

ASSEMBLY BILL NO. 401—ASSEMBLYMAN OCEGUERA

MARCH 21, 2011

Referred to Committee on Judiciary

SUMMARY—Makes various changes concerning constructional defects. (BDR 3-382)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to constructional defects; revising the definition of “constructional defect”; revising provisions governing attorney’s fees in claims concerning constructional defects; revising the statutes of limitation and repose relating to certain actions concerning constructional defects; making an appropriation; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law provides that a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance, which is done in violation of law, including in violation of local codes or ordinances, is a constructional defect. (NRS 40.615) **Section 1** of this bill provides that there is a rebuttable presumption that workmanship which exceeds the standards set forth in the applicable law, including any applicable local codes or ordinances, is not a constructional defect.

Existing law provides that in a claim for damages as the result of a constructional defect, reasonable attorney’s fees may be recovered as damages. (NRS 40.655) **Section 2** of this bill provides that: (1) the court shall award to the prevailing party reasonable attorney’s fees, which must be an element of costs and awarded as costs; and (2) the amount of any attorney’s fees awarded must be determined by and approved by the court. Additionally, **section 2** authorizes any party to petition the court to determine the reasonableness of attorney’s fees to be reimbursed to the claimant if: (1) the contractor has made satisfactory repairs in response to a notice of constructional defect; and (2) the only issue remaining is the amount of the reasonable attorney’s fees to be reimbursed to the claimant.

Existing law sets forth the statute of limitations for various actions. (NRS 11.190) **Section 4** of this bill provides for a statute of limitations of 3 years for an action for damages for certain deficiencies, injury or wrongful death caused by a defect in construction if the defect is a result of willful misconduct or was fraudulently concealed.



Existing law contains certain periods of limitation, known as statutes of repose, in which certain actions for damages for certain deficiencies, injury or wrongful death caused by a defect in construction must be commenced. These statutes of repose apply to both commercial and residential construction. (NRS 11.202-11.206) Sections 3 and 5-8 of this bill exclude residential construction from the existing statutes of repose and provide a new statute of repose relating specifically to residential construction.

Section 9 of this bill provides that the amendatory provisions of the bill relating to claims for constructional defects governed by NRS 40.600 to 40.695, inclusive, apply to claims that arise on or after October 1, 2011, and the amendatory provisions of the remaining sections of the bill apply to actions based upon construction that occurs on or after October 1, 2011.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 40.615 is hereby amended to read as follows:

40.615 **1.** “Constructional defect” means a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance. ~~and~~

2. The term includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance:

~~(a)~~ **(a)** Which is done in violation of law, including, without limitation, in violation of local codes or ordinances ~~;~~

~~—2.], except as otherwise provided in subsection 3;~~

(b) Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed;

~~(c)~~ **(c)** Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; or

~~(d)~~ **(d)** Which presents an unreasonable risk of injury to a person or property.

3. There exists a rebuttable presumption that the term does not include the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance which is done in violation of law, including, without limitation, in violation of local codes or ordinances, if the workmanship of the design, construction, manufacture, repair or landscaping exceeds the standards set forth in the applicable law, including, without limitation, the applicable local codes or ordinances.



Sec. 2. NRS 40.655 is hereby amended to read as follows:

40.655 1. Except as otherwise provided in NRS 40.650, in a claim governed by NRS 40.600 to 40.695, inclusive, the claimant may recover only the following *costs and* damages to the extent proximately caused by a constructional defect:

(a) Any reasonable attorney's fees;

(b) The reasonable cost of any repairs already made that were necessary and of any repairs yet to be made that are necessary to cure any constructional defect that the contractor failed to cure and the reasonable expenses of temporary housing reasonably necessary during the repair;

(c) The reduction in market value of the residence or accessory structure, if any, to the extent the reduction is because of structural failure;

(d) The loss of the use of all or any part of the residence;

(e) The reasonable value of any other property damaged by the constructional defect;

(f) Any additional costs reasonably incurred by the claimant, including, but not limited to, any costs and fees incurred for the retention of experts to:

(1) Ascertain the nature and extent of the constructional defects;

(2) Evaluate appropriate corrective measures to estimate the value of loss of use; and

(3) Estimate the value of loss of use, the cost of temporary housing and the reduction of market value of the residence; and

(g) Any interest provided by statute.

2. *The court shall award to the prevailing party reasonable attorney's fees, which must be an element of costs and awarded as costs.* The amount of any attorney's fees awarded pursuant to this section must be *determined by and* approved by the court.

3. If a contractor complies with the provisions of NRS 40.600 to 40.695, inclusive, the claimant may not recover from the contractor, as a result of the constructional defect, anything other than that which is provided pursuant to NRS 40.600 to 40.695, inclusive. *If a contractor makes satisfactory repairs in response to a notice of a constructional defect pursuant to NRS 40.600 to 40.695, inclusive, and the only issue remaining is the amount of reasonable attorney's fees to be reimbursed to the claimant, any party may petition the court to determine the reasonableness of the fees.*

4. This section must not be construed as impairing any contractual rights between a contractor and a subcontractor, supplier or design professional.



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1 5. As used in this section, "structural failure" means physical
2 damage to the load-bearing portion of a residence or appurtenance
3 caused by a failure of the load-bearing portion of the residence or
4 appurtenance.

5 **Sec. 3.** Chapter 11 of NRS is hereby amended by adding
6 thereto a new section to read as follows:

7 *1. Except as otherwise provided in subsection 2, no action*
8 *may be commenced against the owner, occupier or any person*
9 *performing or furnishing the design, planning, supervision or*
10 *observation of construction, or the construction of a residence*
11 *more than 6 years after the substantial completion of the*
12 *residence, for the recovery of damages for:*

13 *(a) Any deficiency in the design, planning, supervision or*
14 *observation of construction, or the construction of the residence;*

15 *(b) Injury to real or personal property caused by any such*
16 *deficiency; or*

17 *(c) Injury to or the wrongful death of a person caused by any*
18 *such deficiency.*

19 *2. If a deficiency in the design, planning, supervision or*
20 *observation of construction, or the construction of a residence is*
21 *discovered during the sixth year after the substantial completion*
22 *of the residence, the period set forth in subsection 1 is extended 2*
23 *years after the discovery of the deficiency.*

24 *3. Except as otherwise provided in subsection 4, for the*
25 *purposes of this section, the date of substantial completion of a*
26 *residence shall be deemed to be the date on which:*

27 *(a) The final building inspection of the residence is conducted;*

28 *(b) A notice of completion is issued for the residence; or*

29 *(c) A certificate of occupancy is issued for the residence,*

30 *↪ whichever occurs later.*

31 *4. If none of the events described in subsection 3 occurs, the*
32 *date of substantial completion of a residence must be determined*
33 *by the rules of the common law.*

34 *5. The provisions of this section do not apply to:*

35 *(a) A claim for indemnity or contribution.*

36 *(b) An action brought against any person on account of a*
37 *defect in a product.*

38 *6. As used in this section, "residence" has the meaning*
39 *ascribed to it in NRS 40.630.*

40 **Sec. 4.** NRS 11.190 is hereby amended to read as follows:

41 11.190 Except as otherwise provided in NRS 125B.050 and
42 217.007, actions other than those for the recovery of real property,
43 unless further limited by specific statute, may only be commenced
44 as follows:

45 1. Within 6 years:



1 (a) An action upon a judgment or decree of any court of the
2 United States, or of any state or territory within the United States, or
3 the renewal thereof.

4 (b) An action upon a contract, obligation or liability founded
5 upon an instrument in writing, except those mentioned in the
6 preceding sections of this chapter.

7 2. Within 4 years:

8 (a) An action on an open account for goods, wares and
9 merchandise sold and delivered.

10 (b) An action for any article charged on an account in a store.

11 (c) An action upon a contract, obligation or liability not founded
12 upon an instrument in writing.

13 (d) An action against a person alleged to have committed a
14 deceptive trade practice in violation of NRS 598.0903 to 598.0999,
15 inclusive, but the cause of action shall be deemed to accrue when
16 the aggrieved party discovers, or by the exercise of due diligence
17 should have discovered, the facts constituting the deceptive trade
18 practice.

19 3. Within 3 years:

20 (a) An action upon a liability created by statute, other than a
21 penalty or forfeiture.

22 (b) An action for waste or trespass of real property, but when the
23 waste or trespass is committed by means of underground works
24 upon any mining claim, the cause of action shall be deemed to
25 accrue upon the discovery by the aggrieved party of the facts
26 constituting the waste or trespass.

27 (c) An action for taking, detaining or injuring personal property,
28 including actions for specific recovery thereof, but in all cases
29 where the subject of the action is a domestic animal usually included
30 in the term "livestock," which has a recorded mark or brand upon it
31 at the time of its loss, and which strays or is stolen from the true
32 owner without the owner's fault, the statute does not begin to run
33 against an action for the recovery of the animal until the owner has
34 actual knowledge of such facts as would put a reasonable person
35 upon inquiry as to the possession thereof by the defendant.

36 (d) Except as otherwise provided in NRS 112.230 and 166.170,
37 an action for relief on the ground of fraud or mistake, but the cause
38 of action in such a case shall be deemed to accrue upon the
39 discovery by the aggrieved party of the facts constituting the fraud
40 or mistake.

41 (e) An action pursuant to NRS 40.750 for damages sustained by
42 a financial institution or other lender because of its reliance on
43 certain fraudulent conduct of a borrower, but the cause of action in
44 such a case shall be deemed to accrue upon the discovery by the



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1 financial institution or other lender of the facts constituting the
2 concealment or false statement.

3 *(f) An action against the owner, occupier or any person*
4 *performing or furnishing the design, planning, supervision or*
5 *observation of construction, or the construction of a residence, for*
6 *the recovery of damages for:*

7 *(1) Any deficiency in the design, planning, supervision or*
8 *observation of construction, or the construction of the residence*
9 *which is the result of his or her willful misconduct or which he or*
10 *she fraudulently concealed;*

11 *(2) Injury to real or personal property caused by any such*
12 *deficiency; or*

13 *(3) Injury to or the wrongful death of a person caused by*
14 *any such deficiency.*

15 *↪ The cause of action in such a case shall be deemed to accrue*
16 *upon the discovery by the aggrieved party of the deficiency. As*
17 *used in this paragraph, "residence" has the meaning ascribed to it*
18 *in NRS 40.630.*

19 4. Within 2 years:

20 (a) An action against a sheriff, coroner or constable upon
21 liability incurred by acting in his or her official capacity and in
22 virtue of his or her office, or by the omission of an official duty,
23 including the nonpayment of money collected upon an execution.

24 (b) An action upon a statute for a penalty or forfeiture, where the
25 action is given to a person or the State, or both, except when the
26 statute imposing it prescribes a different limitation.

27 (c) An action for libel, slander, assault, battery, false
28 imprisonment or seduction.

29 (d) An action against a sheriff or other officer for the escape of a
30 prisoner arrested or imprisoned on civil process.

31 (e) Except as otherwise provided in *this section and* NRS
32 11.215, an action to recover damages for injuries to a person or for
33 the death of a person caused by the wrongful act or neglect of
34 another. The provisions of this paragraph relating to an action to
35 recover damages for injuries to a person apply only to causes of
36 action which accrue after March 20, 1951.

37 (f) An action to recover damages under NRS 41.740.

38 5. Within 1 year:

39 (a) An action against an officer, or officer de facto to recover
40 goods, wares, merchandise or other property seized by the officer in
41 his or her official capacity, as tax collector, or to recover the price or
42 value of goods, wares, merchandise or other personal property so
43 seized, or for damages for the seizure, detention or sale of, or injury
44 to, goods, wares, merchandise or other personal property seized, or
45 for damages done to any person or property in making the seizure.



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(b) An action against an officer, or officer de facto for money paid to the officer under protest, or seized by the officer in his or her official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

Sec. 5. NRS 11.202 is hereby amended to read as follows:

11.202 1. ~~[An]~~ *Except as otherwise provided in section 3 of this act, an* action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for:

(a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement which is the result of his or her willful misconduct or which he or she fraudulently concealed;

(b) Injury to real or personal property caused by any such deficiency; or

(c) Injury to or the wrongful death of a person caused by any such deficiency.

2. The provisions of this section do not apply in an action brought against:

(a) The owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house in this State on account of his or her liability as an innkeeper.

(b) Any person on account of a defect in a product.

Sec. 6. NRS 11.203 is hereby amended to read as follows:

11.203 1. Except as otherwise provided in NRS 11.202 and 11.206, *and section 3 of this act*, no action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than 10 years after the substantial completion of such an improvement, for the recovery of damages for:

(a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement which is known or through the use of reasonable diligence should have been known to him or her;

(b) Injury to real or personal property caused by any such deficiency; or

(c) Injury to or the wrongful death of a person caused by any such deficiency.

2. Notwithstanding the provisions of NRS 11.190 and subsection 1 of this section, if an injury occurs in the 10th year after the substantial completion of such an improvement, an action for



1 damages for injury to property or person, damages for wrongful
2 death resulting from such injury or damages for breach of contract
3 may be commenced within 2 years after the date of such injury,
4 irrespective of the date of death, but in no event may an action be
5 commenced more than 12 years after the substantial completion of
6 the improvement.

7 3. The provisions of this section do not apply to a claim for
8 indemnity or contribution.

9 **Sec. 7.** NRS 11.204 is hereby amended to read as follows:

10 11.204 1. Except as otherwise provided in NRS 11.202,
11 11.203 and 11.206, *and section 3 of this act*, no action may be
12 commenced against the owner, occupier or any person performing
13 or furnishing the design, planning, supervision or observation of
14 construction, or the construction, of an improvement to real property
15 more than 8 years after the substantial completion of such an
16 improvement, for the recovery of damages for:

17 (a) Any latent deficiency in the design, planning, supervision or
18 observation of construction or the construction of such an
19 improvement;

20 (b) Injury to real or personal property caused by any such
21 deficiency; or

22 (c) Injury to or the wrongful death of a person caused by any
23 such deficiency.

24 2. Notwithstanding the provisions of NRS 11.190 and
25 subsection 1 of this section, if an injury occurs in the eighth year
26 after the substantial completion of such an improvement, an action
27 for damages for injury to property or person, damages for wrongful
28 death resulting from such injury or damages for breach of contract
29 may be commenced within 2 years after the date of such injury,
30 irrespective of the date of death, but in no event may an action be
31 commenced more than 10 years after the substantial completion of
32 the improvement.

33 3. The provisions of this section do not apply to a claim for
34 indemnity or contribution.

35 4. For the purposes of this section, "latent deficiency" means a
36 deficiency which is not apparent by reasonable inspection.

37 **Sec. 8.** NRS 11.205 is hereby amended to read as follows:

38 11.205 1. Except as otherwise provided in NRS 11.202,
39 11.203 and 11.206, *and section 3 of this act*, no action may be
40 commenced against the owner, occupier or any person performing
41 or furnishing the design, planning, supervision or observation of
42 construction, or the construction of an improvement to real property
43 more than 6 years after the substantial completion of such an
44 improvement, for the recovery of damages for:



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1 (a) Any patent deficiency in the design, planning, supervision or
2 observation of construction or the construction of such an
3 improvement;

4 (b) Injury to real or personal property caused by any such
5 deficiency; or

6 (c) Injury to or the wrongful death of a person caused by any
7 such deficiency.

8 2. Notwithstanding the provisions of NRS 11.190 and
9 subsection 1 of this section, if an injury occurs in the sixth year after
10 the substantial completion of such an improvement, an action for
11 damages for injury to property or person, damages for wrongful
12 death resulting from such injury or damages for breach of contract
13 may be commenced within 2 years after the date of such injury,
14 irrespective of the date of death, but in no event may an action be
15 commenced more than 8 years after the substantial completion of
16 the improvement.

17 3. The provisions of this section do not apply to a claim for
18 indemnity or contribution.

19 4. For the purposes of this section, "patent deficiency" means a
20 deficiency which is apparent by reasonable inspection.

21 **Sec. 8.5.** 1. There is hereby appropriated from the State
22 General Fund to the Interim Finance Committee the sum of
23 \$250,000 to contract, through competitive bidding, with a qualified
24 independent consultant:

25 (a) To review the provisions of Nevada law relating to actions to
26 recover damages resulting from constructional defects; and

27 (b) To make recommendations to the Nevada Legislature
28 regarding the long-term effects of the provisions of the Nevada
29 Revised Statutes pertaining to actions to recover damages resulting
30 from constructional defects, including, without limitation:

31 (1) The definition of a constructional defect set forth in
32 NRS 40.615;

33 (2) The length and effect of the statutes of repose for actions
34 to recover damages resulting from constructional defects; and

35 (3) The recovery of attorney's fees in actions to recover
36 damages resulting from constructional defects.

37 2. Any remaining balance of the appropriation made by
38 subsection 1 to the Interim Finance Committee must not be
39 committed for expenditure after June 30, 2013, by the entity to
40 which the appropriation is made or any entity to which money from
41 the appropriation is granted or otherwise transferred in any manner,
42 and any portion of the appropriated money remaining must not be
43 spent for any purpose after September 20, 2013, by either the entity
44 to which the money was appropriated or the entity to which the



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1 money was subsequently granted or transferred, and must be
2 reverted to the State General Fund on or before September 20, 2013.

3 **Sec. 9.** The amendatory provisions of:

4 1. Sections 1 and 2 of this act apply to any claim that arises on
5 or after October 1, 2011.

6 2. Sections 3 to 8, inclusive, of this act apply to actions based
7 upon the design, planning, supervision or observation of
8 construction, or the construction of a residence that occurs on or
9 after October 1, 2011.

