners in a large community. Although most courts have allowed some degree of representative sampling or extrapolation in Colorado construction defect suits, the

HOA's experts will still need to investigate a substantial number of the units personally. The builder, in turn, has a statutory right to inspect any alleged defects before a lawsuit is filed.⁴⁹ If litigation does ensue, the builder will likely seek to schedule more inspections for its expert witnesses. If the builder then elects to file a third-party complaint, the third-party defendants may request yet another round of inspections. Notwithstanding the frustrating inefficiency of this protocol, courts have not been particularly sympathetic to objections over repeated inspections of the same property, and it is therefore not unlikely that an HOA may need to arrange for three or more separate inspections of every unit that contains an alleged defect.

Similarly, if an HOA asserts the right to recover for defects in multiple units, counsel should expect that a court will order the HOA to produce most or all of the homeowners for deposition. Although some courts have upheld limits on homeowner depositions, most treat these individuals as de facto parties to the case.

Where the damage to the units is extensive, these inconveniences are necessary costs of litigation. However, an HOA should not proceed lightly with the decision to assert standing on behalf of all homeowners; if the homeowners' individual claims are not substantial, they may be better left to the owners to pursue on their own.

Remain Aware of Ethical Issues and Confidentiality

Finally, the attorney who represents an HOA in a construction defect case must consider whether the assertion of unit-specific claims may create an attorney-client relationship with the owners of the units and what communications will be protected from discovery.

The test for whether an attorney-client relationship exists is a subjective one based largely on whether the client believes that such a relationship

exists.⁵⁰ Often, if an HOA invokes standing to bring claims on behalf of its members, the HOA's attorney will need to work closely with the individual owners to develop the facts which support these claims, and this interaction can easily cause homeowners to believe that the attorney represents them individually. This is not a bad thing, and joint representation of the homeowners and the HOA will usually be advantageous. Counsel should be careful, however, to avoid violation of any ethical rules under these circumstances.

Rule 1.7 of the Colorado Rules of Professional Conduct allows an attorney to represent multiple parties in an action if (1) the attorney reasonably believes that the representation will not be adversely affected and (2) each client consents after consulting with the attorney about the advantages and risks involved.⁵¹ Since HOA's are corporations, Rule 1.13 also applies and permits the HOA's attorney to represent the HOA's officers only so long as the representation of the individuals does not limit the attorney's allegiance to the organization or otherwise violate Rule 1.7 above.⁵² Notably, if the facts require the organization to consent to joint representation, the consent must be given by "an appropriate official of the organization other than the individual who is to be represented."⁵³ In the context of an HOA, finding such an official can prove difficult, since most associations require their directors to be homeowners; the construction defect attorney who seeks to represent all homeowners may therefore need to contact the HOA's general counsel or locate some other non-homeowner to give valid consent on behalf of the HOA.

Although certain conflicts cannot be waived,⁵⁴ the interests of the HOA and the homeowner in most construction defect suits will be closely aligned: both the association and the individual want to see their community restored. Nonetheless, counsel should anticipate potential disagreements to avoid a situa-

tion in which he or she could be forced to withdraw in the midst of litigation.

After selling his home to Sally, Oscar intervenes in the HOA's lawsuit to recover a \$10,000 discount he purportedly gave her because of the defects. To reduce costs, Oscar retains the same attorney who represents the HOA. The developer then makes a global settlement offer of \$75,000 to the HOA and \$1000 to Oscar. The HOA wants to accept but Oscar refuses, and the developer is unwilling to negotiate with the parties separately. What can the attorney do?

In this situation, the attorney has a conflict of interest which may affect his ability to represent one client or the other. It may be desirable for the HOA to settle its claims for \$75,000, but the attorney cannot recommend accepting the global offer because of his separate duty of loyalty to Oscar. Even if both parties consented to the joint representation and waived conflicts, the attorney must still determine whether withdrawal from the case is now required; if the attorney cannot carry out one client's wishes because of a duty to another client, the attorney may need to withdraw.⁵⁵

Of course, if the attorney reasonably believes that the settlement would benefit both parties, then it may be proper to meet with them and explain this. If the clients are amicable, then the attorney may also act as a mediator between them, so long as the clients consent and understand that the attorney will not be an advocate for either in this role.⁵⁶ The attorney should not act as an intermediary if it will be difficult to maintain impartiality, however, such as where the attorney values a long-standing relationship with the HOA much more than his or her relationship with a new individual client.⁵⁷ The attorney must also be particularly careful not to allow personal interests, such as the desire for a higher contingent fee, to affect his or her judgment.⁵⁸

In the foregoing example, the issues were explicit because the homeowner had intervened in the suit. Counsel, however, should remain cognizant of such potential conflicts even if the homeowners are not named parties to a case. In a lawsuit involving a typical corporation, the shareholders or directors have no direct interest in the suit. By contrast, if an HOA asserts standing to bring claims on behalf of its members, then each member does have a stake in the outcome. Although the interests of most homeowners are sufficiently well-aligned with those of their HOA to make serious conflicts unlikely, the attorney should still address such potential issues up front, make the homeowners and the HOA aware of any limitations on his or her representation and obtain written consent where the rules so require.⁵⁹

The relationship between the HOA's attorney and the homeowners may also be relevant in determining what communications are protected from discovery. If an attorney-client relationship exists with a homeowner, then any communications to or from the attorney are clearly privileged.⁶⁰ Even if no attorney-client relationship exists, however, some communications with owners may still be protected. For example, an attorney hired by the HOA to evaluate construction defect claims will often send questionnaires to all homeowners asking them to identify any damage or defects that they have seen. The United States Supreme Court considered similar facts in *Upjohn Co. v. United States* and found that questionnaires submitted by corporate counsel to employees of the corporation were shielded by the attorney-client privilege, rejecting a lower court's determination that only communications with upper management were privileged.⁶¹ The Colorado courts have adopted *Upjohn* as controlling precedent, so questionnaires sent to homeowners by the HOA's attorneys are likely privileged.⁶²

Similarly, the attorney's relationship with the homeowners will affect

whether opposing counsel may contact the homeowners directly, or whether such contact would violate the rule against communicating with represented parties.⁶³ *Upjohn* suggests that an opposing lawyer can interview low-level employees of a corporation without the permission of the corporation's attorney.⁶⁴ Likewise, the Colorado Bar Association has published a formal ethics opinion stating that, where an organization is a party, consent is only required to communicate with individuals having authority to bind the organization or speak on its behalf.⁶⁵ These authorities would seem to imply that a builder's attorney could question homeowners about defects in the common elements without consent (since this property is under the control of the HOA's board of directors) but that it would be improper for the builder's to ask homeowners about defects in their own units (since these statements could be deemed admissions of party-opponents). Of course, if the HOA's attorney affirmatively asserts an attorney-client relationship with the homeowners, then the builder's lawyer must obtain consent before discussing any issues with the homeowners.

To avoid confusion over the foregoing issues, the parties may wish to draft a case management order that addresses these topics and states whether, and under what terms, the builder's attorney may contact the homeowners. As a personal anecdote, the author recalls being pulled out of the shower early one morning to answer a telephone call concerning one of his HOA clients. A contractor's attorney disputed whether the individual homeowners were represented parties in a case. This attorney apparently concluded that the best way to raise the issue would be to drive out to the community at 7:00 a.m. and call plaintiff's counsel to announce his intent to go in and interrogate the residents in their homes. While that particular situation quickly devolved into cross-motions for protective orders and sanctions, such incidents serve to

remind attorneys of the importance of anticipating and resolving such disputes in advance.

Conclusion

Recent court decisions have correctly recognized that HOA's have standing under CCIOA to bring claims on behalf of their members for construction defects within individual units. Nonetheless, counsel for associations should remain aware of the legal theories which underlie these holdings and invoke standing judiciously. In some cases, it may not be prudent to assert standing as broadly as the law allows; in others, the legal and logistical hurdles may be negligible compared to the homeowners' individual damages. In either situation, the HOA's attorney should advise both the association and its members of what claims are at issue in any lawsuit and clearly define the scope of the attorney's representation. With these principles in mind, counsel for the HOA can and should take advantage of CCIOA's remedies to help achieve the act's goal of providing streamlined relief for Colorado communities suffering from construction defects.

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End Notes

- ¹ *Miller v. Accelerated Bureau of Collections, Inc.*, 932 P.2d 824, 825 (Colo. App. 1996).
- ² *Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977).
- ³ *Summerhouse Condominium Owners Ass'n v. Majestic Savings & Loan Ass'n*, 615 P.2d 71 (1980).

- ⁴ *Id.* at 74.
- ⁵ *Villa Sierra Condominium Ass'n v. Field Corp.*, 787 P.2d 661 (Colo. App. 1990).
- ⁶ *Id.* at 667, citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) and *Warth v. Seldin*, 422 U.S. 490 (1975).
- ⁷ *Id.*
- ⁸ Colo. H. Jud. Comm., HB91-1292 Colorado Common Interest Ownership Act, 58th Gen. Assembly, transcript of tape no. 91-10 (Feb. 12, 1991) at 72:22-74:4 (on file with author).
- ⁹ C.R.S. § 38-33.3-102(1)(b) (2005).
- ¹⁰ C.R.S. § 38-33.3-302(1)(d).
- ¹¹ Colo. H. Jud. Comm., HB91-1292, transcript of tape no. 91-10 at 2:22-10:16.
- ¹² Lynn S. Jordan, *et al.*, *The Colorado Common Interest Ownership Act*, 21 COLO. LAW., 645, 653 & n. 19 (April 1992).
- ¹³ C.R.S. § 38-33.3-303.5(1)(a) (emphasis added).
- ¹⁴ *Yacht Club II Homeowners Association, Inc. v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo. App. 2003), *aff'd*, 114 P.3d 862 (Colo. 2005).
- ¹⁵ The trial court ruled in *Yacht Club* that "the units are not part of the Common Interest Community." (R. at 1134, copy on file with author.) This conflicted with both the HOA's governing documents and CCIOA, which both define a unit to be "a physical portion of the common interest community." C.R.S. § 38-33.3-103(30). The trial court, like several others, appears to have fallen into the trap of equating the term "Common Elements" with "Common Interest Community."
- ¹⁶ *Yacht Club*, 94 P.3d at 1180.
- ¹⁷ *Heritage Vill. Owners Ass'n v. Golden Heritage Investors Ltd.*, 89 P.3d 513, 515 (Colo. App. 2004).
- ¹⁸ *Id.*, citing C.R.S. § 38-33.3-203(3).
- ¹⁹ *Id.* at 515-16.
- ²⁰ *Trailside Townhome Ass'n, Inc. v. Acierno*, 880 P.2d 1197, 1200-01 (Colo. 1994).
- ²¹ *Id.*
- ²² For a more detailed discussion of this issue prior to *Heritage Village*, see Doug Benson and Jesse Witt, *Do Homeowners Associations receive implied warranty of habitability?*, COLO. REAL EST. J., July 18, 2001, at 18.
- ²³ A single-family community could avail itself of CCIOA's provisions so long as some common elements existed in the development; if there were no common elements, then there would be no "other real estate" necessary to meet the definition of a common interest community. See C.R.S. § 38-33.3-103(8).
- ²⁴ *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 864 & 869 (Colo. 2005).
- ²⁵ *Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 641 (Colo. App. 2003).

- ²⁶ *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1045 (Colo. 1983). For simplicity, this article is limited to a discussion of negligence and breach of the implied warranty of habitability, but an HOA's standing to sue on behalf of its members extends to other claims such as deceptive trade practices and negligent misrepresentation based on the original sale of the homes. See *Heritage Vill.*, 89 P.3d at 515.
- ²⁷ *Cosmopolitan Homes*, 663 P.2d at 1045 & n. 6.
- ²⁸ *Id.* at 1045; see also C.R.S. § 13-20-804 (2005) (limiting construction defect negligence claims but preserving contract and warranty claims).
- ²⁹ *Gillespie v. Plemmons*, 849 P.2d 838, 840 (Colo. App. 1992).
- ³⁰ *Ford v. Summertree Lane Ltd. Liability Co.*, 56 P.3d 1206, 1209 (Colo. App. 2002).
- ³¹ *Summerhouse Condo. Ass'n, Inc. v. Majestic Sav. & Loan Ass'n*, 660 P.2d 16, (Colo. App. 1982) (After first case was dismissed for lack of standing, HOA could file new action based on assignments from homeowners).
- ³² *Compare Gergel v. High View Homes, LLC*, 996 P.2d 233, 235 (Colo. App. 1999) with Caroline E. Mayer, "No Suits Allowed / Increasingly, Arbitration Is the Only Recourse," WASH. POST, July 14, 2002, at H1; see also Michelle M. Merz, "Challenging Arbitration Awards: Tough but Not Insurmountable Odds," TRIAL TALK, Aug./Sept. 2004, at 9.
- ³³ *Gergel*, 996 P.2d at 237 (Colo. App. 1999); *National Camera, Inc. v. Love*, 644 P.2d 94, 95 (Colo. App. 1982).
- ³⁴ *Compare Heritage Vill.*, 89 P.3d at 515, with *Summerhouse Condo. Owners Ass'n v. Majestic Sav. & Loan Ass'n*, 44 Colo. App. 495, 497, 615 P.2d 71, 73 (1980).
- ³⁵ C.R.S. § 38-33.3-104, -114.
- ³⁶ *Marina Cove Condo. Owners Ass'n v. Isabella Estates*, 34 P.3d 870, 873 (Wash. App. 2001).
- ³⁷ *Heritage Vill.*, 89 P.3d at 515.
- ³⁸ C.R.S. § 38-33.3-302(1)(d).
- ³⁹ *Eagle Ridge v. Metropolitan Builders*, 98 P.3d 915, 918 (Colo. App. 2004) *cert. denied as improvidently granted*, Sept. 30, 2005.
- ⁴⁰ *Id.* at 919.
- ⁴¹ *Id.*
- ⁴² *Ferla v. Infinity Dev. Assocs., LLC*, 107 P.3d 1006, 1009 (Colo. App. 2004); but see *Lambdin v. Dist. Ct.*, 903 P.2d 1126, 1129 (Colo. 1995) (order compelling arbitration may be reviewed in original proceeding).
- ⁴³ Under the doctrine of *res judicata*, final settlement of a given claim is dispositive in any subsequent litigation involving either the same parties or those in privity with them. *Foley Custom Homes, Inc. v. Flater*, 888 P.2d 363, 364 (Colo. App. 1994). Although members of an HOA are not typically considered to be in privity with their HOA for such purposes, see

id., privity does exist where there is a substantial identity of interests between a party and a non-party such that the non-party is “virtually represented” in the litigation. *Cruz v. Benine*, 984 P.2d 1173, 1176-77 (Colo. 1999). If an HOA brings suit on behalf of its members under CCIOA, the members would be virtually represented in the suit, and res judicata would bar further litigation over the same defects.

- ⁴⁴ *Cf. Martinez v. Colorado Dept. of Human Services*, 97 P.3d 152, 159-61 (Colo. App. 2003).
- ⁴⁵ *Rywalt v. Writer Corp.*, 34 Colo. App. 334, 337, 526 P.2d 316, 317 (1974).
- ⁴⁶ C.R.S. §§ 38-33.3-303(2)(b), -311(1).
- ⁴⁷ C.R.C.P. 23(c)(2).
- ⁴⁸ C.R.S. § 38-33.3-303.5.
- ⁴⁹ C.R.S. § 13-20-803.5 (2005).
- ⁵⁰ *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991).
- ⁵¹ COLO. RULES OF PROF’L CONDUCT R. 1.7(b)(2).
- ⁵² COLO. RULES OF PROF’L CONDUCT R. 1.13(e).
- ⁵³ *Id.*
- ⁵⁴ See COLO. RULES OF PROF’L CONDUCT R. 1.7(c) (“A client’s consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation.”).
- ⁵⁵ COLO. RULES OF PROF’L CONDUCT R. 1.7 cmt.
- ⁵⁶ COLO. RULES OF PROF’L CONDUCT R. 2.2 & cmt.
- ⁵⁷ *Id.*
- ⁵⁸ COLO. RULES OF PROF’L CONDUCT R. 1.7 cmt.
- ⁵⁹ See COLO. RULES OF PROF’L CONDUCT R. 5.4 cmt.
- ⁶⁰ C.R.S. § 13-90-107(1)(b) (2005).
- ⁶¹ *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).
- ⁶² See *Alliance Constr. Solutions, Inc. v. Department of Corrections*, 54 P.3d 861, 865 (Colo. 2002), citing *National Farmers Union Prop. & Cas. Co. v. Dist. Ct.*, 718 P.2d 1044, 1049 (Colo. 1986); but cf. *Morisky v. Public Serv. Electric & Gas Co.*, 191 F.R.D. 419, 423 (D. N.J. 2000) (holding that Upjohn did not protect questionnaires sent by attorneys to putative class members).
- ⁶³ COLO. RULES OF PROF’L CONDUCT R. 4.2.
- ⁶⁴ See *Upjohn*, 449 U.S. at 396.
- ⁶⁵ Colo. Bar Ass’n, Ethics Comm., Rev’d Formal Ethics Op. 69 (1987); see also *Johnson v. Cadillac Plastic Group, Inc.*