MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
February 3, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:34 a.m. on Tuesday, February 3, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Kathleen Swain, Committee Secretary
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

Scott Canepa, Nevada Justice Association
Robert Maddox, Nevada Justice Association
Dave Bavol
Carl Kunz
Ralph Walker
Jack Juan, D.R. Horton; ProGlass Paint
Jay Parmer, Builders Association of Northern Nevada
Steven D. Hill, Chair, Coalition for Fairness in Construction; Senior Vice President, CalPortland Company

Bruce King, President, Pete King Nevada Corporation
Sean Gamble, Builders Association of Western Nevada
Dwight Millard, Builders Association of Western Nevada
Neil B. Davis, The Davis Companies, Incorporated
Katherine Doty, Corporate Treasurer, Classic Door and Trim
Darren Wilson, President, Sierra Air Conditioning, Incorporated
Josh Griffin, MGM Mirage
Lance Semenko, Senior Vice President-Engineering, Q and D Construction
Thomas H. Gallagher, P.E., P.L.S., Chairman and Chief Executive Officer, Summit Engineering Corporation

CHAIR CARE:
The Committee has before it the proposed Committee Rules for the 75th Session, Senate Committee on Judiciary (Exhibit C). If there are no objections, does someone want to move for the adoption of these rules?

> SENATOR WIENER MOVED TO ADOPT COMMITTEE RULES FOR THE 75th SESSION OF THE SENATE COMMITTEE ON JUDICIARY.
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> SENATOR AMODEI SECONDED THE MOTION.
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> THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
There is one major change for this Committee this session; Nevada Revised Statutes (NRS) 116, which deals with homeowners' associations, is now going to come before this Committee. If you have looked at the list of bill draft requests (BDRs) for this Session, there are several of those both on the Assembly side and Senate side. That may not be the end of them, but those will be heard before this Committee as well.

I am an attorney, and I do not practice in the area of construction defects (CD). When I was with my former firm up until a little more than two years ago, I used to say that nobody in my firm was involved in CD litigation. However, one of my partners in that firm represented a subcontractor who got drawn into CD litigation as a third-party defendant on three occasions. All of a sudden, I could no longer say that no member of my firm was involved.

That is about all I know about CD litigation, but I have heard stories from various interims that it is not working, that it is working, we need to change this, we need to change that, we do not need to change this and we do not need to change that.

Most of us are familiar with the newspaper articles about the ongoing Federal Bureau of Investigation (FBI) investigation. I do not know where that is going, and I do not know the depth of it. A former Metro Police officer apparently committed suicide once this investigation got started, and Nancy Quon and her law firm have been mentioned.

There is enough to disturb me and other people, and I thought we ought to have this informational hearing. I do not know that any legislation will come from it; I do not know that we will do anything with NRS 40. As a result of what we hear this morning, this Committee or members of this Committee may propose changes to NRS 116, which is the homeowners' association chapter. It is with that in mind that I scheduled the hearing for today.

Tell us what is right and what is wrong with NRS 40. We want to hear your war stories; we want to hear the stories of things that worked out quite well. What I am most concerned about are the best interests of the homeowner.

I have an exhibit from the Nevada Justice Association (Exhibit D). Bob Maddox, Scott Canepa, give us your overview of NRS 40—what is working well, and what is not.

SCOTT K. CANEPA (Nevada Justice Association):
Nevada Revised Statute 40.600, *et seq*., which is commonly referred to as the construction defect statute, was first enacted as remedial legislation in 1995 in response to a tremendous growing number of construction defect claims which arose from a huge growth in construction, principally in southern Nevada.

In 1995, as a matter of consensus between home builders and representatives of homeowners, it was decided with this body that in the event a homeowner was sold a home that contained construction defects or was defective in some material way, that homeowner should be made whole. The fundamental precept of the legislation was that the homeowner, after the process was over, should either have the home repaired by the builder or be left with enough resources to fix the residence, pay for any expert fees necessary in connection with

diagnosing the problem and pay any reasonable attorney fees. This was agreed upon by industry representatives on both sides.

Also, it was decided there should be a limitation on recovery. That limitation is set forth in NRS 40.655. Essentially, that is the "let us make the homeowner whole damages concept." It also limits what a homeowner can get if sold a defective residence.

For example, as the statute is written, a homeowner is not entitled to punitive damages even if there is the most egregious construction defects. Also excluded from damages was emotional distress. Principally, the building industry wanted to be insulated from punitive damage claims because those are not insurable risks.

After the 1995 Session, there were amendments in 1997, 1999 and 2001. Those amendments tweaked the statute and took into account complex matters, meaning homeowners' associations or matters involving five or more single family residences.

We also agreed that the home-building industry should have the right to repurchase a defective residence for the same price the homeowner paid the builder, as long as the repurchase was accomplished within two years of the sale. A home builder could repurchase the defective residence and dispose of it however the builder saw fit, such as making repairs to the residence and reselling it. In one instance, there were such material defects a home would have had to have been torn down, so the builder made repairs and donated it as a halfway house.

In 2003 Session, there were Herculean efforts on the side of the industry and homeowner representatives to fashion what has been called the "right to repair." The building industry likes to refer to it as the "unfettered right to repair." This body enacted those amendments. Now, when a homeowner gives a Notice of Construction Defect as required by the statute since 1995, the builder has the right to fix the defects without telling the homeowner what the repairs are going to be, and if the homeowner refuses the repairs, the homeowner loses the right to assert the claim. That became the "unfettered right to repair."

We prepared Exhibit D as a postscript to a chart we prepared and handed out in the 2003 Session.

The 2003 chart delineated all the complex cases brought from beginning to conclusion. The chart was prepared in connection with the Governor's Liability Insurance Task Force. One seat was given to the Nevada Justice Association, and I sat on that Committee. That Committee was convened for over six months—from the end of summer 2002 through February 2003—and did not end until the Legislature had convened.

This chart is an update. It contains the cases or claims—because not all claims actually became lawsuits—from the enactment of the 2003 right-to-repair legislation to today. It does not include any pending matters.

The chart is a mutual effort of the majority of Nevada practitioners who represent homeowners in construction defect matters. Most of them are present, either here or in Las Vegas, so they can answer any questions. It may not include every single matter because there are some practitioners who handle a small volume of claims and are not involved with the Nevada Justice Association.

This chart represents the vast majority of the claims brought under the so-called right to repair amendment and represents 104 claims in the five years since the enactment of the right-to-repair legislation. There have been nine claims where all repairs were made by the builder to the satisfaction of the homeowner, and the claim ended. There have been 28 instances of partial repairs, and I will explain what that means in a moment. In 67 instances, there was no election to repair by the builder.

MR. CANEPA:
The right-to-repair legislation did not oblige contractors to repair their mistakes; it only gave them the right to repair. In the instances where there was no election to repair, the builder and/or its subcontractors did not elect to exercise their right to repair that residence. In most instances, the detail will show those matters were referred to the builders' insurance companies for handling.

In fact, the vast majority of the claims have been handled the same way as those since 1995. The builder, upon receipt of a Notice of Construction Defect, turns the matter over to the insurance carrier, and the insurance carrier hires

insurance defense lawyers. The claim is either resolved by a monetary settlement, or it proceeds to trial. Since 2003, we are aware of two matters that have proceeded to verdict, both of which are on appeal to the Nevada Supreme Court.

From the builder's perspective, one idea is to repeal the statute.

Homeowners who are sold defective homes—and sometimes grossly defective homes, riddled with life, health and safety defects—would no longer be made whole because NRS 40.655 would cease to exist. Homeowners would not have the right to receive funds to repair their residences or to be compensated for their reasonable experts' costs and attorney fees.

Repealing the statute would also mean no more right to repair. As seen in the chart, builders who avail themselves of their right to repair could no longer do so. Those matters would proceed to litigation and court. There would be no right to repurchase.

There would be no definition of a construction defect. In conjunction with the Construction Liability Task Force, we devised a definition that works well and takes into account what confronts people. Homeowners should have the right to have life, health and safety defects fixed before they are injured, their house is damaged or it burns to the ground.

There would be no mandatory disclosures of defects as required by NRS 40. All of the Supreme Court cases that have evolved and developed in interpreting NRS 40 would be lost.

Finally, repealing NRS 40 would essentially leave homeowners with little to no rights at all with respect to getting their residences fixed. Based on a Supreme Court decision entitled *Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004), the Supreme Court concluded that the economic loss rule did not apply to claims brought under NRS 40.

That means if you repeal NRS 40, the economic loss rule applies, and homeowners could no longer assert a viable claim for negligence, even where the construction was clearly the result of negligent workmanship.

If you repeal the statute, you are going to send the State of Nevada back to caveat emptor. You will invite a situation where home builders could sell new homes to homeowners with disclaimers. The homeowners will have no idea what was done to construct the house. They have no role in selecting the subcontractors. They are not there during the course of construction of the residence. As lay people, they have no idea whether the residence is well constructed even if they watch the home being built.

In the past, industry representatives have talked with us about amendments to this statute. Unfortunately, there have been no such discussions with us. The only thing that we have heard is there is some desire to repeal the statute. We fervently believe that would be a mistake. It would not only be injurious to the interests of future Nevada homeowners but to the building industry as well.

CHAIR CARE:
Regarding the list that you gave us, Exhibit D, did I understand you to say that only two of these matters proceeded not to trial but to verdict?

MR. CANEPA:
Only two matters have proceeded to verdict; other matters have proceeded to trial but were settled. My firm was involved in one.

CHAIR CARE:
Apparently, a lot of these settle during trial. What is the length of a trial?

MR. CANEPA:
They can go months. Certainly the one in the news last summer, the Sun City Del Webb case, was in trial for three and one-half months. The trials can be lengthy, depending on the complexity of the matter and the number of homes involved.

My firm tried a case on some serious drainage problems for a homeowners' association. We settled the case a few minutes before closing argument, and that case took about four weeks to try.

CHAIR CARE:
Why were there so many contractors who apparently did not elect to repair?

MR. CANEPA:
There are a variety of reasons. First, a lot of those contractors are no longer in business. They do not have the resources or facilities to make the repair.

Second, a lot of the contractors are simply making business decisions. The decision is: turn it over to the insurance company to solve the problem rather than commit resources to the repairs.

In partial-repair situations, the contractor, upon receiving the Notice of Construction Defects as required by statute, sends a notice to subcontractors within 30 days.

In many cases, builders might send the notice to 15 subcontractors, but only three or four of those subcontractors are interested in making repair. Others are out of business; others do not make the repairs as a matter of a business decision. Eventually, the homeowner is given partial repairs and then the claim goes forward to be resolved in total.

CHAIR CARE:
I can understand where a lot of people have difficulty. I buy a house, I have a problem—with windows, plumbing—and ultimately, there is a construction defect suit. The contractor gets named, and he brings in absolutely every single subcontractor who had anything to do with the construction. Is that what you see?

MR. CANEPA:
The so-called shotgun approach unfortunately still exists. The homeowners' association does not have any control over this. The decisions about which subcontractors are ultimately given notice or brought into the suit are made by insurance defense lawyers typically working for general contractors or lawyers working for general contractors or developers.

The insurance industry plays a significant role in how these cases are ultimately decided. One problem that persists is the contractual indemnity provision between subcontractors and general contractors. The subcontractors agree, by way of contract, to defend and indemnify a contractor even if the defects do

not relate to the work done by the subcontractor. Ultimately, responsibility has to lie at the feet of the people who sign the contracts.

One of the other problems that we run into frequently is the contractor who is either completely uninsured or grossly underinsured. A bill that will start in the other House is going to address that subject in a couple of forms. One requires contractors and subcontractors to carry liability insurance because there is no state law requiring them to do so. The other is to open up the State Contractors Recovery Fund to include homeowners' associations (HOAs) or other large groups of homeowners who are presently precluded from making a claim.

My firm represents at least two HOAs where the contractor purchased no liability insurance. The contractor formed a single-purpose limited liability corporation which has no assets, basically saying: "You can get the judgment if you want, but you are never going to collect on it, and by the way, we are not making any repairs."

We can amend the chart to include the builders' names if the Chair desires. We have seen the same builder on a repeated basis. We have tried to suggest that we should change the laws so that the State Contractors' Board can investigate even if a NRS 40 claim exists. The building industry has uniformly said no. That is wrong. If a contractor is building defective homes over and over again in multiple communities, that contractor should not be licensed.

CHAIR CARE:
Other than the Assembly bill, have you suggested any changes to NRS 40?

MR. CANEPA:
None. We are open to suggestions, but this chart demonstrates that to the extent the contractors are committed to make the repairs, it can happen. We need to safeguard the interests of the homeowners, and taking NRS 40 away is not the answer.

ROBERT C. MADDOX (Nevada Justice Association):
I represent homeowners in all parts of the State. I am not going to repeat anything that Mr. Canepa has addressed, but I do want to emphasize the need to consider the wishes and desires of Nevada homeowners.

We have issues regarding some contractors not doing a good job, others doing a good job and subcontractors doing a good job, not doing a good job. We have attorneys who do a good job and some who might not be doing a good job.

We are concerned about doing what is in the best interest of homeowners. We have provided the Committee with written statements of three couples (Exhibit E), homeowners who have had NRS 40 experiences.

We have Reno homeowners Dave and Cyndi Bavol, who had tried to get construction defects repaired and were not successful. They came to us, a NRS 40 notice was made, and they are among the lucky ones where the builder exercised the right to repair. They performed good repairs, and these folks are pleased with the result.

Reno homeowners Ralph and Linda Walker also had tried to get their builder to fix their home, but he did not step up to the plate. The Walkers had to go through the full NRS 40 process, and a lawsuit was filed. The case was settled. They received sufficient money to do major repairs.

Carl and Audrey Kunz, similar to the Walkers, tried to get their builder to do repairs. Eventually, the Kunzes had to come to us. We did the NRS 40 notice, but no builder stepped up. No subcontractors stepped up to exercise the right to repair. We had to file a lawsuit. Eventually, the case was settled. The Kunzes also received sufficient money to do all the repairs, and those are being done now.

CHAIR CARE:
We have their statements, Exhibit E, and we will make them part of the record. Do you have any recommended changes to NRS 40?

MR. MADDOX:
No. We have been to every session as Mr. Canepa has indicated. We did not always like what went into the negotiation. One provision I would like to see eliminated: after everything has been fixed, the homeowners have to go on disclosing forever that they once had a problem, even though it has been fixed. That may be going too far.

We did not come today to ask you to change any part of NRS 40. It has been a compromise in the past, and we are living with it, working with it and trying to

do the best we can for homeowners under that statute. It is working adequately.

CHAIR CARE:
Mr. Canepa talked a bit about the legislative history. Mr. Wilkinson, please walk us through NRS 40.

BRADLEY A. WILKINSON (Chief Deputy Legislative Counsel):
The provisions governing construction defects were originally enacted in 1995 and substantially amended during the 2003 Legislative Session. I will read my testimony (Exhibit F) into the record.

CHAIR CARE:
As Mr. Canepa pointed out, we do have case law now. One of the cases we did not talk about is *Shuette v. Beazer Homes Holdings Corporation.*, 121 Nev. 837, 124 P.3d 530 (2005) and class certification.

Are the Bavols, Walkers and the Kunzes present?

CHAIR CARE:
Mr. Bavol, you wrote you were unable to get your builder to acknowledge the issues and perform the required repairs. Was there no communication between you and the builder?

DAVE BAVOL:
We made phone calls. We had face-to-face discussions. I did not send a letter. There were three homes affected in our particular area, our home, the home next to us and the one on the other side. The problems were much more pronounced at those two homes and gradually worked their way up onto our property. Our neighbors had previous discussions with the builder, as we did, and finally we got very little, if any, response on the lot concerns. We contacted Maddox and Associates.

CHAIR CARE:
Who was the builder?

MR. BAVOL:
Am I free to ...

CHAIR CARE:
Let me explain something. We have what is called absolute immunity because we are Legislators. We are not going to abuse the privilege, but we can say just about anything we want to, and it is not actionable. You have what is called qualified immunity, and if Mr. Maddox wants to, he can explain to you, in confidence, what that means.

MR. BAVOL:
Okay. The builder is Lennar.

CHAIR CARE:
You wrote that eventually the builder did the right thing and addressed the soil and retaining wall issues saying, "We are very pleased with and impressed by the amount of work that the builder eventually performed on our property." You are a happy homeowner now?

MR. BAVOL:
We are all faced with issues on a day-to-day basis. Until you are actually immersed in an issue, you do not have a real understanding of what goes on. We got immersed in the lot difficulties, and thank god for NRS 40.

I am not here to bash the builder. When we purchased our home, Lennar had a very good reputation. We love the floor plan, we love the area, and we are very satisfied with it. The warranty issues we had prior to the lot coming apart were handled very well. We had excellent relationships with everybody we spoke and dealt with.

The lot situation began on Memorial Day 2007. It dragged on for over three months before we finally got a resolution and the builder started to do something on the property.

In the first six months after we bought our home, if somebody had asked me would I recommend a Lennar-built home, I would have said absolutely.

At the height of this process, at the height of the raw nerves, I was almost tempted to sit in my little truck in front of their models with a bullhorn and warn people about buying a Lennar home—that is how adamant I was about how they did not address our problems.

In September, everything started to happen, and by November, just prior to Thanksgiving, everything was fine. I told the construction superintendent, who was out there day in and day out working with us to fix these problems, "You guys have reestablished my faith and my confidence in the Lennar product." They reestablished their creditability in our eyes. This is something a builder needs to know, that some good can come out of that cloud. If somebody were to ask me today if I would purchase a Lennar home, I would say absolutely, and it is a direct result of their having to step up and fulfill their responsibilities under NRS 40.

SENATOR COPENING:
Mr. Bavol, during that three-month period that you were interacting with the builder, what was the builder telling you? You said you could not adequately get them to repair the property.

MR. BAVOL:
The most repeated message we got from them was drainage issues and that we used an unlicensed contractor to do the landscaping in the rear yard.

We moved here from Colorado where they have expansive soil and drainage issues; you have to be very, very focused on your drainage. I am very focused on drainage. I was out there every day with the contractor who was doing my rear yard, including lawn, sprinklers, patio pavers and that sort of thing. I made the point to him that I wanted the drainage and soil to be undisturbed. I wanted no impact on the drainage system on the house, and that was what he did.

Repeated discussions with the Lennar representatives who were in charge at that time constantly came back to drainage issues. There were no drainage issues. There is a drainage pattern underneath the soil, pipes and on top of the soil. They all work just fine.

We developed a major sinkhole and the collapse of our lot, which was minor compared to the other two homes. Those lots literally started to come apart.

According to Lennar, it was my landscaper's fault that our lot collapsed. That was what I kept hearing, time after time after time. The other side of that coin is the contractor was unlicensed.

I was my own supervisor, and there were no drainage issues created by the landscaper or me. If you cannot put down three inches of sod, a sprinkler system and a few pavers and not worry about your lot collapsing—that is not the way it should be done.

Towards the end of this process, the city inspector told me the soil on the lot two doors down from us was without aggregate. There were no rocks or stones to hold that clay. Once clay gets wet, it runs; it follows gravity. The soil moved closer and closer to us, but our lot was fine.

The day they dug up our lot, the inspector showed me that the rock and the aggregate content in the soil were fine. In my opinion, it was a question of improper soil, no compaction or improper compaction, and poor supervision of the engineering that went into those lots before the homes were built.

SENATOR WASHINGTON:
Can you tell me where you are located?

MR. BAVOL:
We are located above what is referred to as the University Ridge area, north of McCarran up Socrates.

SENATOR WASHINGTON:
Does your home sit on a slope?

MR. BAVOL:
No, it is flat, but as you go beyond the end of our property, there is about an eight-foot wall where it drops straight down. It continues out onto an easement where there is other vacant land. I was told the property was hilly at one time and filled in to make the lots buildable. I do not know whether that is true.

SENATOR WASHINGTON:
Was any disclosure given to you as to topography, the composition, the compaction, or whether it was riverbed or any type of erosion?

MR. BAVOL:
I do not remember seeing that. When you purchase a new place, you get tons and tons of documents and paperwork. I have looked through it all since we started this process, and I do not remember ever seeing that.

When we purchased a new home in Highlands Ranch, Colorado, in 2004—we were there for three years—built by Shea, a national builder, they gave us a complete soil report on the property. It is critical that homeowners know about the soil. I do not remember having those conversations with the Lennar people.

SENATOR WASHINGTON:
I live in Sparks in a Di Loreto-built home. When we bought the home, it was disclosed the field behind us was a swamp area that had a tendency to retain water. It had been filled and compacted and was somewhat of a riverbed. I wonder if the soil composition report could be part of a report given to the homeowner or disclosed to the homeowner prior to buying the home. At least the homeowner knows it has been compacted, what the compaction rate is and if there is a possibility of erosion. It might relieve the contractor of some liability. I am not trying to get the contractor out of it, but at least the homeowner is made aware.

CHAIR CARE:
Mr. Kunz, I have read your statement, Exhibit E, as well. In your case, your wife and you did file suit.

MR. KUNZ:
That is correct, along with 14 other homeowners on the same street.

CHAIR CARE:
Was that a class-action suit?

MR. KUNZ:
No.

CHAIR CARE:
Were all of these consolidated cases or just 14 plaintiffs in the action itself?

MR. MADDOX:
Since the decision on *Shuette v. Beazer* none of these are class actions, they are joinders of homeowners with similar problems.

CHAIR CARE:
Mr. Kunz, are you satisfied with the condition of your home now?

MR. KUNZ:
The work is now being finished. It has taken months and months, but a contractor has gutted the house and put in all new foundations. We have moved everything out.

CHAIR CARE:
How long did it take you from the time you discovered the issue with your house until where we are today?

MR. KUNZ:
Three years.

CHAIR CARE:
Three years. How did you discover what the difficulties were with your house?

MR. KUNZ:
Shortly after we moved in, we noticed cracks in the foundation, and the developer said, "Oh, it will stop settling, it's on a slight slope. That is the reason it is moving down the hill." It continued to move down the hill, and soon we realized the doors did not close quite right, the windows did not close right, there were problems in the roof and wallboard, cracking problems in the plaster and outside cracking. It was clear that it was more than just a normal settling problem.

CHAIR CARE:
Who was the builder in your case?

MR. KUNZ:
Jenamar.

CHAIR CARE:
Mr. Walker, I have your statement, Exhibit E, here as well. You and your wife, Linda, actually commenced an action, and you filed a lawsuit. Did you attempt to have any communications with your builder?

MR. WALKER:
Yes, we followed the instructions to have a list of defects available within one year. We did that; no action.

CHAIR CARE:
Was that through your attorney or did you do that?

MR. WALKER:
We did that initially on our own.

CHAIR CARE:
Then you retained counsel who took it from there?

MR. WALKER:
Yes, we did.

CHAIR CARE:
Your testimony says that you want to make your home livable once again?

MR. WALKER:
We are going to start construction on April 1. It needs 87 piers approximately 40-feet deep around the exterior to stabilize the house.

CHAIR CARE:
And who was the builder?

MR. WALKER:
Arndell Construction.

SENATOR WASHINGTON:
There is a common theme here that either erosion or shifting of the foundations is the cause. I wonder whether we need an amendment to NRS 40 or an entire new statute to another chapter for the disclosure of the composition of soil—whether it is from the general contractor or the seller of the land—to the homeowner and the buyer that the lot may sit on a riverbed. Not that the lot would make a difference in the sale, but at least that information is available.

CHAIR CARE:
Is it your thought, Senator, that if that disclosure were made, there would be no cause of action based upon erosion or whatever?

SENATOR WASHINGTON:
I do not really know.

CHAIR CARE:
We can look at that.

MR. WALKER:
Without NRS 40, we would have been out of pocket approximately $160,000 to $170,000. Nevada Revised Statute 40 provided for attorney fees and expenses. If I had to sue on my own, I would have had to get an attorney who would have taken a percentage of my recovery. That is what NRS 40 did for us.

MR. MADDOX:
There is a provision in NRS 40 that says the seller of the property, at a first sale, must make available a soils report to the buyer, so there is a provision for the original soils investigation report.

However, in the instances of the Walkers and the Kunzes, no soils report would have disclosed that the preparation of the land and of the soil under the house was not done correctly. In these situations, there is nothing the Legislature could have done to help.

SENATOR WASHINGTON:
The definition of "avail" may be a little vague. Perhaps we need to redefine the word "avail" so it has meaning that may be beneficial to not only the contractor but also to the first-time home buyer, perhaps even second-home buyers. Within that chapter, Mr. Chair, we could take a look at the word "avail" and define it.

CHAIR CARE:
Let me call forward the builders. Let us talk about NRS 40, what is working and what is not working.

JACK JUAN: (D.R. Horton; ProGlass Paint)
My position on NRS 40 is that it can work, but it takes all sides to work. Previously, Mr. Canepa talked about two cases that went to verdict on construction defect. I was colead counsel on one of them, *Gunderson, Robert v. D.R. Horton,* Case No. A95059. As far as I know, *Gunderson* is the only case that has gone through the entire NRS 40 notice process to verdict. It can work,

but it takes three sides, the plaintiff's counsel, the developer's counsel and the subcontractors.

There were discussions about contractors not willing to do the repairs. That might be true, but the reason why quite a few developers do not exercise the right to repair is not because they do not want to. The notice that you get from the plaintiffs is the triggering event. If you get a shotgun notice, you will get a shotgun approach from the developers. If you have a development of more than 100 units, you are under a time crunch from the time you get the notice. We have to do certain repairs within 105 days or 150 days, but by the time you get to the first 60 to 90 days, you have already eaten into that time frame.

If I get a notice on behalf of a developer that says there are extrapolated defects from the plaintiff's testing, a certain percentage of 20 to 30 homes have been tested in a development of 100 or more. They extrapolate and do not test the rest. But you are going to have problems in the other units. At that point, we pass that off to the subcontractors. By the time they get the chance to review the notice and we get the chance to review it and provide a repair response per the statute, we are already well into the 45- to 90-day time frame, which does not leave much time for the repair process.

The time frame is a little disheartening to a lot of contractors. It is not because they do not want to do the repairs, but the time frame under which they operate is limited. Another concern: If I do the repairs, does that mean that I have bought myself into a potential lawsuit for another 10 years?

Normally, you would have about 10 years from the date a homeowner bought a unit to file a construction defect lawsuit. What would happen if in the fifth year they give you the construction defect notice, and you do the repairs? Does a contractor or subcontractor, buy another 10 years on that potential liability because of the repairs?

These are all factors as to why contractors and developers sometimes will not take the opportunity to repair. They are trying to do the best they can with what they have.

There is also the issue about lawsuits before the notice. When you get the notice and after you go through the NRS 40 process and have mediation, then a lawsuit can be filed. You have the actual right to repair. But that sometimes

does not happen, despite what the statute says. What happens is: You get the notice and the lawsuit is filed at the courthouse, but it might not be served on the developer. Now we have a time frame that we have to fight under NRS, and there is a lawsuit against us. Are we going to repair or litigate?

Under the statute, we are supposed to be mediating before any lawsuits. A lot of times, mediation does not occur for whatever reason or because there is a lawsuit and mediation afterwards. I have been fortunate in that I have seen all cases so far. I represented clients where we have gone through the NRS 40 process, and it has worked. It took the personalities of all counsels to get together, but they accepted the repairs, and we moved on to work out the fees and costs.

MR. JUAN:
I have been on the other end of the scale where it has gone all the way to trial, as in *Gunderson*. As far as I know, *Gunderson* is the only construction defect case after the 2003 changes that has gone to verdict. I am in the middle of a fight on that case trying to finalize fees and costs. But that case is a prime example of all the good and the bad of NRS 40. D.R. Horton, one of the few contractors that exercise their right to repair, did the repairs and were excited about it. We had discussions with subcontractors, we got everybody involved, and we were on the same page and moving. In the middle of the repair process, we started getting more notices. We did not just get one notice in the beginning that applied to 45 or 50 units. In the middle of that process, we started getting more notices, which could start a new time frame.

With cooperation among all counsel, NRS 40 can work. We go through this process where we do the repairs, but if the repairs are rejected, we go to trial. The notice we got from *Gunderson* was in 2004. We completed our four-month jury trial at the end of April last year. The plaintiffs asked for $1 million-plus. The jury came back with $66,300. The plaintiff had alleged over 127 defects in the beginning. We started off with originally 40 to 50 units, but reached the point where we are getting notices for the entire development. By the time we got to trial, there were 39 units. We litigated for four months, and the jury agreed with us that only one was defective.

Now we are in another fight. On behalf of D.R. Horton, I am trying to fend off $4 million in fees and costs claimed by the plaintiffs for 39 units and

one defect. When other contractors and developers see this torturous history, they have to make a business decision.

Everybody is looking out in the best interest of the homeowner. What is in the best interest of the homeowner? To have things repaired? If things are repaired, why are the developers still in the lawsuit? I understand the troubles the homeowners have gone through. There are good counsels and bad counsels, and there are good developers and bad developers. Those developers who want to take advantage of the right to repair or go through this process still get punished because they do not get the necessary time. They get punished because they are asked to pay astronomical fees and costs.

When I say that NRS 40 can work, I say it with respect to its beauty and its thorns. It can work from the middle point of view. If you want to make changes to it, then speak with the judges, like District Judge Susan Johnson, who I spoke with yesterday. I asked her if she thought NRS 40 would work. She said it is working, but she agreed it takes all sides to come together and to have an agreement on the interpretation of the statute.

You are going to hear that maybe it is good to scrap it all together. That might be a good idea. Then what do you have? If you keep it in place, you still have the same problems.

CHAIR CARE:
Please submit to me any proposed clarifying language that you would like to see in NRS 40.

Regarding statutes of repose, if I understand the issue, when somebody tries to make a repair, that starts a statute of repose as opposed to a statute of limitation from running the entire length again. Is that your concern?

MR. JUAN:
Yes. For the repairs, that is correct.

CHAIR CARE:
Why would statutes of repose apply to repairs as opposed to some sort of statute of limitation?

MR. JUAN:
That is the fight we are facing now. There is a belief that if I do the repairs on year five, I bought myself another five years. One way to improve the NRS 40 notice is to clarify or answer these questions. I would be more than happy to submit a proposal.

CHAIR CARE:
Please do. Include any suggestions you may have about the existing time periods.

JAY PARMER (Builders Association of Northern Nevada):
The Builders Association has been involved in discussions on construction defects and related issues since 1995.

We do not have any specific legislation to address at this time, but we stand ready to work with the Legislature on discussing any specific legislation related to construction defect.

CHAIR CARE:
On my list of questions is whether mediation works and whether there is any incentive in the statute to encourage parties to mediate prior to the initiation of any litigation. I would also like somebody to address the issue of arbitration.

STEVEN D. HILL (Chair, Coalition for Fairness in Construction; Senior Vice President, CalPortland Company):
I was involved with the Legislature crafting revisions to NRS 40 in 2003 that would make it easier for homeowners to get their houses fixed before going through a lawsuit.

In our opinion, those efforts have caused more problems than they have resolved. That does not mean at times the NRS 40 process does not work. As Mr. Juan pointed out, it takes three parties. I am not sure that NRS 40 is necessary if those three parties are trying to get together in order to fix the house, they are all on the same page.

We have seen, in an overwhelming majority of the cases, that NRS 40 is expensive and time-consuming and leads to an inevitable lawsuit. When it is your home and you are going through that, it is one of the most important

things to you. To drag it out for an extra year or two on top of what may turn into a lawsuit seems unnecessary.

We agree with much of what Mr. Canepa said on the history of NRS 40. Primarily, we are here to make sure homeowners get their homes fixed as quickly as possible. Nevada Revised Statute 40 is such a convoluted process that it does more harm than good.

CHAIR CARE:
What did you mean when you said "inevitable lawsuit"?

MR. HILL:
It is our opinion that the NRS 40 process does not work. It starts with attorneys and lawsuits are often inevitable.

In the situations where a homeowner, a builder and subcontractors are all on the same page, those tend to be fairly obvious. They do not necessarily involve lots and lots of homeowners with an unspecific list of claims you know is not going to work and is headed for a lawsuit.

SENATOR WIENER:
The statistics we were provided on the 104 claims show 9 total repairs, 27 partial and 67 not attempted for whatever reason.

Without a statute, what would motivate you to do the right thing without having something to drive you to the table?

We heard from the homeowners who had the intent to make the NRS 40 process work and had no response for a year. They had to make the difficult decision to engage counsel. What would inspire the parties to come together? If NRS 40 is not the right thing, how are we to ensure the outcome we all hope for?

MR. HILL:
When all of those parties come together, we see it working. When any of the parties dig their heels in, then there is a dispute. The threat of a lawsuit is what brings those people to the table; if they will not come to the table, the court will cause a resolution. Delaying that process through a series of steps, when those

steps are not effective in making that repair happen, is a substantial waste of time and money.

SENATOR WIENER:
We are here to create the greatest equity we can for all parties concerned with the do-nothing approach. I am concerned there would be no remedy for the homeowner. What drives all parties to the table without a statutory scheme? Maybe we need to address the time frames, if indeed we do something about NRS 40. We need to learn, as we have not had jurisdiction on this issue for awhile.

BRUCE KING (President, Pete King Nevada Corporation):
We are in the paint and drywall business, I do not always understand how the court works. We have lobbyists and lawyers who hopefully figure that out, but we are in the trenches.

I need to acknowledge that I am a member of the State Contractors' Board, but I am not representing that Board. I can concur with Mr. Canepa that the Contractors' Board does a good job in protecting and providing an avenue for homeowners to go to with problems without having to enjoin great costs and expense. It is an underutilized body.

I have a short statement (Exhibit G) to read.

SENATOR WASHINGTON:
After you get the letter of notice of repairs per NRS 40, you complete the repairs. Is there a sign-off of satisfaction by the homeowner?

CHAIR CARE:
What Senator Washington is talking about is a release. Is there a way in statute we could provide a mechanism for an independent third party to certify repairs have been made that would not jeopardize the homeowner and leave him without a right of repair?

MR. KING:
In 2003, we attempted to get a legal right to extract ourselves if we made repairs but were unsuccessful. I am reminded by opposing counsel that I have no legal right to make the request, but we still do.

SENATOR WASHINGTON:
If there was an amendment to NRS 40 that gave you a signature of satisfaction based on the acuity of the case—paint that is peeling, a foundation that is cracked, or a door jam that is ajar; you mentioned the time frame—would it also be incumbent upon us to amend the statute to put a statute of limitation based on the acuity of the case? If it is a severe case that may take five years or seven years, might there be a statute of limitation for that repair. If something occurs again within that limitation, you have to go back in and repair it or they can bring it back up.

MR. KING:
I wish I could tell you if I thought we could get a release once we made a repair from the entire process, I could get out. That would be great, but in reality, I have little faith I will get out of these cases by making a repair and getting a release.

SENATOR WASHINGTON:
I want to make sure we protect the homeowners as well as the contractor. If the repair is acute, there ought to be some time frame to ensure the repair the general contractor has made on that home is sufficient to withstand the test of time before the homeowners sign off. With a homeowner sign-off, there ought to be a certain given time if this reoccurs wherein the contractor has to go back and perform repair to the homeowner's satisfaction.

MR. KING:
Absolutely, Senator. I do not think any of us are asking that once we make the repair we can walk away. All we are saying is that right now, it adds another 10 years. I am not saying we would not be willing to accept some time period. I would be happy to warrant my repairs for a couple of years, whatever would be appropriate, but 10 years, another decade?

One other item: There is about six months within which to receive the notice, make offers and make a timely repair. Why should it take so long? If a homeowner has a problem, why should that homeowner wait six months? I have a list longer than this of the offers for which I have yet to receive a response. Some of them exceed two years.

I have sent out follow-up letters roughly every six to eight months. The homeowners are being strung out something terrible. I heard Mr. Canepa talk

about the number of cases since 2003, and I think he mentioned 120, 130 or so, and that only two of them have gone through the entire process. These homeowners are going through this for years under NRS 40, and that cannot be laid entirely at the feet of the contractors.

This process has turned into one about money. Unfortunately, I am not sure any of us can overcome that hurdle. There is simply too much money to be made by those who have turned NRS 40 into their golden goose. I got involved in the Contractors' Board because I believe in our industry; we ought to police our industry.

The purpose of the Contractors' Board is to instill confidence by the public in the construction industry. This process is not working for anyone—not the homeowner, not the contractor and certainly not the State of Nevada.

I no longer know how to fix the process. There is a place for homeowners to go; the Contractors' Board provides a great service in the State of Nevada.

SENATOR WIENER:
As I recall, one of your frustrations is that you do not get notice directly from the homeowner; it seems to go through counsel before it gets to you, and it is already in the early stages of litigation. Do you feel there could be some kind of partial remedy? What if there were requirements that a direct notice come from homeowners to you with the request for repair? Statute does not read that way. You said only one contact was direct from the homeowner to you requesting repair.

MR. KING:
There were two, maybe two or three. As a contractor, if I have a notice from a homeowner, it means there is a real problem.

SENATOR WIENER:
Were those three that you mentioned resolved?

MR. KING:
Yes. I do not recall any further issues from the homeowners.

SENATOR WIENER:
What is your annual load, that is, how many cases or complaints do you process? Have any gone into litigation because people were not satisfied with the outcome?

MR. KING:
I do not have that information, but should it be the desire of this Committee, they could request that information from the Contractors' Board.

SEAN GAMBLE (Builders Association of Western Nevada):
Everyone is talking about protecting the homeowner, and we are for that as well. You heard from Mr. Canepa's testimony that few homes are getting repaired. The builders who are doing repairs are not being taken out of the lawsuits. You have heard all that. We are in agreement that NRS 40 is not working.

DWIGHT MILLARD (Builders Association of Western Nevada):
I was a litigant in one of the construction defect lawsuits in Carson City. The project included 602 units when it started out. This was prior to the 2003 Session, when the right to repair came into the statute.

We found the process difficult because a lot of our subcontractors would have liked to make the repairs. Prior to 2003 when the subcontractors really did want to do the work, they were prohibited by the legal mechanisms and attorneys who got involved. It appeared to me, as a layman and a builder, that it became a story about money. We finally settled the case through mediation. Former District Judge Michael Fondi was our Special Master, and we met the last Friday of every month in Reno. There were approximately 30 to 40 attorneys who flew up from Las Vegas for a one-hour meeting to see how the case was progressing, which was very slow.

After about two years, we settled the case for $15 million. The 602 units were under a class action. Unless you opt out, you are automatically in. It was our duty to help people understand whether they should opt out or opt in. Of that, approximately 270 were in the suit when the settlement came down. Since it was a class action, they each received a check of over $10,000, which equates to about $3.7 million of the $15 million. We continued to drive that subdivision, as the homes continued to sell. Probably little of that money went into any actual repairs; it went into the pockets of people who were in affordable

housing or were first-time home buyers. Few people ever disclosed they were a participant or recipient of any construction defect lawsuit. To this day, I doubt they are disclosing the fact upon sale.

As a builder, I do not think the right to repair happens successfully. Under the direction and governance of the State Contractors' Board, most builders, if the cases warrant, can be compelled to do repairs under the Contractors' Board. The Board can act as the inspector who verifies the work is done.

Therefore, the complete repeal of NRS 40 is in the best interest of the homeowner.

CHAIR CARE:
Somebody made reference to the *Beazer* case. I do not know that class action suits are all that frequent any more. I have the impression that they are not. But that issue aside, let me ask you this: What was the underlying allegation? What was wrong with the units? What was alleged to be wrong?

MR. MILLARD:
There were more than 100 alleged complaints of defects, and they were extrapolated to the 602 units. What took us into the lawsuit were leaky windows. I would be happy to show you the matrix of the six or eight sprinkler heads that were set up, spraying against windows and making them leak. Because those windows were common to every house, District Judge Michael R. Griffin classified it as a class action.

What kept the case moving along was water under the houses. Most of the houses with water penetration under the foundation had altered drainages caused by homeowners putting in retaining walls. They also put in additional dirt around the house, which stopped the drainage going to the street, or they put in flower boxes next to the house that caught water and forced it underneath. What caused the case to settle was the idea that later on there could be mold and a health issue.

CHAIR CARE:
Let me ask about the subcontractors. Were there any electricians named as third-party defendants?

MR. MILLARD:
Yes, sir.

CHAIR CARE:
What did they have to do with windows, water under the house and mold?

MR. MILLARD:
There was an allegation that the shutoff breaker on the outside of the house was higher than 6 feet from the ground, generally from 6 feet 2 inches to 6 feet 3 inches. The ground had settled a little bit, and the solution was to throw a shovelful of dirt there. We never even put the fences in, but one of the breakers went into a rotten fence post on one lot. That one lot extrapolated to 602 units and came out in excess of $500,000 of repair because it was $900 by the time you replaced the fence post.

SENATOR WASHINGTON:
The class action lawsuit was against 620 units?

MR. MILLARD:
It was 602 units.

SENATOR WASHINGTON:
Do you have a percentage of the cost incurred and the cost was passed on to the final product for additional homes? Such as, did your insurance and legal fees go up, and did you pass those expenses and costs onto the final product for additional homes?

MR. MILLARD:
Not consciously or knowingly, no, we did not.

NEIL B. DAVIS: (The Davis Companies, Incorporated):
I have several different things to discuss, one of them that I was not notified properly about taking care of any repairs.

If somebody tells me they have a problem, I will take care of it. I thought this would remain with the Contractors' Board because if people have a complaint with the Contractors' Board, the Board checks it out. If it is not right, then the Board contacts the contractor.

The contractor goes and takes care of the problem, and everybody is happy. But NRS 40 has become a cash cow for the construction defect, ambulance-chasing lawyers.

For example, one homeowner had picked a certain color for his decking from a color chart. We could not find a duplicate of the color. The chart held by the Contractors' Board, the concrete supplier and me were all one color, but the color the homeowner had, made by the same company, was a different shade. He said, "For "X" number of thousands of dollars, I will let it go." I said, "No, if it is not right, I will tear it out." We tore it out, and I had him sign on my chart that this was the color he wanted. He again complained it was not the right color. I showed the sample to the Contractors' Board. We laid the chart on the concrete, and it was the right color. I about dropped my teeth when the homeowner said, "But it does not match the trim on my house." The Contractors' Board looked at him and said, "You got to be kidding. This is what you picked, you signed it right here, end of story."

The one that really got me concerns the attorney representing our homeowners' association. He got a construction defect. He was not a construction defect attorney, but he referred it to those who were. Before I was even aware of this, $9,000 had been spent in attorney fees. The problem was a retaining wall that would become a million-dollar project. After attorney fees, we would be left with $600,000 to pay for the work. The attorney said, "Oh, that is not a problem. We will inspect those houses. There are about 20 houses, and we will come up with $40,000 worth of defects in the houses."

CHAIR CARE:
You have strayed into another subject with steps a board of a homeowners' association is supposed to go through before it initiates litigation, notice to the members, etc. That is the subject to some degree of the current FBI investigation. We are not going to get into that topic today. This Committee is going to focus on that at some point in the course of this Session as we now have jurisdiction over NRS 116.

KATHERINE DOTY (Corporate Treasurer, Classic Door and Trim):
It was 1997 when I got my first CD lawsuit. I did not know what it was, but of course, I had to contact my attorney. In our first 15 years of business we had never had any lawsuit come up. We have a full-time Customer Service

Department. It is my family's business, and we want to know if a customer is unhappy.

We track our customer service records, and when we go back for customer-service scheduled calls, we have customers sign off if they are happy. If they are not, we go back out and fix the problem.

What happens now with the right to repair, you get a notification of how many houses are involved. You do not really know whether you are in each one of those houses because of the way the construction phases go.

In one case, 20 homeowners literally said they did not want repairs done, they wanted $2 million. In another case, our insurance company did a study to find out how much it was going to take to go to trial. They figured it would cost $50,000 in attorney fees. Against our will, we had to settle because if not, the additional insurance endorsement would have gone to trial. They said it could cost us our business.

In the last case, there was flood damage to two homes in August 2007. They named me in the lawsuit, as well as everybody else who built the house. The damage was due to floodwaters; my insurance company did not respond because they say the damage resulted from flood. I went in good faith to mediation. Two days later, I got a bill from the mediator for $500. They said there is $140,000 in damages in the basements, and they want me to put up the money towards fixing them.

CHAIR CARE:
You are door and trim, is that what you said?

MS. DOTY:
I am door and trim, that is correct.

CHAIR CARE:
You are talking about a flooded basement.

MS. DOTY:
A flooded basement.

CHAIR CARE:
I am sure you have asked yourself this question, so I will ask it anyway. Why are you a party to this lawsuit?

MS. DOTY:
Because we stepped foot on the job.

DARREN WILSON (President, Sierra Air Conditioning, Incorporated):
We all came to the Legislature in 2003 and felt something good would come from NRS 40. Homeowners would get their homes fixed, their biggest investment of their life. I pride myself on the work we do, the work that our people do and the training we implement throughout our industry. We are pretty much the leaders, and the other trades follow us.

I have had over 150 cases of NRS 40 notices sent to my office since January and February 2004, when the new laws took effect. To date, I have not had a response on most of those cases. I have always created a letter and offered to repair. I am a little different from the drywall contractor or the painting contractor. Problems are minor things, like the airflow is not perfect. We go out and we balance; we attempt to satisfy the homeowner.

In 2004, I drew up a letter, basically from my attorney, attempting to get homeowners to sign releases if they were satisfied with my repairs. I was told by plaintiff's counsel you cannot do that, and you cannot talk to the homeowner. That drove a wedge between the subcontractor, the builder and the homeowner, our customer. I have not heard anything back from the cases of 2004; yet, I repaired any case I had the ability to repair.

The issue is this: You have to make a choice. If you admit and fix the problem, basically your insurance can walk away from you.

I chose a different approach. We do good work, and I can stand on my own two feet as a subcontractor in the State of Nevada. I make the repair. The class action that we had in years past is gone, but they are still allowed to extrapolate. I could have an issue in 600 units.

We have a mechanism in place that was available in Nevada way before the construction defect process started, and that is our Contractors' Board. Mr. Canepa alluded that we never wanted the Contractors' Board as part of the

process, which is incorrect. You can go back to the testimony of the 1999 Session. The Contractors' Board was present, but we were pushed away. In the 2001 Session, our subcontractor group said: "Let us come up with a fix. Let the Contractors' Board be part of the process. Make it admissible in court, and our industry will fund it."

We already fund the residential recovery fund. Let us build a process. I am in favor of making the homeowner whole as quickly as possible. In a lot of cases, you are not going to avoid litigation. You just do not need the NRS 40 process.

The Contractors' Board is the licensing body that has the ability to take my license away from me. If it is too complex and the homeowner has a problem, refer that to Mr. Canepa or Mr. Maddox and let them do their thing. But if I am not involved, why am I named? Why is Ms. Doty named when a basement floods? It is wrong.

There is no choice through NRS 40 but to put all of us on notice. If we are the last man standing in mediation and we are going to go to trial, our insurance company is going to settle for a lot of money. Let us fix it, once and for all.

SENATOR WIENER:
When the problem is with a licensed company, the Contractors' Board can pull the license. What is the remedy for an unlicensed subcontractor?

MR. WILSON:
The Contractors' Board has done a great job in the last 10 years under Executive Officer Margi A. Grein. They have gone after unlicensed contractors.

SENATOR WIENER:
What is the remedy for an unlicensed contractor?

MR. WILSON:
They are prosecuted as a felony. It is a felony to contract in the State of Nevada without a license.

JOSH GRIFFIN (MGM Mirage):
I also represent the Nevada Subcontractors Association. MGM Mirage has never engaged in a discussion of NRS 40. At its City Center project, MGM Mirage is developing 2,392 residential units. By any stretch, that makes them the largest

builder in Nevada in 2009. Like any good builder, MGM wants to have happy, satisfied customers and to build a quality product. But as Mr. Hill's testimony outlined, the NRS 40 process is slow, expensive and not working. As a residential builder, MGM Mirage wants to participate in this legislative process.

LANCE SEMENKO (Senior Vice President-Engineering, Q and D Construction):
As others say, the problem is the contractors who work on a project get lumped into one NRS 40.

With our insurance, the best thing for us to do is settle out of court. We have 30 of these that we are settling for $15,000 to $25,000. It is too expensive to go to court and the lawyers know that. Most claims are not actual defects. For instance, as we heard earlier today people are changing the drainage.

We would like to see something get worked out that is beneficial to everybody, including the homeowner.

THOMAS H. GALLAGHER, P.E., P.L.S. (Chairman and Chief Executive Officer, Summit Engineering Corporation):
I may approach this differently than most people, with recommendations of things that need to be modified.

First of all, experts who work on these cases should be licensed in the State of Nevada. The contractors have to be licensed in the State of Nevada. The attorneys have to be licensed in the State of Nevada.

Under NRS 40.6884, it is the subject of being licensed somewhere. Builders do not really understand the territory if they come from a different area.

In addition, if experts were licensed in Nevada, they would have to have professional accountability, just like the contractors. We can take a licensed Nevada professional to the State Board. If contractors practice here with a California license, we have no avenue to take them to the State Board and have their California license taken away.

The second concern is there needs to be clarity under NRS 40.645 as to who can actually be sued by a homeowner. When we do a contract, and subcontractors do a contract, we do a contract with the developer. We state our liability based on what we see as our exposure. But when you have a

100-unit subdivision, all of a sudden all those homeowners start suing you individually. You can have 100 different cases, and all of them are going to have your deductible about to the max.

Another item has been touched on by several people. If a contractor or subcontractor makes a repair on a residence which is satisfactory, there should be a limitation on recoverable damages, most importantly on attorney fees.

Certain attorneys for homeowners file litigation, pursue the claim and keep filing claims because there is little financial incentive to settle. They know they can make claims for outrageous fees and demands on repairs. It is the attorneys telling the homeowner to say that you did not fix this defect.

CHAIR CARE:
We heard testimony earlier about a flooded basement; Ms. Doty did door and trim. It would seem the expert's report to the attorney should say something about whether door and trim is at fault.

MR. GALLAGHER:
What they do is throw in everything but the kitchen sink. We do not do roofs. We do earthwork, utility roads and things like that, but we end up in lawsuits over roofs.

SENATOR COPENING:
Mr. Semenko, you mentioned settling 15 to 20 cases out of court that are just claims, not actual defects.

MR. SEMENKO:
We have not had one go to court. We have settled on all of them.

SENATOR COPENING:
You stated that is because you could not afford to go to court. So you are settling on something that may not actually be a defect; it is just less expensive to settle.

MR. SEMENKO:
Exactly, they bring enough people up front where they have five or six houses, and they hit a contractor for each one of those. You pay $5,000, $10,000, $15,000 to $25,000 on each of those houses.

CHAIR CARE:
We will take all of this under submission. I appreciate all of you coming forward. Our concern rests with the well-being of the homeowner. You cannot stop people from retaining counsel, and everybody has a right to retain counsel.

We are adjourned at 11:04 a.m.

RESPECTFULLY SUBMITTED:

_____
Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

_____
Senator Terry Care, Chair

DATE: _____