

THE DUST IS CLEARING: THE EVOLUTION OF REPRESENTATIVE-TYPE CONSTRUCTION DEFECT ACTIONS IN NEVADA

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The face of multi-homeowner, representative-type construction defect actions has evolved greatly over the past five years in Nevada. Prior to the Nevada Supreme Court's 2005 landmark decision in *Shuette v. Beazer Homes Holdings Corp.*,¹ there was little authority in Nevada regarding representative-type construction defect actions. The battles regarding these types of actions were hard-fought with no solid guideposts to help navigate the path through the complexities facing all parties involved. The *Shuette* decision provided clear parameters for determining whether a construction defect action may be certified as a class action pursuant to Nevada Rule of Civil Procedure 23 (NRCP) when the Supreme Court stated that "as a practical matter, single-family residence construction defect cases will rarely be appropriate for class action treatment," due to, inter alia, "issues of causation, liability defenses and damages that cannot be presumed through the use of generalized proof."² In the pre-*Shuette* era, a class action was the primary litigation vehicle utilized in representative construction defect actions involving multiple homes. It is now rarely utilized and generally only appears in cases involving allegations of singular, fundamental wrongs.

Following the *Shuette* decision, construction defect actions brought by homeowners' associations on behalf of the individual homeowners were regarded, by some, as a means by which a multi-homeowner construction defect action could be pursued without the restrictions imposed by NRCP 23 or *Shuette*. Some considered these suits to be an "end-run" around the clear dictates of *Shuette*. The Supreme Court recently resolved this issue in *D.R. Horton, Inc. v. Eighth Judicial District Court*³ (*First Light II*) holding that, while a homeowners' association may have standing to assert constructional defect claims in a representative capacity in regards to defects within individual units, the action is subject to the requirements of NRCP 23 and the class action principles discussed in *Shuette*.⁴ It can be argued the *First Light II* decision largely signals the end to mass multi-defect/multi-homeowner construction defect cases in Nevada. This may or may not be the case; however, one thing is certain: the dust is clearing and there is a more defined path when both prosecuting and defending multi-homeowner, representative construction defect actions than there was a mere five years ago.

The Path to the Post-*First Light II* Era

Prior to Nevada's codification of the Uniform Common Interest Ownership Act in 1991 (UCIOA), the Nevada Supreme Court ruled homeowners' associations lacked standing to pursue construction defect actions for individual units under NRCP 17, absent a statutory grant or direct ownership interest by the association in the individual units.⁵ After the codification of the UCIOA within NRS chapter 116, homeowners' associations began pursuing such actions, though they often lacked an ownership interest or maintenance obligation in the individual homes. This became an area of considerable dispute among counsel within the developers' and plaintiffs' bars. The initial disputes in this area centered primarily on the interpretation of NRS 116.3102(1)(d), which allowed an association to bring suit "in its own name on behalf of ... two or more units' owners on matters affecting the common-interest community," subject to the provisions of the association's declarations or Conditions, Covenants & Restrictions (CC&Rs). The developer's counsel would generally assert that the phrase "common-

interest community,” as defined in the UCIOA, did not include the individual units when the association did not have an ownership interest in such units pursuant to the CC&Rs of that particular association. In contrast, plaintiffs’ counsel would argue NRS 116.001 et seq. permitted carte blanche representative actions for all elements of the community, as long as the issues affected “two or more units’ owners.”

The general consensus within the defense bar appeared to be that the interpretation adopted by the plaintiffs’ bar did not square with the Nevada Supreme Court’s decision in *Shuette*, which imposed clear parameters to address issues arising in multi-homeowner construction defect class action suits. Though the same concerns addressed in *Shuette* were prevalent in multi-home representative construction defect actions pursued by associations under the UCIOA, there appeared to be no clear rule in place to address these issues. These types of representative-actions were seen by some as a means by which a multi-unit construction defect action could be pursued without the restrictions imposed by NRCP 23 and *Shuette*. These types of cases essentially created two distinct classes of construction defect claimants.

The Nevada Supreme Court resolved the issue in September 2009, in *First Light II*, holding that NRS 116.001 et seq. granted an association standing to pursue construction defects within individual units on behalf of two or more unit owners.⁶ However, the Nevada Supreme Court further held, “because a homeowners’ association functions much like a plaintiff in a class action, when an association asserts claims in a representative capacity, the action must fulfill the requirements of NRCP 23.”

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The court definitively concluded, “[i]n sum, a homeowners’ association filing a suit on behalf of its members will be treated much the same as a plaintiff in class action litigation. Although an association has standing to assert claims on behalf of its members, the suit must fulfill the requirements of NRCP 23 and the principles and concerns discussed in *Shuette*.”⁷ The court then remanded the action to the District Court “to determine whether the claims asserted by [the association] conform with class action principles.”⁸ The guideposts set out by the Nevada Supreme Court in *First Light II* have undoubtedly shaped the manner in which multi-homeowner, representative construction defect actions will be pursued in this state.

The Parameters

The *Shuette* and *First Light II* opinions also provided guidance for our district courts to determine which actions could be prosecuted in a representative capacity. A discussion of the ins and outs of the NRCP 23/*Shuette*-type analysis is too nuanced for this current article. However, generally, in order for a construction defect action to be pursued in a representative capacity, either as a class action or by a homeowners’ association, the purported representative action must meet the numerosity, commonality, typicality and adequacy of representation requirements under Rule 23(a).⁹ In addition the action must meet one of the three¹⁰ conditions set forth in Rule 23(b). Where monetary damages are sought, the focus is on the condition of Rule 23(b)(3) that “common questions of fact or law predominate over individual questions, and a class action is superior to other methods of adjudication.”¹¹

Multiple-homeowner, multiple-defect actions generally fail to meet the commonality, typicality and adequacy requirements of Rule 23(a) and rarely meet the requirements of predominance and superiority under Rule 23(b)(3). This is true because each individual home usually contains a myriad of house-specific defects which will vary in existence, severity, causation and damage from unit to unit. This is often the case

regardless of whether or not the action involves single-family residences or, as in *First Light II*, involves multiple units within single-dwelling structures. Often plaintiffs' counsel will allege that broad defect categories exist in every home; however, there are frequently variances among the units even in regard to a single defect category, which defeat NRCP 23(a)'s requirements of commonality and typicality. The *Shuette* opinion discussed such variances:

The homeowners' claims fail to satisfy the predominance prong of NRCP 23(b)(3) because individual questions of cause and effect are more important than any common questions of exposure, and they cannot be resolved with generalized proof. ... [A] shared experience alone does not justify a class action. Instead, it must be adequately demonstrated that this exposure was similar, and caused similar effects, within the class.¹²

Further, where the plaintiffs assert causes of action for fraud or misrepresentation, individual questions regarding the form of the misrepresentation, reliance and damage will defeat the requirements of commonality and typicality.¹³ Questions of fact and law central to claims for breach of contract, negligent misrepresentation and breach of express warranties will undoubtedly vary among unit owners, especially when some of them are not original purchasers.

Often, these variations in defects and damages among the individual units will also defeat the adequacy requirement of Rule 23(a), which requires that the representatives "possess the same interest and suffer the same injury" as the owners they purport to represent."¹⁴ This requirement is further complicated when a homeowners' association attempts to bring a construction defect action on behalf of its members for issues affecting the individual units where the association has no ownership interest in the unit, and, thus, has suffered no injury and may have interests which are divergent from those of the individual unit owners.

Nonetheless, the Nevada Supreme Court in *Shuette* recognized that not all multi-homeowner construction defect cases will be improper under Rule 23, stating an action may be amendable to class treatment if the case "involves a singular defect that predominates over any other problems which remain minimal."¹⁵ The *Shuette* court cited *Hicks v. Kaufman Broad Home Corp.*, a California appellate case certifying a class with respect to the members' breach of warranty claims, where the only defect at issue involved improper use of a reinforcing mesh in each home's concrete slab. Because the parties merely requested the same economic damages for the repair or replacement

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of the defective items in regards to their breach of warranty claims, such claims could be resolved using generalized proof and simple damages formulas.¹⁶ The *Shuette* court noted that the claimants in *Hicks* were “not permitted to proceed with their negligence claims arising from the same defect because, for those claims, each class member would be required to specifically prove damages.”¹⁷ Thus, it appears certain causes of action in regard to a singular defect – which is prevalent throughout a community and affects all of the units in the same manner – may pass the *NRCP 23/Shuette* analysis where damages for each unit may be shown through the use of general proof rather than individualized inquiries.

Where Do We Go From Here?

The *Shuette* and *First Light II* decisions have changed the landscape of how construction defect cases are prosecuted. It is easily foreseen that the restrictions imposed upon representative-type construction defect actions by the Nevada Supreme Court in these two cases will likely lead to increased utilization of the pre-litigation notice and repair process provided by NRS 40.600 et seq. The mandatory pre-litigation process requires a homeowner to give a developer notice of the deficiencies alleged within the residence and an opportunity to repair such deficiencies before litigation may be commenced.¹⁸ The intent behind the enactment of the mandatory constructional defect pre-litigation process was to allow individual homeowners a cost-effective process through which they could seek remedy for deficiencies within their homes without having to incur the costs and attorney’s fees associated with initiating a formal lawsuit. It could be perceived in the past that the NRS 40.600 et seq. pre-litigation process was often reduced to a mere formality in large multi-homeowner, representative-type construction defect actions, rather than a real opportunity to resolve the issues outside of litigation, due the sheer volume and diversity of issues alleged among the units.

With the recent restrictions imposed upon representative-type construction defect actions, individual homeowners will likely be compelled to take a more proactive role in the pre-litigation process, without an association or class representatives controlling the process on their behalf. These smaller, more focused claims, if legitimate, are more likely to be resolved during the pre-litigation repair process. With more claims resolved during the pre-litigation process, there will likely be smaller-scale construction defect actions in the future. This will allow each homeowner an opportunity to present his or her case before the court, rather than have the issues and

damages specific to his or her home lost in a class action case involving hundreds of other homes. The Legislature provided an attorney’s fees provision to make it economical for individual homeowners to pursue individual construction defect claims.¹⁹

In the end, the *Shuette* and *First Light II* decisions may result in more efficient and economic resolution of legitimate construction defect disputes that also achieve the goal of protecting the due process rights of all parties involved. At the very least, the dust has settled and construction defect litigants now know the litigation vehicles available to them in a representative-type construction defect action in Nevada. ■

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1 121 Nev. 837, 124 P.3d 530.

2 *Id.* at 854–55.

3 215 P.3d 697 (Nev. 2009).

4 *Id.* at 699.

5 *See Deal v. 999 Lakeshore Ass’n*, 94 Nev. 301, 304, 579 P.2d 775 (1978).

6 215 P.3d at 699.

7 *Id.* at 705.

8 *Id.* at 704-05.

9 *Shuette*, 121 Nev. at 846–47.

10 A Plaintiff may alternatively satisfy the conditions of NRCP 23(b)(1) or NRCP 23(b)(2) by showing:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

11 *Shuette*, 121 Nev. at 850.

12 *Id.* at 858.

13 *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 515 P.2d 68 (1973) (citing 114 A.L.R. 1015).

14 *Shuette*, 121 Nev. at 849.

15 *Id.* at 857 (citing *Hicks v. Kaufman Broad Home Corp.*, 107 Cal. Rptr. 2d 761 (Cal. Ct. App. 2001)).

16 *Id.*

17 *Id.*

18 *See* NRS 40.645, 40.647.

19 NRS.40.655.