Chapter 24

PROCEDURAL ASPECTS OF CONSTRUCTION LITIGATION

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§ 24.1 • INTRODUCTION

As more fully explained throughout this book, the substantive law applicable to construction disputes can be unique and tricky. The procedural law that governs such disputes also can be difficult. Claims asserted by parties in a construction dispute can be subject to different certification requirements, mandatory notice provisions, and binding ADR procedures. It is critical that
practitioners in this area be familiar both with the general rules that govern civil litigation in Colorado, and also the special requirements that may apply to claims asserted in the construction context. This chapter covers some of those rules and requirements.

§ 24.1.1 —Types Of Claims


Economic Loss Rule

Colorado practitioners should be aware that it can be difficult to bring tort claims in commercial construction cases. In 2004, in BRW, Inc. v. Dufficy & Sons, Inc.,1 the Colorado Supreme Court held that a subcontractor on a commercial construction project may not sue the design engineer in tort for the subcontractor’s alleged economic losses on the project. The BRW decision turns on the economic loss doctrine and underscores the importance of this doctrine for parties who are engaged in litigation involving commercial construction projects.

The economic loss rule is triggered when a party to a contract claims that he or she has sustained financial loss or has not realized the full profit expected in performing the contract and asserts tort claims to recover these alleged economic losses. This strategy may be an attractive course because tort law permits a more expansive measure of damages than contract law.

Construction law is, by its very nature, contractual. The economic loss rule, as established by the Colorado Supreme Court in 2000, limits parties to recovery under contract theory when a breach causes only economic loss.2 In Colorado, economic loss is any damage other than physical harm to persons or property.3 The Colorado Supreme Court requires the focus to be on the source of the duty, not the resultant harm, when determining whether the economic loss rule applies to a dispute.4 Practitioners should also carefully consider the recent development that extends the economic loss rule both to parties in contractual privity and parties in “interrelated contracts.”5

Thus, BRW and Town of Alma provide a relatively clear analytical framework for those practitioners who either seek to assert or who wish to defend against tort claims in commercial construction context.

Claims by Owners

The most common claims asserted by owners generally are directed either at the architect/engineer on the project, or at the general contractor. Owners hire architects to design their projects, and hire general contractors to implement the design and carry out the project. There are also a number of other entities that may be involved — sub-contractors, material suppliers, and insurers, for example — but the owner’s principal expectations are focused on the architect/engineer and the general contractor.

If an owner is dissatisfied with the performance of its architect/engineer, the owner usually asserts both a breach of contract claim and a negligence claim.6 However, if the owner and
architect/engineer are bound under contract, either party may be barred from asserting a negligence claim under Colorado’s economic loss doctrine. Under the economic loss doctrine, “a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.”

A breach of contract claim can be based on that architect/engineer’s failure to fulfill the explicit written requirements of the contract, as well as the architect’s failure to use reasonable care in the performance of the contract, or the failure to abide by applicable professional standards. Architect/engineers are subject to an implied warranty that they possess the skill and learning ordinarily possessed by others in their profession. A contract claim against the architect may also be predicated on the architect’s failure to meet applicable building codes.

Owners may also assert negligence claims against architect/engineers, but only when the architect/engineer owes the owner an independent duty of care. One court has noted that the evidence admissible under either a contract or a negligence case against an architect is essentially the same, and that the only real difference between the claims are the applicable statutes of limitations, and the damages that are recoverable. Under Colorado law, an architect must exercise reasonable care, which requires him or her to act “in a manner consistent with the knowledge and ability possessed by members of the profession in good standing.” The standard is measured on a statewide, rather than local, basis. As discussed below in section 24.6, if an owner asserts a claim for professional negligence against the architect, he or she is required to file a certification within 60 days that the claim has been reviewed by an expert and determined to be meritorious.

Owners may also assert claims for breach of contract and negligence against the general contractor, but again, only when the contractor owes the owner an independent duty of care. Colorado law recognizes that the contract between the owner and the general contractor creates the obligation of the general contractor to perform its work with reasonable care and skill. Owners also may assert claims for the contractor’s breach of implied warranties, including compliance with applicable building codes, performance of work in a workmanlike manner, and suitability of the completed project for the ordinary purposes for which it might reasonably be used.

Claims Against Owners
See generally Chapter 7, “The Owner of the Construction Project.”

Architects and general contractors may assert claims against the owner for breach of contract, usually involving the failure to pay fees due under the contract. General contractors may also seek lost profits, if the owner improperly ends the project. The owner is also subject to an implied warranty regarding the sufficiency of the plans and specifications provided to contractors. If the plans are not adequate, contractors may be able to recover payment for any additional work or costs occasioned by the defective plans. Because subcontractors rarely have any privity of contract with owners, direct contract claims by subcontractors are usually not viable. However, subcontractors who have not been paid by the contractor generally will file a mechanic’s lien against the property for which the subcontractor’s efforts were provided. Sub-contractors may also file claims for unjust enrichment, although such claims in the context of tenant finish work will likely fail.
Claims by Contractors
See generally Chapter 10, “The Contractor.”

Contractors generally enter into a prime contract with the owner to implement the project as designed by the owner’s architect, as well as one or more additional contracts with subcontractors to carry out the project. As against the owner, the most common claim is for payment under the prime contract. Additionally, contractors may be entitled to recover for harm that results from any delay caused by the owner, unless the prime contract contains a no-damages-for-delay provision. The most common claim that arises against subcontractors is for breach of contract based on the failure to perform pursuant to the requirements of the subcontract. Oftentimes, claims against subcontractors are characterized as a failure to fulfill a warranty that work will be completed in a workmanlike manner. In addition, construction contracts include an implied covenant of good faith and fair dealing, and a contractor can assert a claim for breach of that covenant as part of its claim for breach of contract.

Claims Against Contractors
See generally Chapter 10, “The Contractor.”

The most common claim against a contractor will be for nonpayment to a subcontractor. If the unpaid subcontractor also asserts a mechanic’s lien and/or a claim for unjust enrichment against the owner, the contractor is also likely to face a claim for indemnification by the owner. Owners also may assert a claim for failure to perform as required by the prime contract. If the contractor enters into a design-build contract with the owner, the contractor’s potential liability to the owner expands to include the design phase of the project, as well. As the manager of a project, contractors also face potential premises liability with respect to the worksite. Contractors also face potential liability with respect to worker safety under Colorado Workers’ Compensation Act, as well as the federal Occupational Health and Safety Act.

Claims by Architects and Engineers
See generally Chapter 7, “The Owner of the Construction Project.”

Generally, architects and engineers enter into contracts with owners to design projects as specified by the owner. Assuming that the specifications of the owner are sufficiently identified, the most common claim an architect or engineer will have is for nonpayment by the owner.

Claims Against Architects and Engineers
See generally Chapter 8, “Architect/Engineer Liability.”

The scope of potential claims against an architect or engineer is considerably more expansive. Most commonly, claims against an architect or engineer will be asserted by the owner. As discussed earlier, an owner or other entity may only assert a tort claim against an architect or engineer when the architect or engineer owes the owner a duty independent of the contractual duty.
§ 24.2 • STANDING

Standing is a threshold jurisdictional issue in any litigation. It concerns the question of whether a party who has asserted a claim in litigation has a right to invoke the jurisdiction of the courts to hear the claim. The test in Colorado for determining standing was established in *Wimberly v. Ettenberg*. As the court explained, the “proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions.” Because standing is a jurisdictional issue, it can be raised at any time. In determining the issue of standing, a trial court must accept the allegations of the complaint as true, and can consider other evidence supportive of standing.

Subsequent case law has elaborated on the standing test announced in *Wimberly*. The test involves both constitutional and prudential issues. The constitutional issue arises out of Article VI, section 1 of the Colorado Constitution, which limits the role of the courts to the resolution of actual controversies. Under this prong of the test, a plaintiff must demonstrate that he or she has suffered or will suffer an injury in fact. Such injury need not necessarily be economic in character; harm to intangible values will satisfy this requirement, as well. Similarly, the violation of rights created by statute satisfies the injury in fact requirement. When a statute specifically designates those who may sue under it, however, no one except those designated has standing to pursue a claim for violation of the statute. To satisfy the injury in fact requirement, the alleged injury must be direct and palpable.

The prudential prong of the standing test requires that the plaintiff demonstrate the injury he or she has suffered is to a legally protected right that belongs to the plaintiff. Generally speaking, a party does not have standing based on injury to the legally protected interests of others. However, a plaintiff who can establish his or her own standing may, under certain limited circumstances, be able to establish standing on behalf of a third party, as well. For example, such standing may exist where the plaintiff can establish a substantial relationship with a third party. Second, such standing may exist where the plaintiff can demonstrate sufficient difficulty associated with or improbability of the third party asserting his or her own rights. Finally, the plaintiff can argue the need to avoid dilution of a third party’s rights if third-party standing is not permitted.

§ 24.3 • PROPER FORUM

When a dispute arises, an early determination must be made as to the proper forum in which to address the dispute. This question turns on a number of issues, including contractual language that may govern the proper forum or identify the range of options, jurisdictional questions, and venue issues.
§ 24.3.1—Contractual Language

Colorado law accords wide latitude to parties to a contract in specifying the chosen forum in which to resolve disputes. Practitioners should always study the language of any agreement under which a dispute arises to carefully determine whether it specifies the agreed-upon process and/or forum for resolving disputes.

See generally Chapter 26, “Contract Clauses Managing, Allocating, and Transferring Construction Project Risks.”

Forum Selection Clauses

In Colorado, forum selection clauses are enforceable unless they are unfair or unreasonable.53 The burden of proving that a forum selection clause is unfair or unreasonable is on the party seeking to avoid its effect.54 Mere inconvenience or additional expense is not the test of unreasonableness; instead, the party seeking to avoid the forum selection clause must “show that the trial in contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”55 Thus, if a contract specifies the parties’ chosen forum, that choice will usually be enforced absent some compelling reason why the parties should not be held to the language of the contract. The proper procedure for asserting the applicability of a forum selection clause is to file a motion to dismiss at the outset of the proceedings, at which point the trial court must require the party opposing the motion to demonstrate by a preponderance of the evidence that the clause is unfair, unreasonable, or fraudulently induced.56 The trial court may hold an evidentiary hearing and, where applicable, may hold that enforcement of the forum selection clause was waived.57

See generally Chapter 26, “Contract Clauses Managing, Allocating, and Transferring Construction Project Risks.”

ADR Clauses

See generally Chapter 21, “Arbitration and Mediation of Construction Disputes.”

The public policy of Colorado strongly favors arbitration as a dispute resolution process.58 A valid, enforceable arbitration agreement divests a court of jurisdiction over all issues within the scope of the agreement.59 To decide whether an arbitration agreement encompasses a dispute, the court must decide whether the factual allegations underlying the claims are within the scope of the arbitration clause, regardless of the legal label assigned to the claims.60 Any doubts about the scope of an arbitration provision are to be resolved in favor of arbitration.61

The Colorado Supreme Court has recently overturned the intertwining doctrine in Colorado. Thus, claims that are subject to an arbitration agreement must be arbitrated, while claims that are not subject to arbitration may be stayed or proceed to litigation, in the discretion of the trial court.62

(10/07)
Choice of Law

Regardless of any contractual provision requiring application of the law of another state, the Colorado legislature has stated that the law of Colorado shall apply to all construction projects in Colorado.\(^{63}\)

§ 24.3.2—No Contractual Language

If players in a construction project are not bound by contract, or if the contract does not contain a forum selection clause, state court venue is governed by C.R.C.P. § 98(c). As related to a construction dispute, § 98(c) states that venue is proper in the county:

1) where the contract was signed;\(^{64}\)
2) where the contract was to be performed;\(^{65}\)
3) where the tort was committed;
4) where any of the defendants reside;
5) where the plaintiff resides (a) if service is made on the defendant in that same county, or (b) if the defendant is from out of state;
6) where the defendant may be found; or
7) in the county designated in the complaint.

§ 24.4 • JURISDICTION

Jurisdictional issues can arise in one of two ways. The issue of personal jurisdiction concerns the court’s authority over the parties that are before it. Subject matter jurisdiction focuses on the power of a court to address the substantive issues that are presented and to accord the relief that is requested.

§ 24.4.1—Personal Jurisdiction

C.R.C.P. 12(b)(2) provides for the dismissal of a claim if a court lacks personal jurisdiction over the party subject to the claim. Practitioners must carefully analyze this issue whenever they represent out-of-state defendants, since the absence of personal jurisdiction is a waivable defense.\(^{66}\) The defense can be waived in a number of ways. For example, if a defendant files a motion to dismiss under Rule 12(b), but fails to include the lack of personal jurisdiction among the bases for the motion, the defense is waived.\(^{67}\) If no Rule 12(b) motion is asserted and a defendant also neglects to assert the defense in its responsive pleading or any permissible amendment thereof, again the defense will be waived.\(^{68}\) If the defense is asserted in the responsive pleading but not specifically raised before the trial court within a reasonable time, the defense may be waived.\(^{69}\) The defense may be waived by other conduct, as well. For example, the assertion of a permissive counter claim, a crossclaim, or a third-party claim will probably affect a waiver of the defense.\(^{70}\)
Generally speaking, personal jurisdiction exists if a defendant is served in state. Thus, Colorado courts have personal jurisdiction over an out-of-state corporation qualified to do business in Colorado, including claims arising out of a transaction occurring in another state, as long as service was affected within Colorado. However, there is some question whether service on a defendant who is temporarily in the state but with no other contacts with the state is sufficient to confer personal jurisdiction.

If a defendant who is not served in Colorado challenges the existence of personal jurisdiction, it becomes the plaintiff’s burden to make a prima facie demonstration that personal jurisdiction exists. A prima facie demonstration of personal jurisdiction may be based on the allegations of the complaint. The court may also consider any affidavits offered by the parties, as well as evidence presented at the hearing on the motion to dismiss. The issue of personal jurisdiction is determined based on facts that existed at the time the complaint was filed.

The analysis of personal jurisdiction involves a two-tiered inquiry. The court must first determine whether Colorado’s long-arm statute, C.R.S. § 13-1-124, provides a basis for the exercise of jurisdiction, and then determine whether the exercise of jurisdiction would violate federal due process principles. C.R.S. § 13-1-124 provides in pertinent part as follows:

(1) Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person and, if a natural person, such person’s personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
   (a) The transaction of any business within this state;
   (b) The commission of a tortious act within this state;
   (c) The ownership, use, or possession of any real property situated in this state;
   (d) Contracting to insure any person, property, or risk residing or located within this state at the time of contracting.

Case law makes it clear that the legislature’s intent in enacting this statute was to extend the jurisdiction of Colorado courts to the fullest extent permitted by the due process clause of the 14th Amendment to the United States Constitution.

The due process analysis assesses whether the defendant has had sufficient minimum contacts with the state such that maintenance of the suit does not offend the traditional notions of fair play and substantial justice, as articulated by the U.S. Supreme Court in International Shoe Co. v. State of Washington. Due process requires that individuals have a fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign. The critical issue is whether the defendant has purposefully availed himself or herself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. If sufficient minimum contacts exist, the court may consider those contacts in light of other factors to deter-
mine whether the assertion of personal jurisdiction passes constitutional muster. These factors include the burden on the defendant; the forum state’s interest in adjudicating the dispute; and the plaintiff’s interest in obtaining convenient and effective relief. As one court observed, “[d]etermining personal jurisdiction [is] more an art than a science.”

§ 24.4.2—Subject-Matter Jurisdiction

“Subject-matter jurisdiction concerns a court’s authority to deal with the class of cases in which it renders judgment. A court has jurisdiction over the subject matter of an action if the case is one of the types of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority. In determining whether a court has subject-matter jurisdiction, it is necessary to evaluate both the nature of the claim and the relief sought. Unlike issues of personal jurisdiction, the issue of subject-matter jurisdiction is not a waivable defense, and may be raised at any time.

State Court Jurisdiction

Article VI, Section 9 of the Colorado Constitution confers general jurisdiction upon district courts, with original jurisdiction in all civil, probate, and criminal cases. This jurisdiction extends to cases involving federal rights, even when there is no governing Colorado authority. When a federal question arises, state and federal courts have concurrent jurisdiction unless Congress has affirmatively given exclusive jurisdiction to the federal courts.

Federal Question Jurisdiction

Federal district courts have original jurisdiction of all civil actions arising under the Constitution, laws, and treaties of the United States. Federal question jurisdiction applies to claims founded upon federal common law as well as those of statutory origin. The mere fact that a federal statute or regulation may apply to a dispute may not be enough, however, to confer federal jurisdiction. As Justice Cardozo explained in Gully v. First National Bank, the federal right must be central to the case for federal question jurisdiction to exist:

To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.

Moreover, the mere adoption by a state law of a United States law as a criterion or test does not cause a case under the state law to be subject to federal question jurisdiction.

As mentioned above, state and federal courts share concurrent jurisdiction over matters involving federal questions unless they concern an area involving exclusive federal jurisdiction. A number of federal statutes may arise in construction cases that are subject to exclusive federal jurisdiction. For example, cases under the Miller Act are subject to exclusive federal jurisdic-
Cases arising under a patent or copyright are also subject to exclusive federal jurisdiction. Likewise, claims against the United States under the Federal Tort Claims Act must be filed in federal court. And claims involving property of the estate of a debtor in bankruptcy are subject to exclusive federal jurisdiction; the district courts have original, but not exclusive, jurisdiction over all other proceedings under the Bankruptcy Code.

As to federal court jurisdiction over disputes concerning arbitration, see Chapter 21, “Alternative Dispute Resolution,” Supplement.

**Diversity Jurisdiction**

Federal jurisdiction is also available in cases where the matter in controversy exceeds $75,000, and is between either citizens of different states, citizens of a state and citizens or subjects of a foreign state, or citizens of different states when citizens or subjects of a foreign state are additional parties. The diversity of citizenship must be complete as between the plaintiffs on the one hand and the defendants on the other; if any plaintiff and any defendant are citizens of the same state, diversity jurisdiction does not exist. If the existence of diversity citizenship is challenged, it is the plaintiff’s burden to prove diversity by a preponderance of the evidence.

The citizenship of the parties at the time the action is commenced determines the diversity question. In the case of natural citizens, state citizenship is the equivalent of domicile. Domicile is established by demonstrating physical presence in a location coupled with the intent to remain there indefinitely. With respect to corporations, 28 U.S.C. § 1332(c)(1) provides that a corporation is “deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” When determining a corporation’s principal place of business, a court should look to the total activity of the company or the totality of the circumstances, considering “the character of the corporation, its purposes, the kind of business in which it is engaged and the situs of its operations.” With limited partnerships, the citizenship of each limited partner is evaluated to determine whether there is complete diversity. Similarly, with unincorporated associations, the court looks to the citizenship of all of its individual members in determining the existence of diversity jurisdiction.

**§ 24.4.3—Venue**

The issue of venue is addressed in Rule 98 of the Colorado Rules of Civil Procedure. Rule 98(a) addresses, inter alia, actions “affecting” real property, and provides that such actions shall be tried in the county in which the real property (the subject of the action, “or a substantial part thereof,”) is situated. A number of cases address the issue of whether an action “affects” real property, as contemplated by the rule. For example, actions to cancel a real estate mortgage, to quiet title, to terminate a lease and recover possession of real property, and to determine county boundaries have been characterized as affecting real property. On the other hand, an action directed to the validity of certain county land use regulations was determined not to fall within the scope of Rule 98(a). The Colorado Supreme Court has also ruled that there is no requirement that foreclosure proceedings be filed in the county where the property being foreclosed is located.
Rule 98 offers a number of options with respect to the proper venue for contract or tort actions. If the action falls within either the parameters of Rule 98(a), dealing with claims that “affect” real property, or Rule 98(b), dealing with the recovery of certain penalties or forfeitures, the provisions of those sections must be followed. If those provisions do not apply, the rule offers a number of other alternatives for the proper venue in which to pursue such claims. For example, Rule 98(c)(1) provides that a contract or tort action may be tried either in (1) any county in which any defendant resides, (2) the county where the plaintiff resides if a defendant is served in that county, (3) any county in which a defendant can be found, or in the county designated in the complaint, if the defendant is not a resident of Colorado, or (4) if the defendant is about to depart Colorado, in any county where the plaintiff resides or where the defendant can be served. Additionally, Rule 98(c)(2) — when read in tandem with interpretative case law — provides that contract actions may be tried in the county that the contract identifies as the place of performance. Similarly, Rule 98(c)(4) provides that an action on a contract for services may also be tried in the county in which the services were to be performed. Rule 98(c)(5) provides that a tort action may also be tried in the county where the tort was committed.

Objections to venue can be waived if they are not asserted in a timely fashion. Rule 98(e) provides that motions to change venue must be filed within the same timeframes governing motions to dismiss under Rule 12(b)(1)-(4); i.e., within 20 days of service within the state, and 30 days if the complaint was served outside of Colorado. Additionally, if the defendant intends to file a motion to dismiss under Rule 12(b)(1)-(4), the motion to change venue must be filed simultaneously with the motion to dismiss. If a defendant cannot file an intended motion to change venue within the proper time, a motion to extend must be filed; otherwise, the right to object to venue will be lost. Motions challenging venue with respect to consumer contracts, or which are based either on the inconvenience or the potential prejudice of the chosen venue are treated differently. Such motions are waived only if they are not filed before the case is set for trial, although the court can decide, in its discretion, to entertain such a motion even after that point.

Rule 98(j) provides that if there are either multiple plaintiffs or multiple defendants in the case, a motion to change venue should not be granted unless all the parties on the movant’s side of the case consent to the requested change. However, if the motion is predicated on the convenience of witnesses pursuant to C.R.C.P. 98(f)(2), consent of the parties is not necessary. If a motion to change venue is granted, the response to the complaint must be filed within 10 days of the case being docketed in the new venue, unless that court allows more time. If the motion is denied, the responsive pleading is due within 10 days of the order, unless the court allows more time, as well.

C.R.C.P. 12(b) provides that every defense in law or fact shall be asserted in a responsive pleading, except that certain defenses may be asserted by motion. Those defenses are (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) insufficiency of process; (4) insuf-
ficiency of service of process; (5) failure to state a claim upon which relief can be granted; and (6) failure to join a party under C.R.C.P. 19. Assertion of defenses is subject to the provisions of C.R.C.P. 11.

§ 24.5.1—Waivable Defenses
In determining what defenses to assert when an answer is filed, special consideration should be given to potentially waivable defenses. C.R.C.P. 12(h) provides that three particular defenses are waived if they are neither asserted in a Rule 12 motion, nor included in the answer to the complaint: (a) lack of personal jurisdiction; (b) insufficiency of process; or (c) insufficiency of service of process.128

§ 24.5.2—Statutes Of Limitation
If there is an adequate basis for asserting that any or all of the plaintiff’s claims are time-barred, the statutes of limitations should be asserted as a defense. The key limitations statutes that may apply in a construction case are as follows.

**Actions Against Architects, Engineers, and Contractors**
All actions against architects, contractors, builders, engineers, or inspectors performing or furnishing the design, planning, supervision, inspection, construction or observation of any improvement for defects in their work must be brought within two years of the date such claim arises.129 Such claims are deemed to have arisen when the claimant discovers or should have discovered by the exercise of reasonable diligence the “physical manifestations of a defect in the improvement which ultimately causes the injury.”130 However, no action may be brought more than six years after substantial completion, unless the claim arises during the fifth or sixth year after substantial completion, in which case the action may be brought within two years of the date upon which the claim arises.131

C.R.S. § 13-80-104(1)(b)(II) deals specially with claims for indemnity or contribution, and specifies that when such claims are based on the claimant’s liability to a third party, they may be asserted either in conjunction with the original claim, pursuant to C.R.C.P. 13 and/or 14, or within 90 days after the claims arise.132 The Colorado Supreme Court has interpreted C.R.S. § 13-80-104(1)(b)(II) to be a statute of limitations provision that allows an indemnity claim at any time prior to ninety days after the original construction litigation terminates, not a ripeness provision that precludes an indemnity action prior to termination of the original claim.133

**Contract Actions**
Most claims in the construction context will be covered by the two-year limitations period applicable to claims against architects, engineers, and contractors. Other claims, such as a claim against an owner for nonpayment, will be subject to different limitations periods. C.R.S. § 13-80-101(1)(a), for example, provides that causes of action for breach of contract are subject to a three-year limitation period. A cause of action for breach of any express or implied contract is deemed to have accrued on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence.134
Tort Actions

C.R.S. § 13-80-102(1)(a) provides that tort actions (other than claims within the scope of C.R.S. § 13-80-104), including actions for negligence, must be commenced with two years after the cause of action accrues. Similar to contract actions, such tort actions are deemed to have accrued when the loss caused by the tortious or negligent conduct is discovered or should have been discovered by the exercise of reasonable diligence.

Mechanics’ Lien Act

A mechanics’ lien claimant must bring a foreclosure action within six months of one of three dates, whichever occurs last: (1) the date the claimant last performed work on the project; (2) the date the last materials were furnished; or (3) the date of completion of the building or improvement.

For an extensive analysis of the requirements of Colorado’s mechanics’ lien statutes, see Chapter 19.

Colorado Public Works Act

Colorado’s Public Works Act requires that any person entering into a contract for more than $50,000 with any county, municipality, or school district for the construction of any public building or the completion of any public works (or repairs thereof) must post a bond conditioned that such contractor shall timely make all payments that are lawfully due to its subcontractors and suppliers. All subcontractors, materialmen, and suppliers of such a contractor have the right to bring action against both the contractor and its surety for the amounts due under their subcontracts. The action must be commenced within six months after the completion of the work.

In addition, the Public Works Act also provides that a subcontractor on a public works project may file with the public entity a verified statement of the amounts it is due and unpaid until the final settlement. The subcontractor may file an action against either the contractor or the surety within 90 days of the final settlement.

At least one Colorado court has held that the failure to meet the statutory time limitation set forth in the Colorado Public Works Act does not bar a subcontractor from asserting common law claims against the contractor and/or surety.

Timing

The statutes all agree that the statute of limitations period does not begin until the plaintiff knew or should have known about the injury. Questions arise, however, when the injury manifests slowly over time. Stiff v. BilDen Homes, Inc. dealt with this issue. In Stiff, the engineer presented the builder with two foundation construction alternatives to deal with expansive soils. The builder, with the owner’s knowledge, chose the slab-on-grade alternative that allowed minimal floor movement over the more expensive alternative that eliminated floor movement. Upon occupancy in 1994, the owner observed substantial floor movement but an independent engineer certified, in 1996 and again in 1998, that the foundation movement was acceptable per the design. Finally, the owner noticed in September of 1999 that the walls were moving away from
each other and noticed in June of 2000 that the furniture in the basement sat at an angle. The owner filed suit in February 2001.

The issue at trial was the point at which the statute of limitations began to toll where the defect grows over time. In *Stiff*, the Colorado Court of Appeals analyzed the issue under both C.R.S. § 13-80-108(1) and C.R.S. § 13-80-104(1)(b)(I) and found that the owner discovered the physical manifestation of the defect only when the defect grew worse than the owner should have reasonably expected.

**§ 24.5.3—Failure To Exhaust Administrative Remedies**

If a claimant fails to exhaust available administrative remedies, the court lacks subject-matter jurisdiction to hear the claim. Practitioners should evaluate whether a claim asserted is subject to an administrative review process that has not been exhausted.

One example where such a defense may arise is if a contractor has a dispute with the State of Colorado. If such a dispute arises, the contractor is first required to attempt to resolve the dispute with the head of the state’s purchasing agency or its designee. If the effort fails, or no determination is issued within 20 days after the effort is made, the contractor may either appeal to the Executive Director, or commence a court action. If the contractor has not exhausted the administrative processes before proceeding to court, a defense of failure to exhaust administrative remedies should be asserted, and a motion to dismiss for lack of subject matter jurisdiction should be filed.

See generally § 4.15.2 and § 5.17 in this book.

**§ 24.6 • CERTIFICATION REQUIREMENTS IN PROFESSIONAL NEGLIGENCE CASES**

C.R.S. § 13-20-602(1)(a) provides that “[i]n every action for damages or indemnity based upon the alleged professional negligence of . . . a licensed professional,” the plaintiff or his or her attorney must file a certificate of review within 60 days after service of the complaint. If a certificate of review is untimely filed, the trial court must determine whether there is just cause to excuse the late filing. In making that determination, the court must consider (1) whether the neglect was excusable; (2) whether the underlying claim has merit; and (3) whether permitting the late filing would be equitable, including whether it would result in prejudice to the non-moving party. The certificate of review must specify that the plaintiff’s counsel has consulted with a person who has expertise in the area of the negligent conduct, that the reviewing expert has reviewed the “known facts,” and that based on that review, the reviewing expert has determined that the claim does not lack substantial justification. Allegations in a complaint cannot serve as a substitute for the certificate of review.

Both architects and engineers must be licensed in the state of Colorado. Electrical and plumbing contractors are subject to state licensing requirements, as well, and other contrac-
tors may be subject to local licensing ordinances. Thus, a certificate of review would be necessary in any case asserting a negligence claim against any of these entities. Additionally, a certificate of review applies to any case “based upon” the alleged professional negligence of a licensed professional.\textsuperscript{162} Accordingly, if a plaintiff asserts a breach of contract claim based in part on the alleged failure to abide by applicable professional standards of conduct, a certificate of review would be necessary.\textsuperscript{163} Finally, the certificate of review is required not just in actions against licensed professionals individually, but also in all actions against a company or firm that employs a licensed professional that are based upon professional negligence.\textsuperscript{164}

The statute is inconsistent in specifying whether a certificate of review is necessary in every case involving professional negligence. On the one hand, C.R.S. § 13-20-602(1)(a) states that the certification is required in “every action” involving alleged professional negligence. On the other, C.R.S. § 13-20-602(2) provides that if a certificate is not filed but the defending professional believes an expert is necessary to prove the claim of professional negligence, the defense may move for an order requiring that such a certificate be filed. The Colorado Supreme Court has held that if a plaintiff feels that expert testimony is not required to prove the professional negligence claim, no certificate of review needs to be filed.\textsuperscript{165} Ultimately, the need for a certificate is up to the trial court’s discretion.\textsuperscript{166}

In any event, plaintiffs who choose not to file a certificate of review in a professional negligence case do so at their substantial peril, because the statute specifies that the failure to file a certificate when one is required shall result in the dismissal of the claim.\textsuperscript{167} Claims based on professional negligence that do not require expert testimony would seem to be rare. If filing pressures, such as the applicable statutes of limitation, make it difficult to file the necessary certification on a timely basis, it would be advisable to seek an extension of time to file the certificate\textsuperscript{168} rather than ignore the requirement and count on the court determining that expert testimony is unnecessary or a defendant moving for either a certificate to be filed or dismissal of the case.

\section*{§ 24.7 \cdot PROCEDURAL ASPECTS OF THE CONSTRUCTION DEFECT ACT}

\subsection*{§ 24.7.1—Notice Requirements When An Express Warranty Does Not Apply}

C.R.S. §§ 13-20-801 through -807 outline the procedural requirements and recovery limitations\textsuperscript{169} in construction defect litigation. With this statute, the legislature intended to allow contractors to repair defects before property owners turned to the courts for help. To this end, the statute provides that the property owner shall notify the construction professional of the claim, at least 75 five days\textsuperscript{170} prior to commencement of the action.\textsuperscript{171} Upon receiving notice, the construction professional shall, within 30 days of the notice, inspect the alleged defect.\textsuperscript{172} Within 30 days\textsuperscript{173} of the inspection, the contractor may, in writing, offer to settle the claim by payment or fix\textsuperscript{174} the alleged defects.\textsuperscript{175} If the claimant does not accept the offer to settle within 15 days, the offer is deemed to have been rejected.\textsuperscript{176} If the claimant accepts the offer to remedy, the work must be complete according to the timetable, subject only to events beyond the construction pro-
Provision of notice under C.R.S. § 13-20-803.5, above, tolls the applicable statute of limitations for 60 days. If the parties do not agree to settle the dispute, the court will schedule a construction defect case for trial only after the claimant compiles and serves to the court (or arbitrator) and construction professional a list of alleged construction defects. The claimant must file this supplemental notice within 60 days of commencement of the action.

§ 24.7.2—Type Of Action Restricted
A claimant may not assert a negligence action when the dispute arises from the construction professional’s simple failure to construct according to an applicable building code or industry standard. A claimant may assert a negligence claim, however, for (1) actual damage to real property, (2) actual loss of use of real property, (3) bodily injury or death, or (4) a risk of bodily injury, death, or threats to the life, health, or safety of building occupants.

§ 24.8.1—Claims Subject To The Statute
Colorado’s pro rata statute applies only to an “action brought as a result of a death or an injury to person or property . . . .” The statute is not limited to negligence actions, however. For example, the statute specifies that “no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant . . . .” (emphasis added). There appears to be no basis for limiting the application of the statute to negligence or tort actions, and indeed, the statute has not been so limited. Particularly in the construction litigation context, where there is considerable overlap of contract and negligence claims, practitioners should always take a close look at the potential applicability of the pro rata statute.

The pro rata statute does not apply to punitive damages claims. The statute also does not apply to parties “who consciously conspire and deliberately pursue a common plan or design to commit a tortious act.” Instead, such parties are subject to joint and several liability, although they retain a right of contribution against co-conspirators. The amount of such joint and several liability is limited to the percentage of fault attributed under the statute to the group of conspirators.
§ 24.8.2—Designation Of Responsible Nonparties

The applicability of the pro rata statute is not limited to named parties in an action. The negligence or fault of a nonparty may also be considered by the trier of fact if the defending party gives notice within 90 days of the commencement of the action (or longer if the court determines more time is necessary) that such nonparty was wholly or partially at fault for the plaintiff’s harm.192 The notice must provide the designated nonparty’s name and last-known address, or at least the best identification of the nonparty that is possible under the circumstances, coupled with a brief statement of the basis for believing that the nonparty is at fault.193

Only parties who owe some legal duty to the plaintiff may be designated.194 Thus, if a defendant designates a nonparty whose conduct may have contributed to the plaintiff’s harm, but who owed no legal duty to the plaintiff or plaintiffs, a motion to strike the designation should be filed, and the plaintiff should resist any effort to include such nonparty on the special verdict form.

A wide range of nonparties may be designated under the statute. For example, a governmental entity that would otherwise be immune from liability under the doctrine of governmental immunity may be designated.195 Employers who are otherwise immune from liability under Colorado’s workers’ compensation statutes may also be designated.196 The statute’s reference to providing “the best identification of such nonparty which is possible under the circumstances” supports the designation of nonparties who cannot be specifically identified or located.197 Likewise, the statute would appear to allow designation of parties who have been discharged in bankruptcy; parties who are not subject to the court’s jurisdiction; and parties whose liability is barred by applicable statutes of limitation.198

The statute specifically provides that if a plaintiff settles with another defendant, the remaining defendants may designate the settling defendant as a responsible nonparty.199 Although the statute does not explicitly require notice of such a designation for it to be effective, Colorado case law makes it clear that such notice should be given once the settling party is dismissed from the case.200

§ 24.8.3—Allocation Of Responsibility

The allocation of responsibility among all parties and any properly designated nonparties is done by the jury in the form of a special verdict or, where there is no jury, by the court in the form of special findings.201 In jury trials in which contributory negligence or comparative fault is at issue (see the discussion of these issues below), the court may not instruct the jury as to the effect on allocation of fault among two or more defendants.202 On the other hand, the trial court must instruct the jury as to the effect of its findings with respect to the percentage of negligence or fault attributed to the plaintiff or plaintiffs, and the defendant or defendants.203

§ 24.8.4—Comparative Fault

C.R.S. § 13-21-111(1) provides that “contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought . . . .” Thus, in a simple negligence action involving a sin-
gle plaintiff and a single defendant, the plaintiff’s recovery would be barred only if the fact finder determined that the plaintiff was 50 percent or more negligent. If the plaintiff’s negligence is less than 50 percent when compared with the defendant’s negligence, the plaintiff’s recovery would be diminished in proportion to the amount of negligence attributable to the plaintiff.

Case law construing the statute has clarified the application of the comparative negligence principles in more complex cases. For example, in *Mountain Mobile Mix, Inc. v. Gifford*, the Colorado Supreme Court explained that when a case involves multiple defendants, the plaintiff’s negligence should be compared with the combined negligence of all defendants in determining whether plaintiff’s recovery would be barred. In *Inland/Riggle Oil Co. v. Painter*, the court further explained that not only should the negligence of all named defendants be combined for purposes of the comparative negligence statute, but the negligence of all responsible nonparties designated under C.R.S. § 13-21-111.5 should also be included in the computation. Thus, the plaintiff’s recovery would be barred only when its negligence exceeds the combined negligence attributed by the fact-finder to all named defendants and designated nonparties.

In 2007, the Colorado legislature amended C.R.S. § 13-21-111.5 to include a subsection (6), which states:

[A]ny provision in a construction agreement that requires a person to indemnify, insure or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.

The statute does not affect a provision of a construction contract that requires a person to indemnify another against liability for damage, but it may not require indemnification in an amount greater than the degree or percentage of fault attributable to the indemnitee. It also does not apply to contract clauses that require the indemnitor to purchase or carry insurance covering the acts of the indemnitee (so long as the obligation to insure does not cover more than the indemnitee’s percentage of liability), clauses that require the indemnitor to name the indemnitee as an additional insured, or to builder’s risk insurance. The revised statute took effect on July 1, 2007, and applies to all construction contracts entered into on or after that date.

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§ 24.9 • ARBITRATION OF CONSTRUCTION DISPUTES

This topic, including judicial involvement in the arbitration process, is exhaustively covered in Chapter 21, “Arbitration and Mediation of Construction Disputes.”
§ 24.10.1—Notice Of Intent To Sue

C.R.S. § 24-10-109 requires that any person who claims to have been injured by a public entity or by an employee of a public entity while acting within the course of such employment must file a written notice of the injury within 180 days of the discovery of the injury. The notice requirement applies only to tort claims, and does not apply to contract claims. Compliance with this requirement is jurisdictional, and the failure to provide timely notice bars the claim. If the claim is against the state or an employee of the state, the notice must be provided to the Attorney General. If the claim is against any other governmental entity, the notice must be provided to the governing body of that public entity. The notice must contain (1) the name and address of the claimant and his or her attorney, if one has been engaged; (2) a concise statement of the factual basis for the claim, including the date, time, place, and circumstances of the act, omission, or event complained of; (3) the name and address of any public employee involved, if known; (4) a concise statement of the nature and extent of the injury claimed to have been suffered; and (5) a statement of the amount of money damages being requested.

§ 24.10.2—Sovereign Immunity

Colorado’s Governmental Immunity Act is codified at C.R.S. §§ 24-10-101 through -120. The legislative policy of the Act provides that one of the objectives of the Act is to avoid the “excessive fiscal burdens” that Colorado taxpayers would have to bear if unlimited liability were imposed on public entities and public employees. The Act provides that a “public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort . . . .” The immunity does not extend to contract actions. The Colorado Procurement Code specifically waives sovereign immunity with respect to disputes concerning contracts between the state and a contractor. Sovereign immunity is waived in certain other actions, as well, including actions for injuries resulting from a “dangerous condition” of any highway that is a part of the state highway system.

It is not clear that private entities acting on behalf of the State can assert the immunity. Immunity is extended to every public entity, which is defined as “the state . . . and every other kind of district, agency, instrumentality or political subdivision thereof organized pursuant to law . . . .” Neither “agency” nor “instrumentality” is defined in the Act. Under traditional rules of statutory construction, undefined statutory terms are to be given their plain and ordinary meaning. One court has defined “agency” as “the relation created by express or implied contract or by law whereby one party delegates the transaction of some lawful business with more or less discretionary power to another . . . .” Similarly, “instrumentality” was defined as “something by which an end is achieved; a means, medium, or agency . . . .” Presumably, if a private entity can characterize its role as either an “agent” or an “instrumentality of the state,” it should be able to argue that it is a “public entity” entitled to the protections of the Act.

Governmental immunity is an issue of subject-matter jurisdiction. There is a conflict in the rules as to when such an argument should be raised. On the one hand, Rule 12(b)(1) of the
Colorado Rules of Civil Procedure provides that if a defendant believes the court lacks subject-matter jurisdiction, it may raise the issue in the form of a motion to dismiss. Rule 12(b) further specifies that if such a motion is to be asserted, it must be asserted before the party’s answer to the complaint is filed.

On the other hand, Rule 12(h) makes it clear that a concern about the existence of subject-matter jurisdiction may be brought before and considered by the trial court at any time. Colorado case law consistently reinforces this point, establishing that the absence of subject-matter jurisdiction is not a waivable jurisdictional defect. Thus, even if the defense is not raised in the context of a motion to dismiss under Rule 12, the courts should still be willing to entertain the motion at any other time pursuant to C.R.C.P 12(h).

§ 24.11 • MISCELLANEOUS PROCEDURAL ISSUES

§ 24.11.1—Garnishment Proceeding

In Hoang v. Assurance Co. of America, several homeowners succeeded in their claims for damage caused by expansive soils against the building of their homes. The homeowners then attempted to garnish the insurance policies that covered the builder during the time the damage occurred. Because one of the homeowners did not own the home during the policy period, the court of appeals held that it could not have suffered damage, and that the insurance proceeds could be garnished because the damage occurred during the policy period.

§ 24.12 • FEDERAL CONSTRUCTION CLAIMS

§ 24.12.1—Miller Act Claims

Simply put, the Miller Act allows those who furnish services or materials to a federal project to recover payment from the prime contractor under payment bonds. To maintain a claim under the Miller Act, the subcontractor or materialman must provide notice within 90 days to the contractor, stating with “substantial accuracy” the amount claimed and to whom the materials or work was given. The claim must be filed no later than one year after the last date of work or last date of material supply to the prime contractor. Subject matter jurisdiction in a Miller Act claim is proper in federal district court under federal question jurisdiction, and venue is proper in “any district in which the contract was to be performed.” However, it is now “quite settled” that the venue provision in the Miller Act is not a jurisdictional requirement. Therefore, a plaintiff cannot avoid the enforcement of an arbitration agreement it voluntarily entered into by arguing that it is bound by the Miller Act’s venue requirement, and arbitration agreements will be enforced in Miller Act claims.

To protect a Miller Act claim under a subcontract containing an arbitration clause, the subcontractor should file the lawsuit within the time restraints and then file a motion to stay the...
proceeding pending the outcome of arbitration (possibly in conjunction with a motion to compel arbitration). See Chapter 21 for further information on arbitration of mechanic’s lien and Miller Act claims.

§ 24.12.2—Federal Contracts

This subject is outside the scope of this chapter, but practitioners should be aware that unique federal regulations govern contracts with the federal government.236

§ 24.13 · COUNTERCLAIMS, CROSS CLAIMS, AND THIRD PARTY PRACTICE IN CONSTRUCTION LAW

Because the typical construction project employs a number of different parties and claims, knowledge of cross claim, counterclaim, and third party practice is essential to the construction practitioner. Because of their similarity, this section will refer to the federal and Colorado rules of civil procedure interchangeably.237 This section does not pretend to cover all of the important distinctions present in the federal and state rules of procedure. For a more detailed explanation of the Colorado rules, see Shelia K. Hess and Stephen A. Hess, Colorado Civil Rules Annotated, West’s Colorado Practice Series (3d ed. 1998).

§ 24.13.1—Rule 13: Counterclaim And Cross-Claim

Rule 13 sets forth the rules by which additional claims are brought by a party already named in a lawsuit. Most notably, Rule 13:

1) requires that parties bring all claims arising “out of the transaction or occurrence that is the subject of the opposing party’s claim”;238
2) permits adverse parties to bring unrelated counterclaims; and
3) permits named parties to bring cross claims against coparties and joined parties.239

In Wood v. Jensen,240 the plaintiff homeowners attempted to recover from the contractor under a single contract in two separate lawsuits. The court, in dismissing the contractor’s second claim, held that all counterclaims arising out of one construction project governed by one contract are compulsory.241

As noted supra § 24.11, litigation under the Miller Act presents unique procedural issues. The Supreme Court has recognized this uniqueness in Miller Act litigation by waiving the procedural requirement of compulsory counterclaims in certain situations.242

§ 24.13.2—Rule 14: Third Party Practice

Rule 14 allows defendants (and plaintiffs when defending counterclaims) to bring parties into the litigation who are or may be responsible for all or part of the claim asserted against the defendant. Colorado courts require only (1) the existence of a pre-existing legal relationship between the defendant and the third-party defendant, or (2) that the third party defendant owes a common law duty to protect the defendant to maintain a third party claim.243
Naiman v. Flickinger exemplifies the classic third-party claim situation. Flickinger, an architect, hired Riley Engineering Corp. (Riley), a mechanical engineering firm, and Sol Flax and Assoc. (Sol), an electrical engineering firm, to produce plans for the mechanical and electrical systems of an industrial complex. The contract with Riley was oral. Upon completion of the mechanical and electrical plans, Flickinger simply inserted Riley and Sol’s plans into the final design package. Naiman, the owner of the complex, sued Flickinger over, among other things, negligent preparation of the mechanical and electrical plans. Flickinger simultaneously answered the claim and asserted a third-party claim, denying all allegations but blaming Riley and Sol if the court found the plans to be negligently prepared. The court held that an oral contract for engineering services between two parties constitutes a legal relationship.

3. Town of Alma, 10 P.3d at 1264.
4. See Town of Alma, 10 P.3d at 1262.
5. BRW, 99 P.3d at 72.
6. For a more thorough discussion of owners’ claims against architects or engineers, see § 7.5.1, infra.
7. See City of Westminster v. Centric-Jones Constructors, 100 P.3d 472, (Colo. App. 2003) (tort action between contractually bound owner and engineer maintainable only when an independent duty of care exists). See also Town of Alma v. AZCO Construction, Inc., 10 P.3d 1256, 1264 (Colo. 2000) (parties under contract only owe the duty outlined in the contract and only may recover under the contract unless an independent duty of care exists).
8. Town of Alma, 10 P.3d at 1264.
20. For a more thorough discussion of potential claims against owners, see § 7.4, infra.
23. See generally Chapter 19, “Mechanics’ Liens.”
25. Common provisions found in prime contracts are discussed in § 10.2, infra.
26. See § 10.2.2, infra.
27. See § 10.2.6, infra.
29. See § 10.3, infra.
30. See § 10.4.2, infra.
31. See §§ 10.4.3 and 10.4.4, infra.
32. See § 10.4.6, infra.
33. See §§ 10.2 and 10.3, infra.
36. Wimberly v. Ettenberg, 570 P.2d 535 (Colo. 1977). Because standing in Colorado is based on the Colorado constitution and rules of judicial self-governance, Colorado law on standing is not identical to federal standing law. However, there is enough similarity that Colorado courts frequently rely on federal cases on standing. See., e.g., Maurer v. Young Life, 779 P.2d 1317, 1324 n. 10 (Colo. 1989). There are some differences; for example, the injury in fact test under federal law requires that the injury be concrete and particularized, and actual or imminent, whereas Colorado law is not so specific. City of Greenwood Village, 3 P.3d at 437 n. 8.
39. Lamm, 700 P.2d at 516.
40. City of Greenwood Village, 3 P.3d at 436.
41. Lamm, 700 P.2d at 516.
42. City of Greenwood Village, 3 P.3d at 437.
43. Id.
51. Id.
52. Id.; see also Craig v. Boren, 429 U.S. 190 (1976).
54. Id.
56. Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155, 1161 (Colo. App. 2006). It is not appropriate to form the motion as one for lack of subject matter jurisdiction, failure to state a claim, summary judgment, forum non conveniens, or change of venue. Id. at 1159-61.
57. Id. at 1161.
63. C.R.S. § 13-21-111.5(6)(g).
64. Consumer contract for goods.
65. Consumer contract for services.
66. C.R.C.P. 12(h)(1).
68. C.R.C.P. 12(h)(1)(B).
69. Nations Enter., Inc. v. Process Equipment Co., 579 P.2d 655, 657 (Colo. App. 1978) (because motion was made more than one year after service and less than two months before trial, the defense was waived).
71. White-Rodgers Co. v. District Court, 418 P.2d 527-29 (Colo. 1966); Budde v. Kentron Haaii, Ltd. 565 F.2d 1145, 1148 (10th Cir. 1977).
79. 326 U.S. 310 (1945); Safari Outfitters Inc., v. Superior Court, 448 P.2d 783 (Colo. 1968).
82. Burger King Corp., 471 U.S. at 476.
83. Id. at 477.
84. Sawtelle v. Farrell, 70 F.3d 1381, 1388 (1st Cir. 1995) (quoting Donatelli v. Nat’l Hockey League, 89 F.3d 459, 468 n. 7 (1st Cir. 1990)).
86. Id. at 513.
87. In re Water Rights of Columbine Ass’n, 993 P.2d 483, 488 (Colo. 2000).
90. Telluride Co., 934 P.2d at 889.
95. 299 U.S. 109 (1936).
96. Id. at 112-13 (citations omitted).
98. 40 U.S.C. § 3133 (formerly § 2706(b)).
100. 28 U.S.C. § 1346(b).
103. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 388 (1998); Oppenheim v. Sterling, 368 F.2d 516, 518 (10th Cir. 1966).
104. Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir. 1983); Mid-Continent Pipe Line Co. v. Whiteley, 116 F.2d 871, 873 (10th Cir. 1940).
106. Crowley, 710 F.2d at 678.
108. Amoco Roocount Co. v. Anschutz Corp., 7 F.3d 909, 914-15 n. 2 (10th Cir. 1993).
111. Allen v. City of Sterling, 230 P. 113 (Colo. 1924).
114. People v. Dist. Court, 179 P. 875, 876 (Colo. 1919).
120. C.R.C.P. 12(a).
121. C.R.C.P. 98(e)(1).
123. C.R.C.P. 98(e)(1).
126. C.R.C.P. 98(e)(2).
127. Id.
131. C.R.S. §§ 13-80-104(1)(a) and -104(2).
137. C.R.S. § 38-26-105(1).
138. Id.
139. Id.
140. C.R.S. § 38-26-107(1).
141. C.R.S. § 38-26-107(3); but see Continental Cas. Co. v. Rio Grande Fuel Co., 119 P.2d 618 (Colo. 1941) (90-day limitation in statute is permissive, not mandatory, and therefore creates a lien for 90 days on funds held by the contracting board, without barring an action on the bond if not brought within 90 days).


144. See id., at 640.

145. See id.

146. See id.

147. See id.

148. See id.

149. See id., at 641.

150. The court analyzed the timing issue under both C.R.S. § 13-80-108(1) or C.R.S. § 13-80-104(1)(b)(I) and found that, because both statutes begin the statute of limitations period when the claimant discovers, or should have discovered by the exercise of reasonable diligence, the defect/injury. C.R.S. § 13-80-108(1) requires also the discovery of the cause while C.R.S. § 13-80-104(1)(b)(I) does not, but for the purposes of timing in a construction case, it is generally implied that the builder is the cause.

151. See Stiff, 88 P.3d at 641.

152. 1 C.C.R. 101-0, Art. 109.


155. Id.


158. See C.R.S. § 12-4-107(1).


160. See C.R.S. § 12-23-106(5).


163. See, e.g., Martinez v. Badis, 842 P.2d 245 (Colo. App. 1992), where the court found that the certificate of review requirement was applicable to a claim against attorneys for breach of fiduciary duty because it was necessary to prove the extent of the attorneys’ professional duties and their failure to perform them satisfactorily.


168. C.R.S. § 13-20-602(1)(a) provides that the 60-day deadline for filing the certificate may be extended if necessary for good cause shown.

169. In short, “a claimant shall not recover more than actual damages in an action,” unless the claimant can show that the construction professional violated the Colorado Consumer Protection Act, and, (1) the contractor’s offer to settle is less than 85 percent of the actual damage, or (2) the construction professional fails to complete the agreed-upon remedy or fails to respond to the notice (treble damages apply here). In no event shall damages exceed $250,000, even if bodily injury occurs. See C.R.S. § 13-20-806. See chapter 14 for a complete discussion of the Construction Defect Act’s substantive provisions.

170. In a commercial construction dispute, the owner must notify the construction professional at least 90 days prior to commencing the action. C.R.S. § 13-20-803.5(1).

171. C.R.S. § 13-20-803.5(1).

172. C.R.S. § 13-20-803.5(2).

173. Forty-five days in a dispute involving commercial property.
A written offer to remedy the defect shall include the scope and findings of the inspection, a
description of the additional required work, and a timetable for completion. C.R.S. § 13-20-803.5(3).

C.R.S. § 13-20-803.5(3).

C.R.S. § 13-20-803.5(4).

C.R.S. § 13-20-803.5.

C.R.S. § 13-20-805.

C.R.S. § 13-20-803(1).

C.R.S. § 13-20-803(2).

C.R.S. § 13-20-804(1).

C.R.S. § 13-20-804(1)(a)-(d).

C.R.S. § 13-21-111.5(1).

Id.


Id.

E.g., Loughridge v. Goodyear Tire and Rubber Co., 207 F. Supp. 2d 1187, 1190 (D. Colo. 2002). For a complete discussion of this issue, and of the statute in general, see Robert E. Benson, 


C.R.S. § 13-21-111.5(4).

Id.

Id.

C.R.S. § 13-21-111.5(3).

C.R.S. § 13-21-111.5(3)(b).


Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083, 1086 (Colo. 1996).


See Benson, supra n. 187.

C.R.S. § 13-21-111.5(3)(b) specifically provides that the “[n]egligence or fault of a nonparty may be considered if the claimant entered into a settlement agreement with the nonparty . . . .”


C.R.S. § 13-21-111.5(2).

C.R.S. § 13-21-111.5(5).

Id.


Id.

Id. at 883. See also, B.G.’s, Inc. v. Gross, 23 P.3d 691 (Colo. 2001).

Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083 (Colo. 1996).

Id. at 1086.

C.R.S. § 13-21-111.5(6)(b).

C.R.S. § 13-21-111.5(6)(c).

C.R.S. §§ 13-21-111.5(6)(d)(I) and (II).


C.R.S. § 24-10-109(3).

Id.

Id.
217. C.R.S. § 24-10-102.
218. C.R.S. § 24-10-106(1).
220. C.R.S. § 24-10-106(1).
221. C.R.S. § 24-10-106(1)(d)(I).
222. C.R.S. § 24-10-103(5).
225. *Id.* at 1066 *(quoting from Black's Law Dictionary, 6th ed. 1990, p. 1159).*
228. *Id.*
229. *Id.*
232. *Id.*
237. The Colorado and Federal rules of procedure are very similar. Colorado’s Rule 13 is slightly more comprehensive than the corresponding federal rule. Colorado’s Rule 14 omits only the subsection on admiralty claims.
238. *See F.R.C.P. § 13(a); C.R.C.P. § 13(a).* Note that § 13(f) allows parties to amend their pleadings by leave of court to include compulsory counterclaims. Compulsory counterclaims not asserted in the action are lost.
239. *See F.R.C.P. § 13(h); C.R.C.P. § 13(h).* Joining of parties is discussed in Rules 19 and 20.
241. *See id.* at 310.
242. *See Southern Const. Co. v. Pikard*, 371 U.S. 57 (1962) (holding the provision that a Miller Act claim “shall be brought … in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere” trumps the F.R.C.P. § 13 requirement that claims arising out of the same occurrence or transaction shall be joined).
244. *Id.* at 64.
245. *Id.* at 65.