Contractors and Design Professionals Beware: Homeowner Protection Act Extended to Senior Living Center

by Rebecca W. Dow, Esq.

Rebecca W. Dow, Esq.
Holland & Hart, LLP

On March 9, 2017, the Colorado Court of Appeals extended the scope of the Homeowner Protection Act of 2007 (HPA) to a senior living facility owned by a corporate entity that rents its units to seniors. In a case of first impression, the Court in Broomfield Senior Living Owner, L.L.C. v. R.G. Brinkmann Company d/b/a Brinkman Constructors (2017 WL 929933) held that a senior assisted and independent living facility constitutes "residential property" that is protected by the HPA. The HPA invalidates a limitation or waiver of the Construction Defect Action Reform Act (CDARA) rights, remedies and damages in construction contracts and design professional agreements as being void as against public policy in cases involving residential property. The Court determined that residential property includes a commercial senior facility with tenants based on their conclusion that it is an improvement on a parcel that is used as a dwelling or for living purposes. The Broomfield Court stated that receipt of rental income did not make the property commercial.

What does this mean for contractors, subcontractors and design professionals working on for-rent residential improvements? This means that limitations specified in the contracts as to time periods for bringing claims by the owner will be void if less than the time periods specified in the HPA. CDARA specifies a statute of repose that begins once the residential property construction is substantially complete until the defect is discovered or should have been discovered not to exceed six years, and a two-year statute of limitations that runs from the discovery of the claim. The Broomfield Court held that the two-year statute of limitations specified in the construction contract after final completion was void as against public policy, and that the HPA deadlines applied.

This also means that any limitations as to damages in the contracts are also void. Contractors and design professionals often limit damages to actual damages with waivers of consequential damages and even dollar limitations in these types of contracts, which would not be enforceable under this decision. Owners of for-rent residential projects would be able to bring claims for consequential damages, such as lost profits or loss of use, even if expressly waived in the construction or professional services contracts. Any provision in a construction or design contract for a residential property, including for-rent residential projects that were previously considered to be commercial, that limits the claims to a specified warranty and for a specified period of time are void and unenforceable under this decision.

The Broomfield Court used the CDARA definition of "commercial property" to mean property that is zoned to permit commercial, industrial or office type of use (C.R.S. 13-20-802.5(4). Any property zoned or used for residential use, even if owned by a commercial entity that rents out its units, would now have the rights afforded a homeowner under the HPA. If this case is not reversed by the Supreme Court or overturned by a petition for rehearing, this decision is a serious game changer. Contractors and design professionals working on residential for-rent projects who thought their damages and statutory time periods were limited by the express terms of their contracts and by CDARA for commercial projects, will probably not have sufficient insurance in place. Nor will the contractors and design professionals have factored this increased liability into their fees. In addition to a gut check, a check of insurance policies and coverage and contract provisions should be undertaken by contractors and design professionals. Contractors may well want to require owners to carry owner controlled insurance policies (OCIP) for these types of projects in the future.