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The Homeowner Protection Act of 2007

Nathan S. Silver, Esq.

On April 20, 2007, Governor Ritter signed into law House Bill 1338 entitled "The Homeowner Protection Act of 2007" ("HPA"). This new legislation significantly impacts the ability of construction professionals to contractually limit their exposure to damages and remedies for residential construction. "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."

HPA is an amendment to The Construction Defect Action Reform Act of 2003 ("CDARA"). HPA rendered void and unenforceable any restrictions on the legal rights of residential property owners under CDARA and the Colorado Consumer Protection Act. HPA provides that "any express waiver of, or limitation on, the legal rights, remedies, or damages provided by" CDARA or the Colorado Consumer Protection 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."

HPA apply to the following types of contracts:

- a contract for the purchase of a home, condominium, or townhouse between a developer and a homeowner;
- a contract for construction between a contractor and a homeowner; and
- a contract for design services between a homeowner and an architect.

The following contractual provisions were rendered void and unenforceable by HPA:

- waivers of implied warranties, i.e., the implied warranties of workmanlike construction, habitability, and that the residence complies with the local building code;
- a waiver of the right to recover treble damages and attorneys' fees under the Colorado Consumer Protection Act;
- waivers of consequential or other specific types of damages, i.e., relocation costs, economic costs related to the loss of use, pain and suffering for personal injury, etc.;
- waiver of negligence, other tort claims, or other specific claims for relief;
- limitations or caps on the amount of monetary damages other than already provided in CDARA; and
- any limitation on the time to commence a lawsuit or arbitration that is less than the statute of limitations or repose.

For example, developers cannot limit their damages to the sales price of the residence. For another example, developers cannot require homeowners to bring claims within a certain time period, such as the year of purchase or within two years of substantial completion.

HPA was effective upon passage and applies to actions filed on or after April 20, 2007. Any civil action or arbitration proceeding filed on or after April 20, 2007, is subject to HPA. Consequently, HPA may be applicable to disputes involving contracts that were entered into many years before the statute became effective. Since the statute of limitations for construction defects could be as almost eight years for a latent defect that is first discovered in the sixth year after substantial completion, homeowners may sue or demand arbitration up to eight years after substantial completion of the residential property.

Estate Planning Corner

Paul Chmielewski, JD, LL.M

IRS RELAXES ROLLOVER RULES FOR INHERITED IRAs

Traditionally, many company retirement plans allowed a surviving spouse to take required minimum distributions (RMDs) after the death of the employee/plan participant but required a lump sum distribution to any non-spouse beneficiaries, such as children of the plan participant. The result was a large tax bill when children inherited the company retirement plan. As a result, many advisors recommended that plan participants roll their retirement plan assets into an IRA when they retired. This enabled the plan participants' children to take RMDs from the account when they inherited the IRA assets.



The IRS recently relaxed the rollover rules for inherited company retirement plans and now allows non-spouse beneficiaries to rollover a company plan into an inherited rollover IRA account after the death of the plan participant. This allows a non-spouse beneficiary to enjoy the benefits of continued tax deferral through use of RMDs. As always, the new rollover rules must be strictly adhered to or the beneficiary may inadvertently trigger a taxable event. For instance, the new rules require that the rollover be a direct transfer (as opposed to a 60 day rollover), that the first RMD must be taken by the end of the year following the year of the plan participant's death and that the first RMD must be taken before the plan assets are rolled into an inherited IRA. Furthermore, company plans are not required to allow such rollovers. Given the risks, it may still be preferable to rollover the company plan into an IRA upon retirement. However, the new rules may prove helpful even if assets are not rolled into an IRA before a plan participant's death. Please contact us if you have any questions with respect to these new rules or retirement planning in general.

WHAT TYPE OF DURABLE POWER OF ATTORNEY SHOULD YOU CHOOSE?

In an earlier newsletter we discussed the importance of including a durable general power of attorney ("POA") as part of your estate planning documents. However, many people are surprised to learn that Colorado allows for two types of POAs: (1) an immediate POA, or (2) a springing POA.

Immediate
Durable Power
of Attorney
versus
Springing
Durable Power
of Attorney

An immediate POA authorizes the person designated to handle your financial affairs (your "Agent") to act immediately upon the signing of the POA. An immediate POA has certain risks but also has certain benefits. The main risk is that the designated Agent is authorized to act on behalf of the Principal before the person executing the POA (the "Principal") becomes incapacitated. As a result, persons creating immediate POAs must have absolute trust in the person they are designating. Generally, immediate POAs are utilized when a spouse or other close family members are named as the Agent under the POA. The benefit to an immediate POA is that it does not require the involvement of medical personnel to certify to the Principal's capacity, or lack thereof, to handle his or her own affairs. As a result, the Agent can assume control of the Principal's financial affairs in a quick and efficient manner.

A springing POA authorizes the designated Agent to act only upon the incapacity of the Principal. This requires a medical certification of incapacity, generally by at least two doctors. The result is a time gap between the incapacity of the Principal and the time when the Agent is authorized to act under the POA. If the Principal has financial affairs requiring timely attention, a springing POA may be problematic. At the same time, a springing POA does not authorize the Agent to act on behalf of the Principal while the Principal has capacity to act. This eliminates any confusion as to who should be handling the Principal's affairs while he or she has capacity.

Regardless of which type of POA is chosen, the Principal should only name Agents that are trustworthy and honest. In addition, the Principal should be aware of the potential risks and benefits associated with whichever type of POA they decide to utilize.

What You Can Do to Stop Theft of Your Identity

Nathan S. Silver, JD

In the August 2007 issue, *Consumer Reports* states that every day 27,000 Americans have their identities stolen. *Consumer Reports* says that one way to prevent thieves from opening new accounts in your name is to freeze your credit bureau reports. A freeze on your credit bureau reports locks up the information needed to conduct a credit check, and creditors will not open a new account without a credit check. Accordingly, a good way to prevent the theft of your identity is to freeze your credit bureau reports.



“*Consumer Reports* says that one way to prevent thieves from opening new accounts in your name is freeze your credit bureau reports.”

On July 1, 2006, Colorado enacted a security freeze statute (C.R.S. § 12-14.3-106.6). This statute allows you to freeze your credit bureau reports. To freeze your credit bureau reports, you must send a written request to the credit bureaus by certified mail requesting the credit freeze. The addresses of the three major credit bureaus are:

- **Equifax Security Freeze**, P.O. Box 105788, Atlanta, Georgia 30348
- **Experian**, P.O. Box 9532, Allen, Texas 75013
- **Transunion**, P.O. Box 1000, Chester, Pennsylvania 19022

You must provide the following information to the credit bureaus before they will freeze your credit reports: (1) name, (2) former name if applicable, (3) address, (4) former address if your address has changed in the past 5 years, (5) social security number, (6) date of birth, and (7) proof of current address, such as a current utility bill.

The credit bureaus must freeze your credit reports no later than five business days after receiving the request. They must also send you written confirmation of the security freeze within ten business days, and provide you with a personal identification number or password for you to authorize the release of information from your credit reports. There is no cost for the initial security freeze. The credit bureaus may charge \$10.00 for the temporary or permanent removal of a security freeze, and for the reinstatement of a security freeze. The credit bureaus may also charge \$12.00 for temporarily lifting a security freeze to allow a specific party to access your credit information. The credit bureaus must remove the security freeze within three business days of receiving a request for removal. Therefore, one way to protect your identity is to freeze your credit bureau reports because creditors will not extend new credit without a credit report, and they cannot receive your credit reports with a freeze in place.



The Homeowner Protection Act of 2007, Cont.

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Therefore, developers cannot contractually limit their liability for residential construction to only their limited warranty and the contract price for the residence. Developers no longer may contractually prevent homeowners from: (1) recovering treble damages and attorneys' fees under the Colorado Consumer Protection Act; (2) recovering consequential damages; (3) recovering their actual damages, which may exceed the contract price for the residence, and (4) suing or demanding arbitration before the statute of limitations runs, which could be almost eight years from substantial completion of the residence.

The statute of limitations for a construction defect is two years. The statute of repose for a construction defect is six years. The statute of repose is an absolute bar to bringing suit after the prescribed period. If the construction defect arises during the fifth or sixth year after substantial completion, then the action shall be brought within two years after the date upon which said cause of action arose. Accordingly, for a latent defect, the statute of repose may not run for eight years.

Mallgren & Ferrell, P.C.

200 Spruce Street, Suite 201
Denver, Colorado 80230

Phone: 303-341-0700
Fax: 303-341-0701
Email: office@mallgrenferrell.com
Website: www.mallgrenferrell.com

Our goal is to provide cost-effective legal assistance to help our clients achieve their personal and financial goals.

Did you know that if your child is attending a special school for disabilities, the associated expense may be a deductible medical expense?

Robert A. McDermott, JD, LL.M, CPA

The IRS has recently re-affirmed the long-standing rule that expenses associated with a child's attendance at a special school, designed primarily to treat a diagnosed illness, or disability, is a deductible medical expense. On January 26, 2007, the IRS issued PLR 200704001 that analyzed Regulation Sect. 1.213-1(e)(1)(v)(a), which states that the ". . . cost of medical care includes the cost of attending a special school for a mentally or physically handicapped individual, if his condition is such that the resources of the institution for alleviating such mental or physical handicap are a principal reason for his presence there." If this applies to you, the deductible costs not only include tuition, but also meals, lodging, and the cost of ordinary education provided that is incidental to the special needs education.



In Revenue Ruling 70-285 the IRS further defined "special school" as a school which the primary purpose is to enable the student to compensate for or overcome a handicap. So if your child has been diagnosed with a mental or physical disability, and your doctor recommends that your child attend a special school to assist your child in overcoming his disability, please speak to your tax advisor to see if your situation will allow you to deduct the costs of educating your child at the special school.