Round 4: Plaintiff's Bar v. The Construction Industry

By Ian P. Gillan

It fairly can be assumed that the majority of time spent contemplating or negotiating a piece of original legislation is done prospectively with an eye toward the future. This is primarily the result of the process. Legislation is generally proposed to some extent in a vacuum with only conjecture, opinion, and, hopefully, some form of independent analysis to forecast the likely effect of enactment and subsequent utilization.

This general concept is changed, however, when dealing with efforts to amend existing legislation. Although the general outside forces and factors are still present during the amendment process (primarily constituent pressures and lobbying efforts), legislators have the benefit of real world application and empirical data to aid in the decision making process.

There appears to be no better legislative scheme to utilize as an example of this procedural dichotomy than the construction defect, "right to repair" law colloquially referred to as Chapter 40. NRS 40.600 *et seq.* Chapter 40 can be retrospectively reviewed and analyzed from its inception as an abstract idea to a hotly debated piece of legislation, which has been interpreted by the Nevada Supreme Court on numerous occasions, *see, e.g., Shuette v Beazer Homes Holding Corp.*, 121 Nev. 837, 124 P.3d 530 (2005) and *D.R. Horton v. Eighth Jud. Dist. Court*, 123 Nev. 468, 168 P.3d. 731 (2007), and is likely subject to further deliberation and consideration by the Nevada Legislature and Nevada courts.

In general terms, Chapter 40, which was originally enacted in 1995 and subsequently amended in 1999 and 2003, created an encompassing procedure whereby contractors and subcontractors were allowed the opportunity to inspect and repair alleged construction defects prior to the homeowner's attorney's institution of litigation. This well intentioned concept, although simplistic in the abstract, was riddled with nuances, creating exhaustive debate over the past 13 years. Consequently, an ideological battle has played out in committee rooms, on both congressional floors, and in the district courts between developers, subcontractor representatives, and the plaintiffs' bar.

Most would agree the 2003 legislative session's "right to repair" was the most dramatic change to the initial product of 1995. Nonetheless, after the voices were heard and the votes tallied, a result touted as a compromise left most feeling like a lot was left on the field. While the construction industry got the "right to repair," the plaintiffs' bar retained what is arguably the most rare and powerful weapon in litigation, a non-reciprocal attorney's fees and costs provision. It is this provision—in a rather comprehensive statutory scheme—that has caused the most turmoil and perpetuated the most debate over Chapter 40 and construction litigation in general.

Now, on the cusp of the 77th regular session of the Nevada Legislature, it is a good time to look at how the process worked, failed, and, given the data collected since the original enactment, how to remedy the situation, so that the aims and intent behind the legislation is truly satisfied . (Notably the 2013 legislative session Bill Draft Request No. 480 provides "make various changes concerning construction defects.")

The lobbies and alliances here are easily delineated: there is the construction industry on one side and the plaintiffs' bar on the other. The goals have also always been clearly delineated: the plaintiffs' bar want to maintain the non-reciprocal attorney's fees/cost provision, whereas the construction industry wants to limit their

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potential exposure to repair of or payment for actual, verifiable defective conditions. The recent media focus on the plea deals and personal tragedies surrounding individuals allegedly associated with the Homeowner's Association (HOA) scandal has, and likely will, emphasize this fact.

The pertinent "recovery" section provides in relevant part that ". . . the claimant may recover only the following damages to the extent proximately caused by a constructional defect: (a) Any reasonable attorney's fees; . . . (f) Any additional costs reasonably incurred by the claimant . . . ." NRS 40.655. This deviation from the American Rule governing attorney's fees and costs was purportedly included in Chapter 40 to allow for the hypothetical individual homeowner to seek redress for construction defects to their home without the need to contribute a portion of any recovery to attorney's fees or expert costs. It is this hypothetical, sentimental homeowner figure that has been at the heart of Chapter 40 efforts in both the 2009 and 2011 legislative sessions.

The legislative strategies on both sides differed drastically between those two sessions. In 2009, the focus was on whether to completely do away with the pre-litigation statutory scheme. In 2011, the plaintiffs' bar proposed a revision that did not touch the central issue, but dangled in front of the construction industry what facially amounted to the shortening of the statute of repose period. The strategies on both sides—albeit creative and passionately delivered—resulted in little compromise and the status quo has been maintained.

This time around there is a real need and opportunity to overcome the tactical smokescreens of the prior legislative sessions. It will be hard to ignore the 600 pound gorilla of the federal investigation into the alleged construction defect/HOA scandal. In reality, the Chapter 40 process rarely precludes litigation as intended. Many cases have gone to trial over the past few years after the full Chapter 40 process was exhausted and extensive repairs were made or offered. The broad assertion that the construction "boom" created fast-paced, shoddy construction—which was the backbone of the sentimental, individual homeowner argument—has become nearly irrelevant at this time. The majority of the homes built during the construction "boom" either have or soon will be beyond any statue of repose period or have already been through some form of litigation and potentially subject to the doctrines of *res judicata* or collateral estoppel. The non-reciprocal attorney's fees and costs provision is the tail wagging the dog of almost every construction defect claim. Attorney's fees and expert costs typically outpace recovery for the alleged defective condition by nearly five to one.

This is where the dichotomy between the enactment of original legislation versus subsequent amendment or change should be brought into the clearest focus. Nevada has more than a decade's worth of information and data going into the next legislative session to determine whether the oft-cited sentiment of the hypothetical, individual homeowner will prevail once more. In 2013, the accumulation and presentation of solid facts and statistics should trump conjecture and hypothetical. The efforts in 2009 and 2011 appear marred by excessive lobbying and extreme political strategies. It should be of no surprise that it has and will be hard to get the legislators past these lobbying efforts and argument. If it were easy, the lobbyists on both sides would not be doing a very good job. Nonetheless, if the process is to work at its best, the hard and consistent facts and data should carry the day. Hopefully, the age old adage that "*history repeats itself because no one was listening the first time*" will not, once again, be proven.

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