COLORADO REAL ESTATE CASE LAW UPDATE

2014

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INTRODUCTION

I look forward to my fifteenth case law update for this distinguished group and terrific audience. As always, please let your fearless leaders on the Section Council know how this aspect of the program can be improved.

A word about our format. If a Pacific citation (West) is available, it is given; otherwise, we give the date of the case and numeric/chronological cite now assigned by the Colorado appellate courts, *i.e*. 2014 CO _, and 2014 COA _. In addition, all of the cases can be conveniently located in the Colorado Lawyer or on the Colorado Bar Association's web site, ***www.cobar.org/coappcts/ctappndx.htm*** and ***www.cobar.org/coappcts/scndx.htm****,* or through LEXIS and WESTLAW and Casemaker.

The cases are placed in chronological order by subject. Case coverage is current from July 1, 2013 through July 1, 2014. A supplement with cases decided subsequently may be distributed at the Symposium to make this last sentence true. In terms of cite form, we use informal shortcuts designed for ease of reading.

Some effort has been made to present these cases in a way that real estate experts and non-specialists alike will get something out of this presentation, and so that this summary may be useful as a research tool. Any opinions expressed here and in today's presentation may or may not be my own, and are given primarily to make the subject matter and its presentation more interesting. I am well aware that even a careful reader of these many cases will never know as much about the dispute giving rise to the reported case as the counsel that actually fought the fight at trial and on appeal. So, I ask for forgiveness in advance for errors in my reporting or interpretation. Forgive any attempts at humor – I am well aware that one person's dog is another's goat. Nevertheless, we are at a convention, not in law school, and it is 8 a.m. Let's have fun and learn.

I would like to thank my law partners for allowing me to take on this project and others like it for the past decade or so. Reviewing all of these cases is a challenge, but it is part of what makes the practice of law interesting. I want to give a special thanks to Vicki Fields for her careful support in all phases of this project and many others like it.

All mistakes are mine. They are like trout. They may appear hidden, but they're there.

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2. BOUNDARIES AND ADVERSE POSSESSION

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3. BROKERS

CapitalValue Advisors, LLC v. K2D, Inc.
Colorado Court of Appeals, August 15, 2013
2013 COA 125
Illegal contract; broker license required for sale of business; contract provisions severable.

K2D was a business that required new capital, and it contracted with Capital Value Advisors for a number of different tasks. CapitalValue entered into an engagement agreement whereby it agreed to either help sell K2D (either a majority or minority interest) or to assist K2D in obtaining debt financing. The rub is that CapitalValue does not have a real estate broker license or a securities license. That is required in order to market the sale of K2D as an entity, as one asset of the company was a leasehold interest in property, or to market its stock, under state and federal securities laws.

During the course of its engagement, K2D terminated Capital Value and engaged another company for help. That company obtained a bank loan for K2D – an action which, of itself, does not require a specific license. Since the loan was obtained during the carryover period under the CapitalValue engagement agreement, CapitalValue sued for a 4.5% commission under the terms of its agreement.

The engagement agreement provides:

> In executing this Agreement, [CapitalValue] is committing its resources to provide you the best possible representation in the sale of your business, and in turn, you are granting [CapitalValue] the sole, exclusive, and irrevocable right to procure parties ("Buyer(s)") to purchase, exchange, lease, invest in, *loan to*, contract for the services of, or otherwise obtain an interest in the Client's business, its corporate stock, business assets, right and properties or any portion thereof of Client or Client's affiliates. (Emphasis added.)

In addition, the Agreement set forth that CapitalValue would earn 4.5% of the total amount secured for "debt financing."

The district court dismissed all claims on summary judgment, holding that the entire engagement agreement was an illegal contract. CapitalValue does not contest that it lacked either license, and does not repeal the trial court's finding that two parts of the contract are void under these theories. However, it argues that other contractual obligations in the agreement are lawful, and that those provisions are severable from the "void" agreements, even in the absence of an express contract provision allowing the obligations to be severed. The district court dismissed the complaint on summary judgment, finding that the agreement had no severability clause, so the entire contract was unenforceable.

The court of appeals reverses the summary judgment order, finding that the lack of a severability clause is not determinative as to whether portions of the contract can be enforced.

Where a contract contains multiple provisions, some of which cannot be legally performed, the remaining provisions are not necessarily unenforceable. Rather, "[w]here an agreement founded on a legal consideration contains several promises, or a promise to do several things, and a part only of the things to be done are illegal, the promises which can be separated, or the promise, so far as it can be separated, from the illegality, may be valid." *Reilly v. Korholz*, 320 P.2d 756, 760 (Colo. 1958).

The court distinguishes *Broughall v. Black Forest Development Co.*, 196 Colo. 503, 593 P.2d 314 (1978), the leading case on the requirement for a real estate license to sell a business owning real property. That case involved a single agreement - to find a buyer to purchase a business, including its real estate interest. The broker there argued that, although he was not a licensed real estate broker, his commission could be "based on that part of the sale price which did not involve real estate." The court there ruled that "severing" the contract by simply discounting Broughall's fee "would allow finders and business brokers to disregard completely the licensing requirement to the detriment of the public whom the statute is designed to protect."

In contrast, the court here finds that the CapitalValue agreement contains multiple agreements, each of which could be a separate contract. The Agreement provides that CapitalValue would earn (1) 4.5% for a sale of less than a majority interest in K2D, Inc.; (2) 4.0% for a sale of more than a majority interest in K2D, Inc.; or (3) 4.5% for helping K2D obtain debt financing. CapitalValue does not appeal the district court's rulings that the first and second provisions violate federal and state securities licensing requirements. However, because the Agreement also contains a third provision for payment for securing debt financing that the parties do not contend violates either set of licensing laws, the district court erred in concluding as a matter of law that the Agreement could not be severed. The case is remanded for further proceedings to determine an issue of fact - whether the parties intended the provisions of the contract to be severable.

4. COMMON INTEREST COMMUNITIES, COVENANTS AND CCIOA

Triple Crown at Observatory Village Association v. Village Homes of Colorado
Colorado Court of Appeals, November 7, 2013
2013 COA 150
Construction defect claims; interlocutory review; relationship between revised Nonprofit Corporation Act and the Common Interest Ownership Act.

Arising from alleged construction defects in a common interest community, this interlocutory appeal under C.A.R. 4.2 presents four questions of first impression in Colorado, which the court answers as follows:

(1) Where an association is a nonprofit corporation, the Colorado nonprofit act establishes the time limit for amending its declaration based on action taken without a meeting;

(2) The statutory power to engage in "litigation" under C.R.S. § 38-33.3-302(1) (d) includes arbitration;

(3) C.R.S. § 38-33.3-302(2) does not invalidate the mandatory arbitration provision, because the dispute resolution procedures apply to parties other than the declarant; and

(4) Colorado consumer protection act claims may be subject to mandatory arbitration, because the CCPA does not include a nonwaiver provision.

Village Homes, a residential developer, built homes subject to recorded covenants, and thereby created an association, Triple Crown. Triple Crown was set up as a nonprofit corporation under C.R.S. § 7-121-101, et seq. In the declaration of covenants, the developer included a dispute resolution procedure for claims arising from the design or construction of homes in the Triple Crown development. The declaration requires that construction defect claims be arbitrated under American Arbitration Association rules.

In 2012, residents began a campaign to amend the declaration by repealing the arbitration clause. Unfortunately, it took more than sixty days to gather the votes to amend the covenants. After sixty days, 48% of the members had cast votes in favor of revocation. After another sixty days, the Association had obtained the required 67% of votes to effect the amendment. The Association recorded the amendment, and then brought this action against Village Homes alleging negligent construction, Colorado Consumer Protection Act (CCPA) violations, and breach of fiduciary duties.

Village Homes moved to dismiss for lack of jurisdiction, based on the arbitration clause in the declaration. It argued that the amendment repealing the arbitration provision was ineffective because the Association failed to amend Article 14 within the time limits in the nonprofit corporations act, specifically C.R.S. § 7-127-107(2), which deals with time limits for actions taken without a meeting. The trial court granted the motion, dismissed the case, and ordered the case to arbitration. This order is affirmed on appeal. The court holds that when an association amends its declaration without a meeting under the CCIOA, the association, if it is a nonprofit corporation, must comply with the sixty-day time limit provided in section 7-127-107.

The Court also agreed that the common interest association act gives power to associations to “institute, defend, or intervene in litigation or administrative proceedings . . . on the matters affecting the common interest community.” However, the court reasons that “litigation” includes both civil actions in court and arbitrations. It holds that the mandatory arbitration clause did not infringe on the Association’s statutory power to “institute litigation.”

The association then argues that CCIOA § 38-33.3-302(2) invalidated Article 14. The trial court rejected this argument. The Court agreed with the trial court, finding that the CCIOA section forbids only restrictions unique to the declarant. Article 14 controlled disputes between all parties.

The trial court rejected the Association’s argument that its CCPA claims should not be subject to mandatory arbitration, because CCPA provisions by statute “shall be available in a civil action.” The Court holds that such a right can be waived, and that Article 14 of the Triple Crown declaration was such a waiver.

Ryan Ranch Community Assn., Inc. v. Kelley
Colorado Court of Appeals, March 27, 2014
2014 COA 37M
Liability for homeowner association assessments; annexation; developer side agreement.

This is an interesting situation involving a developer, a side agreement with another landowner to exempt that owner’s land from subdivision covenants, and the annexation provisions of the CCIOA. As a prequel, the following general principles stated in the dissent by Judge Terry set the stage.

- “Provisions of this article may not be varied by agreement . . . . A declarant may not . . . use any . . . device to evade the limitations or prohibitions of this article or the declaration." C.R.S. § 38-33.3-104. . . .
- Members are not "entitled to set up agreements reached with the developer as defenses to the obligation to pay assessments . . . . [T]he developer does not have the power to waive the assessment obligations imposed on property within the common-interest community." Restatement (Third) of Property: Servitudes § 6.5 cmt. e (2000).

Nice notions, but sometimes the developer here found the approval process for a second filing of his development required some last minute adjustments. He had a side agreement with Kelley, and owner of a minority of land to be included in a second filing of a large development, to keep the “Kelley Lots” from control of any covenants or new HOA. At the late stages of approval of the new filing, however, developer includes Kelley’s land in the filing – Kelley signs the plat – and sells the lots in bulk to Ryland. Ryland, going along with the deal, sells the Kelley lots immediately back to developer, and the developer then deeds the land to Kelley. Kelley sells the lots to another builder, who sells homes to consumers. Several years go by, the consumers enjoy neighborhood improvements, and then the HOA takes action to collect assessments – including back fees totaling $70,000. The homeowners had constructive notice of the plat and the declaration from exceptions to their deed warranties. In defense, the homeowners and Kelley argued that their lots had not been appropriately “annexed” into the association. The decision goes through the statutes, and two judges reverse the trial court and hold that the requirements for annexation had not been met.

The reasoning of the majority goes like this. To exercise a development right under CCIOA, a developer must comply with the plat and map requirements of C.R.S. §38-33.3-209 and the recording requirements of C.R.S. §38-33.3-217(3). The homeowner defendants argue that to exercise a reserved development right, CCIOA requires the recording of an amendment to the declaration that must contain certain information and be properly indexed. The court agrees that the recording of an Official Development Plan and the declaration was not sufficient to meet these requirements. The original declaration cannot logically be considered an amendment to itself such that it could annex the Kelley Lots. Moreover, nothing was denominated as an amendment, nothing assigned identifying numbers to newly created units, there was no reallocation of interests among all units, and no common elements were described. Nothing on the Filing 2 plat map subjected the described property to the Declaration.

On the other hand, the dissent notes, the Declaration provides that the additional lots will be annexed into the HOA when (1) a plat for additional properties to be annexed is recorded and (2) either an annexation form is recorded, or a deed for real property within the plat is conveyed from Ryland to a third party other than Ryland. “On November 17, 2005, Ryland recorded the Filing 2 plat, which included the Kelley Lots. On December 20, 2005, Ryland conveyed the Kelley Lots back to the developer by deed. These two actions -- filing of the plat and conveyance by deed -- fulfilled the requirements of the Declaration to annex real property to the HOA.”

CCIOA fans and developers’ counsel will want to dive into this discussion – avoid those shortcuts.

5. CONDEMNATION, EMINENT DOMAIN

Regional Transportation District v. 750 West 48th Ave, LLC
Colorado Court of Appeals, December 5, 2013
2013 COA 168
Qualification of eminent domain commissioner; partiality.

The only question for a trial to a panel of three commissioners is, in most cases, the value of property taken by the government. Three commissioners were appointed by the court, including a Cassidy Turley broker, Ms. Hook. The commissioners were approved after a 90 minute voir dire hearing in the district court. Six months later, but before trial, RTD challenged the partiality of Ms. Hook, on the basis that two other brokers in her firm had testified on value issues in a separate but similar RTD eminent domain case. The question raised here is whether the standard of review on the disqualification motion is based on the standard applicable to a judge, or a juror. The eminent domain statute, C.R.S. § 38-1-105(1), instructs the trial court to disqualify a proposed commissioner who is "not disinterested and impartial." Under C.R.C.P. 97 and Colorado Code of Judicial Conduct Rule 1.2, by contrast, judges may be disqualified if they "appear" partial. In the latter case, courts have held that the test for appearance of partiality of a judge is whether a reasonable person, knowing all the relevant facts, would doubt the judge's impartiality.

Applying the plain language of the eminent domain statute, the court agrees with the trial court and affirms. The applicable standard for disqualifying commissioners is not "an appearance of partiality," a standard applicable to sitting judges, but whether the commissioner was "in fact interested and partial." The court holds that Hook's professional relationship with two fellow employees who had testified against RTD did not make her interested or partial.

The court comments on the special role of a condemnation commissioner. "The court relies on their experience and knowledge of the law of real estate to make the appropriate determination of just compensation. Because commissioners are supposed to bring expertise to valuation proceedings . . . they could not do so if the very knowledge and experience that made their views desirable also disqualified them."

6. CONTRACTS, PURCHASE AND SALE, TRANSACTIONS

Gattis v. McNutt (In re Estate of Gattis)
Colorado Court of Appeals, November 7, 2013
2013 COA 145
Residential sales contract; nondisclosure; economic loss rule.

This case presents another test of the outer limits of the economic loss rule. The buyer of a house, Carol Gattis, sues for fraudulent concealment and recovers a judgment against McNutt. McNutt's company acquired the property to "fix and flip," and obtained detailed soils reports outlining damage that was caused by shifting soils. On the disclosures form included in the standard form residential purchase and sale contract, McNutt disclaimed any "personal" knowledge of defects, and identified only the name of a company which had performed structural repairs - without describing the nature of the repair. McNutt appeals on the basis that the fraud claim is barred by the economic loss rule. He argues that the contract calls for specific disclosures, which were given, and that tort actions are precluded by the economic rule, as the requirement for disclosures "subsumes" the common-law duty to disclose material information.

The appeals court disagrees and affirms the judgment. Under the economic loss rule, "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." The court rejects the economic loss rule defense for two reasons. First, home sellers owe consumers an independent duty to disclose latent defects of which they are aware. Second, the court reasons that the disclosure provisions in the commission-approved form do not subsume the independent duty so as to trigger the economic loss rule. Although sellers were not required by the disclosure form to disclose their involvement with the entity that had performed repairs, the trial court found that this fact was material and should have been disclosed. Gattis could have prevailed on this nondisclosure claim without relying on the form disclosure. In short – the seller was perhaps "too cute by half."

The court distinguishes two recent decisions in which a real estate seller has successfully invoked the economic loss rule to avoid a fraud claim. In those cases - *Former TCHR, LLC v. First Hand Mgmt. LLC*, 2012 COA 129, and *Hamon Contractors, Inc. v. Carter & Burgess, Inc*., 229 P.3d 282 (Colo. App. 2009), the parties negotiated "transaction-specific" contracts. Here, the parties used standard real estate commission forms. The court holds that neither the Seller's Property Disclosure nor any other term in the form contract limits or subsumes the home sellers' common-law duty to disclose latent defects of which they are aware.

Planning Partners International, LLC v. QED, Inc.
Colorado Court of Appeals, July 1, 2013.
2013 CO 43
Contracts; attorney fee shifting provision; discretion to reduce fee claim to account for successful claim for offsets; no mandatory rule.

Our supreme court accepts this case to decide a recurring issue in attorney fee hearings pursuant to contractual fee shifting provisions. The court of appeals held that the trial court erred in failing to apportion a fee award to account for an offset caused by judgment or a counterclaim. The Supreme Court rejects a per se rule of mandatory apportionment in this circumstance. Requiring proportional diminishment in all cases where the judgment based on a note or contract had been reduced by a counterclaim arising out of the transaction would undermine the trial court's ability to determine a reasonable fee under the specific facts of the cases before them. The widely divergent circumstances under which attorney fee issues are litigated militate in favor of flexibility and discretion on the part of the trial court, rather than a rule of mandatory apportionment. In the current case, the trial judge proceeded methodically through the planning company's accounting, discounting the fees incurred in a claim he found to be unsupported by the evidence and reducing the entire amount of requested fees by 20%. He further determined that the attorney's fee issues were sufficiently intertwined and inter-related that apportionment was not appropriate.

The court notes that a trial court's discretion may be circumscribed by the statute or contract giving rise to fees. It points out that the note provision here did not require or preclude apportionment, which is a factor that a drafter of such a note or contract might consider. As a result, a trial court may determine that some apportionment is necessary for a fee to be reasonable, or it may not. The court here holds only that the widely divergent circumstances under which attorney fee issues are litigated militate in favor of flexibility and discretion on the part of the trial court, rather than a rule of mandatory apportionment.

Van Rees, Sr. v. Unleaded Software, Inc.
Colorado Court of Appeals, December 5, 2013
2013 COA 164
Economic loss rule; contract for design of website; no tort claim because no independent duty.

Although this is not a real estate case, I note it simply as an example of how the economic loss rule is spreading to preclude a wide array of fraud claims arising out of contractual relations. In this case, the court deals with the scope and applicability of Colorado's economic loss rule in the context of an agreement for the design and maintenance of a website. Under the economic loss rule, *no independent duty exists* for tort claims of fraud, fraudulent concealment, constructive fraud, or negligent misrepresentation when the alleged misrepresentations and false statements *are about the ability to perform contractual duties.* The court affirms the trial court's dismissal of the fraud, negligent misrepresentation, negligence, Colorado Consumer Protection Act, and civil theft claims. The breach of contract claim has it all.

Hickerson v. Vessels
Colorado Supreme Court, January 13, 2014
2014 CO 2.
Collections; statute of limitations; C.R.S. § 13-80-103.5 (1) (a) (six-year statute); partial payment doctrine; laches.

This case takes up the collection efforts of the holder of a $386,000 promissory note given in 1989 to the Vessels Oil Company. The note was due in ten years. Shortly after 1999, the maker started making payments on the note, and that continued for a couple of years. After payments stopped, Vessels sued to collect the entire balance. Under existing common law, which the court refers to as the partial payment doctrine, the running of the six-year statute of limitations begins anew whenever payments are made voluntarily, as the debt is recognized and acknowledged. The trial court held that the debtor should be protected under the circumstances of this case by the equitable defense of laches. The court of appeals reversed, but the Supreme Court reinstates the trial court's ruling.

Four statutes refer to the partial payment scenario. See C.R.S. §§ 13-80-113 to 116. The court refers to these as examples of the common-law rule, and not a replacement of the rule.

In a fairly bold stroke in support of the exercise of equitable powers, the court holds that the separation of powers doctrine does not bar application of the equitable defense of *laches* to a debt collection action filed within the original or restarted six-year statute of limitations period. Laches does not conflict with the plain meaning of the relevant statute of limitations, nor does it conflict with the partial payment doctrine, which is a creature of Colorado common law. Since early statehood, Colorado case law has recognized the application of equitable remedies to legal claims. Accordingly, the Court reverses the judgment of the court of appeals and remands the case for consideration of issues it did not reach, to wit – does the record support a defense of laches. Maybe not.

"The essential element of laches is unconscionable delay in enforcing a right under the circumstances, usually involving a prejudice to the one against whom the claim is asserted." The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another. Laches requires "such unreasonable delay in the assertion of and attempted securing of equitable rights as to constitute in equity and good conscience a bar to recovery."

The court remands the case to the court of appeals for review of whether the elements of laches are satisfied by evidence in the record. And father time marches on.

Top Rail Ranch Estates, LLC v. Walker
Colorado Court of Appeals, January 30, 2014
2014 COA 9
Sale of residential lots; claim preclusion; fraud; economic loss rule.

Top Rail Ranch entered into a contract with Walker Development to purchase a subdivision of platted residential lots for $1 million, with $200,000 down, and a promissory note for the balance, secured by a second lien deed of trust which it agreed to subordinate to bank financing with Canon National Bank for the subdivision development. Walker Development then attempted to rezone adjoining property that it owned to Agricultural Forestry, with plans to sell the adjoining parcel to a mining company. Walker told Top Rail's owner, Jensen, that the rezoning was to facilitate a conservation easement.

At this point, everything fell apart, and it is not over yet. Walker sold the adjoining land to a mining company after the rezoning was approved. When the sale was announced, Top Rail sales to potential homeowners froze. The County reversed the mining company's zoning approval. Top Rail defaulted on its loan with Canon National, which foreclosed on the subdivision lots. Top Rail could not cure; Walker Development redeemed from its second lien position, acquiring title to all but two of the subdivision lots. The parties sued each other in separate actions, and this consolidated appeal follows.

In the first case, Top Rail sued Walker for fraud, breach of contract, bad faith breach of contract and other claims. Walker Development counterclaimed for breach of the covenants in its deed of trust, seeking to recover damages for $200,000 that it had paid to cure a lien for nonpayment of a water tap. The trial court granted a directed verdict on the counterclaim, on the basis that the Walker Development deed of trust had merged into the Public Trustee's deed after the Canon National Bank foreclosure, and the jury found for Top Rail on its tort and contract claims, awarding in excess of $1 million.

In the meantime, Walker Development sued Top Rail and its principals on the promissory note given in purchase of the property, and for foreclosure on the two lots not covered by Canon National Bank's foreclosure. The district court dismissed Walker Developments on the basis of claim preclusion, based on the judgments entered in the first action.

On appeal, the court holds that the district court improperly dismissed Walker Development's counterclaims in the first action on a motion for directed verdict. Regardless of whether the lien imposed by the Walker Development deed of trust was extinguished by foreclosure of the bank's senior lien – Walker Development acquired title through its certificate of redemption - the contractual covenants in the deed of trust were not extinguished by the foreclosure. *Schwab v. Martin*, 165 Colo. 547, 441 P.2d 17, 19 (1968). Walker had a valid claim for the money spent to remove the water tap lien.

The court then holds that the fraud and bad faith breach of contract claims asserted by Top Rail are barred by the economic loss rule. It affirms the judgment on Top Rail's breach of contract claim ($500,000) is affirmed. The case is then remanded for trial on Walker Development's counterclaim on the tap lien.

Addressing the second case, Walker Development argues that its claims are not barred by claim preclusion, as its promissory note claims were not compulsory counterclaims in the first action; the counterclaims were only permissive. The appeals court agrees. Adjudication of the claims on the promissory notes would not result in inconsistent verdicts or a deprivation of rights established in the first litigation.

Taylor Morrison of Colorado, Inc. v. Bemas Construction
Colorado Court Appeals, January 30, 2013
2014 COA 10
Construction defects statute; willful and wanton breach of contract required to overcome liability limitation provisions in contract.

Taylor Morrison of Colorado, Inc. was the developer of a residential subdivision known as Homestead Hills. Pursuant to written contracts with Taylor, Terracon Consultants, Inc. performed geotechnical engineering and construction material testing services at the construction site. Bemas Construction performed site grading.

After many of the homes were constructed, Taylor began receiving complaints about cracks in the drywall of homes. Taylor remedied the defective conditions, and then sued Terracon and Bemas for breach of contract and negligence and other claims.

Taylor also moved for determination as to whether the Homeowner Protection Act of 2007 (HPA) invalidated the limitation of liability clauses in the contracts with Terracon. The trial court denied the motion on the ground that the HPA applies to residential property owners but not to commercial entities.

Terracon moved for leave to deposit into the court's registry $550,000, representing the maximum amount that Taylor could recover from Terracon under the contractual limitation of liability clauses and the court order. It also requested that upon acceptance of such deposit, the court should declare Taylor's claims against Terracon moot and dismiss them with prejudice. The trial court ruled in favor of Terracon. The money was deposited and the claims were dismissed with prejudice.

Taylor then went to trial against Bemas. The jury returned a verdict in Bemas' favor on all of Taylor's claims. Taylor appeals.

Taylor argued that it was error to rule that the HPA did not invalidate the limitation of liability clauses in Taylor's contracts with Terracon. The court of appeals panel affirms the trial court's judgment, but for different reasons. The court holds that regardless of whether the HPA applies to commercial entities, retroactive application of the HPA to these facts would be unconstitutionally retrospective. The Court concludes, however, that further proceedings are necessary to determine whether Taylor should have been permitted to introduce evidence of Terracon's willful and wanton conduct to attempt to overcome Terracon's assertion of the limitation of liability clauses.

The judgment is affirmed and the case is remanded to the trial court to determine whether Taylor should have been permitted to introduce evidence of Terracon's willful and wanton conduct for the sole purpose of attempting to overcome Terracon's assertion of the limitation of liability clauses at issue.

Jehly v. Brown
Colorado Court of Appeals, March 27, 2014
2014 COA 39
Fraudulent Concealment; Imputed Knowledge.

"Actual knowledge," in the context of a fraudulent concealment claim, cannot be imputed to a principal through knowledge of its agent. Defendant Brown owned real property in Teller County and hired a general contractor to build a house on it. Before commencing, the contractor discovered that part of the property was located in a floodplain. Brown was not told of this fact.

Plaintiffs David and Peggy Jehly entered into a contact to purchase the house from Brown. Brown filled out a Seller's Property Disclosure form by writing "New Construction" diagonally across every page and not checking any of the boxes. Before buying the house, the Jehlys were never informed that part of the property was located in a floodplain.

Approximately five years after the home purchase, heavy rains caused severe flooding and damage to the basement of the house. The Jehlys sued Brown, alleging he fraudulently concealed knowledge of the floodplain to induce plaintiffs to buy the house. During a bench trial, defendant denied having any personal knowledge of the floodplain at the time of the sale and denied that his general contractor or any subcontractors had so informed him. The trial court found as a matter of fact that he had no knowledge, and found in favor of defendant.

On appeal, plaintiffs asserts that it was error not to impute the general contractor's knowledge that part of the property was in a floodplain to Brown. The court of appeals disagrees, and affirms. To prevail on a claim of fraudulent concealment, a plaintiff must show that a defendant *actually knew* of a material fact that was not disclosed. It is not enough that defendant should have or might have known the fact, and knowledge of his agent cannot be imputed for the purpose of this particular tort claim. Plaintiffs did not contest on appeal the trial court's factual finding that defendant had no active or conscious belief or awareness of the existence of the floodplain. The trial court did not apply the wrong legal standard, because defendant did not have the requisite actual knowledge of the information allegedly concealed.

In the Interest of Delluomo v. Cedarblade
Colorado Court of Appeals, April 10, 2014
2014 COA 43
Revocable living trust; breach of fiduciary duty; undue influence; no attorney fees under breach of trust exception to American Rule.

Delluomo creates a revocable living trust and includes all of his assets, including title to his real property. He two beneficiaries, his niece Cedarblade and his nephew, Corcoran. Cedarblade uses undue influence (according to the jury) on her uncle and gets him to convey title to Delluomo and herself in joint tenancy. Corcoran objects, and ultimately a conservator is appointed for Delluomo, who brings suit to set aside the property conveyance. The case is tried to a jury, which finds that Cedarblade breached a fiduciary duty. The court set aside the conveyance, and granted Cedarblade's directed verdict on damages. The court did, however, allow the jury to award attorney fees for prosecuting the litigation, as an exception to the American Rule allowing fees in actions for breach of trust.

The court of appeals reverses that ruling, drawing a distinction between a garden variety breach of fiduciary duty and the kind of breach of trust in which a court has allowed recovery of attorney fees. The lead case is *Buder v. Sartore*, 774 P.2d 1383, 1390-91 (Colo. 1989), where a custodian of a minor's account mismanaged funds by investing the funds in penny stocks. The court here notes that Colorado courts have denied recovery of litigation fees "when the circumstances do not involve a type of fund, type of wrong, or type of wrongdoer" at issue in *Buder*. In other words, Cedarblade did not manage funds for her brother or serve as his trustee; she was a beneficiary, and only controlled funds after her wrongful act. A mere existence of a fiduciary duty is enough; the breach of trust exception calls for control of funds for another, and egregious conduct of some kind. A breach of trust, the court notes, is but one species of breach of fiduciary duty. It is a "failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries." Restatement (Third) of Trusts § 93. This panel notes that our supreme court has "expressly cautioned against liberally construing exceptions to the American rule on attorney fees, because that is "a function better addressed by the legislative than the judicial branch of government."

7. CONSTRUCTION DEFECTS

Mid Valley Real Estate Solutions V, LLC v. Hepworth-Pawlak Geotechnical, Inc.
Colorado Court of Appeals, August 1, 2013.
2013 COA 119
Construction defects; economic loss rule; duties of builder-vendor run to commercial entity that purchases house built for residential purpose.

Alpine Bank was lender on a construction project. The builder-developer defaulted. The bank threatened foreclosure, and ultimately took a deed in lieu of foreclosure. Consistent with its usual practice, the property was conveyed to the bank's REO subsidiary, which then sued for construction defects on the property.

The soils and structural engineers appeal an order denying their motion for summary judgment on the plaintiff's negligence claim. Does a commercial entity - a wholly owned subsidiary of a construction lender - have the rights of a residential consumer to sue design professionals for negligence, under the claims set out in *Cosmopolitan Homes v. Weller*, or are such claims barred by the economic loss rule? The court of appeals affirms the district court's ruling that the "independent duties" outlined in *Cosmopolitan Homes* and its progeny inure to the benefit of a commercial entity that buys a residential property, so that the claim is not barred by the economic loss rule.

The court reviews the economic loss rule and holds that there is an independent duty of care on the part of a builder in residential construction that renders the economic loss rule inapplicable in that context. Of course, the independent duty, which arises from the holding of our supreme court in *Cosmopolitan Homes*, would not apply to the typical commercial construction project.

The court then looks to whether Mid Valley - whose sole function is to hold foreclosure property for resale by the bank - falls within the class of plaintiffs who may enforce this independent duty of care. It concludes that the duty arises from the residential nature of a project, not from the characteristics of the owner of that property. While Mid Valley is not a traditional homeowner, the court reasons that allowing defendants to avoid liability for this reason would afford them a "windfall" resulting from the fortuity that the latent defect caused damage before Mid Valley sold the house. Accordingly, the denial of summary judgment was affirmed and the case was remanded for further proceedings. The Supreme Court has accepted the case for review:

Petition for Writ of Certiorari GRANTED, March 3, 2014, *S K Peightal Engineers v. Mid Valley Real Estate Solutions V, LLC*,

Summary of the Issues:

- Whether the economic loss rule bars a homeowner's negligence claim against a construction professional when the owner is a commercial entity rather than a natural homebuyer.
- Whether the interrelated contract doctrine as defined in *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004), can apply to a wholly-owned subsidiary that did not exist when the initial contracts were drafted but instead was created after work on the relevant contracts had been completed.

8. EASEMENTS AND PUBLIC ROADS

Durango & Silverton Narrow Gauge Railroad Company v. Wolf
Colorado Court of Appeals, August 1, 2013
2013 COA 118
Railroad right-of-way; incidental use doctrine.

A property owner whose land is subject to a railroad company's easement for railroad purposes objects when the railroad company leases a portion of its right-of-way to a local nonprofit for a bicycle path. The owner's predecessor in title granted the railroad company this right in 1881:

> [Grantor] does hereby sell, grant, convey, and release unto the said Denver and Rio Grande Railway Company the right of way for a width of one hundred feet—fifty feet on each side of center line—for the construction of the said Railway. . . . Giving and granting unto [the D&RG] the right to excavate, fill, ditch, drain, erect cattle guards and crossings [etc.].

The property owners appeal the trial court's summary judgment in favor of the Durango & Silverton Narrow Gauge Railroad. The court of appeals affirms.

In 2009, the Durango & Silverton agreed to grant the City of Durango a nonexclusive easement to extend a public recreation trail over its right-of-way and adjacent to the railroad tracks. The tracks remain in use. Part of the trail crosses the Wolf's property. Durango paid DSNGRR $1 million specifically for continued operations and maintenance. The trail also will promote safe use of the right-of-way by pedestrians and bicyclists who walk and ride directly on the railroad tracks.

Wolf opposed the agreement, arguing that the 1881 right-of-way permitted use only for "railroad purposes" and that a recreation trail is not such a purpose. On cross-motions for summary judgment, the trial court held that the original deed conveyed an exclusive easement. It held that a railroad right-of-way is an expansive form of easement, giving the railroad company exclusive use and control of the right-of-way as long as it continues to operate a railroad. It also found that the use by the public was a railroad purpose, because it eliminated safety and liability problems and increased efficiency on any rail repairs.

Relying on state and federal case law, the court of appeals agrees that the right-of-way is more expansive than a typical easement, and that the Durango & Silverton has the right to exclusive use and control of the servient tenement. This use includes the right to lease portions of the right-of-way. It therefore affirms the judgment.

The appeals court does not address whether a public recreation trail is a "railroad purpose," as the district court had found, relying instead on the "incidental use" doctrine. This doctrine, which has never been invoked in Colorado, states that a railroad may lease a portion of its right-of-way where the use is incidental to or not inconsistent with the railroad's continued use of its right-of-way for railroad purposes. The public recreation trail meets both of these criteria, in the court's view.

Wolf argues that the trial court erred by not requiring the joinder of five neighbors that he alleges are indispensable parties. Their property is also subject to DSNGRR's right-of-way and are affected by the public recreation trail. The Court disagrees, holding that this dispute is governed in large part by the interpretation of the deed from Wolf's predecessor, which is specific to Wolf's property.

Maralex Resources, Inc. v. Chamberlain, Public Trustee of Garfield County
Colo. App January 2, 2014
2014 COA 5
Oil and gas lease; prescriptive easement for access to wells; adverse or permissive use of roads; standing.

Since 1996, Maralex has been a lessee under a series of federal oil and gas leases in Rio Grande County. Maralex operates and maintains various oil and gas wells located on federal land. To access the wells, Maralex and its predecessors in interest have historically used two roads crossing private property now owned by Nona Jean Powell. The Powell property is adjacent to the federal land. After issues arose between Maralex and Powell regarding use of the roads, Maralex filed a quiet title action seeking a decree that it has prescriptive easements over the roads for ingress and egress to the oil leaseholds. The trial court first found that Maralex lacked standing, as a real property lessee, to assert a prescriptive easement claim. Notwithstanding that finding, the court went on to consider the merits of the easement claims as a matter of judicial economy. It found that Maralex's use of the roads was permissive and not adverse, and that Maralex did not establish the existence of the asserted prescriptive easements.

On appeal, the court reverses the holding on standing. Citing a long string of cases, an oil and gas lessee has standing to bring a quiet title action and to enforce easement rights. One can even draw an analogy to surface cases in which use by a tenant may be tacked on to prior use by the fee owner in proving possession for the prescriptive period.

The court finds sufficient evidence in the record to affirm the finding that the use by Maralex and its predecessors was permissive, not adverse. It was conceded that oil operators on the government land openly and continuously used the roads on Powell's property for the statutory period. However, because Powell previously permitted the use, the use was not adverse. What made the use permissive? Like so many cases of this sort, we have gates on the roads, and cattle on a ranch. At one point a former owner of the Powell property gave keys to the oil company, telling a grazing tenant that he wanted to oil operation to be successful, but that he did not want his tenant's herd to be impacted. Over the course of decades, there was all manner of evidence of a problematic nature, sufficient that the court could go either way on the "adversity" issue. The trial court resolved it like this – "By giving someone a key, it seems to the Court that the only reasonable interpretation is that 'I want to keep people out, but not you. You have permission to use my road. Here is a key.'" The appeals court also notes that this could also be a recognition of a right of the user to access, with acquiescence by the easement claimant to blockage of use by <u>others</u>. The court goes along with the trial judge.

Sinclair Transportation Company d/b/a Sinclair Pipeline Company v. Sandberg
Colorado Court of Appeals, June 5, 2014
2014 COA 76
Pipeline easement; assignability of easement in gross; proof of assignment of easement rights by parol evidence; abandonment.

This is one in a series – one might say a family - of cases involving Sinclair's pipeline between oil fields in Wyoming and Denver. At one point, the pipeline crosses land in Weld County, creating friction with residential development, and with owners of land such as the Sandbergs. Sinclair seeks to upgrade its pipeline from 6" to 10" according to terms of the written pipeline easement, which dates back to 1963. The easement was in favor of the original servient owner and its "successors and assigns."

In an extensive opinion, the court affirms a partial summary judgment ruling in favor of Sinclair on defenses raised by the landowners, who sought to block any expansion or to require movement of the easement in order to minimize its impact on their residential development. The first issue deals with the use of parol evidence to prove a part of Sinclair's interest (ownership of a series of assignments from partial owners of the pipeline). The court upholds a ruling that Sinclair could prove a part of its chain of title by proving assignment of one 50% interest in the line through testimony of an attorney representing one of the parties to the assignment. The court holds that no statute of frauds bars oral testimony to prove of an assignment of an easement.

More importantly, the court holds that an easement in gross, especially one created for commercial uses, is assignable. The court relies on the modern trend in case law and comments in the Restatement of Property (Servitudes) _4.6(1)(c) ("a benefit in gross is freely transferable"), as well as C.R.S. _ 38-30-101 ("any person . . . entitled to hold . . . <u>any interest in real estate</u> whatever, shall be authorized to convey the same to another"). The court cites a Utah case, *Crane v. Crane*, 683 P.2d 1062 (Utah 1984) which surveys the easement in gross case law as it applies to pipelines and other commercial uses.

For those interested in the industry, the court goes on to discuss interpretation of the easement document in regard to how a pipeline company can expand and improve its pipeline -- whether a pipeline company must "remove, then replace" or "replace, then remove."

Finally, the court holds that Sinclair's attempt in a parallel case to condemn a way across the land in question did not effect an abandonment of its deeded easement rights. The attempt to condemn was derailed in a 2012 decision of the Colorado Supreme Court discussed in this space. Another court of appeals decision (not discussed in this outline) deals with the pipeline condemnation issues.

9. ESTATES AND PARTITION

No reported cases.

10. FORECLOSURE, DEBTOR-CREDITOR, RECEIVERS, LENDER LIABILITY

Colorado Community Bank v. Hoffman
Colorado Court of Appeals, November 7, 2013
2013 COA 146
Receiver; order for sale certified as final judgment; C.R.C.P. 54(b); deadline to appeal; abuse of process; civil conspiracy.

This action arises from the judicial dissolution of certain companies in the course of a receivership proceeding. The companies were formed to develop golf courses. The bank sought appointment of a receiver when the companies defaulted on development loans. Certain individuals intervened and joined in the motion for appointment of a receiver. The companies asserted counterclaims for abuse of process and civil conspiracy.

The court granted a motion by the receiver for the companies to sell the golf courses to an entity controlled by the intervening individuals. The district court certified the sale orders as final under C.R.C.P. 54(b) to allow an appeal. The sale orders disposed of an "entire claim for relief" for purposes of C.R.C.P. 54(b) certification. Is a sale order in the course of a receivership action an "entire claim"? It can be, reasons the court. It states that prior cases have suggested that orders concerning property ownership can properly be certified. In *Corporon v. Safeway Stores, Inc*., 708 P.2d 1385 (Colo. App. 1985), the court held that "a quiet title claim is separable from slander and defamation claims, and therefore, properly certifiable under C.R.C.P. 54(b)." Because defendants did not appeal this order within forty-five days of the certification, but rather waited until the counterclaims had been resolved, the court of appeals lacked jurisdiction over this issue and that portion of the appeal is dismissed.

The court affirms the summary judgment order dismissing the abuse of process and civil conspiracy claims. Although the evidence might have proved that the interveners had an ulterior motive in bringing the receivership action, it did not establish the requisite improper use of process element. The rule was recently stated in *Sterenbuch v. Goss*, 266 P.3d 428 (Colo. App. 2011):

> If the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint there is no abuse, even if the plaintiff had an ulterior motive in bringing the action or if he knowingly brought suit upon an unfounded claim.

The court agrees with the trial court that the claims failed this test. Because the companies' conspiracy claims were based on the alleged underlying wrong of abuse of process, this claim also failed.

Armed Forces Bank v. Hicks
Colorado Court of Appeals, June 5, 2014
2014 COA 74
Guarantor; waiver of anti-deficiency rights; C.R.S. 38-38-106(6); good faith bid at foreclosure sale.

The bank makes a $6 million loan to a closely held, single asset company to build a condominium project in Glenwood Springs. The loan is personally guaranteed by Mr. and Mrs. Hicks, the principals of the company. After the loan goes into default into default in 2009, the banks agrees to several loan extensions, after which the company remained in default for failure to make certain payments and failure to obtain planning department approval of a condominium plat. After a trip by the company through bankruptcy court, the bank forecloses. At the foreclosure sale, the bank bids $3.7 million, leaving a $6 million deficiency, after all interest, costs and the like are added to the final tab. The bank files a civil action to collect the deficiency against Hicks. The Hicks attempt to assert defenses based on failure to make a bid based on a good faith estimate of fair market value, and alleging that the bank violated its duty of good faith and fair dealing by refusing to approve the plat ten months after the borrowers' default. In effect, they argue that the bank failed to mitigate its damages by not allowing the plat to be recorded, even if the borrowers were in default, because the property would be more valuable at that point and the receiver would be able to lease the property, generating income to apply to the loan balance.

The court of appeals affirms the trial court's grant of summary judgment in favor of the bank, holding that the guaranty contained a specific, and very broad, waiver of any right to challenge the bank's bid at the foreclosure sale based on a "one action or anti-deficiency law." In a case of first impression, the court holds that the statutory duty of a creditor under CRS 38-38-106(6) to bid its good faith estimate of fair market value may be waived, and that such an agreement is not void for violation of public policy. The court contrasts this statute, which has no provision barring a contractual waiver of its terms, with CRS 38-38-703, which explicitly prohibits agreements to waive, inter alia, the right of cure and redemption. The court notes that there is still a common law duty to make a good faith bid, under *Chew v. Acacia Mutual Life*, 165 Colo. 43, 437 P.2d 339 (1968) (bid not made in good faith on the basis of what the security could reasonably be expected to produce on sale at its fair market price), but the guaranty signed by Mr. and Mrs. Hicks included a waiver of "any defenses given to guarantors in law or in equity" except for payment of the indebtedness.

It will be interesting to see if the Supreme Court wants to take a look at this.

11. JUDGMENTS AND FRAUDULENT TRANSFER

Shigo, LLC v. Hocker
Colorado Court of Appeals, February 27, 2014
2014 COA 16
Execution upon water rights; homestead; water rights appurtenant to land.

A creditor obtains a judgment against Hocker for $4.4 million, and seeks to levy and execute upon Hockers shares in the Highland Ditch Company. Hocker owns an undivided 50% interest in two and three-quarter shares of Highland stock. The Highland shares represent Hocker's right to use water that runs through a mutually owned ditch, a branch of which leads to a pond on the thirty-five-acre farm that Hocker owns with her husband. Hocker files a claim under the homestead exemption, asserting that the shares, which represent water rights appurtenant to her farm, could not be levied. The court denies Hocker's claim of exemption, and Hocker appeals.

The district court found that the homestead exemption "does not apply to water stock certificates". The appeals court holds that the homestead exemption for a "farm" includes not just the farm's soil, but also the water rights appurtenant to the land.

Shares of stock in a mutual ditch company represent water rights. However, because the record is not clear as to whether the water rights represented by the Highland shares are *necessary to the use and enjoyment* of the farm, the case was reversed and remanded to the trial court for further findings on that issue.

12. LAWYERS AND PROFESSIONAL LIABILITY

Gibbons v. Ludlow
Colorado Supreme Court, July 1, 2013
2013 CO 49
Professional negligence; transactional "case within the case"; causation of damage; "better deal" test.

This case was mentioned in last year's "supplement" to our outline, and is repeated here for convenience, as it is an important case in the professional liability circles. It involves liability claims against both brokers and transactional attorneys, and the key element of causation. If one is negligent in advising a client in a transaction, and the client gains less from a deal than is anticipated, must the plaintiff prove that a "better deal" could be had? The court is required to find the analog to the "case within a case" that is tried in legal malpractice actions arising out of the litigation process. Although the case addresses the liability of a seller's broker, the same principles apply to a claim against a seller's attorney.

The trial court answered the presented question affirmatively, and dismissed a negligence claim against the seller's broker on summary judgment. The court of appeals reversed, but the supreme court reverses and reinstates the summary judgment ruling. To sustain a professional negligence claim against a transaction real estate broker (or attorney), a plaintiff must show causation of damage, in addition to negligence. That is, it must be shown that but for the alleged negligent acts of the broker, the seller either (1) would have been able to obtain a better deal in the underlying transaction, or (2) would have been better off by walking away from the underlying transaction. In the court's view, the sellers failed to present evidence that any negligence of the broker caused the seller to suffer damage. They did not establish beyond mere possibility or speculation that they suffered a financial loss as a result of the transactional broker's professional negligence. Because no injury could be shown, the trial court properly granted summary judgment as a matter of law.

The underlying deal was documented in a contract with a set price, with adjustments for construction of infrastructure and cost-sharing with other developers. The sellers claim that the brokers failed to explain that the net income from the transaction could be substantially less than the stated purchase price as a result of the cost-sharing provisions. The brokers argued that their sellers submitted no evidence that they could have sold the property to someone else for more. This is termed the "better deal" test. The sellers respond that they presented evidence that the property was worth the contract price, or $1.6 million more than the net proceeds of the deal. They argue that they can recover in negligence for this "no deal" scenario. The court of appeals agreed and held that the general measure of damages for a total loss of property is the fair market value of the property at the date of loss. In effect, the Supreme Court says – you must prove you could have sold the property for more, or that you would have made more had you walked away from the deal.

Baker v. Wood, Ris & Hames

Petition for Writ of Certiorari GRANTED February 3, 2014.

Summary of the Issues:

- Whether the court of appeals erred in determining that third-party intended beneficiaries of a deceased testator's estate plan lack standing to pursue a claim for professional malpractice against the testator's estate planning attorneys based on either breach of contract or professional negligence.

- Whether the court of appeals erred in confusing petitioners' claim for fraudulent concealment with the distinct tort of fraudulent misrepresentation in applying the heightened pleading requirements of C.R.C.P. 9(b) to petitioners' concealment claim as if it were a claim for fraudulent representation.

13. LEASING AND EVICTION

No cases.

14. PREMISES LIABILITY, TRESPASS AND NUISANCE

S.W. v. Towers Boat Club, Inc.
Colorado Supreme Court, December 23, 2013
2013 CO 72
Attractive nuisance; premises liability statute.

The Supreme Court considers whether, in the context of our premises liability statute, the attractive nuisance doctrine applies to both (a) trespassing children and (b) children who are licensees or invitees. The Court held that the doctrine permits all children, regardless of their classification, to bring a claim for attractive nuisance. C.R.S. § 13-21-115. The court therefore reverses the judgment of the court of appeals, which had found that the doctrine only protects trespassing children.

15. PROPERTY TAXATION AND ASSESSMENTS

Roaring Fork Club, LLC v. Pitkin County Board of Equalization
Colorado Court of Appeals, December 5, 2013
2013 COA 167
Valuation of a private golf club property.

The Pitkin County assessor determined the value of the Roaring Fork Club property for tax year 2011, and The Pitkin County Board of Equalization and the Board of Assessment Appeals agrees with the valuation. On appeal, the club asserts that the assessor should not have included the value of sold club memberships in the assessment of the club's property. The Court of Appeals agrees and reverses.

The club's property is open only to its members. Membership rights are retained for life unless sold or relinquished or revoked by the club. The club uses membership deposits to improve the property and maintain the improvements. The deposits are treated as a liability for accounting purposes because all or a part of them are refunded if members maintain their membership for at least thirty years or if they resign earlier and replacement members fill their spots.

The club's amenities were completed in 1999 and the club had sold about 82% of the memberships by 2011. The club argues that the value of the sold memberships should not be considered in determining the actual value of the club's property for property tax purposes because they are not interests in the real property. The BOE contends that the membership deposits are akin to prepaid rent on leasehold interests and they would escape taxation if not included in the property value.

On appeal, the club and the BOE agree that the income approach is the proper method to value the club's property. However, the county argues that the memberships are an interest in land, like a leasehold, and should be included in the value under the "unit assessment rule." The club contends that memberships are licenses, and are not an interest in land. The court agrees, and holds: (1) the membership agreement is not a lease; (2) memberships are not life estates; (3) the membership agreement does not give members any other taxable interest in the club's property; (4) the membership agreement establishes that memberships are revocable licenses; (5) the unit assessment rule does not apply to these memberships; and (6) the sold memberships are not usufructuary interests. Accordingly, the Board's order is reversed and the case is remanded to hold a hearing to determine the actual value of the club's property without taking into account the value of the sold memberships.

Village at Treehouse, Inc. v. Property Tax Administrator
Colorado Court of Appeals, January 16, 2014
2014 COA 6.
Property tax; unit assessment rule.

Village paid more than $1 million to purchase certain development rights from the Treehouse Condominium Association (HOA). This supposedly gave Village the right to construct up to nineteen condominium units in the complex. The development rights were created by an amendment to the Treehouse declaration in 2006. The rights were assigned to Village in 2008 in a document entitled "Warranty and Assignment of Supplemental Development Rights". The question is whether this property right is a taxable interest in real property. The Board of Assessment Appeals found that the right to build new condominium units constituted a taxable interest in real property for *ad valorem* tax purposes.

On appeal, the court of appeals affirms the BAA, and holds that the assignment, in effect, severed the development rights from the common elements owned by the HOA, creating a new taxable property interest. Because the Village acquired an interest in land, taxation of the development rights was required under C.R.S. § 39-1-102(16) and (14)(a).

Because the Assignment evinced the intent to sever title to the development rights from the common elements, taxing the development rights separately from the common elements did not contravene §§39-1-103(10) or 38-33.3-105. This taxation does not violate the unit assessment rule.

The Assignment created separate interests in real estate as between the interests of the individual unit owners in the common elements and those of the developer. The order was affirmed.

16. TAX SALES, TREASURER DEEDS AND CONSERVATION EASEMENT TAX CREDITS

No reported cases.

17. TITLES AND TITLE INSURANCE

Grosboll v. Grosboll (In re: the Estate of Grossboll)
Colorado Court of Appeals, October 24, 2013
2013 COA 141
Partnership property; statute of frauds.

Jo Ann Grosboll, decedents' daughter, appeals the district court's order finding that the sales proceeds of an apartment building are an asset of the parents' estates rather than an asset of Grosboll Manor, L.L.L.P., a limited partnership formed by Jo Ann and her parents. Jo Ann's brother, understandably, argues that the apartments are property of the estate. The key issue revolves around the fact that there is no deed of conveyance to the partnership.

As a matter of first impression, the court considers whether real property owned individually by one who enters into a partnership with others may become a partnership asset without a written conveyance sufficient to satisfy the statute of frauds. The court holds that a written conveyance (such as a deed) from a partner to the partnership is not necessarily required.

The court reviews the historical development of the entity theory of partnerships and the Uniform Partnership Act. The current version of the partnership act allows real property titled in an individual partner's name to be deemed an asset of the partnership. The trust relationship between partners provides adequate protection against fraud in oral agreements making a partner's real property a partnership asset. As a result, by statute, the intention of the partners determines whether such real property is a partnership asset. The existence of a written conveyance is a factor for a court to consider in evaluating that intent.

Jo Ann contended that, according to the terms of the written partnership agreement and the intention of the partners, Loma Vista was a partnership asset. The partnership agreement provided that (1) title to all assets of the partnership shall be deemed to be owned by the partnership"; (2) record title to any or all assets of the partnership may be held in the name of . . . one or more nominees"; and (3) all assets of the partnership shall be recorded as the property of the partnership in the books and records of the partnership, irrespective of the name in which record title to such assets is held." Jo Ann testified that when the partnership was established, she and her parents had agreed to make Loma Vista a partnership asset. Additionally, the accountant for the partnership testified that he treated Loma Vista as a partnership asset on the partnership books. Therefore, Jo Ann asserted she was entitled to the sale proceeds because decedents' wills devised their interests in the partnership to her.

The partnership act provides a rebuttable presumption that a partner's property is separate if it is not acquired with partnership assets:

> Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets is presumed to be separate property, even if used for partnership purposes.

C.R.S. § 7-64-204(4).

Because the UPL and UPA specifically contemplate that real property titled in an individual partner's name <u>may</u> be deemed an asset of the partnership, the appeals court holds here that a written conveyance from a partner who originally brings real estate into the partnership, although a factor to consider, is not required to convert real property into partnership property.

Egelhoff v. Taylor
Colorado Court of Appeals, August 15, 2013
2013 COA 137, 312 P.3d 270
Spurious lien statute; phony lien against judge.

Lest anyone be confused about why the legislature passed the spurious lien statute in 1998, we give you the case of Denver District Judge Egelhoff. In 2008, the judge sentenced Taylor to prison on a felony conviction. After he was sentenced, Taylor began mailing the judge various documents, claiming that Judge Egelhoff was indebted to him. The judge understandably did not respond. Taylor filed suit, claiming that the judge's failure to respond created liability to Taylor under a terrific doctrine called the "commercial affidavit process." Robin Hood could not have done better.

Taylor contends that the “commercial affidavit process” permits an individual to send an affidavit to a purported debtor, claiming the recipient owes the sender a debt, and if the recipient does not specifically rebut the alleged debt, he is deemed to have agreed to the debt and its collection by any means. At our social gathering tonight, perhaps someone can advise us from whence this legal doctrine derives. According to Taylor, a recipient’s silence results in a “self-executing contract,” binding the recipient to pay the amount of the alleged debt. Thus, Taylor argues that, because the judge did not respond to his affidavit, his honor “agreed” that the five hundred million dollar debt was valid.

The panel of the court of appeals, seemingly lacking any sense of humor, goes on for several pages as to why this procedure does not form a contract between judge and convict. An opportunity was missed. It is interesting that this case was selected for publication, when many other real estate cases of considerable substance are passed over.

Ute Mesa Lot 1, LLC v. First-Citizens Bank & Trust Co. (In re Ute Mesa Lot 1, LLC)
United States District Court, District of Colorado, November 25, 2013
No. 12-1134
Bankruptcy; *lis pendens*; preferential transfer.

Ute Mesa Lot 1, LLC (Ute Mesa) borrowed $12 million from United Western Bank to finance the construction of a home in Aspen. The deed of trust incorrectly named the property’s owner, so the deed of trust was ineffective in giving the Bank a lien on the property. Later, the Bank filed suit to reform the deed of trust and give it a first priority lien on the property. The Bank then recorded a notice of *lis pendens* with the county real property records. Two months later, Ute Mesa filed for bankruptcy and sought to avoid the *lis pendens* as a preferential transfer. The bankruptcy court and district court dismissed Ute Mesa’s claim. Ute Mesa appealed, arguing that the *lis pendens* would prevent a *bona fide* purchaser from acquiring an interest in the property superior to the Bank’s. Therefore, it was a "transfer of an interest in property" and an avoidable preferential transfer.

The Tenth Circuit holds that a *lis pendens* is merely a notice and does not constitute a lien, despite the fact that under Colorado law, a *lis pendens* renders title unmarketable. The *lis pendens* is not a transfer, so it was not subject to the bankruptcy provision allowing a debtor-in-possession to avoid a transfer of an interest in property that occurs within ninety days before the filing of the bankruptcy petition. The judgment is affirmed.

First Citizens Bank & Trust Co. v. Stewart Title Guaranty Co.
Colorado Court of Appeals, January 2, 2014
2014 COA 1
Title Insurance; Exclusion 3(a) matters "created, suffered, assumed or agreed to by the insured claimant"; closing handled by insured lender; ambiguous; no need "foreclose first" if deed of trust defective; subrogation to rights of insured lender to sue on note; attorney fees and the American Rule.

Bank commits to make a loan, and gets a commitment for a loan policy of title insurance. The commitment reflects that title is not in borrower, and contains a requirement that a deed be recorded vesting title in borrower before issuance of a new policy. Bank closes the loan in house and does not get a vesting deed. According to the trial court's findings, the bank assumed the title company issuing the commitment (but not handling the closing) would get and record the deed. The title company assumed the bank would do that. It is not apparent from the decision whether title was searched prior to closing or issuance of a policy.

The borrower defaults on the loan, and files a title claim in the amount of the debt. A separate action is filed by the bank against the borrower, which had not gone to judgment by the time of trial in this action. The trial court enters judgment against the title insurer for the full amount of the balance due on the loan, together with attorney fees incurred by the lender in bringing the action. On appeal, the court affirms the judgment for the full amount of the debt but reverses the award of attorney fees.

The court follows the holding in *Sims v. Sperry*, 835 P.2d 565 (Colo. App. 1992) that Exclusion 3(a), which excludes coverage for matters "created, suffered, assumed or agreed to" is ambiguous, and that the title insurer must prove that the lender "made a conscious and deliberate act intended to bring about the conflicting claim" in order to successfully resort to this exclusion from coverage. *Id*. at 570. Like many legal rules stated by courts, this rule itself may overstate the meaning of the court's ruling in Sims, since if a title company relies on the "agreed to" portion of 3(a), which would seem to mean that the encumbrance, if you will, was "intended." In any event, the court here held that each party thought the other would satisfy the "requirement," and the court held that the lender was only negligent in not complying with the requirement. The trial court's refusal to apply this defense was support by the record, and the judgment is upheld on liability.

As to damages, the court held that the insurance company could be held liable for the full amount of the indebtedness owed to the insured, as the deed of trust is invalid. The court held that the trial court correctly did not require the lender to attempt foreclosure of the deed of trust under Policy Condition and Limitation 8(b), holding that the limitation does not apply where "it is conceded that the insured's title is defective. It did not require that this action be stayed pending the outcome of the banks suit on the note – any recovery would reduce the damage claim of the insured lender – because upon payment of judgment in this action, the insurer would be subrogated to the bank's right to proceed against its borrower.

Perhaps the most significant ruling in this case is the court's reversal of the insured bank's claim for its attorney fees incurred in suing the title insurer. It explicitly disapproves of the holding in an earlier case, *Hedgecock v. Stewart Title Guaranty Company*, 676 P.2d 1208, 1210-11 (Colo. App. 1983), relying to a large extent on the holding of our supreme court in *Allstate v. Huizar*, 52 P.3d 816, 820-21 (Colo. 2002) (the creation of a new exception to the American Rule is best left to the legislature). In the absence of a contractual or other statutory provision for recovery of attorney fees, no recovery.

Whiting v. Atlantic Richfield
Colorado Supreme Court, March 3, 2014
2014 CO 16
Rule against perpetuities; options; reformation of option agreement under the USRAP, C.R.S. 15-11-106; common law rule does not void commercial option contract.

This is an important case that addresses much of the change in the law of the rule against perpetuities since over the last 25 years. As the case came to Colorado Supreme Court the issue was twofold. First, the court accepted certiorari to examine whether the statutory right to reform a commercial contract under the Colorado version of the statutory rule against perpetuities is unconstitutional because it requires a court to reform a vested contract – in this case the right to declare one's contract void under the common law rule against perpetuities. Second, he court sought to address as a matter of statutory interpretation whether the right of reformation only applied to what the statute refers to as "donative" transfers of property as opposed to a commercial contract such as an option to purchase mineral rights.

The Supreme Court changed to focus of the case and addresses in its decision a different question, thereby avoiding the questions upon which certiorari was granted. It holds instead that the interest in question – a twenty-five year option to purchase mineral rights – does not violate the common law rule against perpetuities. As such, there is no need to resort to the reformation procedure provided in the statute.

ARCO entered into a deal 1968 with a small oil company (Equity, now owned by Whiting) to explore Colorado shale oil development in Garfield county. It gave development money to Equity, and received a partial ownership interest in the mineral rights. Equity was given an option to repurchase Arco's interest within the 25 year term of the deal. In 1983, the agreement (including the option) was extended for another 25 years. The terms are summarized succinctly by the court:

> Pursuant to the 1983 amendment, Equity's right to exercise the option would not expire until 11:59 p.m. on February 1, 2008. Importantly, the parties agreed that "ARCO shall retain the sole and exclusive right to cancel this Option at any time during its term," with the exception that Equity was granted a right of first refusal if ARCO received an offer from another party to buy its interest in the Boies Block.

Equity exercised the option shortly before the deadline. ARCO claimed that the option was void under the common law rule against perpetuities. The trial court, in a decision affirmed by the court of appeals, agreed but applied the reformation provision in CRS § 15-11-1106(2) to add a “savings clause” in the manner outlined in the statute.

The result here is to put off for another day the constitutional validity of the reformation provision of the USRAP. The court instead finds that the common law has changed sufficiently to determine, consistent with past cases of the Colorado Supreme court, that the purpose of the common-law rule is not served by applying the “21 years after the death of lives in being test” to an arms-length transaction between sophisticated oil companies. More particularly, the court holds, in a well developed decision that explores the recent development of case law in considerable depth, that the fact that the option right was revocable at will by ARCO demonstrates that the option was not preventing development of the land. For that reason, the underlying the policy of the common-law rule would not be served by voiding the option simply because its term extended longer than 21 years.

The Real Estate Section of the CBA submitted an amicus brief in support of the lower court’s ruling and in support of the right to reform real estate contracts found the violate the rule. This is motivated in part by the obvious liability risks confronting lawyers who may unwittingly accompany their clients into the “RAP trap.” The risk areas center around long term options, rights of first refusal, and other rights or interests contained in deeds or leases that may “walk or talk” like an executory interest or a right of reversion. As a practice point, it is important in dealing with such interests to keep the USRAP in mind, as it treats “donative transactions” differently than commercial transactions.

US Bank, N.A. v. Stewart Title Guaranty Company
Civil Action No. 13-cv-00117-PAB-KLM
United States District Court For the District Of Colorado
2014 U.S. Dist. LEXIS 36876 (March 20, 2014)

Because Colorado’s appellate courts tend to not “select for publication” any number of interesting cases involving title insurance, I make a note here of a summary judgment order of Judge Brimmer in the federal district court in Denver. There is an allegation in a case brought by homeowner X that a deed of trust recorded by Wells Fargo securing a loan to Y was not a valid lien, as a recorded quit claim deed from X to Y was forged. X first sues Wells Fargo – by this time the loan has been assigned to U.S, Bank. The court discusses whether there is a duty to defend U.S. Bank’s insured title in a lawsuit before U.S. Bank is added to the litigation – the original title claim was made by Wells Fargo. The court reasons “no,” based on a thorough review of the policy language. Paragraph 4(a) of the Conditions and Stipulations states that Stewart Title's obligation extends only to "the defense of an insured."

It also reviews a claim that the insurer had a duty to initiate action to clear title to U.S. Bank’s lien prior to the date that U.S. Bank was served in the underlying litigation. The court surveys the cases on whether the insurer “may” or “must” take an affirmative action when it is notified that an insured may have a title issue. The court agrees that under these facts, no such duty was triggered until U.S. Bank – the real party in interest – was named in the suit. Although a title insurer may take action to clear an insured's title, any duty is subject to the Conditions and Stipulations in the policy. "These policy provisions do not support U.S. Bank's assertion that the policy creates a duty to defend the title independent of the insurer's duty to defend the insured. If anything, these provisions reinforce the interpretation of the policy that Stewart Title's duties are defined in relationship to the insured. The policy's stated purpose is "a contract of indemnity against actual monetary loss or damage sustained or incurred *by the insured*" and Paragraph 7(c) states that Stewart Title will only pay "those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations." (Emphasis added).

18. ZONING AND LAND USE CONTROL

Mountain-Plains Investment Corp. v. Parker Jordan Metropolitan District
Colorado Court of Appeals, August 15, 2013
2013 COA 123
Special districts; Colorado Open Records Act; fee; deposit; attorney-client privilege log.

Mountain-Plains Investment Corporation, and others appeal a summary judgment entered in favor of defendant Parker Jordan Metropolitan District (District) in a dispute over an open records act claim. The court holds:

- The special district did not have to reveal a consultant's emails (that it no longer retained) to Mountain-Plains' shareholders, under C.R.S. § 24-72-202(7), because the District did not make or keep the emails and the consultant did not keep them for it.

- Charging a retrieval fee without having in place a records retention policy, and requiring a deposit to cover the retrieval fee, did not violate the Colorado Open Records Act C.R.S. § 24-72-201, *et seq*. No policy was required at the time the records were sought, and C.R.S. § 24-72-203 allows a fee.

- A fee can be charged to segregate privileged material because C.R.S. § 24-72-204(3) (a) (IV) bars inspection of privileged matter.

- A fee for a privilege log was proper because C.R.S. § 24-72-205(3) allows a fee for creating a record, and the fee did not exceed the log's cost.

Friends of Denver Parks, Inc. v. City and County of Denver
Colorado Court of Appeals, December 26, 2013
2013 COA 177
City park; conveyance of park land; Denver Charter § 2.4.5.

Defendant, the City and County of Denver (City), agreed to transfer a parcel of land (southern parcel) to a school district so that the district could build a school on it. Plaintiffs, an organization called Friends of Denver Parks, Inc. and several other interested parties, tried to file a referendum petition to repeal the ordinance transferring the southern parcel; however, the City's Clerk and Recorder refused to accept the petition. Plaintiffs then filed a motion for a preliminary injunction to enjoin the City's transfer of the southern parcel to the school district. The court denied both requests.

On appeal, plaintiffs argued that the trial court erred in denying their requested relief because (1) the City's conduct over the years had dedicated the southern parcel as a park under the common law; and (2) the City's charter requires that voters approve the transfer of a "park belonging to the city as of December 31, 1955." The Court of Appeals disagreed on both counts.

Denver Charter § 2.4.5 sets forth the sole mechanism as of December 31, 1955 for creating parks and transferring parks. The City did not pass an ordinance dedicating the southern parcel as a park pursuant to § 2.4.5 after December 31, 1955. Additionally, the record did not clearly establish that the City, through its unambiguous actions, had demonstrated an unequivocal intent to dedicate the southern parcel as a park on or before December 31, 1955. Therefore, Denver Charter § 3.2.6 authorized the City to sell or transfer it without following the requirements of § 2.4.5, and the trial court did not abuse its discretion when it determined that plaintiffs did not establish a reasonable likelihood of success on the merits of this issue. The order was affirmed.

Marin Metropolitan District v. Landmark Towers Assn., Inc.
Colorado Court of Appeals, March 27, 2014
2014 COA 40
Special Metropolitan District—CRS § 32-1-305(7).

In 2007, a developer and five affiliated individuals (organizers) commenced proceedings under C.R.S. §§ 32-1-101 *et seq*. to form a special metropolitan district within the boundaries of Greenwood Village. The organizers filed a service plan with the municipality, and the city council approved it.

On September 5, 2007, a petition for organization was filed with the Arapahoe County District Court pursuant to CRS §32-1-301, and a hearing was set for October 4, 2007. Notice was published in the local newspaper and the clerk of the court issued a notice of the hearing. At the hearing, the district court entered an order directing an organizational election be held on November 6, 2007. The election was held, and on December 6, 2007, the district court entered findings and an order and decree creating the special district. The order included within the special district the Landmark Towers condominiums, which were under construction. Approximately 130 people were under contract to purchase, but no sales had been completed.

The Landmark homeowners association alleged it was not until several years after the Marin Metropolitan District (District) was formed that the owners discovered facts indicating that the District had been organized through alleged misrepresentations and and a “fraud on the court.” In 2012, Landmark intervened in the annexation case and moved pursuant to C.R.C.P. 60(b)(2), (3), and (5) to set aside the December 2007 order for alleged fraud on the court, a lack of subject matter jurisdiction to approve the special district, and invalidity of the order due to lack of due process. The court held a three-day evidentiary hearing and issued an order on December 17, 2012 dismissing Landmark’s motion pursuant to C.R.S. §32-1-305(7).

The court of appeals reviews the pertinent provisions of the statutory scheme for creating a special district. Landmark argues that regardless of subsection (7), a court has inherent power to vacate a void judgment, notwithstanding a statutory time bar; has jurisdiction to set aside a previously entered order based on fraud on the court; and has a duty to provide constitutional due process, providing jurisdiction to set aside an order that is void for lack of notice and an opportunity to be heard. The Court disagrees.

C.R.S. § 32-1-305(7) states that once an order establishing a special district is entered, it “shall be deemed final, and no appeal or other remedy shall lie therefrom.” There is only one exception, which allows for an action in the nature of *quo warranto* commenced by the attorney general within thirty days after entry of the organizational order. Finally, the subsection mandates that the organization of the district “shall not be directly or collaterally questioned in any suit, action, or proceeding except as expressly authorized in this subsection (7).” The jurisdictional issue is dispositive. The order is affirmed.

Board of County Commissioners of Summit County v. Hazel
Petition for Writ of Certiorari GRANTED, January 27, 2014.

<u>Summary of the Issue:</u>

- Whether the court of appeals erred by holding that under C.R.C.P. 50, a trial court cannot direct a verdict as to some but not all issues within a single claim against a single defendant.

Board of County Commissioners of Teller County v. City of Woodland Park
Colorado Supreme Court, May 20, 2014
2014 CO 35
Municipal Annexation Act of 1965; timely motion for reconsideration with the municipality as condition to judicial review; C.R.S. § 31-12-116.

The Supreme Court, in a direct appeal by Woodland Park under C.A.R. 21, holds that the district court lacked jurisdiction to review Teller County's petition for judicial review of an annexation by the City of Woodland Park under C.R.S. §31-12-116. Subsection (2)(a)(II) of the statue requires a party (such as a county in which the property is located) to file a motion for reconsideration with the governing body of the annexing municipality within ten days of the effective date of an annexation ordinance as a precondition for obtaining judicial review of a municipal annexation. The effective date of the ordinance can, and is here, different than the effective date of the annexation. The petition for reconsideration with the City should have been filed by September 16, 2013, but was not filed until September 20, 2013.

Town of Dillon v. Yacht Club Condominiums Home Owners Association
Colorado Supreme Court, May 27, 2014
2014 CO 37
Homeowners association; town parking ordinance; "tandem" parking in town right-of-way; police power; due process.

This is a declaratory judgment action brought by a condominium association near the Dillon Marina in Summit County. The small complex was built in the 1960's, not long after the creation of the Dillon reservoir, and occupies the corner of an intersection of two residential streets (Tenderfoot and Gold). The reservoir lies to the rear. The condominium buildings consist of approximately 64 "available units," but only 44 parking spaces. The discrepancy is apparently due to the creation of additional "lockoff" units through subdivision of original units over the years. Over the decades, parking became a problem, for neighbors, bicyclists, and the town. The project provides parking for its owners in paved spaces in front of the building, which is parallel to the adjacent streets. In recent years the occupants have adopted the practice of parking "two cars deep," front to rear, at right angles to the building along both city streets. This created some stress, as cars parked in front of the building might be forced to back out through a "tunnel" of two cars on each side. Moreover, the second row of cars frequently (neighbors might say substantially) encroached on the town "right-of-way," which is Town property.

The Town sought by ordinance to prohibit the stacked parking procedure, citing the danger and inconvenience to town residents and interference with the town's new recreational path – a popular bicycle path connecting Dillon with Frisco and Keystone. Noting that "only one" accident had been reported in the past 40 years, the district court ruled that the parking ordinance was unreasonable, and a violation of procedural due process. Along with this came an award for attorney fees against the Town under 42 U.S.C. _ 1985. The court of appeals affirmed, in an unpublished decision, reasoning that the ordinances were not reasonably related to a legitimate governmental interest because they caused the condo owners significant economic harm and there were alternatives available which would have furthered the Town's interests. The supreme court accepted the case for review, which is interesting for an unpublished, 3-0 decision. The court reverses the lower courts.

The Supreme Court, in a 7-0 decision by Justice Marquez, holds that the Town did not abuse its police power in enacting the two parking ordinances at issue here.

Can a municipality constitutionally exercise its police power to undertake a road improvement project that eliminates parking on the municipality's street near a condominium? An ordinance comports with due process where it bears a reasonable relationship to a legitimate government interest. The two ordinances here were within the Town's police power to regulate matters of public health, safety, and welfare, and were a reasonable exercise of that power because the measures are reasonably related to the Town's objectives of improving traffic safety, improving water drainage, and remedying a missing portion of a recreational bike path.

Importantly, the Court holds that the inquiry turns on the reasonableness of the relationship between the ordinance and the government objectives to be achieved, and not on the burden on the complaining party or the availability of less burdensome alternatives. Accordingly, the Court reversed the court of appeals' judgment, and remands the case to the court of appeals for further proceedings – the lower court had affirmed the district court's ruling solely on the police power issue, without considering the district court's alternative findings that the ordinances were unconstitutionally retrospective.

FBS
June 26, 2014