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ADVOCATES FOR JUSTICE

NEVADA TRIAL LAWYERS ASSOCIATION

ROLLING BACK 75 YEARS OF

HOMEOWNER PROTECTION – SB241

I. Synopsis

SB241 would obliterate the legislative settlement worked out between home builders and homeowner advocates in 1995 that led to the enactment of SB395 codified as NRS 40.600 through 40.695, inclusive ("Chapter 40"). That carefully negotiated compromise gave builders what they asked for - an elimination of punitive and emotional distress damages as well as the right to early mediation of disputes all in exchange for provisions that would enable homeowners to be made whole when pursuing claims for construction defects. If SB241 were to be enacted, Chapter 40, including all of the amendments that have been so carefully crafted over the years since its original enactment would not apply to new construction defect claims.

In replacement of this sensible, mid-course , legislative program, SB241 would ravage a homeowner's right to seek and obtain justice for the wrongful acts of the home builder. SB241 is a perfidious scheme for forcing Nevada homebuyers to be stuck with what they got no matter how unstable, unsound, leaking, dripping, moldy, unhealthy or unsafe the home may be. SB241 would accomplish this inexplicable objective of the homebuilders in the following ways: By forcing a homeowner to negotiate a complex maze of procedural requirements in the homeowner's simple attempt to get his or her home fixed right; by defining as not defective and thus not subject to any remedy for homeowners conditions that may seriously threaten the safety and health of occupants of the home no matter that such conditions may be blatant building code violations; by enabling builders of impaired, peccant residences to hide behind the mistakes, neglect or unawareness of building inspectors; by

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forcing homeowners to accept repairs to the home by the builder who created the defects in the first place no matter how rude and unpleasant the builder may have been to the homeowner; by intimidating homeowners with a requirement that the mortgage holder on the residence be notified of any construction defect claim; by forcing the homeowner to do battle on the contractors' home court, the contractor run State Contractors Board; by depriving the homeowner of the ability to recover expenses for hiring expert engineers, architects, contractors or others who might have been necessary to figure out what was actually causing the problem in the home; by impairing the right of a homeowner to negotiate an agreement for affordable legal services with an attorney skilled and experienced in handling homeowner construction defect claims; and, by a provision forcing a homeowner to settle the homeowner's claim for the cost of repair only and denying the homeowner the ability to recover his or her attorneys fees, expert fees and other costs.

II. The Absence of Justification for A Brutish Trampling of Homeowner Rights.

A. No Slowing of The New Home Market

Homebuilders cry "poor me." They beg the wise solons of Nevada to help them survive in these economic hard times. How hard has it been for Nevada Homebuilders?

There aren't enough superlatives in the English language to describe just how "hot" the housing market is and has been in the Silver State over the last decade. After setting a record number of new home sales in 2001, a near new record in 2002, and a forecast for a new all-time records in 2003 and 2004, the homebuilding industry couldn't be healthier.

The unprecedented demand for new homes in Southern Nevada has caused eager developers to gobble up land at staggering rates. In turn, land prices have soared, and the

median prices of new homes have risen at a steady rate over the past few years. Indeed, capitalism in the homebuilding industry is working flawlessly, as homebuilders reap huge profits in the process.

Unfortunately, the unprecedented demand for new housing and the desire by aggressive real estate developers to satisfy that demand also has its downside. Faulty construction, particularly in the entry-level housing market, has become a crisis that promises to turn into an epidemic unless something is done to see to it that homes are constructed properly to begin with. While human error cannot be avoided in any endeavor, human error alone cannot explain the magnitude of the construction defect problems facing many thousands of first-time homebuyers in our State.

As good businessmen, the homebuilders have insured themselves against potential losses arising from construction defect claims. Unfortunately, these same homebuilders have uniformly turned the most serious of these construction defect claims over to their insurance companies, rather than attempting to fix the problems themselves. This has, as might be expected, led to increased insurance premiums for policies of insurance covering construction defect claims.

B. No Evidence That Homeowners Have Turned Down Repair Offers

The ostensible premise for legislation that would, among other things, amplify a homebuilders "right" to repair defects created by the homebuilder is the illusion that homeowners are refusing to let builders fix defects. The home builders have demonstrated an inability to support their false premise. Throughout the latter half of 2002, the

Construction Liability Insurance Task Force, established pursuant to the request of Governor Kenny Guinn, met repeatedly, heard testimony, took other evidence and issued a report. The membership of the task force was dominated by construction industry and liability insurance industry representatives. Consumers and their representatives were assigned a single position on the task force. The Nevada Trial Lawyers Association repeatedly brought before the task force clear and convincing evidence that homeowners have not refused builders the opportunity to make repairs when construction defects are reported to builders. The builders presented no conflicting evidence. In fact, the report of the construction liability task force at page 6, item 6 states, in part, "there was no testimony by any homeowners or contractors that any repairs were refused . . . ."

Without a foundation there is nothing to build on. SB241 should not be allowed to get off the ground.

III. The Separate Provisions of SB241 Add Up To A Serious Pummeling of Innocent But Mishappen Homeowners

A. No Matter How Serious A Building Code Violation May Be SB241 Provides Immunity To Builders Unless and Until A Tragedy Occurs.

Section 24 of SB241 says that a contractor is not liable for a construction defect that is not the proximate cause of any damage or injury. This attempt at qualified immunity, recycled from previous legislative attempts, would prevent a homeowner from seeking redress against a contractor to get building code violations or other serious construction defects repaired before damage or injury occurs. Not only is this provision morally repugnant in that it requires that homeowners wait until they or members of their families

suffer bodily injuries or until their homes are damaged or destroyed before they can compel repairs, the provision is also unconstitutional inasmuch as it is not limited to tort claims, and would therefore impermissibly interfere with every existing contract that requires contractor compliance with the Building Codes irrespective of damage or injury to the homeowner or property. Finally, this provision would have the unintended consequence of increasing insurance premiums, as will be discussed further below.

B. SB241 Will Increase Insurance Costs to Contractors and Homeowners Alike.

Sections 24 and 33 of SB241 will necessarily result in increased insurance costs to contractors and homeowners throughout our State. Section 24 will increase insurance costs because it stands to reason that the cost to repair defective homes after damage or injury occurs is more than repairing the defect or Code violation before damage or injury occurs. In this vein, it should be understood that it was the insurance industry that promulgated standardized building codes like the Uniform Building Code (UBC), which has been adopted by all major municipalities in the State of Nevada. The purpose behind standardized codes was to give the insurance industry some level of predictability as to the construction practices that they could expect from their insureds. Said another way, the insurance industry has an expectation that contractors will, at a minimum, follow the minimum requirements of the Building Codes and that in turn insurers will not be faced with casualty losses arising from personal injury or property damage that occurs as a result of a failure of a contractor to follow those very same Codes. During recent Insurance Task Force hearings, insurance industry representatives proposed a definition of construction defect inconsistent with that

offered by the developers in SB241. The insurance industry proposed a definition of defect that would include the following:

- The quality level of construction does not meet the standards of the applicable building code;
- There is actual damage to property, and the damage must be to the work of another trade and not to the contractor's own work;
- The construction quality creates peril (e.g. inadequate firewall);
- The construction quality does not comply with the acceptable customary practices in the immediate geographic area.

Section 33 of SB241 which permits a contractor to unilaterally involve its insurance company in pre-litigation Chapter 40 proceedings will also unquestionably increase the costs of insurance for all contractors throughout the State. Section 33 requires that an insurance carrier treat a Chapter 40 pre-litigation notice of defects as a formal claim under the policy. Insurance representatives testifying during Task Force hearings stated categorically that they were opposed to being injected into the pre-litigation repair process, inasmuch as during that phase it should be contractors who cure their own defective work, not the insurance industry.

C. SB241 Shifts the Burden of Faulty Construction from Contractors to Tax Payers.

Section 24 of SB241 says that approval of construction by a municipal building department, is "prima facie" (presumptive proof) evidence of building code compliance. This provision runs counter to established Nevada law, and is unworkable in the rapid-

growth environment currently experienced by our State.

Under NRS 41.033, municipal governments are immune from liability if building inspectors negligently approve construction that is defective, or negligently approve construction that was never inspected. The exceptions to this rule, set forth in a series of Nevada Supreme Court decisions, may no longer apply in the wake of the Supreme Court's decision in *Calloway v. City of Reno,* 116 Nev. Adv. Op. No. 24, (2000). While not expressly overruling its prior decisions, the Court stated in *Calloway* that the City of Reno had no liability whatsoever for its negligence in connection with the inspection and approval process of 164 defectively constructed townhomes. Section 24 of SB241 attempts to perpetuate the myth that approvals by building departments mean that a home is free from defects.

Not only are cities immune from liability as discussed above, building inspectors who have given deposition testimony on this subject have stated categorically that they only do "spot" inspections, and that those "spot" inspections do not guarantee defect-free construction. Inspectors have also candidly stated that they cannot control what a contractor does at a construction site after a particular inspection has occurred.

If Section 24 of SB241 is adopted, there will undoubtedly be increased efforts to hold municipal governments liable, and if sanctioned by the Courts will cause Nevada taxpayers to bear the burden of faulty construction.

D. Under the Guise of Affording Home Builders A "Right to Repair", SB241 Would Lay Waste To Established Rights of Homeowners To Seek and Obtain Justice

Advocating the premise that contractor insurance costs will decrease if contractors

are given an opportunity to repair defects before a claim is made on their insurance policies, developers have included within SB241 Sections 26, 27, 28, 29, 30, 31 and 42. Cumulatively, these sections take away a homeowner's existing right to reject proposed inadequate repairs to legitimate construction defects, and give to the contractor the unilateral right to decide whether the contractor will undertake repairs or force the homeowner to file suit. These sections further abolish the present distinction between non-complex and complex cases, giving contractors as much time (150 days) to respond to a notice of a roof leak in one house as they would to respond to 50 complaints of soils damage in another, obliterate the ability of the Court system to join similar claims in a class action for purposes of efficiency, and will sharply curtail the rights of homeowners associations to represent the interests of the members within a homeowners association.

Having coined the phrase "right to repair", developers have turned all notions of justice and fair play on their head. Instead of the homeowners' right to an adequate repair, Nevada's big real estate developers seek to claim that when they engage in faulty construction practices, their rights to make any kind of repair, faulty or legitimate, supercede the right of a homeowner to have a permanent and lasting repair.

Under existing law, Chapter 40 requires homeowners in both complex and non-complex cases to give specific notice of defects to contractors, the opportunity for the contractors to inspect those defects, and the requirement that a contractor make a written response disclaiming liability, making a monetary proposal, or an offer to repair. Under present law, if a contractor makes an offer to repair then the contractor must set forth the methods, adequacy and proposed cost of the repairs. If a homeowner rejects a legitimate repair proposal, the Court is vested with the discretion to deny the homeowner's attorney's

fees and costs and to make the homeowner pay all attorney's fees and costs incurred by the contractor.

In short, there is no justification for the inequitable changes in the law advanced set forth in SB241. During recent Task Force hearings, the contractors could not point to a single example of (1) a repair offer made by a contractor in a complex case; (2) a repair offer rejected by a homeowner in a complex case, or (3) a request by a contractor or a decision by a Court finding that a homeowner unreasonably rejected a reasonable offer of repair.

E. The Contractors Board Has Neither the Expertise or the Funds to Perform the Tasks Required of it by SB241.

Section 31 of SB241 would have the State Contractors Board serve as the equivalent of a screening panel to make non-judicially reviewable decisions regarding the method or adequacy of any repair made by a contractor which a homeowner disputes. While the Board's involvement in each case would not be mandatory, it would leave the decision to the contractor or the homeowner to involve the Board to make such a non-judicially reviewable finding, during which time the homeowner's ability to pursue their legal rights in Court would be stalled. Developers made a similar attempt to involve the Board – made up of 6 contractors and 1 member of the public – in the 2001 session, at which time Board representatives stated that a fiscal note would be crucial for the Board to carry out any such functions. SB241 carries no such fiscal note. How can that be? Clearly the Contractors Board would need a greatly expanded staff to investigate all such claims and would need to retain engineers and architects to analyze complex claims.

Nor is the Board, by its own charter responsible for licensing of contractors, equipped to handle the type of construction defect claims that would come to it in the wake of SB241.

The Board typically addresses "workmanship" issues, and does not carry an appropriate staff of design professionals, including architects, civil engineers, structural engineers and the like, necessary to evaluate whether a repair made by a contractor for a serious construction defect is appropriate or not. Moreover, the State Contractors Licensing Board lacks jurisdiction over non-licensed tradesmen, to whom NRS Chapter 40 currently, and SB241 both apply.

Finally, even if the Board were able to fulfill its functions under SB241, SB241 sets forth no timelines by which the Board must perform its functions, with the homeowners left holding the bag because suit cannot be filed until the Contractors Board's decision has been rendered.

F. SB241 Discriminates Against Lower Income Households.

Section 50 of SB241 has the practical effect of eliminating contingent fee arrangements between homeowners and attorneys. In cases where a contractor refuses to make a repair, or makes a faulty repair necessitating the filing of a lawsuit, SB241 permits the Court to approve attorney's fees based on an hourly basis only. The practical effect of this section is that lower income households, who cannot afford to hire an attorney by the hour, will be forced to abandon their claim simply because they cannot afford to fight a contractor and its attorneys in Court.

Moreover, Section 49 of SB241 unfairly allows contractors to avoid evaluating the legitimacy of a homeowner's claim before years of costly litigation ensues. Section 49 of SB241 says that a homeowner is not entitled to any attorney's fees or legal costs if the homeowner fails to obtain a judgment that exceeds the "best and final offer" made by the contractor. The phrase "best and final offer" is not defined within the bill and has no meaning within the Nevada Rules of Civil Procedure or the Nevada Revised Statutes.

Moreover, this would permit contractors to drag homeowners through years of litigation, months of trial, only to make an offer five minutes before judgment is rendered which could, based on pure happenstance, require the Court to deny all attorney's fees and costs incurred by the homeowner during that timeframe simply because the contractor got "lucky" and obtained a judgment that was one cent less than the "best and final offer" made by the contractor. Under current law, NRS 40.650 allows the Court to deny all of the homeowner's fees and costs and award all of the contractor's fees and costs as a penalty against a homeowner if the homeowner unreasonably rejects a reasonable monetary offer of settlement made by the contractor during the Chapter 40 process. Accordingly, present law encourages contractors to evaluate the legitimacy of the claims made against them before a lawsuit is filed, and therefore present law avoids the evils of SB241 described above.

G. SB241 Unduly Delays a Homeowner's Day in Court.

Sections 26, 27, 28, 29, 30, 31, 37 and 39 of SB241 directly violate the maxim that justice delayed is justice denied. It could literally take years for a homeowner to be able to clear the hurdles, jump through the hoops and crawl under the barbed wire fences that would be put in place by SB241. The deadlines set forth in Sections 28, 29 and 30 on their face do not seem so unreasonable, although allowing a total of 150 days for correcting minor defects is surely a stretch. The true land mines in SB241 are somewhat disguised. Pursuant to Subsection 5 of Section 30, the 150 day deadline for completing repairs is extended indefinitely. That provision states that "if timely completion of the repairs is not reasonably possible, the claimant and the contractor, subcontractor, supplier or design professional must negotiate in good faith to set a reasonable period for completion of the repairs." Nothing is said as to who is to determine whether or not timely completion of the repairs is "reasonably

possible." To say that the homeowner "must negotiate" means that the homeowner will be forced to give in to whatever extended period for completing any repairs the builder dictates.

Then, whenever the repairs are finally done, if the claimant disputes the method or adequacy of the repairs all the contractor has to do to delay matters further is to "submit the dispute to the State Contractors Board." (Section 31) There is no time limit set forth for the Contractors Board to act on the dispute submitted to it. Is the homeowner able to file a lawsuit after the Contractors Board finally acts? Whoa Nelly, not so fast! After going through all of this, before being able to file a lawsuit the homeowner then must pursue mediation. (Section 37.) There is no time limit on the mediation process except that the mediator must begin the process within 60 days after the matter is submitted to him. Finally, after the extended delays for the builder to complete a repair, a time period which could easily exceed one year, and after the builder then submits the matter to the Contractors Board and the Contractors Board takes action, which could add at least another 6 months, the homeowner must then go through a lengthy mediation process which could last another 6 months before a lawsuit could be filed.

Thus, SB241 could force a homeowner to endure two years of hassling before the homeowner could even have access to the judicial system. As if that were not enough, the sponsors of SB241 have even greater burdens in store for the unfortunate homeowner who simply wants his home to be fixed properly and permanently. Pursuant to Section 26 of SB241, if while going through this lengthy process as to the first construction defect, the homeowner discovers a second or third or fourth construction defect, the entire process has to start all over as to each and every separate defect. Pity the poor homeowner or

homeowners' association with multiple defects if SB241 would be enacted. To suffer multiple defects in one's residence ought to be a sufficiently painful experience but in their zeal to protect the interest of purveyors of blighted construction, the sponsors of SB241 show no mercy to such hapless homeowners. In being forced to deal with each defect separately the homeowner may have to fight battles on multiple fronts. For example, the builder may chose to repair some but not others. The homeowner is then forced into a proceeding before the Contractors Board as to those that are not adequately repaired. Then, let's assume that during this process new defects are discovered, the homeowner must start all over with those defects. As to at least one of the new defects, assume that the builder has put a subcontractor on notice who agrees to do a repair. The homeowner is not satisfied with that repair then the homeowner can be forced into another proceeding before the Contractors Board. Then, let's assume that as to the first defects the homeowner finally got through the Contractors Board and has now gone through mediation where the builder again proposes to do repairs. The homeowner accepted but the builders repairs are inadequate. Assuming that the homeowner finally has filed suit as to the first defects, pursuant to Section 46, the homeowner must submit his final defect list within 180 days after a meeting is held between counsel for the parties. If a new defect is discovered after that 180 day period the homeowner must start all over as to the newly discovered defect.

The process envisioned by SB241 is utter chaos for victims of wretched construction

H. SB241 Seeks To Intimidate Homeowners By Requiring Notification of Each and Every Construction Defect Claim To The Homeowners Mortgage Holder

Section 43 of SB241 requires that the homeowner notify the mortgage holder on the residence of each and every claim for construction defect. The obvious purpose of this

provision is to intimidate homebuyers from pursuing a construction defect claim. The clear expectation of the sponsors of SB241 is that homeowners will be fearful of notifying lenders on the basis of a, perhaps misguided, assumption that the lender may take some action against the homeowner.

I. SB241 Seeks To Prevent Homeowners Associations From Pursuing Construction Defect Claims

Section 27 of SB241 requires that before a homeowners association can commence a construction defect claim the association must have obtained an affirmative vote of a majority of the members of the association. Apathy within homeowners associations is a widespread phenomenon. The usual voting requirements are "a majority of those voting at a meeting where a quorum is present." Because of the widely understood apathy within homeowners associations' the Nevada Legislature has reduced the quorum requirements for a meeting of members of the homeowners association to 20% of the total votes that could be cast. NRS 116.3109. Thus, most business of a homeowners association can be conducted with a mere 10% plus 1 of the total membership agreeing to some action. That majority vote requirement of SB241 is not for the protection of the members of the homeowners association. Clearly, when members are sufficiently interested in an issue they will go to a meeting or fill out a ballot. No, the onerous voting requirement of SB241 is for the protection of those who build unsafe and unsound condominiums and other common interest community homes.

J. The Dissemination of The Class Action Device Proposed by SB241 Would Be Particularly Onerous For Lower Income Families

SB241 at Section 42 would greatly limit the availability of the class action procedure

in residential construction defect cases. The class action device is extremely important where the cost to pursue a claim separately is disproportionate to the value of the claim. Because of the need to hire expert witnesses including architects, engineers and contractors, construction defect claims can be extremely expensive to pursue. Thus, where defects are common within a subdivision, such as where the foundations of the homes were not adequately designed or built to resist identified soil movement at the site, homeowners who could not otherwise afford to pursue a claim on their own can join a class action by simply not opting out once a notice is sent to them. Homeowners who may be passive by nature need not play an active role yet they are protected.

But, the availability of the class action procedure would be severely limited by Section 42 because it would require each and every homeowner to separately pursue the notice requirements of Section 27 of SB241. There is clearly no need for such a requirement. Currently, a class action would be a complex matter subject to NRS 40.682. Although a lawsuit would be filed by a class representatives and class certification would be sought, inspections of each and every home by experts for the plaintiffs for the homeowners as well as the defendants would take place so as to document the conditions of each home. In no way are builders deprived of the full and thorough inspection of each and every home involved in a class action. There is no benefit to anyone that would result from the class action provisions of SB241.

IV. Conclusion

SB241 is a selfish bit of special interest legislation designed to leave homeowners holding

the bag for defective construction. The legislation would set up unreasonable hurdles and

delays for homeowners simply trying to get their homes fixed right.

SB241 is based upon a false premise. The ill that the legislation purportedly addresses is the fact that there are construction defect lawsuits filed in Nevada. The bill tries to discourage lawsuits without ever addressing the reason why there are construction defect lawsuits in the first place: Homes are being built in Nevada that are unsafe, unsound and which are not built in accordance with the requirements of applicable building codes. SB241 does nothing to address quality of construction.

Further, despite the feel sorry for us approach of home builders their industry is as robust and healthy as any industry could be. Furthermore, the excuse that they have made for seeking this draconian legislation is that homebuyers refuse to let them come in and repair defects. Yet, there is no evidence to support that claim nor does it make any logical sense. Homeowners do not refuse to have their homes repaired provided that the proposed repairs will truly correct the defects.

On behalf of the consumers of the State of Nevada, the Nevada Trial Lawyers Association respectfully requests that the Nevada Legislature not pass SB241.