MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
April 5, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 8:03 a.m. on Friday, April 5, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Donald G. Gustavson, Senatorial District No. 14
Senator David R. Parks, Senatorial District No. 7
Senator Michael Roberson, Senatorial District No. 20
Assemblyman John Ellison, Assembly District No. 33

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Caitlin Brady, Committee Secretary

OTHERS PRESENT:

Rocky Cochran, Cochair, Coalition for Fairness in Construction; President, Southern Nevada Home Builders Association

Jesse James Haw, President, Hawco Development Company; Cochair, Coalition for Fairness in Construction
Terry Care, Leading Builders of America
Josh Hicks, Coalition for Fairness in Construction
Allison Copening
Chris Hallman, Pardee Homes of Nevada
Craig Marquiz, Coalition for Fairness in Construction
Robert Coleman Jr.
Tracy Rhodes
Christopher Smith
Ralph Walker
Peter Brunt
Charles Litt
Ken Anderson
Mary Davis, President, J & L Windows, Inc.
Susan Cavallero, Vice President, Cavallero Heating and Air Conditioning, Inc.
Katherine Carr Doty, Classic Door and Trim, Inc.
Norberto Cisneros
Michael Hoy
George Ross, Las Vegas Metro Chamber of Commerce
Gail J. Anderson, Administrator, Real Estate Division, Department of Business and Industry
Stephany Madsen, Senior Vice President, Special Projects, American Resort Development Association
Karen Dennison, American Resort Development Association
John McCormick, Administrative Office of the Courts, Nevada Supreme Court
John T. Jones, Jr., Department of Family Services, Clark County

Chair Segerblom:
I will open the hearing on Senate Bill (S.B.) 161.

SENATE BILL 161: Revises various provisions relating to constructional defects. (BDR 3-480)

Senator Michael Roberson (Senatorial District No. 20):
I will read from my written testimony (Exhibit C) in support of this legislation. I have also provided the Committee with a housing market study (Exhibit D) by the Center for Business and Economic Research, Lee Business School,

University of Nevada, Las Vegas (UNLV), entitled *The Nevada Housing Market: Prospects for Recovery* that I refer to in my testimony.

Rocky Cochran (Cochair, Coalition for Fairness in Construction; President, Southern Nevada Home Builders Association):
I have lived in Nevada for over 50 years. I am a third-generation homebuilder and have been building homes in Las Vegas for 23 years. I would like to have everyone in Carson City and Las Vegas who supports Nevadans getting back to work to please stand. I notice that a majority of attendees in Carson City and Las Vegas are standing in support of S.B. 161.

As Vice President of construction operations for Pardee Homes of Nevada, I see all construction defect lawsuits under *Nevada Revised Statutes* (NRS) 40 involving our company. Over 98 percent of these lawsuits are the first time I have heard about warranty issues from homeowners. I have a fully staffed, award-winning customer service department that responds to service calls within 2 hours. We complete service work within 7 to 14 days. Homebuilders need to build and service quality homes to ensure success for repeat buyers and referral business. We would like to be given the opportunity to service our homebuyers and put tens of thousands of Nevadans back to work. When you buy a new car and you have a warranty issue, is the first call you make to an attorney? Of course not.

Jesse James Haw (President, Hawco Development Company; Cochair, Coalition for Fairness in Construction):
My family has built houses for three generations in Henderson, Las Vegas, Winnemucca, Sparks and Reno. I grew up building homes, going to local schools and was the first in my family to graduate from college. Since 1990, we have built over 1,500 homes in Reno. In 2002, we had 209 employees. During the 62 years my family built homes in Nevada, we did not have a single lawsuit. When something was wrong with a house, we fixed it. We take pride in the homes we build because we are building them for our community and neighbors. We were fortunate enough to give back to our community by donating three school sites, a house for a University of Nevada, Reno, fundraiser and thousands of dollars for Little League teams.

Almost 10 years after building our last house, we were sued. The lawsuits continued. In 1997, our insurance premiums were $37,000 per year. In 2002, they were $749,000 for a policy with many exclusions in coverage. The cost of

insurance coupled with the increasing prevalence of costly construction defect litigation has pushed my company out of the market. Today, we have three employees. I want to return to doing what my family has been doing in Nevada for six decades. I am here on behalf of my family, my company and all of Nevada's homebuilders to implore you to repair a system that is no longer working for Nevadans. It does not work for homebuilders, employees of homebuilders nor Nevada homeowners. If there is an issue with a house, builders want to fix it. We need an environment that fosters repairs, not entices lawsuits.

I am seeing the effects of homeowners who are stranded after the conclusion of a lawsuit. Homeowners are required to disclose construction defects, which causes the value of the house to decrease. We believe litigation should be the last option, not the first. As our fragile residential market returns, family-owned homebuilders have to weigh the options of building again. The language in NRS 40 is a serious barrier to returning to business. In 1998, local builders made up 55 percent of the market in the State. Today, they are less than 21 percent. The recession and unintended consequences of NRS 40 have stopped me from building production homes. If a public company is sued, the company's stock value decreases. If a family company is sued, the company is devastated.

Senator Hutchison:
What is your response to people who say homebuilders are no longer in Nevada solely because of the economy?

Mr. Haw:
I agree the economy has played a significant role in why homes are no longer being built. However, for local companies wanting to return to the homebuilding business, knowing the extent of the impending lawsuits is a real concern. There are extreme effects on insurance costs and other unintended consequences.

Mr. Cochran:
It is explained best by the volume of NRS 40 cases over the last 3 years. It is a business decision for both public and private builders who want to continue to build homes.

Senator Hutchison:
Do the construction defect laws of the State have a substantial impact on your business decision to continue doing business in Nevada?

Mr. Haw:
Absolutely.

Mr. Cochran:
Yes. The insurance is also a big factor. If a private builder is sued, he or she must close the business. A public builder may survive the number of lawsuits but must make other business decisions. The NRS 40 laws are affecting the way we do business in southern Nevada.

Terry Care (Leading Builders of America):
This is a compilation of S.B. No. 337 of the 75th Session and S.B. No. 349 of the 75th Session. Senate Bill No. 349 of the 75th Session is contained within sections 1 through 3 of S.B. 161. Section 1 changes the definition of construction defect such that an unreasonable risk of injury to a person or property would be considered a construction defect. Section 2 removes allowing a claimant to recover attorneys' fees for construction defect lawsuits. Section 3 requires a signed affidavit from a claimant affirming he or she is aware of the provisions of NRS 40. In the case of a homeowners' association (HOA), the claimant must notify the unit owners. If a residence is the subject of NRS 40 action, it must be disclosed when the homeowner attempts to sell the property. Sections 4 through 6 shorten the statute of repose if there is a known defect or an apparent defect if you were to engage in reasonable discovery.

Both bills passed out of the full Senate in the 75th Session. The bills were never given a hearing in the Assembly. If you build a house in Nevada or are involved in the building process at any time, you will be brought into any NRS 40 lawsuit filed. A code violation is not a construction defect. If there is a substandard home, the homeowner should be allowed to seek legal redress. Builders and subcontractors should not operate in fear of litigation. The NRS 40 laws give an incentive to sue. Passing S.B. 161 is the right thing to do.

Josh Hicks (Coalition for Fairness in Construction):
I will present a brief presentation (Exhibit E) of the exhibits we have provided. First, I would direct you to the UNLV housing market study, Exhibit D, referenced by Senator Roberson. This study provides an objective look at the

housing market in Nevada. It focused on how construction defect lawsuits have affected the market since 2000. Next, we have provided a variety of solicitation letters (Exhibit F). Many NRS 40 lawsuits do not start with homeowners contacting builders. Homeowners receive similar letters, pressuring them to file lawsuits. We have provided samples of NRS 40 notices (Exhibit G). There is typically a lot of vagueness in these notices, which makes it difficult for builders to find the problems. Next, we have provided you 11 frequently asked questions (Exhibit H) that have been raised repeatedly as we have gone through this process.

Finally, we have provided you with a case study (Exhibit I) of the district court case *Porter v. Richmond American Homes*, No. 10A586718 (Clark County Nev. Filed Mar. 31, 2009). We provided this to give you an illustration as to why these cases can get so expensive. This is a pending case, but the case study, Exhibit I, is a public document. The jury verdict was approximately $15,000, and the motion for fees and costs was $1.5 million. Insurance carriers and builders have to consider this when deciding whether to settle a case.

Senator Jones:
What was the outcome of *Porter v. Richmond*?

Mr. Hicks:
It is a pending case. The initial motion was denied because of insufficient documentation to support the case. It was not denied on grounds that it was unreasonable. It is pending on a motion of reconsideration.

Senator Jones:
Do you think offers of judgment are not a sufficient way to handle these issues? The opinion of District Court Judge Timothy Williams was reasonable. He cited *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006) and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), establishing how to assess the amount of attorneys' fees awarded. The offer of judgment process is in place to solve these situations. District Judge Williams did not find attorneys' fees to be automatically awarded. Why did you choose *Porter v. Richmond* as your case study?

Mr. Hicks:
District Judge Williams' determination cited the lack of adequate documentation. The case is pending. We chose *Porter v. Richmond* to

demonstrate what a builder and insurance carrier face in construction defect cases. According to the Nevada Supreme Court, the plaintiffs are entitled to be awarded attorneys' fees. Even with a modest cost to repair, builders are faced with motions for attorneys' fees vastly in excess of the repair cost.

Senator Jones:
We should not be concerned about filing motions for attorneys' fees. *Porter v. Richmond* illustrates that a motion does not ensure the awarding of fees.

Mr. Hicks:
Construction defect cases settle for such large amounts because attorneys' fees are included as damages. Plaintiffs are entitled to attorneys' fees, and the builders fear the court will award them. The entitlement of attorneys' fees increases the cost of construction defect cases.

Senator Jones:
I do not see that in the case study. Similar cases resulted in other than hoped for recoveries by the attorneys. A motion was filed for attorneys' fees, but they were not awarded.

Mr. Hicks:
I do not know of any such cases. Most of these cases settle. Cases would settle for significantly smaller amounts if plaintiffs were not entitled to attorneys' fees.

Senator Jones:
One example is district court case *Gunderson v. D.R. Horton, Inc.*, No. 04A495059 (Clark County Nev. 2008).

Allison Copening:
I am here to share my experience with construction defect litigation. When I served in the Legislature between 2008 and 2012, I was surprised to find construction defect was a partisan issue. Construction defect should not be a partisan issue or a trial lawyers versus construction industry issue. Everyone involved wants to ensure the homeowner is helped when a legitimate construction defect is discovered.

Since the construction defect laws changed over 15 years ago, Nevada has experienced a myriad of problems. Homeowners with construction defects have

not been made whole. Builders, subcontractors and small businesses have folded because insurance companies no longer insure them. Hundreds of Nevadans have lost their jobs. Real estate agents cannot sell homes that are defective. The HOAs have been fraught with corruption over the potential millions of dollars that could be made from construction defect lawsuits. The worst outcome—because of numerous construction defect lawsuits in our State—is that Nevada has a national reputation of building defective homes.

Our laws have caused an ugly, toxic environment for all stakeholders except construction defect attorneys. Nevada laws guarantee the legal fees for the attorneys. From a purely financial aspect, the attorney would be a fool to help the homeowner get a problem solved in a timely manner. My personal story proves my assertions.

Between 2001 and 2006, I served as Director of Public Affairs for Pulte Homes and Del Webb. A primary focus of my job was solving critical issues with the tens of thousands of homeowners. I managed communication with homeowners in addressing construction defect lawsuits. In 2003, a local law firm convinced the Resident Board of Directors at Sun City MacDonald Ranch, a Del Webb community of over 2,500 homes, to enter into a lawsuit over mold found in the shower of the community center. Mold in the shower is a simple fix. Del Webb sent a letter to the Board, requesting a meeting to examine the shower and make repairs if the mold was determined to be a result of our building methods. We had always enjoyed a good relationship with the Board, so we believed we could rectify this situation quickly.

Del Webb received a letter back from the Board's attorneys chastising us for attempting to talk with the Board members. Several letters went back and forth, attempting to work with the attorneys to fix the problem and avoid a costly lawsuit. Each time, the plaintiffs' attorneys had a myriad of excuses as to why this was not possible. During the correspondence process, we began copying the entire membership of Sun City MacDonald Ranch so the members could witness the unwillingness of the Board and the attorneys to rectify the situation. I personally drafted all the letters on behalf of Del Webb. Del Webb's offers included paying for all the repairs, even if it was proved to be someone else's fault; paying for all destructive testing, past and current; and paying all the attorneys' fees to date, approximately $75,000. We also offered to coauthor a letter to the membership to show unification in wanting to resolve the issue in a timely manner. All of our offers where rejected by the attorneys.

Del Webb knew this is how it would unfold. We knew that the attorneys cared little about fixing the problem in the shower. We knew that if they refused to allow the repairs, they could string the lawsuit out for more than 2 years. Nevada laws guarantee the attorneys will be paid for their services regardless of the outcome. The attorneys could let Del Webb fix the problem expeditiously and walk away with a mere $75,000, or they could collect millions of dollars if they strung it out over several years.

Over the next few years, the homeowners protested to the Board because of what they viewed as an injustice against Del Webb. They circulated petitions for months to drop the lawsuit and let Del Webb repair the problem. All to no avail. In the 2 years the attorneys occupied Sun City MacDonald Ranch, they did more destructive testing in the hopes of filing more class action lawsuits. The destructive testing did reveal a problem in the firewalls of duplex units. The Board's attorneys proceeded to file a class action lawsuit against Del Webb instead of approaching Del Webb to make the repairs. Del Webb did not wait for the lawsuit to settle years later. Del Webb began working directly with the homeowners to make repairs to the firewalls at no cost to the homeowners.

By the time the lawsuit made it to court years later, all the repairs had been made except for a few homes that decided to stay in the lawsuit. The judge appeared perplexed and chastised the attorneys for continuing with the lawsuit and wasting the court's time. Regardless, because of Nevada's laws, the attorneys enjoyed a lucrative payout. There are solutions that can be beneficial for all. No one begrudges the trial lawyer for making good money, but not for making it on the backs of homeowners, HOAs, builders, subcontractors, real estate agents and the reputation of Nevada. I urge you take action and support S.B. 161.

Senator Hutchison:
Chapter 40 of NRS was created for the right to repair, which helps homeowners get problems fixed through a warranty process. What has been your experience in the difference of learning of a problem for the first time through the warranty process versus the NRS 40 litigation process?

Ms. Copening:
It is the difference between rectifying a matter in a couple weeks to it lasting years and costing thousands or millions. The NRS 40 litigation process involves subcontractors in lawsuits where they should not be. The subcontractors end up

paying large amounts to settle the lawsuits. Del Webb, builders and subcontractors want the right to repair. Del Webb used to be first on the scene to resolve any issue a homeowner had. Our hands are tied as soon as a lawsuit is filed. The reputation of the builder suffers, and homeowners have to wait years for problems to be fixed.

Senator Hutchison:
What impact do the reforms in S.B. 161 have on right-to-repair laws?

Ms. Copening:
I am not an expert on the contents of the bill pertaining to today's laws. I speak from years of experience of watching the system not work. I defer to the drafters and attorneys.

Chris Hallman (Pardee Homes of Nevada):
The problem with the process is the inability to define in the NRS 40 notice what needs to be repaired. The bill will clarify the notice requirement and the definition of a construction defect. There will be less controversy over whether something is a defect and can be repaired by the builder or whether the developer is subject to litigation. If a homeowner goes through the warranty process, the builder or developer can repair the problem. If the builder receives notice from an attorney, it typically is not detailed, and the builder must find the problem before he or she can respond. Builders do not have an opportunity to respond, and that triggers the NRS 40 litigation process.

Senator Hutchison:
What percentage of construction defect cases go through the warranty process instead of the NRS 40 litigation process?

Mr. Hallman:
Approximately 5 or 6 years ago, 100 percent of the construction defect cases we faced went through the warranty process. A majority of the construction defect cases still go through that process. However, the typical NRS 40 litigation notices we see are on behalf of 20 to 100 homeowners. The majority of volume of construction defect notices come through the NRS 40 litigation process even though we have more cases through the warranty process. We would rather go through the warranty process.

Senator Hutchison:
If a construction defect is processed through the warranty process, the builder can fix the problem and it is over. If it is processed through the NRS 40 process, it is much more difficult.

Senator Jones:
We are often presented at the Legislature with problems and solutions, and I am concerned when the problem and solution do not have a nexus. I am not sure what the nexus is with the problem and the solution presented in this bill. If there is a problem with the notice of construction defect and right to repair, why are we not fixing NRS 40.645 and NRS 40.670 through 40.675?

Mr. Hallman:
Senate Bill 161 does help with the notification and right-to-repair process. Section 1 of the bill amends the definition of construction defect. If a homeowner is to move forward with the NRS 40 process, he or she needs to know what is recoverable. If we narrow the definition, we narrow what notice builders will receive.

Senator Jones:
The changes in section 1 to the definition do not give any more or less information.

Mr. Hallman:
We can respond to a notice of construction defect and decide if a problem actually exists. If it does, a decision must be made whether to move forward with the litigation process. The first part of NRS 40 statutes relate to the notice and right to repair. The second aspect of NRS 40 statutes relates to mediation and litigation. If the definition of construction defect is narrowed and the discussion about the potential scope of the case takes place, then we can define the notice or the attorneys can decide whether they have an NRS 40 defect for which they can move forward to recover.

Senator Jones:
The definition under NRS 40.615 removes the code violation aspect. I do not agree with that. When discussing incentives for attorneys to file lawsuits and not go through the repair process, is there an incentive for a builder to not build a product to code if no penalties for code violations exist?

Mr. Hallman:
A builder is always incentivized to build something to code and build a quality product. That is the business.

Senator Jones:
If there is no penalty in statute, is there an incentive to build something to code?

Mr. Hallman:
I would not say there is an incentive to not build something to code. There is a discussion about whether something is built to code and needs to be fixed if defective.

Senator Jones:
I will rephrase it. There is no disincentive to not build something to code.

Craig Marquiz (Coalition for Fairness in Construction):
There is no disincentive for a builder or subcontractor to not build a good product. Most builders and subcontractors build to a higher level of production than what the minimum code requires. Under the definition of construction defect in NRS 40, that is defined as a defect because it is not built according to code. The definition in S.B. 161 narrows the definition of construction defect. Builders and subcontractors should not be held accountable for betterments to a home or product. Builders are forced to pay hundreds of thousands or millions of dollars in construction defect litigation costs because they did not build something according to code. They built it better. *Nevada Revised Statutes* 40 is not part of the litigation process of filing motions for attorneys' fees. Most cases are settled in mediation. Plaintiffs seek millions in repairs, most of which are betterments, not defects. Builders receive NRS 40 notices and are required to notice subcontractors. Everyone is involved in the inefficiency. The right to repair was designed to allow builders and subcontractors the opportunity to fix homeowners' legitimate problems in a timely and cost-effective manner. The process was designed to take 180 days. The builder would have 30 days from the time of notice to notify subcontractors. The subcontractors would have a set period of time to complete the repair. The whole process would be completed in 180 days. Most NRS 40 processes take years to complete. There are inefficiencies. A $15,000 repair cost can become a lawsuit for over $1.5 million. The right to repair has been removed from the process. Senate Bill 161 redefines construction defect to fix the inefficiencies in

the process. Builders and developers want to fix legitimate construction defects expeditiously.

Robert Coleman Jr.:
I was not trying to sue anyone. I woke up one night and my house was rattling. My plumbing was damaged, and there was a leak outside the house. I called the plumber. The plumber looked at my pipes and told me he could not help because they were Kitec pipes. I had no idea what Kitec was. I did my own investigation and research. I tried to contact the builder and plumbing subcontractor. The builder was no longer in business. The plumber had changed names. No one wanted to help. I turned to other resources through a class action lawsuit in process.

Chair Segerblom:
What was the result?

Mr. Coleman:
For about 6 months, I had no running water. I filed a claim with the class action lawsuit against Kitec because no one would help. I paid for the repairs, hoping to get some money back from the lawsuit.

Senator Hutchison:
If you had a responsive builder who came to fix the problem, would you have joined the class action lawsuit?

Mr. Coleman:
No.

Tracy Rhodes:
I did not want to go to trial either. In the summer of 2007, I read a story in my HOA newsletter about my community being part of a class action lawsuit against Kitec plumbing. I started noticing discoloration in my baseboards, but it took months for it to become clear that I had a plumbing leak. I did verify that there was Kitec plumbing in my home. In November 2007, I noticed mushrooms growing from behind my walls, dishwasher and baseboards. Immediate action was necessary. My builder was no longer in business. My homeowners' insurance did not cover the problem. I had nowhere to turn to get my house repaired. I contacted the attorneys listed in the HOA newsletter article.

This experience follows me financially and overshadows good memories at my house. I will never be fully repaid for the debts incurred to fix a 4.5-year-old house destroyed by Kitec plumbing. A jury expressed interest in compensating me for my experience but was instructed that could not happen. Money is only one aspect of this. I had to claim bankruptcy because the interest payments on the credit cards used to repair my home drove me to financial ruin. I cannot easily buy a new home. I suffered from severe anxiety waiting for the next disaster. I stopped going home and hated being in the house. The financial stress played a significant role in unraveling my relationship and former life. By 2010, I was broke, homeless and alone. I was forced to live in my parents' basement. I was not sure if I would ever see any money from a lawsuit. My house cost me $165,000. The repairs cost an additional $19,000 because my builder chose not to spend an extra $50 on plumbing other than Kitec.

Christopher Smith:
I had a similar situation with Kitec. Six years ago, my wife and I bought our first home. A year later, we stepped into water in the master bathroom. We spent a week waiting for the house to dry out. I did a majority of the remodeling because we could not afford to have someone do it. There was a $1,000 insurance deductible on top of repair expenses to get the plumbing leak fixed. We did not know where to go. We called a plumber at the beginning. He mentioned there had been problems with Kitec plumbing. We talked to the neighbors to find out who the builder was. The house was 6 years old when we bought it. The builder was no longer in business. We did not have anywhere to turn. When we found out about the lawsuit, we were told we would have to pay for the repairs ourselves. We had to wait 2 years to save enough for an entire replumb of our house. Every time we left the house for more than 24 hours, we shut the water off or had someone check the house. The opportunity for someone in our situation to be made partially whole or have the problem fixed is huge. We eventually did replumb our house.

Ralph Walker:
We built our dream house. It cost approximately $500,000. Within 3 years, it was settling. I am a trial attorney by trade. I did not want a lawsuit. I went to the builder and showed him our problem. He called the engineer. We never heard back from the engineer. That is why I got a lawyer involved. We tried resolving the problem under the warranty system. The floors were settling, there were cracks three-quarters of an inch wide and the doors would not open. I was constantly changing the strike plates on the doors so we could shut them.

The concrete around the house cracked. Ultimately, the engineers agreed to a solution installing 95 helical piers around the house 40 feet down to bedrock. It cost $400,000. If it were not for NRS 40, I would have had to pay $133,000 in attorneys' fees. The process took 6 years, from 2003 to 2009. We lived in the house for 6 years with the problem. Ultimately, the house is stable, but we have to disclose the defect. It was a trying period. We sued the engineering subcontractors who had been sued on a third-party petition by the builder. The builder's insurance was out of money, so the only way to recover repair costs was to bring in the engineers. Builders involve all the subcontractors. The gutter subcontractor was involved in our lawsuit, even though we did not have any problems with the gutters. Laws against frivolous lawsuits are not effective in NRS 40 litigations.

Senator Hammond:
Would your ability to seek redress through the courts be limited by this bill? Would you still have been able to sue to get damages if this bill passed?

Mr. Walker:
I have not read the bill. I just wanted to tell the Committee that NRS 40 worked the way it was intended for us. We did not have to pay for repair costs and attorneys' fees out of our own pockets.

Peter Brunt:
In December 2002, my wife and I bought a house being constructed in Reno. In April 2003, we moved in. Within 45 days, we notified the developer, Silver Star Development, of extensive construction defect issues, particularly with the stucco. We hired an outside inspector. The inspector found a broken rafter, a damaged pipe leaking water into the crawl space and cracked and peeling stucco. We provided the report to Silver Star Development. From 2004 to 2006, the developer and representative from the stucco subcontractor attempted to fix the stucco. The results were not acceptable to us or to Silver Star Development. Over the next 3 years, we continued to pressure Silver Star Development to repair the stucco. From 2004 to 2010, five representatives from Silver Star Development inspected the stucco on multiple occasions. No work was ever completed. We formally wrote to Silver Star Development in September 2008 and April 2010 to no avail. We were convinced the developer had no intention of fixing our problem. We had no other options. We joined our neighbors in taking legal action against Silver Star Development. I am concerned about the bill rewarding the attitude of companies like Silver Star Development.

There needs to be checks and balances for builders who forget their responsibility to provide quality products to their customers.

Senator Ford:
It appears NRS 40 is necessary to protect consumers; however, we may need to amend the statutes. I have concerns about the notices sent to subcontractors. They seem unclear and make it difficult for subcontractors to fix problems. I do not know if that is a prolific practice. What can we do to make the notice process more effective? I am also concerned that any violation of code could be considered a construction defect. I do not think attorneys' fees are guaranteed. Statute uses "may" language and requires approval from the judge to award attorneys' fees. Why can we not use prevailing party language?

Charles Litt:
The NRS 40 process was designed to discourage litigation and promote early resolution of claims. In 2003, the statutes were revised to guarantee contractors a right to repair. The changes were agreed to by all stakeholders. It was clear the contractor would receive specific notice. The notice would identify the problem, the code or standard violated and the location of the construction defect. The contractor would have a meaningful opportunity to repair. Any eventual litigation case could be dismissed based on unspecific notice. If the contractor asks for more specificity, the homeowner is required to provide it.

Senator Ford:
In a situation where someone gives an unspecific or vague notice and the case is dismissed, are attorneys' fees still awarded?

Mr. Litt:
No, attorneys' fees are only awarded if the homeowner prevails.

Senator Jones is concerned there is not a nexus between the problem and solution. Contractors have complained about the right to repair being obstructed. Not a single proposal exists to strengthen or clarify the notice or the right-to-repair provisions statute. Notice is required to be clear, and homeowners are required to give the contractor access to make a repair. If that does not happen, the case can be dismissed and no attorneys' fees awarded.

Originally, statute defined construction defect as a defect in the design of construction of a residence. In 2003, all parties agreed to a more specific definition. It is in place today as a violation of building code, unreasonable safety risk, property damage or work below the standard of care. Senate Bill 161 would destroy the ability of a homeowner to make a construction defect claim unless there is an unreasonable safety risk. The bill requires homeowners to prove a building code violation, property damage and work below the standard of care. Building codes do not apply to all aspects of construction. Building codes apply to structural, plumbing, mechanical, electrical and fire safety work. There is not a code for installation of windows or roofs. Under the bill, a leaking roof would not be recoverable because there is not a building code violation. The new definition would also require property damage to have already occurred before making a claim. A homeowner could identify a problem, such as corroding pipes, but could not file a claim until the pipes actually leak. This bill does not only eliminate frivolous construction defect lawsuits but also meaningful ones.

Senator Ford:
What appropriate change to the language proposed could bring the construction defect definition outside the realm of any code violation?

Mr. Litt:
If you exceed the minimum standards of the building code, it is a construction defect. I would propose clarifying standards so that exceeding code is not a construction defect. This makes it impossible for a homeowner to establish a construction defect violation under law.

Senator Jones:
Section 1, subsection 1, adds the language "unless the workmanship of the design, construction, manufacture, repair or landscaping exceeds the standards set forth in any applicable codes and ordinances." Are you opposed to that language?

Mr. Litt:
We have no objection to that language. There was a proposal last Session to clarify attorneys' fees would only be awarded to the prevailing party and construction in excess of the code is not a defect. We endorse those proposals. We endorse strengthening the right to repair.

Four protections built into law protect against the abuse of attorneys' fees. First, to be entitled to recover attorneys' fees, the homeowner must prevail in a lawsuit. Second, the homeowner must act reasonably in the prelitigation NRS 40 process. If the homeowner does not act reasonably, there is a risk of being denied attorneys' fees even if the homeowner prevails in trial. Third, the homeowner must overcome any offer of judgment or settlement offer conveyed during litigation. If the homeowner receives a reasonable offer, does not accept the offer and does not do as well at trial, the homeowner is not awarded attorneys' fees and costs. Fourth, reasonable attorneys' fees are awarded at the discretion of the judge based on posttrial applications by the homeowner and motions to tax the fee requests by the contractor. General or unspecified damages are not awarded in construction defect cases. The homeowner is only awarded what he or she can prove is the cost to repair. If we remove the entitlement to recover litigation expenses in addition to repair costs, a homeowner would never recover enough to pay repair and attorneys' fee expenses.

Finally, S.B. 161 changes the statute of repose to 4 years. Some construction defects take more than 4 years to manifest. A majority of the states have a 10-year statute of repose. The shortest is Louisiana with a 5-year statute of repose. Senate Bill 161 would prevent a homeowner from proving any construction defect except those posing an unreasonable risk to safety, bar a homeowner from recovering sufficient amount to repair the home and give Nevada the shortest statute of repose in the Country. This bill is not warranted.

Ken Anderson:
We purchased a new home in a Del Webb community. We also experienced problems with Kitec plumbing.

Chair Segerblom:
Did you have similar problems as the others who have testified today?

Mr. Anderson:
Yes.

Senator Brower:
Why did the homeowners testify today? Even if S.B. 161 were adopted, the homeowners here today would have been able to recover damages for the defects in their homes.

Mr. Litt:
The homeowners testified to address the traditional contention that homeowners call lawyers without going through the warranty process with the builder. In the instances presented, as long as a building code related to Kitec, there was already a leak and the installation was determined to be below the standard of care, the homeowners would have received a recovery award. There were thousands of Nevadans with problems because of Kitec plumbing. Many of them got the problem fixed before the home was damaged. We do not think homeowners should have to wait until a home is damaged to start construction defect proceedings. If the Kitec pipes had lasted more than 4 years before leaking, the homeowners would have no redress under the bill.

Senator Brower:
The homeowners described claims that would have allowed for recovery even if this bill were to pass. Correct?

Mr. Litt:
Yes.

Chair Segerblom:
Would they have received attorneys' fees?

Mr. Litt:
No. Mr. Walker would not have been able to fix his home if attorneys' fees were deducted from the award.

Senator Brower:
Is there any requirement that the money awarded be used by the homeowners to make repairs?

Mr. Litt:
No. It is within the homeowner's discretion as to how they repair the home.

Senator Brower:
Is there any requirement the money awarded be used for repairs?

Mr. Litt:
When a homeowner presents a case, he or she also presents a cost to repair. If the homeowner is awarded that money, it is up to the homeowner to make the repairs. There is no law requiring the homeowner to make the repairs.

Senator Brower:
Could the homeowner and attorney also determine how the attorney is to be paid through a contractual agreement?

Mr. Litt:
I do not see why not.

Senator Brower:
Could we leave the attorneys' fee award to an agreement between the homeowner and the attorney? It would be similar to what is done in a personal injury case.

Mr. Litt:
No. If you are required to pay attorneys' fees from the amount awarded, the homeowner would not have enough money to repair the home. Personal injury cases are entitled to general unspecified damages for pain and suffering and punitive damages. Attorneys' fees are not required to be awarded because of the general damages awarded to a claimant. Under NRS 40, contractors cannot be subject to unspecified damages.

Senator Brower:
Should we consider awarding general damages upon recovery to allow the homeowner to pay the attorneys' fees through an agreement instead of a statutory attorneys' fees requirement?

Mr. Litt:
Traditionally, contractors have not been in support of allowing a homeowner to claim pain and suffering or punitive damages to punish builders for poor construction.

Senator Brower:
What is the opinion of plaintiffs' lawyers about general damages?

Mr. Litt:
It has never been considered. The basis of NRS 40 was to limit homeowners to damages that can be proved.

Senator Hutchison:
The purpose of NRS 40 is to have homes repaired. Could we defer attorneys' fees until court certification that the repairs were made?

Mr. Litt:
If the homeowner elects to not repair his or her home, would the attorney not be compensated?

Senator Hutchison:
The idea would be to award money for the purpose of repairing the home. After the house is repaired, the homeowner would certify to the court the money was used for the purposes brought in the lawsuit. After the certification, attorneys' fees would be awarded.

Mr. Litt:
That is an interesting concept. I have never considered it.

Senator Hutchison:
Are you opposed to the idea?

Mr. Litt:
No.

Senator Hutchison:
Is there a requirement to disclose to the homeowner that not using the award to repair the home could decrease the value of the home or the homeowner could be brought into a fraud case for failure to disclose a material defect?

Mr. Litt:
A lawyer would be practicing below the standard of care if he or she did not disclose that to a homeowner. An HOA cannot file a lawsuit without a ratification vote from its membership. In the ratification vote, the HOA is required to provide disclosure obligations, estimated costs and attorneys' fees, and the status of the settlement negotiations in the mediation process. It is built into the HOA requirements. The law is clear on an individual's requirement to

disclose construction defects. There is no requirement for a lawyer to file an affidavit stating he or she informed the homeowner about the disclosure requirements.

Senator Hutchison:
Would it make sense to have disclosure requirements similar to those governing HOAs for individual homeowner cases?

Mr. Litt:
Requiring an affidavit be filed by a homeowner intimidates homeowners from filing claims. Strong disclosure requirements are built into statute. I am unaware of any comparable requirements of homeowners filing an affidavit understanding the property may be stigmatized. It would discourage legitimate construction defect claims.

Senator Jones:
Something could be done about the way lawsuits are solicited instead. There should be additional notice so a homeowner understands a lawsuit will immediately devalue the home. Would you agree to additional notice to homeowners of what will happen if they are involved in a lawsuit?

Mr. Litt:
Yes, we are open to working in that regard.

Senator Jones:
In regard to the statute of repose, I do not have sympathy for reducing the statute of repose for latent defects. The statute of repose for a patent defect of something in the open and obvious to the homeowner should be less.

Mr. Litt:
The statute of repose for patent defects is 6 years. From the date a homeowner knows about a problem, he or she has 4 years to make a claim.

Senator Jones:
Six years is still a long time. Could we lessen that time?

Mr. Litt:
We would be open to working with the Committee in that regard.

Senator Hammond:
Do you practice law in any other state? I would like to compare our laws with those of other states.

Mr. Litt:
I practice in Nevada and California.

Senator Hammond:
We want to make this a more fair process. Does California have a different process for awarding attorneys' fees? Is it in statute?

Mr. Litt:
In California, attorneys' fees for construction defect claims are only awarded through contract. If there is an attorneys' fees provision in the sales contract for the homeowner or in the governing documents of a HOA, the attorneys' fees would be recoverable. There is not an attorneys' fee provision written in California statute.

Senator Hammond:
Has that worked well?

Mr. Litt:
It is more difficult to get a result for a client where the homeowner is awarded enough to repair the home.

Senator Ford:
There is an alternative route for homeowners with smaller claims. Homeowners with $10,000 or $15,000 repair costs could contact the State Contractors' Board with a complaint. The Board would then award the homeowner money to repair the problem out of a recovery fund. Is this an option for homeowners?

Mr. Litt:
A homeowner can file a complaint with the Board. The Board then investigates the complaint and directs the contractor to make a repair if necessary. If the contractor fails to make the repair, the Board could issue a citation on the contractor's license. There is not a mechanism for the Board to award damages to a homeowner. Contractors' licenses are public record, so citations are available for other homeowners to view. There is no award of money to a homeowner if the contractor refuses to fix a problem.

Senator Ford:
I wanted to make a point about the affidavit disclosure requirement. I am selling property, and my real estate agent makes me fill out a form disclosing defects in my house. Do statute provisions address the disclosure of defects?

Mr. Litt:
Yes. The law is extremely clear about the extensive disclosure requirements.

Senator Hutchison:
There is no question that you have to disclose defects when you sell a house. The question is whether an individual understands the disclosure requirements when he or she files a construction defect lawsuit.

Senator Brower:
Why is it more difficult for a homeowner to get a positive result in California because of the attorneys' fees provisions?

Mr. Litt:
In California, homeowners are entitled to recover a series of performance standards and repairs. Homeowners are only allowed to recover the approved costs of repair. It is difficult to get a result for the homeowner to recover attorneys' fees. Litigation costs are recoverable under statute, but attorneys' fees are not. It is more difficult to get a result for the homeowner covering all litigation expenses, attorneys' fees and repair costs.

Senator Brower:
Is it a matter of contract in California? Is there a contractual provision to allow recovery fees?

Mr. Litt:
It is a matter of contract, but there is not always a contractual provision. Many times, a provision in the sales agreement or governing documents of an HOA allows attorneys' fees to be recovered. The entitlement to attorneys' fees in California is not in statute.

Senator Brower:
There is clearly a problem with the construction defect laws in Nevada. I have witnessed it as a Legislator and prosecutor. The system is rife with abuse.

Senator Roberson:
We do have a serious problem with the statutory scheme for construction defect. There is no other state with a similar law. Many Nevadans care about this topic. It affects people's lives. Many homeowners spoke of problems with the construction defect laws. Senate Bill 161 will not impair the ability of a homeowner to have legitimate construction defects fixed. It will reduce frivolous litigation that is bad for homeowners, builders and Nevadans.

Chair Segerblom:
I will close the hearing on S.B. 161 and open the hearing on S.B. 231.

SENATE BILL 231: Revises provisions relating to lawsuits involving real property. (BDR 10-1004)

Senator Michael Roberson (Senatorial District No. 20):
Senate Bill 231 is a companion bill to S.B. 161 that addresses another element of construction defect reform. There is an inherent flaw in NRS 40 in regard to homeowners' associations. Some people have steered HOAs into large-scale NRS 40 lawsuits. This bill aims to eliminate the ability of anyone to take over an HOA for these purposes. The bill states an HOA does not have standing to bring an NRS 40 lawsuit, except for common elements. This does not preclude homeowners from bringing NRS 40 actions or from bringing an action as a neighborhood. The HOA cannot direct the association to bring an NRS 40 case. Frivolous lawsuits in Nevada hurt every homeowner in the State by increasing insurance costs. The bills I presented today, S.B. 161 and S.B. 231, will help homeowners and the construction industry.

Mr. Hicks:
We support the bill for the same reasons we support S.B. 161. This is an important part of construction defect reform.

Mary Davis (President, J & L Windows, Inc.):
I am currently a part of over 500 NRS 40 claims with over 3,000 plaintiffs. In 2004, my insurance increased to a $25,000 deductible. This is an unfair law. I have never had a warranty request. I have lost my business. I am also facing a bad-faith claim because the insurance company is denying all of my claims. This law is wrong. I no longer subcontract for noncustom residential construction. I support the bill.

Senator Hutchison:
Are most of the lawsuits you are involved in HOA-related?

Ms. Davis:
Some of them are. I am a window subcontractor, but if the roof or stucco is broken, I am brought into the lawsuit.

Senator Hutchison:
Is there any way for you to get out of a lawsuit, or are you part of it for the duration of the suit?

Ms. Davis:
No, I cannot get out of the lawsuits. I never go to trial. I have no power.

Susan Cavallero (Vice President, Cavallero Heating and Air Conditioning, Inc.):
We have been in the heating and air-conditioning business for over 37 years. Within 1 year, our homeowners know if there are problems. The NRS 40 statutes are not helping us survive as a business, and it is not helping Nevada put people back to work. More money than it costs to build a home is being paid out for alleged defects and fees. Many of these issues could be remedied if the homeowner called the subcontractor. We could go to the home and fix the problem. The State should rescind the licenses of the subcontractors that do not fix problems. This bill is needed so we can continue working and making Nevada one of the best states in the Nation.

Katherine Carr Doty (Classic Door and Trim, Inc.):
My family founded Classic Door and Trim over 30 years ago. We have approximately 45 employees. The NRS 40 process has been devastating to my business. It has affected all the workers in the State. My employees are my biggest asset. They work every day to produce a product. They take it personally when they are told their product was defective. When houses settle, the doors stick. The door is not defective; it is the house settling around the door. The excessive insurance payments and deductibles come out of my employees' pay. The main problem with this law is that everyone involved in a job, no matter how small the part, is named in a lawsuit. We have been named in lawsuits for projects we did not work on. We were named because we are still in business.

Senator Jones:
I am concerned that S.B. 231 does not reach the nexus between the problem and solution. Subcontractors are pulled into lawsuits that they should not be. Assembly Bill 367 reaches that nexus.

ASSEMBLY BILL 367: Revises provisions relating to constructional defects. (BDR 3-670)

Senator Brower:
How are subcontractors who had nothing to do with a home's construction brought into a lawsuit?

Ms. Doty:
A subcontractor must sign a contract with a contractor. We are told not to sign these contracts because they are one-sided. We cannot do business if we do not sign these contracts. When a developer is notified of the lawsuit, the developer sends notices to every subcontractor believed to have worked on that job. Usually it is between 30 and 45 subcontractors.

Mr. Marquiz:
The notice provision is part of NRS 40.645. That provision triggers the claimants' notice to the builder or developer. The builder or developer is statutorily required to give notice, under NRS 40.646, to any subcontractor who potentially may be obligated to provide review or inspection and make a determination on repairs to a project. Most of these notices are shotgun notices. There is a problem with the stucco, drywall or framing, and the subcontractor must go to the home in search for the problem. Subcontractors and developers are kept in the process far longer than needed because the process does not end until the claimant identifies a final defect list. The final defect list is usually released at approximately the same time of the settlement mediation. If the case is not settled, the final defect list becomes the trial list of legitimate issues of the homeowner.

Mr. Litt:
Provision in NRS 116.3102, subsection 1, paragraph (d) empower HOAs to make claims for noncommon area properties in a representative capacity under certain circumstances. Nevada is not unique in this regard. This is part of the Uniform Common Interest Ownership Act (UCIOA) adopted by more than

20 states. Nevada adopted the UCIOA more than 20 years ago with NRS 116. The HOAs generally bring common area claims.

In the mid-2000s, developers started jerry-rigging HOA covenants, conditions and restrictions (CC&R) documents to push the boundaries of condominium units from the interior air space of the unit to the outside of the building. This makes the homeowners of an eight-unit building share the maintenance of the stucco, roof and other common area elements. This is done to thwart construction defect claims. It also makes the buildings impossible to maintain.

This law is used to bring claims on behalf of HOAs on multiunit buildings in order to get the roof, stucco or windows fixed. On December 27, 2012, the Nevada Supreme Court unanimously ruled in favor of *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court,* 128 Nev. ___, 291 P.3d 128 (2012), stating this was a proper use of this statute. If we change the law to not allow HOAs to act in a representative capacity except for common area problems, the provisions in the UCIOA have no meaning. The condominiums built during the next wave of construction will be unmaintainable. The use of this statute to bring claims in multiunit buildings where the developer has jerry-rigged the CC&Rs has been unanimously endorsed by the Nevada Supreme Court.

Chair Segerblom:
I will close the hearing on S.B. 231 and open the hearing on S.B. 368.

SENATE BILL 368: Revises provisions concerning constructional defects. (BDR 3-425)

This bill removes the provision in NRS 40 dealing with attorney's fees. Correct?

Senator Donald G. Gustavson (Senatorial District No. 14):
Yes.

Chair Segerblom:
Is it similar to a provision in S.B. 161?

Senator Gustavson:
Yes. I have submitted written testimony (Exhibit J) and refer you to the UNLV housing market study, Exhibit D.

Assemblyman John Ellison (Assembly District No. 33):
I support the bill. I have submitted written testimony (Exhibit K).

Mr. Hicks:
We support this bill for the same reasons as the two previous bills.

Chair Segerblom:
I will close the hearing on S.B. 368.

Senator Kihuen:
I will open the hearing on S.B. 417.

SENATE BILL 417: Revises provisions relating to civil actions. (BDR 2-1105)

Senator Tick Segerblom (Senatorial District No. 3):
Senate Bill 417 is a simple bill to help homeowners and subcontractors. The bill covers a situation when there is a defective product in a home installed by a subcontractor. The bill allows the homeowner to prosecute the manufacturer of the defect and allows the subcontractor to recover costs from litigation.

Norberto Cisneros:
This bill brings rationality to NRS 40 processing and construction defect litigation. There is a definition of a supplier in statute; and under that definition, the supplier is responsible for certain construction defects. Statute does not clarify that "supplier" includes supplier of certain products the supplier manufactures. Some manufacturers believe they are not subject to NRS 40 litigation. We have discussed the issue with the Legislative Counsel Bureau (LCB), which issued an opinion that manufacturers are subject to NRS 40. The bill clarifies this issue.

Senate Bill 417 also covers the notice process to manufacturers. Many suppliers of defective products are not located in Nevada. You heard about Kitec, a Finnish company. The bill clarifies that even companies located outside the United States are subject to NRS 40 processing. Under the bill, NRS 40 notice requirements are waived for manufacturers. It does not make sense for manufacturers to be subject to NRS 40 and given the same notice as a contractor or subcontractor.

Section 1 of the bill allows subcontractors who seek a good-faith settlement in lawsuits to be released from all indemnity obligations. The general contractors, through contractual obligations that include indemnification clauses, are pulling subcontractors into lawsuits. This will allow subcontractors to seek a good-faith settlement and remove any indemnity requirements from that point forward.

Senator Hutchison:
In section 1, you are only striking the word "equitable." Correct?

Mr. Cisneros:
Correct.

Senator Hutchison:
Will that small change accomplish what you described if there is an attempt to seek a good-faith settlement? Will it release all indemnity obligations and not just equitable indemnity obligations?

Mr. Cisneros:
Yes. If there is a contractual indemnity provision, this good-faith provision applies.

Senator Hutchison:
This covers the difference between equitable indemnity and express indemnity.

Michael Hoy:
I have been active in commercial and residential construction defect in Nevada. I have represented homeowners, builders, subcontractors and suppliers. I have mediated residential construction defect cases. I have many technical concerns about the bill. I am not opposed to the policy. Section 1 of the bill seeks to remove the right to seek express indemnity through a good-faith settlement hearing process. The bill is intended to be limited to construction defect litigation, but it is not written that way. Chapter 17 of NRS has more application than only residential construction defect. It can also apply to personal injury cases and medical malpractice. There needs to be more focused language in section 1.

Additionally, there might be a constitutional issue with the impairment of contract portion in section 1. It is unclear if the provisions in the bill would apply to existing contracts. I suggest amending the bill to apply only to contracts

entered into after the bill takes effect. Other provisions in the bill relate to product manufacturers and suppliers for products incorporated into homes. The scope of the language in the bill goes far beyond a tract home developer, custom home or home built on speculation. If a homeowner buys and installs a window from Home Depot, the window manufacturer and the entire supply chain can be defendants under common law and NRS 40. It is overly broad.

Senator Hutchison:
Everything is being codified in terms of product liability. Does your concern include everyone in NRS 40 processes when common law provides for these protections?

Mr. Hoy:
Common law and the Uniform Commercial Code (UCC) both provide protections. It would behoove the Committee to investigate what product liability is already in place, particularly under the UCC. There are statutorily implied warranties in the UCC. I do not understand why builders would have a right to receive notice but product manufacturers do not.

Senator Ford:
The LCB has stated manufacturers are a part of NRS 40. Are you arguing otherwise?

Mr. Hoy:
No. I would like manufacturers and suppliers to receive the same prelitigation notice as subcontractors.

Senator Ford:
Do you agree with the proponents that manufacturers are already a part of NRS 40, and this bill only codifies that point?

Mr. Hoy:
Yes.

Mr. Marquiz:
Section 2, subsection 1 expands the universe for construction defect litigation. There is no definition of a supplier or limit to a manufacturer of a good. Anyone in the chain of commerce could be considered a supplier. Many subcontractors manufacture their own parts for purposes of installing larger products, such as

sheet metal for the installation of a roof. That subcontractor can now be brought into a claim.

I want to explain the Kitec situation. A manufacturer produced a particular plumbing product comprised of a certain amount of zinc. Unfortunately, as soon as that product was introduced into water, it began a process of dezincification. The zinc leached out of the brass fittings, and the fittings failed. The manufacturer put those into the stream of commerce with stamps affixed that certified the fittings met certain certifications. Builders called for those particular products to be used. Plumbing subcontractors used the products and installed the fittings in accordance with the contractual rights.

There was an influx of problems when the product became defective. Not every one of these fittings failed, only a certain number. The argument was made that all the fittings will fail. Trial lawyers did not want to wait for NRS 40 proceedings. The preference was to proceed directly against the manufacturer, claim potential insurance and settle the cases without going to trial. This case addresses the issue of product defect. There was a breach of implied warranty of merchantability for fitness for a particular purpose. I am concerned with the product liability aspect of section 2 redefining construction defect for purposes of NRS 40.

Section 2, subsection 2, is trying to circumvent the Rule 23 class certification requirements set forth in Nevada Rules of Civil Procedure (NRCP). Under NRCP 23, class certification requirements include a group numerous enough that it is impracticable to join all parties; the selected representative has an adequate basis; the representation is appropriate; the claims are common of all members in the class; and the issues raised are typical issues of law that will be addressed by all members. The language in the bill allows one homeowner in one development to bring a class action lawsuit on behalf of every other homeowner in the State who has a particular issue. Definitive caselaw from the Nevada Supreme Court states there cannot be class action lawsuits in construction defect cases unless the case raises a common issue unique to each home. The bill attempts to remove the procedural requirement of proving a typical, common and adequate issue. I am concerned with NRCP 23 being subverted.

Senator Hutchison:
Would your concerns be alleviated if the bill specified that NRCP 23 continues to apply?

Mr. Marquiz:
Yes.

George Ross (Las Vegas Metro Chamber of Commerce):
We agree with the opposition to the bill, particularly the statements by Mr. Marquiz.

Mr. Cisneros:
Chapter 40 of NRS states that the provisions have no effect on NRCP 23 and the class action requirements. In essence, Mr. Marquiz' concerns are already addressed.

Senator Kihuen:
I will close the hearing on S.B. 417.

Chair Segerblom:
I will open the hearing on S.B. 383.

SENATE BILL 383: Revises provisions governing time shares. (BDR 10-916)

Senator David R. Parks (Senatorial District No. 7):
I will read my written testimony (Exhibit L).

Gail J. Anderson (Administrator, Real Estate Division, Department of Business and Industry):
I have been working with the American Resort Development Association (ARDA) on this bill. I do have a proposed amendment (Exhibit M) and will continue working with the ARDA to submit a revised proposed amendment soon. Sections 2 and 3 add definitions of "component site" and "managing entity" to more adequately reflect current time-share marketing. Throughout the bill, we have removed the word "draft" before the term "public offering statement." The ARDA and the Real Estate Division have worked to refine the procedure used at the Division whereby the developer submits the statement for the Division to approve for use and identify deficiencies to be remedied.

Section 4, subsection 3, sets forth a developer's responsibility to address deficiencies identified by the Division. The developer may revise and resubmit a public offering statement within 30 days after receiving notification of deficiency. The Division shall notify the developer of approval of the revised statement within 30 days of receipt. There is duplicative language in section 4, subsection 3 to be clarified. The intent is that after two deficiency notices, the developer must submit an additional application fee when resubmitting the statement. Each application fee covers a certain number of hours of work. After multiple deficiency notices and resubmittals, a new filing fee is required so the Division can continue to address issues. The Division has agreed to provide specific deficiency points.

In section 4, subsection 4, we would add the word "material." Any material change to an approved public offering statement would require an amendment. The section also sets a timeline of 45 days for the Division to respond to the amended statement. The developer would then have 30 days to remedy the deficiencies on an amended statement. If the deficiencies are not adequately remedied, the Division will reject the amended statement. Before refiling, the developer would have to pay an additional filing fee. We are putting the burden on the developer to submit statements properly and completely.

Section 4, subsection 5, sets forth certain disclosures required to be included in the public offering statement submitted by the developer. The disclosure advises the consumer to refer to the statement and not rely on oral representations and sales presentations. The disclosure also states that the State makes no guarantees concerning the continuance of the offering or the financial future of the offering, plan, club or affiliated association. It warns the consumer that expenses are difficult to accurately predict and usually increase with the age of the facilities. The disclosure also informs the purchaser of the right to cancel the contract. In Nevada, the purchaser can cancel a contract until midnight of the fifth calendar day following the date of execution of the contract. The disclosure indicates the State is not in any way backing the project or providing assurances of its continuation or financial stability. Parts of the disclosure statement are removed in sections 5 and 6 in the proposed amendment, Exhibit M. After discussions with the ARDA, we will consider these disclosures in the regulation process with input from the industry.

Section 5, subsection 7, dictates the extensive and detailed information required to be included in the public offering statement submitted by the developer. This

will codify the requirements. The information ranges from the history of the developer and information on property taxes to restrictions on use of the facility and any fees due at closing. There is an extensive list in the bill. These documents submitted to the Division as part of the statement are available to the purchaser upon request.

The public offering statement will be prepared by the developer and approved by the Division. The bill also clarifies that a time-share sales agent works under the direct supervision of a broker or a broker-salesperson working for a broker. We have received numerous complaints about inadequate supervision. This change will allow a project broker to have a broker-salesperson supervising and managing sales agents. It would also apply to provisional licensees allowed under NRS. Section 16, subsection 4, allows for the Division to accept an abbreviated application for a time-share plan located out of the State but marketed in the State. The abbreviated application must contain the required disclosures.

The bill amends the cancellation provision in section 22. The cancellation notice must be in writing, but we are now allowing it to be delivered by common carrier with proof of service, such as FedEx. Finally, section 24 requires a developer who maintains control of a site to have a reserve study prepared every 5 years.

Stephany Madsen (Senior Vice President, Special Projects, American Resort Development Association):
The ARDA represents nearly 1,000 corporate members, including nationally and internationally recognized hospitality brands: Diamond Resorts, Disney, Hilton, Holiday Inn, Club Vacations, Hyatt, Marriott, Starwood and Wyndham. Our primary objection to S.B. 383 is that it does not address regulatory efficiency and lack of staff. Assembly Bill (A.B.) 404 does address those issues.

ASSEMBLY BILL 404: Revises provisions relating to time shares. (BDR 10-960)

Many developers have received delays of up to 2 years in filing processing. We need to find ways to get more revenue because it is necessary to business vitality in the State.

Chair Segerblom:
Is an annual fee per unit paid to the Division?

Ms. Madsen:
We have a fee schedule to discuss with the Division. We are focused on economic development. We also represent over 1 million individual time-share owners. Our job is to protect the interests of the owners. We are supportive of proper public offering statements. We would like to find a way to harmonize S.B. 383 with A.B. 404. We are concerned the duplication of documentation might increase the size of the offering statement. Public offering statements in New York are usually between 6 and 10 inches thick. Consumers are not going to read something that big. That is a disservice to the consumer. We want the consumer to make a good purchase decision.

Karen Dennison (American Resort Development Association):
We have resolved many issues already. We are confident we can find solutions for our remaining concerns. We will continue to work with Ms. Anderson.

Chair Segerblom:
We hope you can solve your differences, but we do support the Division.

Senator Parks:
We will work quickly to get a revised amendment to you.

Chair Segerblom:
I will close the hearing on S.B. 383. I will open the work session on S.B. 31.

SENATE BILL 31: Provides for the sharing of information regarding certain children among child welfare agencies, schools, courts, probation departments and treatment providers. (BDR 5-385)

Mindy Martini (Policy Analyst):
Senate Bill 31 requires certain entities to share information and records relating to a child who is within the purview of the juvenile court or who is in the protective custody of an agency which provides child welfare services. There are two proposed amendments in the work session document (Exhibit N). The first proposed amendment was submitted by John McCormick and rewrites S.B. 31. Mr. McCormick has provided an explanation of the changes to each section in the work session document, Exhibit N. The second proposed amendment was submitted by John T. Jones, Jr., and there is an explanation of that in the work session document, Exhibit N, as well. Mr. Jones has indicated

it is a friendly amendment to Mr. McCormick's. Finally, a substantial fiscal note is attached to the bill. Proposed amendments would negate the fiscal note.

John McCormick (Administrative Office of the Courts, Nevada Supreme Court):
We agree with Mr. Jones' proposed amendment. It makes clarifications to NRS 432B that are in line with the Arizona law we used as a model.

John T. Jones, Jr. (Department of Family Services, Clark County):
We agree with Mr. McCormick's proposed amendment.

Chair Segerblom:
I will close the work session on S.B. 31.

SENATOR JONES MOVED TO AMEND AND DO PASS AS AMENDED S.B. 31 WITH BOTH PROPOSED AMENDMENTS.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

*****

Chair Segerblom:
There is no longer a fiscal note on S.B. 31. I am opening the work session on S.B. 111.

SENATE BILL 111: Requires production of certain evidence under certain circumstances. (BDR 3-771)

Ms. Martini:
Senate Bill 111 requires a person who owns or controls the premises on which an injury or death allegedly occurred to produce copies of any visual evidence of the incident. The bill also requires copies be provided within 10 judicial days. Two proposed amendments are included in the work session document (Exhibit O). The compromise amendment from Senator Jones has three primary revisions to the bill. An explanation of the three revisions appears at the top of Senator Jones' amendment, page 2 of Exhibit O. The second amendment submitted by Clark County revises the time frame on providing copies of the

visual evidence from 10 to 20 judicial days. Senator Jones' amendment changes it from 10 to 15 judicial days.

Chair Segerblom:
Is Clark County's proposed amendment, page 4 of Exhibit O, friendly?

Senator Jones:
We agreed on 15 judicial days and included that in my proposed amendment.

I met with the interested parties to compromise with the goal of reducing frivolous lawsuits and to keep some of the procedural safeguards the Committee raised during the hearing in this Committee on March 6. I incorporated language from NRCP 45 relating to subpoenas to third parties. I also incorporated additional safeguards based on concerns at the hearing so the visual evidence cannot be used for any other purposes. We did not compromise on every issue. Section 2 of the amendment asks the Nevada Supreme Court to incorporate some of the means for addressing evidence dictated in NRCP 45 into the prelitigation process set out by NRCP 27. The amendment also sunsets the bill in June 2015. At that time, we will see if this works and if the Supreme Court has incorporated NRCP 45.

Senator Hutchison:
I want to see this go through the rule-making process in the Supreme Court. Is there a reason why we cannot wait to see if they will amend the NRCP?

Senator Jones:
The Supreme Court is independent of the Legislature. Senate Bill No. 194 of the 76th Session asked the Supreme Court to revise NRCP 23. The Supreme Court did not. This bill gives the Supreme Court incentive to look at the NRCP and consider revisions.

Senator Ford:
I support the notion of prelitigation investigation to cut down on frivolous lawsuits. Senator Jones has tried to accommodate the concerns raised at the hearing. The bill provides safeguards relative to quashing a request deemed inappropriate. I support the sunset clause. This is different from what we initially saw and a great effort to compromise. I support it.

Chair Segerblom:
I will close the work session on S.B. 111.

SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 111 WITH SENATOR JONES' PROPOSED AMENDMENT.

SENATOR KIHUEN SECONDED THE MOTION.

Senator Hutchison:
This is a different bill from that initial attempt to accommodate many concerns. My preference would be to go through the rule-making process, particularly when talking about exjudicial compulsion, which has been addressed by the State Bar of Nevada.

Chair Segerblom:
This is a good way to force the Supreme Court to act.

Senator Brower:
The amendment is more complicated than the original bill. I would prefer a NRCP 27 change. I cannot support the bill.

THE MOTION PASSED. (SENATORS BROWER, HAMMOND AND HUTCHISON VOTED NO.)

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Chair Segerblom:
I will open the work session on S.B. 131.

SENATE BILL 131: Establishes provisions governing the disposition of a decedent's accounts on electronic mail, social networking, messaging and other web-based services. (BDR 12-563)

Ms. Martini:
This bill authorizes the personal representative of a decedent to take control of, conduct, continue or terminate any account on an Internet Website. The Proposed Amendment 7756 mock-up by Senator Barbara K. Cegavske is included in the work session document (Exhibit P). Proposed

Amendment 7756 makes three revisions. First, it adds that the personal representative may take control of any similar electronic or digital asset of the decedent. Second, it clarifies this measure does not authorize a personal representative to take control of, continue or terminate any financial account, including a bank or investment account. Third, it clarifies the provisions do not invalidate or revoke any conditions, terms, services or contractual obligations that the holder of such an account or asset has with the provider or administrator of the account, asset or Internet Website.

Senator Brower:
There may be more work to be done on this.

Chair Segerblom:
There may be some intellectual property issues.

Senator Hutchison:
It looks like some of those issues were addressed with the proposed amendment.

Chair Segerblom:
I will close the work session on S.B. 131.

SENATOR HUTCHISON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 131.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

*****

Chair Segerblom:
I am opening the work session on S.B. 226.

SENATE BILL 226: Makes various changes concerning firearms. (BDR 15-38)

Ms. Martini:
Senate Bill 226 requires a person who is eligible to hold a driver's license or identification card issued by the Department of Motor Vehicles (DMV) to obtain one with the designation "CCW" if the person holds a permit to carry a concealed firearm. The DMV shall not charge a fee for providing the "CCW" designation. Finally, it would require the removal of Clark County's ordinance relating to registration of firearms. The summary of the bill is located in the work session document (Exhibit Q).

Chair Segerblom:
I propose an amendment to remove the section requiring the removal of Clark County's registration ordinance. There is a substantial fiscal note associated with the bill.

Mr. Jones:
During the March 25 hearing on this bill in this Committee, Clark County stated opposition to the bill in part because it deleted NRS 202.3673 relating to permitting holders on public property. I want to clarify the bill does not delete that section.

Senator Hutchison:
Is Clark County the only county that has a registration ordinance?

Chair Segerblom:
Yes.

Senator Hutchison:
Would you please explain your proposed amendment again?

Chair Segerblom:
The bill removes the registration ordinance in Clark County. My proposed amendment would retain it. Clark County would continue to register handguns.

Senator Hutchison:
It would be status quo. Correct?

Chair Segerblom:
Correct. I will close the work session on S.B. 226.

SENATOR JONES MOVED TO AMEND AND DO PASS AS AMENDED S.B. 226.

SENATOR FORD SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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Chair Segerblom:
I am opening the work session on S.B. 286.

SENATE BILL 286: Provides immunity from civil action under certain circumstances. (BDR 3-675)

Ms. Martini:
Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. Senator Jones submitted a proposed amendment provided in the work session document (Exhibit R). The proposed amendment provides revisions and indicates the reason for each.

Senator Jones:
A few issues raised by District Judge Elizabeth Gonzalez of the Eighth Judicial District regard section 3, subsection 3, paragraph (f). The proposed amendment changes it from "7 days after the motion is filed" to "7 judicial days after the motion is served upon the plaintiff or plaintiffs." This will ensure sufficient time for notice to the opposing party. The other changes affect section 4, subsection 1, paragraph (b), and section 4, subsection 2, paragraph (b), concerning the $10,000 penalty awarded in addition to attorney's fees. The amended language makes the award discretionary and in an amount "up to $10,000."

Senator Hutchison:
Was it a mandatory fee and now it is discretionary up to $10,000?

Senator Jones:
The attorney's fees are separate. The $10,000 is on top of attorney's fees.

Chair Segerblom:
I view it as being similar to NRCP 11.

Senator Hutchison:
Is there anything mandatory now?

Senator Jones:
No, it is all discretionary.

Senator Hutchison:
I was concerned with the mandates. I am comfortable giving the courts discretion.

Chair Segerblom:
I will close the work session on S.B. 286.

SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 286.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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Chair Segerblom:
I will open the work session on S.B. 356.

SENATE BILL 356: Revises provisions relating to real property. (BDR 9-824)

Ms. Martini:
Senate Bill 356 revised provisions relating to statutory covenants that may be adopted by reference in a deed of trust. The majority of this bill was a State Bar measure, specifically S.B. No. 402 of the 76th Session. Section 4 of S.B. 356 was not included in that bill. Section 4 requires the signature of the banking or financial institution when an agreement to sell real property secured by the mortgage or deed of trust to a third party is for an amount less than the indebtedness secured. The summary of the bill is included in the work session document (Exhibit S).

Chair Segerblom:
This bill needs a little more work and I am pulling it from today's work session. I am closing the work session on S.B. 356 and opening the work session on S.B. 373.

SENATE BILL 373: Makes various changes relating to judgments. (BDR 2-932)

Ms. Martini:
Senate Bill 373 authorizes a judge to make a written order permitting a judgment debtor to pay a judgment in installments if the court determines the person is unable to pay the full amount. In addition, the measure increases the percent of a judgment debtor's take-home pay that is exempt from garnishment from 75 percent to 90 percent. There are four amendments provided in the work session document (Exhibit T).

Senator Segerblom submitted Proposed Amendment 7869, exempting take-home pay from garnishment that would be at a rate of 90 percent if the annual income of the debtor is $70,000 or less, and at 85 percent if the annual income is over $70,000. We did receive an oral amendment from Jon Sasser to change "gross annual income" to "gross annual salary or wages." The proposed amendment from Bill Uffelman is included in the mock-up of Proposed Amendment 7869. Dee Barbash's amendment proposes to change section 1, subsection 3, by replacing "At any time" with "Within 10 days." It would also add a provision in section 1 for the hearing to take place within 7 days after the

hearing is requested. The first three amendments in Exhibit T can be considered as a group. The fourth proposed amendment from the Nevada Collectors' Association makes two changes. It would delete sections 2 through 4 and sections 6 through 9. Those sections allow for the collection on 10 percent of the weekly exempt earnings. It would also amend section 1 to provide that if a judgment debtor fails to make an installment payment, the creditor may immediately seek a writ of execution or a writ of garnishment.

Senator Segerblom:
I want to make a verbal amendment to change 85 percent to 75 percent for wages over $70,000.

Senator Ford:
What does the proposed amendment from the Collectors' Association do?

Senator Segerblom:
It guts my bill.

Senator Ford:
It would also add the ability to start immediately garnishing wages if a debtor breached the agreement to pay. I am not bothered with the latter part.

Senator Hutchison:
The Collectors' Association proposed amendment does not accept the 10 percent threshold of the bill. It does provide a vehicle for payment plans to be accepted by the courts. If those payment plans are breached, does the wage garnishment process begin?

Ms. Martini:
Yes.

Senator Jones:
Does your proposed amendment include Dee Barbash's proposed amendment?

Chair Segerblom:
No.

Senator Jones:
Does it include Mr. Uffelman's proposed amendment?

Chair Segerblom:
Yes.

I will close the work session on S.B. 373.

SENATOR JONES MOVED TO AMEND AND DO PASS AS AMENDED S.B. 373 WITH PROPOSED AMENDMENT 7869 AND SENATOR SEGERBLOM'S VERBAL AMENDMENT.

SENATOR FORD SECONDED THE MOTION.

THE MOTION PASSED. (SENATORS BROWER, HAMMOND AND HUTCHISON VOTED NO.)

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Chair Segerblom:
The meeting is adjourned at 12:08 pm.

RESPECTFULLY SUBMITTED:

_____
Caitlin Brady,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE: _____

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	2		Agenda
	B	32		Attendance Roster
S.B. 161	C	1	Senator Michael Roberson	Written Testimony
S.B. 161	D	27	Senator Michael Roberson	Housing Market Study
S.B. 161	E	6	Josh Hicks	Presentation
S.B. 161	F	19	Josh Hicks	Solicitation Letters
S.B. 161	G	18	Josh Hicks	Chapter 40 Notices
S.B. 161	H	6	Josh Hicks	Frequently Asked Questions
S.B. 161	I	52	Josh Hicks	Case Studies
S.B. 368	J	3	Senator Donald G. Gustavson	Written Testimony
S.B. 368	K	2	Assemblyman John Ellison	Written Testimony
S.B. 383	L	2	Senator David R. Parks	Written Testimony
S.B. 383	M	13	Gail J. Anderson	Proposed Amendment
S.B. 31	N	15	Mindy Martini	Work Session Document
S.B. 111	O	5	Mindy Martini	Work Session Document
S.B. 131	P	3	Mindy Martini	Work Session Document
S.B. 226	Q	1	Mindy Martini	Work Session Document
S.B. 286	R	2	Mindy Martini	Work Session Document
S.B. 356	S	1	Mindy Martini	Work Session Document
S.B. 373	T	25	Mindy Martini	Work Session Document