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LITIGATION AND REAL ESTATE PRACTICE GROUPS | NOVEMBER 2013

Otten Johnson Alert -

Possible Expansion of the Homebuilder Implied Warranty of Habitability in Colorado

Can an individual who purchases a new home from a professional homebuilder sue the master developer which sold the lot to the homebuilder for breach of an implied warranty of habitability even though there is no contract between them? Until the 2013 jury verdict in *Rogers v. Forest City Stapleton, Inc. and FC Stapleton II*, the prevailing wisdom in Colorado was "no." Under *Rogers*, however, the theories of liability for homebuyer claims against a master developer now potentially include implied warranties.

In *Rogers*, a Plaintiff homeowner purchased a home from a homebuilder, and paid a premium for a particular lot and for an upgraded basement with higher ceilings, which required deeper foundation excavation. On completion of the house, the Plaintiff alleged that he could not finish the basement because groundwater was causing the sump pumps to run continuously to pump out thousands of gallons of water a month. The Plaintiff sued the master developer under an implied warranty of habitability claim (among others) and prevailed. The jury awarded over \$700,000 to the Plaintiff.

This is the first time a Colorado court has allowed liability to flow back to a master developer when the developer sold a lot to a professional homebuilder. In fact, in 2011, in a case resting on seemingly identical facts, the judge found no master developer liability for breach of the implied warranty. The Court specifically stated that no implied warranty arises between a residential developer and a downstream purchaser where the developer sells land to an experienced homebuilder who inspects the developer's improvements and constructs and sells a home to a purchaser.

While the *Rogers* case was tried by a jury, the earlier case was tried by a judge, and the two courts reached different conclusions on whether an implied warranty can be found in the absence of a contract between the parties. Two facts that may have been compelling to the *Rogers* jury were the fact that the Defendant developer retained a level of control over the project after the sale of the lot, and the fact that the Defendant developer

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received a portion of the proceeds from the Plaintiff's basement upgrade.

For developers, the different outcomes of these two cases make it difficult to navigate liability going forward. Developers should consider having their attorneys conduct comprehensive reviews of sales documents and agreements with a view to minimizing the impact of *Rogers*. However, it is important to note that the final outcome of the *Rogers* case remains to be seen. Post-trial motions have been filed with the trial court, and an appeal is possible.

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