

Nevada Construction Law Update

“A Closer Look at Senate Bill 349: Proposed Amendments to NRS Chapter 40”

By: Monica Dean

Nevada construction defect claims are governed by Nevada Revised Statutes (“NRS”) 40.600 – 40.695, which is commonly referred to as “Chapter 40.” Chapter 40 first became law in 1995. The original stated goal of Chapter 40 was to provide a pre-litigation process to allow construction defect claims the opportunity to settle without incurring the costs associated with litigation. However, since its inception, the Chapter 40 pre-litigation process has faced harsh criticism due in large part to its ineffectiveness to settle construction defect claims in a cost effective manner. During the 2003 legislative session the statute was significantly modified. The 2003 amendments gave contractors “the right to repair” allegedly defective work *prior* to allowing a homeowner claimant to institute litigation proceedings. Currently, there is considerable debate among those involved in the construction industry, consumer advocates and Nevada lawmakers regarding the need for additional amendments to Chapter 40. During the 2009 legislative session, the Senate Judicial Committee proposed Senate Bill (“SB”) 349. This controversial bill seeks to amend three sections of Chapter 40 as set forth below.

First, SB 349 would more narrowly define a “constructional defect.” Under the current law, a constructional defect is defined as:

[A] defect in the design, construction, manufacture, repair or landscaping of a new residence, or an alteration or addition to an existing residence or appurtenance: 1. Which is done in violation of law, including, without limitation, in violation of local codes or ordinances; 2. Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed; 3. Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; **or** 4. Which presents an unreasonable risk of injury to a person or property.

See NRS 40.615 (**emphasis added**). This liberal definition specifically, the use of “or” in the statute allows homeowners to bring claims based on loosely defined criteria, which some argue encourages a floodgate of potentially baseless claims. Under the proposed amendment, to be considered defective the home would have to present

“unreasonable risk of injury to a person or property,” or in the alternative, the home would have to meet all of the following criteria: 1.) violate building codes and ordinances, 2.) proximately cause damage to the residence, and 3.) be built in a manner not good and workmanlike in accordance with generally accepted industry standards. Senate Amendment to Senate Bill No. 349, 75th Leg. (Nev., March 23, 2009). Under the current 2003 definition, a home may qualify as a defective home by satisfying just *one* of the above criteria. By heightening the criteria, the affect of this proposed amendment would seemingly curtail unjustified homeowner lawsuits against builders and subcontractors.

Second, SB 349 would limit a homeowner claimant’s recovery on a Chapter 40 claim brought against a builder. Under the current law, a homeowner claimant will recover reasonable attorney’s fees from a builder as damages. NRS 40.655(1)(a). However, some critics argue that this provision creates an incentive to bring baseless Chapter 40 claims, which accumulate excessive legal fees that are passed on to builders and subcontractors. In practice, Plaintiffs attorneys that practice in the field of Construction Law will regularly wield the sword of these massive attorney’s fees as a method to extort much higher settlements from all defendants. SB 349 would eliminate the provision in the current law that allows claimants to collect attorney’s fees as damages as a matter of law. Senate Amendment to Senate Bill No. 349, 75th Leg. (Nev., March 23, 2009).

Lastly, SB 349 would amend the attorney pre-filing disclosure requirements set forth in NRS 40.688(2). Under the current law, an attorney need only notify a homeowner claimant in writing of the homeowner disclosure requirements set forth in NRS 40.688(1) before taking any action on a Chapter 40 claim. Under the proposed amendment, an attorney for a homeowner claimant would be required to obtain a notarized affidavit from the claimant stating that the claimant has been notified of the provisions of the disclosure section. Furthermore, at the time of commencing an action or amending a complaint to add a cause of action for a constructional defect the attorney would be required to file the affidavit with the court. Notably, the failure to file the affidavit would warrant a dismissal of the action. Senate Amendment to Senate Bill No. 349, 75th Leg. (Nev., March 23, 2009).

On April 16, 2009, Senate Democrats, led by Judiciary Committee Chairman Terry Care, voted 19-1 in favor of SB 349. Thereafter, SB 349 was held up in the Assembly Judiciary Committee. The 75th legislative session ended on June 2, 2009 without any further action on SB 349. The Nevada Legislature only meets every two years, and as such, the outcome of this proposed legislation will not be decided until 2011. After the legislature reconvenes on February 7, 2011, the debate over SB 349 will once again be the subject of intense debate between those involved in the building industry, consumer advocates and Nevada lawmakers. Some critics fear that the proposed legislation goes too far and will impede the rights of homeowners. However, those involved in the construction industry believe this legislation would help curtail homeowner lawsuits against builders. Indubitably, if this legislation is passed it will have a massive impact on construction defect claims in Nevada.

If this bill is passed during the 2011 legislative session in its current form based on the above three proposed amendments with an estimated enactment date of October 2011, we will likely see a flood of construction defect claims filed before its enactment in order to avoid the heightened criteria as a consequence of the amendments. In particular, the heightened criteria to the definition of a constructional defect by itself will seemingly create a disincentive for homeowners to bring a construction defect claim against a builder. In addition, eliminating the provision that allows homeowners to collect reasonable attorney's fees as damages against a builder will also create a deterrent for homeowners to bring a constructional defect claim against a builder. In total, the proposed amendments in their current form are not favorable to homeowners, plaintiff's attorneys and consumer advocates and may be amended significantly to reach an amicable resolution between those among those involved in the construction industry, consumer advocates and Nevada lawmakers before its enactment.