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SB371

SB371 Is A Seriously Flawed Proposal For An Unconstitutional Deprivation of The Rights Of Nevada Citizens To A Trial By Jury of Civil Lawsuits For Damages

I. Synopsis

SB371 would completely erase the carefully negotiated legislative settlement worked out between homebuilders and homeowner advocates in 1995 that led to the enactment of SB395, codified as NRS 40.600 through 40.695, inclusive ("Chapter 40"). SB371 proposes that Chapter 40 be thrown out with the trash and replaced with a blatantly unconstitutional proposal for denying Nevada homeowners their right to have a jury of their peers decide their claims. SB371 would instead have all construction defect claims decided by a commission that would surely be dominated by developers and contractors.

Even if the constitutional defect could somehow be corrected, the commission would be powerless to accomplish its stated objectives of causing contractors to repair defects.

II. Identification of Some of The Defects of SB371

A. The Legislature Is Powerless to Do What SB371 Proposes.

Sections 2 through 12 of SB371 would establish a Construction Defect Commission acting under the auspices of the State Contractors Board. Pursuant to Section 9 the commission would have "exclusive jurisdiction to determine

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claims or causes of action for the recovery of damages based on construction defects . . .”

The commission would not be a screening panel. It would entirely replace the jury trial system for resolving such disputes in Nevada. The court system could only become involved pursuant to subpart 2 of Section 9 by way of judicial review of decisions by the commission. Pursuant to the Administrative Procedures Act which is incorporated by reference in Section 9, subsection 2, judicial review is by a court acting without a jury and the court could not substitute its judgment for that of the commission. It could only overturn a finding of the commission if it were to find that the actions of the commission were “clearly erroneous.”

The attempt to deprive Nevada homeowners of a right to jury trial and to force homeowners to submit their claims to the proposed Constructional Defect Commission is not permitted by the Nevada constitution. Article 1, Section 3 states in pertinent part: “The right of trial by jury shall be secured to all and remain inviolate forever . . .” Since forever is not over, SB371 cannot take away the rights of Nevada citizens to a jury trial.

Other constitutional protections at odds with SB371 include Article 3, Section 1 and Article 6, Section 1 which require a separation of powers of the separate branches of government.

Section 9 of SB 371 creates more than a delegation of mere “quasi-judicial” functions to a legislatively created administrative agency by actually extending complete judicial jurisdiction and authority to fully determine civil tort and contract claims which are currently within the exclusive jurisdiction of the judiciary, predominately the district

courts. Thus, SB 371 actually divests the courts of jurisdiction and confers that jurisdiction upon a legislatively created administrative agency – blatantly unconstitutional.

B. The Make Up of The Commission Would Be An Unacceptable Substitute For A Jury Of One's Peers

Pursuant to Section 6, the Contractors Board would create the Constructional Defect Commission whose members would initially be appointed by the Governor. Three of the seven members would be required to be licensed contractors. The members of the commission would serve without compensation pursuant to Section 7.

Given the construction defect crisis that exists in Nevada, the Constructional Defect Commission would be extremely busy. Who would be willing to serve a four-year term on such a commission without compensation and have to deal with extremely difficult and complicated engineering issues and contentious battles between homeowners and builders? The answer is that very few people would do such a thing without compensation. It is quite apparent that the commission would be stacked against homeowners.

C. Section 13 Sets Up Unreasonable Procedural Requirements

Section 13 provides that no claim involving a constructional defect may be presented to the commission until the claimant provides two written notices by certified mail to the contractor and that the two written notices must be mailed at least 30 days apart. What is the justification for making a homeowner who simply wants his home fixed to have to do two separate certified mail notices and make sure that they are at least

30 days apart? Subpart 4 of Section 13 provides that "within 15 days after a contractor receives a second notice, a claimant may present a claim to the commission." Does this mean that if the claimant does not present the claim within 15 days after the contractor receives the second notice that the claimant loses his rights? Section 15 requires that any and all pleadings must be served by certified or registered mail or personal service. Court rules are providing more user friendly provisions such as service by fax. These are not user friendly provisions, apparently intentionally so.

D. The Section 14 Requirement That A Contractor Must Be Present At Any Inspection Is An Invasion of The Homeowners Right to Privacy And of His Property Rights

The provision that a contractor or his representative "must be present at any inspection of the residence . . ." clearly deprives the homeowner of the right to inspect his own residence without the intrusion of any and all outsiders. Further, a homeowner has the right to hire someone to help him analyze what is wrong with his home. What possible justification is there for saying that the contractor must be present? What if the contractor does not want to be present? Does that mean that the homeowner is deprived of any right to conduct an inspection?

E. The Commission Would Be Powerless To Enforce Its Orders

Pursuant to Section 18, if the commission makes a finding in favor of the claimant the commission may order the contractor to make repairs at the contractors expense or "cause the repairs to be made at the contractors expense and, if insured, his insurers expense, by another contractor who is bonded, insured and licensed to make the repairs."

SB371 offers no suggestions as to how this commission is going to cause the repairs to be made at the contractors expense. Even more absurd is the suggestion that the commission is going to make an insurance carrier pay for any such repairs. How is this commission going to compel an insurance company for the builder pay money to have the repairs made? Is the commission going to sue the insurance company? On what basis? Who is going to hire the contractor to do the repairs? How is the homeowner going to be protected against mechanics liens, assuming the first hurdles can be overcome?

With all due respect, it is not possible for the commission to accomplish what SB371 suggests the commission could accomplish.

F. The Statute Of Limitations Provisions Are Unreasonable

Section 20 provides that no "action for the recovery of damages for a constructional defect more than 2 years after the alleged constructional defect is discovered or should have been discovered . . ." Ordinarily commencing an action means filing a lawsuit. Since Section 9 deprives the homeowner of the ability to file a lawsuit what does "commence an action" mean for purposes of SB371? Presently, the statute of limitations from the date of discovery is either 3 or 4 years depending on the nature of the cause of action. NRS 11.190 and NRS 11.220. For a claim of a breach of warranties under NRS 116.4113 or 116.4114 is 6 years from completion of construction which time can be reduced to 2 years if explicitly stated in an agreement separately signed by the homebuyer. Two years is a very short time period particularly where a homeowner would not likely be aware of this time limitation.

G. What SB371 Ignores

SB371 does not seem to contemplate the long involved, complex claims that sometimes rise in homeowner construction defect cases. It appears that SB371 is intended to deal only with very simple, straightforward workmanship issues as opposed to complicated engineering issues. A recent trial of an expansive soil case involving 200 homes took three and ½ months. The commission would have to have a large staff if it were to be dealing with the larger, more complicated construction defect cases. Presently in Clark County there are three judges handling construction defect cases all at the same time. If the commission were to take on the entire workload of the three courts in Clark County and the courts throughout the state that are also handling construction defect cases there would have to be at least half a dozen commissions each with its own investigative and support staff.

H. The Recovery Fund Cannot Sustain The Burdens To Be Imposed by SB371

Per Section 21 the Recovery Fund established in 1999 to assist homeowners to get defects corrected will be the entire funding source for the commission, its staffing, consultants and for the cost of correcting defects in the cases where insurance carriers are now footing the bills.

During testimony presented by the State Contractors Board to the Senate Commerce and Labor Committee during the 2001 session it was estimated that for the Contractors Board to adjudicate construction defect claims, the Contractors Board budget would have to be increased by approximately \$26 million annually. At least that sum

would be necessary just to fund the commission, its staff and consultants. Additional millions would be needed to pay for repairs that builders will refuse to perform.

The Recovery Fund was never contemplated to pay the cost of replacing the judicial system in Nevada and to pay the enormous costs of correcting construction defects that are currently the responsibility of builders and their insurance carriers.

III. Conclusion

SB371 first and foremost proposes an unconstitutional deprivation of the right to jury trial. For that reason alone it must be rejected.

If somehow SB371 can overcome the constitutional objection, it is an unworkable program. The commission can not make an insurance company for a builder pay for repairs to a home. Nor can the commission effectively cause the repairs to be made at the expense of the builder.

For all the foregoing reasons SB371 should be firmly rejected.