# MINUTES OF THE
# SENATE COMMITTEE ON JUDICIARY

## Seventy-fifth Session
## April 1, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:40 a.m. on Wednesday, April 1, 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

**COMMITTEE MEMBERS ABSENT:**

Senator Maurice E. Washington
Senator Mark E. Amodei

**STAFF MEMBERS PRESENT:**

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

**OTHERS PRESENT:**

Steve Hill, Coalition for Fairness in Construction
James L. Wadhams, Coalition for Fairness in Construction
Katherine Doty, Nevada Subcontractors Association; Classic Door and Trim
Josh Griffin, Nevada Subcontractors Association
Pete Coates, President, Douglas County Building Industry Association
Darren Wilson, Sierra Air Conditioning
Craig Marquiz, Nevada Subcontractors Association

Steve Holloway, Association of General Contractors, Las Vegas Chapter
William H. Hoover, Southern Nevada Home Builders Association; Pageantry Homes
Norman L. Dianda, Q & D Construction, Inc.
Mary Davis, J & L Windows, Inc.
Thomas H. Gallagher, Summit Engineering Corporation
Scott K. Canepa, Nevada Justice Association
Christine Slabaugh
Bill Killup, Nevada Justice Association
Annette Fuentes
Jack Mallory, International Union of Painters and Allied Trades, District Council 15
Richard L. Peel, Subcontractors Legislative Coalition
Richard W. Lisle, Mechanical Contractors Association, Inc.
Ken Schultz, Chapter Executive, Sheet Metal Air Conditioning Contractors National Association
Sherry Vyvyan, Southern Nevada Air Conditioning Refrigeration Service Contractors Association
Shawn Butter, Butter Plumbing; Plumbing-Heating-Cooling Contractors of Nevada
Gaylord Rodeman, J & L Windows, Inc.
Mike Hoy, Hoy & Hoy, PC
Don Springmeyer, Nevada Justice Association

CHAIR CARE:
I will open the hearing on Senate Bill (S.B.) 349.

**SENATE BILL 349**: Makes various changes relating to constructional defects. (BDR 3-1151)

STEVE HILL (Coalition for Fairness in Construction):
We support S.B. 349 because it takes steps in the right direction. The Legislature, homeowners, construction industry and trial attorneys have worked for over a decade on this issue. *Nevada Revised Statute* (NRS) 40 is unfixable. Our initial recommendation was a complete repeal of chapter 40 of NRS.

The unbalanced nature of the money involved in the NRS 40 process has caused problems in repairing homes and in the lawsuits we see. The claims in a

long, frustrating and expensive process do not always result in a satisfactory ending for homeowners or contractors.

Removing the automatic awards of attorney fees as damages will bring some balance back into the system. The courts have the right to award those fees, but they will have the discretion to do so in a just manner. That is a positive step forward.

These cases are not brought without a foundation of merit, but they have a broader scope than justified. The cases have a long list of nonspecific, vague defects involving numbers of homes. It is impossible to identify the real problems.

Adjusting the definition of a defect to include only issues that are actually causing a problem will help homeowners get real problems fixed. The construction industry is not trying to get out of the responsibility for code violations and issues that have not caused a problem.

CHAIR CARE:
The bill has three sections. Section 1 one alters the definition of constructional defect. Section 2 adopts the American Rule regarding attorney fees. Section 3 addresses the homeowner's acknowledgement that he understands the necessary disclosures.

JAMES L. WADHAMS (Coalition for Fairness in Construction):
Compare the provisions on page 2, lines 5 and 6 of the bill with lines 16 and 17. The bill drafter rearranged the structure, but not the content.

The effect is different. Those four elements on page 2, lines 5 through 15 of the bill, were previously alternatives. The alternatives either represent an unreasonable risk of injury to a person or property or the remaining elements—done in violation of law, including building codes, proximately causes physical damage, and not completed in a good and workmanlike manner. There are two alternative bases to bring the elements into what will be chapter 40 of NRS. The purpose is to leave outside of NRS 40 any other issues, for example, cosmetic issues not causing damage or not representing a risk.

CHAIR CARE:
As the statute reads now, a violation of code is a constructional defect.

MR. WADHAMS:
Yes.

CHAIR CARE:
You are saying that is cosmetic?

MR. WADHAMS:
An example would be a nailing pattern. When the nailing pattern on the drywall or the length of the nails are not correct, they are technically code violations. If the setback of the electrical box from the drywall does not precisely meet the code, it is a code violation. We are proposing the NRS 40 process include only those issues that either present an unreasonable risk of injury or cause damages. Nailing patterns or the setback of the electrical box do neither. They are matters of concern for someone, but should not be included in the NRS 40 process.

In my handout (Exhibit C) are copies of an NRS 40 notice and the subsequent lawsuit. Page 5 of Exhibit C is an example of an NRS 40 notice. You will see items such as "Entry Hall Closet Door" and "Paint on hinges." If section 1 passes, these items would be included in the NRS 40 process.

The construction defects in this lawsuit are identified on page 25 of Exhibit C. Section 1 in this bill separates important issues, which would stay in the NRS 40 process, from punch-list issues, which should be fixed through the walk-through process, but not under NRS 40.

Section 2 of the bill restores the American Rule. The American Rule means parties are responsible for their attorney fees in litigation. It does not preclude the judge from awarding attorney fees.

Section 3 of the bill clarifies that instructions are to be given to plaintiffs advising them of the risks and responsibilities attendant to initiating the NRS 40 process. Section 3 of the bill requires there be a signed affidavit showing the consumer understands what they are getting into and why.

I will provide you with a copy of an article from the *Nevada Lawyer* (Exhibit D) where Judge Allan R. Earl says NRS 40 may work for a single homeowner but not for a development with 200 or more homes.

CHAIR CARE:
Section 1 of the bill says, "… which presents an unreasonable risk of injury to a person or property … or … ." That means there is a defect of such magnitude that it is inevitable someone will be hurt. Page 2, line 7 of the bill says, "… violation of law, including, without limitation, in violation of local codes or ordinances." Beginning on line 12 on page 2 of the bill, it says, "Which is not completed in a good or workmanlike manner … ." What is the distinction? Can you have something in violation of code, but still in good and workmanlike manner? Can you have something that is not in good and workmanlike manner, but not a violation of law or code? Page 2 of the bill, line 9 says, "Which proximately causes physical damage … ."

MR. WADHAMS:
The building code is the minimum standard. Some communities may have standards beyond the building code. I do not think one cancels the other out.

CHAIR CARE:
Normally, litigation often leads to a settlement agreement and mutual release of all parties. Almost always, the settlement agreement includes language that the parties bear their own fees and costs. I do not recall seeing a settlement agreement for "X" number of dollars, in addition to settling for attorney fees. Please explain how this came to be law because if parties settle, they settle, whether prejudgment or pretrial. I can understand a provision in statute that allows for an award of attorney fees at the discretion of the court. This seems to go beyond that.

MR. WADHAMS:
The observation you make generally is correct. This statute, absent the amendment, has been interpreted to mean attorney fees are an element of damage in addition to the damage to the house. That creates another party in the action. That is part of the concern. The American Rule brings some balance back to the system.

SENATOR WIENER:
In the change you have provided, we have the magic of the "ors" and the "ands." We have "… which presents an unreasonable risk of injury to a person or property or … ." Then we have three conditions below that are joined with "and," so it is either that or all three.

MR. WADHAMS:
That is correct.

SENATOR WIENER:
It would not be any one of those; it would have to be all three?

MR. WADHAMS:
It has to be either the first one or the other three combined.

KATHERINE DOTY (Nevada Subcontractors Association; Classic Door and Trim):
I would like to know how this affects me and my job. This started in 1997, and since then, we have tried different ways. I am not trying to get out of fixing something. I respond to the NRS 40 notices of defect and try to follow up with them.

We thought the right to repair was going to be something that would help us all. I want to make sure I have a quality product. Many times when we go to repair, we see maintenance issues that have not been addressed. Initially, our settlements cost in the $5,000 range. They are up to $10,000 and $40,000 now. My attorneys have estimated the amount of money it will cost to stay in these lawsuits. They do the cost-effectiveness analysis of that and conclude I have no choice. It can cost from $30,000 to $50,000, even if we have not done anything wrong. We have to settle. It is disheartening.

When I tried to renew our insurance policy, my insurance company wanted us to change our name from Classic Door and Trim Co., Inc., to another name completely. That was the only way we would be able to get insurance that year. My insurance premium went from $30,000 to $160,000. I could not give raises to my employees. Last year, I had two choices for my insurance, which was the first time in six years.

CHAIR CARE:
In section 1 of the bill, what is a constructional defect? When you receive a notice, what does it say specifically about your company?

MS. DOTY:
They usually say my doors are not plumb and square, and there is a lack of sealant at the threshold. The notice lists the defects and the experts' opinions

on that job. I can go to 8.0, and it refers to those. Customers call us, and when their house settles, we readjust the door.

CHAIR CARE:
You mentioned 8.0. Will you tell the Committee what that is?

MS. DOTY:
That is a section containing my defects. We are also a materials supplier. In many construction defect cases where we are named, we only sold the materials. We are named because the more named, the more money there is to go around.

CHAIR CARE:
I want to address what a constructional defect really is. We have a statutory definition. The issue before the Committee is to alter that definition. That is the heart of what we are looking at in S.B. 349.

JOSH GRIFFIN (Nevada Subcontractors Association):
I will hand out some articles that articulate the flaws with the process (Exhibit E).

PETE COATES (President, Douglas County Building Industry Association):
Construction defect litigation affects subcontractors brought into the process when experts on both sides have proven the subcontractor has no liability. In 2002 and 2003, my concrete construction company was involved in one of the first construction defect litigation lawsuits in northern Nevada. The experts on both sides agreed my company was not at fault. However, my liability insurance company agreed to settle out of court for approximately $100,000. The insurance company left the state and discontinued its service in Nevada. Later that year, I had to find a new liability insurance company. My premium went from $76,000 per year to $230,000 per year. I was unable to meet that obligation. I had to close my business, and 50 employees lost their jobs. Hundreds of thousands of dollars had to be paid off.

Senate Bill 349 will help both the general contractor and subcontractor if the definition of construction defect becomes more specific rather than the blanket definition that brings in all the subcontractors. That original construction defect suit was brought because of a mold issue. It involved everyone up to the electrician. We had to prove ourselves innocent rather than be proved guilty. We

had attorney fees, which our insurance company paid off. We also had to hire our private attorney to monitor the insurance company's defense of us in this matter.

CHAIR CARE:
The bill would purport to say, " ... an unreasonable risk of injury to a person or property ... ." Do you agree that would be a constructional defect?

MR. COATES:
Yes.

CHAIR CARE:
The items on page 2, lines 7 through 15 of the bill would have to be read collectively to constitute a constructional defect. The first one says, "... violation of law, including, without limitation, in violation of local codes or ordinances, ... ." Do you agree that standing alone is a constructional defect?

MR. COATES:
Yes.

CHAIR CARE:
The second one says, "Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed; ..." Is just that, with no other factor, a constructional defect?

MR. COATES:
Yes.

CHAIR CARE:
If the only allegation is that the work is not completed in a good and workmanlike manner, would that be a constructional defect?

MR. COATES:
I have issues with that point. Workmanlike manner is a subjective perspective on architectural aesthetics. There is a varying standard from commercial work to production work to highly involved and intricate work for custom homes or custom commercial and industrial work. For example, if you do a concrete job on sidewalks on a commercial project, you have a sound product as long as the

work meets the building and safety codes and meets the American Institute for Concrete Standards on control joints for crack control. The finish is typically specified by the architect. It can be a medium, a fine or a rough finish. There is a broad subjective scope of work on that. This applies to most finishes in workmanlike manner. If things are not plumb or out of square and displeasing to the eye, it is a workmanlike problem.

There is already a remedy in place for unworkmanlike manner, which is the Nevada State Contractors' Board. Many contractors throughout the State have had to answer complaints from their clients that they have not performed in a workmanlike manner. A third-party investigator comes to the site and determines whether or not the workmanship meets the specification for that particular job. It is a can of worms to define workmanlike manner through construction defect litigation.

DARREN WILSON (Sierra Air Conditioning):
You asked for a definition of constructional defect. You have the *Las Vegas Sun* article of March 24, Exhibit E. The article described a nine-year-old home where a family pet chewed the insulation off the refrigeration freon line. Is that a construction defect? When is it a homeowner's responsibility to have maintenance done?

It brings to light the issues we have as subcontractors and general contractors that not everything is a defect. Things happen to homes over a period of time. I will not get out of this NRS 40 process without paying. I was willing to fix the problem, but I was not allowed to repair it that day. My company will have to not only fix the product, but we will have to pay. It is all about the money.

Senator Wiener, you had asked me about what the Contractors' Board does to contractors who do not perform. The Nevada State Contractors' Board is there for the homeowner. The Board fines a general contractor or subcontractor if they choose not to take care of a homeowner or a commercial building. The process is in place. It does not cost anything. The contractors, who do not make repairs, lose their license.

CHAIR CARE:
You have entered into settlement agreements. Settlement agreements always include language that says it is not an admission of liability by entering into a

settlement agreement. On page 2 of the bill, line 5 it says, " ... an unreasonable risk of injury to a person or property ... ." Is that a constructional defect?

MR. WILSON:
Yes.

CHAIR CARE:
On page 2 of the bill, lines 7 through 15 are read together, but if you break them apart, is subsection 1 a constructional defect?

MR. WILSON:
I have an issue with that because the codes change rapidly in our industry. Codes are updated along the way. I attempt to stay ahead of the code and drive our industry to do a better job. A house built nine years ago does not follow today's code. Ninety-nine percent of the time, the inspector or expert, who comes to the job site and states my system is not installed to that code, looks at the code the way it was written today. It has changed, and it could change greatly. That code in effect at the time that permit was pulled is what should be utilized. That does not happen.

Also, the municipality may require something different from the code. The code does not always include the correct items. My company does things above the code. I have a case now where there are multiple NRS 40 issues. We went above the code, and I am being penalized for doing a better job.

CHAIR CARE:
What is the difference between violation of a code and not completed in a good and workmanlike manner?

MR. WILSON:
Good workmanlike manner is a broad area. The way I do my business may not be the same as my competitor. There may not be anything wrong with the way he hung his can or register. I may choose to do it a different way. Mine may look better, and his may function perfectly. If the register was hanging off the ceiling, it is poor workmanlike manner. They are not talking about workmanlike manner when we get NRS 40 notices. They are talking about codes. Anyone can have an opinion on workmanlike manner regarding how it should be or could be. There is a big difference in how people perceive workmanlike manner

regarding whether it is aesthetically pleasing or correct. That is what gets thrown to us in mediation all the time.

CRAIG MARQUIZ (Nevada Subcontractors Association):
In section 1 of the bill modifying NRS 40.615, something that presents an unreasonable risk of injury is on its face something that needs to be addressed and remedied. The three subparts that comprise the "or" component, in lines 7 through 15 on page 2 of the bill, need to be read in conjunction together. The reason for this is that most of the subcontractors performing work in their particular trades are actually installing improved building methodologies. Technically, if you were to look at their work versus what was set forth on the plans and specifications, that betterment improving the homeowner's home is a defect. So, you are allowing individuals to be sued for actually installing improved building methodologies on a home.

The code is a minimum standard set by the Uniform Building Code. Each individual trade has trade specifications, which are constantly evolving to improve the methodologies of that trade. The code adoption process is a multiyear process. Today's building code is out for comments now from trade practitioners and individuals who can provide input on how things can be done differently or better. There are individual subcontractors in the industry who are ahead of the curve, and they are installing improved building methodologies in the homes they are constructing now. Even though the code might require a minimum, they are going above and beyond that standard.

When you look at the violation code, you also have to look at subsections 2 and 3 in section 1 of the bill in order to put that in context. Is it truly a violation of a code where someone has installed an improved building methodology or someone has failed to meet that minimum standard? The only way you can accurately assess whether someone has failed to meet that minimum standard is to look at subsections 2 and 3.

Section 1, subsection 3 of the bill encompasses what addresses a generally accepted practice or standard in the industry. Has this particular installation been performed in the way that is generally accepted or that we would see other subcontractors installing that particular scope of work? It is important to understand that because, if it is a betterment, has that betterment been done the way it is supposed to have been done that others in the industry would be doing it?

Section 1, subsection 2 of the bill is important because when you look at any particular claim, damage must be proximately caused. There must be some injury flowing from the claimed harm in order for it to be compensable as a damage. It is important for the proximate causation element to be a part of this definition. Something that might be damage or claimed to be damage might not have any impact whatsoever on the structure or the functionality of the unit and may not be proximately causing any injury.

A distinction must be drawn when we are talking about defects. You heard some of this in the testimony regarding paint, for example, on hinges or around doors. Most builders in the industry have a one-year walk-through as part of their sale process. They will go back into the home and meet with the homeowner. They ask for a subsequent punch list of items to determine whether or not it is a homeowner maintenance issue or something that needs to be addressed. The homeowners present those items, and the builders repair them. In the majority of cases, all those issues are resolved.

The definition in section 1 of the bill is critical for the changes being proposed because it takes into consideration homeowner maintenance issues not being performed. At some point, that distinction is important because in the NRS 40 process, where individual homeowners are allowed to bring everything under the sun into the shotgun notices, the developers are forced to bring in every subcontractor who stepped on that project to search for the needle in the haystack. When you see the shotgun notice citing problems with roofing, framing, drywall, concrete and stucco, the contractor is obligated to pass it on to the subcontractors even though it is defective. The subcontractors have to reinspect every component of their work because they have a shotgun notice.

It wrongfully shifts the burden of proof onto the developers and subcontractors to find what is claimed to be wrong as opposed to what specificity is there. When you look at the nature of the defect and the definition, this proposed amendment will eliminate all of the chaff and leave only the legitimate issues to be presented for NRS 40 purposes.

CHAIR CARE:
The American Rule in litigation says the parties bear their own fees and costs, absent a contractual provision to the contrary or some statutory provision to the contrary. Existing law has the statutory provision. Please address how this works, not just following judgment, but before the lawsuit.

MR. MARQUIZ:
The provision in section 2 of the bill eliminates the guaranteed attorney fees that are part of process. Most construction defect cases brought through the NRS 40 process are settled through a mandatory mediation or settlement conference process. The reason for that is because most insurance companies involved make a cost-benefit decision. They are forced with the predicament of participating in a global settlement for which the individual NRS 40 mandatory attorney fees are passed on as part of the cost of repair. The developer in turn gets that plaintiff's demand and adds on their respective costs of defense, and then the subcontractors are issued pass-through demands. It absorbs all the inefficiencies. That is one of the issues that has not been addressed but is a critical reason why the attorney fees provision is so egregious.

Many individuals are involved when a shotgun notice is received. They are required to participate in the inspection process, the report-writing process and the meetings required with special masters. There is ultimately mediation session after mediation session.

The attorney fees awarded in this process are not the same as in a typical lawsuit. In a typical lawsuit, a plaintiff's firm would be submitting an attorney fees petition or application for reimbursement of attorney fees and costs detailing each and every billing entry for which they are seeking recovery. These cases are taken on a contingent-fee basis, so there is no review by the court of what is reasonable. The courts, through their prior precedent of blessing settlements, have established a threshold that up to a 40-percent contingent fee in construction cases is determined to be reasonable. Claims are being asserted that are not legitimate, are requiring the reimbursement of all attorney and expert fees and all of the inspections process, which is ultimately absorbed into the settlement. The individual standing at the table at the time of settlement getting their pass-through demands needs to determine whether it is appropriate to settle or be the only one left standing, who potentially has the onslaught at trial for all of the attorney fees and costs being applied to their result.

The oversight of the attorney fees is limited by the courts. That is why removing it from the presuit process is so critical. When parties settle in a prelitigation process like NRS 40, a motion for good faith settlement determination is presented either by the plaintiff's firm or jointly by the parties, which says please bless what we have just resolved. There are no admissions of liability in those settlement agreements. But it is a resolution of any and all

claims, actions or causes of action arising out of anything that could have been brought as part of that suit.

The court is presented with the ultimate number of settlement, the parties who are part of the settlement and the amounts they are contributing toward settlement. The court makes that determination based on the parties consenting to that result of granting a motion for good-faith settlement to do what is a ministerial task in approving it.

If a party objects, there is a hearing. For example, maybe a particular trade was allowed to settle out cheaply. Maybe that business is no longer in business or maybe there are limited insurance proceeds available under that company's commercial general liability policies. Other people might challenge whether or not that settlement is a good-faith settlement. The court will make a determination based on the facts presented in the briefs. But that is a limited and rare occurrence because these cases are forced to that settlement process. You are held hostage because, if you do not participate, the nightmare of the end result will fall upon you if you are the one who proceeds to trial.

STEVE HOLLOWAY (Association of General Contractors, Las Vegas Chapter):
I want to point out why code violations should not stand alone as a construction defect. Looking at complaints, I will point out two types of complaints regarding nail patterns in the wall. We have had many complaints that the nail patterns are off one-quarter inch or one-half inch. There is not cause and effect there. In order for that to be a construction defect, it would have to cause a structural problem, damage or consequential damage.

We have also had complaints where the wrong nail was used or a better nail. This is another reason why the code should not be used to stand alone as structural defect.

The third reason is in all these code violations or construction defect violations involving nails and nail patterns, there is a remedy for that. Most builders have a one-year warranty, and there is a walk-through any time during the year that you built the house where you can do these checklists and have these types of things repaired.

WILLIAM H. HOOVER (Southern Nevada Home Builders Association; Pageantry Homes):
We have been in business since the early 1990s. We live in Las Vegas and are involved in Las Vegas. We have built over 6,000 houses in that time period. We have had problems, but not because we have tried to cut corners or use defective materials. To the contrary, we have done the best job we could. Houses are built by hand, one at a time, and involve 50 to 100 people in many trades. We have never had a house fail in those 20 years.

In the vast majority of cases, our homeowners call us, and we investigate. If it is our responsibility, we fix it. Nevada Revised Statute 40 seems to prevent that from happening. In large-scale cases, we do not hear from the homeowner. We hear from the homeowner's attorney, which requires us to get our attorney or insurance company involved. The time frames are extended. The list of issues is exaggerated. In many cases, the homeowner has told us they did not know there was anything wrong with that particular item. It defeats the process that works every day.

We are to blame here because we asked for NRS 40. But it is not working. It is time to change NRS 40.

NORMAN L. DIANDA (Q & D Construction, Inc.):
We do a 6-, 9- and 12-month walk-through on every project we build. We give a three-year warranty on our work. Since NRS 40 has come into effect, it is a nightmare.

The definition of construction defect needs to be changed. It should be limited to significant damage to structure, not basic warranty issues. It should be limited to something that poses a danger to the occupant—life, health and safety—not inconvenience.

I will give you an example of an NRS 40 demand (Exhibit F). The automatic attorney fees provision should be deleted. These claims are not driven by trying to repair legitimate defects, but instead by attorney fees and costs. These fees and costs are outrageous. Plaintiffs say they are entitled to them because NRS 40 allows it. Outrageous demands for fees interfere with the likelihood of doing repairs and reaching a fair settlement.

The alleged damages in the example, Exhibit F, amount to $978,422. The demand for attorney fees is $558,358, plus $55,358 in interest. The demand for attorney fees is more than 60 percent of the alleged cost to repair. Innocent parties need to be protected from the process.

Notice provisions to subcontractors need to be strengthened. For example, I just went on an arbitration where the judge said I should settle the suit today. We had to settle the case or we would go to court, and it would have cost three times what it cost to settle. It is extortion. I am proud of the industry I am in; I am proud of what we produce. But NRS 40 is subjecting everyone to future bankruptcy.

MARY DAVIS (J & L Windows, Inc.):
Until 2004, I had never been in a construction defect claim. I believe in servicing our customers and taking care of them. Since 2004, my general manager has walked through over 1,000 homes and has never seen a defect in our product. We receive complaints for dirty windows or missing screens after 10 years. I did one walk-through and saw destructive testing where they tore apart the siding, tore off the roof and broke the tiles. The builder was sued and is out of business today. He had no way to fight this.

THOMAS H. GALLAGHER (Summit Engineering Corporation):
I look at this from a different perspective. We do not build anything, but we design, survey, test and inspect. We are involved in all the same suits the rest of these people are involved in, whether it is a window, door or trim. When you look at an NRS 40 notice, you feel like you should fire your entire staff. They are shotgun, and as soon as you spend half your deductible, maybe $50,000 to $75,000, your insurance company will settle the case. Especially with construction down as far as it is, there is immediacy to this. We are not building houses or making any money, but these frivolous lawsuits can be filed against us, which will ultimately drive us all into bankruptcy. We have had to do the adjustments we have had to do because of the economy, and we have all done that. The changes indicated in this bill need to happen soon.

SCOTT K. CANEPA (Nevada Justice Association):
I will testify in opposition to S.B. 349, and I have given you my handout (Exhibit G). Two homeowners will also testify in opposition to the bill.

CHRISTINE SLABAUGH:
I will read from my prepared testimony (Exhibit H).

We did have a one-year walk-through with our developer, and we were told the cracks were normal.

CHAIR CARE:
Your written testimony will also be entered as part of the record on Senate Bill 337 because you got into the issue of repose limitations.

When you testified, it was reassuring to know you did not have to pay attorney fees out of your own pocket. Are you saying you would not have gotten any success but for the language in the current statute?

MS. SLABAUGH:
That is correct.

MR. CANEPA:
I have been practicing exclusively in construction defect litigation and representation of homeowners with construction defects since 1994. I have represented thousands of homeowners in large and small cases in southern Nevada. I do not want to completely characterize the preceding testimony as anecdotal, but there were not many specific examples.

It is important to make the record clear on one significant point. Mr. Wilson stated the construction he performed five years ago is being judged by the codes in effect today. That statement is legally and factually wrong. The experts look at the construction and judge it by the codes in existence at the time of construction. There has been a national trend with the adoption of the International Building Code to make codes more stringent to afford more protection to the homeowners. The building code is the minimum standard necessary to protect life, limb and property.

Mr. Holloway's testimony was at odds with Mr. Coates' testimony. Mr. Coates properly identified the statute as it exists is proper, that standing alone, a code violation should give rise to a construction defect claim if not repaired in the NRS 40 process. That is the law in Nevada and most other states. If we were to adopt the bill as written, we would be the only state in the country with this type of partial immunity bill.

The list of items constituting construction defects is presently codified at NRS 40.615. Those items were suggested to be the standards by the Governor's Insurance Liability Task Force, which convened in 2002 for more than six months as a precursor to the 2003 Legislative Session. It was the consensus of those involved on the Task Force those should be the things included in the definition of construction defect. The problem with their proposal is they leave the door open for contractors to build homes riddled with construction defects with no recourse to the homeowner. To say the defect must present an unreasonable risk of injury or harm to the person is fine for some construction defects, perhaps in the electrical arena or plumbing and mechanical arena. But, they say you must satisfy all three other criteria. That means your house could have hundreds of code violations, which they no longer have any legal liability for. To the extent the Committee wishes to process this bill, you are effectively negating by legislative fiat all the building codes that have been adopted and enacted throughout the State of Nevada. It is customary for the predecessor to be adopted by each of the cities and counties, which has been done in Clark and Washoe Counties.

Some say the county building inspectors can watch out for these building codes. Under NRS 41.033, the building inspectors have no liability for negligent failure to inspect or negligent inspection. In our State, there are only building departments in the two major metropolitan areas. Most of the State of Nevada has no building departments. If it is the inclination of the Committee, please understand that by requiring the conjunctive on the last three by saying you must have a code violation, that it must have caused physical damage to property, you are inviting contractors to flaunt the building codes and exposing homeowners to live in residences that do not meet the minimum standards of the code. We suggest this bill should be rejected in its present form.

The second definition of the three criteria you must meet would also legislatively unwind *Olson v. Richard,* 120 Nev. 240, 89 P.3d 31 (2004), which said the economic loss rule does not apply in cases involving NRS 40. By requiring physical injury as suggested in the bill, the *Olson* decision will no longer apply. The State of Nevada would adopt the economic loss rule, which means you have all these code violations, but unless and until they either cause physical damage to property or present an unreasonable risk of damage to property or person, you have no cause of action. I submit to you that is morally repugnant.

CHAIR CARE:
For example, I purchase a home, and there are code violations and a lack of good and workmanlike manner, but nothing has happened. No one has been hurt, and there is no immediate risk of injury. There may be a risk down the road, but there is no proximate damage at this time. Are you saying in a case like that, the homeowner has no recourse until something happens?

MR. CANEPA:
That is correct. It is not so much on the good and workmanlike manner. The code speaks to many aspects of the construction of a residence, but they do not speak to much of the construction of the residence. The best example might be the roof. There is no specific requirement as to the roof. Usually the contractors are required to follow the manufacturer's recommendations. If this bill is enacted, the homeowner with a defective roof has to wait until the roof leaks and causes physical damage to the residence before they can get any recourse.

CHAIR CARE:
The testimony was that the recourse here for workmanlike manner, or maybe it was code violation, was the Contractors' Board. Please address that. No one has talked about a purchase agreement. Is the issue of construction defect remedies addressed in a purchase agreement?

MR. CANEPA:
The Contractors' Board has been effective on cosmetic issues. They have been of some assistance on larger issues as well. There are limitations on the Contractors' Board. First of all, the Contractors' Board loses jurisdiction after four years. The statute of repose in this State, unless this Committee decides to cut those statutes in half by virtue of passing the next bill you are going to hear, the State Contractors' Board is going to be of no assistance to homeowners whose homes are more than four years old. There are many problems, especially in southern Nevada, that do not start cropping up until the homes are five, six, seven and eight years old. The biggest example of that, and this will dovetail with the testimony against S.B. 337, are instances where we have corrosive soils, and copper plumbing has been routed underground. We had a community association called Rock Springs Vista III that was over 500 condominiums. In about year six, the copper pipes started to fail underground. Homeowners would come home to find a mini swimming pool in their living room. They would have

to jackhammer the concrete to find the leak. Eventually that case was resolved by rerouting all the plumbing aboveground and up through the attic.

The Contractors' Board would have no jurisdiction over those types of problems. That is just the tip of the iceberg. The Contractors' Board only has jurisdiction over licensees. The vast majority of homes sold in Nevada are not sold by people licensed by the Contractors' Board but are governed by NRS 40—limited liability companies formed by companies like Pageantry on a specific basis. When a component part of a residence fails, the homeowner does not have to go to the component-part manufacturer. They go to the person who sold the house, and it is that person's obligation to either fix it or secure the assistance of the subcontractor who caused that part to fail.

The Contractors' Board is of nominal assistance, but because of its limitations, it is no panacea and no answer or justification for the passage of this bill.

Good and workmanlike manner is meant to be a catchall. The code does not speak to every aspect of construction of a residence. Most of the time, the installation of stucco systems are governed by manufacturers' recommendations. So the good and workmanlike manner phrase inserted by bill drafting in 2003 was not new to this chapter. It is repeated in chapter 116 under NRS 116.4114, which governs the rights and remedies of community associations. A defect under the statute is a defect, which is a home that is not free from defective materials or was not constructed according to law, sound standards of engineering or in a good and workmanlike manner. The phrase "good and workmanlike manner" is replete throughout the NRS. It is also in most of the codes, the national electrical codes for sure, because the codes recognize there are aspects of installation the code cannot cover because of the breadth of things they do.

It was included in the original definition of NRS 40 because there are going to be times when there is no code requirement and no industry standard, so it becomes the judgment of an expert for a plaintiff or defendant to say whether it was done in a good and workmanlike manner.

CHAIR CARE:
I had a question about the purchase agreement. This may take us into attorney fees. Sometimes there are provisions about attorney fees in contracts. Maybe a

purchase agreement is silent on that issue, but do purchase agreements say anything about a buyer's remedies?

MR. CANEPA:
By State law all purchase agreements for new homes do not address the subsequent purchaser. If you buy a new home, the NRS requires the builder to provide the homeowner with a copy of NRS 40. That is the present disclosure of the buyer's rights and remedies. Every new home builder has to provide a new home purchaser with that remedy.

CHAIR CARE:
The statute is incorporated as terms into the purchase agreement?

MR. CANEPA:
I am not sure it is incorporated, but they are required to provide a copy of it. We have another category of homeowners. What about subsequent purchasers who were not the original purchaser. The Nevada Supreme Court recently concluded in *ANSE, Inc. v. Dist. Ct.,* 124 Nev. Ad. Op. 74, 192 P.3d 738 (2008), that subsequent purchasers should have the same rights and remedies under NRS 40 as the original purchaser. There was no good reason to exclude those people from the panoply of remedies available under NRS 40. To the extent there is any thought you might solve this through a purchase agreement, that will not work as to the subsequent purchaser. In southern Nevada particularly, there is a transient community where as many as 40 percent of the homes presently owned are owned by people other than the original purchaser who bought it from the original home builder. We have a statute of repose that extends up to 10 years, which is about the norm across the country.

CHAIR CARE:
While we are on the subject of subsequent purchaser, if I buy a house from someone else and the house is five years old, does the clock start ticking again?

MR. CANEPA:
No.

CHAIR CARE:
It is the substantial completion date?

MR. CANEPA:
Mr. Springmeyer will make that presentation.

I will address the attorney fees issue. To answer your question directly why is it, given the American Rule and the customary arrangement, that people pay their own attorney fees? I will tell you why. In 1995, the home builders' representatives, the home buyers and homeowners' representatives met and there was a bargained-for exchange. The industry did not want to be exposed to claims for punitive damages because there is no insurance coverage for punitive damages under Nevada law. They did not want to be exposed to emotional distress damages in those rare instances where a construction defect might cause someone emotional distress. In exchange for giving up those rights on behalf of homeowners, the building industry agreed that the homeowners should be given the entitlement to attorney fees for one singular purpose—to make the homeowner whole. Reference the testimony of the witness that was just here. If she had to pay the attorney fees out of her pocket, she would not have had the proceeds necessary to fix a residence that was sold to her in a defective manner. Without the right to attorney fees, homeowners cannot be made whole.

You have to contrast this with the normal personal injury case or other tort-based claim where the claimant may have the right to general damages. The best example is the personal injury case where the jury can award the amount of money for medical bills. But then they can award money for pain and suffering, which are generally characterized as general damages. The lawyers are generally paid out of those general damages. There are no general damages in construction defect cases.

Nevada Revised Statute 40.655 puts the limitation on what the homeowner may get. They may get the cost to repair their residence if not fixed by the builder previously, their reasonable expert fees, their reasonable attorney fees and interest by statute, and relocation expenses, if necessary. If you take away the homeowners' right to attorney fees, homeowners who purchased a legitimately defective residence will not have enough money to fix their residence and make them whole.

CHAIR CARE:
Is it possible that a settlement figure can be less than the award of attorney fees? Let me take a simple case. You have a single home, and there is an

agreed-to settlement figure, absent attorney fees. Then there is the application for attorney fees. Can the award of attorney fees exceed the settlement amount itself. Is that possible?

MR. CANEPA:
It probably is possible. In fact, there was a Nevada Supreme Court case in which that happened. The Nevada Supreme Court concluded that because of the extraordinary lengths to which the plaintiff had to go, including but not limited to taking an appeal to the Nevada Supreme Court, the award of attorney fees was justified even though it exceeded the value of the underlying settlement.

We could have brought up other homeowners who had to go through lengthy litigation because of recalcitrant insurance companies. There might be instances where attorney fees exceed the value of the claim. It is not the norm.

I do not know where they get the idea the award of attorney fees is automatic. The statute says the homeowner is entitled to those things. In the customary case, that is how lawyers handle cases both for the defense and the plaintiff. When I represent a homeowner, even if it is a single-family homeowner, it is my duty and obligation to my client and to the court to send a settlement demand. I am obligated to tell the defendant and its insurance company what its maximum possible exposure at trial could be. I will tell them the house will cost $100,000 to repair. On top of that you could face exposure to our contingent fee, which is 25 percent or higher depending on the complexity and difficulty of the case. You could face exposure to interest on those damages from the date of filing of the complaint. That becomes a demand upon which the case is settled. There is a settlement agreement where everyone agrees to bear their own fees and costs, but that has already been included and subsumed in the settlement agreement because any settlement negotiations have been done.

Conversely, the defendants are sending an offer of judgment to the plaintiff's lawyer, which was authorized by the Legislature in 2003. The offer of judgment says I am duty-bound to tell my client that if they do not recover the amount of this offer, the court is obligated to deny their attorney fees and costs and award attorney fees and costs in favor of the builder. That was not mentioned in any of the testimony today. There is a carrot and stick approach on behalf of both the defendant and the plaintiff. In the 2003 Session, the building industry lobby

argued for, and we agreed, they should be given the right to serve offers of judgment under the Nevada Rules of Civil Procedure.

I did note that even though they want to take away the attorney fees, which was part of the deal we struck in 1995 and has been continued through every session since, I do not see anything in the bill that restores the homeowners' right to punitive or emotional distress damages.

The present statute requires the lawyer to tell the homeowner about NRS 40.688, which says the homeowner must in perpetuity disclose to any subsequent purchaser all of the experts' reports that were generated in connection with a particular defect that was claimed to exist and a statement of repairs that were made and related items. It never ends, in perpetuity. As a matter of our practice at the end of our cases, we put all the expert reports on a DVD and at the end we put what repairs were done. We give that to our client so they can hand it off to the next purchaser.

They now want an affidavit requirement from the client saying they have spoken with us, the lawyer, and that we have explained this provision to them. The most immediate problem with that affidavit, which must be filed with the court, is that it invades the attorney-client privilege. They will be asked in a deposition if their attorney had them sign an affidavit saying you read and understood NRS 40. They will then ask what their attorney told them. It invades the attorney-client privilege. It is unconstitutional for that reason, and it is unnecessary.

We view it largely as a scare tactic. How can the homeowner provide an affidavit that says they understand NRS 40? When I challenge most of the people in the room to understand NRS 40, after reading it 100 times, there are people that are taking it on faith that their lawyers are ethically representing them by telling them what is required by the statute and what is not. To require such an affidavit is anomalous to the fact that attorneys are officers of the court and are ethically obligated to comply with statute.

Mr. Wadhams said defects will fail. We are now going to cull defects with this new definition, many of which will be code violations because they have not resulted in damage, and they do not present an unreasonable risk of injury to property or person. The scenario is they are going to file a lawsuit directly on those things while NRS 40 is mediating this. That is a violation against the rule

precluding splitting of causes of action. The courts will never sustain that. You cannot have two separate lawsuits filed simultaneously on the same subject matter. One of those cases will be dismissed by the court, and the homeowner will lose their right to sue. That paradigm he announced today fails for that reason.

I would challenge Mr. Marquiz to provide an instance where a contractor or subcontractor was sued for doing something better than the code. I have never heard of any such thing.

Ms. Doty left out a considerable component of the problem we face. The missing player is the insurance companies. Where are they? Were the multiple claims brought against her brought by the homeowners or by insurance-retained lawyers on behalf of contractors at the direction of insurance companies? Based on my history and practice in this area, those claims are generated by insurance companies because there is a contractual indemnity provision requiring the subcontractor to defend and indemnify the contractor, or they are looking to spread the risk amongst other insurers, including insurers for the subcontractors. Those issues are crucial to a full and final dialogue concerning these issues, especially when we are considering a partial immunity statute as is suggested by S.B. 349.

CHAIR CARE:
The largest purchase most Americans make is the purchase of a home. It deserves special attention in the law. We all understand the disclosure existing in the law. For example, the buyer must be made aware the house was once a methamphetamine laboratory. There is a series of items that must be disclosed. There may be a potential buyer who loves the house and would have bought it but for the disclosure. Would there be anything wrong with the plaintiff signing something to say they are aware but are not including the discussion about NRS 40 with their attorney? That discussion would take place, but would not be part of the statute. I am aware that by doing this, the whole disclosure apparatus kicks in?

MR. CANEPA:
In general, there is nothing wrong with the proposition, but the devils are in the details. If you represent a community association of 300 unit owners, would you have to secure that from all 300 unit owners as a condition precedent to filing the NRS 40 notice, and failing to do so would subject the claim to

dismissal? There was not one specific example given to you of one time when a homeowner claimant said the lawyer did not follow the rule and provide them with this disclosure. This is not a problem the Committee should be concerned with because the attorneys are complying with the law and giving the homeowners the disclosure requirement. There could be a bar complaint against an attorney who openly violates that rule, and I am not sure we need to be policing any more than we currently have in the law. I see no evidence before this Committee upon which to conclude that is reasonably necessary at this time.

BILL KILLUP (Nevada Justice Association):
I am an attorney practicing in Las Vegas. I am here with my client, Annette Fuentes, who has a statement for the Committee.

ANNETTE FUENTES:
My husband and I bought a home in 2004. Two years later, we started to notice problems with the home. I contacted our builder and asked him to check the home. He informed me we should have done a better inspection. We are the second owners of the home. He told me he has no obligation for this. The home has multiple cracks. The trusses are popping through the drywall. There is a crack in a slab that runs the whole distance of the house. The concrete is coming up through the carpet. We have a fireplace that goes from ceiling to floor, which is separating from the wall.

I did contact the builder, and we got no response. I contacted an attorney and found out we did have recourse. Mr. Killup filed an NRS 40 for us. The builder's insurance company did come out. Now we have a mediation scheduled at the end of this month. We are hoping to settle this in mediation. If we do not settle it, we will have to go to court.

We did not have the resources for attorney fees. We are not liable for this. It is not a frivolous lawsuit. I have obligations to continue making a house payment, but the builder is not willing to fulfill his obligation. Therefore, I ask that you take the attorney fees into consideration. There was a statement made earlier regarding the Contractors' Board. Several builders in Pahrump have not been held accountable. They open up under different names. I urge you not to revise the attorney fees.

CHAIR CARE:
Your testimony is confined to section 2 of the bill. You are saying but for the existing language in NRS 40, it would not be possible for you to be where you are in the course of the upcoming mediation? Because you do have the mediation pending, I will not ask you to testify about the specifics of your case.

MR. KILLUP:
This testimony impacts the other bill too. Maybe it would be appropriate to enter the testimony in that regard as well.

CHAIR CARE:
Ms. Fuentes' testimony is also testimony for S.B. 337.

JACK MALLORY (International Union of Painters and Allied Trades, District Council 15):
I am conflicted in testifying against this bill today because not only do I represent workers and their families who are consumers of durable goods and services in our communities, but I also am a representative of the construction industry.

There are problems with what is being proposed in section 1 where it dramatically increases the standard by which a homeowner has to prove there are problems with the home to receive any type of recourse under NRS 40.

I want to speak directly about the third section and the "or" provision of section 1 of the bill. When you talk about cosmetic defects—a door not having a sufficient coat of paint would constitute a construction defect. You have heard testimony that small stress cracks could be an indicator of a latent deficiency. The provisions of this statute as they exist do not go far enough in protecting subcontractors either. When you see stress cracks in drywall, typically the drywall contractor received a call to fix the stress cracks. The stress cracks could be a result of improper framing. It could be a problem with reinforcing steel or post tension cable. In the slab, it could be a problem with expansive or inadequate compaction of soils. All these things are not directly their fault. They should not have to bear the cost of performing those repairs.

There are also issues with components included in the installation of homes that do not have a durable life as long as the ten years provided for in the statute. Some things need to be addressed, not only to protect the homeowner but also

to protect and address some of the issues that affect subcontractors in the industry.

The way S.B. 349 is written, it does not address those issues as they relate to subcontractors. It seems on its surface that all it does is create additional roadblocks and obstacles for homeowners to receive some way to address problems with their individual residences or as a group.

CHAIR CARE:
I will close the hearing on S.B. 349. I will open the hearing on S.B. 337.

**SENATE BILL 337**: Revises the statutes of repose relating to certain actions concerning construction defects. (BDR 2-1149)

RICHARD L. PEEL (Subcontractors Legislative Coalition):
We represent almost every subcontractor trade organization in southern Nevada, except the Nevada Subcontractors Association. We also represent the Nevada Association of Mechanical Contractors.

Chapter 11 of NRS divides construction claims into four categories for the purpose of statutes of limitation and repose. These categories are deficiency claims due to willful conduct or fraudulent concealment, which have no statute of limitations or repose limit. Deficiency claims that were known or should have been known through reasonable inspection have a ten-year limit with a two-year extension. Latent deficiency claims have an eight-year limit with a two-year extension. Patent deficiency claims have a six-year limit with a two-year extension.

Because of the length of our statute of repose in this State, our construction defect judges in southern Nevada have found and held that plaintiffs can bring complaints up to 12 years after substantial completion. This creates a 12-year warranty on the part of contractors, subcontractors and materials suppliers. Our proposed remedy for this problem, starting with section 1 on page 2 of the bill, would be to reduce the statute of limitations period for willful conduct or fraudulent concealment claims to six years.

In section 2, on pages 2 and 3 of the bill, we are proposing to reduce the statute of limitations for claims that were known or should have been known from ten years to three years and eliminate the two-year extension period.

In section 3, page 3 of the bill, we are proposing to reduce the statute of limitations for claims that are latent from eight years to four years and eliminate the two-year extension period.

In section 4, page 4 of the bill, we propose reducing the statute of limitations for patent claims from six years to three years and to eliminate the two-year extension period.

We are making the proposals because Nevada's statute of limitations is the longest in the Western 11 states. With respect to willful conduct or fraudulent concealment claims that are the subject of NRS 11.202, there is no limit. No other Western state out of 11 has an unlimited statute like this. With respect to known or should-have-known claims that are the subject of NRS 11.203, our statute provides the longest statute of limitation period—ten years plus a possible two-year extension—among the Western states. With respect to latent defect claims that are the subject of NRS 11.204, our statute provides the second longest statute of limitations period out of the Western states.

Because of the length of our statute of limitations, contractors have limited ability to procure contractors liability insurance. This is a problem in our State. As a result, insurance carriers have raised premiums for contractors. In some cases, premiums have gone up in the neighborhood of 6,000 percent. The insurance companies become more selective about the issuance of insurance policies. They also have attempted to exclude coverage for losses through the use of specific exclusions. As a result, many contractors who previously could have afforded to purchase insurance and the insurance was available to them cannot get insurance today, or they have to pass on higher costs to the ultimate consumer.

Senate Bill 337 gives consumers adequate time to identify defects. Most construction projects have a one-year warranty period. If you do not know what is going on in your property within a three-year period, you have not been looking. Settling cracks tend to manifest themselves sometime during the first year.

Furthermore, claims arise that have nothing to do with a contractor's performance. They are a result of the homeowner's maintenance of the property. A good example of this is gaskets in dual-pane windows. They have to be maintained or replaced. If that is not done, that window will ultimately not

last. The same is true if you let your sprinklers spray onto your stucco. Maintenance is something a consumer has to do.

Our statute of repose period is being used as a 12-year warranty period rather than requiring homeowners to maintain their properties. The changes we are proposing in S.B. 337 serve the public policy of statute of limitations by promoting judicial economy, giving matters finality and requiring people to timely enforce their rights. In doing so, it strikes a balance between contractors seeking to avoid the expensive costs of litigation as well as consumers seeking to procure remedies. For these reasons, we respectfully request the Committee approve and pass S.B. 337.

CHAIR CARE:
Regarding section 3 with respect to the latent deficiency, what about subsequent buyers? Maybe you have a homebuyer who sells after three years and nine months. There is a new purchaser, and the walk-through does not reveal a deficiency. What would happen then?

MR. PEEL:
If the four years has passed, they would not have a remedy. You have to have a cutoff at some point. Twelve years is too long. The opponents would probably say it needs to be longer than 12 years. Four years in this instance is a fair period. You can determine what is wrong with your house by reasonable inspection in most instances. In the case of a latent deficiency, most of them will manifest themselves well before the fourth year. That has been the experience of the contractors I deal with.

CHAIR CARE:
Is there a reason you emphasized the Western states and looked at their statutes?

MR. PEEL:
There is no magic to it. We focused on the states around Nevada because Nevada tends to follow the lead of other states in close proximity.

RICHARD W. LISLE (Executive Director, Mechanical Contractors Association, Inc.):
I represent unionized mechanical, plumbing and heating, ventilating and air conditioning (HVAC) contractors. We support the passage of S.B. 337. The statute of repose in Nevada is not realistic in the relationship to the useful life of

water heaters, boilers and HVAC equipment. We need to examine where preventive maintenance starts and how well the building owner has maintained the mechanical equipment. It is unfair to expect subcontractors to be liable for unmaintained equipment after 10 or 12 years.

KEN SCHULTZ (Chapter Executive, Sheet Metal Air Conditioning Contractors National Association):
Our 23 contractor members support S.B. 337 for all the reasons given.

SHERRY VYVYAN (Southern Nevada Air Conditioning Refrigeration Service Contractors Association):
I am in favor of lowering the statute of limitations for many reasons. Air conditioning units we purchase have a maximum manufacturer warranty of five years on the compressor. There is not an air-conditioning unit made that lasts beyond 10 to 15 years in our climate. Our warranties are pushed to the limit as it is. I have been asked to replace a unit on a home after ten years. That unit has worked and served the customer well during those years, but it is not my fault it is not designed to withstand our statute of limitations. We support S.B. 337 in reducing the statute of limitations.

SHAWN BUTTER (Butter Plumbing; Plumbing-Heating-Cooling Contractors of Nevada):
Our business is primarily service and repair. In most cases when we go out to homes, they are not being maintained. We see the neglect from the homeowner in not doing their maintenance, and that causes a lot of these problems. It is not necessarily construction defect. It is the customer not doing the maintenance or not knowing they have to maintain the equipment. That is why 12 years is too long.

GAYLORD RODEMAN (J & L Windows, Inc.):
I have gone on hundreds of home inspections on NRS 40 defect cases. Nevada Revised Statute 40 is being abused by plaintiffs' attorneys. We get notices saying there are dirty windows or dust behind the window in the track.

CHAIR CARE:
Have you ever gotten into the issue where you were alleged to have done something that occurred eight or ten years ago?

MR. BUTTER:
Mostly, it is warranty issues. Our windows have a lifetime warranty. We are not given the opportunity to do warranty work because the lawyers get involved, and the homeowner is not allowed to call us for warranty service. We have to fix it through NRS 40. You cannot fix a home well enough to satisfy the lawyers in the construction defect arena. Ninety percent of the repairs we have done have been warranty or homeowner maintenance issues. We lubricate the windows because the homeowners do not know to do it. Ninety percent of the time when I go to an inspection, the homeowners wonder why I am there because they do not have a problem with our windows. It is on the list their lawyer provides that the windows are sticky. They are sticky because they have not been maintained.

CHAIR CARE:
This testimony is actually directed at S.B. 349.

MR. GRIFFIN:
We support S.B. 337.

MR. HOOVER:
We support S.B. 337.

MR. HOLLOWAY:
We support S.B. 337.

MIKE HOY (Hoy & Hoy, PC):
I practice in construction defect litigation. My perspective is different from some of the others who have testified because my practice has included representation of homeowners. I have served as mediator in these cases. I have represented developers. I represent manufacturers and subcontractors as well as design professionals. My clients have no insurance, and the insurance industry is a problem in all this litigation.

Regarding S.B. 337 and the statutes of repose, no matter what you do with the time periods, you have such a complicated system that you will see unnecessary motion practice. Any homeowner lawyer will put allegations in the complaint that say the developer knew about these defects and concealed them fraudulently to get into the no-statute-of-repose category. There will be litigation about the nature of each of the defects, whether it falls into the unlimited

statute of repose, the ten-years-plus-two-years, the eight-years-plus-two-years or the six-years-plus-two-years statute of repose.

I would endorse the Legislature picking one date. It does not matter what the nature of the defect is. If you simplify the law in that respect, you will cut down on a lot of the motion practice, particularly in Las Vegas.

CHAIR CARE:
That would be the date you discovered or reasonably through the use of due diligence should have discovered?

MR. HOY:
No, Senator. My recommendation would be to simply say no case arising out of construction defect shall be brought more than "X" number of years after substantial completion. Eight years would be a major reform in this area.

DON SPRINGMEYER (Nevada Justice Association):
We oppose S.B. 337, and I have given you a handout (Exhibit I). As you saw from the national survey of the statutes of repose in every state in the country, Nevada is in the mainstream at the most. There are a few states with longer statutes, and there are a few states with shorter ones. Nevada's law is more favorable to the developers and builders than most other states in the area of what starts the statute running. Occupancy by the buyer starts it running in most states. In Nevada, it is substantial completion. That can be well before someone has bought the home and moved in. That is a significant difference that could be up to months or years. In this economy, there are subdivisions in southern Nevada sitting there finished and substantially completed, but they cannot sell them.

Our statute is running while that is going on. Our statutes end up being shorter, even though they look longer because of the definition of when things start.

Beyond that, look at the question of why we have these multiple time periods. There is no time limit on the fraud. That is the way it should be. Nevada has an appropriate public policy that if you cheat someone, you should not be protected by the law. There is the ten-year period, which relates to defects known by the builder. There is the eight-year period for latent defects, something the homeowner should not have been able to see. The copper pipes in the corrosive soil under the slab with no wrapping or protection is an example

of this. That corrosive soil slowly eats away at the copper. Six years go by, and finally, it eats away at the copper enough that a pinhole leak starts. That saturates the soil under the slab, and eventually it bubbles up through the slab. You have a swimming pool in your living room several years after the substantial completion of the house because that is how long it took for that defect to result in physical damage. If you make the statute three years, that is tough luck.

Another example is where the slabs in a huge development were intentionally built with no reinforcement. If the builder had misrepresented that to the buyer, and said the slab was six inches thick with rebar to the hilt, it would be fraud because that is not what they built. If the homeowner ever discovers that is not true, they have a right to sue. However, if the builder does not say anything about it, how would the home buyer find out there is no reinforcement in the slab until something goes wrong? Suddenly, there is a crack several years down the road.

CHAIR CARE:
Do you make a distinction between fraud in the inducement, which is three years under NRS 11 and has nothing to do with construction defects, and fraudulently concealed?

MR. SPRINGMEYER:
You are affirmatively misdirected from suspecting anything because they tell you something that was false, and it was cheating you. That is something they should not have any protection for. There should be protection for all those other categories. Nevada is in the mainstream, or more favorable to the builders, because of the start date. Our point is, there are all kinds of things that can go wrong. You will be taking away the homeowner's remedies if you shorten these periods and you give them that three-year protection for fraud. There is no justification or basis for that. Almost 40 states have about the same thing we do, a few longer and a few shorter. Why do we need the two-year additions? Nevada Revised Statute 40 requires a notice. There has to be a right to repair. There has to be the mediation before you can file litigation. That is one of the reasons you need the two-year period tacked on to the statute of repose. You cannot file the suit until you do those things. If you take that two years away, you are making the statute of repose even shorter.

It is more complicated, and no other states have a similar situation. The extra time period is something we have created by our legislative solution to the right to repair. The statutory time periods are set the way they are because they balance the protection for the homeowners' needs to discover things that take a long time to go wrong and manifest themselves against the legitimate concerns of builders and developers for not having unending time periods of liability.

CHAIR CARE:
Mr. Hoy said a construction defect lawsuit must be filed within "X" number of years after substantial completion. I would like your thoughts on that, forgetting for a moment willful misconduct and fraudulent concealment.

MR. SPRINGMEYER:
There are a number of states that do it that way, which we point out in our survey. Nevada's distinction between patent and latent is not something you see in very many of the other state statutes. That is simpler, but I urge you that the distinction between something you cannot possibly have found out and something you can see is a legitimate policy distinction where the Legislature has decided you should have less time to go after something you should have found out and more time for something you had no reason to find out.

Mr. Peel mistakenly said statute of limitations in every point. That should have been statute of repose because these things often end up as citations in law cases. I did not want that to stand uncorrected. We are only talking in this bill about modifications to the statute of repose. The statute of limitations is another subject and an overlay on the statute of repose, but that is not at issue here.

MR. CANEPA:
Do not forget that under NRS 11.190, subsection 4, there is a discovery rule that forces a homeowner who has knowledge of the defect to bring the claim within two years. The statutes of repose go out the window once the homeowner is on notice or reasonably should have been on notice of the claim under our statute of limitations. There are broader public policy implications here. We looked back through the legislative history, and the ten-plus-two-year tack-on was done directly in response to the MGM fire litigation. These statutes of repose apply to commercial and residential contractors, and they apply to property damage and bodily injury claims. That was done because you only get the two-year tack-on if the defect was discovered in the tenth year or the

eighth year or in the sixth year. The MGM, which was riddled with construction defects that ultimately caused it to catch fire and kill people, was discovered in the tenth year, and the Legislature cured that by adding on a two-year time frame to allow those victims to bring their claims. Please understand there are broader issues here than just residential construction defect claims.

CHAIR CARE:
I will close the hearing on S.B. 337. There being nothing further to come before the Committee, we are adjourned at 11:10 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: