MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Sixth Session
April 11, 2011

The Committee on Judiciary was called to order by Chairman William C. Horne at 8:15 a.m. on Monday, April 11, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman William C. Horne, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Steven Brooks
Assemblyman Richard Carrillo
Assemblyman Richard (Skip) Daly
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Jason Frierson
Assemblyman Scott Hammond
Assemblyman Ira Hansen
Assemblyman Kelly Kite
Assemblyman Richard McArthur
Assemblyman Tick Segerblom
Assemblyman Mark Sherwood

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman John Oceguera, Clark County Assembly District No. 16
Assemblyman Marcus L. Conklin, Clark County Assembly District No. 37

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Lenore Carfora-Nye, Committee Secretary
Jeff Eck, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Bruce King, representing the Coalition for Fairness in Construction
Craig Marquiz, representing Coalition for Fairness in Construction
Norman Dianda, President, Q & D Construction, Inc., Sparks, Nevada
Mary Davis, President, J & L Windows, Inc., Sparks, Nevada
Robert A. Fehling, President, Silverado Excavating Company, Reno, Nevada
Bruce Geschieder, President/Owner, Moana Nursery, Reno, Nevada
Brett Seabert, Owner, Tanamera Construction, LLC, Reno, Nevada
Susan M. Cavallero, Vice President, Cavallero Heating and Air Conditioning, Inc., Carson City, Nevada
Raymond M. Pezonella, President, Pezonella Associates, Inc., Reno, Nevada
John Griffin, representing Nevada Justice Association
Charles Litt, representing Nevada Justice Association
Ralph Walker, Private Citizen, Reno, Nevada
Dan Roggemann, Private Citizen, Sparks, Nevada
Jack Delp, Private Citizen, Las Vegas, Nevada
Dee Hopper, Lynch Hopper & Salzano LLP**,** Las Vegas, Nevada
Amie Webster, Private Citizen, Las Vegas, Nevada
Robert Robey, Private Citizen, Las Vegas, Nevada
Ryan Bauman, representing Nevada Contractors Association
Michael D. Hillerby, representing JELD-WEN, Inc
Steve Holloway, Executive Vice President, Associated General Contractors of America, Las Vegas, Nevada
John Madole, representing the Nevada Chapter of Associated General Contractors of Northern Nevada
Richard Peel, representing Associated General Contractors; and Subcontractor Legislative Coalition

Richard Lisle, Chairman, Subcontractor Legislative Coalition
Brian Kerzetski, President, Plumbing, Heating and Cooling Contractors of Nevada, Inc., Las Vegas, Nevada
Greg Esposito, Plumbers, Pipefitters & HVAC/R Technicians Local 525; and Southern Nevada Building and Construction Trades Council
Chris Ferrari, representing Nevada Contractors Association
Greg Ferraro, representing Nevada Resort Association

Chairman Horne:
[The roll was called.] Good morning, ladies and gentlemen. There are four bills on the agenda for today. There is a floor session scheduled for 11:30 a.m. I may limit testimony, if necessary. It is permissible to simply say "me too," if you agree with what has been testified before you. Even if you do not speak, you may indicate your position on the sign-in sheets, which will be reflected on the record. Your testimony is to remain civil and respectful. I realize this is a very serious issue for everyone; however, I will not tolerate the meeting getting out of hand. We will now open the hearing on Assembly Bill 285.

Assembly Bill 285: Revises provisions governing an award of attorney's fees in causes of action for constructional defects. (BDR 3-607)

Assemblyman Ira Hansen, Assembly District No. 32:
I am a licensed contractor. I hold a C-1 mechanical license and a B-2 residential license. This bill will impact all contractors equally. I have a duty to represent my constituents with issues as paramount as this one. The room is filled with people like me, contractors who have been dramatically impacted by a law passed in 1995, known as Chapter 40 of *Nevada Revised Statutes* (NRS). Through the years, the law of unintended consequences came into play in a big way. The original intent of the bill was to remedy issues between homeowners and contractors regarding warranty issues. The law has now evolved to where the contractor almost never has the opportunity to repair any alleged defect before he is involved in a lawsuit. This is a "jobs" bill. As you know, the construction industry consists of approximately 80 percent unemployment in Nevada. Not only is this drop due to market forces, the drop is additionally due to forces by law. The homebuilders are afraid to start any new housing tracts simply because they are guaranteed to wind up in a lawsuit.

I am a small contractor. At my peak in 2005, I had approximately 40 employees, which are currently down to 3 employees. On Saturdays, I frequently work in the field myself trying to keep my head above water. Our liability insurance has gone up tremendously. It is difficult to find an insurance company who will provide quotes for new residential construction. The costs

have become so prohibitive that companies are getting squeezed out of the market. The problem is addressed by Assembly Bill 285, which deals exclusively with the right of an attorney to be guaranteed attorney's fees. Currently the law is structured so that contractors are becoming involved in lawsuits rather than being allowed the opportunity to repair any constructional defects. The files I am holding represent four separate construction defect lawsuits that I am currently involved in. In every single case, I have not been asked to provide a single warranty repair, even after being brought into the suit. Let me provide you with a specific example. During a hearing process, I was asked to provide an inspection on all of the alleged defects in a home. Upon completing the inspection, I noticed a few very minor plumbing issues which were related to normal service wear and tear. I offered to make the repairs on the spot. I was immediately informed that I was not to touch anything. I was told to put it in writing and submit the findings to the law firm. I was also told that I would be notified if they wanted me to complete any of the repairs. I have been in probably 12 to 16 of these lawsuits over the last 12 years. Never once, have I been given the opportunity to make a repair.

My son lives in a housing community where there is currently a lawsuit underway, and I attended the hearing in February of this year. The lawsuit process consists of sending out a mailer to every homeowner, encouraging them to participate in the lawsuit. While I was in attendance at the hearing, I was informed that there is no responsibility to allow the developer or subcontractors to provide any repairs, prior to the lawsuit. Once the money is issued, there is no responsibility to do the repairs at all. The attorney representing the firm informed me that his former clients sent him a photo of themselves on their vacation in Alaska, in their new motor home, which was purchased with their settlement money. There is nobody in this room, myself included, who is using this bill to get out of any warranty, repair work, or trying to sneak by. We simply want the law to go back as it was, prior to what is known as the American Rule, when attorneys' fees were not guaranteed.

The opponents of this bill will say we are trying to cheat the homeowners. They will say that somehow we are all trying to escape our responsibilities to honor warrantees. I am here to let you know that is absolute nonsense. We do not even have the right to do the repairs before we are sued. The bill says "The court may award reasonable attorney's fees to a prevailing party in a claim governed by NRS 40.600 to NRS 40.695, inclusive, if an independent basis for such an award exists pursuant to NRS 17.115, 18.010 or 40.650, or Rule 68 of the Nevada Rules of Civil Procedure."

Also, I believe that you have received a handout showing pictures of issues we are being sued for (Exhibit C). The exhibit will provide you with some examples

of the types of incidences we are being sued for. In one instance, a lawsuit is being suggested because the plumbers failed to put caulking around the bathtub spout. The plumbers have not been allowed to come back and caulk the spout. This example reflects the type of incident which is bringing lawsuit after lawsuit, and is killing the construction industry in Nevada. There are a number of people here waiting to testify. Some have a great deal of expertise with the subject matter.

Chairman Horne:
Are you saying that this bill is changing how attorney's fees are awarded and will eliminate construction defect litigations?

Assemblyman Hansen:
I believe the bill cuts to the root of the problem. I also believe there are other issues to contend with. Speaker Oceguera's bill, which we will hear about today, addresses some other concerns. After all of my research, it is clear to me that this issue is the root of the problem. Having been involved with Senate Bill No. 241 of the 72nd Session in 2003, it was my understanding the problem may have been solved then. I will not say this bill is guaranteed to solve all problems regarding construction defect laws. I do think it is a great first step. Everyone in the field that I talk to agrees. We must eliminate the guaranteed attorney's fees before we can truly solve the problem.

Chairman Horne:
This bill gives the judge discretion on whether or not to award attorney's fees to a prevailing party. Theoretically, either the contractor or the plaintiff could win the suit, and the judge may choose not to award attorney's fees.

Assemblyman Hansen:
That is correct. It is my understanding that it is called the American Rule, which is what virtually all lawsuits in Nevada deal with.

Chairman Horne:
What is the rationale to the person who prevails and does not get attorney's fees? Why would we adopt a law that says if you win, you may not be entitled to attorney's fees? What about a situation where a plumber is brought into an expensive lawsuit for something as simple as caulking around a tub, and the plumber wins? Mr. Hansen, I believe if you were that plumber, you would be incensed that the judge does not award you attorney's fees.

Assemblyman Hansen:
That is why the bill consists of a "may" clause. It will no longer be mandatory to provide the attorney's fees. *Nevada Revised Statutes* (NRS) 18.010 indicates that if the lawsuit was considered to be in bad faith or vexatious, the attorney's fees would not be awarded. For example, if I am sued, and the attorneys successfully prove that I failed to put caulking around a tub spout, I might lose the lawsuit because of negligence to provide the caulking. However, to award $20,000 in attorney's fees would be considered bad faith, unreasonable, and vexatious. Those are the circumstances that we are dealing with.

Chairman Horne:
With this bill, you struck "Any reasonable attorney's fees" from Section 1, subsection 1, paragraph (a). Additionally, you struck subsection 2, which read, "The amount of any attorney's fees awarded pursuant to this section must be approved by the court." That section does not say that it was mandatory. It sounds like it was giving the judge discretion on approving attorney's fees.

Assemblyman Hansen:
Exactly, and that is exactly what we want. We want the judge to be able to have discretion rather than how the law is currently reflecting the right of reimbursement, regardless of the absolute impact of the case.

Chairman Horne:
I believe you have misunderstood me. As I read it, the section being deleted does not say that there is a mandatory right to attorney's fees. The existing law states that it would have to be approved by a court.

Assemblyman Hansen:
Since I am not an attorney, I will defer this question to some other witnesses who are here to testify. Some of them are experts in the legal field and will address the questions much better than I can.

Chairman Horne:
Before we move ahead, Mr. Frierson has a question.

Assemblyman Frierson:
From your introduction, it sounds like your concern is with respect to the right to repair, which seems to have nothing to do with your bill. I am wondering whether there will be a connection made by other witnesses. It seems your main concern is with the inability to make repairs before a suit is filed. Your bill seems to go on a different path.

Assemblyman Hansen:
You are correct in the assumption that there are people present today, who will make the connection very clearly.

Chairman Horne:
You mentioned Bruce King.

Assemblyman Hansen:
I am not sure of the order to testify. Mr. King approached me first. I am sure there will be others wishing to testify as well.

Chairman Horne:
Let us get to the witnesses who can speak on the technical sense of the statute.

Bruce King, representing the Coalition for Fairness in Construction:
I am a resident of Clark County. Besides being the President of Pete King Nevada Corporation, I am the Chairman of the Coalition for Fairness in Construction, which is a statewide organization formed in 2000. I would also like to disclose that I am a standing member of the Nevada State Contractor's Board, although I am not here speaking as a board member. Also at the witness table is Mr. Craig Marquiz. Mr. Chairman, you may want to have Mr. Marquiz address your questions before I begin my testimony.

Craig Marquiz, representing Coalition for Fairness in Construction:
I am an attorney and general counsel for approximately 35 subcontractors in the Las Vegas metropolitan area. I am general counsel for the Nevada Subcontractors Association and the Coalition for Fairness in Construction. I deal with construction defect litigation issues on a variety of fronts, not only in the defensive action, but also in the general counsel capacity with insurance coverage issues. It is important for us to begin the discussion addressing the issues the Chairman raised, to provide some clarity. What essentially is the scope of A.B. 285 in the context of attorney's fees?

The issue was raised with respect to constructional defects under NRS 40.655. Let us first have an understanding that under Chapter 40 of NRS, there is a prelitigation process, which means the process occurs before a lawsuit is filed. The process begins by a homeowner claimant issuing what is called a Chapter 40 notice. In most cases, the notice is referred to as a shotgun notice. The lawyer who represents the homeowner issues a letter to the developer listing the various problems in the home, despite the requirements of NRS 40.645, section 1, paragraph (a). Once a builder or developer receives that Chapter 40 notice, he is obligated to provide the notice to each individual

subcontractor who performed work on the job. The subcontractors are then introduced into the lawsuit. They are then afforded the opportunity to go out and determine whether or not there are legitimate issues, and whether or not to exercise their right to repair. Here is where the process becomes essentially one-sided and goes against the issue of exercising the right to repair. In a construction defect setting, normally there will be a whole host of issues. Most of these are not actual issues. There are cases with legitimate issues. The problem becomes the costs associated in the prelitigation process, including the hiring of experts. Virtually all of the plaintiff's attorneys accept the cases on contingent fees, based primarily on 40 percent of the cost of repair. Through counsel and experts, homeowners are motivated to raise each and every issue imaginable, including nonlegitimate issues. The attorneys put together a laundry list of subcontractors, utilizing as many insurance policies as possible, increasing the likelihood of recovery. With this construction defect litigation process, and a declining economy, there are fewer and fewer people in business. Insurance policies are exhausted leaving no option for people to effectively repair legitimate issues. The reason being the subcontractors and developers do not control the process. The insurance companies control the process. The issue is not about merits. The issue is one of cost versus benefit to the insurance companies. The insurance companies will consider what it will cost them by providing indemnity coverage through a policy to defend the action, and what the potential risks and exposures are.

There is an expression that I tell my clients about going forward with a case. You being proven right is principle. Unfortunately, going through the exercise to be proven right will cost you. That is principal spelled another way. This Chapter 40 process is one-sided against the builders and subcontractors and, in reality, is against the homeowner. The costs and attorney's fees end up driving this process.

Coming back to the process of construction defects and prelitigation, it is important that you understand the technical reality. When attorneys are retained for homeowners, they are retained on a contingency basis. However, there is no such thing as contingent fees under the existing statutory structure of NRS 40.655. The reason is because they are in a prelitigation context. There is ultimately nobody to make the determination of the reasonableness and necessity of attorney's fees. The parties go through the prelitigation process and have all the fees and experts generated. The claimant will issue a settlement demand to the developers who will add their own attorney's fees, costs, and expenses. The developers will then issue pass-through demands to subcontractors. There is no position to address the merits of the claims. The issue becomes "do we want to cap our risk, buy our exposure, and pay our price to resolve this matter?" In a prelitigation context, both parties should be

obligated to bear their respective fees and costs. At the settlement table, the likelihood of Chapter 40 being held to 180 days will be enhanced. During that time frame, additional attorney's fees and expert fees are incurred. The fees and costs are driving the case.

Regarding the issue of attorney's fees, the key point is the issue of discretion on the part of the court. In the existing statutory scheme in Chapter 40, there is no absolute right for a case going to trial, which is discretionary with the court. There is other statutory basis such as NRS 17.115, as well as Rule 68 of the Nevada Rules of Civil Procedure, dealing with offers of judgment. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006), is a case that went into the mechanics between Chapter 40 permissive entitlements versus a statutory entitlement under Rule 68. Essentially, the Supreme Court says that NRS Chapter 40 has left discretionary the award of attorney's fees, as well as providing a penalty for failure to accept a settlement made under the constructional defect statutes. The Supreme Court case goes on to address Rule 68, and NRS 17.115, that imposes a mandatory penalty against a party who rejected a more favorable offer of judgment. The distinction here is that under Rule 68, and NRS 17.115, the court must award fees and costs if someone makes a settlement offer post-suit, and ends up doing better with the offer than what they had provided. For instance, a builder or developer makes a settlement offer of $1 million. Now say that there is an award to a plaintiff in a lawsuit, and the award to the plaintiff is less than $1 million. The party who extended the offer has essentially become the prevailing party. Statutorily they are entitled to their fees and costs associated with the offer. In the Chapter 40 context, the abuse of running up fees is pre-suit. The reason why it is permissive is because it is appropriate for the court to make the determination of what was reasonable and necessary.

The case of *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) guides courts in the decision-making process. Essentially, the court looks at the issues that are involved, the complexity of the issues, the counsel that is involved, and their essential effectiveness in prevailing on those issues. Therefore, when a judge is afforded the opportunity to evaluate the application for attorney's fees and costs post-suit, the court is given the discretion based upon the shotgun Chapter 40 notice, which asserted numerous things, adding up to millions of dollars in reported claims. Ultimately, at trial there is a result of perhaps only one or two cases favoring the claimant. The court is afforded the discretion to not award the claimant for bringing illegitimate issues.

The purpose of the statute of NRS 17.115 and Rule 68 is to ensure that legitimate issues that are tried will have a mechanism where parties can reasonably assess settlement possibilities, and make reasonable offers, with the

hope of legitimately resolving cases. In the prelitigation context of Chapter 40, there is no such incentive because the costs added defy the likely scenario of having the homeowners resolving their issues.

I will be more than happy to provide some additional insights as others testify about the practical impact of this legislation. Mr. Chairman, there is another nuance that you raised that I would like to touch on, which is the definition of a defect.

Chairman Horne:
That issue will be discussed in another bill. This bill has to do with attorney's fees, and I would like to keep it narrowly focused on that matter.

Craig Marquiz:
My comments will be on subject because they go hand-in-hand. When you are addressing what issues can be legitimately brought in the beginning of the process, it impacts directly how much time and attorney's fees will be spent in the process. I will reserve my specific comments for the other bill, but you raised the issue about why we are here. The definition of a defect is a significant part of the answer.

Chairman Horne:
We will get to that, but first, I am confused on how you outline NRS 17.115 and Rule 68. It seems to me that you were stating that as per Chapter 40, the attorney's fees and costs which are discretionary by the court are only pre-suit. Whereas, Rule 68 covered the post-suit. I am not sure how the statute would trump the rule. I do not see how Chapter 40 would not apply to post-suit.

Craig Marquiz:
The language dealing with prevailing parties in the context of a post-suit filing is only dealing with approximately 1 to 2 percent of cases that are not resolved through the settlement process in Chapter 40 proceedings. They ultimately result in a lawsuit where the parties are afforded their statutory rights under NRS 17.115 as well as Rule 68. Chapter 40 is in the context of prelitigation, and is where the attorney's fees essentially get stacked in the beginning of this process. Assembly Bill 285, as it is proposed, essentially says that if someone was going to come in for a settlement, the parties should bear their own attorney's fees and costs. In the event that a matter is not resolved in Chapter 40, and ultimately goes on to a lawsuit, the court has the discretion to review the full case from beginning to end taking into account all fees and costs. We must ensure that the fees and costs do not drive the show. We must make sure the process is kept intact with individuals meaningfully exercising their rights to repair. They should not be precluded from doing so

because the costs associated with the litigation are being driven by insurance companies.

Chairman Horne:
I would like to move to hear some brief comments from Mr. King.

Bruce King:
I began this process in 2003, and there was a bill passed which we called the "right to repair." It was a very good bill that gave the contractor the right to make a repair. With that bill, it was this Committee's intent that if a contractor made the repair, the contractor would not be subject to lawsuits. In the following two years, my company documented over 100 repairs with documented requests to have our name removed from defect cases. My company was not removed from any of them. Not one single time was my company ever released from a Chapter 40 lawsuit after making the repairs. Over that period of time, it became obvious that Chapter 40 probably caused businesses in the construction industry to make a business decision to not make repairs. In most instances, Chapter 40 cases exceeding two years past the warranty period have chosen not to make the repairs, because it did not make sense to make the repairs and still be dragged into a lawsuit. A company does not want to pay money to get themselves out of the process. Once repairs are made, the clock starts ticking again on the 10-year process. As it is currently designed, Chapter 40 simply does not allow a business in the construction industry to choose to make the necessary repairs.

Chairman Horne:
I need to stop you there, because I assume these will be the same comments you are going to make on Assembly Bill 401. We are discussing the framework on structural defects as described in Chapter 40 in general. I would like to focus on the attorney's fees and costs as outlined in this bill

Bruce King:
I would like to add therein lies the reason we have focused on fees and costs. We have turned this thing upside down. You gave us a great right to make a repair, and we went and made the repairs. We then ask ourselves, what is it that keeps the Chapter 40 cases coming at us? I submit to this Committee it is the money, not repairs. I made the repairs that I was asked to make. It was the intention of this Committee that if the repairs were made, we would get out of these Chapter 40 lawsuits. Every vehicle has been addressed in Chapter 40 short of fees and costs. Here we are today, again addressing fees and costs. I have lived with this for over a decade, and it is all about the money. I do not want to take up any more of your time, but I would ask that we can have three people provide their brief testimony. Since January of this

year, I have received 14 lawsuits. I have been out of the residential construction industry for 4 years. It does not stop. The cost will be approximately $250,000 for one quarter of the year. I cannot sustain this. This is plain and simply a jobs bill. We are asking for you to help us save our companies and keep the contractors in Nevada employed. At this rate, it is a poor business decision to keep my doors open and struggle as we are struggling in this economy. I would like to invite three very brief testimonies.

Chairman Horne:
You mentioned how despite making the repairs, you were still brought in to a lawsuit. However, Mr. Marquiz testified that there are other things to consider such as the indemnity clauses in contracts. Despite making the repairs, is there anything in the contracts that say you will be released if repairs are made? The way I understand it, a subcontractor signs an indemnity clause to the contractor, indemnifying the work. Therefore, if the subcontractor makes the repair, is there anything in the contract that says the indemnity will be released upon making the repairs? It sounds like if the language is not in the context, the problem is not that you have to pay attorney's fees and costs. It seems to me the fact is more about not being released to indemnify the suit despite making the repairs.

Bruce King:
The problem is that I would still have to go to court to demonstrate that the proper repairs were made. The judge would then make the ruling that would release me from the contractual obligation to indemnify the contractor. Also, the description of the required repairs is too vague. The description may indicate there is a water leak. Meanwhile, the water leak may involve the roof, the stucco, the drywall, or any other possible factor. When the contractor uses the shotgun approach, he is basically covering his bases that any of the subcontractors may be responsible. Therefore I would have to go to court to prove the water leak is not a result of anything that I did. Unfortunately, we are left to the courts to get us out of those suits. Therein lies the problem.

Chairman Horne:
Okay, let us hear from the three witnesses you brought here to testify.

Bruce King:
Thank you. We would also like to leave Mr. Marquiz up here to answer any technical or legal questions you may have.

Craig Marquiz:
I would also like to make one quick statement while we are waiting for the witnesses to come up, with respect to your last comment for release. It is

important that you understand in a prelitigation context, generally speaking, builders and developers are not allowing their subcontractors out until a final defect list is ultimately issued. Rarely are there instances where a claimant will release a specific subcontractor for a certain amount of money. In a limited context, there may be an issue of release if the specific subcontractor is able to pay a designated amount of money to have himself removed from the Chapter 40 mix. Generally speaking, unless the case is settled, there is no global release. Once settled, there is a global release. In a prelitigation context, the only way to get out of the suit is to settle. If the contractors do not settle, they will go on to a lawsuit. There is no way where a developer will release the subcontractors based upon the contractual indemnity language that exists.

Chairman Horne:
I guess the problem for me is that the subcontractors are not being released because the plaintiff's attorneys are failing to release them. They are not being released because the general contractors are not releasing them, even though the subcontractors may have made the repairs.

Assemblyman Sherwood:
Regarding your response to the Chairman, does the issue have to do with attorney's fees in prelitigation in Chapter 40 for contractors, whereas the rest of the civil litigations in Nevada are not guaranteed prelitigation attorney's fees? Is that the issue?

Craig Marquiz:
You are absolutely correct.

Norman Dianda, President, Q & D Construction, Inc., Sparks, Nevada:
I am president and owner of Q & D Construction. We will start our 47th year in business in May of this year. Q & D is a lot different than most contractors. We are one of the most diversified construction companies in Nevada and probably in the western United States. We do heavy highway work, civil engineering work, we build subdivisions, we build roads, and we build bridges. We also do commercial construction where we build hotels, hospitals, casinos, and condominiums. We have constructed the building you are sitting in here today.

I have forwarded to you some information and hard facts about how our company has been affected, which I will describe shortly. Meanwhile, I will read to you some of the letter I have submitted dated February 11, 2011 (Exhibit D). Construction projects are not just handed to us by government entities or private business. They must be earned by hard bid or negotiation with the owners. The low bidder gets the work and then must properly manage

the project to make a profit. There are no guarantees. Why is it that under Chapter 40, the plaintiff's lawyers are guaranteed attorney's fees? It is all about fairness. I want the system to be made fair to everyone involved. Construction defect cases should be treated like any other case under the law. Construction defect statutes are good in theory, but in practice they are broken. The only ones that win are the plaintiff's rich attorneys, who just keep getting richer and richer at everyone else's expense. I am tired of having my company being abused and taken advantage of just because that is how the system works. If contractors are to survive in the future, and consider providing residential construction, we need to do away with automatic attorney's fees for the plaintiff's lawyers. No one else is guaranteed their fees. Why are the attorney's fees guaranteed? This is all about the future.

I forwarded to you something that I would like to read now for everyone to hear. It is the statistics that reflect how Q & D Construction has been affected. I think I have a pretty impeccable record. [Read from letter dated April 8, 2011 (Exhibit E).] What I have read are real facts. I have prided myself through all these years to deliver the best product, and I have done that. I have been subject to a poor law. Thank you.

[Vice Chairman Ohrenschall assumed the Chair.]

Vice Chairman Ohrenschall:
Thank you very much, Mr. Dianda. Are there any questions?

Assemblyman Sherwood:
I know you have been in business for a long time in Nevada. Before the law took effect, how many defect lawsuits did you have, and how much was your liability insurance? Then, after the law took effect, how much have you paid in liability insurance?

Norman Dianda:
I have had no lawsuits, and our liability insurance goes up every year. I think you have heard some great testimony about how the insurance companies would rather settle these cases than take a hard stand to prove the case. As a dirt contractor, who builds roads and cuts subdivisions, what do I have to do with caulking around a shower spout or a roof tile that blows off? This is totally unjust, and we are never notified of the problem until the lawsuit has taken place.

Mary Davis, President, J & L Windows, Inc., Sparks, Nevada:
I am President of J & L Windows, and I started my company 28 years ago, as a single mother. I currently have over 300 Chapter 40 cases in process. I have

stacked some of them in a picture, which I have presented to you today (Exhibit F). In the last 4 years, I have probably gotten 6 Chapter 40 cases a week. I have actually shut down all operations because I can no longer take the time to tender these to insurance companies who refuse to defend my lawsuits.

In 2004, my insurance costs went from $50,000 per year to $250,000 per year, which I have paid since then. The policy carries a $25,000 deductible, which increased from a $1,000 deductible. The insurance company that provided insurance for me denies every claim. After having 3 summary judgments against my company, the insurance company finally decided to defend me, because they would be stuck with whatever the summary judgment may be. I cannot pass the company on to my son. I am shutting it down. Until this law is fixed, I refuse to do tract home building. I have turned down numerous contracts from many top contractors. In doing so, I have laid off an additional 20 people. I have since started a new company that will not sign an indemnity. It is just impossible for me to go forward like this. I no longer tender any one of my claims. I just put them in a box. This law is completely broken. Being a single mother, without a high school diploma, and losing my company after 28 years because of the law and not the economy, is outrageous. That is not what America is about. Thank you.

[Chairman Horne reassumed the Chair.]

Robert A. Fehling, President, Silverado Excavating Company, Reno, Nevada:

I currently have over 90 cases pending, involving nearly 400 claimants. I am one of the few subcontractors in the entire process that has third-party professionals verify the validity of my work, from a foundation compaction standpoint, and upon final grade. Drainage is the subject of approximately 99.99 percent of the cases I am involved in. The builder hires a third-party professional to certify that our drainage is correct according to the city plot plans. Even so, I cannot get out of any of these cases, and it is costing us a fortune. I have provided written testimony (Exhibit G).

The current statute continues to cause layoffs from good paying jobs with benefits due to the staggering number of claims the subcontractors and suppliers continue to be named in. The cost of legal defense, research, file review and reproduction, site inspections, and correspondence associated with noticing of inspections has forced businesses to offset this additional overhead by laying off employees. Of the remaining staff, some are forced to be dedicated solely to this process, and are unavailable to provide critical support services to our revenue-generating operations. It is not uncommon for key

personnel to spend significant portions of time, and even entire days, attending inspections. The outcome is nearly always the same. We find that subcontractors and design professionals are spending precious working capital to comply with this process, only to find the claims are completely meritless. Due to Nevada's economic decline, tens of thousands of construction jobs have already been lost and many contractors and suppliers have gone out of business. For those of us who currently remain, it is a struggle to keep the doors open and hang on to key and core employees in the hope of improving economic conditions in the near future. Market forces dictate little to no profitability on the small pool of work that is currently available. Therefore, it is a challenge to maintain sufficient levels of working capital required to keep our businesses open.

Chapter 40, in its current reform, is depleting what precious working capital remains by forcing contractors and suppliers to expend those funds to comply with this long and arduous process. Insurance carriers tend to settle the claims not based on merit but based on the estimated cost of defense. In so doing, this obligates contractors to pay their deductibles out of shrinking working capital. Without immediate reform, darker days lie just ahead for the building industry. Construction defect attorneys are filing new claims at an alarming rate. Nearly all of the claims are for properties constructed seven to ten years ago. They are intentionally being filed now in anticipation of reform to the current statute of repose, as was recently verified with the introduction of Assembly Bill 401, which proposes to change the statute of limitations from ten years to seven years, among other things. This is not an effective solution, by itself. In addition to the reduction from ten to seven years . . .

Chairman Horne:
Mr. Fehling, you are now talking about a different bill. I would like to stay with the issue of the attorney's fees.

Robert A. Fehling:
Elimination of the current method of plaintiff attorney's compensation is mandatory in order to save Nevada jobs. The construction defect attorneys are essentially stockpiling the thousands of residential properties in recent years past. As Nevada's residential market grew, so did our insurance premiums and deductibles. The effect is that we are essentially accruing unfunded liabilities now. Without reform, the insurance carriers elect to settle these claims, not based on merit but on the estimated cost of defense, which creates a demand in our working capital. If that does not put us out of business, many contractors will be forced to close based on the inability to purchase general liability insurance. There is only one carrier who will quote me. I have gone from approximately 12 carriers who will quote me to one. I just renewed my

policy a few weeks ago. As more carriers are refusing to underwrite in Nevada, due to Chapter 40, those that do are issuing much higher premium rates. I am currently paying three times the premium for residential work than the same work in nonresidential construction. Thousands more Nevada jobs are at stake, most of which are good paying jobs with benefits. Although we use the term jobs, what we are really talking about here are families. Without immediate reform to change the current format for attorney compensation, Chapter 40 is threatening Nevada families and is impacting local and state government.

In conclusion, we trust that you will pass this reform bill, and in doing so, you will likely save thousands of Nevada jobs. It will lessen the impact from additional home foreclosures, bankruptcies, and the loss of local and state government revenues generated from businesses, fees, and taxes. There will also be a savings to Nevada taxpayers by decreasing the judicial costs associated with the current process. Of equal importance is that by supporting this bill, homeowner rights are not being diminished. As mentioned by others in previous testimony, there are excellent laws that already permit homeowners to bring legal action against contractors if they are not able to settle their disputes outside of the legal process. It is not, and has never been, the desire of the contracting community to remove or diminish homeowner rights from seeking and obtaining relief for legitimate constructional defects. Under the current statute, it is extremely oppressive. The average case takes several years and is costing Nevada jobs. Homeowners end up without enough money to make repairs while enriching a few legal firms specializing in construction defects. This is not consistent with good public policy, which is the very essence by which our legislative and judicial systems should be governed.

Finally, we appreciate the enormity of your assignments this session. Thank you for your public service. As you consider our industry's testimony, along with other related published and unpublished information, we respectfully urge you to demand a vote in support of this reform bill. The bill is simply a win-win situation for Nevadans. As mentioned, we have tried many times to change this expensive and job-killing policy. The time for reform is now. I have a stack of letters from other contractors, which I will submit to the clerk (Exhibit H).

Chairman Horne:
We have been at this for one hour, and we have not yet heard testimony from the other side. I will allow 10 more minutes for testimony in favor of the bill. We will then switch over to the opposition.

Bruce Geschieder, President/Owner, Moana Nursery, Reno, Nevada:
In addition to owning three garden centers, I am the Chairman of the Reno Sparks Chamber of Commerce. [Read from written testimony (Exhibit I).]

I will quote a section from a typical letter sent by the lawyer who was retained by the insurance company. [Read passage from letter dated July 10, 2009 (Exhibit J), and then continued to read from written testimony.]

Brett Seabert, Owner, Tanamera Construction, LLC, Reno, Nevada:
I am the owner and Chief Financial Officer for Tanamera Construction, a Nevada general contractor and home builder. Like the others, we are struggling to keep employees on staff and keep our company alive. Currently, we have approximately 120 single-family construction defect suits, and a townhome project of 270 units that has been in litigation for 3.5 years. We pride ourselves on building quality homes and providing customer service. Of the 400 homes that are now in the litigation process, we were not contacted by the homeowners for repairs on any of them. On the townhome project, we are well aware of the litigious nature, and we are bending over backwards to keep those people happy. We recently replaced concrete in the entry area, and we are in discussions regarding another section. We had no idea there were any issues, but received notice from the law firm of Quon Bruce Christensen informing us that a lawsuit was filed. We are 3.5 years into the lawsuit now. There is so much money involved in this process now that it has become quite corrupt.

I will relay to you a brief section from an article in the *Las Vegas Review Journal*. This is following the raiding of the Quon Bruce Christensen Law Firm in 2008 by the Federal Bureau of Investigation (FBI). The investigation has been going on for quite some time regarding an alleged scheme to rig condo homeowner association board elections to place conspirators on the board, including some Las Vegas police officers who had pushed for lawsuits over construction defects that would go to participating attorneys and funnel repair work to associated companies. From a more recent article, federal prosecutors have identified 75 to 100 co-conspirators, including judges, attorneys, and former police officers at various levels of a massive fraud scheme involving Las Vegas homeowner associations. Some 20 to 30 targets of investigation are taking plea deals that will ensure their cooperation in the prosecution of as many as 2 dozen high level players in the scheme. The system is broken, and there is too much money in it for the plaintiff's attorneys. I urge you to level the playing field. Thank you.

Susan M. Cavallero, Vice President, Cavallero Heating and Air Conditioning, Inc., Carson City, Nevada:
Cavallero Heating and Air Conditioning, Inc. was founded 35 years ago by my father, who is in the hospital this morning. I agree with everything that has been said today. In addition, I have something pertaining to fees that may bring some clarification. What I will relay to you is a small case out of over 100 cases we are dealing with right now. There was a small home which was

built in 2002. We were paid $7,395 to install heating and air conditioning. In our industry, if there is a defect of any kind, we know about it immediately. They are cold or they are hot, and they do not wait 8 or 9 years to file a complaint. Yet, here we are. There are 17 alleged defects in this case, some of which are to clean heaters, debris around the air conditioner, and other electrical items. They demanded $17,480 for repair costs, which did not include fees of any sort. That is way over what it would cost us to rip the whole thing out and install a new unit. With attorney's fees and costs, the total demand came to $42,710. What is fair and right about that? Who is making this money? The homeowners are not making money. The contractors are going out of business because of this. On top of that, we have 2 insurance companies defending us, and we will have to pay a $2,500 deductible on one case, and a $5,000 on the other. It is not fair, and it does not work. We are all taking cuts. The attorneys on the other side need to take cuts too. Thank you.

Raymond M. Pezonella, President, Pezonella Associates, Inc., Reno, Nevada:
I have owned a geotechnical construction testing engineering firm in northern Nevada for the last 35 years. I hire 25 to 30 people during the construction season. I have not yet laid off anyone. I have kept everybody in my office. I received the most difficult notice that I could have imagined, on Thursday of last week, in a UPS envelope. I maintain Errors and Omissions Insurance (E & O), and the only way that I can operate my business is with this insurance. I have been told, as you have heard here today, about all the issues dealing with contractors. After being in business for 35 year, I was told by my insurance company that they will no longer be offering me the E & O insurance (Exhibit K). That is because of Chapter 40 claims. I have had 8 claims in the last year, which is not as many as others have testified to. Mr. Marquiz explained to you how the process works. We received a Chapter 40 notice, which is not even a lawsuit. I pleaded with the insurance company, explaining that I have not been sued. They still hold it against me because they are paying fees for attorneys. They must set aside money right from the beginning of receiving notice. It kills me as a business owner, because I will not be able to obtain insurance. If I do not obtain E & O insurance by May 6 of this year, 25 families will go home unemployed after my door is shut. That impacts me tremendously. Thank you for your time and understanding. This will make a huge difference to a small business to be able to keep people employed. Thank you.

Chairman Horne:
For those of you in favor of A.B. 285, who did not get a chance to testify, I apologize. This is a tough decision for a Chairman to make, but there comes a time that I have to cut off testimony in the interest of time. There are a total of four bills on the agenda today, and one of the other bills is constructional-defect

related. We will now begin to hear the testimony of the opposition. Please come to the table.

John Griffin, representing Nevada Justice Association:
Mr. Chairman, and members of the Committee, I am here today with Charles Litt on behalf of the Nevada Justice Association in opposition to A.B. 285. The opponents have spent a great deal of time today talking about the construction defect process. Respecting the Committee's time, I will speak only to the specifics of the bill. This bill very simply takes money from homeowners. It is not about litigation, the judicial process, or lawyers. It is about putting homeowners on the losing side of a simple math problem. I will speak briefly about the bill. I will turn the balance over to some homeowners who wish to testify.

The precept that a purchaser of a defective home should be made whole was a central basis for the formulation and enactment of NRS 40.600 in 1995. Assembly Bill 285 does violence to the common sense principle by eliminating a homeowner's current statutory right to collect reasonably incurred attorney's fees as damages when successful in proving the home was defective. When I say this bill puts homeowners on the losing side of a simple math problem, this is what I mean. Current law allows a prevailing party to recover reasonable attorney's fees in a construction defect case. For example, let us say a homeowner is a victim of a construction defect, and is awarded $40,000. If the homeowner hired an attorney and paid $10,000 in attorney's fees, the homeowner could request the court to award the attorney's fees of $10,000 in addition to the $40,000 in damages already awarded. That is the current law. The effect of this bill would be to remove that provision and have the homeowner's attorney's fees deducted from the damages awarded. In my example, the homeowner would be left with only $30,000 in court awarded damages to fix his $40,000 defect, which would prevent homeowners from being able to properly repair their home.

You have heard some inaccurate representations today, indicating that nowhere else in Nevada law is there this statutory entitlement. I submit that is incorrect. There are a number of areas in Nevada law where a similar provision is in place. The best example is Nevada's mechanic lien statutes. In NRS Chapter 108, a contractor is statutorily entitled to its attorney's fees and costs when suing for money owed on a project. Without that statutory attorney's fees right, contractors would have to pay their attorney's fees and costs out of their award for the outstanding balance on a mechanic's lien. Without this statutory provision, contractors would be on the wrong side of the math problem and could never be made whole. If contractors should be made whole in a mechanic's lien example, why should homeowners not be made whole when

suing to repair their defective home? I will conclude where I have started. This bill simply puts homeowners on the losing side of a math problem. There is no reason to steal from homeowners in what for many is their biggest and most important investment, which is their home. I am available for any questions.

Charles Litt, representing Nevada Justice Association:
I just have a few comments before moving to homeowner testimony. I reside in Clark County where I am a practicing attorney. Our law practice includes representing homeowners in construction defect disputes. With regard to A.B. 285, I would like to make some clarifications. The current law does not provide that attorney's fees are automatic. *Nevada Revised Statutes* (NRS) 40.655 provides that it must be proved that a construction defect exists in order to be entitled to attorney's fees. The attorney's fees are awarded by the judge at the court's discretion, in conclusion of the trial. The judge is required to deny the attorney's fees to the homeowners and award attorney's fees to the contractors if one of two things happens. If the homeowner is deemed to have acted unreasonably in the Chapter 40 process before litigation, he does not get awarded attorney's fees. The homeowner and his counsel must beat the developer's best statutory offer at trial. Ultimately, the homeowner must prove a construction defect, establish reasonable actions before filing suit, and exceed the best settlement offer conveyed by the developer, before trial. Attorney's fees are clearly not automatic. We would like to have five witnesses testify.

Chairman Horne:
We heard testimony stating that many of these complaints are shotgun style. In other words, the complaint is not being articulated as to what the specific defect is. I heard conflicting testimony because someone had stated that he had never been called to make repairs on a complaint. Someone else said that he made repairs and yet remained in the suit. In those scenarios, regarding attorney's fees, is it the case where all the fees incurred during prelitigation in Chapter 40 are moved over regardless of the right to repair?

Charles Litt:
That is a great question. First, I will clarify some things that Assemblyman Hansen raised with regard to the Chapter 40 process. If a contractor is not given the right to repair, the lawsuit is subject to immediate dismissal upon motion from the contractor. As Bruce King stated, there is a very strong right to repair. Secondly, Mr. Hansen stated that the lawyer said that he had to specify what repair he was going to make before he would be permitted to make the repair. That was wrong for the lawyer to do that because that is not what the law is about. The law states the contractor can make any repair he would like. Thirty days after the repair is completed, the

contractor is required to provide a statement to the homeowner indicating what repair was made so that the homeowner, and his counsel, can decide whether the problem has been solved. With regard to attorney's fees, before litigation, if the case is resolved by way of compromise, generally there is some award of attorney's fees in addition to the cost of repairing the home. In most instances, the subcontractors are being sued by the developers. Even when the subcontractor makes the repair, the developer keeps the subcontractor in the case to seek award of developer's fees and costs from the subcontractor.

I represent homeowners in southern Nevada, where subcontractors have come to me. I do not have a single issue with regard to anything the subcontractor may have done wrong. The developer sued them and will not let them out of the case until they contribute financially to the settlement. Developers have treated subcontractors very unfairly based upon indemnity contracts, which happen to be banned in the State of California. To be clear, homeowners do not sue subcontractors. Developers sue subcontractors, as the Chairman pointed out. Before trial, the calculation of attorney's fees is by compromise and agreement among the parties. Post-trial, it is awarded by the discretion of the court.

Chairman Horne:
In post-trial, how is that processed? Does your office submit an accounting to the court requesting a certain amount of fees if you are the prevailing party? Do you submit the accounting even if you were not the prevailing party? Give me an idea on how your fees are determined.

Charles Litt:
In post-trial, the prevailing party submits to the court an accounting of costs in an affidavit reflecting time spent, requesting attorney's fees. The defendants in the case will file countering papers arguing the costs and fees should be less. After the review of all statements, the judge will make a discretionary award of attorney's fees and costs.

Chairman Horne:
Is that if the plaintiff prevails?

Charles Litt:
Correct. If the homeowner is not the prevailing party in the action, the process is reversed. The homeowner will be obligated to pay the attorney's fees and costs of the contractor, while not being awarded any attorney's fees and costs himself.

Chairman Horne:
There are no further questions. Which one of your witnesses would you like to have testify first?

Ralph Walker, Private Citizen, Reno, Nevada:
We only have our house because of our attorney. Because of the damages to our house, we would not have had enough money to pay the attorney and make the necessary repairs. Our house was purchased in November 2001. Within two years, we started noticing substantial cracking of the walls, spaces where the doors were, along the window lines, across the ceiling, in the concrete outside, and the floors actually sloped six inches from one end of the house to the other end. All I wanted to do was get it all fixed. I contacted the contractor and sent pictures. He tried to work with me to figure out what was going wrong. Ultimately, I hired a contractor on my own. The conclusion was the soil was improper for 15 feet of fill. It should have been raised only 1.5 to 3 feet, and the house would continue to settle until something was done. There were 95 helical piers put around the perimeter of the house, and through part of the interior of the house. It took four years to complete these repairs, and the cost was over $400,000, almost exceeding the original cost of the house. Taking into account those damages, I received $400,000 in damages to cover the cost of the repairs, but I have to pay up to $150,000 to an attorney. Therefore, I would not have the ability to pay for all of the repairs. In our case, the contractor would not be able to install some of the piers. Yet, all of the piers were necessary to complete the job properly. If we could not have made the repairs, what would we do? What would we have done had we not had an attorney who was able to take his fees through the contingent fee process? We would have had to take the $400,000 award, pay off the $250,000 mortgage, pay the attorney for up to $150,000 in attorney's fees, and we would have had to abandon the house. If it continued to settle, the building inspectors would not have allowed us to stay in the home.

Our attorney, Bob Maddox, did a great job for us. There was only $1 million in insurance coverage. There were 13 houses this problem was affecting, and the special master did not want to deal with the worst problem, which was our house, until the end. At that point, all of the insurance money was gone. Bob came up with an idea to sue the contractor's various businesses, which brought us some money. He also thought to sue the engineering firms that supposedly certified the compression tests for the soil on which our house was built. That did work, and we finally received a recovery. We never could have done it without the contingent fee system, which was in place. We still do not have the landscaping done and will have to speak with the gentleman from Moana Nursery, because the house is stabilized now, and we are ready to complete the outside after 5 years in litigation. We did submit a Chapter 40 claim, and the

contractor told us he could not do anything about it. I will be happy to answer any questions. [In addition to Mr. Walker's oral testimony, written testimony was provided (Exhibit L).]

Assemblyman Sherwood:
Aside from the engineer that your attorney brought in, were there other subcontractors which they brought in? If so, who were they?

Ralph Walker:
Our contractor sued everyone who even looked at that area. We are up in the Hidden Meadows area.

Assemblyman Sherwood:
Did your attorney receive money from everyone who ever looked at the house, such as the window contractor, or the tile contractor? Were those fees found and then passed on to you through the Chapter 40 law?

Ralph Walker:
Not really, because the amount that we settled for was just covering the landscaping that had to be torn out in order to place the helical piers. We basically recovered the money to install the helical piers. Any other defects found by the engineers we essentially did not receive recovery for.

Assemblyman Sherwood:
We know what you recovered the money for, and I am glad that you had everything repaired. You received money from all the other subcontractors who were dragged into the Chapter 40 pre-discovery phase.

Ralph Walker:
Not really.

Assemblyman Sherwood:
Perhaps Mr. Litt can answer that.

Ralph Walker:
Let me explain. The only money that became available to us was approximately $150,000 from an engineering firm and $250,000 from Stantec. I may have the amounts reversed. The $400,000 settlement was funded primarily by the two engineering companies.

Assemblyman Sherwood:
Would you agree that the other subcontractors did not need to be there?

Ralph Walker:
Did they need to be there? Well, yes, we had some other defects. Would we have pursued them outside of the foundation settling? We probably would not have.

Assemblyman Hammond:
I understand this particular case was egregious, and I am glad that it worked out for you. Since we have had the Chapter 40 statute, how many cases have you actually taken to court under Chapter 40?

Charles Litt:
We have filed numerous litigation matters. I would estimate it to be over 100 cases. We have begun two trials, both of which were resolved before verdict.

Assemblyman Hammond:
Several cases were resolved before court. The claim was paid and the case ended. Is that correct?

Charles Litt:
Yes, exactly. Mediation is required under Chapter 40 statute. The parties go to mediation, and the discussions revolve around reasonable costs of repairs, and reasonable allocation of attorney's costs. Once everyone is paid, the homeowner can implement the repairs. The vast majority of cases settle by agreement among the parties, before trial.

Assemblyman Hammond:
One hundred cases since 1995 does not seem like a lot, but I suspect there were many other cases settled before court. Were there quite a few?

Charles Litt:
We settle most cases before trial. We settle many cases before a lawsuit is even filed.

Chairman Horne:
Mr. Litt, who is your second witness?

Dan Roggemann, Private Citizen, Sparks, Nevada:
Thank you for listening to me this morning. My wife and I bought a home in Sparks, and much to our distress, after approximately a year, we began to see cracks in the ceiling, walls, and doors that would not open or shut properly. In talking with my neighbors, we learned that there was approximately 10 to 15 feet of fill, which was removed from the mountain above us to flatten the

street out for our building lots. Each of my neighbors addressed the developer individually in writing, and verbally. We tried to meet with them, and had no success in doing so. We kept hearing from the developer that this was normal settling. It was not normal, and things kept getting worse. I have included pictures of the floors and wall, along with my written testimony (Exhibit M). Prior to the litigation, one of the neighbors had to move from his home because it moved so much that the plumbing and sewer lines broke, resulting in sewage underneath the slab. We were referred to a law firm called Robert C. Maddox & Associates in Sparks. We provided them with all of the documentation and information we had gathered. They agreed to represent us. We received approximately $200,000 to repair our house. We had to completely move out of our house because they had to tear up the whole slab and replace the foundations. I know there were subsequent faults found with the roof, and the roofing contractor made the repairs. There were other defects also found. Our main concern was the fact that, ultimately, we were unable to live in the house because to do so would have been unsafe. We had to move out of our house for approximately six months while it was being torn apart and rebuilt, with a new foundation, new piers under the slab, rebar, et cetera. We have been back in the home approximately 2.5 years now, and it seems that the repairs were successful. We were fortunate that we had a cabin in Montana that we could stay in while the house was being repaired. However, if we would have had to live in a motel, we would have been out quite a bit of money. We did consider bulldozing the house and selling the lot because we were so fed up with the developer and contractors. We stuck it out, and we are happy now. I can tell you that without the law firm assisting us, we would have gone nowhere. We would have probably ended up bulldozing the house. Thank you.

Chairman Horne:
I do not see any questions.

Charles Litt:
I would like the witnesses in Las Vegas to come forward to give their brief testimony.

Chairman Horne:
We can hear from two witnesses.

Jack Delp, Private Citizen, Las Vegas, Nevada:
I represent a homeowners' association. I am a retired engineer, and I have worked for the government for over 30 years in the construction management of large water projects. Tapatio II is the homeowners' association that I represent, and I have been on the board since 2001. In 2005, cracking in

the walls and floor of a home was brought to our attention. This resulted in the review of other homes having similar problems. Sinkholes were found along the foundations. Our management company was contacted. I contacted the builder, who called a meeting at the site with the insurance company. We actually had two meetings to review the site, which took approximately 18 months. After inspection, the builder and the insurance company stated that it was just normal settlement and took no further action. We found cracking in approximately one-third of the 73 homes in the community. We looked for recourse and hired an attorney who practiced in the construction defect area. For the next 18 months, we went through an evaluation process to determine the cause of the settlement and reviewed many records. As an engineer, I knew there was compaction, and I tried to get information from the City of Las Vegas. I talked to the people who performed the testing, but they were in litigation and would not provide me with the information. We met with the attorneys, and after 18 months, other defects were found as well. They had to install helical coils in approximately 10 homes. The attorneys worked with the builder and his insurance. Since building the homes, the builder went out of business, and the contact was mostly with various insurance agents. We finally reached a settlement just prior to the trial date. We accepted a settlement which was less than the estimated cost, because we thought it was best to move forward in order to get repairs made and to keep people in their homes. We tried every effort to work with the builder first, but the builder was out of business, which led us to deal with the insurance companies. We settled for less in order to repair our homes.

Chairman Horne:
I see no questions. Thank you. I believe we have one more person to testify in opposition of A.B. 285.

Dee Hopper, Lynch Hopper & Salzano LLP, Las Vegas, Nevada:
We actually have a total of three people to testify.

Chairman Horne:
For clarification purposes, I see three people sitting at the table now. You three people will be the last ones to speak.

Dee Hopper:
I am not going to be speaking. I am here to introduce them.

Amie Webster, Private Citizen, Las Vegas, Nevada:
I am a homeowner in Clark County. My family and I have been living in the home for approximately three years. Upon moving in, I was disturbed about how long it took for both hot and cold water to flow through the house. We

had to leave the water running for quite a long period of time. We discovered a small leak at a spigot outside which was causing damage to the stucco and drywall. The plumbers told us that we had Kitec plumbing, and there was nothing they could do to repair the problem due to the fittings installed in the original plumbing of our home. Fortunately, we were able to join the class-action lawsuit, and the attorneys were able to prove that there was a defect with the plumbing. My home has now been repaired and replumbed at no cost to me. If the laws were any different, I would not have been able to pay any attorney's fees, or to have my home repaired. I am here to ask that you vote no on A.B. 285 so that homeowners will be able to have their defects corrected without having to incur the costs.

Assemblyman Hammond:
After you discovered the leak, you said you hired a plumber who was not the original plumber of installation. Is that correct?

Amie Webster:
That is correct.

Assemblyman Hammond:
Did you contact the builder to ask him about making the repair before you found out about the class-action litigation?

Amie Webster:
No, I did not.

Assemblyman Hammond:
The reason I ask is because I had a similar situation in my home. I went on vacation and came back to a leak in the wall behind one of the bathrooms. I contacted the homebuilder, and he took care of it right away. I understand what you are saying, but was just wondering whether you contacted the builder at all.

Amie Webster:
No, I personally did not contact the builder. As the plumber explained to me, the problem was the chemical make-up of the fittings. I believe that the Committee was provided some examples of some of the fittings (Exhibit N).

Assemblyman Hammond:
I am wondering how many times people are not contacting the builder who may solve the problem.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I live in Sun City Summerlin Community Association, Inc. Although I do not see any of my neighbors here, I am sure they would be had they not been made whole by Kitec. There were 7,779 homes repaired thanks to the good work of the lawyers. I would never had known what the problem was with my piping, as it slowly decreased the flow of water over the years to the point where I was unable to fill my bathtub without waiting for 45 minutes. In my condition, it was rather difficult for me to take a shower, as I am in a wheelchair. Without the lawyers, I would have never been made whole. With regard to contacting the developer, I found a vent in my roof which was attached to nothing with air conditioning going nowhere. I contacted the developer and was told to sue them. I went a step further and wrote a certified letter to the home office and asked what was going on. They decided to react, and authorized the repairs. Even though I sent them a bill for $100, they sent me $300. I appreciated that.

The point that I am trying to make is, that if it were not for the lawyers, we would never have been made whole. Every home in Sun City Summerlin had a plumbing defect. Not all of them have been made whole because of the games being played in court. My home is also in another litigation involving a weed screen. It is being held up in the Nevada Supreme Court. I do not know why, and I am not a lawyer, but I need to be made whole because I put a lot of money into my house. Something is wrong when a lawyer has to sue the developers to be made whole. I was shocked to hear that the goings-on of a homeowners' association, which had a lawyer and police involved with fraud, in defect lawsuits that did not exist, was brought into this hearing. That was the fault of the Nevada Division of Real Estate, and a fault of the system within the homeowners' association. It has nothing to do with defect litigation. Thank you for your time.

Assemblyman Hammond:
Mr. Litt, are all five cases that we heard today cases that went to court?

Charles Litt:
I believe so. I am not counsel for all five witnesses, but listening to their testimony, I believe they all went to court.

Assemblyman Hammond:
There are several people that we did not hear from whose cases did not go to court. Is this correct?

Charles Litt:
Yes, absolutely.

Chairman Horne:
Those who are in favor or in opposition, who did not get an opportunity to testify, we have your position on the sign-in sheets. Additionally, if you wish, you may submit a letter by email, which we will show as part of the record. I have not yet called for the neutral position. Is there anyone here or in Las Vegas who is neutral to A.B. 285? I see none and will now close the hearing on A.B. 285.

[A recess was called at 10:04 a.m., and the meeting reconvened at 10:16 a.m.]

Chairman Horne:
We will now open the hearing on Assembly Bill 401.

Assembly Bill 401: Makes various changes concerning constructional defects. (BDR 3-382)

Assemblyman John Oceguera, Clark County Assembly District No. 16:
I am here to introduce Assembly Bill 401. I have a few items I would like to discuss this morning. First, I will bring to your attention a binder, which may also be found on NELIS (Exhibit O). By way of introduction, I have been in the Legislature since 2001 and have worked on this issue since then. In 2003, I was intimately involved in the negotiations that resulted in what we call the "right to repair." I have been involved in the process ever since. In listening to the earlier testimony, I believe there are some concerns. I have composed this binder to provide an overview of the body of work that has been invested in this law since its enactment.

Tab one of the binder contains the bill. Tab two contains the legislative timeline. The Legislative Counsel Bureau (LCB) constructed this for me to provide the Committee with a summary of everything that has been enacted since 1995. There have been some major bills that have changed Chapter 40 in 1995, 1997, 1999, and 2001. Senate Bill No. 241 of the 72nd Session, in 2003, consisted of some major revisions. In 2005, we agreed to a two-year stand-down, however, we did make one small revision in 2005. There were no major revisions in 2007 and 2009. Tab three in the binder describes each individual section of the bill. The chart is broken down by year, and 2005 was not listed for its small revision. You can see the progression of changes in each section. For example, based on the discussion in the last hearing about defect, you can find the category regarding constructional defect on the second page under *Nevada Revised Statutes* (NRS) 40.615. It shows the original definition in 1995 and some major changes in 2005. You can review each individual section to determine the changes that have been made. On page 5, under NRS 40.645 for notice of defect, you will see that every year it has changed

substantially. There are two pages of changes. I will not go through them all, but there are 31 pages of examples of changes. A modification in my bill, which was discussed earlier, is regarding statute of limitations. Page 31 shows the progression of all the amendments on that subject. Tab four shows the statute of limitations and repose, as directly related to A.B. 401. This is a report which was prepared by the Nevada Justice Association and is basically a compilation of what occurred in other states. Prior to the 2003 session, hundreds of hours were invested to make major changes to Chapter 40 during the 2003 session. The report was originally prepared in 2003. It was revised in 2009, and again this year. Looking at page three of the report which discusses the time period on repose, if my bill is enacted, making the limitation period 7 years, we would be listed as the second lowest in the country. The report is currently showing Louisiana at 5 years, and South Carolina at 8 years. With the enactment of this bill, Nevada would be between them with a 7-year limitation. There are some states at 10 years, and others showing 15 years. Some states do not even have limitations. Some states have increased their limitations, while we are decreasing. Lastly in the binder is a list of all of the construction defect Supreme Court decisions since enactment in 1995. A tremendous amount of judicial resources have been applied to this law in the last 10 years. There is a large body of case law surrounding Chapter 40, which is fairly important.

Why do we have Chapter 40 in the first place? I believe it was a remedial response to an enormous amount of construction defect cases during a time of tremendous growth in Nevada, from the mid-1990s to the mid-2000s. There is an important fact to remember, as cited in a number of cases, the first being *Calloway v. City of Reno*, 113 Nev. 564, 939, P.2d 1020 (1997). Nevada is facing a tremendous surge of new home construction. Many families are faced with the decision of buying a new home. The purchase of a home is often the most important economic decision these families will make. Such a family can already assert express and implied warranties to recover from a builder or a vendor for defects in new construction. Too often, however, recovery against a builder or vendor is thwarted.

What you have in front of you is a package of reforms that will enable the homeowners to access the justice system, and will provide some of the relief the contractors are seeking. Section 1 of the bill is fairly simple. It is derived from Senate Bill No. 349 of the 75th Session. It provides that if construction exceeds the standard and applicable law, there is a rebuttable presumption that it is not a construction defect. This was requested by the contractors last session, and I have added it to the bill. Section 2 was touched on in the previous bill's hearing. This section covers the prevailing parties getting paid. I believe it was fairly clear in former versions of Chapter 40, but I believe this

makes it crystal clear that attorney's fees are paid to the prevailing party. Sections 3, and 5 through 8, cover the new 7-year statute of repose. As you know, repose is the outside limit, and the statute of limitations begins when you discover the defect or problem. This bill allows for a 3-year statute of limitations. In the last hours of the last session, we worked on this problem. Although no bills passed, there were tremendous amounts of time spent on this subject. I submitted a study of this problem in which former Chairman Anderson concurred. However, the Committee could not come to an agreement, as you have seen so many times before with this issue. I offer an amendment to the bill, asking you to look at these issues as well.

Finally, after discussing all that we have done, I want to clarify further the paper I am holding represents a timeline of what actions I have personally taken in this process. It begins in June of last year, where there were meetings with the Coalition for Fairness in Construction. In August, there was a meeting with Mr. King. In September, there was a meeting with the Fairness in Construction group, and a meeting with Mr. Dianda. In October, I had a meeting with the Coalition. In January I sent a letter to the Coalition. In late January, there was another meeting with the Coalition. In February, there was a meeting with Mr. Griffin. In March, I had a meeting with Mr. King. That is just a small part of the emails, phone calls, texts, et cetera.

Mr. Chairman, I am not here to tell you that we have an agreement, because we do not. However, I can tell you that both sides are equally unhappy. Sometimes if both sides are equally unhappy, it means we are getting close to getting something right. I do believe you will hear the Coalition say this is not enough. You may see the Justice Association say that this is too much. Maybe we are close, and I will offer my assistance to have these parties meet. I am well aware of the deadlines, but they may meet in my office at your discretion to try to find a compromise. Over the weekend, I had discussions with both parties a number of times with no resolution. I believe we are in the direction of reform, and it is helpful. We are absolutely putting in the time and effort it takes to make a difference.

Chairman Horne:
Thank you. Are there any questions for Mr. Oceguera pertaining to the bill?

Assemblyman Frierson:
I am presuming that at some point, we will hear clarification on the difference between limitations and repose.

Assemblyman Oceguera:
Repose is setting an outside limit, with an absolute ending point. In this case, it is seven years. The statute of limitations begins when the defect is discovered, and with this bill it is three years to begin the process.

Chairman Horne:
Perhaps we can have someone try to put it into laymen's terms for everyone else. I do not mind having a lawyer from each side come up to explain the differences. I also have questions about how the bill will operate in that regard. Is there anyone in particular that you wish to call, Mr. Speaker?

Assemblyman Oceguera:
I believe we can have Mr. Litt come up, along with a few others.

Chairman Horne:
Mr. Litt, can you begin by answering Mr. Frierson's question. Also, for the benefit of the Committee, please keep in mind that only a few of us are attorneys. Additionally, there are nine brand-new freshmen. I am the only one that was here in 2003.

Charles Litt, representing Nevada Justice Association:
The difference between the statute of repose and the statute of limitations is simply this; the statute of repose is the most amount of time the homeowner can take to file a claim. Under Speaker Oceguera's bill, that would be 7 years. Under the current law, it could be as long as 12 years. The statute of limitations simply provides that if you discover a problem, you have to file within 4 years. Therefore, if someone discovers a problem with his home in the second year, he would have to file a claim on that problem within 4 years. If you get to 6 years without filing a claim, and you are within the outer limit, you lose your rights. Statute of limitations is your deadline to file, once you know of a problem.

Chairman Horne:
It is possible to discover the problem, but by the time the claim is filed, it could be outside of the statute of limitations, correct?

Charles Litt:
Yes, exactly.

Chairman Horne:
Is that including injury to property and to persons?

Charles Litt:
Yes.

Chairman Horne:
All right, please proceed with your testimony.

Charles Litt:
On behalf of the Nevada Justice Association, and the thousands of homeowners our members currently represent, we offer the following statement regarding A.B. 401. The Chapter 40 statute enacted in 1995, and last amended by compromise among homeowners and contractors in 2003, has served to protect the interest of homeowners and contractors by guaranteeing contractors the right to repair any home before litigation is pursued. As Bruce King stated, "A right to repair." It provides homeowners with a mechanism to have a defective home repaired if the contractor does not comply. According to the Southern Nevada Home Builders Association, as set forth on their website, more than $65 billion in new homes have been sold under the protection of the Chapter 40 statute. It is the largest construction boom in our state's history. There is no more compelling evidence that Chapter 40 has not been a burden on new home construction. No interest group has suffered more in Nevada during our tough economic times than homeowners. Nevada leads the nation in foreclosures, and the majority of all mortgages in our state are under water. We do not believe that it is time to make it more difficult for homeowners to get a defective home repaired. In the interest of compromise, and the hopes that compromise will allow the Legislature to focus on tackling the budget crisis and solving the many problems Nevada faces, the Nevada Justice Association does not and will not oppose A.B. 401.

Chairman Horne:
Speaker Oceguera said there are aspects that you do not like.

Charles Litt:
What we dislike most is the seven-year statute of limitations. A big reason for that is because it makes Nevada have the second shortest time limit to file a claim in the nation. Las Vegas has been ranked as the number one most over-built city in America. There are thousands of new homes that have been completed, unsold, and still vacant. The date of completion determines when the statute of repose starts running, so we do not believe that now is the time to be shortening the statute of repose, with the clock ticking on so many unsold homes.

Chairman Horne:
What is it about A.B. 401 that you like?

Charles Litt:
The clarification to the definition of defect addresses a concern that was raised by contractors in the last legislative session. We are happy to provide that clarity. With regard to the prevailing party on attorney's fees, it makes statutory what is governed by a current process referred to as an offer of judgment. This means if the developer makes a statutory offer of judgment before trial, and the homeowner does not do better, he does not get his attorney's fees and costs after trial. They will have to pay the attorney's costs and fees of the contractors. By putting this into statute, it memorializes every current case in law, when the developer makes the offer of judgment. We do not think that is fair. We feel the developer should have to make their best offer before trial. In the spirit of compromise, we can live with that.

Chairman Horne:
In defining what the prevailing party is, would it include exceeding what the offer of judgment is?

Charles Litt:
Exactly.

Assemblyman Hammond:
In your testimony, you claimed that because of the number of homes going up, and the amount of money going into the homes, that it does not reflect the hurt or harm that has come upon these contractors or subcontractors. Is that correct?

Charles Litt:
Yes, that is correct. What I was saying was that $65 billion in new homes were sold under the Chapter 40 statute, which was the largest building boom in Nevada's history. Developers literally built more homes than there were buyers for. We do not believe there is evidence that Chapter 40 is a burden on new construction, given that the largest building boom in Nevada's history occurred under the Chapter 40 statute.

Assemblyman Hammond:
I have a hard time with this because we are in 2011, and the statute of limitations is 10 years, therefore homes that were built in 2000 may have had litigation 2 or 3 years ago during the recession. I believe some of those companies are now hurting. Would you agree with that?

Charles Litt:
It is absolutely true. The construction industry is hurting tremendously. There is no doubt about that.

Assemblyman Hammond:
Well, it is not just hurting the construction industry, but how many Chapter 40 cases have you heard of in 2007, 2008, 2009, or 2010 of homes that were built in 1999, 2000, 2001, or 2002? Are there quite a few?

Charles Litt:
Generally, cases are not filed in 10 years. They are normally filed much sooner. I would say that in my experience, the typical case is filed in 5 to 6 years after problems first start arising.

Assemblyman Hammond:
Some of those cases are from houses built in 2002 or 2003, and are still going on now?

Charles Litt:
Yes, it does happen.

Chairman Horne:
Are there any other questions for Mr. Litt? I see none. Who here wishes to testify in favor of A.B. 401?

Ryan Bauman, representing Nevada Contractors Association:
Our association is comprised of some of the oldest and largest contractors in Nevada. We employ tens of thousands of contractors in Nevada. I would like to go on record in saying we support this bill.

Michael D. Hillerby, representing JELD-WEN, Inc.:
We have been talking with Speaker Oceguera along with other members of the Coalition for Fairness in Construction, hence our decision to sign in support of the bill. Speaker Oceguera has met with us several times and we continue to work together. Hopefully the bill will improve as it moves forward allowing us the opportunity to continue our support. I am sure that members of the Coalition will discuss specific and general issues. I would like to discuss one particular issue that involves JELD-WEN, Inc., a third-generation, family-owned, window and door manufacturer. They are one of the largest suppliers of windows in the southern Nevada homebuilding market. We are specifically interested in language which would address products that have an express warranty. I will give you an example. JELD-WEN's very popular vinyl windows have a lifetime warranty. We are looking for some specific language in Chapter 40 that would prohibit a Chapter 40 claim or other litigation until the homeowner or developer has exhausted an express warranty on a product. We will continue to work with Speaker Oceguera on that issue. We were asked whether the existing homeowner's warranty language covers that issue. The

definition of a homeowner's warranty in NRS 40.625 does not include product warranties. It only talks about a warranty or insurance type of product that is purchased by or on behalf of the claimant. We will need to change that definition, which probably should be shown in another section which specifically precludes the filing of any claims until an express warranty is exhausted. We would like the opportunity to repair any problem, should there be one, in a home. To my knowledge, JELD-WEN has never had a judgment against it in Nevada. They include a very good warranty, and will send factory representatives out to make the repairs. Just like much of the testimony heard previously, they have been named in a number of these actions and have spent considerable amounts of money to get out of these types of claims. I would be happy to answer any questions.

Chairman Horne:
Have you discussed your proposed amendment with Speaker Oceguera?

Michael Hillerby:
Yes, we have. We are continuing discussions about that issue.

Steve Holloway, Executive Vice President, Associated General Contractors of America, Las Vegas, Nevada:
In the spirit of compromise, we signed in favor of this bill. I have just a few comments to add. Regarding the section about construction defects, it says that any workmanship in the design, construction, manufacture, repair or landscaping "exceeds" the standards. We think it should say "meets or exceeds" the standards. If the home is built to code, there should be a rebuttable presumption that there is no construction defect. We are not satisfied with the definition of prevailing party or attorney's fees but we will accept them in the spirit of compromise. Thank you.

John Madole, representing the Nevada Chapter of Associated General Contractors of Northern Nevada:
I agree with Mr. Holloway's comments. What we discussed earlier in relation to attorney's fees would be the one modification we would like to see. We would like for A.B. 285 and A.B. 401 to be processed together. Thank you.

Chairman Horne:
I think that A.B. 285 and A.B. 401 may conflict with each other.

John Madole:
I recognize that, and I am suggesting that the issues be reconciled.

Bruce King, representing the Coalition for Fairness in Construction:
On behalf of the Coalition for Fairness in Construction, we are in support of the Speaker's bill and do want to recognize the amount of work that has gone into this effort. I am personally aware of the great deal of work thus far. We do feel that the three major points are definitions, the award to prevailing party, and the statute of limitations. We believe that additional work should be put into it, and we would like to propose some amendments to strengthen the bill. Our concern is that we do not want to do what has been done to some extent in the past. We do not want to "shuffle chairs on the Titanic." Pardon me for the tired phrase but unless we can patch the hole and keep the ship afloat, it just does not make sense to move the chairs around on the deck. From the 40,000 foot view, what we really want to do is to be able to focus on people who have real defects with their homes. As I have said earlier, I am a member of the Nevada State Contractors' Board. I have acted as Chairman for the Residential Recovery Fund for approximately two years. There is no one in this room that gets angrier about poor contracting than contractors do. We are livid. We want people to be made whole. With that being said, I think there is a misconception by some of the testifiers in opposition to A.B. 285. The misconception being that if these laws change, people would not have access to the legal side of our courts in resolving their problems. That is simply not the case. Nevada stands out in the country with these laws. There are several class-action cases going on throughout the country, such as Kitec. There is legal help, and we are not trying to preclude that. The Contractors' Board provides one of the first lines of defense for the homeowner, which is the Recovery Fund. We have one of the few solvent recovery funds in the country. I know that, personally. We are not trying to prevent homeowners from getting issues fixed. The one-sided, easily abused, guaranteed fees in Nevada's Chapter 40 laws are simply egregiously unfair to contractors, and sets them up for abuse. We are in support of A.B. 401 and would like to offer some amendments. This industry simply needs to address the problem with Chapter 40, which are the fees and costs. I appreciate your time.

Assemblyman Hammond:
On average, how many cases of litigation come towards the end of the statute of limitations, which I believe is 10 years at present?

Bruce King:
I believe that Mr. Litt is correct. They typically average 4 to 6 years, but we get a fair amount at 9 and 10 years.

Assemblyman Hammond:
Perhaps we can compromise and go a little bit lower than 7 years. We can maybe go to 5 or 6 years.

Bruce King:
We support dealing with the statute of limitations, and we support trying to come up with a satisfying definition of defect. Our intention of definition of defect would try to target those homeowners with real problems. I know we can get there because the other side is always able to bring the homeowners who have real problems here to testify. We seldom hear from the people who pocket the $7,500 and bought whatever it is that they bought. If we can get laws that work for us, it will allow this industry to focus its money and efforts on people who have real problems. Right now, we throw up our hands because it is just beyond us.

Assemblyman Sherwood:
If Chapter 40 were completely repealed, would the homeowner that had a legitimate problem have recourse under the law?

Bruce King:
Yes, the homeowner absolutely would. I want to emphasize two things. Homeowners first have the Contractors' Board. I will provide a short example about a defective pool. The homeowners went through the Chapter 40 process, rather than first coming to the Contractor's Board. The homeowner received an award of $60,500. The amount of $26,429 was paid to the law firm for costs. $24,200 was paid to the law firm for fees. The claimants were paid $9,870. The homeowners spent $40,000 to buy a pool and were left with a check for $9,870. The homeowners then came to the Recovery Fund, but we are precluded by law from paying out any additional funds once a settlement in excess of $35,000 is received. Had the homeowners come to the Contractors' Board first, they could have received the award of $35,000. They would have had their pool fixed, and would have been happy. In addition, all states have construction problems. Homeowners in other parts of the country readily have access to the courts. I am sure that trial attorneys will take fee contingent cases on any of these large, egregious construction problems. We are not asking this body to preclude a homeowner from recourse when it cannot be obtained any other way.

Chairman Horne:
For clarity, you are not proposing that we repeal Chapter 40. You are here testifying in support of the bill, correct?

Bruce King:
Yes, thank you. We are in support of A.B. 401, with amendments, just as we are in support of A.B. 285.

Craig Marquiz, representing Coalition for Fairness in Construction:
I will try to highlight some issues so that you can understand some of the distinctions that we are dealing with. While we applaud the Speaker's bill, there are some significant modifications we would like in order for us to bridge the gap and solve the problems that the contractors, builders, and developers are facing on a daily basis. I will begin by coming back to some of the discussion heard in the hearing of A.B. 285. As I have stated earlier, it has dove-tailed into this issue for purposes of why we are here. In the construction defect context, the Chapter 40 shotgun notice immediately starts the process. The claimant's attorney will hire experts. The experts will do extensive review, analysis, and reports. The developer and subcontractors hire their own experts. That process ends up driving the whole show because all fees and costs incurred for experts and attorneys get added to the cost of repair. The total is not just what the homeowner may have in legitimate issues, but it is also all the other fluff added into the mix. As the claimant's attorney, we ask for 100 percent repayment, under the pretense of making the homeowner whole.

In prior sessions, we have heard testimony that in the event the attorney's fee provision was eliminated from Chapter 40, homeowners would never be made whole. That is simply not true. If that were the case, there would be no personal injury lawsuits. The personal injury lawyers work on the same basis of a contingent fee. A contingent fee is the lawyer agreeing to represent the client, and is willing to assume the risk that in the event that the client does not prevail, the lawyer will recover no fee. Regarding the attorney's fee provision in NRS 40.655, we are dealing with 98 percent of the cases in pre-litigation that settle. They settle under this context of having cases processed, insurance companies making the decision and paying the inflated costs to get the insured parties out of harm's way. We are only dealing with 1 to 2 percent of cases that actually do go forward to trial, and become subject to Rule 68 offers of judgment. In the event that a builder, developer, or subcontractor makes such an offer and they do better than that number at trial, there are penalties associated with a claimant continuing to advance those issues. There is one important thing to remember in the context of prevailing party. Assembly Bill 285 makes it abundantly clear that a prevailing party is post-suit and not pre-suit Chapter 40. Nevada Supreme Court has expressly clarified the issue.

There are some cases that I would like to reference for the record. In *Hornwood v. Smiths Food King No.1*, 105 Nev. 188, 772 P.2d 1294 (1989), the Supreme Court defined prevailing party as one who succeeds on any significant issue in litigation which achieves some benefit it sought in bringing the suit. The Supreme Court is making it very clear that "prevailing party" is triggered after a lawsuit is filed. The Supreme Court further clarified that in the

case of *Dimick v. Dimick*, 112 Nev.402, 915 P.2d 254 (1996), in saying that a party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not proceeded to a judgment. That is very important language to keep in mind when we are addressing this distinction. We have heard the issue and testimony earlier today with respect to A.B. 285, regarding prevailing parties. In order for the claimants to recover attorney's fees in the Chapter 40 context, they must prove a constructional defect. With all due respect, there is no proving of constructional defects in a pre-litigation context. There is no arbitrator, judge, or jury that will issue any finding of fact or conclusion of law that something is wrong or meritorious and deserves to be addressed. It goes back to my testimony of earlier today, the principle of being proven right versus the principle of how much it will cost to buy your peace. That is the issue which is underlying the whole attorney's fee concept. I have heard from many mediators that it is not so much whether you are right or wrong, but it is about how much you want to pay to buy finality and get out of harm's way. That is what the mediators will tell your clients and the insurance representatives. Deals are made by the insurance companies based on the risk assessment and cost of defense issues.

I will get back to the point of the section of the bill that Speaker Oceguera has addressed in section 1 of A.B. 401, which is defining a defect. In dealing with these shotgun notices, we need to tighten up the process. We need to make sure that the people, who legitimately have problems, are made whole. It may be piers that need to be placed under the home because of a soil subsidence or a compaction issue. It may be the result of a plumbing issue such as in the case of Kitec that we heard some of the homeowners speak of, which was a manufacturing defect claim and not a builder or subcontractor issue. The root of that problem was a chemical reaction that occurred the moment the water was initiated into the plumbing system. There was a dezincification of the yellow brass fittings. The manufacturer was ultimately able to settle for $90 million. Several hundred million dollars were paid by insurance companies on behalf of the builders and subcontractors in order to buy peace for this manufacturing problem. It is the abuse that underscores the legitimacy of legitimate issues. There are decisions that our Supreme Court has issued such as *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 124 P.3d 530 (2005). It states that Chapter 40 is typically not appropriate for class actions unless there are single issue cases. In the case of Kitec plumbing, the class was certified. There were approximately 35,000 homes in the valley that were subject to this resolution for people to have their homes re-plumbed, which is the exception. The contracting industry sees the shotgun notices on a daily basis. The notice is supposed to identify the exact and precise nature of the problem, and not provide a general description such as "there is a roof leak." The subcontractor or developer is expected to find the nature of the leak, and

remain in the case should it not be found. There is tightening which is required with respect to the rebuttable presumption. In the pre-litigation context, there is no proving of anything. It becomes the he said–she said dispute. The claimant will say, "You have a roofing problem." The developer or subcontractor will say, "There are no issues." The way the current definition of a defect is defined, if I vary from the plans and specifications, even if I do something more than what was minimally required, I have a defect and can be sued for that installation.

Chairman Horne:
Excuse me, Mr. Marquiz, you may be running into others' time now. You are in support of A.B. 401, correct?

Craig Marquiz:
We are with the modifications. This is why I come back to the point of dealing with rebuttable presumptions. In order for the rebuttable presumption to have meaning, the "and" connectors are required in section 1, so that the people who have legitimate problems can be addressed. We need to tighten it up in various sections of the bill. Using "and" connectors will further clarify what legitimately can be brought rather than "or" which allows much more latitude and abuse of the process.

Chairman Horne:
Your support of the bill is like someone offering me a liver dinner. It is like my saying "I love eating dinner, but I cannot stand liver." That is what it sounds like you are telling me here.

Craig Marquiz:
Mr. Chairman, what I am telling you is that the industry has spoken in support with modifications. We are highlighting some of the modifications and issues we will continue to work on with the Speaker. It is important for you to understand the dynamics and the reason for the differences.

Assemblyman Hansen:
In the prelitigation context regarding attorney's fees, if we roll A.B. 285 in with A.B. 401, would that be what you are looking for?

Craig Marquiz:
If you roll in the language, you essentially are going to be narrowing the type of claims that are advanced, because you will not have attorneys wasting time in the prelitigation where they are not going to be recovering any monies. It will essentially help streamline the process. Right now, Chapter 40 has a 180-day window for claims, from the initiation of a Chapter 40 claim to the time that it

is supposed to be completed. I can assure you the vast majority of cases extend multiple years and not 180 days.

Assemblyman Hansen:
I would like to go on record as supporting that compromise.

Assemblyman Brooks:
As I understand it, the subcontractors are upset because when the lawyer litigates, other subcontractors are brought into the case. Is it the lawyers or the insurance companies that are adding the additional subcontractors to the cases?

Craig Marquiz:
The process begins with the claimant's Chapter 40 notice. When the claimant issues a Chapter 40 notice, the developer is statutorily obligated to provide notice to everyone who touched that project. Understand this is not bringing them into a suit, which may be somewhere down the road if the case is not ultimately resolved. This is in a pre-litigation context. A homeowner claimant sends the letter to the developer. The developer through his counsel brings it to the subcontractors, who all get in the mix. There is a mediator appointment and then a process of inspections, visual inspections, testing, et cetera. They will ultimately sit down in a mediation setting. If it settles, the case is over. If it does not settle, it goes to a lawsuit. It is based on the claimant's notice. There is no one really brought in, other than what the claimant tenders in the notice of all of the issues. The developer gives notice to his subcontractors as they are statutorily required to. All are forced to participate.

Assemblyman Brooks:
Is it the lawyer or the insurance company?

Craig Marquiz:
There are no insurance companies at the initiation of the claimant's notice. It is issued through the attorney that is representing the claimant. The claimant tenders the notice to the developer. The developer has commercial general liability insurance policies. In a self-insured retention, if a developer is obligated to pay the first $25,000, $50,000, or $100,000 of any issue out of his own pocket, he will automatically assign the letter which will begin the process. The subcontractor's insurance companies are receiving notice once the subcontractors are notified. The subcontractors may or may not have the benefit of their own insurance companies through their own general liability policies to actually assign defense counsel. Many times you have subcontractors bearing the fight at their own expense up until the time when a claim is legitimately issued, where they would receive the benefit of the insurance policy.

Bruce King:
In reply to Mr. Brooks' question, it is the builder's insurance company's counsel who starts the process. The problem is the defect list that is provided. The list is much too generalized. The builder is compelled to fire off the list to everyone involved because, by obligation, he is forced to due to the general way the lists are made.

Chairman Horne:
We are getting dangerously close to opening up the whole indemnity clause in the contracts. Part of what Mr. Brooks is saying is that the subcontractors are being brought into the suits by the developers and their attorneys because they have promised to indemnify on any of these suits. For example, if I have a defect in my home, and I only list "leaky roof" as the defect, I can guess that the landscaper will get called into that suit. It seems that is just the practice to send the notice to whoever worked on the project.

Bruce King:
There are many cases where I have not received a notice because it simply does not deal with my work, although I am not disputing that it does not happen. As for the indemnification issue, we tried previously to have that changed in 2007, but did not get any support at all.

Norman Dianda, President, Q & D Construction, Inc., Sparks, Nevada:
I would like to add to Mr. Sherwood's question about when these claims begin.

Chairman Horne:
Mr. Dianda, currently I am accepting testimony in support of A.B. 401. Is that your purpose?

Norman Dianda:
I think we are all in agreement and are in support of it, with modifications. What I would like to say is that I believe some people are on a witch hunt. We have been notified that we may be the subject of 105 claims out of 589, with several developers. These claims go back to 2002, where people have lived in these houses for 8 years or longer. Some of the claims being made are for defective roofs, leaking windows, dirt coming through windows, drywall cracking, hardboard separating, hardboard staining, stucco staining, and poor workmanship. Why did it take 8 years for someone to decide he has a claim? He has lived in the house, and lack of maintenance is probably why he has a real problem. It is all about rounding up homeowners for the trial lawyers to get business. How can someone go out and find 589 houses with construction defects after 8 years?

Chairman Horne:
I am sure there are extremes on both sides. I know my house in Las Vegas is 20 years old, and there may have been 4 occasions in the last 20 years where the rain was significant enough for me to notice it leak. I am sure there are different examples, but I understand what you are saying. Is there anyone in Las Vegas wishing to testify in favor of A.B. 401? Seeing none, we will move to the opposition now. Is there anyone wishing to testify in opposition? Is there anyone in the neutral position? I will close the hearing on A.B. 401. I usually bring back the presenter for some final words. I forgot with Mr. Hansen, and I apologize. However, I will reopen the hearing for A.B. 401 so that Speaker Oceguera can present his final words.

Assemblyman Oceguera:
I have offered to bring the parties together. Perhaps I will order the parties to come together. I do think we are close to a resolution, but there must be a compromise on both sides. For the record, I would like to have a bill this session, voted out of this Committee, and I would like a bill voted on the floor. With that, I will suggest that I bring the parties to my office and suggest that they get something back to the Committee in 48 hours.

Chairman Horne:
I appreciate it as well. I offered my assistance last session with this matter. It sounds like we are close but not everyone will get everything they want. Keep that in mind when in negotiations. Please get something resolved to bring back to the Committee to process, remembering Friday is the deadline. We will close the hearing on A.B. 401. Once again, I would like to extend my apologies to Mr. Hansen by not affording him the opportunity for the last word on A.B. 285. There are two more bills on today's agenda. We will recess and reconvene approximately 4 p.m., after Commerce and Labor's meeting adjourns. We have had discussions with the Chairman of the Committee on Education, and there is no problem if some of you are absent for the hearing due to the conflicting schedule. Unfortunately, we will not have video conferencing with Las Vegas at that time. I apologize for that. We are in recess.

[Recess was called at 11:19 a.m., and meeting reconvened at 5:11 p.m.]

Chairman Horne:
The Assembly Committee on Judiciary will come back to order. We have two bills left on the agenda and we will begin with Assembly Bill 412.

Assembly Bill 412: Revises various provisions governing mechanics' and materialmen's liens. (BDR 9-833)

Assemblyman Marcus L. Conklin, Clark County Assembly District No. 37:
I will leave the nuances of the bill to others who are more skilled at explaining the intimate details of the bill. I would like to share some of my personal background and why I feel this bill is important. I have spent the last interim working in the construction industry. I work for what was originally a paving and grading company that provides all kinds of paving, grading, underground work, and demolition work. This may mean something to those of you who have worked in construction. It is a dirt business, but like anyone else in construction, generally we find ourselves in the position of being a subcontractor to a large general contractor, or to another subcontractor. As such, when we finish work and get paid, there is a portion of money held, which is known as retention. I will provide you with an example. Let us say that I am paving the parking lot to a new restaurant, and my fee for the lot is $100,000. I would get paid $90,000. The other $10,000 stays with the owner, until the end of the entire project, and the owner signs off. That amount is known as the retention. Generally in construction, that 10 percent represents profit for a really good business. Most businesses run a little bit less, somewhere in the range of 7 to 9 percent in ultimate profit from a project. I feel confident in bringing this bill, without conflict, because over the past two years we have phased out any business which has any kind of retention. We had 127 employees in July of 2009. When I left to come up here in January, there were 7 employees. In 2009, we did paving, grading, underground work, demolition work, and recycled aggregate sales. Currently, the only thing we do is recycled aggregate, because it is basically a cash business. Along the way, many companies that we had completed work for would try to negotiate away the retention, or file for bankruptcy. Of course, if a company files for bankruptcy, the money becomes protected and a subcontractor has no access to it.

Late last year, I contacted Gary Milliken and Steve Holloway at the Associated General Contractors of America (AGC). As I expressed to them, it may be too late for my company, but there are many businesses trying to make it. I also expressed how we really need to put the general contractor and subcontractor on equal footing with the owner for a completed job. At the time, I asked whether they could develop language that would protect the interest construction companies have in their retention or their profitability. It is the only way to grow a business from a finance side. If I start with $100,000 in order to build that parking lot, I would have to lay out all $100,000. It may take me two or three months to build it, but every week I have to put out money for aggregate, equipment rental, asphalt, and wages, payroll, and benefits. When I pay out $100,000 in expenses, I am doing so with the expectation that I will make $110,000 for the job. If for some reason, I do not make the full $110,000, the largest job I can ever do is only $100,000. If

starting with $90,000 and hoping to make $100,000, all I could expend is $90,000. Companies in this business grow off their profit. The reason they do is because they have to lay out all of their capital to execute the next project. If someone does not pay on time, there is no capital to do the next project.

Mr. Chairman, it is in that spirit that I feel this bill is necessary. It is not a new issue or an easy issue for this Committee. There are multiple sides to every issue. I was approached yesterday by Mr. Ferraro, representing the Nevada Resort Association. I know the Association has some issues to discuss. We have agreed to listen and work with them. Since the bill has been drafted, we have been working with other parties within the industry to tighten up the language and make it fair for all parties involved. If I may, I would like to turn it over to Mr. Holloway and Mr. Peel for a more technical assessment of the bill.

Steve Holloway, Executive Vice President, Associated General Contractors of America, Las Vegas, Nevada:

I am here on behalf of the Associated General Contractors in both northern and southern Nevada, as well as the Subcontractor Legislative Coalition. I would like to begin by saying that most states have retainage laws. I have provided you with a summary of those laws (Exhibit P). I would like to point out that currently 27 states have provisions for escrow retention accounts. This is not something new, although it may be new to Nevada.

We are talking about having the owner or the bank set up an escrow account, so that as progress payments are made on a job, the standard 10 percent withheld from the progress payment will be put into this escrow account. The purpose of the account is so that at the end of the project we know the money is available. If the owner or bank declares bankruptcy, the money that the contractors have already earned is there and safeguarded for that purpose so that it does not fall under bankruptcy laws. This has happened on a tremendous number of projects both big and small over the last 20 years. I have seen over 200 contractors go bankrupt over the last 15 years because of this. This bill will address that problem as well as a collateral problem. As long as the money is available, if the statute sets forth the terms on which the owner or prime contractor may continue to withhold the money if the job is not completed, there are provisions that will allow them to continue to withhold the money. If the owners have occupied the building, obviously they should pay the money. What happens is, in many cases, they may not declare bankruptcy, but they will use the implied or expressed threat that they will declare bankruptcy to force the contractor to settle for less. If the money is in escrow and the terms are clear, the owners can no longer do such a thing indiscriminately.

If these escrow accounts would have been established in 1999, perhaps we would not have had the problems we had with The Venetian. Regarding the Venetian situation, had those contractors not settled for less, they would still be in court with others that did not settle. The decisions are currently being appealed through the Nevada Supreme Court, even though the district courts have found in favor of the contractors in every case. We also would not have had the Aladdin Hotel and Casino situation, where I know of a contractor that was owed $7 million on that job and ended up paying the subcontractor out of his own pocket while going bankrupt. I could go on to mention more cases, such as the Regency and the Fontainebleau, that have declared bankruptcy. They have wiped these contractors out because the money that the contractor earned was lost.

One more brief matter I would like to discuss is a recent Supreme Court decision known as the J. E. Dunn decision, technically known as *J. E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC,* 127 Nev. Adv. Op. No. 5. In our amendment (Exhibit Q), we are proposing to supersede that decision. The statute currently says that commencement of construction occurs when any lienable work performed or materials, and equipment furnished is first visible from a reasonable inspection of the property, and that preparatory work performed, materials, and equipment furnished can constitute "commencement of construction" if such work, materials and equipment is visible. J. E. Dunn Construction performed work and furnished equipment and materials as described by this definition and it may have been visible. This Legislature, along with past Legislatures from 2003 and 2005, reinforced this. In *J. E. Dunn Northwest, Inc.,* someone with a subsequent loan which occurred after the startup of construction was able to come in and have priority over the mechanics' liens on the project due to the Supreme Court decision. This turns around the whole idea of mechanics' liens.

Chairman Horne:
Did you provide that decision in your packet? I would like to read the rationale from the court regarding the ruling.

Richard Peel, representing Associated General Contractors; and Subcontractor Legislative Coalition:
No, that particular case was not provided. It is cited in the materials we provided but the actual case itself was not.

Chairman Horne:
When someone asks us to supersede a Supreme Court decision, I want to know the rationale on the decision.

Steve Holloway:
We will try to obtain a copy of the decision.

Richard Peel:
As Mr. Holloway noted, we are presenting an amendment to A.B. 412 which is intended to identify the forms to be used in conjunction with this bill. It is intended to delete certain language that was initially proposed, which was a concern to certain groups. After some discussion, we thought it best to remove the language. It is intended to add certain definitions to the bill. It further intends to make clear that the J. E. Dunn decision, as it pertains to commencement of construction, is being superseded for all purposes. The bill additionally intends to rearrange certain sections and subsections contained in the bill so that they flow better. With no offense to the Legislative Counsel Bureau (LCB), historically when we have had bills passed, it has been difficult to track concepts that are set forth in certain statutory provisions. We want to make sure that as the statutes are being interpreted, it will be easier for the court, as well as attorneys, to understand the intent. Additionally, the amendment is intended to make changes to certain existing statutory provisions that are affected by the bill and the amendment. I am prepared to go through the sections of the bill as amended. If there is a point that you would like for me to stop, please let me know.

Sections 2 through 7 of the bill set forth definitions for terms used throughout the bill. Section 6, as amended, makes it clear that the definition of retention amount set forth in section 6 applies to all contracts and not just those that are the subjects of section 8 through 11 of the bill. Section 8, as amended, states that the bill applies to prime contracts of $1 million or more where the owner or lessee is authorized by contract to withhold a retention amount. For those projects to which the bill applies, owners and lessees are required to: (1) obtain the services of an escrow agency and establish a trust account; (2) record a notice of establishment of trust account with the county recorder's office where the property is located, whereby the contractor and subcontractors can verify the trust account has been established; and (3) provide a recorded copy of the notice of establishment of trust account to the building inspector or other governmental authority overseeing the construction. Section 8, as amended, also identifies the information that must be contained in the notice of establishment of trust account and the form to be used for the same purpose. Section 9, as amended, identifies the requirements for a retention amount held pursuant to the bill.

Section 10, as amended, requires an owner, lessee, or an escrow agency to pay a retention amount to a prime contractor pursuant to subsection 1 of NRS 624.620. It also requires a hired contractor to pay a retention amount to a

subcontractor as provided in subsection 1 of NRS 624.624. It gives a prime contractor a right to stop work and terminate the prime contract if the owner or lessee fails to comply with sections 8 through 11 of the bill. It prohibits a building inspector or other government authority from issuing a certificate of occupancy for a construction project until the owner, lessee, or escrow agency causes a verification of compliance to be recorded against the property. The owner or lessee must provide that government body a recorded copy of the verification of compliance in order to confirm compliance. It also confirms that the rights and remedies provided the prime contractor and his subcontractors, by way of the bill, are in addition to other rights and remedies they may possess in law or otherwise. It confirms that the duty to comply with the bill cannot be waived, modified, or released. Section 11, as amended, requires an escrow agency to keep detailed and complete records of all transactions with respect to a retention amount. It also requires the escrow agency to provide an accounting of the retention amount held upon the prime contractor or his subcontractors' request. Section 13, as amended, revised the definition of lien to clarify that it applies to the ownership interest of a lien claimant to a retention amount.

Sections 15 and 16 are being revised to reflect the statutory references that are being inserted as a result of this bill. Section 17 makes it clear that a retention amount must be paid pursuant to NRS 624.620, and the withholding of a retention amount is subject to the bill, if applicable. Section 18, as amended, makes changes to NRS 624.620. It identifies the date on which a final payment is due to a prime contractor. It clarifies what an owner may withhold from the final payment. It makes clerical changes to subsections 3 and 5. This section also makes it clear that an owner, lessee, or escrow agency shall not withhold from the final payment to be made to a prime contractor more than the amounts allowed by subsection 2, paragraph (a), and subsection 4, paragraph (b). The withholding is only allowed if the owner, lessee, or escrow agency has complied with subsection 3. Section 19, as amended, revised the language of subsection 2, paragraph (a), line 1 of NRS 624.624 to make it clear that the retention amount must be paid pursuant to that particular section, and the withholding of the retention amount is subject to the bill, if applicable. Section 20 is being revised to reflect the statutory references to the bill. Section 21, as amended, revises the language of subsection 2, paragraph (a), line 1 to include reference to a lower-tiered subcontractor. Section 22 confirms that the provisions of the bill apply to any person administering an escrow pursuant to the bill.

Regarding the new sections, which are being presented by way of the amendment, I will refer to those as item numbers. Item numbers 17 and 18 of the amendment adds the definitions for fiduciary and lessee to

NRS 108.221. Item numbers 19 and 20 of the amendment amend NRS 108.22112, which is the definition of commencement of construction, and NRS 108.22188, which is the definition of work of improvement, to make it clear that for priority purposes, commencement of construction has occurred with any lienable work performed, or materials or equipment furnished is first visible from a reasonable inspection of the property. It also provides that preparatory work performed, and materials and equipment furnished, can constitute commencement of construction if such work, materials, and equipment is lienable and visible. These amendments unambiguously supersede the decision of the Nevada Supreme Court in *J. E. Dunn Northwest, Inc*. Item number 21 of the amendment revises the definition of fiduciary in NRS 162.020, subsection 1, to include an owner or lessee who holds a retention amount or an escrow agency who administers an escrow pursuant to the act. Items 22 and 23 of the amendment insert the definitions of escrow agency and retention amount as new subsections to NRS 624.606. Those particular terms are also used in that particular section of the statute. Item number 24 adds a new section to NRS Chapter 624 to make it clear that a person who acts in the capacity of a construction control must comply with the requirements of sections 8 to 11 of the bill. Item number 25 adds a new section to NRS Chapter 662 to make it clear that the proceeds of a construction loan must be used to pay for the work, equipment, or materials provided by a prime contractor and his lower-tiered subcontractors. Item number 26 of the amendment adds a new subsection to NRS 662.235 to make it clear that the bank holding a retention amount must comply with sections 8 to 11 of the bill. Item number 27 revises the definition of fiduciary in NRS 669.045, subsection 1, to include an owner or lessee who holds a retention amount, or an escrow agency who administers an escrow pursuant to the act. Item 28 adds a new subsection to NRS 669.080 to make it clear that the provisions of the chapter apply to an owner or lessee who holds a retention amount, or an escrow agency who administers an escrow pursuant to the act. Finally, item 29 of the amendment states that items number 19 and 20 of the amendment become effective upon passage and approval of the bill. They are intended to immediately supersede the decision of the Nevada Supreme Court in the J. E. Dunn case, and for all other purposes, on July 1, 2011.

That was an overview of the bill and the amendment as it is presented. I will be happy to answer any questions.

Chairman Horne:
When monies are in escrow, how long do you anticipate that money to be there? Is it going to be paid out in increments throughout the stages of the project, or will it be there until the completion of the project? Is it accruing interest? If so, who keeps the interest?

Richard Peel:
Currently, there is no time period on how long the retention is held. This bill is not intended to say that the retention must be paid by a certain date. We are not getting into the date the retention is to be paid. Instead, by way of contract, the retention is to be paid pursuant to NRS 624.620 when the work on the project is completed, or when the project is made available, or it is occupied by the owner for its intended purposes. That is the only deadline for payment of retention, and that currently exists by way of statute. There is a statutory provision currently that discusses when the final payment is to be made.

Chairman Horne:
There may be a completion date of the project; however, a subcontractor's part may be completed long before the completion of the whole project, yet the retention is still being withheld.

Richard Peel:
In my perfect world, I would love to address that issue; however, it is very complicated to talk about starting to pay subcontractors early on a project. If there are issues that arise later on, there will be no security to address the particular concern. It was included as part of the bill in section 18, subsection 1. We originally proposed to address that issue, but because of concerns that were raised, our amendment proposes to delete that particular subsection. We will not be addressing that issue at this time. Monies will be withheld for a given period of time until the completion of the project. Regarding the interest accrued, we debated about concerns over the Federal Deposit Insurance Corporation (FDIC) overtaking many banks, and not knowing which bank may be the subject of a takeover. We know that non-interest-bearing accounts generally are not subject to some of the requirements as interest-bearing accounts are. We did not address interest versus noninterest bearing for these accounts. It is not part of our proposed bill. Did I miss any of your questions?

Chairman Horne:
I asked whether there is interest. I was curious about what would happen to the funds that had been accrued.

Steve Holloway:
That would be a matter of the contract between the owner and the prime contractor, or between the bank and the owner. It would occur by however they contractually agree to do so.

Chairman Horne:
That is a great segue into my final question, which is regarding item number 25 in your proposed amendment. This item covers what the proceeds of the loan are to be used for. Are we delving into the contract between the developer and the bank? The developer goes to the bank and requests a certain amount of money for the project. The bank agrees to provide the money for the project. Let us say that the developer uses that money for something else. Would that not be between the developer and the bank? Are we delving into making a law which will interfere with the contract between the bank and the developer?

Richard Peel:
This goes back to a discussion that we had in 2009. Mr. Chairman, you were on the Committee at the time when we discussed some of the concerns that the construction industry has. There are monies earmarked for a particular project that are borrowed. The monies may be used for other things and are not paid to contractors and subcontractors. As a result, the contractors and subcontractors are not paid. I thought the Majority Leader was eloquent in explaining some of the problems that he has seen and experienced throughout his career. What he said was correct, and I will add one more caveat to it. In this economy, we are seeing contractors and subcontractors who are expecting to receive a 7 to 9 percent profit margin. Instead, the average profit margin is anywhere between 1 to 3 percent. If there is a 10 percent retention withheld, not only has there been a loss in profit margin, but there has been monies lost which were paid for taxes, equipment, materials, et cetera. We want to make sure that these monies are in fact being used for the projects. Are we stepping into the area of contracts between a bank and a borrower? Perhaps we are. At the same time we feel as though we must do something to ensure the people are paid. I think you have heard this scenario before but I could not walk into a grocery store, fill up my cart with merchandise, and tell the cashier that I will come back at a later date to make payment. It should be the same on a construction project. It is one of the few industries where we see people financing a project out of their own pockets with the hope of getting paid at some later date.

One last matter concerns one of the biggest dilemmas we have that compares with the Fontainebleau situation. My firm represents 30 subcontractors who are collectively owed well in excess of $100 million. They will likely never see all that they are owed. I have several clients who are owed between $25 million to $36 million on that job. That would put any small contractor out of business. They must now fight with a construction lender via the bankruptcy process to participate in the receipt in some of the proceeds of the sale proceeds from that project. It is likely to go on for years, and will likely end up

before the Nevada Supreme Court for a decision. There is no sense to that. Had this money been withheld in a retention fund, it would have been available to pay the contractors for the work and materials they furnished. Had the bank complied with the language referenced in item number 25 of the amendment, there would have certainly been a circumstance for the subcontractors to have a better chance to get paid. The way it looks right now, it will be a long, hard fight with many good subcontractors going out of business. I hope that answers your question.

Assemblyman Segerblom:
Does this deal with a situation like the Venetian, where the owner did not go out of business but simply did not want to pay? He let the subcontractors wait for years.

Richard Peel:
Yes, absolutely. We had 14 clients on the Venetian project. When the Venetian opened, if there had been laws having the escrow retained, the subcontractors would have ended up getting paid, eliminating the 10-year battle that ensued. The contractors would have been paid much sooner.

Assemblyman Daly:
This is meant to apply to private jobs and not public ones, correct?

Richard Peel:
That is correct. Right now, our intent is to modify. We are proposing to set this bill as part of the mechanics' lien statute. It is not intended to apply to public works.

Assemblyman Daly:
Can you explain how it will work? The prime contractor will be getting paid by the owner. There will be an escrow account that the owner opens. How many escrow accounts will there be? Will there be one blanket account, or will every subcontractor have an account?

Richard Peel:
There will be one trust account, which is established by the owner or tenant. It applies only to prime contracts of $1 million or more. The owner will withhold whatever percentage allowed by way of the contract, with a maximum of 10 percent. The money will be deposited into the trust account as monies are withheld. We are tying the payment of the retention amount back to existing law which is NRS 624.620, subsection 1. It says that an owner has to pay the final payment for a particular project within a certain time period.

Assemblyman Daly:
If you take a project like the CityCenter, there is only one prime contractor, but there are numerous subcontractors. You said that it only applies to the prime contracts above $1 million. Was every subcontractor on the project uncovered? How will all of that work?

Steve Holloway:
The current law sets forth when a prime contractor will pay retention to his subcontractors and when those first-tier subcontractors will pay to the second-tier subcontractors, et cetera. We have not attempted to mess with the current law. The problem that we are dealing with is the retention that is being withheld by the owner. That seems to be where the losses come in. As soon as the money is freed under escrow, the law dictates what he will do, which is to pay his subcontractor within the time limit dictated, which I believe is 10 days. There is no need to set up another retention account for those 10 days.

Assemblyman Brooks:
I think this is ingenious. I cannot understand why the money would not be put into escrow. If the profit margin is 3 percent to 10 percent, it will undoubtedly put someone out of business. How many businesses have gone under due to the monies not being withheld appropriately?

Steve Holloway:
I personally know of at least 200 contractors that have gone out of business over the last 15 years.

Chairman Horne:
I see no more questions, but we have one more speaker at the table.

Richard Lisle, Chairman, Subcontractor Legislative Coalition:
The Subcontractor Legislative Coalition (SLC) is a group of subcontractors made up of union and nonunion members, trade associations, and organized laborers with a single goal, which is to get subcontractors paid. I would like to quickly run through my list. Some of our nonunion association members are the plumbing, heating, and cooling contractors of Nevada, southern Nevada air conditioning and refrigeration service contractors, Nevada Underground Contractors Association, Southern Nevada Fire Protection Association, and the Glass and Glazing Association of Nevada. Our signatory union associations are the Mechanical Contractors Association, sheet metal contractors, national electrical contractors, and the Western Wall and Ceiling Contractors Association. We also have four laborer groups, which are Sheet Metal Workers Local 88, International Electrical Workers Local 357,

Plumbers and Pipe Fitters Local 525, and Southern Nevada Building Trades Council. It may look like lions are lying with lambs, as we normally fight with each other. However, when we do not get paid, nothing happens. There is no money to filter down, and no pensions get paid. Health and welfare programs do not get paid. Insurance does not get purchased. The whole industry grinds to a halt. We have been doing this retention for 50 years that I know of. This is the first time it was suggested to set the money aside in an account. In the past, the retention just stayed on a balance sheet somewhere. If the company did not go broke, it may actually be there someday. I will have some witnesses testify as to how long they have had to wait for some of this retainage. In the interest of time, I will yield to Brian Kerzetski of Universal Plumbing and Heating.

Brian Kerzetski, President, Plumbing Heating and Cooling Contractors of Nevada, Inc., Las Vegas, Nevada:
In addition to being the President of the Plumbing, Heating and Cooling Contractors of Nevada, Inc., I am Vice President of Universal Plumbing and Heating Company. I would like to briefly share a quick scenario that we have experienced. Fortunately, we are still in business but the fear of not being paid the final retention always exists for us. While we try to make good decisions about whom we do business with, many times we do not have much control over whom our general contractors choose to do business with.

We have constructed a medical building. When the project was completed, we were in the midst of the many massive bank failures that were happening. One of those failures affected the funding of the project. The project was complete, but we came to find out that the money to pay the contractors was not available. Had this money been set aside through the duration of the project, there would have been no concern. We would have received our retention, but instead we were forced to negotiate a settlement to receive some of the money. We would have had to wait to maybe get paid, or make a settlement for some of the money. We decided to settle because we are not a large enough contractor to stretch our money for a long period of time, and expect to stay in business. While we did receive some money, the project did not end up being nearly as profitable as it should have been. Had we known this would have happened, we may not have chosen this project. Some of the best projects are the ones that you choose not to do. Hopefully, that scenario will provide you with some insight on what we deal with. If the money is set aside, and we know it is there, at the end all will get paid. We pay our subcontractors, and we pay our suppliers, either through cash flow, loans, or out of our own pockets. We need them to finish the job, just as the general contractors need us to finish the job. We are asking that both the subcontractors and the general contractors have the security at the end of the project. Thank you.

[Assemblyman Frierson assumed the Chair.]

Acting Chairman Frierson:
Thank you. Are there any questions? There are none.

Greg Esposito, Plumbers, Pipefitters & HVAC/R Technicians Local 525; and Southern Nevada Building and Construction Trades Council
Imagine having representation over thousands of men and women who work for a living. Imagine these men and women go to work in good faith, understanding they were to get paid. They accumulated bills and mortgages in that good faith, but the job they are working on either shuts down or does not pay the contractors. The company will claim there is no money, or that the funding was not there. I have watched large contractors shut down because when the job finished, there was no money to get paid. I am testifying in support of this bill on behalf of workers, and on behalf of people with families and futures to support. This is an important step toward making sure they are protected and get paid for the work that they do. Thank you.

Acting Chairman Frierson:
Are there any questions for Mr. Esposito? I see none. Is there anyone else wishing to testify in favor of A.B. 412?

Chris Ferrari, representing Nevada Contractors Association:
I would like to say for the record that we support A.B. 412, as amended.

Acting Chairman Frierson:
Is there anyone else wishing to testify in support? Seeing none, is there anyone in opposition?

Greg Ferraro, representing Nevada Resort Association:
I checked two boxes on your sign-in sheet. I checked opposed and neutral. It is not because I cannot figure out where we are. It is because I want to put on the record that the Nevada Resort Association has spoken to the sponsor. We had some concerns about the bill as it was introduced. We were provided a copy of the comprehensive amendment this morning, and we have sent it to a number of our experts to review. I do not have a position to put on record as it relates to the amendment, but I do want to preserve our place at the table. As the sponsor indicated previously, we have agreed to work with him and others to reach an understanding. With that said, as the bill was introduced, we have some serious reservations about what the bill does and how it does it. We would like to reserve our place and apply the attention to the amendment.

Acting Chairman Frierson:
I urge you to get together with all parties in order to work out anything you are concerned with.

Greg Ferraro:
I appreciate that opportunity, and we will do so.

Acting Chairman Frierson:
Is there anyone else in opposition or neutral? Seeing none, we will bring it back to the Committee, and I will close the hearing on A.B. 412. We will open the hearing on Assembly Bill 317.

Assembly Bill 317: Revises provisions governing mediation and arbitration of certain claims relating to residential property. (BDR 3-540)

Assemblyman Tick Segerblom, Clark County Assembly District No. 9:
I will make this very simple. In NELIS, there is a proposed amendment (Exhibit R), which basically strikes the whole bill except one sentence which deals with filing an appeal with district court. The bill deals with the Real Estate Division of the Department of Business and Industry, which is the administrative agency that handles homeowner disputes. There are huge problems with that agency, but it is too late in the session to try to accomplish anything significant. Rather than focus on the whole situation, I want to focus on one small issue regarding the process. At completion of the process, one has the right to go to district court. The question that has arisen is about when the time limit starts. The arbitrator will issue several different decisions, one of which is the finding. The arbitrator can then issue findings on attorney's fees and other issues. This portion of the bill allows for 30 days to take action in court, which does not start to run until all other issues have been completed. It is a very simple change in the law. There have been disputes in Nevada as to when the time begins to run. This will clarify the issue, and make it clear that there are 30 days from when all issues in arbitration have been decided.

Acting Chairman Frierson:
Do we have any questions for Assemblyman Segerblom?

Assemblyman Sherwood:
It appears there has been another amendment proposed. I understand that you totally swapped out the bill; so much of this may be inapplicable. Did you have a chance to look at that? If you did, are any of the five items, which were submitted by Jonathan Friedrich, relevant?

Assemblyman Segerblom:
I apologize but I have not seen the amendment. We have lost our video link. Mr. Friedrich was supposed to be present in Las Vegas to discuss it but without the video link, he is not available. This issue is not going away. There is a major problem with the way the arbitrators are selected. If you look at their decisions, they are 99 percent in favor of the homeowners' associations versus the homeowners. We need to address it, but it is not going to happen right now.

Acting Chairman Frierson:
Are there any other questions for Mr. Segerblom?

Assemblyman Brooks:
Regarding the proposed amendment in NELIS (Exhibit S), do you want us to consider it as well?

Assemblyman Segerblom:
Since I have not had the opportunity to read it, I cannot comment on that at this time. I know Mr. Friedrich is very knowledgeable in these areas. Although I would not want to discount it, I cannot say for sure without having seen it.

Acting Chairman Frierson:
I will encourage Mr. Segerblom to review it so that if we bring it back to the Committee, we will have a better idea of the sponsor's views on the amendment.

Assemblyman Daly:
You want to eliminate all sections of the bill except section 4, subsection 8. I am assuming that is on page 6 starting on line 35. You just want to keep that one piece of the language in there. The other part refers to "and section 1 of this act." I assume this should be removed as well, because you are eliminating section 1. I just want to be clear.

Assemblyman Segerblom:
Yes, we want to be clear that the allotted 30 days runs from when everything has been resolved by the arbitrator. Sometimes the court will issue its findings and there will be an award of attorney's fees, but the award will not occur immediately. It has been disputed as to when to file, whether it be 30 days from the decision or 30 days from when the attorney's fees are paid, et cetera. This just makes it clear as to when it begins.

Acting Chairman Frierson:
I see no more questions. Do you have anyone to testify?

Assemblyman Segerblom:
No, I do not.

Acting Chairman Frierson:
Is there anyone else wishing to testify? I will close the hearing on A.B. 317 and will return the gavel to Chairman Horne.

[Chairman Horne reassumed the Chair.]

Chairman Horne:
Thank you all for staying so late to handle our last bills. If there is no other business to come before the Committee, I will see you all tomorrow morning. We are adjourned [at 6:11 p.m.].

[Exhibits not discussed during the meeting include testimony on A.B. 285 by Jack Mallory (Exhibit T); Testimony via email on A.B. 285 by Jodi Fraser (Exhibit U); Follow the Money—A Position Paper by the Coalition for Fairness in Construction (Exhibit V); Construction Defect Photos—Exhibit 1 (Exhibit W); Construction Defect Photos—Exhibit 2 (Exhibit X); Construction Defect Photos—Exhibit 3 (Exhibit Y); Construction Defect Photos—Exhibit 4 (Exhibit Z); Construction Defect Photos—Exhibit 6 (Exhibit AA); Proposed Amendment to A.B. 401 from Assemblyman John Oceguera (Exhibit BB); A.B. 401—Streamlining the Construction Defect Resolution Process from Assemblyman John Oceguera (Exhibit CC); Overview of Retention Escrow Act from Steve Holloway (Exhibit DD); Letter dated April 11, 2011 from Delores Bornbach for A.B. 317 (Exhibit EE); Letter dated April 11, 2011 from John A. Radocha (Exhibit FF).]

RESPECTFULLY SUBMITTED:

_____
Lenore Carfora-Nye
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: April 11, 2011 Time of Meeting: 8:15 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 285	C	Assemblyman Ira Hansen, Assembly District No. 32	Common Defects in Current Construction
A.B. 285	D	Norman L. Dianda, Q & L Construction	Letter dated February 11, 2011
A.B. 285	E	Norman L. Dianda, Q & L Construction	Letter dated April 8, 2011
A.B. 285	F	Mary Davis, J & L Windows	Buried in Chapter 40 Lawsuits
A.B. 285	G	Robert A. Fehling, President, Silverado Excavating Company	Written Testimony
A.B. 285	H	Various Contractors	Numerous Testimonies
A.B. 285	I	Bruce Gescheider, Moana Nursery	Letter of Support
A.B. 285	J	Bruce Gescheider, Moana Nursery	Letter from Timothy F. Hunter dated July 10, 2009
A.B. 285	K	Raymond M. Pezonella, President, Pezonella Associates, Inc	Notice of Nonrenewal of Insurance
A.B. 285	L	Ralph and Linda Walker	Written Testimony
A.B. 285	M	Dan and Linda Roggemann	Written Testimony
A.B. 285	N	Amie Webster	Kitec Litigation — Pipe Fittings
A.B. 401	O	Assemblyman John Oceguera, Clark County Assembly District No. 16	Summary — Makes various changes concerning constructional defects.
A.B. 412	P	Steve Holloway, Executive Vice President, Associated General Contractors	50 State Summary of Retainage Laws
A.B. 412	Q	Steve Holloway and Richard Peel	Amendment to Assembly Bill 412

A.B. 317	R	Assemblyman Tick Segerblom, Clark County District No. 9:	Proposed Amendment
A.B. 317	S	Jonathan Friedrich	Proposed Amendment
A.B. 285	T	Jack Mallory, Director of Government Affairs, IUPAT District Counsel 15	Written Testimony
A.B. 285	U	Jodi Fraser	Email dated April 11, 2011
A.B. 285	V	Coalition for Fairness in Construction	Follow the Money
A.B. 285	W	Caitlin Rose Ostomel	Construction Defect Photo — Exhibit 1
A.B. 285	X	Caitlin Rose Ostomel	Construction Defect Photo — Exhibit 2
A.B. 285	Y	Caitlin Rose Ostomel	Construction Defect Photo — Exhibit 3
A.B. 285	Z	Caitlin Rose Ostomel	Construction Defect Photo — Exhibit 4
A.B. 285	AA	Caitlin Rose Ostomel	Construction Defect Photo — Exhibit 6
A.B. 401	BB	Assemblyman John Oceguera, Clark County Assembly District No. 16	Proposed Amendment
A.B. 401	CC	Speaker John Oceguera	Streamlining the Construction Defect Resolution Process
A.B. 412	DD	Steve Holloway	Overview of Retention Escrow Act
A.B. 317	EE	Delores Bornbach	Letter dated April 11, 2011
A.B. 317	FF	John A. Radocha	Letter dated April 11, 2011