This paper and presentation is not intended to provide a complete Utah case history of construction defects for residential homes or claims against developers of residential subdivisions and condominiums. Rather, this paper is an overview of some of the current issues related to such claims[1] and new paradigm for addressing construction defect claims[2].

I. *DAVENCOURT*.

Not until the Utah Supreme Court decided *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, 221 P.3d 234 (Utah 2009), was there a viable claim (i) against developers of residential subdivisions and condominiums or (ii) against the vendor of a new residence.

In *Davencourt* independent limited fiduciary duties were imposed upon the developer and, this author believes, upon the developer appointed homeowner association board. The Court also established a non-waivable implied warranty upon the developer/vendor and builder/vendor of a new residence.

"Until the developer relinquishes control of the association to the members, the developer owes the following duties to the association and its members:

> (1) to use reasonable care and prudence in managing and maintaining the common property;
> (2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;
> (3) to disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide;
> (4) to maintain records and to account for the financial affairs of the association from its inception;
> (5) to comply with and enforce the terms of the governing documents, including design controls, ***land***-use restrictions, and the payment of assessments;
> (6) *to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining*; and
> (7) to disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer's affiliates in any contract, lease, or other agreement entered into by the association.
> *Restatement (Third) of Property: Servitudes § 6.20* (2000)." (emphasis added).

Davencourt, 221 P.3d at 246.

"[T]o establish a breach of the implied warranty of workmanlike manner or habitability under Utah law a plaintiff must show (1) the purchase of a new residence from a defendant builder-vendor/developer-vendor; (2) the residence contained a latent defect; (3) the defect

[1] The overview provided by attorney Bruce C. Jenkins.
[2] The new paradigm presented by attorney Robert Diamond.

manifested itself after purchase; (4) the defect was caused by improper design, material, or workmanship; and (5) the defect created a question of safety or made the house unfit for human habitation." *See id.*

Id. at 253 (citation omitted).

II. IMPLIED WARRANTY CLAIMS.

A. Performance Standard Sounding in Strict Liability Versus An Industry Standard Based In Tort.

Essential to the analysis of these implied warranties and the required proof is an understanding of the difference between an implied warranty originating in contract versus tort. "The term 'implied warranty' is used in at least two different ways in modern legal parlance. It has been used to denote contract-type action, and it has also been used to denote a tort-type action. Each action has its own history and set of rules which governs its application." *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 14 (Utah 1990). Unlike tort theory, an implied warranty based in contract requires privity of contract and "directs its attention to the purchaser's disappointed expectations [whereas] tort law traditionally has concerned itself with social policy and risk allocation." *Utah Local Gov't Trust v. Wheeler Mach. Co., 199 P.3d 949, 955 (Utah 2008); see, Davencourt*, 2009 UT 65 at ¶55. "Contract warranty was the original cause of action for recovering for injuries caused by defective products without having to prove negligence, but privity of contract between the injured party and the seller of the product was required." *Utah Local Gov't Trust*, 199 P.3d at 955; *see Davidson Lumber Sales*, 794 P.2d at 15.

Colorado similarly distinguishes claims for damage in residential construction based in a contractual implied warranty from those arising from negligence/tort based claims. In *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983) (a case on certiorari review from the Colorado Court of Appeals), plaintiff (the fourth owner of the residence) brought claims against a homebuilder, including a claim for breach of implied warranty of habitability. In analyzing plaintiff's claims the court stated:

> The implied warranty of habitability and fitness arises from the contractual relation between the builder and the purchaser. **Proof of a defect due to improper construction, design, or preparation is sufficient to establish liability in the builder-vendor**. Negligence, however, requires that a builder or contractor be held to a standard of reasonable care in the conduct of its duties to the foreseeable users of the property. Negligence in tort must establish defects in workmanship, supervision, or design as a responsibility of the individual defendant. Proof of defect alone is not enough to establish the claim.

Id. at 1045 (emphasis added).

Therefore, unlike negligence based claims, "an implied warranty of habitability has been likened to strict liability of the builder for construction defects." *Id.* at fn. 6 (citations omitted); *see also, Crumpacker*, 2010 Ark. App. 179 (finding with regard to contract-based implied warranty claims brought against a builder-vendor that proof of causation is not required as

implied warranty claims based upon contract are intended to hold the builder-vendor to a standard of fairness and, therefore, plaintiff's presentation of evidence that the house was defective and that plaintiff sustained damages was sufficient to withstand builder-vendor's motion for summary judgment).[3]

Any question about a standard of care under a duty in contract or otherwise, versus a promise of a performance standard under a warranty − including an implied warranty, has been resolved in Utah more than two decades ago. *See Groen v. Tri-O-Inc.*, 667 P.2d 598 (Utah 1983). In *Groen v. Tri-O-Inc.*, Rocky Mountain Helicopters ("Rocky Mountain") contracted with Tri-O-Inc. to provide helicopter service. Rocky Mountain's employee Groen was injured in a crash at the worksite. Rocky Mountain and Groen brought several causes of action against Defendant for personal injury and property damage including negligence and express and implied warranty claims. *Groen,* 667 P.2d 598 (Utah 1983). In analyzing the express and implied contract warranty claims the Utah Supreme Court explained that:

> [a] warranty is ***an assurance*** by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself, ***and it amounts to a promise to answer in damages of any injury proximately caused if the fact warranted proves untrue***.

Id at 604 (Utah 1983) (emphasis added).[4] In distinguishing the express and implied warranty claims from those brought in negligence/tort, the Utah Supreme Court further stated:

> [a] cause of action in warranty is separate from a cause of action in negligence . . . Unlike liability for negligence, which is based on fault, ***breach of warranty sounds in strict liability***. Breach of warranty does not require that the person making the representation or promise be aware that it is false, and ***a person may be liable for breach of warranty despite his exercise of all reasonable or even all possible care.***

Id. (emphasis added). Finally, though the Utah Supreme Court did not impose an implied warranty under the facts of *Groen*, it acknowledged that this performance/strict liability standard under a contract-based implied warranty has been recognized and applied in many situations including in "[m]any states [an] impl[ied] warranty of habitability in the sale of a new home." *Id*.[5]

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[3] *Accord, see e.g. Kansas City Wholesale v. Weber Packing Corp.*, 73 P.2d 1272, 93 Utah 414 (1937) (holding that implied warranty based in contract for sale of goods requires the thing made and sold to be free of any latent defect and fit for the purpose intended); *cf. Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 159 (Utah 1979) (holding that for negligence-based implied warranty and strict liability claims, "the elements of both actions are essentially the same").

[4] *See Black's Law Dictionary* 818 (5th ed. 1983) (defining both an express warranty and an implied warranty as: "[a] promise that a proposition of fact is true.").

[5] Nearly 25 years later, in *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing*, the Utah Supreme Court joined the majority of other states by expanding Utah's contract-based implied warranty to include habitability and workmanlike manner in the sale of a new home. *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing*, LC, 221 P.3d 234, 252 (Utah 2009).

It is this author's position that breach of contract-based implied warranty claims (i) do not require establishing a standard of care or foreseeability[6] (ii) do not require proof of defects **in** workmanship, supervision, or design as the responsibility of [any] individual defendant,[7] (iii) do not require proof of causation concerning such defects as do negligence claims,[8] and, (iv) simply require the plaintiff to present at trial proof of a defect due to improper "construction", "design" or "material" to "establish liability of the builder-vendor"[9] that gives rise to a "question of safety". Thus, a plaintiff's experts should not be required to opine on local standards of reasonable care in the industry pertaining to defects in the workmanship, supervision or design of the improvements. Such testimony is simply not relevant.[10] The only testimony required of a plaintiff's experts is to opine whether a question of safety exists due to defect in construction, design, or preparation.[11]

B. Cases Cited in Davencourt Interpret the Implied Warranty Broadly.

The following cases cited in *Davencourt* involve situations where the scope of the implied warranty extended beyond the physical "abode," "dwelling" or "residence". *See Davencourt*, 2009 UT 65, ¶¶54-55 (citing *Sloat v. Matheny*, 625 P.2d 1031, 1032-34 (Colo. 1981) (upholding trial court's ruling that the implied warranty applies to a cracked driveway and unstable deck); *Yepsen v. Burgess*, 269 Or. 635, 641-42 (Or. 1974) (holding that "[t]he use of the house is so dependent upon the proper disposition of waste through a properly operating septic tank and drain field system that the house would not be habitable without them"); *Tavares v. Horstman*, 542 P.2d 1275, 1282 (Wyo. 1975) (holding that implied warranty applies to a septic tank system incorrectly installed that fails prematurely); *Bethlahmy v. Bechtel*, 415 P.2d 698, 711 (Idaho 1966) (remanded for ruling on breach of implied warranty related to water seeping into the basement where a drainage tile conduit across the front of the lot and under the garage floor

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[6] In *Davencourt* has already established the standards for each of these issues and applied them retroactively (generally meaning that such standards were foreseeable). *See also Cosmopolitan,* at 1045 (contract-based implied warranty claims do not require proof of a "standard of reasonable care in the conduct of [one's] duties to the foreseeable users of the property" as do negligence claims).

[7] *Id*. (Emphasis added). In a contract-based implied warranty action, plaintiff need only prove "a defect **due to** improper construction, design or preparation . . . ." *Id.; see also Davencourt,* 2009 UT 65at ¶ 60 ("the defect was caused by [was due to] improper design, material, or workmanship").

[8] *Id*. *See also*, *Crumpacker,* 2010 Ark. App. 179.

[9] Black's law dictionary defines "defect" as "deficiency [or] . . . insufficiency. The want or absence of something necessary for the completeness . . .; a lack or absence of something of something essential to completeness; a deficiency essential to the proper use for the purpose for which a thing is to be used" (Black's Law Dictionary 217 (Abr. 5th ed. 1983)) and defines "latent defect" as "[o]ne which is not apparent to buyer upon reasonable observation" (*id*. at 218).

[10] Expert testimony as to any local standard of care should be more prejudicial than probative, would misconstrue the nature of a plaintiff's claims, would confuse the jury and should be excluded from the trial. U.R.E. 403.

[11] It should be noted by way of clarification, that this author is not asserting that the five elements to prove an implied warranty claim under *Davencourt* are supplanted. Rather, the assertion is that to prove a **defect**, it is a warranty performance standard not an industry standard of care that applies.

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III. LIMITED EXPERT TESTIMONY NEEDED TO ESTABLISH BREACH OF *DAVENCOURT* FIDUCIARY DUTIES.

"[U]nder Utah Law if the applicable standard of care in an action for negligence is not 'fixed by law', then 'the determination of the appropriate standard is a factual issue to resolve by the finder of fact.'" *Callister v. Snowbird Corp*., 2014 UT. App. 243 ¶12, 337 P.3d 1044 (quoting *Berry v. Greater Park City Co*., 2007 UT 87, ¶30, 171 P.3d 442) (emphasis added).

A. Fixed By Law.

An "applicable standard of care in a given case may be established, as a matter of law, by legislative enactment or **prior judicial decision**." *Wycalis v. Guardian Title of Utah*, 780 p.2d 821, 825 (UT App. 1989) *citing* Restatement (Second of Torts § 285) (1965) (emphasis added); *see Elmer v. Vanderford*, 74 WA. 2d 546, 445 p. 2d 612, 614 (1968); *see also, Little America Refining Co. v. Leyba*, 641 P.2d 112 (Utah 1982) (holding that the applicable standard of care in the case was established by legislative enactment); *see also, Virginia S. v. Salt Lake Care Ctr.*, 741 P.2d 969, 972 (Utah Ct. App. 1987) (noting that a standard of care in a given case may be established by prior judicial decision or a standard of care set by the court); *see also*, *Booty v. Kentwood Manor Nursing Home, Inc.*, 483 So. 2d 634, 639 (La.App. 1 Cir. 1985) (finding that the standards of care as to nursing homes had been established as a matter of case law); *see also*, *Oswald v. Rapides Iberia Management Enterprises, Inc.*, 452 So. 2d 1258, 1262 (La.App. 2 Cir. 1984) (the Court established the standard of care as to nursing homes).

It may be argued that the standard of care, "duty of care," is "fixed by law." In that case, the standard is no longer a factual issue to be resolved by the finder of fact. *Wycalis*, 782 P.2d at 825. It is reasonable to argue that *Davencourt* "fixed by law" the duty and standard of care applicable to all developers in the State of Utah and the homeowners associations they establish.

In *Davencourt*, the Utah Supreme Court found, based upon the developer's relationship with an association, that the developer owed a duty to the association and its members. The Court then went on to identify seven limited fiduciary duties, which fixed the standard in discharging the general duty. The duties can be no more or less than set forth in *Davencourt.* Moreover, the standard of the duty is fixed, and the measure of a duty defined. There are seven limited duties of care fixed in relation to the general duty of the developer to the association and its members.[12] The limited fiduciary duties articulated in *Davencourt* were not limited to the *Davencourt* case but apply to all associations within the State of Utah, such that all associations receive the same benefit, not varying from locale to locale based upon varying degrees of performance or lack of performance with respect to the identified standards of care. *See Elmer* 445 P.2d 612, 614.

[12] It is important to note that although *Davencourt* has established the duty and standard of care as it relates to the seven limited fiduciary duties that a developer owes an association, three of the limited fiduciary duties outlined in *Davencourt* concern the developer's duty to disclose certain information to the association (including all material facts and circumstances affecting the condition of the property,). "Hence, regardless of the applicable standard of care, [Defendants] [have] a duty to disclose latent defects of which it had knowledge." *Salt Lake County v. W. Dairyman Coop.*, 48 P.3d 910, 916 (Utah 2002).

In *Davencourt*, the Court noted that "the pending action for breach of fiduciary duty may best resolve those allegations arising under the negligence and negligent misrepresentation claims. These allegations implicate the limited fiduciary duty that a developer owes to a homeowners association and its members." *Davencourt* at ¶40, fn 5. Thus, it seems plausible that the more general duties of negligence and negligent misrepresentation, for which a standard of care and locale would have been appropriate, were superseded and replaced by "the limited fiduciary duty [the "duty of care"] that a developer owes to a homeowners association and its members." *Id.*

B. Do Plaintiffs Need a Developer Expert? Likely Not.

If the standard of care is not fixed by law, then to prove a breach of fiduciary duty claim against a developer an association must demonstrate that the developer breached the duty, the association or its members suffered damages, and the damages were actually and proximately caused by the developer's breach. *See Reperex Inc. v. Child, Van Wagoner & Bradshaw*, 2017 UT App 25, ¶34 (Feb. 9, 2017)(Voros, J.); accord *Giles v. Mineral Resources Int'l, Inc*., 2014 UT App 259, ¶6, 338 P.3d 825. "Utah courts have held that expert testimony may be helpful, and in some cases necessary, in establishing the standard of care required in cases dealing with the duties owed by a particular profession". *Reperex* at ¶34 (*quoting Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah Ct. App. 1997)). "Specifically, '[e]xpert testimony is required [w]here the average person has little understanding of the duties owed by particular trades or professions . . . .' *Id*. (second alteration in original) (citation and internal quotation marks omitted). "But, 'expert testimony may be unnecessary where the propriety of the defendant's conduct 'is within the common knowledge and experience' of a layperson. "'*Id*. (quoting *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980)).

However, the Court of Appeals made it clear in *Reperex* and *White v. Jeppson*, 2014 UT App 90, ¶¶19-23, 325 P.3d 888, that the complexity of the claim, not the complexity of the transaction, determines whether expert testimony is required. *Reperex*, at ¶50.

The specifics of the "duty of care" owed to the association and its members by the developer has been established by the Utah Supreme Court in *Davencourt*.[13] Whether expert testimony from an association is required to establish the *standard of care* associated with the

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[13] For example:

> *(1) to use reasonable care and prudence in managing and maintaining the common property;*
> *(2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;*
> *(3) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining;*
> *Davencourt* 221 P.3d 234 ¶36 (Utah 2009) (emphasis in original).

In other words, this author believes that not only the duty, but also the standard of care, has been clearly laid out by the Court.

After fleshing out the standard for the limited fiduciary duties, the Court further elaborated on the standard, stating:

> In adopting this limited fiduciary duty, we recognize that it constitutes a **newly-recognized independent duty of care** in Utah.
> *Davencourt* 221 P.3d 234 (Utah 2009) ¶38 (emphasis added).

duty of care has tangentially been discussed in *The Townhomes at Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC,* 2014 UT App 52. However, developers often misconstrue the *Pointe Meadows Townhomes* holding. They rely on the statement that "[o]rdinarily, the standard of care in trade or profession must be determined by testimony of witnesses in the same trade or profession"[14] to argue that an association needs a developer and/or general contractor expert to prove its non-contractual claims. However, because the association in *Pointe Meadows Townhomes* had no expert, any rationale on the type of expert ordinarily needed may be considered dicta.[15] Additionally, this quotation in *Pointe Meadows Townhomes* is taken from the Utah Supreme Court case *Wessel v. Erickson Landscaping Company*, 711 P.2d 250, 253 (Utah 1985), which is distinguishable as a case dealing with **negligence claims relating to underlying construction defects, not "the Developer's alleged failure to respond to the defect."** *See Pointe Meadows Townhomes* at ¶21**.**

Pointe Meadows Townhomes does not stand for the proposition that one needs a developer expert to opine as to the standard for **developer fiduciary duties**. Instead, *Pointe Meadows Townhomes* holds that the ***Davencourt* duties hinge upon underlying construction defects; the proof of such defects** ordinarily requires expert testimony. *Pointe Meadows* 329 P.3d 815, 821.[16] However, once the defect is established, the claim for breach of the limited fiduciary duty is not complex. See *Reperex* at ¶50 ("the complexity of the claim, not the complexity of the transaction determines whether expert testimony is required"). In other words, to prove that a developer failed (*1) to use reasonable care and prudence in managing and maintaining the common property*, an association must have expert and/or fact witnesses to show that the common property was damaged, defective, or otherwise not capable of being maintained; but a developer expert is not necessary. To prove that a developer failed (*2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property* an association must have expert, and/or fact witnesses to prove that a sound fiscal basis was not established; but a developer expert is not necessary. To prove that a developer failed *(6) to disclose all material facts and circumstances affecting the condition of (common property)* an Association must have expert and/or fact witnesses to establish the material facts and circumstances affecting the condition of the common property, but expert testimony from a developer is not necessary.

IV. OTHER PROPERTY.

A. Negligence Claims for "Other Property" Outside a Single Contract.

[14] *Pointe Meadows*, 2014 UT App. 52, ¶20.

[15] "Obiter dicta is that part of an opinion which does not express any final conclusion on any legal question presented by the case for determination or any conclusion on any principle of law which it is necessary to determine as basis for a final conclusion on one or more questions to be decided by the court." *Beaver Co. v. Home Indem. Co.*, 88 Utah 1, 52 P.2d 435, 444-45 (1935).

[16] The Court in *Pointe Meadows* further states:

> Thus, to the extent that the Association's negligence claim requires the Association to **prove the existence or extent of construction defects**, that claim must fail because the Association did not timely disclose an expert to prove its construction defect claims … [w]e therefore agree with the district court that the Association's negligence claims required **proof of construction defects** to survive summary judgment. *Pointe Meadows* 329 P.3d 815, 821 (emphasis added).

Though not defining what constituted "other property" in either *American Towers* or *Davencourt*, the Utah Supreme Court in *Reighard v. Yates*, 2012 UT 45, 285 P.3d 1168, finally did define "other property" along the "*single contract"* principles articulated in both *American Towers* and *Davencourt.* In *Reighard*, Reighard bought the residence from Yates, the builder-vendor, under a Real Estate Purchase Contract ("REPC"). Reighard then brought suit against Yates under claims sounding in, among others, negligence for damages to the residence caused by water penetration and mold. *Id.* at ¶¶1-6. In addressing the economic loss rule, the Utah Supreme Court (for the first time) defined "other property" "[a]s property that is outside the scope of the contract and unaffected by the contract bargain" and held that "**when property falls outside of the scope of a contract**, the economic loss rule will **not** apply and relief may be available in tort." *Id.* at ¶22 (emphasis added). The court found that Reighard could not maintain a claim against Yates sounding in negligence because "[t]he subject of the contract is the house, and the contract itself expressly addresses moisture-related damage to the house." *Id.* at ¶25.

In homeowner associations, a lot owner may not sue in breach of contract for defects in common property supporting and sustaining the owner's lot as such are not typically included in real estate purchase contracts. *Nolin v. S&S Construction, Inc.*, 2013 UT App 94. However, the lot owner is also a party to the governing documents of the association prepared by the developer, which documents do cover common area. It may be appropriate for a lot owner to bring a non-contractual claim against the developer for defects in common areas as other property not covered by the real estate purchase contract. See *Simantob v. Mullican Flooring, L.P.*, 527 Fed. App 799, 801-02 (10th Cir. 2013).

B. Association Breach of Contract (CC&R) Claims for Common Areas.

Utah Courts have intimated that an association may have a right to bring contractual claims against a developer under the declaration of the association. In *Lodges at Bear Hollow*, the association brought contractual claims (under the declaration) against the developer of the association and also brought contractual claims against another company under an alter-ego theory of liability. *Lodges at Bear Hollow Condo. Homeowner Ass'n v. Bear Hollow Restoration, LLC*., 2015 UT App 6, (Utah Ct. App. 2015). In reviewing these contract claims, the Utah Court of Appeals noted:

> [t]he district court allowed the Association to pursue its contract claims against Bear Hollow [the developer] but dismissed the Association's contract claims against Hamlet Homes [other company]. The court ruled that the Association enjoys privity of contract with Bear Hollow only and that the Association had failed to show that Hamlet Homes is an alter ego of Bear Hollow.

Id. at ¶6. With regard to the association's contract claims against Bear Hollow (the developer), the Court of Appeals stated "[t]he claims against Bear Hollow are well pleaded and will proceed toward trial." *Id*. at ¶10.

Other jurisdictions have similarly held that the declaration acts as a contract between the developer and the association. In *Pinnacle Museum Tower Assn*, a homeowners association brought a construction defect action against a developer for damage to its property and damage to the separate interests of the condominium owners. In response, the developer filed a motion to compel arbitration, based on a clause in the declaration. In determining whether the declaration

serves as a binding contract between the developer and the association, the California Supreme Court stated:

> [i]n light of the foregoing, it is no surprise that courts have described recorded declarations as contracts. (E.g., *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 512–513 [229 Cal.Rptr. 456, 723 P.2d 573 [CC&R's as contract between condominium owners association and unit owner]; *Villa Milano, supra*, 84 Cal.App.4th at pp. 824–826 [CC&R's as contract between developer and homeowners association]; see *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054 [71 Cal. Rptr. 2d 899] [right of neighbors to enforce a recorded restrictive covenant limiting the neighboring property's use was "clearly contractual"]; *Harbor View Hills Community Assn. v. Torley* (1992) 5 Cal.App.4th 343, 346–349 [7 Cal. Rptr. 2d 96] [amendment to Civ. Code, § 1717, which governs contractual attorney fees, was applicable to CC&R's of homeowners association]; see also *Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824, 828, 833 [23 Cal.Rptr.2d 744] [accepting parties' assumption that CC&R's formed a contract between condominium owners and owners association].)
>
> In the proceedings below, the Court of Appeal held the arbitration clause in the Project CC&R's was not binding on the Association. Specifically, the court observed that the Association could not have agreed to arbitrate or waive its constitutional right to a jury trial, because "for all intents and purposes, Pinnacle [as the developer] was the only party to the 'agreement,' and there was no independent homeowners association when Pinnacle recorded the CC&R's." [However] this reasoning is not persuasive in light of the statutory and contract principles at play.

Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC, 282 P.3d 1217, 1227 (Cal. 2012). The California Supreme Court concluded:

> In sum, even though the Association did not bargain with Pinnacle [the developer] over the terms of the Project CC&R's or participate in their drafting, it is settled under the statutory and decisional law pertaining to common interest developments that the covenants and terms in the recorded declaration, including those in article XVIII, reflect written promises and agreements that are subject to enforcement against the Association.
>
> *Id*. at 1231.

V. STATUTORY RESTRAINTS

A. HB 157

Liability of declarant -- Period of declarant control.

(1) An association may not, after the period of declarant control, bring a legal action against a declarant, a management committee, or an employee, an independent contractor, or an agent of the declarant or the management committee related to the period of declarant control unless:

(a) the legal action is approved, by written vote, by owners of more than 51% in aggregate in interest of the undivided ownership of the common areas and facilities;

(b) the association provides each unit owner with the items described in Subsection (2);

(c) the association establishes the trust described in Subsection (3); and

(d) the association first:

(i) notifies the person subject to the proposed action of the action and the basis of the association's claim; and

(ii) gives the person subject to the proposed action a reasonable opportunity to resolve the dispute that is the basis of the action.

(2) Before unit owners in an association may vote to approve an action described in Subsection (1), the association shall provide each unit owner:

(a) written notice that the association is contemplating legal action against a declarant or a declarant's agent;

(b) a written copy of a legal opinion, signed by an attorney licensed to practice in the state, that assesses:

(i) the likelihood that the legal action will succeed; and

(ii) the likely cost of resolving the legal action to the association's satisfaction; and

(c) a written assessment of the likely effect any legal action will have on a unit owner's or prospective unit buyer's ability to obtain financing for a unit while the legal action is pending.

(3) Before the association commences a legal action described in Subsection (1), the association shall:

(a) allocate an amount equal to 10% of the cost estimated by the attorney described in Subsection (2)(b)(ii), not including attorney fees; and

(b) place the amount described in Subsection (3)(a) in a trust that the association may only use to pay the costs to resolve the legal action.

B. 78B-4-513

78B-4-513 Cause of action for defective construction.

(1) Except as provided in Subsection (2), an action for defective design or construction is limited to breach of the contract, whether written or otherwise, including both express and implied warranties.

(2) An action for defective design or construction may include damage to other property or physical personal injury if the damage or injury is caused by the defective design or construction.

(3) For purposes of Subsection (2), property damage does not include:

(a) the failure of construction to function as designed; or

(b) diminution of the value of the constructed property because of the defective design or construction.

(4) Except as provided in Subsections (2) and (6), an action for defective design or construction may be brought only by a person in privity of contract with the original contractor, architect, engineer, or the real estate developer.
(5) If a person in privity of contract sues for defective design or construction under this section, nothing in this section precludes the person from bringing, in the same suit, another cause of action to which the person is entitled based on an intentional or willful breach of a duty existing in law.
(6) Nothing in this section precludes a person from assigning a right under a contract to another person, including to a subsequent owner or a homeowners association.

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