DISCLAIMER

Electronic versions of the exhibits in these minutes may not be complete.

This information is supplied as an informational service only and should not be relied upon as an official record.

Original exhibits are on file at the Legislative Counsel Bureau Research Library in Carson City.

Contact the Library at (775) 684-6827 or library@lcb.state.nv.us.

ADVOCATES FOR JUSTICE

NEVADA TRIAL LAWYERS ASSOCIATION

AB446 : FAIRNESS FOR HOMEOWNER AND SUBCONTRACTORS

I.

Synopsis.

AB446 seeks to protect homeowners from traps hidden in developer printed form purchase agreements. The bill seeks to put some teeth into existing law requiring builders to promptly correct life safety defects. The bill provides protection for homeowners where the developer has set up a shell corporation or limited liability company which is dissolved immediately upon completion of the project. Homeowner Association voting requirements regarding commencing civil litigation are clarified and protection is provided to subcontractors who had no responsibility for defects.

II.

AB446 would protect a subcontractor who neither contributed to a defect nor had any knowledge of the defect when the subcontractor did his work.

Typically, when homeowners or homeowners associations commence construction defect lawsuits, the homeowners sue the developer. The developer, in turn, files a third party complaint against subcontractors and others whom the developer thinks may share responsibility for the homeowner's claim. Some subcontractors who are totally blameless get sued. Because of indemnification clauses in the standard printed form contracts, the subcontractor cannot readily extricate himself from the lawsuit without paying a substantial

Advocates for Justice

1 of 6

ASSEMBLY JUDICIARY
DATE: 4/8/03 ROOM: 3138 EXHIBIT P
SUBMITTED BY: Scott Canepa

sum of money. SB446 at Section 4 proposes to remedy this situation by clearly stating that the developer cannot hold a subcontractor responsible for the work that was done entirely by someone else unless the developer can demonstrate that the subcontractor had concealed the defective condition.

III.

AB446 provides protection for a homeowner where a contractor proposes to repair a defect .

Occasionally, contractors will seek to resolve construction defect claims by offering to perform repairs. The "repair" may be akin to using chewing gum to hold a fender on a bicycle. Where roof flashing is missing or incorrectly installed, a contractor may simply apply some roofing mastic, a short term and wholly inadequate repair. Where crawl spaces under homes have filled up with water, a contractor's "repair" may remove the water in the short run, but not provide any prophylactic measure for preventing water intrusion in the future. Where expansive soil has caused extensive cracking to wall surfaces, the contractor may patch the cracks but do nothing to prevent a recurrence of the damage.

AB446 at Section 5 provides that once the homeowner has made a Chapter 40 claim and the developer proposes to repair the defect, the contractor must pay for an independent person to supervise and inspect the repair. The contractor would also have to provide a payment and performance bond to assure proper, timely and lien-free performance of the work.

NEVADA TRIAL LAWYERS ASSOCIATION

IV.

AB446 would impose penalties on a contractor who does not properly repair a construction defect.

Section 7 of AB446 provides an incentive for a contractor to properly repair a construction defect. If the repair were not done properly, the limitation on damages provided in NRS 40.655 would not apply, the contractor's license would be revoked and the contractor would be liable to the claimant for three times the cost of repair. Contractors insist they should have a "right to repair." Indeed, they already have a right to repair. Let's get the repairs done right and give the homeowner some peace of mind.

V.

Life safety defects must be promptly corrected.

Currently NRS 40.670 requires a contractor to promptly repair a defect which "creates an imminent threat to the health or safety of the inhabitants of the residence. . ." Unfortunately, NRS 40.670 has no teeth. AB446 at Section 8 would give an incentive to builders to comply with their statutory duty to properly fix life safety defects. That section provides that if an architect or engineer certifies that a defect creates an imminent threat to the health or safety of the inhabitants of the residence and if the judge or jury determines that the contractor refused to correct the defect in a timely manner and was not acting in good faith, the contractor would lose his license and would have to pay treble damages.

ADVOCATES FOR JUSTICE

NEVADA TRIAL LAWYERS ASSOCIATION

VI.

AB446 provides protection for homeowners where developers have dissolved the corporate entity that developed the project.

It is a common practice for developers to set up separate entities to develop each individual project. The entities may be subsidiary corporations or limited liability companies. After the last home is sold, the assets are distributed to the parent corporation and the subsidiary is dissolved. Currently NRS 78.585 provides that two years after the dissolution of the corporation, claimants have no right to go after assets of the dissolved corporation . Section 10 of NRS 446 would correct this problem. The claim would be enforceable against any insurance policy maintained by the corporation prior to dissolution. Section 12 provides a similar remedy as to a dissolved limited liability company.

VII.

AB446 protects home buyers from harsh provisions disguised in developer generated purchase agreements and other documents.

In July 2002, the Nevada Supreme Court decided the case of James and Linda Burch v. District Court (118 Nev. Adv. Op. No. 46). In that case, the Supreme Court refused to enforce provisions in a homeowners' warranty that had been touted by the developer at the Reno subdivision as a plus for home buyers. The type of warranty at issue in the Burch case is similar to those now typically offered by developers as part of new home sales. Burches received a

HBW 2-10 warranty which actually disclaimed more protections than it granted. The

Supreme Court noted in that case: "Double Diamond (the developer) told the Burches that the HBW's issuance was 'automatic' and offered extra protection for their home, when in fact, the warranty limited their protection under Nevada law." The warranty limitation included a long list of items not covered and statements denying the homeowner the right to recover under NRS Chapter 40, specifically, NRS 40.655, except as to the cost of repair of the specific defect only. In other words, the warranty would not have allowed for recovery of any consequential damages, nothing for attorney's fees nor expert's fees nor loss of use. The homeowners could not have been adequately compensated if this warranty were enforceable.

The Nevada Supreme Court refused to allow the builder to get away with deprivation of homeowner rights under the guise of homeowner protection. The court determined that for many reasons the warranty at issue was "unconscionable." The court also determined that the mandatory binding arbitration provision of the warranty was itself "unconscionable and, therefore, unenforceable."

AB446 would enact into law some of the protections for consumers as noted by the Supreme Court in the Burch case. Section 6 would make unenforceable any contractual provision that would limit or alter the damages that may be recoverable pursuant to NRS 40.655. What the legislature has provided as homeowner protection could not be taken away by builders' contract terms. AB446 at Sections 1, 2, 13 and 15 would make unenforceable provisions mandating arbitration of a claim governed by Chapter 40. AB446 does provide that in the Chapter 40 process the parties can agree to arbitration as a way to resolve the claim, but simply restricts the ability of a developer or

a contractor from forcing arbitration on the homeowner in contracts typically prepared by or on behalf of the developer.

VIII.

AB446 clarifies the homeowners' association voting requirements.

Currently, NRS 116.3115 requires approval by a majority of the members of an association before commencement of a lawsuit. There are several exceptions to this requirement including an action brought "to protect the health, safety and welfare of the members of the association." Where the latter exclusion applies, a ratification vote must be undertaken within 90 days after commencement of the action. The language is somewhat vague. AB446 provides that where the association makes a good faith effort to obtain a majority of votes to commence a civil action, the association may nonetheless proceed with the civil action unless a majority of the votes were against commencement of the civil action.

IX.

Conclusion.

AB446 provides for fair and reasonable protections both for homeowners and Subcontractors and should be enacted into law.