



## COLORADO SUPREME COURT PRESERVES A DEVELOPER-DECLARANT'S RIGHT TO ENFORCE ARBITRATION IN CONSTRUCTION DEFECT ACTIONS

On June 5, 2017, the Colorado Supreme Court announced the *Vallagio at Inverness Residential Con. Ass'n v. Metro Homes, Inc.*, No. 15SC508, 2017 CO 69 (Colo. June 5, 2017) decision. Through this decision, the Colorado Supreme Court concluded that a Developer-Declarant could retain its right to consent to amendments in common interest community declarations and that Colorado Consumer Protection Act ("CCPA") claims, frequently brought in construction defect actions, are arbitrable.

The Vallagio at Inverness Residential Condominiums were developed by Metro Inverness, LLC, ("Developer-Declarant"). As the Developer-Declarant, Metro drafted the first declarations for Vallagio's homeowner association (the "HOA"). Those declarations included a mandatory arbitration provision for construction defect claims. Moreover, the provision stated that it "shall not ever be amended without the written consent of Declarant and without regard to whether Declarant owns any portion of the Real Estate at the time of the amendment." The Developer-Declarant turned the HOA over to the board of directors in 2010.

Fast-forward to 2013, when the HOA brought construction defect claims, including a CCPA claim, against the Developer-Declarant in the district court. Prior to bringing that action, the HOA amended the declarations to remove the arbitration provision, without the Developer-Declarant's consent. The Developer-Declarant moved to compel arbitration, relying on the arbitration provision and the failure to obtain the required consent to amend. The HOA argued that the declarant consent requirement violated the Colorado Common Interest Act ("CCIOA") and that CCPA claims were not arbitrable because the CCPA expressly provides for a "civil action," which the HOA argued meant only a court proceeding.

The district court agreed with the HOA and denied the motion to compel arbitration. Specifically, the district court held that the declarant consent provision violated C.R.S. § 38-33.3-302(2), which provides: "The declaration may not impose limitations on the power of the association to deal with the declarant that are more restrictive than the limitations imposed on the power of the association to deal with other persons." The court also found that the declarant consent provision violated C.R.S. § 38-33.3-217(1)(a)(I), which states:

[T]he declaration . . . may be amended only by affirmative vote or agreement of unit owners to which more than fifty percent of the votes in the association are allocated or any larger percentage, not to exceed sixty-seven percent, that the declaration specifies. Any provision in the declaration that purports to specify a percentage larger than sixty-seven percent is hereby declared void as contrary to public policy, and until amended, such provision shall be deemed to specify a percentage of sixty-seven percent.

The Developer-Declarant brought an interlocutory appeal to the Colorado Court of Appeals on the issues, which led to a unanimous conclusion that the declarations required the HOA to bring its claims against the Developer-Declarant in arbitration. *Vallagio at Inverness Residential Condo. Ass'n v. Metro Homes, Inc.*, 2015 COA 65, ¶¶ 1, 72, \_\_\_P.3d\_\_\_. Thereafter, the HOA petitioned the Colorado Supreme Court, which brings us to this decision, upholding the Colorado Court of Appeals' determination.

The Supreme Court's decision addressed three of the HOA's specific arguments in concluding that the consent-to-



amend provision is consistent with CCIOA's plain language and therefore enforceable. First, it found that nothing in CCIOA precluded a declaration from imposing additional requirements (i.e., non-percentage based requirements) for amendments. Indeed, the Supreme Court noted that a number of CCIOA provisions expressly contemplate a third party retaining the right to consent to proposed amendments.

Second, the Supreme Court disagreed with the HOA that the consent-to-amend provision evaded the limitations of CCIOA. To the contrary, the provision is actually consistent with both CCIOA and Colorado's public policy favoring arbitration as a mechanism of alternative dispute resolution.

Third, in response to the HOA's argument that C.R.S. § 38-33.3-302(2) prohibits more restrictive limitations on the HOA's ability to deal with the Developer-Declarant, the Supreme Court concluded that a declaration cannot limit a power that has not been conferred on the HOA. Under CCIOA, the HOA itself had no power to amend the declaration - such power belonged directly to the unit-owners. Therefore, the "consent-to-amend" provision did not impose any limitations on "the power of the association" under section 38-33.3-302(2).

Finally, addressing the issue related to arbitrating CCPA claims, the Supreme Court concluded that the language in the CCPA does not prevent arbitration. The CCPA states that its provisions "shall be available in a civil action for any claim against any person who has engaged in or caused another to engage in any deceptive trade practice listed in this article." § 6-1-113(1) (emphasis added). A division of the Colorado Court of Appeals has already concluded that the legislature's use of the phrase "civil action" in section 6-1-113(1) established a right to commence a judicial proceeding - whether by court proceedings or other binding dispute resolution. Further, the Supreme Court noted that nothing in the CCPA prohibits waiving the right to a "civil action" - something other statutes providing such rights expressly include. Thus, the Supreme Court concluded here that the legislature intended that the

right to a traditional "civil action" under section 6-1-113 be waivable and that the declaration's arbitration provision effects such a waiver.

In summary, the Supreme Court favored arbitration yesterday, by concluding that the "consent-to-amend" provision was enforceable and consistent with CCIOA and that claims for violations of the CCPA may be properly arbitrated. This decision represents a favorable development for Colorado construction professionals by preserving the right to enforce arbitration provisions in construction defect cases.

The full opinion can be found at: [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Opinions/2015/15SC508.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2015/15SC508.pdf)

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