



“FOLLOW THE MONEY”

A Position Paper by the Coalition for Fairness in Construction

On December 4, 1996, an article, entitled “*Building is Booming and California Lawyers Are Massing on State Line,*” appeared in the New York Times. The author began the article by stating:

“It happened first in California 15 years ago: a housing boom touched off a litigation boom as legions of lawyers filed lawsuits accusing builders of shoddy workmanship.

“Now it is Nevada’s turn.”

The History of Construction Defect Litigation in Nevada

The litigation boom in Nevada was facilitated by the passage of Chapter 40 of the Nevada Revised Statutes in 1995. Chapter 40 provides that if the homeowner prevails in a construction defect lawsuit, he is entitled to his attorney’s fees and costs, expert fees and the loss of value in his home (otherwise known as the Chapter 40 “entitlements”). The loss of value may generally be equated to the cost to repair.

In December 1996, there were about a dozen construction defect cases pending in Clark County District Court. Five years later in 2001, there were so many construction defect cases ongoing in Clark County that three District Court Justices – Michael Cherry, Nancy Saitta and Allan Earl – were assigned to a so-called “construction defect panel” or “dirt court” to exclusively handle the ever increasing number of defect cases (many involving hundreds of residences).

Less than two years later in 2003, a special 3,000 square foot courtroom known as the Clark County Complex Litigation Center was constructed just to handle the crush of attorneys, homeowners, developers, contractors and insurance representatives involved in a single construction defect case. The cost to the judicial system and ultimately the taxpayer is huge. The cost to homeowners and the construction industry in this State is even greater.

Justice Nancy Saitta once boasted that during its first year, the so-called “dirt court” moved \$600 million in case settlements. A cursory review of websites shows that just five of the legion of construction defect plaintiff attorneys now practicing in this State have been collectively awarded more than \$1 billion (\$1,023,058,082.00 to be exact).

The Cost to Homeowners

Unfortunately, Chapter 40 is structured so that homeowners receive little of the money

recovered in a construction defect lawsuit. Typically, their attorneys pocket 40 percent in guaranteed fees. We estimate that another 30 to 40 percent goes to their attorneys for expenses to include the employment of supposed experts. In *Gunderson v. D.R. Horton*, for example, plaintiffs' attorneys initially sought a total of approximately \$7.8 million in damages and attorneys' fees and costs for a multitude of alleged defects in 195 residential units. At trial, the jury discarded all but one defect and awarded just 39 of the units a total of \$66,300 in damages (\$1,700 per unit). Plaintiffs' attorneys are now seeking \$4,385,953.58 in attorney fees and costs.

Although many of the plaintiff attorneys are now multi-millionaires, homeowners are left with little money to repair the alleged defects. Instead, they are typically left with a devalued home with a clouded title.

The FHA, VA and others will not write a mortgage for a home that is the subject of a claim governed by NRS 40.600 to 40.695, inclusive.

The 2009 Legislative Session

For these and other reasons, the Committee on Judiciary authored Senate Bill No. 349 during the recently concluded 75th Session of the Nevada State Legislature. Section 2 of this bill would have, if enacted, removed from Chapter 40 of NRS the provision that allows a claimant to recover attorney's fees for a construction defect claim with no regard to the merits of the case.

We believe that the authors of SB 349 were also influenced by the Federal Bureau of Investigation's ongoing investigation into whether individuals were planted on homeowners association boards to funnel business stemming from construction defect lawsuits to certain attorneys and construction companies. Testimony during the hearings that led to the promulgation of SB 349 showed, however, that this was just one of several tactics employed by plaintiff attorneys to draw individual homeowners and homeowner associations into construction defect lawsuits. While these other tactics may not be characterized as criminal, they do appear in many cases to be unethical.

Testimony during the SB 349 hearings also showed that the awards granted by the "dirt court" in a number of cases have exceeded the original sales prices, and current market values, of the allegedly defective homes. Plaintiff attorneys typically place onto a defect list each and every possible or potential defect – a standard laundry list attached to virtually all cases. The plaintiff attorney's construction "expert" then produces an estimated cost of repair from this list that is usually exponentially greater than the actual cost of repair. The laundry list of defects also serves to increase the available pool of money by drawing each and every subcontractor who provided work or material for the development (and their insurers) into the lawsuit. It is also done to prolong the lawsuit. Case after case settles prior to trial – but only after there has been an expenditure of monies for experts and attorneys that greatly exceeds any damages that may be awarded the homeowners.

Indeed, plaintiff attorneys have alleged that flues in non-existent fireplaces were defective; stairs to non-existent balconies were defective; nails used to attach the drywall were not those specified in the building code when in fact the ones used were better nails; a stud in the wall was an inch off spec; etc., etc., etc..... The idea is to drag in as many subcontractors and their insurance companies as possible, who then must "ransom" their way out of the lawsuit.

The result is that most subcontractors are either unable or unwilling to avail themselves of the opportunity to repair provided by Chapter 40. As alluded to previously, subcontractors cannot repair a defect that doesn't exist. Subcontractors are also reluctant to make repairs that are needed because they cannot get a release and end the lawsuit. And, unfortunately, doing a repair

still subjects the subcontractor to plaintiff's attorney fees and costs and raises issues related to warranties and the statute of repose.

In response to hours of testimony on these questionable practices, the Senate Judiciary Committee narrowed the definition of a construction defect in SB 349. Section 1 of SB 349 would, if enacted, have provided "that a constructional defect is a defect: (1) which presents an unreasonable risk of injury to a person or property; or (2) which violates the law, unless the workmanship exceeds the standards set forth in any applicable codes and ordinances, which causes physical damages and which is not completed in a good and workmanlike manner (NRS 40.615)."

At this juncture, it is important to note that the Senate Judiciary Committee also addressed the statutes of repose for construction defects in SB 337. The time to bring a lawsuit on a patent defect (a defect easily identified with inspection) would have been reduced from 6 years to 3 years; the time to bring a lawsuit on a latent defect (a defect not easily identified) would have been shortened from 8 years to 3 years; and, the time to bring a lawsuit on a known defect would have been shortened from 10 years to 3 years, if SB 337 had been enacted into law. Combined with the Chapter 40 entitlements, the lengthy statutes of repose set forth in Chapter 11 of NRS have caused nearly every admitted insurance carrier to stop issuing builders and subcontractors coverage for construction defects. Others have increased their premiums to the extent that rates are prohibitive.

During the just concluded 75th session of the Nevada State Legislature, both SB 337 and SB 349 passed out of the Senate by a nearly unanimous vote. The Assembly Judiciary Committee, however, refused to hear either bill.

The 2011 Legislative Session

Chapter 40 was originally intended to allow homeowners to receive prompt repair of real defects. Instead, Chapter 40 is a mechanism that delays repairs until after an exceptionally expensive, multi-year process – a process that has very little to do with helping homeowners and virtually everything to do with enriching plaintiff attorneys.

The Coalition for Fairness in Construction respectfully asks that you support our efforts in the forthcoming 76th Session of the Nevada State Legislature to:

- 1) Bring common sense to the definition of a construction defect;**
- 2) Provide that a claimant may recover attorney fees and costs in the same fashion as provided in every other type of litigation in Nevada; and**
- 3) Allow a reasonable and responsible time frame for bringing construction defect complaints.**