The Homeowner Protection Act Charitable Organization Exemption

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This article examines Colorado's Homeowner Protection Act's bona fide charitable organization exemption and when it may apply.

Colorado's Homeowner Protection Act (HPA) voids certain waivers of or limitations on residential property owners' rights, remedies, and damages. By its terms, the HPA does not apply to sales or donations of property or services by a bona fide charitable organization (BFCO). No court has construed this exemption.

This article examines who qualifies for the HPA's BFCO exemption (the exemption) and discusses how the exemption might or might not apply to the property or services vendor or donor that participates in the property's design or construction. Finally, it analyzes how Colorado's new-home implied warranties might apply to homes obtained from BFCOs subject to the exemption.

The Homeowner Protection Act

The HPA is part of Colorado's Construction Defect Action Reform Act (CDARA)[1] and applies *only* to construction defect claims asserted against construction professionals.[2] It provides, in pertinent part:

> (7)(a) In order to preserve Colorado residential property owners' legal rights and remedies, in any civil action or arbitration proceeding described in section 13-20-802.5(1), *any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the "Construction Defect Action Reform Act"*, this part 8, or provided by the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S., as described in this section, or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitation or repose *are void as against public policy*.
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> . . . .
>
> (c) *This subsection (7)* applies only to the legal rights, remedies, or damages of claimants asserting claims arising out of residential property and *shall not apply to sales or donations of property or services by a bona fide charitable organization that is in compliance with the registration and reporting requirements of article 16 of title 6, C.R.S.*[3]

Framing the Issue

A nonprofit charitable organization that sells or donates a home or home construction services may argue it is a BFCO and therefore the HPA does not apply to claims made against it for construction defects in the home. In some instances, the charitable organization may sell or construct a home as part of a government "affordable housing" subsidy program (subsidized housing).[4]

While the exemption, CRS § 13-20-806(7)(c), consists of a single sentence, it requires several elements to apply. No Colorado court has interpreted or applied the exemption in a publicly available decision. Therefore, questions exist regarding how courts will construe these requirements and what impact, if any, a successful or unsuccessful exemption claim may have on other claims or liabilities, including:

1. What entities may rely on the exemption?
2. What is a "bona fide" charitable organization?
3. What is required to prove compliance with the relevant statutory registration and reporting requirements?
4. What criminal or civil liabilities may arise from an unsuccessful or bogus exemption claim?
5. How might the exemption apply to subsidized housing?
6. Do Colorado's implied warranties apply when the vendor is a BFCO?
7. Do the exemption's legislative history or decisions construing other parts of CDARA or the HPA provide any insights into the answers to these questions?

Qualifying for the Exemption

As explained in more detail below, to qualify for the exemption, the organization must be (1) a "construction professional," (2) that is a "bona fide charitable organization," (3) "in compliance with the registration and reporting requirements of" Article 16 of Title 6 of the Colorado Revised Statutes, the Colorado Charitable Solicitations Act (CCSA).

Step 1: Qualifying as a "Construction Professional"

As a threshold matter, the HPA applies only to design and construction defect claims asserted in an "action" against a "construction professional" as those terms are defined by CDARA.[5] "'Construction professional' means an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property."[6] Therefore, a person who does not meet this definition, such as a transferor of residential real property who only sells or donates the property to another, is not subject to CDARA or the HPA, and the exemption is irrelevant. However, a person who sells or donates residential property and who also developed or built the property, or supervised, directed, employed, or joined in the efforts of others who designed or constructed the property, may qualify as a construction professional subject to CDARA and the HPA.[7]

CDARA's "grand compromise"[8] of residential property stakeholder rights and remedies does not apply to disputes between a non-construction professional vendor and a home purchaser. Instead, common law controls such disputes.[9] Under common law, to avoid liability, a new-home vendor who is not a construction professional must effectively disclaim any contract, warranty, tort, statutory, or other liability

for damages and establish that it obtained from the purchaser a knowing and voluntary waiver of the same.[10] In challenging enforcement of such a purportedly valid disclaimer or release, a homeowner may argue that it is void under Colorado's public policy or otherwise unenforceable.[11] For example, Colorado generally does not recognize the validity of a release of claims founded on willful and wanton negligence.[12]

Step 2: Qualifying as a BFCO

The HPA does not define "bona fide charitable organization." At first blush, it may be hard to conceive of many situations where a construction professional would qualify for the exemption because few builder-vendors, which are typically profit-seeking ventures, organize themselves as charitable organizations.[13]

Charitable organization. The CCSA defines a "charitable organization" as one that "is or holds [itself] out to be established for any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or other eleemosynary purpose," or "who in any manner employs a charitable appeal or an appeal which suggests that there is a charitable purpose as the basis for any solicitation."[14] A "charitable purpose" includes "any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or other eleemosynary purpose . . . ."[15]

Assuming an entity is a construction professional (a condition precedent to the HPA's application), the nature of the entity's sales, donation, or services activities and the sales, donation, or services transaction at issue will bear on whether the entity meets the CCSA's definition of a "charitable organization." The construction professional is a charitable organization if it "holds [it]self out" in its advertising, marketing, sales solicitations, representations or otherwise as being "established" for one or more of the qualifying enumerated purposes of a charitable organization.[16] The construction professional also qualifies as a charitable organization if it "employs a charitable appeal" or an appeal that "suggests" a charitable purpose underlying its "solicitation."[17] If a residential property or services vendor or donor engaged in the property's design or construction fails to satisfy one of these tests, then it is not a charitable organization, and the exemption does not apply.[18]

"Bona fide" charitable organization. Some may seek to take advantage of the exemption by creatively structuring their sales, donation, or services activities to ostensibly serve a charitable purpose, possibly undermining CDARA's and the HPA's benevolent intent at the expense of innocent homeowners. Therefore, a construction professional must be a *bona fide* charitable organization to qualify for the exemption. Presumably, the legislature purposefully qualified the term "charitable organization" with the words "bona fide."[19] However, neither the HPA nor the CCSA defines "bona fide" or "bona fide charitable organization."[20]

"Bona fide" generally means acting "in good faith; without fraud or deceit" or "sincere; genuine."[21] Whether a charitable organization is subject to the CCSA registration and reporting requirements, addressed below in step 3, may inform whether the organization is "bona fide" for purposes of the exemption. Moreover, the more a charitable organization's marketing, sales, or donor activities are distanced from its purported charitable purpose, the less the organization may look like a BFCO and more like a part of a residential developer's effort to obtain subsidized housing funds while improperly seeking to avoid application of the HPA.

Step 3: The CCSA's Registration and Reporting Requirements

To qualify for the exemption, a construction professional that is a BFCO must prove that it has complied with the CCSA's registration and reporting requirements.[22] The CCSA regulates charitable solicitations.[23] It was adopted "to protect the public's interest in making informed choices as to which charitable causes should be supported" and "to help the secretary of state investigate allegations of wrongdoing in charities, without having a chilling effect on donors . . . ."[24]

The CCSA's registration and reporting requirements apply to an organization that "intends to solicit *contributions* in [Colorado] by any means or to have *contributions* solicited in [Colorado] on its behalf by any other person or entity or that participates in a charitable sales promotion . . . ."[25] Thus, the CCSA applies when an organization seeks or solicits a "contribution." Whether the contribution itself must have a nexus to the charitable organization's property or services sales or donation activities is an unanswered question. Moreover, as discussed more fully below, since the HPA requires the seller or donor to be "in compliance with the registration and reporting requirements" of the CCSA,[26] such compliance may be mandatory to qualify for the exemption, without regard to whether the organization intends to solicit or has solicited any contributions.

"Contribution" under the CCSA. The CCSA defines "contribution" as a "grant, promise, or pledge of money, credit, property, financial assistance, *or any other thing of value in response to a solicitation*."[27] The CCSA defines "solicitation" to mean "*to request*, or the request for, directly or indirectly, *money*, credit, property, financial assistance, *or any other thing of value* on the plea or *representation that such money*, credit, property, financial assistance, *or other thing of value*, or any portion thereof, *will be used for a charitable purpose or will benefit a charitable organization*."[28]

A construction professional qualifying as a charitable organization may be ostensibly subject to the CCSA's filing and registration requirements if it intended to solicit contributions in the form of governmental subsidies for, or revenues from, its sale or donation of property or services, and such proceeds qualify as a "contribution." If so, the CCSA registration and reporting requirements must be met.

Put another way, if a construction professional *did not intend* to "solicit contributions . . . or have contributions solicited" in Colorado, then—by definition—it may not be not subject to the CCSA registration and reporting requirements.[29] However, because the exemption expressly applies to residential property or services sales or donations by a construction professional BFCO "*in compliance with*" the CCSA's registration and reporting requirements, homeowners may argue the exemption only

applies if the BFCO is *subject to* the registration and reporting requirements.

Conversely, construction professionals may argue that they can establish compliance with the CCSA by showing that no registration or reporting requirements apply to them. In other words, if the CCSA does not require that they take any affirmative act, do they then—by definition—satisfy the HPA's compliance requirement? As discussed above, there may be an inherent conflict between an organization's position that it is not subject to the CCSA's registration and reporting requirements and the simultaneous claim that it is a BFCO *in compliance* with those requirements as required by the HPA. Still, because the HPA requires the seller or donor to be "in compliance with the registration and reporting requirements" of the CCSA,[30] such registration and reporting may be mandatory regardless of whether the organization intends to solicit or has solicited any contributions.

Summary of CCSA registration and reporting requirements. To the extent a BFCO construction professional must affirmatively satisfy the CCSA's registration and reporting requirements, it is an open question whether substantial or strict compliance with these requirements is necessary.[31] The CCSA requires:

- paying the required filing fee,[32] and
- filing a registration statement with the secretary of state (SOS) on a prescribed form, signed and affirmed by an officer under penalty of perjury, describing:
  - the purpose of the organization,
  - its office location,
  - its executive officers and directors,
  - the person with custody of its financial records,
  - the names and addresses of any paid solicitors,[33] professional fundraising consultants, and commercial coventurers who are acting or have agreed to act on behalf of the charitable organization, and
  - other details.[34]

The organization also must file annually a copy of a prescribed financial report,[35] which may include the charitable organization's federal Form 990.[36] After a charitable organization's initial filings and registration with the SOS, the organization's paid solicitors must maintain specified records for at least two years, including records of employees/agents, financial accounts, contracts, donations, receipts, disbursements, expenditures, contributions and contributor identities, marketing materials, disclosures, sales pitches, and solicitations.[37] The organization must report any changes that materially affect the charitable organization's identity or business to the SOS within 30 days after the change.[38] If the charitable organization "withdraws its registration or allows its registration to expire," it must file a final financial report, in a form prescribed by the SOS, that includes information through the last date on which the organization solicited contributions in Colorado.[39]

Ancillary secretary of state responsibilities under the CCSA. The SOS bears certain record-keeping and enforcement responsibilities under the CCSA. The SOS's record-keeping duty and ability to deny entities charitable organization status may become relevant during litigation involving the exemption, perhaps by establishing a presumption or prima facie evidence of the organization's BFCO status or lack thereof. Colorado's SOS is charged with examining each CCSA registration to determine if the CCSA's registration requirements are met and, if not, with notifying the charitable organization of any deficiencies.[40] If met, the registration is deemed approved as filed and the SOS must issue a registration number.[41] Most information filed under the CCSA is public record.[42]

Potential Civil and Criminal Liabilities

A construction professional entity that incorrectly or improperly claims the exemption potentially exposes itself to civil and criminal liabilities, as outlined below.[43]

Felony Prosecution

Colorado's legislature has created an extensive laundry list of "charitable fraud" felony offenses related to various violations of Article 6 and other specified misconduct.[44]

Colorado Consumer Protection Act

Any CCSA violation is deemed a deceptive trade practice under Colorado's Consumer Protection Act (CPA) and is therefore subject to the CPA's remedies and penalties.[45]

Ancillary Tax Liability Issues

A BFCO may qualify for various tax benefits. In the HPA context, this could include tax exemptions for construction and building material sales for buildings owned and used by charitable organizations for their regular charitable functions.[46] Similarly, a contractor's or subcontractor's storage, use, or consumption of construction and building materials for buildings owned and used by charitable organizations for their regular charitable functions and activities may also be tax exempt.[47] Conversely, persons or entities that improperly invoke the exemption and claim certain tax benefits expose themselves to adverse tax consequences, including criminal penalties, and liability for payment of unpaid taxes, penalties, and interest.

Applying the Exemption to Subsidized Housing Sales

Consider applying the exemption to the following hypothetical circumstances:

Scenario 1. To incentivize the construction or sale of new homes (single- or multi-family), a government subdivision or entity directly or indirectly subsidizes the cost of a new home's construction or purchase by offering down payment assistance, low-interest construction loans, tax credits, or other enticements, perhaps combined with land covenants or regulations limiting the offering price to and identity of initial and subsequent purchasers.

In this scenario, (1) a charitable land trust contracts with a for-profit homebuilder to obtain plans and permits and design and construct homes; (2) the land trust agrees to apply for and obtain subsidized housing funds to be used for construction and to market and sell the homes to qualifying buyers under the subsidization program; and (3) the land trust markets the homes and, upon finding a qualifying and willing homebuyer, buys the home from the homebuilder and then sells the *structure* to the homebuyer, while leasing the *underlying land* to the homebuyer.[48]

Within this arrangement, the homebuilder might agree to ensure that the homebuyers

receive warranties that meet FHA requirements and to act as the initial declarant for any homeowners association (HOA). The land trust might agree to certify the homebuyer's income and, perhaps, guarantee the home's purchase at the homebuilder's cost plus 10% if a homebuyer drops out of the transaction. Last, the homes may be made subject to deed or covenant transfer restrictions on transferee income, asset, or employment qualifications.

Scenario 2. A for-profit developer creates a subsidiary or affiliate charitable organization to act as the builder-vendor of newly constructed homes. The charitable organization may perform, contract out, or otherwise arrange for some or all of the construction work. The builder-vendor charitable organization then identifies subsidized housing funds to be secured in connection with the construction and/or sale of the new homes to qualifying buyers.

As discussed below, scenario 1 may allow the land trust to invoke the exemption if it was formed for a charitable purpose as a BFCO (but only if it *also* qualifies as a construction professional), while scenario 2 may not fall within the exemption's scope if the subsidiary's claimed BFCO status invites scrutiny because of its intertwined relationship with a for-profit development entity, and an ensuing investigation establishes that the subsidiary is not a qualifying BFCO. However, scenario 1, and scenario 2 if the subsidiary qualifies as a BCFO, raises the question of whether Colorado would impose its new-home implied warranties on the for-profit homebuilder/developer despite there being no privity of contract between it and the first homebuyer, an issue discussed more fully below.[49]

Land Trusts as Qualifying BFCOs

When deciding whether a land trust qualifies as a BFCO for purposes of the exemption, courts and practitioners should analyze why the land trust was formed (its purpose), and whether it was formed primarily to avoid the HPA's anti-waiver provisions[50] and not for a charitable purpose. If a significant "charitable purpose" is served by the land trust, then courts may view the land trust and the sales or construction services transaction at issue favorably and recognize and enforce the exemption. If a court finds that the land trust was formed to avoid the HPA's anti-waiver provisions and not primarily for a charitable purpose, the claimed exemption may be declared void on public policy grounds or because the organization is not a "bona fide" charitable organization under the HPA.

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Potential Nullification of Colorado's New-Home Implied Warranties

Under either scenario 1 or 2, a residential property vendor that is also a construction professional may try to invoke the exemption, assuming it qualifies as a BFCO and all the necessary CCSA and other pre-conditions have been met. A significant incentive exists for obtaining this result: potentially avoiding the implied warranty liability that is generally imposed on builder-vendors of new homes, including those who hire or participate with others to construct new homes. But, as discussed below, additional hurdles exist to avoiding such liability even if the exemption applies. And, although a BFCO vendor may be able to effectively protect itself from implied warranty liability, such liability might still be imposed on others involved in the home's construction.

A BFCO that qualifies as a builder-vendor will argue that, because the exemption applies separately to sales of either "property or services," it logically extends to a BFCO's sale of home construction services as embodied by a home construction contract between it and a homebuyer, and not only to a contract for the sale of the home itself. BFCOs may argue further that since they are not subject to the HPA unless involved in a home's design or construction activities, the exemption for "services" by implication extends to their implied warranty or other liability when they are involved in arranging for these activities as a builder-vendor despite the statute failing to state this expressly and despite the fact they contracted for no services with the homeowner but, instead, simply sold the homeowner a new home.

Homeowners may counter that the exemption is limited to residential property *vendors* (sellers) only in that capacity because it does not expressly state that it extends to their implied warranty liability as *builder-vendors*, and that a sale of a home is not equivalent to a sale of construction services. Homeowners may argue further that even if, hypothetically, the exemption applies to a BFCO that qualifies as a builder-vendor, then the builder-vendor's and homebuyer's rights and obligations still would be governed by CDARA's other provisions, and that imposition of a binding and

effective disclaimer and waiver of Colorado's new-home implied warranties nevertheless faces obstacles under the common law, as discussed below. There is support for the conclusion that the HPA's anti-waiver provisions are simply a "codification of" common law "policy principles" voiding some "contractual liability waiver clauses as against public policy," and the authors have located no published Colorado appellate case enforcing such a waiver of implied warranty liability; several states have expressly voided such waivers on public policy grounds.[51]

Nature of Colorado's New-Home Implied Warranties

Typically, Colorado's new-home implied warranties of habitability (including suitability for the ordinary purposes for which the home might reasonably be used); workmanlike construction; and building code compliance are imposed on builder-vendors of newly constructed homes.[52] Builder-vendors who construct and sell new homes but are not physically involved in the construction, such as developers who hire others to do the work, still owe these implied warranties to the homebuyer.[53] "[F]or purposes of the implied warranty of workmanlike construction, a 'builder-vendor' is any seller who 'either built, or participated in the building of, or supervised the building of, the property.'"[54]

Such implied warranty liability typically requires privity of contract between the builder-vendor and the initial homebuyer. By creating or working with a charitable organization to serve as the home's vendor, a homebuilder may argue that no implied warranties arose on its part from the new home's sale because no contractual privity exists between the homebuilder and the first homebuyer-occupant. However, as discussed below, Colorado appellate courts have not always required a contract to exist between the homebuilder and the first homeowner-occupant to impose implied warranty liability on the homebuilder.[55]

Persistence of Implied Warranty Liability in the Absence of Contractual Privity

Because implied warranties are intended to protect ordinary first purchaser owner-occupants,[56] they may sometimes arise even in the absence of contractual privity between a new-home builder and the home's first owner-occupant. When there is an intermediate owner who the builder knows or should know will not occupy the home, implied warranties were held by the Colorado Court of Appeals to extend to the first owner-occupant.[57] The Colorado Court of Appeals has also held that such implied warranty liability may run for the benefit of an HOA and its individual owners even if no residential property sale occurred between the homebuilder and individual owners.[58] In an unusual case, the Colorado Supreme Court held that the implied warranty survived where the original builder sold the home, received complaints of defects from the first purchaser, and then repurchased the home, attempted repairs, and resold it to the plaintiffs, secondary purchasers of the home.[59] These cases suggest that Colorado courts may consider extending implied warranty liability to those performing or directing a home's construction process other than the BFCO that sells or donates the home.

Balancing the Public Policies Underlying Implied Warranties and the Exemption

Purchasers of government subsidized housing may be viewed as among the most financially vulnerable home purchasers, in greatest need of the HPA's protections. In situations similar to scenario 1, some homeowners may argue that if the land trust serves primarily as a "conduit" for the for-profit builder-vendor to pass title to the residential structure—but not to the underlying land—to the initial homeowner, courts should view this as an artifice intended to avoid the HPA's anti-waiver provisions, or as a basis to deny the land trust the status of "bona fide" charitable organization *if* it participated in the home's design or construction. A BFCO vendor may counter that reducing a BFCO's construction defect liability exposure as a residential builder-vendor may help reduce construction costs by potentially lowering insurance premiums, thereby improving the availability of subsidized housing. Homebuyers may respond that lowering construction defect liability exposures may incentivize shoddy construction, heaping unexpected repair costs on middle- or low-income homeowners and their successors who are least able to bear such expenses. Colorado courts have not addressed these conflicting arguments.

Alternatively, if a residential BFCO property vendor (such as a nonprofit land trust) properly qualifies for the exemption, homebuyers may argue that implied warranty liability should be imposed on a for-profit homebuilder/general contractor where title to the structure passes from the for-profit homebuilder/general contractor to and through the BFCO and then onto the ultimate initial homeowner and resident.[60] Whether this argument would prevail is an unanswered question in Colorado.

HPA's Purpose and Intent: Legislative History

In this age of textualism, legislative intent has become less important when construing laws.[61] But Colorado continues to recognize that courts may "consider the statute as a whole, construing it 'to give consistent, harmonious, and sensible effect to all its parts,'" and in the event of statutory ambiguity or a conflict between statutory provisions, express statements of a statutory scheme's purpose remain highly relevant.[62] The HPA is an integral part of CDARA, and Colorado's legislature has declared that one of CDARA's primary purposes is "preserving adequate rights and remedies" for residential property owners for defective home construction.[63] While CDARA typically does not apply to an entity that only sells or donates property, the exemption applies more broadly to "sales or donations of property *or services*."[64] As noted above, this language may be offered to support an argument that the exemption protects BFCOs from liability for the "design and construction" of residential property should they bear such liability as builder-vendors or otherwise,[65] even if they did not sell or donate any construction "services" themselves, as part of a legislative "belt and suspenders" approach to limiting BFCOs' construction defect liability.

Delving deeper into the exemption's legislative history sheds little additional light on how the HPA should be interpreted and applied. The

only substantive reference in the legislative record to the exemption the authors have found is the following statement by the HPA's primary co-sponsor, Rep. Pommer, in 2007:

> [The HPA] only affects residential construction and it doesn't apply to sales or donations by charitable groups. That's because some of the charitable groups said that they're giving away a home or selling it for reduced value, they don't want to be affected by this. I don't see why not, but it was a concession that we gave up.[66]

Rep. Pommer's testimony suggests that the exemption was a last-minute concession that may not have been thoroughly considered or debated, and therefore it should be construed in a manner consistent with CDARA's over-arching legislative purposes, described above. Moreover, it is unknown whether the legislation was drafted with subsidized housing facilitated by land trusts in mind.

CRS § 7-123-105 and Charitable Immunity

An enduring curiosity concerning the exemption is its interaction with CRS § 7-123-105. Section 105 provides, in relevant part, that

> any civil action . . . may be brought against any nonprofit corporation, and the assets of any nonprofit corporation that would, but for [Colorado's Revised Nonprofit Corporation Act], be immune from levy and execution on any judgment shall nonetheless be subject to levy and execution to the extent such nonprofit corporation would be reimbursed by proceeds of liability insurance carried by it were judgment levied and executed against its assets.

Construing this law, the Colorado Court of Appeals held in *Wycoff v. Grace Community Church of the Assemblies of God* that the statute does two things: First, "it removes any possible immunity from suit by providing that '[a]ny other provision of law to the contrary notwithstanding, any civil action permitted under the law of this state may be brought against any nonprofit corporation.'"[67] Second, "it allows for levy and execution against otherwise immune assets of nonprofit entities 'to the extent' the entity would be reimbursed by liability insurance."[68] The court concluded that under the statute's plain language and prior common law, the existence and amount of liability insurance offers no basis for limiting a judgment against a nonprofit or charitable defendant, and such insurance is pertinent only if a plaintiff seeks to levy and execute on a judgment.[69]

Court Construction of the HPA

Only a few published opinions have construed the HPA, and none have dealt with the exemption. Rather, they have addressed what sort of property qualifies as "residential property" subject to the HPA and what persons may invoke the HPA's anti-waiver provisions.[70]

Conclusion

BFCOs who sell or donate homes but who do not qualify as construction professionals typically will not be subject to CDARA. However, they may still be exposed to liability under the common law or statute to, for example, misrepresentation or concealment claims, unless that liability is effectively disclaimed and waived.

BFCOs who qualify as construction professionals will be subject to CDARA but may be exempt from the HPA. They remain exposed to various common law liabilities under CDARA, including possibly for breach of implied warranty if they qualify as a home's builder-vendor, unless they prove that the homebuyer knowingly and voluntarily released all claims and that such release/disclaimer does not violate Colorado public policy.

The issues discussed in this article will most likely arise in the subsidized housing context. It remains an undecided question whether courts will impose Colorado's common law new-home implied warranties on non-vendor homebuilders/general contractors in the context of subsidized housing sales or sales made through subsidiary charitable entities. CL


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NOTES

1. CRS §§ 13-20-801 et seq.

2. CRS § 13-20-802.5(1) (defining an "action" brought against a "construction professional" under CDARA as involving a "claim for damages . . . caused by a defect in the design or construction of an improvement to real property"); CRS § 802.5(4) (defining "construction professional").

3. CRS § 13-20-806(7) (emphasis added).

4. Subsidized (socialized) housing development and sales may take many forms including: (1) the Low Income Housing Tax Credit program, administered through the Colorado Housing Financing Authority; (2) municipal development homebuyer income-qualifying set-asides, typically accompanied by deed restrictions relating to qualifying owners and shared appreciation; (3) public-private partnerships involving federal tax credits or funding from Colorado Proposition 123, the state affordable housing fund; and (4) funding from land use trusts, such as the Elevation Land Trust, one of the largest land use trusts in Colorado.

5. CRS § 13-20-806(7) (HPA's anti-waiver provisions apply only to "actions" as defined in § 13-20-802.5(1)). *See also* CRS § 13-20-802.5(1) (defining "civil action or arbitration" as proceedings involving real property improvement construction or design defect claims "brought against a construction professional").

6. CRS § 13-20-802.5(4). For brevity, this article may refer to these various activities together as "design or construction." CRS § 13-20-802.5(4) also provides that if the real property improvement is to "a commercial property," then "construction professional" includes "any prior owner" of the property. However, the exemption only applies to claims "arising out of residential property." CRS § 13-20-806(7)(c).

7. Developers who sell new homes but hire others to do the construction owe implied warranties to the initial home purchaser-occupants even if they were not physically involved in the homes' construction. *See Mazurek v. Nielsen*, 599 P.2d 269, 271 (Colo.App. 1979) (approving jury instruction

that seller is builder-vendor where they "either built, or participated in the building of, or supervised the building of, the property"; "seller need not be involved in the physical acts of construction before the implied warranty of habitability attaches"). *Accord Davies v. Bradley*, 676 P.2d 1242, 1245 (Colo.App. 1983), *abrogated on other grounds by Mortg. Fin., Inc. v. Podleski*, 742 P.2d 900, 904 (Colo. 1987); *Erickson v. Oberlohr*, 749 P.2d 996, 998 (Colo.App. 1987). Some sellers may bear construction defect liability if they qualify as a codeveloper or joint venturer. *See* CRS § 30-28-101(9) (defining "developer"); CRS § 12-10-501(2) (defining "developer"); CJI-Civ. 7:4 (2024) (defining "joint venture"); 15 USCS § 1701(5) (defining "developer" for purposes of the Interstate Land Sales Full Disclosure Act).

8. *See* Benson, ed., *Practitioner's Guide to Colorado Construction Law* §§ 14.2.3 at 14-29, n.266; 14.2.4 at 14-41 & n.379; 14.2.7 at 14-62 & n.622; 14.5.1.j at 14-153, n.1490 (CBA-CLE 2024) (discussing CDARA's origins and characterizing statutory scheme as a "grand compromise" among the various stakeholders involved in new home construction and sales); Sandgrund and Sullan, "The Construction Defect Action Reform Act of 2003," 32 *Colo. Law.* 89, 89, 100 (July 2003) (CDARA was the "result of a historic compromise involving homeowners, developers, and insurance companies" and "represents a grand compromise of the long-standing rights and remedies of property owners and construction professionals").

9. Common law similarly governs claims for material misrepresentation and failure to disclose known defects (the most prevalent claims buyers assert against home sellers) and potential defenses, such as the economic waste doctrine. *See generally* Benson, *supra* note 8, § 14.5.2 ("Misrepresentation and Concealment," discussing these types of claims). *See also Cohen v. Vivian*, 349 P.2d 366, 367 (Colo. 1960) (holding failure to disclose a known latent defect amounts to concealment, exposing the seller to a fraud claim).

10. *See generally* Benson, *supra* note 8, §§ 14.4.3.g, 14-108–109 and nn.1010–42 (collecting cases and bases for voiding such disclaimers).

11. *Id. See also Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 2017 COA 31, ¶ 53 (noting that HPA's anti-waiver provisions are simply a "codification of the policy principles" voiding "contractual liability waiver clauses as against public policy" (Davidson, J., concurring)).

12. *US Fire Ins. Co. v. Sonitrol Mgmt.*, 192 P.3d 543, 548 (Colo.App. 2008) (exculpatory clause is against public policy if it enforces release from willful and wanton conduct).

13. An organization may elect the status of a "public benefit corporation" under Colorado's Public Benefit Corporation Act (PBCA), CRS §§ 7-101-501 et seq. *See generally* Lidstone, "The Long and Winding Road to Public Benefit Corporations in Colorado," 43 *Colo. Law.* 39 (Jan. 2014). Under some circumstances, a public benefit corporation's objective may qualify as a "charitable purpose" as used in the PBCA. *Id.* at 48. To the authors' knowledge, a BFCO under the CCSA has little need to simultaneously qualify as a public benefit corporation.

14. CRS § 6-16-103(1). In the property tax context, CRS § 39-3-101 declares that "only the judiciary may make a final decision as to whether or not any given property is used for charitable purposes within the meaning of the Colorado constitution," and in offering guidelines for making day-to-day decisions and attempting to assist in avoiding litigation, declares that certain use of property is "for charitable purposes [that] benefit the people of Colorado and lessen the burdens of government by performing services that government would otherwise be required to perform"; is presumed to be used or owned solely and exclusively for strictly charitable purposes, not for private gain or profit; and is exempt from the levy and collection of property tax.

15. CRS § 6-16-103(2).

16. *See* CRS § 6-16-103(1) (defining "charitable organization"); CRS § 6-16-103(8) (defining "person" for purposes of the CCSA as "an individual, a corporation, an association, a partnership, a trust, a foundation, or any other entity however organized or any group of individuals associated in fact but not a legal entity"). Based on this definition, it does not appear that a natural person would qualify as a charitable organization.

17. CRS § 6-16-103(1).

18. Even if a residential property vendor meets the conditions for the exemption, this fact should not exempt non-vendor developers, contractors, subcontractors, design professionals, or others from the HPA because, presumably, they do not similarly qualify as charitable organizations and otherwise meet the CCSA's requirements.

19. *See Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) ("when examining a statute's language, we give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language'") (internal citation omitted).

20. Three CCSA subsections use the term "bona fide" in defining the term "contribution," yet none define "bona fide": CRS § 6-16-103(5) (referring to "bona fide fees, dues, or assessments paid by members of a charitable organization"); CRS § 6-16-103(7)(c) (referring to (but not defining) "a bona fide volunteer"); and CRS § 6-16-103(9.3) (referring to a "professional fundraising consultant" as "any

person, other than a bona fide officer or regular employee of a charitable organization . . . ."). *Cf.* CRS § 24-21-607(1) (limiting the issuance of bingo-raffle licenses to "any bona fide . . . charitable . . . organization").

21. *Black's Law Dictionary* (12th ed. Thomson West 2024).

22. CRS § 13-20-806(7)(c).

23. The CCSA's origins can be traced, in part, to "A Model Act Concerning the Solicitation of Funds for Charitable Purposes." *See generally* Charitable Solicitation Model Act (Nat'l Ass'n of Atty's Gen. Comm. on Trs. and Solicitations, Nat'l Ass'n of State Charity Offs., Priv. Sector Advisory Grp. 1986), https://www.501c3.org/501c3-services/charitable-solicitations-registration-2/charitable-solicitation-model-act.

24. CRS § 6-16-102.

25. CRS § 6-16-104(1) (emphasis added).

26. CRS § 13-20-806(7)(c).

27. CRS § 6-16-103(5) (emphasis added). Contributions do not include "assessments paid by members of a charitable organization if membership is not conferred primarily as consideration for making a contribution in response to a solicitation." *Id.*

28. CRS § 6-16-103(10) (emphasis added). Under the CCSA, the terms "solicit" or "solicitation" include, but are not limited to, any of the following: (a) any oral or written request; or (b) any sale or attempted sale of or any offer to sell any "tangible item" in which any appeal is made for any charitable organization or purpose. *See* CRS § 6-16-103(10). Solicitations are deemed to have occurred whether or not the person making the "solicitation" receives any contribution. *Id.*

29. CRS § 6-16-104(1) (defining organizations subject to CCSA requirements). As noted above, if the charitable organization is not also a construction professional, the HPA does not apply to its sale or donation of residential property.

30. CRS § 13-20-806(7)(c).

31. Generally, "[w]hether a statute requires strict or substantial compliance is a question of statutory construction . . . ." *Colorow Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 10. "'Strict compliance leaves no margin for error and even technical deficiencies may be unacceptable. Substantial compliance is less than absolute, but still requires a significant level of conformity.'" *Id.* at ¶ 15 (citation omitted). In interpreting statutes, Colorado gives "effect to the intent of the General Assembly," and to determine that intent, the analysis begins with a statute's plain language, applying the "text as written, reading words in context, and according them their ordinary meanings." *Id.* at ¶ 11 (citations omitted). While the word "shall" appeared 17 times in the statute at issue, and "the word 'shall' connotes a mandate," suggesting "strict compliance is the proper standard," our Supreme Court in *Fischer* interpreted the "statute to require only substantial compliance if doing so better furthers the statute's purpose." *Id.* at ¶ 20.

32. CRS § 6-16-104.

33. "Paid solicitors" does not include, among others, lawyers who render professional services to charitable organizations; people who provide services or products to charitable organizations and who do not directly solicit for charitable contributions; and directors, officers, and compensated employees of charitable organizations. CRS § 6-16-103(7)(b), (d), and (h).

34. CRS § 6-16-103(7)(a)–(g).

35. CRS § 6-16-104(2)(f).

36. Federal Form 990 "is the tax form the Internal Revenue Service (IRS) requires all 501(c)(3) tax-exempt charitable and nonprofit organizations to submit annually" and "is designed . . . to assess whether a nonprofit aligns with federal requirements for tax-exempt status. The forms are publicly accessible once they are processed . . . ." Library of Congress Research Guides (Form 990), https://guides.loc.gov/nonprofit-sector/form-990. Certain organizations are exempt from filing a Form 990, such as charitable organizations "that do not intend to and do not actually raise or receive gross revenue, excluding grants from governmental entities or from organizations exempt from federal taxation under section 501(c)(3) . . . in excess of twenty-five thousand dollars during a fiscal year or do not receive contributions from more than ten persons during a fiscal year," although the latter exemption does "not apply to a charitable organization that has contracted with a paid solicitor to solicit contributions" in Colorado. *See* CRS § 6-16-104(6)(c). Other exemptions are available. *See* CRS § 6-16-103(7)(d).

37. CRS § 6-16-109.

38. CRS § 6-16-109(c).

39. CRS § 6-16-109(b).

40. CRS § 6-16-104(8).

41. *Id.* All information filed with the SOS (except for individuals' residential addresses and telephone numbers, financial institution account numbers, and contributor schedules listed on federal Form 990 or its equivalent) is a public record for purposes of Colorado's public records law. *See* CRS § 6-16-104(10).

42. The law directs the SOS to publicize the CCSA's requirements and to compile and publish annually the information provided by charitable organizations, professional fundraising consultants, and paid solicitors; to participate in a national online charity information system (if established); to exchange with other states information with respect to charitable organizations, professional fundraising consultants, commercial coventurers, and paid solicitors; and to set "fines for noncompliance with" the CCSA. *Id.* CRS §§ 6-16-110.5 and -114.

43. CRS § 6-16-111 (describing numerous criminal felony violations under the rubric of "charitable fraud"); CRS § 6-1-105(1)(b), (c), and (e) (describing prohibited unfair or deceptive trade practices under Colorado's Consumer Protection Act, such as knowingly or recklessly misrepresenting (1) the "source, sponsorship, approval, or certification of . . . property"; (2) the "affiliation, connection, or association with or certification by another"; or (3) the "sponsorship, approval, status, affiliation, or connection of" an organization with "property"). Charitable organizations required to register under the CCSA may not aid, abet, or otherwise permit a paid solicitor to solicit contributions on their behalf unless the paid solicitor has complied with the CCSA's requirements. CRS § 6-16-104(9)(b).

44. CRS § 6-16-111.

45. CRS § 6-16-111(5). *See also supra* note 43 (describing potential CPA violations). It is unclear what other elements might need to be proven, if any, to establish a CPA violation, such as "public impact," and whether a CCSA violation itself constitutes public impact. *See Martinez v. Lewis,* 969 P.2d 213, 222 (Colo. 1998) (challenged practice must have a "public impact" to establish CPA violation so as to distinguish "run-of-the-mill" fraud claims and contract disputes from actionable CPA violations).

46. CRS § 39-26-708(1).

47. *Id.*

48. For a general description of how these land trusts are organized and operate, *see* Svaldi, "Opening the Door for Renters to Buy Their Homes," *Den. Post* (July 15, 2023), https://edition.pagesuite.com/popovers/dynamic_article_popover.aspx?guid=f410d25f-8089-4ba7-ba07-1bd3d74426bd&appcode=DAI986&eguid=0255ed87-7110-4d23-adab-a9fa283d756d&pnum=91#. By splitting ownership of the land from the home, the land trust may be able to take advantage of a Colorado property tax exemption, CRS § 39-3-127.7, while the homebuyer typically will be obligated to maintain the entirety of the property and sacrifice a significant portion of the property's appreciated value upon sale. The land trust may be entitled to a similar property tax exemption before selling or leasing the home pursuant to CRS § 39-3-113.5. In either case, the property tax exemption must be sought and approved in accord with CRS § 39-2-117.

49. If the homebuilder extended FHA qualifying warranties directly to the homebuyer, this might supply sufficient privity of contract to support extending Colorado's implied warranties from the homebuilder to the homeowner as well. *See Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC*, 2020 COA 165, ¶ 32 (imposing implied warranty liability on non-vendor homebuilder who provided express warranties to condominium owners). *Brooktree* also held that even without contractual privity between the builder and the purchasers, the builder owed implied warranties because it knew that the townhomes it constructed would be sold to individual owners, and it created the development entity primarily to market and sell the townhomes that the builder constructed. *Id.* at ¶ 49.

50. The authors use the term "anti-waiver provisions" in reference to the following HPA language: "any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the 'Construction Defect Action Reform Act' . . . or on the ability to enforce such legal rights, remedies, or damages within

the time provided by applicable statutes of limitation or repose are void as against public policy." CRS § 13-20-806(7)(a).

51. *Broomfield*, ¶ 53 (Davidson, J., concurring). One commentary notes: "Colorado apparently recognizes such [disclaimers] only in principle, not in fact." Bain and Cohen, "Let the Builder-Vendor Beware: Defenses and Damages in Home Builder Litigation—Part II," 16 *Colo. Law.* 629, 629 (Apr. 1987). Many jurisdictions have voided such implied warranty disclaimers on public policy or other grounds. *See* Benson, *supra* note 8, §§ 14.4.3.g, 14-108 & nn.1011–12 (collecting cases and bases for voiding such disclaimers).

52. *Carpenter v. Donohoe*, 388 P.2d 399, 402 (Colo. 1964); *Rusch v. Lincoln-Devore Testing Lab'y, Inc.*, 698 P.2d 832, 834 (Colo.App. 1984) (recognizing implied warranty of suitability inherent in implied warranty of habitability).

53. *Mazurek*, 599 P.2d at 271. *See also supra* note 7. *Mazurek* suggested that for the implied warranty to arise, the status of builder-vendor "implies an element of commerciality," that is, that the vendor is in "the business of building." *Id.* (citing *Klos v. Gockel*, 554 P.2d 1349, 1352 (Wash. 1976)). *Klos* said that the distinction is whether the sale is "commercial rather than casual or personal in nature." *See also Sloat v. Matheny*, 605 P.2d 71, 72 (Colo.App. 1980) (builder-vendor may impliedly warrant a home if the "primary reason for constructing the house is to resell it" (citing *Mazurek*, 599 P.2d at 271), *rev'd on other grounds*, 625 P.2d 1031 (Colo. 1981). It is an unanswered question in Colorado whether a BFCO that regularly participates in home construction and sales activities may be deemed to be "in the business of building" and, even if not, whether Colorado's new-home implied warranties arise from its sale of new homes.

54. *Erickson v. Oberlohr*, 749 P.2d 996, 998 (Colo.App. 1987). *See also Mazurek*, 599 P.2d at 271; *Davies*, 676 P.2d at 1245. Generally, a vendor who does not directly participate in the home's construction is not responsible to the buyer for any new-home implied warranties. *Gallegos v. Graff*, 508 P.2d 798, 799 (Colo.App. 1973). This article does not examine a vendor's potential liability under the common law of civil conspiracy or statutory "acting in concert" joint liability under CRS § 13-21-111.5(2) as construed by *Resol. Tr. Corp. v. Heiserman*, 898 P.2d 1049, 1057 (Colo. 1995).

55. *See, e.g., Brooktree*, ¶¶ 48–49 (holding that even without contractual privity between the builder and townhome purchasers, the builder owed implied warranties because it knew that the townhomes it constructed would be sold to individual owners and had created a development entity primarily to market and sell the townhomes that the builder constructed). *See also* Benson, *supra* note 8, §§ 14.4.3.e, 14-105-07 ("Persons Liable and Privity of Contract").

56. *Gillespie v. Plemmons*, 849 P.2d 838, 840 (Colo.App. 1992) (typically, "class of purchasers entitled to contractual protection of implied warranty of habitability is limited to first purchasers"; bank that purchased home out of foreclosure acquired no interest in implied warranty claim).

57. *Utz v. Moss*, 503 P.2d 365, 367 (Colo.App. 1972).

58. *Brooktree* noted that the builder owed implied warranties because it knew that the townhomes it constructed would be sold to individual owners and it had created the development entity primarily to market and sell the townhomes that the builder constructed. *Brooktree*, ¶¶ 33–34. The court also noted that the builder had extended written warranties to the homeowners. *Id.* at ¶ 32.

59. *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637, 639 (Colo. 1978), *superseded by statute on other grounds*, CRS § 13-80-127 (1979), *as recognized in Homestake Enters., Inc. v. Oliver*, 817 P.2d 979, 982–83 (Colo. 1991).

60. Homeowners may argue that these facts are analogous to the *Brooktree* case discussed above at notes 49, 55, and 58. *Brooktree* imposed implied warranty liability on a builder who did not sell the townhomes at issue to the plaintiff homeowners and HOA. Brooktree, ¶ 35.

61. Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 16 (Thomson West 2012) ("Textualism, in its purest form, begins and ends with what the text says and fairly implies.").

62. *People v. Garcia*, 382 P.3d 1258, 1260–61 (Colo.App. 2016). "'If the statutory language unambiguously sets forth the legislative purpose,' the court 'need not apply additional rules of statutory construction to determine the statute's meaning. . . . But if the language is ambiguous or appears to conflict with other statutory provisions, the court may consider the statute's legislative history, the object sought to be attained, the consequences of a particular construction of the statute, and the legislative declaration or purpose." *Id.*, ¶ 10 (quoting *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001); citing CRS § 2-4-203(1)). Courts "may also consider the title of the statute and any accompanying statement of legislative purpose." *Larson v. Sinclair Transp. Co.*, 284 P.3d 42, 44 (Colo. 2012) (citing *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006)). *See also* CRS § 2-4-203(1) ("If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider among other matters: (a) The object sought to be attained; (b) The circumstances under which the statute was enacted; (c) The legislative history, if any; (d) The common law or former statutory provisions, including laws upon the same or similar subjects; (e) The consequences of a particular construction; (f) The administrative construction of the statute; (g) The legislative declaration or purpose.").

63. CRS § 13-20-802.

64. CRS § 13-20-806(7)(c) (emphasis added).

65. CRS § 13-20-802.5(4).

66. Proceedings on HB 07-1338, House Judiciary Comm., 66th Gen. Assemb., 1st Reg. Sess., recording at 14'27"–14'44" (Colo. 2007), Colorado State Archives 03.21.2007.mp3.

67. *Wycoff v. Grace Cmty. Church of the Assemblies of God*, 251 P.3d 1260 (Colo.App. 2010) (citations omitted).

68. *Id.* at 1269–70 (holding it was premature to construe church's insurance policy to determine extent of coverage, including coverage for prejudgment interest in addition to the liability limit because, regardless of coverage, the plaintiff was entitled to entry of judgment against the church for the judgment's full amount that would have been entered against a for-profit entity).

69. *Id.*

70. *See, e.g., Heights Healthcare Co. v. BCER Eng'g, Inc.*, 2023 COA 44, ¶¶ 25–26 (HPA applies to claims relating to senior living community located on parcel zoned "commercial" or "mixed use" because senior living community constituted residential property); *Broomfield*, ¶ 22 (HPA applies to claims relating to senior living facility because senior living facility is "residential property"). *Cf. Advanced Exteriors, Inc. v. Figlus*, No. 21CA0930, 2022 Colo. App. LEXIS 1448, slip op. at 19–20 (Colo.App. Sept. 29, 2022) (not selected for publication) (HPA anti-waiver provision inapplicable because defendants asserted no claims subject to the HPA), *cert. denied*, 2023 WL 2589171 (Mar. 20, 2023); *Van Etten v. Tapia*, No. 2020CV30304, slip op. at 2, 4–5 (Pueblo Cnty. Dist. Ct. Feb. 22, 2023) (holding person who built a house on lot adjacent to his home "with the intent of selling it to the public," performed the engineering work, and hired and supervised the subcontractors is a "construction professional" under CDARA, and the HPA applied to preclude contractual pre-dispute implied warranty waiver); *Crimson Bldg. Co. v. V*, No. 18CV33158, 2020 Colo. Dist. LEXIS 818, at *12–15 (Denver Cnty. Dist. Ct. Mar. 15, 2020) (HPA applied to mixed use building used primarily as residences rendering waiver of liability provision unenforceable); *Opus One, LLC v. Stepneski*, No. 16CV33858, slip op. at 3, 6–8 (Denver Cnty. Dist. Ct. Nov. 9, 2017) (court would consider intended use of property and zoning variance in determining whether property qualified as residential property subject to HPA's anti-waiver provision); and *Gertie v. E.J.L. Enters.*, No. 09CV46, slip op. at 2 (Elbert Cnty. Dist. Ct. Dec. 22, 2010) (HPA precludes purported contractual limitation on homeowner's rights and remedies contained in limited warranty and purchase agreements; however, limitations that do not affect remedies and damages provided by CDARA or the CPA not automatically prohibited). *And compare, e.g., Warner Devs., Inc. v. Koechlien Consulting Eng'rs, Inc.*, No. 2011CV33, slip op. at 3–4 (Eagle Cnty. Dist. Ct. Sept. 26, 2011) (persons claiming benefit of the HPA must actually reside on the property; the HPA does not apply to builder who constructs and owns home with intent to sell it to residential end user), *with Thacker v. Gallery Homes, Inc.*, No. 07CV1195, slip op. at 5 (Larimer Cnty. Dist. Ct. Apr. 7, 2010) (applying the HPA to indemnity and contribution claims asserted by residential builders against their engineers), *and Cent. Park Townhomes Condo. Ass'n v. Aggregate Indus.*, No. 06CV4013 (Arapahoe Cnty. Dist. Ct. Sept. 29, 2010) (accord).