CONSTRUCTION DEFECT LAWS: IN NEED OF REPAIR?

BY COURTNEY FORSTER, ESQ.

This deck could collapse at any moment, and it's only extremely good luck that it hasn't already. The basement floods every time my neighbor waters her lawn. The retaining walls in my subdivision, built on a steep hill, are collapsing. The stucco on my house is breaking apart and falling off. The concrete driveway has a crack. The caulking around my bathroom sink is starting to peel. My fireplace has a funny smell.

Construction defect cases cover an extraordinarily wide range of complaints, from the life-threatening to the absurd. Regardless of how serious, complex, straight-forward or frivolous a claim might be, they are all required to go through the pre-litigation process set forth in NRS 40.600 *et seq*. Over the past several years, I have represented homeowners, general contractors and subcontractors in the prosecution and defense of construction defect claims. This unusual mix of clients from both sides of the aisle has given me the opportunity to see firsthand how these laws have negatively impacted plaintiffs and defendants alike, forcing them to spend time and energy on a pre-litigation process that does nothing but delay the inevitable. These construction defect laws are unproductive for both homeowners and builders alike, and they are hurting the legal system, the parties and the construction industry as a whole. They must be revised.

GOOD INTENTIONS

The current construction defect laws in Nevada were enacted nearly 20 years ago, with an unquestionably noble goal: contractors were frustrated by lawsuits being filed before they had the chance to fix a problem in a home, and homeowners were frustrated by having to wait several years for their lawsuits to complete before getting the money needed to pay for repairs. Insurance companies were not allowing contractors to repair relatively minor problems in homes, for fear of inviting additional lawsuits or increasing liability. Homeowners and contractors alike wanted the legislature to reform the law in a way that would encourage informal resolution of these problems without the need to file a lawsuit or hire an attorney.[1]

Ultimately, the builders, homeowners and legislators developed a plan that would require homeowners to give a contractor written notice of the

defects before the homeowners could file suit, and allow the responsible contractor or subcontractor the opportunity to correct the deficiency before the dispute moved into litigation. The parties would also be required to attend mediation, in an effort to work out their differences before a lawsuit was filed. This procedure was intended to speed up the resolution of defect claims, encourage insurance companies to allow builders to make appropriate repairs and help homeowners who could not afford an attorney to guide themselves through the repair process.[2]

Although the law as it was eventually passed meant to promote informal resolution of a construction dispute, the implementation has caused a huge amount of trouble for homeowners and builders alike. Despite subsequent revisions, the problems with construction defect claims identified 20 years ago are just as prevalent now. Even worse, these laws have created a huge amount of additional — and entirely unnecessary — bureaucracy and paperwork.

IDEAS MEET REALITY

The laws, as written, have created three specific problems: an overly strict notice requirement, an unused right to repair and an unproductive mandatory mediation.

To begin, NRS 40.645 and 40.646 have highly technical notice requirements for owners, contractors, subcontractors and suppliers. A homeowner is required to send a letter to the contractor, containing very specific information about the nature, cause and location of each defect (if known), and the extent of damage or injury caused by those defects. When a contractor receives this written notice of defect, he must immediately send it on to each subcontractor, supplier or design professional that the contractor reasonably believes is responsible for a defect identified in the notice. If the contractor fails to do so within 30 days of receiving the homeowners' notice, the contractor is barred from later bringing a claim against that responsible company.

The practical effect of this requirement is that a contractor is strongly encouraged to mail this defect notice to every other person or company who worked on the home. The contractor doesn't have enough time or information to perform a detailed investigation into which subcontractors worked on each issue, and frequently a "defect" may have involved several different companies. For example, a drainage problem could have been caused by the rough grader, the finish grader, the landscaper or a combination of all three. Contractors would rather notify everyone and sort out who is really responsible later, than find out months afterward that they failed to notify the right subcontractor and are now prohibited from filing a claim against the responsible party. As a result, contractors, subcontractors and suppliers are overwhelmed with notices that may or may not be relevant. This rule promotes a dragnet manner of litigation that overburdens everyone involved.

Once the written notices have been mailed, NRS 40.6462 and NRS 40.647 require a homeowner to allow the builders, suppliers or design professionals who may be responsible for the defect the chance to inspect the residence; they must also permit those persons a reasonable opportunity to make repairs. Ideally, these inspection and repair requirements would give the homeowner and the builder an opportunity to work together to solve the perceived problem.

In reality, homeowners are extremely reluctant to have a builder, who they believe does poor work, to come into their homes and make repairs. At the same time, builders often believe that a claimed defect is really an issue of the homeowner failing to maintain the home, or that the repair an owner is seeking is too expensive, unnecessary or inappropriate. Insurance companies are still very hesitant to allow builders to make any repairs to a home, fearing additional liability. As a result, owners are forced to allow a number of people whom they already distrust into their homes, with no tangible benefit.

Finally, after everyone has received notice, inspected the problems and decided that they cannot reach an agreement about repairs, the homeowner is still barred from initiating a lawsuit. Instead, NRS 40.680 requires the parties to participate in mediation before the complaint can be filed.

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Unfortunately, because this mediation necessarily occurs early in the litigation process, it is commonly unsuccessful. Homeowners and builders alike (along with their insurance companies) strongly believe in the strength of their own positions. The give and take that occurs over the course of litigation, as depositions are taken and preliminary rulings are issued by the court, has not yet brought the parties to a position where they are more open to settlement. Indeed, these lawsuits — like so many others — frequently settle in the lead-up to trial, once the parties have a much better understanding of the strengths and weaknesses of each other's positions. The mediation also frequently delays the filing of a lawsuit by several additional months, as the parties work to find a mediator and a mutually convenient date on which all the various contractors and subcontractors, along with their attorneys, are available. Although the pre-litigation mediation requirement is rooted in the ideals of resolving disputes prior to filing a lawsuit, the reality is that this just becomes yet another delay on the path to a final resolution.

Together, these pre-litigation requirements postpone the filing of a lawsuit by several months, while the homeowners

continued on page 26

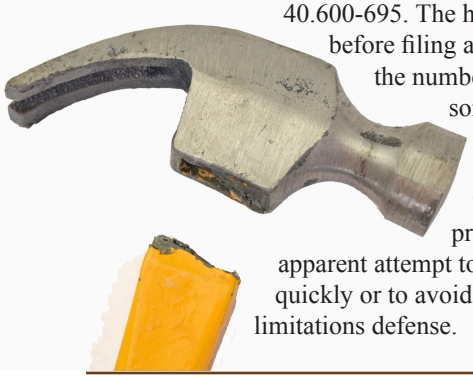
CONSTRUCTION DEFECT LAWS: IN NEED OF REPAIR?

continued from page 25

prepare and send detailed defect notices, schedule the inspections, wait for builders to make a written offer to repair, and schedule and participate in a (frequently unsuccessful) mediation. These steps very rarely lead to the actual repair of defects without the need for a lawsuit; instead, they cost homeowners and builders alike both time and money as they go through the motions.

NOW WHAT?

Ultimately, the best way to reform these laws is by eliminating the pre-litigation requirements throughout NRS 40.600-695. The hurdles parties must jump before filing a complaint do not reduce the number of lawsuits. In fact, some homeowners' attorneys have started filing their complaints well before they have completed the pre-litigation process, in an apparent attempt to make things move more quickly or to avoid any potential statute of limitations defense.



Nevada law already offers the protections contained in these statutes. If a general contractor is sued because of work performed by a subcontractor, it can file a third-party or contribution claim. Defendants will still have the right to inspect purported defects through discovery, and the parties can participate in a mediation of their own accord when they have enough information to do so in a productive and meaningful manner. Reforming the construction defect laws will ensure that homeowners and builders have swift, fair and reasonable access to the courts. ■

1. Hearing on SB 395 before the Senate Committee on Judiciary, 68th Session (May 10, 1995) (Statements of I.R. Ashleman, Robert Lyle, and Jim Wadhams).
2. *Id*.

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