

# **House Bill 1161 – Constructive Litigation Reform**

## ***Summary:***

This document generally describes provisions of House Bill 1161 that was signed into law by Governor Bill Owens on April 25, 2003. It compares the anticipated effect the bill may have with respect to laws previously in effect governing construction defect litigation.

The bill has three significant components that will have an effect on construction defect litigation. The first is a right to remedy and notice provision. The second is a limitation on the nature and type of damages that can be pursued and awarded in a construction defect case. The third is a limitation on the availability and amount of treble damages under the provisions of the Colorado Consumer Protection Act.

There are other changes to existing Colorado law, but generally these changes fall within one of the three areas identified above.

## ***Right to Remedy:***

The bill contemplates delivery of a notice as a condition that must be satisfied in most circumstances before a construction defect claim can be asserted. The bill requires that at least 75 days prior to the filing of an action, a claimant must give the builder a notice that describes the nature of the claimed construction defects, the location of the defects and a general description of the type of damages that are claimed. The bill then places an obligation on the builder to respond to the notice if the builder wants to take advantage of the benefits provided by the bill (primarily limits on damages). The bill requires the homeowner to allow a reasonable inspection of the premises enabling the builder to respond to the notice of claim. The bill creates consequences for failing to respond to a notice of construction defect and likewise creates consequences for a claimant who does not accept an offer of settlement under the bill (see discussion of Colorado Consumer Protection Act below). Prior to the adoption of this statute, there was no such provision in Colorado law. In the event that an action is filed without complying with the bill, the action is to be stayed until the resolution procedure contemplated under the bill is completed.

## ***Limitation on Damages:***

One of the other significant aspects of the bill is to limit a plaintiff's recovery in construction defect cases to "actual damages" with regard to property based claims. Actual damages are the lesser of: (1) the fair market value of the property as if not construction defect existed, or (2) the cost of replacement or (3) the cost to repair, plus relocation costs, interest and any actual economic damages caused by the loss of use of the premises. "Probable damages" are no longer awardable in negligence cases. These are significant changes from existing Colorado law that in some instances allowed the cost to repair plus the diminution in value and the cost of repair even where such cost substantially exceeded the value of the property. Plaintiffs were also allowed to recover for annoyance, inconvenience, aggravation and other types of non-economic loss. The change in the bill should eliminate the ability of plaintiffs to assert or extrapolation evidence or

extrapolation causes of action for unknown or undiscovered damages from construction defect negligence claims. Additionally, although not explicit, the bill appears to eliminate recovery of punitive damages.

For those cases in which a personal injury is alleged to have been caused by a construction defect, a plaintiff is still entitled to recover for economic damages and non-economic damages. However, non-economic damages are limited to the sum of \$250,000 (subject to an annual adjustment based upon the cost of living increase in the Denver metropolitan area). This is consistent with other tort reform measures. Under prior Colorado law, there was arguably a wider latitude given to a trial court to allow an award for non-economic damages (pain, suffering, mental aggravation, emotional distress).

***Colorado Consumer Protection Act:***

The bill limits treble damages in a construction defect action to \$250,000 instead of the present standard where the actual damages awarded by a jury, including non-economic damages are trebled. Further, the bill places attorney's fees awarded under the CCPA within the \$250,000 cap on treble damages. The bill also clarifies that personal injury damages are not awardable under the CCPA. In addition, assuming a builder reasonably complies with the notice and response provisions of the bill, there is an additional requirement that a plaintiff must meet to be entitled to an award of treble damages in a CCPA action. Specifically, the bill contemplates that if a builder's offer of settlement is at least 85% of the damages (excluding legal fees and costs) that a claimant recovers, then there will be no availability of treble damages under the CCPA, even if a CCPA claim were otherwise proven. If, on the other hand, a builder fails to respond to a notice of defect, or fails to complete its work under an accepted settlement agreement, these damage limitations are not available.

***General Matters:***

There are a variety of other general matters that are contained within the bill that may have an effect on construction defect claims. The bill still authorizes alternative dispute resolution provisions in contracts and does not appear to preclude other warranty based limitations.

As noted above, this memorandum generally sets forth the anticipated effects of the bill. It is not intended to be an exhaustive review of all of the aspects of the bill, but is offered as a general summary of aspects of the bill and changes to existing law.