

## Court Decides Contentious Issue in Construction Defects Litigation

The Construction Defects Bill, SB 177, in this past legislative session was defeated and to the detriment of home owners. The legislation would have: (1) precluded changing any mandate in the HOA declaration that required arbitration as a means to resolve construction defects cases and 2) required the approval of home owners prior to using HOA funds on court cases. The goal of the legislation was to reduce the number and cost of construction defects cases that inhibit building affordable housing.

The issue of mandatory arbitration (vs a court case) has now been decided by the court: Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., et al. The court ruled that the mandatory arbitration clause in an HOA declaration can't be changed by a vote of the home owners (in this case without the consent of the declarant/developer). The impact of this ruling will be minimal as almost all of the State's 9,000 HOAs have never and will never attempt to change this language in their governing documents and most HOAs are beyond the statute of limitations to sue for "construction defects". The ruling still allows for litigation and only changes the venue for dispute resolution. Note, precluding home owners from changing the mandatory arbitration clause in their HOA governing documents was the main argument against this Bill and this court case basically ends that argument.

The voting requirement clause in SB 177 would have empowered home owners on the use of HOA funds in litigation. This alone would have automatically reduced the number of legal actions even more so than the mandatory arbitration clause. This clause would have also saved HOAs and home owners millions in legal costs each year. The defeat of SB 177 still leaves home owners vulnerable to and powerless when HOA Boards embark upon special interest, high cost, and "low success rate" litigation without their knowledge or approval.

Opposition to SB 177 was from the Community Association Institute (CAI) and HOA trial lawyers and focused on continued interest in costly court cases for dispute resolution vs arbitration. Arbitration can be argued to be much less costly, litigious, and expeditious all to the detriment of these interest groups. They also opposed this Bill because it would have limited their ease of access to HOA funds for litigation by requiring a vote of approval by home owners. Thus, opposition to SB 177 was less about protecting home owner's rights to pursue court cases and more about protecting the abusive environment that benefits HOA lawyers.. If the opposition was concerned about home owner's rights they would have at least supported empowering home owners on the use of their own funds. Note, this opposition has also been a factor in watering down or killing other HOA reform for many years so this is no surprise.

The Colorado Courts have defined home owner's rights on this issue indicating the arbitration clause can't generally be changed. Legislative efforts on the issue of HOA litigation should now focus on that part of SB 177 that empowered home owners by requiring voting on litigation. Those voting against SB 177 due to the "home owner's rights" argument should now be able to support legislation (and that part of SB 177) that would empower and protect home owners from costly, special interest, frivolous, and unapproved use of HOA funds in legal actions by requiring a vote of approval.

We will seek out sponsors for HOA legislation that will require home owner approval on the use of HOA funds in legislation.