

**First Regular Session
Sixty-third General Assembly
STATE OF COLORADO**

INTRODUCED

LLS NO. 01-0776.02 Stephen Miller

HOUSE BILL 01-1296

HOUSE SPONSORSHIP

Cadman

SENATE SPONSORSHIP

Evans

House Committees

Civil Justice & Judiciary

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING REFORMS TO CIVIL LITIGATION, AND, IN CONNECTION**
102 **THEREWITH, CHANGING THE BURDEN OF PROOF, ESTABLISHING**
103 **A PRE-LITIGATION MEDIATION PROCESS, AND MODIFYING THE**
104 **AVAILABILITY OF PUNITIVE DAMAGES IN CERTAIN CIVIL ACTIONS**
105 **AND ARBITRATIONS.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Except in civil actions where damages are sought for physical or mental injuries sustained by a person, establishes that, in cases alleging a breach of a fiduciary duty, the burden of proof shall be by clear and convincing evidence. Creates the "Colorado Construction Consumer Fair

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

Remedy Act". Except in civil actions or arbitrations where damages are sought for physical or mental injuries sustained by a person, establishes that, in cases alleging a defect in an improvement to real property, the burden of proof shall be by clear and convincing evidence. Except in civil actions or arbitrations where damages are sought for physical or mental injuries sustained by a person, establishes that, in cases alleging a defect in an improvement to real property, compliance with a mediation process shall be a prerequisite to the pleading of exemplary damages. Prohibits under certain circumstances the initial pleading of exemplary damages in civil actions or arbitrations alleging a defect in an improvement to real property, except where damages are sought for physical or mental injuries sustained by a person. Permits under certain circumstances the amended pleading of exemplary damages in civil actions or arbitrations alleging a defect in an improvement to real property, except where damages are sought for physical or mental injuries sustained by a person. Allows the trier of fact to impose reasonable exemplary damages in civil actions or arbitrations alleging a defect in an improvement to real property under certain circumstances. Tolls the applicable statute of limitations for the commencement of an action or arbitration alleging a defect in any improvement to real property under certain circumstances.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** Article 20 of title 13, Colorado Revised Statutes, is
3 amended BY THE ADDITION OF THE FOLLOWING NEW PARTS to
4 read:

5 PART 8

6 ACTIONS BASED UPON BREACH

7 OF A FIDUCIARY DUTY

8 **13-20-801. Civil actions - breach of fiduciary duty - burden of**
9 **proof.** (1) EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (2) OF THIS
10 SECTION, IN ANY CIVIL ACTION IN WHICH ANY RELIEF IS SOUGHT BASED
11 UPON AN ALLEGED BREACH OF A FIDUCIARY DUTY, THE CLAIMANT SHALL
12 HAVE THE BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THE
13 EXISTENCE OF THE DUTY, THE BREACH OF THE DUTY, THE PROXIMATE
14 CAUSE OF THE DAMAGES DUE TO THE BREACH OF THE DUTY, AND THE

1 AMOUNT OF DAMAGES.

2 (2) THIS SECTION SHALL NOT APPLY TO A CLAIM SEEKING
3 RECOVERY OF DAMAGES FOR PHYSICAL OR MENTAL INJURIES SUSTAINED BY
4 A PERSON.

5 PART 9

6 ACTIONS OR ARBITRATIONS ALLEGING A DEFECT
7 IN ANY IMPROVEMENT TO REAL PROPERTY

8 **13-20-901. Short title.** THIS PART 9 SHALL BE KNOWN AND MAY
9 BE CITED AS THE "COLORADO CONSTRUCTION CONSUMER FAIR REMEDY
10 ACT".

11 **13-20-902. Actions and arbitrations alleging a defect in any**
12 **improvement to real property - burden of proof.** (1) (a) AS USED IN
13 THIS PART 9, UNLESS THE CONTEXT OTHERWISE REQUIRES, "ACTION OR
14 ARBITRATION ALLEGING A DEFECT IN ANY IMPROVEMENT TO REAL
15 PROPERTY" MEANS ANY CIVIL ACTION OR ARBITRATION PROCEEDING
16 AGAINST ANY ARCHITECT, CONTRACTOR, BUILDER OR BUILDER VENDOR,
17 ENGINEER, OR INSPECTOR PERFORMING OR FURNISHING THE DESIGN,
18 PLANNING, SUPERVISION, INSPECTION, CONSTRUCTION, OR OBSERVATION
19 OF CONSTRUCTION OF ANY IMPROVEMENT TO REAL PROPERTY FOR THE
20 RECOVERY OF DAMAGES FOR:

21 (I) ANY DEFICIENCY IN THE DESIGN, PLANNING, SUPERVISION,
22 INSPECTION, CONSTRUCTION, OR OBSERVATION OF CONSTRUCTION OF ANY
23 IMPROVEMENT TO REAL PROPERTY; OR

24 (II) INJURY TO REAL OR PERSONAL PROPERTY CAUSED BY ANY SUCH
25 DEFICIENCY.

26 (b) "ACTION OR ARBITRATION ALLEGING A DEFECT IN ANY
27 IMPROVEMENT TO REAL PROPERTY" DOES NOT INCLUDE ANY CLAIM

1 SEEKING RECOVERY OF DAMAGES FOR PHYSICAL OR MENTAL INJURIES
2 SUSTAINED BY A PERSON.

3 (2) IN ANY ACTION OR ARBITRATION ALLEGING A DEFECT IN ANY
4 IMPROVEMENT TO REAL PROPERTY, THE CLAIMANT SHALL HAVE THE
5 BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE ALL OF THE
6 ELEMENTS OF THE CLAIM.

7 **13-20-903. Exemplary damages - legislative declaration -**
8 **mediation - limitations.** (1) THE GENERAL ASSEMBLY HEREBY FINDS,
9 DETERMINES, AND DECLARES THAT:

10 (a) IT IS IN THE PUBLIC INTEREST TO ESTABLISH A CONSISTENT AND
11 UNIFORMLY APPLICABLE STANDARD FOR THE DETERMINATION, AMOUNT,
12 IMPOSITION, AND DISTRIBUTION OF EXEMPLARY MONETARY DAMAGES
13 ARISING FROM AN ACTION OR ARBITRATION ALLEGING A DEFECT IN ANY
14 IMPROVEMENT TO REAL PROPERTY;

15 (b) IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT ANY SUCH
16 EXEMPLARY DAMAGES SERVE THE PUBLIC PURPOSE OF DETERRING
17 NEGLIGENT ACTS;

18 (c) IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT THE
19 AVAILABILITY OF EXEMPLARY DAMAGES UNDER THE STANDARD
20 ESTABLISHED BY THIS SECTION IN AN ACTION OR ARBITRATION PROCEEDING
21 SHOULD BE CONDITIONED ON THE PARTICIPATION OF THE PARTIES IN
22 MEDIATION PRIOR TO THE INSTITUTION OF LITIGATION.

23 (2) NOTWITHSTANDING ANY OTHER PROVISION OF LAW TO THE
24 CONTRARY, THE EXEMPLARY DAMAGES PROVIDED FOR IN THIS SECTION AND
25 AUTHORIZED TO BE IMPOSED UPON A PARTY IN AN ACTION OR ARBITRATION
26 ALLEGING A DEFECT IN ANY IMPROVEMENT TO REAL PROPERTY SHALL BE
27 THE ONLY EXEMPLARY DAMAGES IMPOSED AS A RESULT OF ANY

1 NEGLIGENCE CLAIM ALLEGING SUCH DEFECT.

2 (3) (a) ANY PERSON, PRIOR TO BRINGING AN ACTION OR
3 ARBITRATION FOR A CLAIM ALLEGING A DEFECT IN ANY IMPROVEMENT TO
4 REAL PROPERTY, SHALL SERVE, BY CERTIFIED MAIL OR PERSONAL SERVICE,
5 A NOTICE OF THE CLAIM UPON THE PERSON AGAINST WHOM THE CLAIM IS
6 ASSERTED. THE NOTICE OF CLAIM SHALL DESCRIBE THE CLAIM IN
7 REASONABLE DETAIL. NOTHING IN THIS PARAGRAPH (a) SHALL PRECLUDE
8 THE CLAIMANT FROM LISTING MORE THAN ONE CLAIM OR NAMING MORE
9 THAN ONE PERSON IN THE NOTICE OF CLAIM, SO LONG AS THE NOTICE OF
10 CLAIM DESCRIBES WITH REASONABLE DETAIL EACH CLAIM AS IT APPLIES TO
11 EACH PERSON SO NAMED AND THE NOTICE OF CLAIM IS SERVED ON EACH
12 PERSON SO NAMED.

13 (b) (I) WITHIN THIRTY DAYS AFTER SERVICE OF THE NOTICE OF
14 CLAIM, THE PERSON OR PERSONS AGAINST WHOM THE CLAIM IS ASSERTED
15 SHALL INITIATE MEDIATION UNDER THE PROVISIONS OF PART 3 OF ARTICLE
16 22 OF THIS TITLE IN THE NEAREST JUDICIAL DISTRICT IN WHICH MEDIATION
17 SERVICES ARE AVAILABLE. THE COSTS OF THE MEDIATION SHALL BE BORNE
18 BY THE PERSON AGAINST WHOM THE CLAIM IS ASSERTED. IF A CLAIM IS
19 ASSERTED AGAINST MORE THAN ONE PERSON, ALL SUCH PERSONS SHALL
20 JOINTLY BEAR THE COST OF THE MEDIATION.

21 (II) THE CLAIMANT AND THE PERSON OR PERSONS AGAINST WHOM
22 A CLAIM IS ASSERTED SHALL PARTICIPATE IN THE MEDIATION, COMPLY WITH
23 ALL APPLICABLE PROVISIONS, RULES, REGULATIONS, AND PROCEDURES
24 ESTABLISHED IN PART 3 OF ARTICLE 22 OF THIS TITLE, AND MAKE A GOOD
25 FAITH EFFORT TO RESOLVE THE CLAIM OR CLAIMS IN DISPUTE.

26 (III) THE PARTIES SHALL HAVE SIXTY DAYS AFTER THE DATE
27 MEDIATION IS INITIATED TO CONCLUDE THE MEDIATION. FOR PURPOSES OF

1 THIS SECTION, THE MEDIATION SHALL BE CONSIDERED CONCLUDED WHEN:

2 (A) THE PARTIES HAVE RESOLVED THE CLAIM;

3 (B) THE MEDIATOR, AS DEFINED IN SECTION 13-22-302 (4), HAS
4 DECLARED THAT ALL PARTIES TO THE MEDIATION HAVE MADE A GOOD
5 FAITH EFFORT TO RESOLVE THE CLAIM AND, NOTWITHSTANDING SUCH GOOD
6 FAITH EFFORT, THE CLAIM IS IRRECONCILABLE.

7 (IV) NOTHING IN THIS SUBSECTION (3) SHALL PRECLUDE A
8 MEDIATION FROM INVOLVING TWO OR MORE CLAIMS, OR TWO OR MORE
9 PERSONS AGAINST WHOM A CLAIM IS ASSERTED, SO LONG AS THE
10 PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (3) HAVE BEEN
11 COMPLIED WITH.

12 (c) THE PROVISIONS OF THIS SUBSECTION (3) SHALL NOT APPLY TO
13 DISPUTES ARISING FROM WRITTEN ARBITRATION AGREEMENTS MADE PRIOR
14 TO JULY 1, 2001, AND THAT ARE SUBJECT TO THE PROVISIONS OF PART 2 OF
15 ARTICLE 22 OF THIS TITLE.

16 (4) (a) EXCEPT AS OTHERWISE PROVIDED IN SUBSECTIONS (6) AND
17 (7) OF THIS SECTION, THE PROCEDURES IN THIS SUBSECTION (4) SHALL BE
18 FOLLOWED IN ANY ACTION OR ARBITRATION ALLEGING A DEFECT IN ANY
19 IMPROVEMENT TO REAL PROPERTY.

20 (b) IF NEGLIGENCE IS ALLEGED IN AN ACTION OR ARBITRATION
21 ALLEGING A DEFECT IN ANY IMPROVEMENT TO REAL PROPERTY,
22 EXEMPLARY DAMAGES MAY NOT BE INCLUDED IN ANY INITIAL CLAIM FOR
23 RELIEF. A CLAIM FOR SUCH EXEMPLARY DAMAGES MAY BE ASSERTED BY
24 AMENDMENT TO THE PLEADINGS ONLY AFTER THE SUBSTANTIAL
25 COMPLETION OF DISCOVERY AND ONLY AFTER THE PLAINTIFF ESTABLISHES
26 PRIMA FACIE PROOF OF A TRIABLE ISSUE. IF THE JUDGE OR ARBITRATOR
27 ALLOWS SUCH AN AMENDMENT TO THE COMPLAINT UNDER THIS

1 SUBSECTION (4), HE OR SHE MAY ALSO, IN HIS OR HER DISCRETION, PERMIT
2 ADDITIONAL DISCOVERY ON THE QUESTION OF EXEMPLARY DAMAGES.

3 (c) IF COMPENSATORY DAMAGES ARE ASSESSED AGAINST A PARTY,
4 THE JUDGE OR ARBITRATOR, IN HIS OR HER DISCRETION, AND ONLY IF IT IS
5 SHOWN AT THE TRIAL OR PROCEEDING THAT THE ACTION COMPLAINED OF
6 WAS ATTENDED BY CIRCUMSTANCES OF FRAUD, MALICE, OR WILLFUL AND
7 WANTON CONDUCT, MAY ALLOW THE TRIER OF FACT TO IMPOSE
8 REASONABLE EXEMPLARY DAMAGES, AS PROVIDED IN THIS SUBSECTION (4).
9 THE DEGREE OF PROOF SHALL BE AS PROVIDED IN SECTION 13-25-127 (2).

10 (d) THE STANDARDS FOR AWARDING AND THE AMOUNT OF
11 EXEMPLARY DAMAGES, IF IMPOSED, SHALL BE AS PROVIDED IN SECTIONS
12 13-21-102 AND 13-25-127 (2).

13 (5) NO EXEMPLARY DAMAGES SHALL BE ASSESSED AGAINST A
14 PARTY IN AN ACTION OR ARBITRATION ALLEGING A DEFECT IN ANY
15 IMPROVEMENT TO REAL PROPERTY AS A RESULT OF THE ACTS OF OTHERS
16 UNLESS SUCH PARTY SPECIFICALLY DIRECTED THE ACT TO BE DONE OR
17 RATIFIED THE SAME.

18 (6) IN THE EVENT A PERSON AGAINST WHOM A CLAIM IS ASSERTED
19 FAILS OR REFUSES TO COMPLY WITH THE PROVISIONS OF SUBSECTION (3) OF
20 THIS SECTION, THE PROVISIONS OF SUBSECTION (4) OF THIS SECTION SHALL
21 NOT APPLY TO SUCH PERSON IN AN ACTION OR ARBITRATION ALLEGING A
22 DEFECT IN ANY IMPROVEMENT TO REAL PROPERTY, AND THE CLAIMANT IN
23 SUCH CASE MAY PROCEED AGAINST SUCH PERSON UNDER THE PROVISIONS
24 OF SECTIONS 13-21-102 AND 13-25-127 (2).

25 (7) IN THE EVENT A CLAIMANT FAILS OR REFUSES TO COMPLY WITH
26 THE PROVISIONS OF SUBSECTION (3) OF THIS SECTION, THE CLAIMANT MAY
27 NOT REQUEST EXEMPLARY DAMAGES IN AN INITIAL CLAIM FOR RELIEF OR

1 IN ANY AMENDED PLEADING OR BE AWARDED EXEMPLARY DAMAGES IN AN
2 ACTION OR ARBITRATION ALLEGING A DEFECT IN ANY IMPROVEMENT TO
3 REAL PROPERTY.

4 (8) (a) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPH (b) OF THIS
5 SUBSECTION (8), NOTHING IN THIS SECTION SHALL BE CONSTRUED TO ALTER
6 OR AMEND THE APPLICABLE TIME PERIODS FOR THE COMMENCEMENT OF
7 ACTIONS UNDER THE LAWS OF THIS STATE.

8 (b) IN THE EVENT THE CLAIMANT HAS FULLY COMPLIED WITH THE
9 PROVISIONS OF THIS SECTION, THE APPLICABLE TIME PERIODS FOR THE
10 COMMENCEMENT OF AN ACTION OR ARBITRATION ALLEGING A DEFECT IN
11 ANY IMPROVEMENT TO REAL PROPERTY SHALL BE TOLLED FROM THE DATE
12 THE CLAIMANT'S CAUSE OF ACTION ACCRUES, PURSUANT TO SECTION
13 13-80-108, UNTIL THE EARLIEST OF THE FOLLOWING DATES:

14 (I) THE THIRTY-FIRST DAY FOLLOWING SERVICE OF THE NOTICE OF
15 CLAIM IF THE PERSON AGAINST WHOM THE CLAIM IS ASSERTED HAS FAILED
16 OR REFUSED TO INITIATE MEDIATION AS REQUIRED UNDER SUBPARAGRAPH
17 (I) OF PARAGRAPH (b) OF SUBSECTION (3) OF THIS SECTION;

18 (II) THE DATE THAT THE MEDIATOR DECLARES THAT THE CLAIM
19 BEING MEDIATED IS IRRECONCILABLE DUE TO THE WITHDRAWAL OF A
20 PARTY AGAINST WHOM THE CLAIM IS ASSERTED FROM THE MEDIATION
21 PRIOR TO THE CONCLUSION OF THE MEDIATION; OR

22 (III) THE DATE THAT THE MEDIATION REQUIRED UNDER THIS
23 SECTION IS CONCLUDED, AS DESCRIBED IN SUBPARAGRAPH (III) OF
24 PARAGRAPH (b) OF SUBSECTION (3) OF THIS SECTION.

25 **SECTION 2.** 13-25-127 (1), Colorado Revised Statutes, is
26 amended to read:

27 **13-25-127. Civil actions - degree of proof required.** (1) Any

1 provision of the law to the contrary notwithstanding and except as
2 provided in subsection (2) of this section, the burden of proof in any civil
3 action shall be by a preponderance of the evidence. The provisions of this
4 subsection (1) shall not apply to the burden of proof required in
5 determining the validity of any legislative enactment OR TO THE BURDEN
6 OF PROOF REQUIRED BY SECTIONS 13-20-801 (1) AND 13-20-901 (2).

7 **SECTION 3. Effective date - applicability.** This act shall take
8 effect July 1, 2001, and shall apply to all causes of action accruing on or
9 after said date.

10 **SECTION 4. Safety clause.** The general assembly hereby finds,
11 determines, and declares that this act is necessary for the immediate
12 preservation of the public peace, health, and safety.