



# WE HAD NOTHING IN COMMON:

## A LOOK BACK AT NEVADA'S DIVORCE FROM "SIMILARLY- SITUATED" CONSTRUCTIONAL DEFECT NOTICES

BY RICHARD YOUNG, ESQ.

The Nevada Legislature enacted NRS Chapter 40 in 1995. Intended to achieve repairs to residential constructional defects in lieu of lawsuits, Chapter 40 accomplished the opposite. Toothless mandatory pre-litigation notice requirements, an overly-broad definition of a constructional defect and a generous provision for the recovery of attorneys' fees as damages combined to result in an extraordinary number of lawsuits. During the two decades that followed, there was such an influx of litigation that a specialty docket, colloquially referred to as the "dirt court," was created.

Recognizing that Chapter 40 had become something of a gold mine for Silver State plaintiffs' attorneys, in 2015 the Nevada Legislature revisited the statutory scheme and enacted sweeping changes through Assembly Bill 125 (AB125). Most commentary on the 2015 law has focused on the repeal of the right to recover attorney's fees, the narrowing of the definition of a constructional defect and the shortening of the applicable repose periods. While these aspects of AB125 are the most well-known, perhaps the most immediate impact of AB125 resulted from repeal of the provision that allowed a single notice of common constructional defects to be sent on behalf of numerous "similarly-situated" homeowners. This article discusses the history of common

constructional defect notices, how they were abused, why they were eliminated and the overall effect of this infrequently discussed change in the law.

### A Brief Overview of the Chapter 40 Pre-Litigation Process

Chapter 40 requires that, before bringing an action for damages resulting from defective construction of a home, a claimant (defined as a homeowner or homeowners' association) must provide the contractor with notice of the alleged defects, along with an opportunity to inspect and repair those alleged defects. To preserve its third-party claims, the contractor must forward the claimant's notice to any subcontractor, supplier or design professional whose work

is implicated by the alleged defects. If the claimant's concerns are not resolved through repairs or mandatory pre-suit mediation, the claimant is free to file a complaint.

### Chapter 40 Notices of Common Constructional Defects

Prior to the enactment of AB125, Chapter 40 permitted a single notice of common constructional defects to be sent to a contractor on behalf of any number of similarly-situated homeowners. Originally suited to facilitate the mandatory pre-litigation process in situations in which the same, single faulty product (e.g., Kitec plumbing fittings) or method of installation was utilized in the construction of multiple homes, the similarly-situated notice provisions quickly morphed into something else entirely. Consider the following, quite typical scenario:

An attorney is retained by a group of homeowners from the Utopia development – say 10 in total – who complain about a particular constructional defect within their homes. The attorney sends out a construction consultant to inspect the 10 homes for the condition complained about and any other potentially defective conditions. Each and every condition observed, even if seen only at one of the 10 homes, is identified in a notice of common

constructional defects that is sent to the contractor on behalf of the 10 named claimants and all other similarly-situated homeowners in the development (i.e. all the residents of Utopia not specifically named in the notice).

Depending on the size of the development, the unnamed and allegedly similarly-situated homeowners could number in the thousands, and depending on the decisions made by the plaintiffs' attorneys and inspecting consultants, more than 100 defects could be alleged as common, even if a particular defect was found at only one home. Once served with a common constructional defect notice, the contractor was given 60 days to forward the notice to every homeowner in the development – again, potentially thousands – and inform the homeowners that there have been allegations of common constructional defects. The homeowners were then permitted to have the contractor inspect their homes. The practical effect of this action was to aid the original homeowners' attorney's recruitment efforts in the development, all the while providing no legitimate opportunity to effectuate repairs due to the overbroad nature of the common defect allegations.

But if the contractor did not forward the common constructional defect notice, then every homeowner in the development

would be free to file a lawsuit. Moreover, the service of the notice itself acted to toll the periods of repose and limitation applicable to the claims of the unnamed homeowners, allowing attorneys to expand the timetable for recruitment of additional homeowners to the litigation.

### The Reasonable Threshold Test

The Nevada Supreme Court addressed the manipulation of Chapter 40's similarly-situated notice provisions in *First Light I*, when it held that a notice of common constructional defects must, like a notice sent by an individual homeowner, comply with the NRS 40.645(2) reasonableness requirement. 123 Nev. 468, 163 P.3d 731 (2007) The reasonableness requirement mandated that a Chapter 40 notice identify, in reasonable detail, each defect and damage that was the subject of the homeowner's claim. According to the *First Light I* court, notice of a common constructional defect was sufficient under NRS 40.645(2), only if it survived the reasonable threshold test.

The reasonable threshold test was satisfied only if the scope of the notice of common defects was narrow. The test disfavored notices sent on behalf of all the residents of a particular development, preferring rather that a notice of common

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defects identify the subset of homes to which it applied (e.g., homes of a particular floor plan or elevation in the development). If the consultant who assisted in formulating the notice for the named homeowners believed that a particular defect existed in all the homes in the development, the reasonable threshold test required that the consultant confirm the condition's existence in a home from each subset of the development.

Despite the seemingly mandatory language utilized in the *First Light I* opinion, the reasonable threshold test did not materially affect the contents or use of notices of common defects. Up until the effective date of AB125, contractors regularly received notices of common constructional defects from similarly-situated homeowners like the hypothetical one described above. And, although contractors challenged the sufficiency of the notices, as was done in *First Light I*, contractors enjoyed little success getting district courts to apply the reasonable threshold test to the allegedly common defects, let alone to the effect of finding that the notices failed to satisfy the NRS 40.645(2) reasonableness requirement for any of the common defects alleged therein.

## Nevada Makes a Change

After 20 years of evidence that the allowance of common constructional defect notices did not represent sound public policy for the state of Nevada, the Legislature passed, and Governor Brian Sandoval signed, AB125. Today, Chapter 40 no longer permits notices of common defects to be sent on behalf of similarly-situated

homeowners. Each homeowner that desires to pursue a claim for a constructional defect must provide the contractor with individual notice of that defect, and each homeowner must include with his or her notice a signed a verification form attesting to the existence of the alleged conditions. This change is, at least in part, responsible for the noticeable reduction in constructional defect claims that have been made in the past two-and-a-half years.

AB125 also repealed NRS 40.645(2)'s reasonableness requirement, replacing it with the requirement that a homeowner's Chapter 40 notice must now identify each defect or damage that is the subject of the claim in specific – not merely reasonable – detail. While it remains to be seen whether these legislative changes will stick (the plaintiffs' bar has already begun lobbying the Legislature to rethink AB125), or whether the changes will further NRS Chapter 40's original goal of getting homes fixed without lawsuits, a good riddance to the exploitation of notices of common constructional defects is in order for now. **NL**



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## PRO BONO Honor Roll

The State Bar of Nevada Board of Governors and the Access to Justice Commission extend a special thanks to the following attorneys who generously accepted cases in June 2017, through the Legal Aid Center of Southern Nevada, Washoe Legal Services, Nevada Legal Services and Volunteer Attorneys for Rural Nevadans.

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### Attorneys who participated in Ask-A-Lawyer, Lawyer in the Library or other clinics:

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**BOLD** honors multiple cases accepted and/or sessions conducted within the month.