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Otten Johnson Alert -

Lessons from *Countryside Community Association v. Pulte Home Corporation*

In December, the Colorado Court of Appeals rendered an unpublished decision in *Countryside Community Association, Inc. v. Pulte Home Corporation*. Developers of communities falling within the Colorado Common Interest Ownership Act (CCIOA) should take note of the court's ruling, as the ruling confuses certain provisions of CCIOA.

According to the complaint, in 2004, Pulte, the Declarant, recorded a declaration for the Countryside Townhome subdivision in El Paso County, Colorado. The declaration did not initially include any property within the community, but contained a legal description of 186 additional lots for later annexation into the community. Annexation would occur when Declarant recorded a plat of these properties and conveyed individual properties to third parties. Thus, property under Declarant's ownership would remain unencumbered by the declaration. Declarant additionally reserved easements over common areas and used those easements for Declarant's own construction, development, and sales activities. The Countryside homeowners association (HOA) alleged that it had maintained the easements and Declarant's fee-owned properties. Once the declarant control period ended, the HOA levied assessments on Declarant-owned properties. Declarant refused to pay those assessments, and litigation ensued.

The HOA brought three claims against Declarant: (1) the HOA claimed that Declarant's failure to pay assessments constituted a breach of contract; (2) the HOA brought an unjust enrichment claim against Declarant for benefits received from the HOA due to Declarant's use of the easements and the HOA's maintenance of Declarant-owned property; and (3) the HOA claimed breach of fiduciary duty against Declarant because the HOA paid for upkeep of Declarant's properties during the period of declarant control. The district court granted summary judgment to Declarant on all of the HOA's claims.

The court of appeals found Declarant could be held liable for breach of contract. Relying on CCIOA § 201 and specific language in the declaration, the court found that the properties specified for later

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annexation to the community became part of the community upon recordation of the plat for those additional properties. Furthermore, the court read declaration language obligating "Owners, including Declarant" to pay assessments as requiring Declarant to pay assessments on properties owned by it in the community. Moreover, the court found Declarant could be liable for expenses related to its own property, including easements and those platted lands that were unsold to third parties, because CCIOA § 307 obligates a declarant to pay expenses associated with properties within the community subject to development rights, in addition to assessment liability established elsewhere in CCIOA. Because the HOA paid common expenses related to Declarant's properties, the court held that Declarant could be liable for general expenses which benefited Declarant's property, and the HOA could impose additional assessments against Declarant for payment of those expenses.

Additionally, the court found Declarant could be liable for breach of fiduciary duty because Declarant's employees served on the HOA board and authorized the expenditure of HOA funds for maintenance and upkeep of Declarant's lots and buildings. The Court of Appeals affirmed the trial court's denial of the unjust enrichment claim, since unjust enrichment cannot be asserted where a valid contract covers the subject matter of the alleged obligation to pay.

Many of the court's conclusions in the *Countryside* case are confusing. In many respects, the declaration's language played a dispositive role in the court's decision. The court's finding that recordation of the plat automatically included the 186 platted lots in the community is curious. CCIOA § 201 makes recordation of a plat a condition precedent for the creation of a common interest community, but the court instead read § 201 to require the community to be automatically created upon the plat's recordation. The court's interpretation of § 201 conflicts with the plain meaning of that provision. It appears, however, that the creation of a shell community with no initial lands, or subjecting of property to the declaration only upon conveyance to third parties, motivated the court's finding.

Moreover, there is an uneasy relationship between the three claims that were brought by the HOA. The HOA's breach of contract claim contemplated that Declarant violated elements of the declaration. But the court was first required to find that Declarant's property was encumbered by the declaration for it to find a breach. Furthermore, the court accepted that Declarant's failure to reimburse the HOA for maintenance activities on Declarant's lots constituted both a breach of contract and a breach of fiduciary duty, which implicates the "economic loss rule." The economic loss rule generally states that a claimant may not recover damages in both a contractual claim and a commercial tort claim arising out of the same set of circumstances. Finally, the court's determination that unjust enrichment was inappropriate is strange given that the HOA provided services to properties owned by Declarant in the apparent absence of contractual terms addressing the types of services performed by the HOA.

As the *Countryside* case is unpublished, it is of limited precedential value. However, a petition for a writ of certiorari has been filed with the Colorado Supreme Court. Developers of common interest communities should take note of continuing proceedings in the matter and should consult CCIOA attorneys for advice on drafting community declarations.

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