

Colorado Court Bars Limitation of Liability Provisions for Design Professionals

By Justin Jagher, Esq.

A COLORADO STATE DISTRICT COURT (“COURT”) RECENTLY INTERPRETED a newly-enacted Colorado statute (The Homeowners Protection Act of 2007) to prohibit limitation of liability clauses in design professional agreements. Although adverse to design professionals, it is unclear if other courts will follow the Court’s lead and similarly narrow the efficacy of these limitation of liability clauses.

Terracon Consultants, Inc. (“Terracon”), an engineering firm, entered into three written contracts with Gallery Homes (“Gallery”), a property developer, to provide certain engineering and testing services for a housing subdivision. Each agreement contained a limitation of liability provision for all claims arising out of Terracon’s services to be provided for the project. Following commencement of litigation arising out of the project, Terracon moved for partial summary judgment based upon its contractual limitation of liability provision. Terracon argued that its contracts were the result of negotiations between the contracting parties, and that there was no reason not to enforce the parties’ agreement. Terracon argued further that The Homeowners Protection Act of 2007 was intended to limit liability to protect individual homeowners, not sophisticated parties of equal standing.

The Court denied Terracon’s motion based upon its interpretation of The Homeowner Protection Act of 2007 that, it held, voids any contractual provisions that attempt to limit or reduce the rights or remedies of Colorado residential homeowners. C.R.S. 13-20-806 (7) (a) provides, in relevant part:

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.

In light of the foregoing, the Court held that the limitation of liability provisions in all of Terracon’s agreements with Gallery were unenforceable on the grounds that “[t]he plain language of the Statute does not state that only current homeowners may enforce it.” Rather, the Court reasoned that:

[i]f the intent of the statute, as argued by Terracon, is to preserve the legal rights and remedies of homeowners, allowing design professionals such as Terracon to limit their liability to a general contractor or developer in a third party claim in which the homeowner is the Plaintiff, would limit the homeowner’s ability to fully recover their damages.

In essence, the Court determined that, to enforce the limitation provision would result in fewer available resources from which the residential homeowners could recover. However, in attempting to preserve the “pot of money” for potential homeowners, the Court appears to have extended its interpretation of the statute beyond its express terms. Had the intent of the statute been to preclude all provisions that limit liability, including those between design and construction professionals, or other sophisticated parties, in favor of future residential landowners, it should have expressly incorporated that language in the statute.

The affect of this ruling will be detrimental on design professionals practicing in Colorado. Although this is only one court’s interpretation of the statute, it is likely that other courts will follow suit. Until this issue has been addressed by the Colorado Supreme Court, and it has had an opportunity to ultimately determine the efficacy of limitation of liability provisions in this context, a valuable contractual defense may no longer be available. ■