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JUSTICE AND DEMOCRACY FORUM

THE LAW AND POLITICS OF TORT REFORM

APRIL 25, 2003

WILLIAM S. BOYD SCHOOL OF LAW – UNLV

Center for Democratic Culture – UNLV

On April 25, 2003, the University of Nevada, Las Vegas (“UNLV”) Center for Democratic Culture (“CDC”) and the William S. Boyd School of Law sponsored a one-day symposium addressing issues of tort reform. In particular, the Forum addressed concerns regarding construction defect litigation and medical malpractice, two areas of current and substantial concern in Nevada. As reflected in the discussion at the Forum, both topics received considerable attention from the Nevada State Legislature during its 2003 Session. Ultimately, the legislature enacted amendments to state statutes governing claims for defective construction.¹ Despite significant lobbying by physicians and insurers, the legislature did not revise the state’s medical malpractice statute that had been enacted in a 2002 special session.²

Both topics remain actively debated in Nevada. Medical malpractice concerns have also received substantial attention across the nation, as have other tort reform issues such as punitive damages, limits on non-economic damages, regulation of attorney fees, and control of class actions.³ At the same time, many in the legal and political community regard the very term “tort reform” as

¹ See S.B. No. 241, 2003 Leg., 72d Sess. (Nev. 2003) (amending Chapter 40 of NEVADA REVISED STATUTES). Senate Bill 241 attempts to address the issues raised by the dramatic increase in construction defect litigation by establishing a procedure whereby aggrieved homeowners, in cooperation with contractors, may resolve construction defects discovered in their homes prior to filing suit. The primary objective of this bill is to facilitate speedy resolution of construction defects, ensure that contractors can stay in business, and lower the cost of construction by arresting skyrocketing insurance rates.

² See Assemb. B. 1, § 5, 18th Spec. Sess. (Nev. 2002); NEV. REV. STAT. 41.031 (2003). Assembly Bill 1 marked a monumental change in Nevada’s regulation of medical malpractice disputes. The most controversial piece of the legislation caps the amount of noneconomic damages available to a plaintiff in a civil suit against his or her health care provider, subject to two exceptions. The bill also made other important changes: it eliminates the Medical and Dental Screening Panel; shortens the statute of limitations for a malpractice claim; requires pretrial conferences; regulates expert testimony; requires training for district court judges who try malpractice cases; and requires physicians and dentists to carry malpractice insurance with minimum limits. See also Carl Tobias, *Procedural Provisions in Nevada Medical Malpractice Reform*, 3 NEV. L.J. 406 (2003).

³ In April 2003, the U.S. Supreme Court issued *State Farm Automobile Insurance Co. v. Campbell*, perhaps its most significant punitive damages decision, which overturned a Utah Supreme Court punitive damages award of \$145 million and announced substantial constitu-

a more political than descriptive term, one that masks a movement designed not to improve the legal system but only to limit victims' rights. As reflected in the Forum's comments and discussion, there are a variety of intermediate and nuanced positions on the issue.

I. INTRODUCTION

DMITRI SHALIN:⁴ This is the second event in the Justice and Democracy Forum series sponsored by the CDC and the Boyd School of Law. The issue before us is a pressing one. We can glean this from a letter of welcome written by Governor Kenny Quinn, as well as from several messages addressed to this Forum by the members of the Nevada Congressional Delegation. Here are a few passages underscoring the vital importance of the problem we are discussing today. Governor Guinn writes:

It is my pleasure to welcome you to the Center for Democratic Culture for the "Justice in Democracy" Forum, which will address tort reform. This will be an invaluable opportunity for all participants to discuss issues that are of paramount concern to the citizens of Nevada. This valuable informational discussion promises to be an enlightening experience. The concept of bringing together representatives from the medical profession, construction, insurance companies, legal firms specializing in malpractice and product liability, and members of the Nevada Assembly should prove to be a productive and positive step toward finding solutions for a serious situation affecting Nevadans.

United States Senator Harry Reid (D-Nev.) also writes:

It is my pleasure to welcome you to the "Justice in Democracy" Forum series, a discussion on the law and politics of tort reform. Exercises like this Forum serve as an important reminder of what it means to live in a Democratic society. I would like to commend the Center for Democratic Culture for their vision in developing a program such as this. It is important that we, as Americans, do not take for granted the freedoms we have in our country to discuss, debate, and even disagree on topics of national importance. The topic, "The Law and Politics of Tort Reform," is especially timely. I understand that rising medical and malpractice insurance rates are a serious problem in Nevada, as well as elsewhere in the nation. I am committed to doing everything in my power to ensure that our doctors have affordable medical malpractice insurance so that patients can have access to their doctors when they need them most. Everyone here agrees that there is a medical malpractice insurance crisis in Nevada. However, not everyone agrees about the cause of the problem or how to solve it. This is why today's forum is so timely.

Congressman John Porter (R-Nev.) writes:

The University of Nevada, Las Vegas, provides a great service in opening a discussion like this to the public. Through this medium the public gains access to the leading personalities of those who either directly reform our tort system, or those to whom the reform applies. Allowing the people of Nevada to participate in this manner provides those directly impacted by tort reform, particularly in light of the current health insurance crisis, to gain a better understanding of what is being done to alleviate the situation and what still needs to be accomplished.

tional constraints upon punitive damage awards. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).

⁴ Professor of Sociology, University of Nevada, Las Vegas; Director of Center for Democratic Culture.

Dr. Carol Harter, President of the University of Nevada, Las Vegas, could not be here today because of an out-of-town engagement. She asked me to extend to you her warm welcome and to reaffirm this University's commitment to developing partnerships with our community, pulling our weight in this community, and addressing the needs of Las Vegas and Nevada.

With this I'm pleased to turn the floor over to Richard Morgan, Dean of the Boyd School of Law, who graciously agreed to host today's forum.

II. WELCOME

RICHARD J. MORGAN:⁵ Thank you, Dmitri. Thank you all for attending this important program. I will be extremely brief because you have very important work to do today and I don't want to delay the onset of that work. The Boyd Law School is extremely pleased to host this program by providing our facilities and the expertise of some of my faculty colleagues here at the Boyd Law School. The credit, however, for pulling the program together and for grappling with this very important issue goes to the Center for Democratic Culture, headed by Dmitri Shalin. That is the interdisciplinary campus group that has pulled this affair together and it is to be commended.

We have had malpractice insurance crises of various types in this state and, indeed, around this country many times in my memory, which goes back a ways. They always provoke considerable debate and controversy about the cause of the problem and the solution, or solutions, for the problem. I think it is very worthwhile that we've pulled together people with great expertise and differing perspectives on the tort reform debate, with a view, I hope, of making some real progress in solving the problem, not only now, but perhaps for future years or generations to come.

I commend you for the work. I welcome you to the Boyd Law School. I thank you, Dmitri, and your colleagues, for your willingness to share this program with us here at the Boyd Law School.

III. APPROACHING TORT REFORM ISSUES WITH AN OPEN MIND AND GOOD FAITH APPRECIATION OF THE VARIOUS VIEWPOINTS

DMITRI SHALIN: I want to add just a few words about the "Justice and Democracy" Forum series and why our community does indeed need a forum like this. You must have heard many times about the woman who scalded herself with hot coffee purchased at a McDonald's restaurant, and the jury awarded her \$2.7 million. You don't hear as often that the award was actually cut to approximately \$400,000. You hear such a story, and you think, "Well, maybe insurance companies are right and those noneconomic damages must be capped in some fashion." Then you listen to the other side of the story, to the lawyers who will tell you that in states where such damages have been capped, like in California, people with legitimate complaints have trouble finding lawyers.

⁵ Dean and Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

A recent case of Casey Kaiser,⁶ a child born premature, is a case in point. The parents had no problems landing a lawyer. Several, in fact, offered their services. Things were on track to move toward an adjudication of the dispute. But the baby died and, one after another, the lawyers backed off. Why? Because it's one thing to represent the case when parents face years of expensive medical treatment for an injured child, and another when all they have is a \$250,000 maximum potential award that could be given to them. It looks as though the parents may not be able to find a lawyer to prosecute the claim on behalf of their dead child.

Then you listen to Nevada home builders, and they will tell you that all they want to do is have the right to fix the problem before the homeowners file a lawsuit, that they want a neutral party to evaluate the damage, and they want to give rights to homeowners to decide for themselves whether they want to be part of a class action suit or not. It sounds perfectly reasonable.

But then you listen to the homeowner plaintiffs and realize that this is, at best, half of the story. Lawyers representing the other side will tell you that the Nevada Building Code is substandard, that licensing requirements for subcontractors are abysmal in our state, and that home builders are pretty slow in addressing the issues at hand.

And so it goes. Each claim meets a counterclaim. The only way to settle the dispute, it seems, is to form a lobbying organization and put pressure on the legislature in the hopes of launching a favorable bill. However, there is no legislative silver bullet, no law that cannot be subverted, and certainly no piece of legislation that will please everybody.

Yet even an imperfect system can work if there's goodwill in the community, if we are willing to listen to each other in good faith and meet our opponents halfway. The "Justice and Democracy" Forum, first and foremost, advocates community building. This is a necessary first step to improving the discussion and resolution of social and political issues.

The Center is based on the premise that we can join issues with our opponents, expand room for the honest difference of opinion, and agree to disagree when no consensus can be reached. If we can accomplish that, we should be able to live with whatever system emerges at the end of the current legislative system, assuming that we can come together, review its workings, and make pragmatic adjustments when needed.

This is my hope: that in today's conference and the future work of the Center, we can address serious social and political issues in a spirit of cooperation and goodwill. With this I turn the floor over to Jeffrey Stempel, a distinguished member of the campus and Las Vegas community, who is a national authority on insurance, tax law, and alternative dispute resolution, and organizer of many symposia, in whose able hands I'm happy to deliver.

⁶ See Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, Mar. 5, 2003, available at <http://www.consumerwatchdog.org/healthcare/nw/nw003165.php3> (last visited Jan. 22, 2004).

IV. PANEL I: CONSTRUCTION DEFECT DISPUTES IN NEVADA

JEFFREY STEMPEL: As we did with last December's "Judging the Judges" program, the proceedings today will be transcribed and presented in edited form in the *Nevada Law Journal* for publication in a future issue. With that, let me introduce our speakers. Scott Canepa is a noted plaintiff's construction defect lawyer in town. He's a graduate of the University of Nevada, Reno, attended the University of Southern California and Cal Western Law School, and has been practicing in this area for approximately ten years. Steve Hill is the President and Chairman for the Coalition for Fairness in Construction and the President of Silver State Materials. He might have a slightly different perspective on construction defect matters. Betsy Gonzalez is a graduate of the University of Florida Law School, a long-time practitioner in the area of construction defect, formerly of Beckley Singleton, and now operating her own law firm. I think it's fair to say that most of her experience has been on the defendant's side of the line as well. Our first speaker today, is Bill Robinson, a member of the faculty from the School of Business and former President of the UNLV Faculty Senate. Learned Hand once said that there was nothing he feared, other than sickness and death, more than a lawsuit. Bill earned his ticket here by being a plaintiff in a homeowners' construction defect suit. Thus, we have a variety of perspectives, both microcosmic and macrocosmic.

A. Living Through Construction Defects – and Construction Defect Litigation – as a Homeowner and Plaintiff

WILLIAM J. ROBINSON:⁷ Thank you. I'm going to mix my damage experience with my economist hat so it won't be a total loss for you to hear what otherwise might seem like an embattled homeowner's sob story. I live in a condo complex with 112 units. I am the original owner of my unit and the only one that's ever lived there. About four years after it was built, every time it rained, we started getting leaks all over the complex. Every building in the complex was leaking like crazy. It doesn't rain very often in Las Vegas, so that was probably six or eight rains after the place was actually built. So the people who were on the board at that time went to the builder and the builder said: "You know, the day after I sold the last unit, I dissolved the corporation I used to build this complex, and I have no responsibility for it in any way."

So we played around for a couple more years and our homeowners' association looked to me for leadership. The association was about to go bankrupt and it was insolvent at the time. I ran for the board on the "Let's go back and do something about this" platform. I won and they made me the president. We went back to the builder and said, "You've got to do something. We're spending six or seven thousand dollars a month, every month it rains, on repairs. Our income is only six or seven thousand a month."

If you spend all your funds on repair, of course, you can't pay electrical bills, you can't pay water bills, you can't cut the grass. The association reserves were just being drained. The builder essentially told us to buzz off. We realized that this kind of "negotiation" with the developer was going

⁷ Assistant Professor of Economics, University of Nevada, Las Vegas.

nowhere and we turned to a legal solution. We found Scott Canepa, got the homeowners together, and took a vote on how to proceed. We agreed to pursue litigation against the builder. We ended up borrowing a half a million dollars to do this. I wouldn't be here if we lost. My head would be on a pike somewhere outside my complex. We were one of the first groups to take action under NEVADA REVISED STATUTES Chapter 40, the state's construction defect law.

The experts that went into our complex found, for example, that cardboard boxes had been used as construction materials in what were supposedly waterproof areas of our complex. They found that the roof had not been constructed properly. The air conditioners were up on the roof but the roof had not been structurally designed to hold the weight of the air conditioners. Every time someone turned the air conditioner on and there was vibration, it was ripping apart the plywood or cardboard that was used to construct the roof. The tiles that were used to construct the roof weren't up to code and any time anybody stepped on them, they just shattered.

Electrical stuff was wrong in our complex. The list is just endless as to what was wrong with our complex. During the legislative and media debate over construction law, I keep hearing contractors argue that homeowners complain of little trivial things. Well, cardboard and stucco that's half as thick as it should be and no fire walls – does that sound trivial to you? It wasn't trivial to me and the other condominium owners. We have eight buildings in our complex. In many of the buildings you can go up in one person's attic and keep walking throughout the building. Not anymore. But it turned out people had burglar alarms in their attics because there was no fire wall between all the eight units. You could go up into the attic and walk into somebody's house through the little wooden door that sits outside the attic.

Let's just say it was bad. After we actually filed the lawsuit and the defense came in to examine the merits of our claim, their experts came in. They did destructive testing. Let me tell you – you do not want to do destructive testing. I spent many an evening, until midnight, one, or two o'clock in someone's house because the people had gone in, ripped their ceiling out to do a destructive test, to look for something in the roof, and hadn't fixed it. Their kid's bedroom was, as a result, just covered with the remnants of the ceiling. It was a disaster. The defense experts simply compounded our misery through a lack of common courtesy for the homeowner. I had people out at one or two o'clock in the morning working on the units or dealing with problems affecting the units.

So we went through the destructive testing. When the defense came in you'd have two subcontractors there with their own experts, and many a time I was treated to the two defense experts sitting there arguing, one saying "This can be fixed," and the other one saying, "No, we can't fix it. We can do it differently." They were up in my attic doing this. I was hearing these diametrically opposed arguments about whether the problem could be fixed or whether the entire complex needed to be replaced. Fortunately, it turned out they could fix what was wrong with my house.

But it was an unbelievable pain. To me, the injustice of the situation – of all construction defect situations – is staggering. If the guy who built my com-

plex had gone with a gun into 7-11 and stolen two hundred bucks, we could have sent him on an all expense paid trip to the prison in Ely at the State's expense. If he had been calling people up on a phone saying, "I want to sell you a gold pen," and sold a bunch of people alleged gold pens that turned out to be copper, we would have sent him on an all expense paid trip to Ely. But this same charlatan can sell me a house with cardboard, a house with no firewalls, a house that doesn't even meet the building code, and he is simply a "businessman" – even an abused businessman according to the lobbyists of the construction industry.

Building codes are minimum standards. They're not highly aspirational. They're minimum standards. When a contractor sells me a house that doesn't even meet the minimum standards, it is just fraud. It's as big a fraud or more extensive a fraud than selling somebody a fake gold pen. Yet, he gets to walk around and has no personal liability of any kind. The insurance companies paid every dime of insurance they had to us because of the misdeeds of this builder. We're just now getting back in financial shape because we had to drain every dime of reserves we had. We had to put special assessments onto our association to cover things we still couldn't fix that were still wrong because we used up all the insurance. But this builder doesn't have any personal liability. He gets to walk away.

Incredibly, the building industry licenses him to keep building. The insurance industry gives him insurance to keep building. He's out there building for other people. If I run my car into the wall three times this year, my insurance company is going to cancel my policy. A doctor can slice the wrong thing off three times and they're still a doctor. And they still get insurance. And you can build with cardboard and somehow insurance companies still think you're insurable. And the state still thinks you're licensable. I don't understand this situation. This guy should be in jail. We shouldn't be talking about tort reform. We should be talking about criminalizing behaviors of these people, just like we criminalize fraud in other industries. This is criminal fraud, and these perpetrators of criminal fraud should be in Ely State Prison. This would deter fraudulent construction.

In economics, we have a concept called "asymmetric information" – that's what exists in the housing industry. The buyer always knows less than the seller and that leads to what economists call "market failure." The market is not going to work right because the buyer does not know, and cannot know, sufficient information about the property that they're going to buy to match the knowledge of the seller. It's no different than the used car business.

Differences in information cause great problems and cause market failure. It also leads to something we call "adverse selection." What that means is this: you have builders who are building bad stuff and you have builders who are building good stuff. Who's going to make the biggest profit? The people who are building poor structures are going to make the biggest profits because they are cutting corners. They have low costs. But the buyer can't distinguish between the two end products. So the buyer is the one absorbing the cost of fraud and shoddy construction. The builder who builds cheap makes more money than the builder who builds quality and it encourages everybody to build as cheaply as they can. That's adverse selection.

At the same time, the way around that is something called “signaling.” The typical signaling is through warranty. If the builder of my complex had said – or any complex would say – “I will personally stand behind what I have done, and I will stand behind it forever if I built something that was not up to building code standard,” then people could build quality and sell quality and everything would be fine.

I don’t want a coalition for fairness in construction. I want a coalition for quality in construction. I want the builders saying, if I’m a subcontractor, “You built that thing with cardboard. I’m not working for you. We’re not working for you. We’re not going to license you. We’re going to do something about our industry to create a quality environment.”

But that’s not what we see. We see we need the right to fix it. Well, first, my builder didn’t want to fix the problem – period. Second, what would he have done if he tried – if he had known he had the [duty] to fix it – and thought about that for a second. Remember asymmetric information. He would have patched my roof and prayed it didn’t rain until the statute of limitations ran out, and then I would have been deceived a second time. He would have strung me along, never told me there was cardboard, never told me there weren’t fire walls, never told us the underground electrical was installed improperly, never told us that just about everything in the complex was installed improperly, never told us he didn’t have a building permit for some of the things he built on the complex. This contractor also never told us that the fireplaces – a lot of them – had flues with approximately a foot of empty space that should have had flue pipe. He didn’t want to put in like 20 feet of pipe, he only wanted to put in the number of feet he had. If he didn’t have enough feet, he just kind of left it there.

Unscrupulous builders will not tell you those things. The only way we could know is to have somebody investigate, and the only way to do that is to spend money. And if we’re not going to get a return – if you’re just going to fix the problem [and not pay us back for the cost of investigation] – there’s no way we could have afforded to do the testing necessary to find out what was wrong with our unit.

It’s that simple. My analogy, with all due respect to lawyers like Scott Canepa who helped me and my homeowners’ association, is that lawyers are bacteria. What I mean by that is there are millions and millions of bacteria sitting on my hand right now, and they do me no harm because I’m healthy and my skin is intact and everything is fine. But if you cut my hand and don’t take care of it, then the bacteria come in and my hand can become infected. If I don’t take care of that infection it’s going to spread through my whole body, and then all of a sudden I have a crisis and I need the legislature to do something about it. The answer is: it’s not the bacteria’s fault. It’s my fault that I didn’t fix this problem that occurred in my industry before it could infect my whole body and cause me this problem.

The insurance company shouldn’t have insured these people. The builder should have gotten rid of them. And if it was clear you had to build by the codes – and build quality or you would not be allowed to build in the State of Nevada because you couldn’t get insurance and you would not be licensed by the State – we would not be having this Forum and the Governor would not be

meeting. If the people who built that house, instead of saying, "I need to throw up as many of these as I can, as fast as I can" – if they took pride in what they did – we would not be here today. [If only] they would say: "We, as the builders, only want to build the best." Well, we know that's not true because we're sitting here and they're not. And if they wanted to, they would. It's as simple as that. If they wanted to, they would. The fact that we're here shows there's something wrong in the insurance industry and something wrong in the construction industry, and it's that simple.

B. The Builder's Perspective on Construction Defect Claims

STEVE HILL:⁸ I want to thank everybody for the opportunity to come today. I have a couple of observations to start with. As I was looking through the agenda for today and the list of esteemed speakers, I noticed there were probably only two without an advanced degree, one being me, and the other being our Congressman, John Porter. Apparently somebody figured out John doesn't have an advanced degree and axed him from the program, and I apparently am the only one left without an advanced degree. It also strikes me that coming into a law school to convince you folks that we need less [litigation] and lawyers may be a fool's game. But, like Don Quixote, I have optimism. I think that if you listen to me with an open mind, I might be able to convince you a little of that is true.

The other observation I have is that what we are talking about here today is really not tort reform. It is a combination of contract and tort law that has become a special area of law in Nevada, under Chapter 40, that deals with residential construction. The construction industry, in large part, agrees with what Mr. Robinson said today. We have probably several differences of opinion. The idea that a house that has many components is built by people that, if our desire was at a higher level, would not make mistakes, I think, is obviously incorrect on its face. There are mistakes made.

Now, I think Mr. Robinson's builder possibly intended to build that development incorrectly. The construction industry has no regard for such people. We don't want them in our industry. We want them gone. But the construction industry is not in charge of that process. We do not have the ability. We can, and we have, put pressure on the Nevada State Contractor's Board to enforce the rules that apply to the industry. They have done a much better job of that over the past few years. It is an ongoing process that we support and encourage, and we are asking them to get more involved in that process.

The construction industry wants the law reformed and we want options for homeowners in addition to lawsuits. The trial lawyers have eloquently argued that, once we get into a Chapter 40 notice and lawsuit, homes do not get fixed. We agree. We believe that is proof we need reform, that we need a better option, and that's what the Coalition for Fairness in Construction is promoting.

Now, it has been said that there's no evidence of need for change, and I would like to address that issue. To start with, as I said, homes do not get fixed

⁸ Chairman of the Coalition for Fairness in Housing Construction and President of Silver State Materials.

once they get into these complex cases, which are either cases brought by associations or by five or more individual homeowners.

NTLA (the Nevada Trial Lawyers Association) distributed a list to the Governor-appointed Construction Liability Insurance Task Force, of which I was the chair, illustrating 120 complex cases in which no repairs were made as a result of the lawsuit. Settlements happened later, but those cases dragged on for years. We agree that in most, if not all cases, homes do not get fixed under the Chapter 40 guidelines.

As a result, insurance has become ridiculously expensive. Our numbers show upwards of 1,600% increases, predominantly for subcontractors that work in the construction industry. The increase averaged between 500-600% over the last several years. Insurance companies have suffered financially. They are not really building [the loss] into their rates, but they have a smaller pool of funds available to commit to markets. When they look at the construction liability market in Nevada, they see a terrible risk profile. They see that they are going to be sued if they write insurance here, regardless of whether the subcontractor involved does a good job of building or not.

By next year, insurance will become largely unavailable. We're starting to see that now. Subcontractors in particular, but also some builders, have gone out of business. Thousands of people lost their jobs and were uprooted as a result of that. This is largely correctable. The price of housing has gone up tremendously. Some of that is due to these extra insurance costs but a large part is due to land [prices]. The best way to solve both of those problems is to build affordable and efficient housing, which are usually condominiums or townhomes. But condominiums and townhomes are also a tremendous target for lawsuits. Virtually every complex in town has been sued.

So insurance companies will not, as a matter of course, insure contractors that work on townhomes or condominiums. In addition, because apartment buildings can, at some point, be turned into condominiums or townhomes, insurance companies do not want to insure apartment building construction either. The magnitude [of the problem] causes it to be a big issue to the State. The construction industry is the second largest employer in the state – everybody wants to buy a house. It is important that people have homeownership. The national rate for homeownership in the country is sixty-six percent, and for Nevada it is sixty-one percent. California's current rate is fifty-six percent and we're heading in that direction. This problem affects everyone.

What needs to change? Better construction is the first topic that everybody thinks about. As I said, it is naïve to say that an increased commitment to better quality will solve the problem. This law is written for when mistakes happen. What do you do when those mistakes happen? Right now homeowners have very few options. The Coalition has come up with what it thinks is a reasonable, responsible, and fair option for the industry and, more specifically, for homeowners. That is why we ask to be given notice of every problem in every house and that we be given a maximum of 150 days to solve the problem. This notice should go to an owner of a company, and not necessarily to the customer service representative that many of us have dealt with. I've bought homes in town. I've been frustrated with customer service representatives. Notice going right to the top of the company will get [the owners'] attention.

We heard testimony, both in the Task Force and Legislature, that homeowners have tried to work with their builder. We appreciate that they tried to work with their builders for years before they filed suit, but we don't want them to have to work with their home builders for years. We don't want to put them through that process. Give us 150 days, make it a more formal process, and let us get in and get the problem fixed quickly.

Chapter 40 currently has a two-line definition [for construction defect]. The first line says that a construction defect is a defect caused by construction. The second line says that it includes physical damage. That's the only definition in Chapter 40. It should require that we build to Code [specifications], and if we cause a problem in a home, we are responsible for it. We offered that definition because we think there needs to be a bright line between good construction and problems. We have also suggested that the Nevada State Contractors Board have a representative, or a group of representatives, available. If the homeowner or the contractor would like a representative to come on site during the "right to repair" process to help mediate a dispute between the homeowner and the builder, the Nevada State Contractors Board would be available to do that. This brings the sheriff to town since the Contractors Board is the organization that is responsible for licensing contractors.

As Dr. Robinson pointed out, homeowners may not have the information necessary to help resolve problems with builders; but the State Contractors Board does. So we think having them as a part of that process, as an option, is very important. Homeowners should have the right to choose whether or not they get into a lawsuit before they find out they're in a lawsuit, because the cost of these cases is unreasonable and out of sight. That is something that also needs to be corrected.

In summary, the industry understands there are many problems and there are many ramifications to these problems. But we also realize that if we can't get in and get homes fixed, we are not going to solve any of these problems. We just want the opportunity – in a short period of time – to get in and get these homes fixed. If we don't fix those homes, the homeowner has every right to, and should, sue us. Thank you.

C. A Plaintiff Attorney's Perspective on the Construction Defect Debate

SCOTT CANEPA:⁹ Good morning. Hopefully I'm the beneficial bacteria. I represent homeowners who are confronted with construction defects. Before that, at one point in my career, I represented developers, subcontractors and general contractors in these types of disputes. So I have some perspective from each side of these lawsuits. Mr. Robinson, I want to ask you a question. After your debacle, did your homeowners' association make the repairs to your community?

WILLIAM ROBINSON: Yes, my community is beautiful.

SCOTT CANEPA: I ask this for a reason. Mr. Hill and I have had many spirited debates on this subject, both on local television programs and programs like "Face-to-Face with John Ralston." The statement that homes are not get-

⁹ Partner, Law Offices of Vannah Costello Canepa Riedy Rubino & Lattie, Las Vegas, Nevada.

ting repaired is a false statement. Homes are getting repaired. The problem is that homes aren't getting repaired by the builders who caused the defects because those builders are refusing to make those repairs, even though they've been given notice and opportunity to fix the defects. Homes are getting fixed after builders refuse to make repairs to them. Homeowners sue those builders, get dragged through years of litigation, and force contractors either into settlements on the courthouse steps or judgments. So, ultimately, there is financial recourse for the homeowners' association to make those repairs.

Mr. Hill made reference to a list of cases generated by the Nevada Trial Lawyers Association presented in connection with the Liability Task Force and hearings at the State Legislature. It's apparent to me that maybe he misunderstood the point. The list of cases was meant to be a list of complex construction defect cases, and that has a meaning under our statutes. Under NEVADA REVISED STATUTES Section 116, a complex case contains five or more single family homes, a condominium, or townhome.

That list was meant to demonstrate that these were cases, including Mr. Robinson's homeowners' association, in which the association gave a full and complete list of problems in their community to their builder, gave their builder an opportunity to make an offer to repair those defects, and then the builders made no offers to repair. It has been brought to our attention that there are one or two cases on that list that were noncomplex cases, and I'll talk about that in a little bit. As for the complex cases on that list, those are situations where the builder, who was the company in charge of the subcontractors, was afforded a complete and full opportunity to come in and fix its mistakes, and instead committed the homeowners to a lawsuit against the builder. It cannot be refuted that was the point of the list.

That leads me to what's happening in our State Legislature. Nevada Senate Bill 241 ("S.B. 241") is now being considered by the Legislature. That bill, which gives the builder the mandatory right to repair, proceeds from a false premise. The premise is that homeowners in our community are refusing contractors' offers to repair their homes. I can tell you as a practitioner – and we're a very small group of people because it's a very complex area of law with very few firms practicing in this area – there is a common theme among the people that come to our firms. They have tried to get their builders to fix their problems. Mr. Hill admitted that. Mr. Robinson told you about his efforts in trying to get his builder to fix his problems.

In many cases those homeowners have gone to the State Contractors Board and tried to get them to do something. I had a homeowners' association, which proceeded to verdict last summer, that brought over 150 complaints to the State Contractors Board prior to coming to me. In most cases, the Contractors Board found no violation of the statute – that's not uncommon. That's another problem with S.B. 241: it claims that the Contractors Board is a neutral party, yet it consists of six contractors and one public member. I'm not here to impugn the Board, or to say that they're going to side with the contractor in every instance, but I am here to tell you that the average person who buys a home doesn't think they're going to get a fair shake in front of a board that consists of six contractors and one member from the public.

What's even more offensive about the Bill is that it allows the contractor to file a complaint against the homeowner, in front of the Contractors Board, to have the Board make a determination as to whether the repairs done by the contractor were adequate. So if it's an item like a missing structural strap, as in the case of Mr. Robinson – missing structural elements, missing firewalls – what's the Board representative going to see? They're going to have to take the word of the contractor that the repairs were actually done; otherwise they're going to have to tear open the walls to determine whether or not they were done, which is a very expensive endeavor. The way the Bill was written makes no sense with respect to the Contractors Board involvement.

It was stated by one of my colleagues, in connection with a hearing on S.B. 241, that Nevada doesn't have a construction defect lawsuit problem. Nevada has a construction defect problem. And you heard Mr. Hill articulate very well the problems that now confront the insurance industry.

I couldn't have said it any better than Professor Robinson. If you crash your car three times a year, your rates are going up. If everybody else in Las Vegas crashes their car three times a month, everybody's insurance rates will go up. In preparation for a July hearing last year, Insurance Commissioner Alice Mollasky sought input from insurers about why insurance rates for contractors have gone up so substantially. I want to read you an excerpt from one of the insurance companies that responded. [The company] said that, while the high cost of litigation is one reason for claim severity, it believes the most critical cost driver, from a claims perspective, is the substandard construction practices and poor workmanship by the contractors.

That's why insurance rates are going up; not because beneficial bacteria are opening up wounds and causing unmeritorious and frivolous lawsuits. In the last six months, I can't even begin to tell you how many times I've seen the phrase "frivolous lawsuits" used in the media in connection with construction defect claims. Yet, do you know how many complete defense verdicts occurred where the contractor walks away? There have been no defense verdicts.

BETSY GONZALEZ: There were twelve.

SCOTT CANEPA: That was one complex case, Betsy. And how many

...

BETSY GONZALEZ: I got twelve zeros.

SCOTT CANEPA: I'm sorry?

BETSY GONZALEZ: I got twelve zeros.

SCOTT CANEPA: As to the homeowners, but not as to the homeowners' association. We'll talk about that. You would agree with me, would you not, that there has never been a construction defect case dismissed as frivolous.

BETSY GONZALEZ: That's true.

SCOTT CANEPA: The case Betsy Gonzalez is talking about, the *Falls* case,¹⁰ was a case where there were how many homeowners?

BETSY GONZALEZ: One hundred thirty-nine.

¹⁰ See Hubbel Smith, *Homeowner Feels Defect Case Award Too Small*, LAS VEGAS REV.-J., June 28, 2001, available at http://www.reviewjournal.com/lvrj_home/2001/Jun-28-Thu-2001/business/16423393.html (last visited Jan. 22, 2004) (describing settlement awarded to homeowners in the Falls at Hidden Canyon).

SCOTT CANEPA: One hundred thirty-nine homeowners. It was my understanding, and I stand corrected if I'm wrong, that the verdict came in favor of the homeowners in that case.

BETSY GONZALEZ: There were individual verdicts on a homeowner-by-homeowner basis.

SCOTT CANEPA: I stand corrected. Out of 139 homeowners in that case, twelve homeowners received nothing. I don't know what happened thereafter. But in complex cases, which is what I meant to talk about, where the plaintiff is a homeowners' association or a group of homeowners, there have been no defense verdicts. In fact, I think [Betsy was] involved in one of the cases in which there was a plaintiff's verdict in favor of the homeowners' association.

BETSY GONZALEZ: Yes, I was.

SCOTT CANEPA: She can tell you what happened with the twelve homeowners that got zero, but from my perspective, the change in the law, that has been advocated by the Coalition for Fairness in Construction, is not justified by the facts in any way, shape, or form. Present law affords the contractor the opportunity to make an offer to repair. One big difference between present law and what the builders advocate to the legislature is: under present law, the builder must make a response to the homeowner. Even if they're not going to repair, they have to respond to each defect that the homeowner alleges and tell the homeowner if they contend it's not a defect or why they have no responsibility [to fix it]. If they don't want to fix it, but it is a defect, current law requires that they make an offer to settle that case before mediation ensues.

S.B. 241 takes that all away. It gives the contractor the unilateral right to say: "We're either going to fix it, or commit you to litigation against us." And then, to make matters worse – and this is probably one of the worst features of that bill – there's a provision that talks about contingent fee arrangements. Mr. Robinson articulated the budget crisis that his homeowners' association faced when they were confronted with the decision to go forward. I can tell you that homeowners' associations, being nonprofit companies, don't have money other than what they generate from their dues to pay their monthly expenses. Those HOAs, homeowners, and single family homes only have access to the court system through a contingent fee arrangement. Lawyers are willing to take the case on the notion that if we get money for you, we get paid. If we lose the case – we get zip. That's the nature of a contingent fee arrangement, and S.B. 241 effectively does away with them.

The statute only empowers the court to award attorney's fees based on an hourly basis. That just doesn't make sense. It doesn't level the playing field. In every one of the cases in the list we provided to the Construction Defect Task Force and the Legislature, the builders could have stepped up and done the right thing. You know what they did in every single case? They turned it over to their insurance company. What do you think happens when you ask your insurance company to bail you out over and over again? The answer is simple: premiums go up.

The idea that a builder should be given notice and opportunity to fix the defect before litigation ensues is already present law in noncomplex cases of five or fewer homes. In 1999, the building industry advocated for a change in

the law. They said in complex cases we want to start with a lawsuit. They asked the Legislature to take away homeowners' rights on the basis that they can't fix homes [but instead must file] a lawsuit. That just staggers common sense.

In the final analysis, you have to analyze the legislation in context of what's happening in our community. If you look at the list of lobbyists up in Carson City, Nevada, there are more than twenty-five lobbyists for the construction industry and two for homeowners. Politics and money mean a lot. Thank you.

D. A Defense Attorney's Perspective on the Construction Defect Debate

ELIZABETH GOFF GONZALEZ:¹¹ I think we should take a step back [and consider] when cases get involved in Chapter 40. Cases get in Chapter 40 when a builder is non-responsive to a customer service or a warranty claim. Many of the home builders now take a very proactive stance in customer service and warranty problems. When homeowners come in, they are making concerted efforts to resolve those problems.

The home builders who want to be in this community, who have a reputation selling homes, want those problems fixed because those houses are the basis of their reputation. We get into Chapter 40 when the warranty program or customer service program fails. That can occur in a number of situations when massive problems have occurred that are somewhat outside the scope a customer service problem would usually control. We've had cases historically where the home builder does not hear about the customer service warranty problems as a group of claims until they get the Chapter 40 notice. Those kinds of things have contributed to the problems the industry has seen. The question is: does Chapter 40, as we currently have it, work? Not very well. Can it work? It can work very well, and it does work very well in many situations.

It works well where people want to solve the problem, work together to agree on the scope of a repair, and agree to any other damages. And those happen every day. There are cases where Chapter 40 claims are filed and are solved without litigation. Usually those cases involve single family homes.

We recently settled a case involving forty-eight homes in the Chapter 40 process for a cash payment. We offered to make the repair or alternatively to pay them cash. They didn't want us to do the repair, which is fine. We agreed to a cash settlement, and got the subcontractors involved in an early stage, because the builder recognized there was a problem. The subcontractors recognized the problem and got their insurers involved, who, after some coercion, realized there was a problem. Then an amount of money was [agreed upon] to solve it. That's when Chapter 40 works.

Chapter 40 fails when any one of those four components doesn't want to solve the problem: when a homeowner has unrealistic expectations or wants an unreasonable repair; when a home builder ignores it or doesn't want to make the repair; when a subcontractor refuses to be involved; or when an insurer refuses to step up to the plate and make payments that are required under its policy. If any of those four things occur, Chapter 40 doesn't work. Also,

¹¹ Partner, Gonzalez & Associates, Ltd., Las Vegas, Nevada.

there's no current enforcement mechanism in the Chapter 40 Bill or statute. We're required to go through mediation processes, but only to try and bring people together, not to force them to do anything. As I told a client the other day, you can't force somebody who's being unreasonable to settle. Even if you're [offering] twice as much money as it's worth, you can't make them settle. If they want to sue you, they will.

[Under the current] Chapter 40, if people don't want to work together to do the right thing, you're not going to be able to solve the problem. The only way to solve that problem is to have a procedure to force people to do something. And other than the litigation process, I don't know of a better procedure to do that. You can go through arbitration processes, but arbitration results are often appealed. You can go through mediation processes, but you can't force an agreement. So the goal, I think, is for the participants to go into Chapter 40 with the idea that they're going to try and resolve the problem, and to have realistic expectations by all the participants.

But it's going to fail if you can't force those realistic expectations. We had a homeowner who wanted \$200 a night to be relocated from his house while we did his drywall repairs. We thought that was unreasonable. He also thought he should be out of his house for forty-five days. We thought it would only take two weeks to resolve. We sat down, went through mediation, and eventually got the homeowner to agree: "Maybe I'm asking for too much pay per night and maybe I'm asking for too long." Then we gave some and we settled it. That's how the process is supposed to work but it doesn't always. When attorneys' fees and expert fees become involved, it makes it even more difficult to resolve because then you're not only talking about what the homeowner wants resolved, you're talking about the money they've had to pay for experts already. They're talking about attorneys' fees that have been incurred by their counsel. [If we can act] earlier and quicker through some sort of process, we will be able to resolve cases and it will work better. Without having some sort of forced procedure to make people be reasonable, Chapter 40 will never work, even with the Bill here now. The builders have the right to repair right now. They may not have the right to repair as indicated under the new bill, but the builders have the right to repair and they frequently offer to make the repair. The problem happens when people disagree about what the repairs should be.

There's no current mechanism to enforce that. And whether you have the State Contractors Board, or you hire an independent expert agreeable to both people to look at the repair and make sure it's okay, there has to be a mechanism agreed upon by the parties to resolve that dispute. Chapter 40 can work, but the people involved in the process have to want to make it work. Without that, no Bill we adopt is going to work.

V. PANEL II: MEDICAL MALPRACTICE IN NEVADA

JEFFREY STEMPEL: Let me introduce our speakers. Dean Hardy is the President of the Nevada Trial Lawyers Association. He's a graduate of the University of Nevada and Pepperdine Law School. He's been a long time trial lawyer in this town, particularly specializing in workers compensation. Bill

Bradley is a Reno-based lawyer representing plaintiffs in a variety of matters. His undergraduate degree is from Stanford and his J.D. is from the McGeorge School of Law. He has more than twenty years experience as a plaintiff's lawyer. He is the past President of the Nevada Trial Lawyers Association and currently a spokesman on behalf of the Association before the Nevada Legislature. Doctor John Nowlins of Keep Our Doctors in Nevada, a medical malpractice reform advocacy group, was scheduled to appear but had a conflict arise at the last minute. As a result, we were unable to have a substitute member of the medical profession on today's panel.

A. An Overview of the Medical Malpractice Problem

DEAN HARDY:¹² My perspective [regarding] the malpractice issue is from a step before the malpractice premium issue arises. We cannot start discussing medical malpractice premium increases without an analysis that the increases were caused by lawsuits. The media often reported the drastic and significant increases in doctors' malpractice premiums that occurred in the beginning of 2002. Prior to the year 2002, we didn't hear much about medical malpractice premiums in Southern Nevada. It wasn't on the radar screen.

But [looking from an] historical perspective, we can see there are at least some other causes for the drastic and significant malpractice premium increases. What happened in 2001 was, of course, September 11th, a tragic day in our history. In the years prior to 2000, the economy was in a different state than it is today. Those of you whose 401k's were invested in an economy saw dramatic double digit increases in 401k's and investment portfolios. That same phenomena was occurring with the insurance companies.

In 1994, St. Paul Insurance Company came to the State of Nevada and purchased a small mutual insurance company called Nevada Medical Liability Insurance Company. It had been formulated by doctors in Southern Nevada in response to a similar crisis that occurred in the early '70's, when the economy took a major down turn. Some of you might be too young for that but most of you look like you were around back then. The economy took a major down-turn, the doctors formed this company, and it ran efficiently for twenty years between 1974 and 1994.

The [company] adhered to strict underwriting criteria; they did not insure every physician that walked in with an application; they adjudicated claims appropriately against their insured physicians; and they ran appropriately and efficiently until 1994 when St. Paul came in and said: "We'd like to buy your company." The doctors said: "It's not for sale." [St. Paul] jotted a number on a check, held it up in front of the doctors, and the doctors said: "Oh, it's for sale now."

That's not an indictment of the doctors. They formed a good company – that's the American dream – and they sold that company for a profit, which is their right and certainly not inappropriate. Thereafter, St. Paul became very aggressive in Southern Nevada. Between 1994 and 2000, they were able to garner 60% of the market in Southern Nevada. Sixty percent of the physicians

¹² Partner, Hardy & Hardy, Las Vegas, Nevada; Past President, Nevada Trial Lawyers Association.

insured in Southern Nevada were insured through St. Paul. Take a step back for just a second and wonder what might happen if State Farm insured 60% of the people driving on our streets. That can create a problem if State Farm walks out. That's exactly what happened. St. Paul insured 60% of the physicians, many of whom had double digit claims made against them between 1994 and 2000.

Between 1994 and 2000, St. Paul increased their premiums by 5.4%. There is no other commodity in Southern Nevada – or anywhere in Nevada or the United States, I suspect – that increased in price between 1994 and 2000 by as little as 5.4%. Why did St. Paul continue to insure doctors that had double digit claims against them? You heard what Mr. Robinson and Mr. Canepa said. If I wreck my car [three times] I don't get renewed. Doctors that had been sued in excess of 10, 12, 15, or 20 times [continued] being insured by the same insurance company. Insurance companies do not insure individuals time and time again. They know who's being sued. Why would they continue to insure these physicians? There's only one reason.

Between 1994 and 2000, the investment return on that premium dollar was double digit. Claims were a minor irritant – do not misunderstand that. Insurance companies are very, very, very savvy with investments – much more savvy than you or me. The economy soured in 2000 and September 11th, 2001 occurred. Insurance companies [were no longer] making double digit returns on that investment portfolio. They recognized that the doctors they have under insurance contracts are probably going to be sued again and again and again for medical negligence. St. Paul decided to make a business decision and pulled out of the State of Nevada, [as well as the entire] United States, in underwriting policies for doctors.

It's a claims-made policy as opposed to an occurrence policy.¹³ That means if St. Paul was insuring a doctor when the claim was made, they defended the claim and had to pay the claim. If they were insuring the doctor when the negligence occurred, but the claim was yet to be made, they were not on the hook. So [St. Paul] pulled out of the State of Nevada at the end of 2001, beginning of 2002. At that point, those doctors were bare. Sixty percent of the physicians were insured by St. Paul. Some of them knew they had committed malpractice during this timeframe and that the claim had not yet been made.

So they had to go out and secure what's called "tail coverage" from other insurance companies that were not in this market because St. Paul had artificially kept the premium deflated to get the market share. Those insurance companies said: "Sure we'll insure you." Let's talk about what the cost of that premium might be, and let's talk about what might occur now that St. Paul has walked out of the market. That is an insurance problem. That is not a medical malpractice claims problem from a trial lawyer's perspective. The number of claims that went through the system [were discussed] in the Special Session [of

¹³ For a more detailed description of the distinction between claims-made liability policies and occurrence basis liability policies, see JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* § 14.02 (2d ed. 1999 & Supp. 2003). Where liability insurance coverage is "triggered" as of the date of an alleged act of negligence by the policyholder, this is an "occurrence" policy. Where the operative date for triggering coverage is the time at which a third party formally charges the policyholder with negligence, this is a claims-made policy.

the Nevada legislature]. The system [in place at the time was] a medical legal screening panel in the State of Nevada. The doctors advocated that this panel be eliminated. For the life of me, I couldn't figure out why they were on that side of the argument because it didn't make any sense. Let me just tell you: there were 181 claims that went through Southern Nevada's screening process in the year 2000. Now, juxtapose that with the nearly 4,000 doctors, 16,000 nurses, and hundreds of medical facilities in the State of Nevada that were subject to the jurisdiction of the panel – all making diagnoses, taking blood, doing medical procedures. [There were] literally tens of thousands [of procedures] a day where the prospect of medical negligence might occur, and yet 181 cases went through the Southern Nevada screening panel in the year 2000.

You hear that “excessive claims,” “excessive number of cases,” and “frivolous cases” were the cause of the malpractice premium increase. As a lawyer, we are used to going into court and making sure that the other side proves a fact. In the State Legislature there is no burden of proof. Statements and anecdote become factual. When I read that the number of claims, the frivolity of the claims, and the significance of the claims has created a medical malpractice premium crisis, I [question those facts]. Please don't accept that as factual without asking someone to prove it because they will not be able to do so.

I haven't seen one physician step up to any podium and say: “This is how we are going to reduce the number of medical negligence claims.” All they speak of is how we're going to limit a victim's rights in court by capping damages, by limiting attorneys' fees, by doing something other than fixing the problem. Mistakes will happen as Mr. Hill has suggested. But at least we ought to think in terms of the reduction of medical negligence claims.

B. Medical Malpractice Insurer Failure to Address the Problem of High Risk Physicians and Physician Failure to Recognize the Inevitability of Mistakes and Injury

BILL BRADLEY:¹⁴ I appreciate the opportunity to appear in front of this forum and discuss this very important issue. I want to cover one thing that Dean Hardy left out. The Nevada State Medical Association made a deal, a contract, with St. Paul. St. Paul agreed to offer every member of the State Medical Association a fifteen percent rate. Who isn't going to take a rate discount? That's what attracted the doctors and the Medical Association to St. Paul.

Another part of the deal was that the Medical Association got a one percent fee for bringing in all the physicians from St. Paul. That was paid in the form of an agent rebate to the Nevada State Medical Association. Our Insurance Commissioner has since found that agreement and the payment back to the Medical Association as an unlicensed refund of premium, violative of many provisions of our law. The [Commissioner] has initiated a lawsuit against St. Paul to correct that terrible wrong, but that's what really led us to this – an aggressive insurance company and a Medical Association looking to do what's best for its members. But the real insidious part of that agreement was that it

¹⁴ Partner, Bradley, Drendel & Jeanney, Reno, Nevada.

made St. Paul take every single physician who was a member of the Nevada State Medical Association without regard to their prior history.

There was a physician in Southern Nevada, named Dr. D'Ambrosia, who got the benefit of this wonderful opportunity to get a fifteen percent discount. Unfortunately, at the time that Dr. D'Ambrosia came in, he was known as a spinal surgeon who was horribly injuring people during spinal surgery. Yet, Dr. D'Ambrosia got a fifteen percent rate discount, came in, continued to operate, and hurt 40, 50, 60, or 70 people badly while operating on their spines. Claims continued to mount up against him and the Board of Medical Examiners did nothing. He had forty-one complaints against him in Southern Nevada without any action by our Board of Medical Examiners.

Realize that when [Dr. D'Ambrosia was] hurting all these people, St. Paul had to pay [the victims'] medical bills and their pain and suffering. They had to get the money from someone else – so who did they get it from? They got it from all the good physicians who entered into this agreement in good faith. As a result, many good and qualified Nevada physicians had to pay for one horrible surgeon's errors and the lack of regulatory authority over doctors like him. And, of course, that's not the end of the D'Ambrosia story. When the Medical Board finally caught up with Dr. D'Ambrosia, before they could implement disciplinary proceedings against him, he voluntarily resigned his license. So it looked like he never had [a practice] in Nevada. He went to California and was approved for licensing. Within a few months of beginning his practice in California, one of his patients died following spinal surgery in Malibu. That case is currently being investigated by numerous agencies in Southern California.

So we come to this forum and to every public opportunity with what we believe is an explanation for the crisis – not medical malpractice, but excessive verdicts. I have never heard a physician tell me about a frivolous claim in which he has been involved. I have twenty-one verdicts that I'm happy to share with each and every one of you. There have been twenty-one verdicts in Southern Nevada since 1996 for medical malpractice. I have yet to hear a physician in any public forum say that one of those was an excessive verdict. The verdicts represent eight fine citizens – neighbors, coworkers, friends of yours – who took their job very seriously as a juror, listened intently to every single piece of evidence, and, as a jury unit, made a tough decision in twenty-one cases where a physician made an error.

The problem we have is that many physicians think malpractice means they are a bad doctor. Malpractice does not mean you're a bad doctor. It means a mistake happened. Unfortunately, when physicians make errors, people can be hurt very seriously. The claim that hundreds of physicians were leaving Southern Nevada took on a life of its own during the summer of 2002, and we wondered why the UMC Trauma Center truly closed. It's part of a national movement that's now occurring in thirty-six other states. It just happens to be a coincidence that it's all happening right now.

As a result, our Governor appointed a task force of physicians, lawyers and insurers. One of the most frustrating things is that we never get in one of these forums with an insurer. It's tough to get insurers sitting in these chairs. They let us worry about it. They let all of you reach your own conclusions and just raise their premiums because nobody says you can't raise your premiums.

I remember that Karen Ferguson said [insurance is] the only industry that is exempt from antitrust. I've never understood this. If you and I are in business and we lose money, and we need to run our business, what do we do? We go to the bank. We borrow more money. We go into our savings. We buckle down, fire people, let people go, and do everything we have to do. Well, they don't. What do they do? Raise premiums. And if we don't like it, they'll leave.

So in the Special Session [of the Nevada legislature], a law was passed that unfortunately limited victims' rights. It's a \$350,000 cap on so called "non-economic" or pain-and-suffering damages. It's a cap per victim, per physician. We felt that was much fairer than the California system where [the cap is] \$250,000 per event. The California system is very insidious. To put it bluntly, it eliminates claims on behalf of senior citizens, stay at home parents, and children. If you think about that for a minute, those are the people that don't have any economic damages. Their medical bills are paid by Medicare. The stay-at-home mom has no income. She doesn't earn anything. Although we all know how hard she or he works, there's not a dollar figure that we attach to it.

With the death of a child, the child never gained any income. In all of those cases – senior citizens, parents who do not work outside the home, and children – all they have is a noneconomic loss, or what we call "physical and mental pain, suffering, disability and anguish." But the insurers say: "Let's limit that." And when they limit that, all of a sudden it becomes very difficult for [the victims] to find a lawyer. Believe me, if insurance companies wanted to get rid of trial lawyers, it would be very easy to do. They don't have to go through all this expensive legislation. All they need to do is treat people fairly. When there's a mistake in the hospital the insurers know it within twenty-four to thirty-six hours because of the claims reporting requirements. They come in and say, "We understand that you were injured." A wrong limb was taken off or both of a woman's breasts were removed accidentally. They get there early and say: "Let us help you."

In the twenty-two years I've been practicing, I have never had a client come to me and say, "The insurance company was there early; we just disagree on what the compensation is." What the insurance company does is say, "We hope they're like all the other people and just go away." Unfortunately, only two to three percent of the people affected by medical negligence wind up in litigation. When the jury returns a verdict in favor of the doctor, that's truly a just verdict. Insurance companies really like those verdicts, and that's when they support the jury system. But when a jury comes back and finds in favor of an injured plaintiff, you hear cries that juries are out of control.

You really can't have it both ways. I don't believe Southern Nevada juries are out of control, and I challenge anybody to show me that they are. I'd like to speak a lot longer about what we did, and I'm happy to take questions about what [Nevada Assembly Bill 1] did, and how it limits your rights as Nevadans; how the initiative petition destroys your rights as Nevadans; why the insurance industry is pushing forward with a Bill in the Legislature that mimics the initiative provision; and what the Legislature is doing to correct it. Thank you very much for your time.

C. Questions and Discussion

JEFFREY STEMPEL: [Does the data imply] that, although there are many plaintiff's verdicts, the overall winning percentage is low enough to suggest that unmeritorious suits are a problem?

BILL BRADLEY: I'm glad you asked that question because we had a screening panel that was designed to screen out frivolous cases. The screening panel was eliminated, at the doctors' and insureds' insistence. It was supposed to screen out the frivolous cases at an early stage and resolve the meritorious cases. It did that for frivolous cases and for small cases.

We're also required to file an affidavit with our complaint stating that we've spoken to a medical professional and that professional agrees there is malpractice. So it's very hard to say there have been frivolous cases brought into our courtroom. Finally, the Nevada Trial Lawyers [Association] passed a Bill in 1995 called "The Lawyer Pays." Many of you have heard of a statute called "The Loser Pays." Well, we weren't comfortable saying the loser pays because the loser is relying on his or her lawyer to make a recommendation whether the suit is meritorious or not. So we felt, why make the decision of a lawyer affect the client? We fought for and passed a law that says the lawyer pays, so if a lawyer is found to have filed, maintained, or defended an action in a frivolous manner, there are sanctions that can be awarded against that lawyer.

In the context of medical malpractice cases, I'm not aware of that sanction ever being made against a lawyer. The thing is, in the context of medical malpractice, in order to represent someone we, as plaintiffs' lawyers, know that there will be a cost of \$100,000 to \$150,000 to fight the insurance company. The experts are very expensive. There's a lot of travel. I don't know anybody who is willing to throw out \$100,000 or \$150,000 on something that's frivolous and hope they can intimidate a multi-billion dollar insurance company into paying something if the facts aren't on their side.

NANCY UDELL:¹⁵ I'm just curious. Are you advocating that these screening panels be reinstituted?

BILL BRADLEY: We believe that the screening panels were an effective process. But not in combination with tort reform because they become too burdensome. When you make an injured victim go through multiple expensive hoops, you chill their ability to hold the wrongdoer accountable.

NANCY UDELL: But a lot of you defend screening panels?

BILL BRADLEY: We wrote, created, and defended screening panels for 14 years in Nevada, despite the objection of the Nevada State Medical Association and the insurance industry.

NANCY UDELL: You thought they worked well?

BILL BRADLEY: I thought the one in Northern Nevada worked better than Southern Nevada. The problem with the screening panel is that it costs approximately \$20,000 to put a screening panel presentation together. We would get an expert that would criticize the care provided. The other side would get three experts that supported the care that was given. Under that circumstance, there is a legitimate dispute. The case has been screened. We had three lawyers and three doctors review the written material and reach a

¹⁵ General Counsel, Common Good.

decision. The three possible findings were “no malpractice,” “unable to decide,” or “yes, there’s a reasonable probability of malpractice.” When there was either an “unable to decide” or a “no malpractice,” the doctors felt their case had been adjudicated on the merits.

Another problem with screening panels was the absence of a right to cross-examination. You’re relying on the medical records only. Doctors became frustrated when a screening panel said they didn’t do anything wrong, yet the case went forward. Now, for many of those cases that went forward, once we got into deposition and cross-examination and found out what truly wasn’t in the records, they became meritorious. But as a preliminary step in resolving or eliminating the frivolous case, it works. The other goal of the screening panel was to resolve the meritorious case earlier. That was an abysmal failure.

I don’t care whether you’re talking about construction defect or medical malpractice, until you hold the insurers responsible for delaying conduct in order to generate investment income, we are going to have a problem resolving claims quickly.

JOE GILBERT: I’m a Professor of Management here at the University, and in a prior life I spent 16 years managing an insurance company. If I said I have nothing good to say about trial lawyers, I think you would dismiss me as a one-sided, biased, unbalanced individual. We need you to say something positive about the insurance company.

BILL BRADLEY: I think there are several things you can say positively about insurance companies. They are tremendously adept at making money. I would also add that I’d love to have a business that started to make less money but have the ability to go to our State Legislature and say, “We didn’t make enough money last year. You’ve got to change the law so I can make more money.” The insurance industry has that ability.

AUDIENCE MEMBER: In all seriousness, if I said one thing positive about trial lawyers – they’re very adept at making money – would you consider that a positive comment?

BILL BRADLEY: They are an essential service and they provide a fundamental need in our society. Without them, people don’t have anywhere to turn when they are devastatingly injured. So obviously, they have a significant role in the world economy, plain and simple.

JEFFREY STEMPEL: Let me just try to piggyback on that. One tends to hear monolithic statements about the trial lawyers, the defense bar, and the insurance industry. Is it such a herd mentality that you don’t make distinctions between different lawyers, different doctors and hospitals, and different insurers? Does the insurance industry move as one? I think, as a matter of economic theory, they have some variance to grab some market share. The more responsible insurers should, at least in theory, do better by building a long-term book of business. Do we see that, or not see that? And why or why not?

BILL BRADLEY: First of all, in the context of medical malpractice in Nevada, we only have 4,000 physicians. So it’s not a particularly attractive market, and that’s something we have to be sensitive to as we engage in this debate. Nevada Medical Liability Insurance Company, the company who was

bought by St. Paul, was a phenomenal insurance company with tremendous underwriting guidelines, great claims handling, and early resolution.

An area we didn't talk about is verdicts beyond policy limits. Out of the twenty-one verdicts I mentioned to you earlier, in approximately thirteen of those, the doctor wanted to settle, the injured person was willing to settle within the policy limits of the physician, and the insurance company single-handedly made the decision to go forward because the insurance company doesn't have to listen to the doctor on the amount. The doctors get to say whether or not they want to settle. In those thirteen cases, the verdicts went well beyond the policy limits of the physician. In that case you have an excess verdict. It creates problems when they could have gotten out for \$1,000,000, yet they paid \$5,000,000. They did that in over thirteen cases. And once again the good doctors ended up paying for a bad insurance company's decision.

Out of those thirteen cases, I think six of them were the same insurance company – a company from California that just doesn't seem to ever get the message that it is important to get these cases resolved early. You have to realize, when those excess verdicts happen, it hurts the doctor. They've been dragged through a very emotional trial, it hurts his or her reputation, and the victim waits for years to get compensation. And the lawyers make the money. It seems to us that, if the screening panel works, and if these insurers would really get their act together, they could eliminate that risk early. Get the lawyers out of it and get resolution before it turns into litigation. So to answer [the original question], there are a couple of good insurers here taking their responsibility very seriously, and that's what Nevada should really be asking for.

A group of 4,000 physicians can't afford the *Rambo* decision of an insurer to go forward and worry about a verdict down the road. That is just poor management for Nevada.

ANN MCGINLEY:¹⁶ That raises a question to you and to Scott: what kind of regulation do you think we need from insurance companies in order to be assured? We know the market isn't working, and we know it's a state law that covers insurance companies.

DEAN HARDY: Let me tackle this. One of the things we proposed was some regulatory reform over insurers. I'd like to understand underwriting criteria and I think the doctors have a right to understand that. How did the insurance company arrive at the policy premium price? Let's publish all of the underwriting criteria and see whether or not there have been instances in which the insurer has ignored its own underwriting criteria.

In the case of St. Paul, not only was it ignored, but it was nonexistent. There was absolutely no adherence to underwriting policies or guidelines. So I think it's important. I thought it was important to mandate that insurers provide that type of information. Of course, they suggested that was privileged information and they weren't going to produce it.

The other thing I thought was a purposeful reform, that may or may not have impacted the insurer, was mandatory reporting of medical errors. If that list were available, we could find out who the bad doctors are. Right now, you can't find out how many claims were made against your physician or who has

¹⁶ Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

been sued in the State of Nevada. There is a database, but it's only available for hospitals and insurance companies. I'm not sure why that information is not available to someone who is seeking a physician. There are some good opportunities for reform in that arena.

BILL BRADLEY: You can look on the Board of Medical Examiners under your physician's name, but the reporting has not been 100% accurate.

Our state should be not proud of the way we've treated our insurance division. They don't have the funds to do the job they need to do. If you're up in Carson City, you should take the time to go to the Insurance Division Commissioner's office. It's an embarrassment. When we're dealing with a small risk pool – 4,000 physicians – that insurance Commissioner needs to have the staff, the money, and the power to do adequate studies of insurers to find out if they're under-pricing the market or over-pricing the market.

Right now the State Senate has approved a Bill to make it much more difficult to discipline a physician under the Board of Medical Examiners. They've increased the burden of proof. It's unbelievable that, at a time when we know the quality of medical care is degrading because of managed care and all the hurdles that people have to go through, at a time when our quality of care is suffering, there are people who want the Board of Medical Examiners to have to work harder to discipline bad physicians. That is a terrible mistake.

SCOTT CANEPA: Let me add in the construction defect context, one of the things presently in S.B. 241 is the presence of the State Contractors Board to which I made reference. But ultimately, the State Contractors Board has no jurisdiction over entities that don't have licenses. The majority of homes that are built and sold in the State of Nevada, in most states in our country, are sold by real estate development companies that aren't licensed. So the State Contractors Licensing Board has no jurisdiction.

Furthermore, the State Contractors Licensing Board has absolutely no jurisdiction or authority to order any insurance company to do anything. Even if they concluded, in the confines of S.B. 241, that the repairs offered or made by the contractor were insufficient or band-aid repairs, and the money behind those repairs [came from] some insurance company, they can't do anything whatsoever. They have no jurisdiction over that insurance company. I think the statement made, and it's correct, was that there are only two businesses in the country that are exempt from the Sherman antitrust law: major league baseball and the insurance industry. Go figure.

I want to just add on to what Bill Bradley said. I took a case to trial last summer, a construction defect case, where AIG Insurance Company was given the opportunity to settle the case for less than \$6 million and absolutely thumbed their nose at the homeowner. Then the jury returned a verdict in favor of the homeowners in the amount of \$12 million. Who's to blame for that? The contractor was behind the settlement. Everybody wanted to settle that case, including the homeowners. The insurance company didn't want to settle and we should place the blame on the insurer in cases like that.

I don't know what to do in terms of insurance reform in forcing carriers. In the insurance task force that Mr. Hill sat on, any time a suggestion was raised to impose rules or give homeowners more rights, the insurers balked. When an insurance company takes control of the defense of a general contrac-

tor and starts making bad decisions, why shouldn't the homeowners have direct recourse against that insurance company? Any time we raised that issue, the sweeping statement was made: "If we impose any further regulations on the insurance industry, we will provide further reasons for them to stay out of our state." I think that if you're going to be here making a profit, [you should take] some responsibility to act correctly.

ANN MCGINLEY: Isn't there one response to that – I know this is going to be unpopular here – but the State could take over the insurance industry. The State itself could provide the insurance?

BILL BRADLEY: No. The Governor has done a great job. He formed his own insurance company. He put in the past president of the little company that was so successful, Bob Bird. They have now started writing physician policies in Nevada and they're doing a great job. If A.B. 1, the Bill that passed last summer, survives constitutional challenge – and there are some built in safeguards to ensure constitutionality – it will reduce premiums.

The better news is that the Governor's plan has been fully underwritten by AIG, the world's largest insurer. The president of AIG said last summer: "we will not go into a state anymore unless they have meaningful tort reform." When they said that, I thought, "Well, they're not going to insure in some states." What they really said is, "We're not going to go in and write insurance or participate in the bond offerings." It is devastating to state government when the largest insurer says, "We're not going to come to your state and buy your bonds to build your roads."

As a result, the Bill that passed last summer, which has constitutional safeguards, still treats people fairly and still allows them to hire a lawyer. AIG came into the State and fully underwrote the Governor's plan. So we feel very strongly that the Bill met the needs of the insurers and is run by a good and experienced person. The Governor did a great job setting that up and putting people in there. It's not a State-run program, but he started it under the auspices of the State. Eventually it will go private. I really commend the Governor. He understood the issue and got it running under the right circumstances. He did a great job.

JOHN MURTOCH:¹⁷ My wife is an OB/GYN nurse, and I'm a home builder. Here's the challenge I have. I've worked in other states. I came to Las Vegas fifteen years ago from the New York area. I build these homes. My wife stopped working because Nevada is not a very business-friendly state anymore for the medical industry or the home building industry. I don't have to build homes now in Las Vegas. My insurance premiums went from \$100,000 to \$900,000 last year – not because of me but because of other builders – because of the system. Is anyone at the Assembly and Senate asking: "Are the citizens of Nevada being protected by the current system?" They are not. I could leave tomorrow and they lose a great home builder. My wife stopped working years ago and they lost a good OB/GYN nurse. You can go somewhere else. Nevada is not so big – it's a small place.

Are the [legislators] mature enough to know that with all this infighting they'll lose the good home builders, and they'll have the bad home builders?

¹⁷ President of Lawnford Homes, Las Vegas, Nevada

They'll lose good doctors and have the bad doctors. We have to stop fighting about trial attorneys, home builders, and insurance companies or else we can vote with our feet as citizens: [we can] go somewhere else.

BILL BRADLEY: Yes, I think everybody in the Legislature is mature enough to understand that. But so far, the only solution that has been offered is to take away victims' rights and eliminate juries. If you are a believer in this country, and if you've ever had the opportunity to sit on a jury, I challenge you to say Nevada juries don't work. But so far, the only solution that has been forwarded by powerful money interests is: "Take away victims' rights."

JOHN MURTOCH: But they're afraid the same jury that gives a person \$3.2 million for a coffee [burn] might give \$10 million for a leaky toilet. The jury says: "If you burn yourself, we'll award you \$2,000,000." That's the fear of the defendants. Just because it's a jury doesn't mean it's a responsible jury. That's the biggest fear insurance companies have, that juries are not responsible.

BILL BRADLEY: But you're talking about "what if." We deal with facts. And we have to see the misconduct you're talking about. What if an airplane crashes and it lands in this building. We'll all die. Should we all be outside worrying about an airplane crashing here?

My concern is that "what ifs" are the hysteria. And that's what drives this national campaign to deprive victims of their rights. We're not saying that there are solutions or that under certain circumstances our civil justice system needs reform. But don't put it *all* on the civil justice system.

JOHN MURTOCH: I'll tell you that under the current system, the doctors and the builders and all the people who are being sued will leave.

BILL BRADLEY: May I read something to you? This is a survey and I'm going to let you guess what state it is, all right?

Seventy-five percent of physicians have become less satisfied with medical practice in the past five years. Relationships with patients provide physicians' greatest source of satisfaction. Low reimbursement, managed care hassles, and government regulation are the greatest sources of dissatisfaction. Forty-three percent of surveyed physicians – this was a State Medical Association survey – forty-three percent of surveyed physicians plan to leave medical practice in the next three years. Another twelve percent will reduce their time spent on patient care. The time physicians spend in patient care has declined by seven percent in the last five years. Forty-four percent of physicians spend less time [practicing] than they did five years ago. Fifty-eight percent of physicians have experienced difficulty attracting other physicians to join a practice. Primary care, urology, orthopedic surgery and neurosurgery are leading specialty shortages. More than one quarter of physicians would no longer choose medicine as a career, starting over, and more than one-third of those who would still choose medicine would not choose to practice in this particular state. Two-thirds of physicians are advising their children not to practice medicine.

What state do you think that comes from?

JEFFREY STEMPEL: You've got to be talking about California, right?

BILL BRADLEY: The land of the \$250,000 cap on economic damages that is touted by many as the answer to all of Nevada's problems. The Report I just read certainly seems to contradict that shibboleth. My point is this: in California, which has the most Draconian tort reform law where victims' rights are ignored every day, the horrible problems that physicians are having with

managed care and lack of adequate reimbursement from the state medical program are the problems we need to address along with our civil justice system. As all of you watch the tax debate that's going on right now in Nevada, think about some of these things: why are physicians only being reimbursed \$800 or \$900 to deliver the most precious commodity our society has – those little babies? Someone figure that out.

MICHAEL GREEN:¹⁸ Ann McGinley's suggestion about the state taking over medical malpractice insurance reminded me of her home state, Pennsylvania. For many years now, Pennsylvania has had what's known as a "cat fund," which is a state fund that actually takes a significant layer of excess insurance. They're primary private insurers. I'm not sure where it kicks in – \$750,000 or something like that. At that point, the "cat fund" is [triggered] and pays. That has been an unmitigated disaster in Pennsylvania, according to everybody I've talked to: judges, plaintiff lawyers, defense lawyers, and the insurance commission. They are in the process of doing away with the state "cat fund." Maybe some states could do it better, but we ought to take some lesson from what happened in Pennsylvania.

Scott, I have a question: you said S.B. 241 abolishes contingent fees.

SCOTT CANEPA: It has the practical effect of that, correct.

MICHAEL GREEN: You said it would require fees to be paid on an hourly basis.

SCOTT CANEPA: The section of the Bill says that fees may only be awarded based on an hourly calculation.

MICHAEL GREEN: This would regulate the contract as to how you could charge your clients.

SCOTT CANEPA: That's correct.

MICHAEL GREEN: Is that not a loser pays?

SCOTT CANEPA: No. That's completely different. That's another [section of] the Bill. S.B. 241 says that the court shall use an hourly multiplier irrespective of any contract that the lawyer may have with the homeowner.

MICHAEL GREEN: The court shall?

SCOTT CANEPA: Correct.

MICHAEL GREEN: Why is the court going to be involved?

SCOTT CANEPA: You'll have to ask Mr. Hill that.

STEVE HILL: Because under S.B. 241 the court is going to approve any fee paid to any attorney, whether the case is settled, proceeds to verdict, or is resolved at any time.

MICHAEL GREEN: Is that true for both plaintiff and defense attorneys?

STEVE HILL: No, no. Plaintiffs' attorneys.

SCOTT CANEPA: Just the homeowners.

MICHAEL GREEN: Okay. Instead of this regulation of one-size fees, suppose the legislature just put in a provision that said the loser pays. The court would then have to determine how much the loser pays, but it would be a loser pays system in which attorneys' fees were paid by the party that lost.

¹⁸ Bess and Walter Williams Distinguished Chair in Law and Professor of Law, Wake Forest University School of Law.

SCOTT CANEPA: That's existing law. Under current Chapter 40, if a homeowner rejects a reasonable offer of settlement – whether that settlement is a monetary settlement or an offer to repair – the court has the discretion to deny all of the attorneys' fees and costs of the homeowner and make the homeowner pay all of the attorneys' fees and costs of the contractor.

MICHAEL GREEN: Is the reverse, the mirror image of that, also the law?

SCOTT CANEPA: Yes.

MICHAEL GREEN: If you don't get a settlement offer greater than your judgment, you can recover your fees?

SCOTT CANEPA: No. Under Chapter 40, if the homeowner rejects a reasonable offer to resolve the case, whether by a monetary settlement or an offer to repair, the court can make the contractor pay the contractor's legal expenses and costs and deny the homeowner's fees and costs.

If it's determined that the offer wasn't unreasonably rejected, the homeowner has the right to his or her attorneys' fees, litigation costs, and the cost to repair their house. One point I didn't make earlier: they're not entitled to any noneconomic damages. You're not entitled, in Nevada, to pain and suffering. You're not entitled to any inconvenience damages under current existing framework. And, if the builder just makes a threshold response under the statute, the builder is insulated from punitive damages under existing law.

BILL BRADLEY: I'd like to respond in the context of medical malpractice. First of all, the injured victim, who is not able to work, still has to pay the mortgage, still has to pay the car payment, and is in a very financially vulnerable situation. That's not to say their case needs to be meritorious in order to proceed. I agree with that. But adding the threat of having to pay when their life has been destroyed through no fault of their own is offensive in some situations as far as I'm concerned.

The other problem is in the context of medical malpractice. If I bring a claim and I lose under our screening panel, the loser – my client – pays. When I bring a claim against a physician and I win more than I offered to settle, the loser – the physician – should pay. But, the physician never pays. The insurance company pays. The physician has no risk because the insurance company pays his fees. Unfortunately, under the initiative petition that the doctors think they want so badly, [there will be] some significant ramifications to them that they simply are not understanding right now. But "loser" should mean "loser."

MICHAEL GREEN: You said the trial lawyers successfully established that if there were penalties imposed for filing frivolous suits, [those penalties] would be imposed on the lawyers rather than on their clients.

BILL BRADLEY: Absolutely. That's our current law.

MICHAEL GREEN: It seems to that me if we had similar laws that say instead your client pays [that would be unfair]. After all, [the lawyers are] the ones who pick whether these cases go forward, so if they're unsuccessful, let them pay the other side's fee. Similarly, let them recover in the event that they're successful.

BILL BRADLEY: When you say "unsuccessful," if I've got two physicians that are credible and honest and truly believe that the defendant committed malpractice and the other side has two physicians that also firmly believe that they did not, I don't think you want the chilling effect of the loser pays in

that case. We're still in America, and we still rely on juries. However, that is where the judge becomes the gatekeeper. That decision should be left up to the judge, who has the benefit of listening to the case and determining if it was brought meritoriously and in good faith. If it was, there's a legitimate dispute between the opposing physicians about what happened. The one thing you're forgetting about is the propaganda that has been promulgated upon our society for the last fifteen years about the lawsuit lottery.

I don't care what anybody says in this room. When an injured victim walks into a courtroom these days, they walk in one step less than even. They better be able to show that jury right out of the box that this is a meritorious case. Juries are so inundated with propaganda from the insurance agency – that we're involved in a lawsuit lottery – that we're not starting with unbiased jurors. I would love to work with your group to take the propagandizing of jurors out of the media.

STEVE HILL: I just have some comments. The construction industry had a hearing in front of the Insurance Commissioner last July in which we asked for help. We didn't want the state to take over the insurance industry, but we asked that the state supplement insurance for the construction industry. Immediately after that hearing, the companies that provide liability insurance for individuals – State Farm, Travelers, Farmers – said that, because they would be partially liable for the risk, they would all leave the state en masse. The system right now is so bad and unpredictable that they wanted no part of writing construction liability insurance.

The size of the construction liability market is so large that it dwarfs many other things. Those problems would bleed out to our customers. We didn't want to cause that. That's really not an option in our industry. We understood that and we asked the Insurance Commissioner to disregard that thought.

As far as the attorneys' fee issue and the contingency fee issue currently in Chapter 40, what has not been addressed is the fact that residential construction is the only body of law in Nevada in which these costs and fees do not come out of a jury verdict. [Those fees are] termed "entitlements." They are added to a verdict, and they are out of control. In the recent *Beazer* case¹⁹ that made the paper, the demand was for \$24 million. The ultimate jury award was for \$7.3 million. That would not be within a reasonable definition of a "win" for the plaintiffs. But the attorneys' fee request in that case, on top of the \$7.3 million, was for \$9.3 million. Additionally, [there were] expert witness fees and prejudgment interest. So the homebuyers [basically had] to pay \$25-30 million to get those \$7.3 million worth of repairs made. We don't feel that's fair.

S.B. 241 does two things to address these points: it has not outlawed contingency fees in any way, shape or form. The request that a judge make the calculation on an hourly basis is part of a list of reasonableness standards that are included in that law. It does not require that they use only that method for awarding fees, but that it be considered as part of the reasonable standard. Secondly, we have tried to beef up the offer of judgment language, which is basi-

¹⁹ See Hubbel Smith, *Jury Awards NLV Homeowners \$7.8 Million*, LAS VEGAS REV.-J., Feb. 8, 2003, available at http://www.reviewjournal.com/lvrj_home/2003/Feb-08-Sat-2003/news/20650286.html (last visited Jan. 22, 2004).

cally the win/loss thought process. The court system here that deals with construction defect has ruled that the offer of judgment cannot be used in Chapter 40 and that Chapter 40 trumps the offer of judgment philosophy. We feel that's a very good idea and we encourage that.

SCOTT CANEPA: I just want to point out that the *Beazer* verdict, which I think was actually \$7.8 million, was more than twice what the developer offered the homeowners to fix the houses. The developer was given the opportunity to fix those homes and refused, thereby causing the lawsuit.

STEVE HILL: It is also obviously less than half of what was demanded. Those are just bargaining positions to start with on both sides. Obviously the verdict was much closer to what was offered. Furthermore, the \$7.8 million was reduced down to a \$7.3 million award because of homeowner responsibility in that case.

VI. PANEL III: NATIONAL PERSPECTIVES ON THE MEDICAL MALPRACTICE ISSUE

JEFFREY STEMPEL: We have a somewhat smaller segment now with two speakers. Nancy Udell is the general counsel and policy director for Common Good. Even if you're not familiar with the organization, you're familiar with its founder, Philip Howard, who is the author of two best selling books, *The Death of Common Sense*²⁰ and *The Collapse of the Common Good*.²¹ Nancy is a graduate of Yale Law School and, before attending law school, she worked in the New York City school system where she observed bureaucratic pathologies first hand. Ann McGinley is a graduate of the University of Pennsylvania Law School and taught at Brooklyn Law School and Florida State prior to joining the Boyd faculty in 1999.

A. *A Global Approach to the Medical Malpractice Problem*

NANCY UDELL:²² I want to try and clear away the rubble a little bit. It's always hard to have this conversation about how to fix things. But what's good is everybody agrees that the system is broken. That's certainly the case in medical malpractice, though I don't know as much about building defect or construction defect litigation. But I've studied the voluminous scholarship extensively in the medical malpractice area.

The current federal reforms proposed to cap pain and suffering damages are much too narrow and unintentionally reinforce the false dichotomy that doctors and patients are natural enemies. That's just not the case. Instead, doctors and patients have been driven apart by a system that is unreliable.

Common Good conducted a Harris poll of doctors and medical professionals last year. Over ninety percent of doctors do not trust the justice system to reach a fair verdict in a medical malpractice case. I imagine the patients feel the same way, given that the loss rate is extremely high. Approximately 1.3

²⁰ See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994).

²¹ See PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (2001).

²² General Counsel, Common Good.

million people who are injured in iatrogenic injury every year, or injury caused by treatment in a hospital, get any compensation whatsoever from the current system. That's probably less than one percent. That's an abysmal failure rate.

The two functions of any system of compensation should be: (1) to compensate victims and (2) to deter further bad behavior or accidents. That's what a compensation or tort system is supposed to do. Today the medical malpractice system is not doing either of those and yet it's hugely expensive. You could debate for years over why premiums are rising, why St. Paul left the market, and whether insurers are making money or not. Everyone has their facts, and they go both ways. The medical malpractice premiums are the tip of the iceberg. The real costs of our broken tort system in medical malpractice are dwarfed by the med-mal issue. First of all, you've got defensive medicine which estimates costs between fifty and one hundred billion dollars a year. Even that cost is dwarfed by the cost required to take care of the 1.3 million people a year who are injured when they go into the hospital.

Studies almost uniformly agree that the culture of our current system of "shame and blame" – let's find who committed malpractice and let's punish them – is totally inefficient in deterring errors. It also creates a culture of secrecy and blame that is counter-productive. We know how to make the system safer. It requires a culture of openness. It requires people to discuss mistakes and to talk about what happened. More than anything it requires the implementation of system changes in hospitals and big health care institutions. For example, electronic medical records are very expensive for any hospital or HMO to implement, but are well known to reduce error. Electronic order entry for prescriptions also reduces errors. In the current system, [we need] to get facts out into the open and free up funds to invest in these proven patient safety measures. [However, these needs] are simply buried under the constant back and forth [litigation] – doctor versus patient.

It's not just a matter of the current system creating a culture of secrecy and blame that prevents the discussion of errors. Additionally, the current system does not provide the right incentives for providers. One reason the current system doesn't deter bad behavior, or provide the right incentives for good behavior, is because the deterrent signal is almost completely random. In other words, the small number of people who are getting compensation out of the medical malpractice system are often people who are not victims of medical malpractice while the vast number of people who are not getting compensation often are victims of medical malpractice.

Most errors don't have anything to do with the doctor being bad or careless, but have to do with the fact that improvements have not been put into a hospital. For example, in the tragic case of Jessica Santillan,²³ who died due to an improper blood transfusion, the doctors were the best doctors in the world. That mistake had absolutely nothing to do with the doctor being a bad doctor. In fact, her family wanted the same doctor to do the second transplant. That was a systems error. That was a miscommunication about blood type. It was electronic order entry error.

²³ See Background Information on Jessica Santillan Blood Type Mismatch, *available at* <http://dukemednews.org/mediakits/detail.php?id=6498> (last visited Jan. 22, 2004).

The fact that we try to take this hammer, which is the current tort system, and hit doctors over the head shows we want the system to get better. I keep hitting you and hitting you with a bigger hammer, and I don't understand why things aren't getting better. Well, the problem is we're using the wrong tool. The hammer is not working. We're also saying: "We're getting too many big verdicts. Let's cut down the size and number of those verdicts." Everybody agrees that our current broken system does not work – it's totally unreliable, it reaches the wrong results a vast majority of time, and it's hugely expensive. [But, we're effectively saying]: "Let's keep that system but just try to cut back on a small portion of what people get in the system." We think that's a flawed way to go about that.

What we are advocating is something much more radical. We have been gathering the leaders of health care. When I say "leaders of health care," I mean the top leaders: the heads of medical schools; the heads of hospitals; the heads of universities. We have a petition coming out in a couple of weeks signed by former Senators, former Attorneys General, and all the patient safety groups. If you look at the list of who's signed onto this approach it's a very high powered group in medicine. Everybody says: "Let's stop tinkering around the edges. Let's actually put together a new system of medical justice that will compensate patients, that will deter bad care, and that will give incentives for the kinds of system improvements we need to make the system better, to improve the quality of care, and to be cost efficient."

It sounds shocking. It sounds like a crazy, totally radical, idea: "Let's throw it away and start over." That's what we're advocating. Let me quickly go through six elements that we think should be included in any reliable system of medical justice. They're also on our website: "cgood.org."²⁴ We've tried to pull together the research and the scholarship in this area. One thing that's great about medical malpractice is that you talk about facts. The facts are there, it's very clear, and everybody agrees. That's kind of a good thing. There's really not a lot of dispute among credible scholars and peer-reviewed pieces over what the issues are. We have two books: one is *The Effect of Law on Health Care* and the other is *Six Elements of the System of Medical Justice*. These can be downloaded from our website without attachments. But let me run through the six [elements].

Number one: expert decision makers. We've heard the trial lawyers tell us, and I think it's generally true, that juries generally get things right. I think that's true in a lot of areas, but all the research shows that it's not true in medical malpractice. A reliable system of medical justice needs an expert decision maker who can draw on a reservoir of information, scholarly knowledge, and past experiences with cases in a highly complex and highly scientific area that simply cannot be explained to one jury in one case.

We're not talking about a hit-and-run here. The bottom line is, if you read the research and some of the great work that's being done on appropriate standard of care, there are often four or five acceptable standards of care in any given medical situation, not just one. What happens is that you get a [group of] lay jurors. They're not allowed to look at any scholarship. Maybe if we

²⁴ <http://cgood.org/> (last visited Jan. 22, 2004).

allowed them to read scholarly articles and expert opinions they might do better. But instead, the jurors have one expert from the plaintiffs and another expert from the defendant who say diametrically opposed things about an extremely complicated topic. Often, it comes down to who makes better eye contact and who the jury decides to trust. It's simply not possible to decide something that scientists and doctors can't even agree about, having no background knowledge and no access to scholarship. We think expert decision makers are important.

The function of law is to let people know what the rules are and to be predictable so that people can use their judgment. I would put money down that if there are any doctors in this room, not a single one of them could tell me what negligence means in their practice. The law is completely standardless on this right now. Juries are supposed to decide facts – they're not supposed to decide standards of medical care. That's why expert decision makers are important. [Many of you] like to say we're still Americans and we still need to have juries. In this jingoistic time, it's important to remember that we can talk about making changes to our legal system without being Communists or without being un-American. Throughout the United States today there are many examples of specialized technical courts that use expert decision makers. The one everyone is probably most familiar with is worker's compensation. Those cases don't go to a jury. The tax court, the court of customs, and the court of claims don't use juries. The [National Labor Relations Board] doesn't use juries. Immigration courts don't use juries. You may be interested to know, at the risk of sounding un-American, that there is not a single civil law jurisdiction that currently uses juries to hear medical malpractice cases – not a single one.

The second element of [the system of medical] justice is impartial experts. It's very important that the court – the expert decision maker – should be able to get expert testimony from a source that he trusts and knows to be impartial. The parties can still submit written expert testimony if they want to. The court should be able to call upon credible expert testimony from people who have scientific merit, people who publish peer reviewed articles, and people who are known to be well read and well practiced in the area. There should be some body of doctors who wouldn't mind contributing some of their time to give credible expert testimony. The court could then examine the witnesses and find out what the science is in this area. That's an important thing.

Third, a reliable system has to be accessible to patients. Take, for example, the story that somebody told earlier about the family in California whose baby was born with a birth defect, and then the baby subsequently died very tragically. The family had about five lawyers banging down the door when the baby was alive. As soon as the baby died, all the lawyers quit because there was no money left. The lawyers want to take a portion of the dollars that are allocated to future care – that's a big chunk of cash. If there's no future care dollars, then the lawyers aren't interested in the case. That's really tragic. That's not to say lawyers are bad people, but that's an economic decision [they make] just like the insurance companies. There's a reason people are in this to make money – and that's entirely fair.

People shouldn't be in that position. People should not have to give away portions of the money in order to get access to the system and to get justice for an error that may have occurred. A good example of that kind of a system is the program that currently provides compensation to kids who get injured from vaccines. It's good for the herd to be vaccinated because the herd gets stronger, but there is risk inherent in vaccinating the herd. The kid who does get injured should get compensated.

In the vaccine compensation system, the lawyers are paid an hourly fee. I used to be in private practice. I always got paid by the hour. I thought it was pretty good. They're paid an hourly fee and there's no shortage of lawyers in that program. There are currently a hundred lawyers on a waiting list to represent claimants in the vaccine injury compensation program. What I'm envisioning is a system like the screening panel, but one that actually makes decisions so people can get in, get a decision, and get some compensation. They won't wait four, five, or six years and give fifty percent of whatever money they receive to costs and lawyer fees. They're going to be able to get their damages and get in and out.

A fourth part of the proposed reform program is to create incentives for error reduction. I think I already talked about that.

Fifth, the system needs to make deliberate judgments about compensation. We talk about compensation all the time, but we have to realize that if we take \$5 million and give it to one victim, [there are still a] vast majority of victims not being compensated. If we just randomly pull a number out of the air and give that \$5 million to one victim, that's \$5 million that's not available to compensate other victims and not available for future care. Every other modern Western country that deals with medical malpractice makes deliberate judgments about pain and suffering payments; [they don't have] a rigid cap that's one size fits all, but a deliberate judgment. Some of them do it by having schedules. England, by the way, eliminated the use of a civil jury in med-mal cases in 1883 and every European country has some kind of a schedule rather than a rigid cap.

Decision makers can still use their judgment. For example, Germany uses something called the Schwartz and Tabellan. They just pile all the verdicts that have been given so [as to achieve a] norming effect. For economic damages, you don't need a schedule because economic damages are [ascertainable]. Whatever the methodology, whether it is a cap, a schedule, or a compilation of other damages, there need to be deliberate judgments. I guess this is really the biggest point in the Common Good program. It's important because we have to think about how an award in an individual case affects the rest of the system and the rest of the society. You can't look at these things in a vacuum. One of the reasons we're having this melt down is that we're looking at everything as an individual case.

The final point is that a reliable system has to have a barrel for the bad apples. It's entirely true that most mistakes are not due to bad doctors; they're due to system errors and communication errors – things that are mistakes and not negligence. It's also entirely true there are some very bad doctors out there. There are a few of them. There are not a lot. They're extremely troublesome, and they often slip through the system. Ironically, they often slip through the

system because they hire a lawyer and sue a hospital who tries to discipline them, an HMO that tries to get them out, or a licensing board that tries to take their license away. Then they settle quietly and go off to another state.

In order to protect patients from these rare and very troublesome creatures – bad doctors – a reliable system has to build that policing function in. You can't just have these cases coming through, and then not have the punishment or the discipline function. Thank you.

B. Commentary on the Common Good Proposals for Medical Malpractice Reform

ANN MCGINLEY:²⁵ Many of the things I was going to say are similar, and yet different, from what has already been said. First, we are not really talking about one broken system. We're not just talking about a broken civil justice system. We're also talking about a broken health care system. What I mean by that goes well beyond what we're here to talk about today, but I think it's really important as a background issue.

We have forty-one million people without insurance in this country. Many people don't even have access to health care. So national universal health care has to be something that we think about when we're talking about medical malpractice. We have to think about how we're going to give people access to good health care.

Furthermore, we have a semi-broken, if not broken, civil justice system. We also have lack of access for the poor. Attorney fees and costs are very high. Time delays, obstructive tactics, excessive and deceptive discovery, procedural hoops, and many adversarial processes seem too overwhelming to permit just and efficient dispute resolution. Basically, these are two broken systems that both need reform.

Tort reform and medical malpractice problems that have been identified are the result of both of these problematic systems. Certain dynamics have already been mentioned. We've got an economic downturn. We have insurance companies that are probably too unregulated. We have political interest in this issue. We have media that portrays doctors and lawyers as greedy, evil people on a regular basis. We have doctors and lawyers who both seem concerned more about protecting their own turf than about improving the system.

By the same token, we have doctors who express incredible emotional upset when they become defendants in medical malpractice lawsuits. It's a genuine feeling that must be addressed in any successful effort of medical malpractice reform. Doctors feel they can't practice their profession the way they want to practice it. There is much panic and misinformation. We have to find a way to take that pressure off the doctors. I don't think we've created all that pressure through the malpractice system. I think a lot of it is the economic downturn and the economics of running a medical office, but we need to recognize that doctors, to some extent, need [relief from the stigma of] shame or blame. They feel it's punishment. As a lawyer, I view it as a way of spreading the risk. But that's not the way it feels when you're the one that's being sued. My primary work is in the field of employment discrimination. I find myself

²⁵ Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

often aligning with the plaintiffs, but I also realize that employers take it personally when someone says: "You treated me badly because of my race and my gender." I think it's a very similar dynamic.

Another dynamic [that has been] mentioned is the media. Doctors are winning the media war with tales of runaway juries and excessive verdicts. We have insurance companies that are driving the debate but staying in the background, leaving few fingerprints.

What's the best solution? Changing these two systems. I'm not sure we can make those major changes. Earlier this week, Professor Steve Johnson of the Boyd School of Law gave a speech on tax reform. Instead of advocating a radical change in the tax system, he suggested some modest simple reform that might make things better. I'm going to try to follow his lead here. I agree with Nancy [that we need] deterrence, victim compensation, and we need to spread the risk of accidents through insurance. If tort law's purpose is to deter bad medical practices, [we should be concerned because] it's not happening. The doctors are practicing defensive medicine. It also seems they are underreporting accidents, injuries, and mistakes. You hear of doctors operating while drunk or on drugs and their colleagues not reporting them. What's going on?

Doctors need to police themselves. We have to create some kind of an incentive to get them to do that. By the same token, victims need compensation. I'm not a big proponent of these caps on pain and suffering because personally I think they're harmful. They basically stress that men's lives are worth more than women's and children's – that alone I have trouble with.

Nancy advocates schedules and having a more even system. Everything that has to do with our civil justice system is uneven. I don't know if we're going to go [towards the schedule system]. Many foreign countries that use those systems and do award less money have social networks and social programs that are supporting people. We don't have those same kinds of networks. We have to ask whether we're willing to try some of those social programs if we're going to make these major changes.

The goals in medical malpractice reform should be to improve the health care system by creating incentives for better systems, by creating incentives for better reporting of accidents, and by creating incentives for better policing of doctors by the doctors themselves. [Other goals are] to lower the cost of health care to those who can't afford it, provide better access [to the health care system], prevent future injuries if preventable, and compensate victims and spread the risk to society through insurance and other social programs. The goals of reform should not be to protect lawyers, doctors, or insurance companies unless that protection will improve the system for the public.

I have modest solutions. One is the idea of enterprise liability. I really believe that hospitals should be liable for the doctors and everybody else who have working privileges in the hospital. They shouldn't have to be employees of the hospital for the hospital to be liable. If the hospitals are liable, the hospitals will have the incentive to make sure those systems are in place. I certainly think the hospitals might be able to negotiate better insurance deals than the individual doctors. This idea comes from a concept in employment law called *respondeat superior*, where an employer is liable for actions of employees. [But it goes] beyond that to reach not only employees, but other people who

have work privileges in the hospital because the hospital has the right to control how those people practice. The hospital needs to exercise that right.

We could also reduce the liability of individual doctors, or eliminate it altogether, except when there is cover up, fraud, or intentional or very reckless behavior. I think the doctor group or the enterprise should be liable rather than the individual. That gets rid of the blame game. People make mistakes. [This will work] better where there are organizations that create an incentive to report those mistakes. If we look at the Mayo Clinic, the Cleveland Clinic, and other places where everybody who works in the facility is an employee and the hospitals are liable, we might find a good system that we could use. We could actually expand the liability to the enterprise or to the hospital, even for people who are practicing but who are not employees of the hospital.

There are [other changes that can be made]. Strict regulation of insurance companies must accompany any reform we have. Right now, it seems [insurance companies are] in the background and we have doctors and lawyers pitted against one another. I don't think that makes any sense. Improved social networks are also required. Perhaps we need a national health care system and some kind of social services for the injured, the sick, and those who cannot work. I also don't think it would be a bad idea to limit the attorneys' fees to a smaller percentage. We should also probably have some kind of a board or panel of experts, where both sides agree to the particular selection [of board members]. This would be similar to the way you would select an arbitrator to look at cases, and would alleviate having people pay their own experts.

C. Audience and Panel Discussion

MICHAEL GREEN: [You both addressed the idea of] court appointed experts – which I'm very attracted to. At the same time, both of you spoke about the cost of the system, right? Well, court appointed experts are just going to be an add-on. They're not going to replace adversary experts – not if the lawyers around here have any say about it. That's going to inevitably build additional costs into the malpractice system. It may be worth it, but let's recognize that we're talking about additional costs.

NANCY UDELL: Well, in our system you would not be talking about additional costs. We are working with a large number of people who are very involved, including AARP, to develop a system. The idea is to have reliable expert testimony and pare down costs. The money in the system should be going to injured patients and not going primarily to experts, lawyers, and court costs [like they are] now. We don't think that expert decision makers and impartial experts add costs. Parties [could still] put in written testimony from an expert. I think that's a bad idea and I'm not sure why it's necessary. Maybe we could have a panel of experts. The cost should be borne by the system, not come out of the money that patients get to care for their injuries. It should cut down on costs – not increase them.

ANN MCGINLEY: Actually, my idea would not be an additional cost to individuals. There would be a number of experts that would be agreed upon by both sides.

NANCY UDELL: Many European jurisdictions do it that way. For example, for both product liability and medical malpractice, almost every European

jurisdiction uses court appointed experts. Sometimes they appoint a panel. Doctors and scientists consider it part of their professional duty to participate. They don't get huge fees, but it's to everybody's benefit. You have credible scientists and reliable medical professionals, who are aware of the current science, giving testimony almost as an officer of the court. It's a professional obligation.

JEFFREY STEMPEL: Let me just jump in for a second and ask: am I being too postmodern to suggest that it's really hard to say that there is an agreed upon neutral standard in some of these areas? For example, if we were trying a case where the proof was economic, it would make a difference if you had Milton Friedman²⁶ or Lester Thurow²⁷ as your neutral court appointed expert. How would we control for that?

ANN MCGINLEY: I was thinking in terms of having more than one expert, as in the arbitration model, where you would have three experts – each side picks one and the judge picks the third. Or [there could be] two – each side picking one – and they're already from a panel that's been screened somehow.

JEFFREY STEMPEL: [Would you be] able to strike for cause?

STANLEY FELDMAN: It seems that we're assuming in the medical malpractice case that plaintiffs are putting on experts who are not reliable and are not credentialed. I don't know why we make that assumption. It has been my observation in practice that you would be a very unsuccessful plaintiff's lawyer if you tried to prove your case to a jury with an expert who was not well qualified and who was subject to cross-examination on his qualifications, experience, and logic. Why do we have this assumption and on what data [is it based]?

NANCY UDELL: I think both sides pick experts who support their case. I think it's possible to do that. I don't know what the statistics are about the credentials of expert testimony. What I know is anecdotal and it's probably much less reliable than what you know anecdotally, given your line of work.

What is detrimental is the fact that the experts are partisan. Let's say you've got a particular case in an operating room and the doctor makes a decision. You can always find an expert to say that if the doctor had done something else, the outcome might have been different. What you really need is an expert to say: "Look, in this situation there were four or five acceptable standards or courses of action that the doctor could have taken, not just one." You need to know what the current science is. In some situations it's very clear what's considered the acceptable standard of care. In others it may not be.

²⁶ Milton Friedman was the conservative University of Chicago economist most associated with the theory of monetarism, in which the government's only significant legitimate role is to manage the money supply through the federal reserve (interest rates, etc.) and otherwise to stay out of the way of the private free market.

²⁷ Lester Thurow is a liberal economist at MIT who generally advocates more government involvement and is a modern champion of Keynesian economics (so-named for the great British liberal economist John Maynard Keynes). This would include targeted government spending, job training programs, maybe even tariff protection and wage or price controls in extreme cases.

Right now you don't get that. You get two dueling experts, one saying this is the standard of care and the other saying it isn't.

STANLEY FELDMAN: Again, I think you're assuming that defense lawyers aren't doing their job. It's my experience they are. If it is a situation in which there are several different options, all within the standards of care, one expects the defense [would bring that information forth]. I don't think [defense] experts [will testify falsely] because the attitude in the medical profession is that, if it is at all possible in good faith to establish that the claim is not well taken, they will come forward and testify. It's easy to get defense experts. It's much harder to get good plaintiff experts.

NANCY UDELL: I hear what you're saying. I'm not sure we're disagreeing. I think the system of dueling experts is wasteful and hugely expensive. I don't think it's particularly productive. I think it would be more productive to do it as many European jurisdictions do and allow the court to examine and choose experts to testify on what the standard of care was. They may need two experts if it's a tricky area. I think that area [creates huge] costs. Trial lawyers often have a hard time because, if there is a cap on pain and suffering, they're not going to have enough money to pay their experts.

BILL BRADLEY: I have a couple of points. The first is in the context of defensive medicine. I don't think there's anybody in this room who would not like the ability to utilize the most current equipment to make a diagnosis. I think we have taken defensive medicine to a new level. We've allowed science to progress and do wonderful things with machines. But now it's [considered] defensive medicine if we use that technology. Where I struggle is with the very simple issue of someone walking along the street who falls and hits their head. They come to the emergency room and the doctor decides to do a CAT scan to see if there's bleeding in the brain.

Well, if I fell and hit my head, I would like a CAT scan to know I wasn't bleeding, but maybe you wouldn't. When the physician makes the decision to take a CAT scan, it is sometimes referred to as defensive medicine. I struggle with that. I also struggle with the concept of defensive medicine in managed care because now you have decisions made, unfortunately, by very unqualified medical professionals. It's not even fair to call them medical professionals. I struggle with the defensive medicine argument.

Another issue I have with your presentation is the total commitment to literature. I think fifty to seventy-five years ago you were correct. But I think in the last fifty years, with the incredible power and money generated by corporations that are funding a lot of the research, we [have to question the integrity of that research].

NANCY UDELL: It's hard to respond to a wholesale questioning of the validity of scientific research, which is how I interpret your question. I guess I'd refer you to the briefing books that contain very credible scholarly research. I'd be happy to have a follow up conversation with you if you can point out how these studies are not credible because of how they were funded. I don't believe that to be the case, but I'd be happy to talk about it. It's hard to talk about in the abstract because I don't know specifically what you're referring to. I'm a believer in science. I believe in facts and I think the facts are clear.

Let me respond to your first point about defensive medicine. Dan Kessler (who's now the head of the FDA) and Mark McClellan (who is now at Stanford) did a study in our first briefing book on defensive medicine. They estimated the costs in today's dollars [of doctors performing defensive medicine] to be \$50-100 billion dollars. This is a hard thing to measure, but Common Good did a poll of doctors last year which I found really stunning. In the poll, over fifty percent of doctors admitted to performing tests they believed to be unnecessary, performing procedures they believed to be unnecessary, and prescribing drugs they believed to be unnecessary because they were worried that down the road someone might say: "Why didn't you?" I think CAT scans are often appropriate, and I do want to get a CAT scan when I get injured. But I don't think as a society we can afford to conduct a CAT scan every single time someone is injured just because a lawyer could come along later and say: "Might it not have been different if you gave a CAT scan?" That's what defensive medicine is about. It's not about using the technology we have. It's about second guessing. You can always say "what if?" Always.

MICHAEL GREEN: Bill, I would just ask you this question. Suppose you went into the emergency room and the doctor said: "We can give you a CAT scan. I think there's a very small chance [of damage if you don't have one] and the bill will be \$1,100. Do you want it?"

BILL BRADLEY: I agree that the physician and the patient should reconnect and have that discussion.

NANCY UDELL: You would say: "Yeah, I'll pay for it?"

BILL BRADLEY: Here is the problem: when I have health insurance, I don't have any problem.

NANCY UDELL: That's the point. Who pays for that? We're all paying for it. The 41 million uninsured are paying for it. That's who's paying for it.

BILL BRADLEY: [I disagree that] the issue is [whether the doctor should give a] CAT scan because he is worried about being sued. I think the reason doctors should or should not decide to give a CAT scan should be based on objective findings and the possibility of future costs to that brain damaged person whose treatment could have been eliminated by a simple nonintrusive test. I think that's what the doctor has to make the decision on.

NANCY UDELL: I agree with that. I'm not disagreeing on that. That's the goal absolutely. That's what we want.

VII. PANEL IV: INTRODUCTION

DMITRI SHALIN: I just received a note from Dina Titus, Nevada State Senate Minority Leader and Professor of Political Science at UNLV, as well as a member of the Center for Democratic Culture. She writes:

I regret that I'm unable to attend your forum today but legislative hearings and votes keep me in Carson City. The program promises to be interesting and informative, and I was looking forward to participating.

You are to be commended for taking on the subject of construction defects. It is both critical and controversial and those reasons need to be addressed in an open forum with well respected representatives from both sides involved. Accordingly, good policy can result which balances the concerns of attorneys, builders, and insur-

ance companies in order to best protect the interest of Nevada homeowners. As you know, a construction defect Bill, S.B. 241, passed the Senate last week. While I support the right to repair, which is an important reform included in the Bill, there were other provisions that I felt tipped the scales too far in one direction and kept homeowners vulnerable. I'm confident, however, that some changes will be made in the Assembly, and I look forward to voting for a compromise Bill before the session is over. Thank you for your involvement in this important issue, and please feel free to call me anytime I can be of service.

JEFFREY STEMPEL: Let me take the liberty of again introducing everybody. Rob Correales is a member of the Boyd School of Law faculty. He's a graduate of the Kansas Law School, has his LL.M from Georgetown, and is one of the founding faculty of the Law School. He came here in 1998 after years as an Assistant Dean at the University of Wisconsin. Carl Tobias is another member of our founding faculty and the Beckley Singleton Professor of Law. His J.D. is from the University of Virginia. He was a long time member of the University of Montana faculty and came down here to be one of the founders of the Boyd School of Law. He is also a prolific scholar – he writes more than I can read. Mike Green almost falls into that category because he writes nearly more than I can read. Mike is the Bess and Walter Williams Distinguished Professor of Law at Wake Forest University School of Law. For years Mike was a member of the University of Iowa faculty. He's a graduate of Penn Law School and one of the most prominent tort experts in the country; he's very active in the American Law Institute. These three speakers will be forming what might logically be a somewhat different segment. Rob is going to talk about how real or severe the purported tort liability problem is. Mike and Carl will talk about historical and recent developments in tort reform.

The Honorable Stanley Feldman recently retired after twenty years on the Arizona Supreme Court. Prior to that, he had a very distinguished career as one of the leading plaintiff lawyers in the State of Arizona and, indeed, in the country. I teach insurance law and some of his opinions as a Justice are absolute classics in the area, whatever your point of view on the issue, and are frequently cited in the casebooks. Connie Akridge is a partner in Wadhams & Akridge and represents insurers in a variety of capacities, legislative and litigative. Connie is a graduate of the University of Arkansas School of Law and is the current president of the Clark County Bar Association. These two will provide a judicial and practitioner perspective on tort reform.

A. How Real is the Alleged Tort Crisis?

ROB CORREALES:²⁸ The subject of my talk this afternoon is how real or severe is the purported tort liability problem. I basically don't have an answer for that. But I suggest that much is missing from the discussion as to whether, and to what degree, there is a tort liability problem. I would like to share some of those thoughts with you.

The current tort liability crisis that we're experiencing is not unique. We've had cycles of tort liability crises throughout the second half of the 20th Century, and this is but the latest. We experienced those crises in the '60's,

²⁸ Assistant Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

'70's, and '80's. All have proven to be remarkably successful for tort reforms. Before then, we had what is called the progressive era when, believe it or not, both judges and academics agreed that we didn't have enough litigation. Litigation was on its way to vindicate rights before these cycles began and was invited by many commentators and judges. These crises have many things in common, but I would like to talk about three perceived flaws in the tort system.

First is the ease with which cases can be filed and the resulting proliferation and number of cases. This has become known as the litigation explosion. Litigation is exploding all around us, and we're very concerned. This has been the claim of many tort reforms.

A second part of tort crisis rhetoric is the perception that juries tend to favor plaintiffs at the expense of the facts, and they tend to disfavor defendants, particularly rich defendants.

A third article of faith among tort crisis devotees is a claim that jury awards are unpredictable and that they're provided by out-of-control juries. [It is perceived that these juries] do not care much about the facts, that they only care about awarding extremely large sums of money, and that these large sums of money are very commonly awarded.

These concerns have sparked a great deal of study by legal academics. Much of this research was done by Professor Mark Galanta, of the University of Wisconsin, who I consider to be one of my mentors and who I admire a great deal. He and his colleagues utilized principles of empirical analysis to explore each of these concerns and have come up with some interesting results. I want to talk about these concerns through the prism of that work.

But before I do that, I want to make the observation that tort reformists have been incredibly successful over the years in passing tort reform, in spite of the fact that many claims about the system are not supported by empirical evidence. Academic commentators have noted that this success may, in fact, have been the result of media coverage of tort cases. It's far better drama to report on the occasional large award against a corporation, to report cases with silly facts, to announce that corporations tend to prevail in more than fifty percent of the cases, and to assert that many cases are indeed stopped before they get out of the starting gate. By contrast, my friend's methodical, analytical work makes for less exciting theater. Still, the effect of the media upon public perception of the tort system sometimes drives political action and can be striking.

For example, I want to talk about the verdict in the McDonald's coffee case. Although that verdict has been thoroughly investigated and, in fact, vindicated by the pro-business WALL STREET JOURNAL, newspapers around the country continue to use that case as an example. The [media uses the case to] cite and attempt to expose the excessive tort system and the capriciousness of juries. Their version of the story cites an outlandish award of nearly \$3 million to a woman who carelessly spilled coffee on herself – evidence of a system gone out of the control. For whatever reason, they failed to note the case was eventually settled for just over \$200,000, which is not rare in these large award cases, and that the plaintiff suffered serious injuries in the form of third degree burns on sensitive areas of her body that necessitated vary painful skin grafts. This happened from coffee that was at 180 degrees Fahrenheit, when other restaurants keep it below 160. This happened to a company that was fully

aware that people would be severely burned under these circumstances, yet chose to take that chance in order to maximize the flavor of its coffee.

I have a better example that I want to relate to you. It is the story of a psychic who apparently recovered nearly a million dollars for the loss of her psychic powers during a CAT scan. You get a story that says: "Psychic sues doctor, recovers nearly \$1 million for the loss of her psychic powers." The story clearly suggests, and none of us would argue with the conclusion, that this was the work of an irresponsible jury. The story, in fact, was made famous by then vice-president Quayle who used it to illustrate the problems with the tort system. He used the story to rally support for his tort reform initiatives.

By now, as you can imagine, this might not get an endorsement in many circles. What is not told about the story is that the jury verdict was based on serious brain damage resulting from a negligently administered contrast dye and that the court had thrown out the allegation regarding the loss of the plaintiff's psychic powers. The jury verdict in that case, and the judge's dismissal of the silly claim, were both quite rational – but those facts did not make the popular press.

In a study of newspaper coverage of product liability cases, Professor Galanter reported that a verdict involving punitive damages is one and a half times more likely to be reported than a compensatory verdict, which is twelve times more likely to be reported than a defense verdict. Professor Galanter concluded that product liability and medical malpractice cases were eleven percent of tort filings and thirteen percent of tort trials. Yet, those kinds of cases accounted for seventy-four percent of the suits reported in five national magazines between 1980 and 1990. What you get is a picture of proliferation of tort lawsuits. Professor Galanter also cited empirical studies demonstrating that plaintiffs win fifty percent of all tort cases that go to trial. He also reported that a somewhat smaller percentage of products liability cases are won by plaintiffs and a much smaller percentage of cases involving medical malpractice are won by plaintiffs. But the five national magazines report eighty-five percent of plaintiff victories. In fact, it's not unusual that news reports of large cases are accompanied by even more reactions by prominent politicians and business leaders decrying the American tort system as a system gone out of control, where plaintiffs just line up for this litigation lottery.

If we were to rely strictly on the accounts of these cases, one would reasonably conclude that: first, the number of tort filings keeps getting larger; second, that plaintiffs win the majority of lawsuits; third, that large awards are common; and fourth, juries are extremely capricious. But empirical studies demonstrate a vastly different picture.

Tort cases are not easy. They are very expensive. They also require a great deal of emotional and economic investment on the part of both defendants and plaintiffs. For a plaintiff's attorney to take a malpractice case, for example, that attorney must be willing to invest in excess of \$40,000 per case in many jurisdictions. It is not easy to file those cases. Is there a litigation explosion? A national study performed in 1998 by the National Center for State Courts revealed that litigation threats remained virtually unchanged from 1989 to 1998 in twenty-eight states. Figures revealed ninety-two million state court filings in

the year 2000, representing an eight year high. The new high is due largely to increases in traffic caseloads and domestic relations filings.

Tort filings in thirty states have decreased ten percent since 1991, and population adjusted court filings declined in twenty-two of the thirty states examined. In addition, the study also found a downward trend in automobile accident cases, a downward trend in product liability filings, and little change in medical malpractice filings. So that would tend to argue for either a downward or steady trend, not an increase in litigation.

The other two concerns are about whether juries tend to favor plaintiffs and about the size and frequency of large jury awards. In response to that, the National Center for State Courts did a study in 1996 of seventy-five of the largest counties in the country and produced a set of interesting figures. The study revealed that plaintiffs won about 48.2% of all tort cases filed throughout the country. They do better in automobile cases and in cases involving intentional harm. They do less well in other types of negligence cases, averaging 39% of premises liability cases, 37.2% in products liability cases and 34.2% in libel/slander cases. Plaintiffs fare the worst in cases involving medical malpractice, where the winning percentage was 23.4%.

The low winning percentage for plaintiffs could be interpreted to mean that juries instead favor defendants. But that would be an unfair characterization by the work of juries.

B. Perpetual Tort Reform

MICHAEL D. GREEN:²⁹ I still remember when Jeff first called and asked me if I would come out here for this forum. I thought I detected just a slight note of tension in his voice. Jeff said something like: "Mike, I need a nationally recognized tort scholar with an intimate knowledge of tort reform and all the data about how the system operates, and one whose speech can overcome the after-lunch somnolence of people who have just eaten." I thought about it for a minute and then, in a very rare moment of candor, I said to Jeff: "You know, I can think of a couple of people who do torts who would probably be better for you." He responded very quickly and I rapidly realized the source of that tension in his voice. He said: "Two or three? Mike, there are dozens, but everyone has turned me down."

I'm delighted to be here, even if it is not as a first round draft choice. Jeff doesn't know I found out that one of the people he asked before me, who turned him down, was – you're not going to believe this but it's absolutely true – Yogi Berra.³⁰ Yogi, in addition to being an astute student of life and baseball, has been an observer of tort reform for many years. After all, which contemporary social commentator can match the title of Yogi's latest book: "When You Come to a Fork in the Road Take it."³¹ Well, Yogi wasn't available. He's on special assignment for George Steinbrenner³² this month. After I agreed to

²⁹ Bess and Walter Williams Distinguished Chair in Law and Professor of Law, Wake Forest University School of Law.

³⁰ Baseball player, coach, and inductee into the National Baseball Hall of Fame.

³¹ For more examples of "Yogi-isms," see <http://www.yogi-berra.com/yogiisms.html> (last visited Jan. 22, 2004).

³² Owner of the New York Yankees baseball team.

come, I called Yogi to talk to him about his views, and I discovered that Yogi actually had a prepared lecture on the history and contemporary trends in tort reform. He was kind enough to share it with me.

So I come to you, not to express my views, but to present to you Yogi Berra's five laws of tort reform. First of all, it's *deja vu* all over again. Since tort law evolved into something separate to address accidental injury in the 19th Century, we've had continual tort reform. Indeed, the first tort reform was to do away with the tort system as a method for compensating accidental injury, and to instead adopt worker's compensation. This took the question of accidental injuries out of the tort system because it did not work well with regard to employees. It was a progressive reform.

Later, in the early part of the 20th Century, Benjamin Cardozo, then a judge on the New York Court of Appeals, swept away certain litigation barriers that were indeed the precursors for the modern system we have. That was court-initiated tort reform. In the latter half of the 20th Century, as Rob mentioned, we had an enormous expansion of tort liability. Strict products liability was adopted in the beginning of the '60's and continued through the '80's. We did away with contributory negligence as a complete bar – another necessary tort reform. We expanded tort duties in many contexts to control the activities of others who might cause harm. Some of you may be old enough to remember the *Connie Francis* case.³³ That was a path-breaking case in which the plaintiff successfully sued the Howard Johnson's hotel she was staying at after she was sexually assaulted by a third person. That was a path-breaking case in imposing liability for failure to control and provide adequate security in a hotel.

Even the current round of tort reform is a reprise of several similar cycles of tort reform. Listen to the following comments about medical malpractice: "Premium increases of up to 500% in some states; commercial carriers withdrawing from the market entirely in others; medical malpractice has become uninsurable!" Those comments were made in the 1970s after medical malpractice insurance premiums jumped sharply, right at the turn of the decade, and then again in the middle part of the 1970s. In response, fifteen states enacted limits on damages in malpractice cases. Forty-three states enacted some other form of malpractice reform. That's three decades and three cycles of modern tort reform ago.

My focus is on damage caps. I want to spend a little time talking about damage caps because they have the greatest impact. If we want to reduce the cost of the malpractice system, and in the end either control or reduce malpractice premiums, caps on damages are the way to do it. Pat Danson, an economist at Wharton School of Business at the University of Pennsylvania, did a study of the 1970s reforms and found that most of them had very little impact. Statutes of limitations did reduce the number of claims that were being brought, but malpractice damage caps were the most effective.

The mid-1980s brought yet another malpractice crisis, complete with rapidly increasing insurance premiums and other hand wringing efforts; another crisis occurred in the 1990s. Here we are in 2003 in another round, with

³³ *Garzilli v. Howard Johnson's Motor Lodges, Inc.*, 419 F. Supp. 1210 (E.D.N.Y. 1976).

another crisis in medical malpractice, and the American Tort Reform Association predicting that this year will be the most active since the mid 1990's.

Does this mean that every ten years plaintiffs' lawyers gather up all their malpractice cases and dump them into the hopper and every ten years juries go through this incredible spate of generosity? I don't think so. I think what's going on here, and Patricia Danzon's work pretty well documents this, is that we have a recurring cycle. We have significant volatility in insurance medical malpractice premiums. It occurs because we have increased claims costs that are going up at a rate of not 100%, not 500%, but even faster than the costs of medical care are going up. That's one reason. Second, we have the failure of insurers during that decade to adjust their rates to reflect the problem, because of competitive pressures to obtain business. So it comes all of a sudden on this ten year cycle.

Third, we have financial factors involved for the insurance company. One key factor is the returns obtained on investments by insurance companies. Each of these cycles seems to be preceded by a substantial decrease in the returns on investments. What are your investments doing right now? What have they been doing for the last three years? Of course, the same phenomena are affecting the insurers who collect premium dollars and invest them. There's another aspect to this that I don't entirely understand but I think is also at work, and that is the flow of capital into and out of the insurance industry depending upon the profits they're making.

We've got a complicated number of factors, in malpractice and other liability areas, that result in this tremendous volatility of premiums. If it were spread out over the ten years it would not look great, but it would look much more normal than when all of a sudden it's compressed into a short period every decade. Similarly, Congress has had bills to federalize products liability law. This is also history repeating itself. We've been talking about federalized product liability tort reform since the 1970s. We continue to have that on the plate of Congress. Actually, Congress did pass a bill during the Clinton Administration, but President Clinton vetoed it. So, the issue remains, likely to continue recycling back.

Yogi's second law of tort reform is you can't tell the shape of an elephant by performing an autopsy on a butterfly. Rob Correales talked about the horror stories that are out there: McDonald's, the psychic in Philadelphia. I don't think those cases, even correctly reporting the details, tell us very much about the tort system, which is what we ought to be interested in. No baseball player bats a thousand. No system that's operated by human beings is going to bat a thousand. When we're trying to understand how the system works, I don't think that looking at the McDonald's case, or similar cases trumpeted in the popular press, tells us very much about what's happening. This is where we really need data in order to understand how the system is operating.

We're very good at talking about the costs of the tort system. Nancy Udell, for example, listed the cost of the tort system. We're talking about verdicts that are rendered by juries, corrected for reductions, post-trial motions, and on appeal. There are not just those verdicts but there's the amount paid in settlements, which really reflect most of the cases, not the cases that go to trial. There are the defense costs. There are the contingent fees that are paid to

plaintiffs. There's defensive medicine and angst by physicians who are sued. If they haven't been sued, they're worried about the prospect that they will be sued. Those are all real costs of the tort system.

We have much less of a handle on how much the tort system prevents socially undesirable conduct because it's very hard to measure that which doesn't happen. Put another way: how much deterrence are we getting out of the system that we don't see because accidents don't happen? That's the benefit of what we get from the tort system. I think that's a complicated question and a difficult one to address. I have a fair amount of sympathy for the idea that, in the medical malpractice context, we're probably not getting a whole hell of a lot of deterrence out of the current medical malpractice system. There are probably better ways to try and address it.

We need to really think about [the areas of tort law] as disaggregated fields of liability. I think we get a significant amount of deterrence that we really want to have. Indeed, if we're going to give up, or reduce the tort system as it exists, we need to be prepared to adjust in another way to have a much more aggressive regulatory stay, which is what the Europeans have. As Ann McGinley mentioned, we need a much greater social safety net for those who are the victims of accidental injury.

Yogi's third law of tort reform is: "I didn't mean to do what I meant to do, did I?" A corollary of this law is, "I never said most of the things I said." Another expression of this law, more familiar to lawyers, is the law of unintended consequences. We try and reform something and then we discover that sometimes the cure involves adverse side effects. I think damage caps are the best illustration of that. We can impose damage caps and they do reduce costs. There's no question about that. They do have an impact on malpractice premiums.

Let me point out one thing from the best study that's been done of the medical malpractice system. This was a Harvard study of New York hospitals and accidental injuries. Researchers discovered that only about one in seven people who are injured in the hospital due to medical error end up filing suit. Why is that? Some of it may be ignorance – they don't know why. I think a predominant reason is something that Bill Bradley said this morning. He said that a medical malpractice case requires an investment of \$100,000 to \$150,000. If you're a plaintiff's lawyer and somebody comes to you and says: "I was injured and I think my doctor did it," what's the first question you're going to ask them? It is how badly were you injured? There's no point in investing \$100,000 or \$150,000, plus time, for a return that is under a quarter of a million dollars, particularly given the probability of success in medical malpractice cases.

What happens when we put a cap on damages? Well, one of the ways costs are reduced with a cap on non-pecuniary damages, is that fewer cases are brought, meritorious or not. Why? Because, as was explained earlier, it is children, non-wage earners, and the elderly who, no matter how seriously injured, don't have economic loss; with a \$250,000 cap, no good malpractice lawyer is interested in the case.

That is not the intention behind caps, but that is the unintended consequence of them. The *Kaiser* case³⁴ that Dmitri mentioned this morning is a well known example of that phenomenon. The child was prematurely born with severe neurological birth defects. Plenty of lawyers were around when he was alive, but they all left after he died. As Yogi explains it, we made too many mistakes.

Now is there a solution? Is there a problem with noneconomic damages? I think so. I teach torts, and I do an experiment at the end of the semester when I teach damages. I give my class the facts of a case that was litigated a number of years ago. I ask them to break up into panels of juries and decide how much should be awarded in damages to a woman who was injured when bus doors closed on her, she was dragged along the road, and she suffered fairly severe injuries. Then I let each of these groups deliberate. I tell them they have to come up with a damage award. I just did this earlier this week and I had twenty-one jury verdicts that ranged from \$170,000 to \$7.7 million. The median was \$1.5 million. The median is what the plaintiffs' lawyers talk about because it's always lower. The average was about \$2 million. That's what the defendants lawyers talk about, and I think that's probably the better figure because it represents real cost.

What we see with jury verdicts on non-pecuniary damages is a wide range of awards because they're virtually unconstrained. There's no standard for it. There's no market to judge it by. Individual juries are told to do what's reasonable and just, and different juries see it different ways. There certainly is reform that can make similar cases come out more similarly and that can do away with the outliers that exist. A number of people have made proposals. A very sensible proposal would simply be to tell juries what had been awarded by other juries in similar cases. Judges who award damages, both in the United States and in other countries, know what has been awarded in other similar cases. But we don't give that information to juries.

Yogi's fourth law addresses the politics of tort reform, and that is: "The game ain't over until it's over." This reflects the vagaries of the political process that result in legislation being enacted or not enacted. One of the major impacts on the likelihood of federal legislation being enacted this year is the fate of a 17-year-old in Durham, North Carolina. Her name is Jessica Santillan,³⁵ the teenager who had a heart-lung transplant from a donor who had an incompatible blood type. The Santillan episode has had a significant impact on the debate in Congress over federal malpractice legislation. One lobbyist described the legislation as having hit a brick wall in response to her death. More generally, we often find that legislation gets enacted when there is some major public dramatic event that captures our attention. That was true back in the 1960s when we federalized worker's compensation for coal miners in the Federal Black Lung Miners Act. How did that happen? It happened because of a well-publicized coal mine cave in West Virginia.

³⁴ See Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, Mar. 5, 2003, available at <http://www.consumerwatchdog.org/healthcare/nw/nw003165.php3> (last visited Jan. 22, 2004).

³⁵ See Background Information on Jessica Santillan Blood Type Mismatch, available at <http://dukemednews.org/mediakits/detail.php?id=6498>.

How did we end up federalizing and creating a no-fault compensation scheme for a certain group of New Yorkers who happened to be affected by September 11th in the World Trade Center? It was because a dramatic event captured public attention and spurred the legislature to change the status quo, which is often what drives the lack of legislation.

I'm pleased to say that one of my favorite tort reforms, one that should have been done for at least twenty years, is apparently about to happen in Congress, though not due to any dramatic event. I read that we are about to get a federal asbestos compensation statute enacted in 2003, finally, after years and years of Congressional dilly-dallying.

Yogi's fifth and final law is, appropriately: "You should go to other people's funerals, otherwise they won't come to yours." This addresses efforts to do away with contingent fees. We often see that as part of tort reform effort. It's often proffered as consumer protection. Victims are paying too much to their lawyers and we need to change that. After all, defense lawyers work on an hourly fee, so why can't plaintiff's lawyers? I think the reality will be to simply close down access to the tort system. That may be what some would like but it's certainly not proffered with that in mind.

You have to appreciate that contingent fee lawyers provide three different things for the fee that they get paid. Contingent fees pay for services provided by that attorney. But it goes beyond that. That \$100,000 or \$150,000 that Bill Bradley was talking about this morning is money an attorney is putting up to finance the case. In almost all cases, it is money that he will not get back if he's unsuccessful.

That's the third aspect – plaintiffs' lawyers don't know it, but they're in the insurance business. They are insuring their clients against the risk that they'll lose. They take on that risk and, not unsurprisingly, they want to get paid for it just like insurance companies want to get paid for taking on certain risks. Now if you ask me, do we have a well functioning market in plaintiffs' personal injury contingency fees? I don't think so. I think they are high. We don't really have good competition because we have the victims who come to their lawyers and don't really have a basis for making judgments about the quality of attorneys. We might be able to make that a little more competitive. But certainly shutting down contingent fees is not the way to go about doing it.

Let me close with a final observation by Yogi, one that I find especially appropriate for an academic who has come out to the desert as the last round draft choice of his good friend, Jeff Stempel. Yogi's law is: "It ain't the heat, it's the humility." Thank you.

C. Commentary

CARL TOBIAS. I shall respond to Professor Correales and Professor Green and then offer some of my own ideas. Precision and specificity are important when addressing tort reform. First, Professor Green talked about courts and legislatures. It is important to think about who the decisionmaker is and who is engaging in tort reform. Is it the court or the legislature and how does each entity act? Which is preferable? Each certainly has authority and relevant expertise. Much of tort law has historically reflected common law development; legislatures have only recently enacted tort law.

When state legislatures undertake tort reform, both Professor Correales and Professor Green correctly observed that they need the maximum accurate empirical data to support reform. That is quite difficult to achieve, especially in the fifty states, many of which lack sophisticated means for gathering valid empirical data. It's not as if we have the National Center for State Courts in Nevada or Montana, where I used to teach, or many other states. State legislatures must have valid data to undertake meaningful reform.

In discussing precision, Professor Green correctly stated that when people say tort reform, do they mean the entire tort process, product liability, or medical malpractice? There are quite different approaches that legislatures might take depending on which of the different substantive policies, goals, interests, and procedures apply to particular areas. More specifically, a legislature – and I'm not conceding this point – might decide in the medical malpractice area that it is so critical to have health care delivered at a lower cost that the legislature might be willing to impose certain procedural requirements, or substantive rules, that the legislature would not be willing to apply in the garden variety automobile accident case.

Another example is joint and several liability. I'm not urging that legislatures should today, or in the future, abolish joint and several liability for medical malpractice, but they might be able to justify this reform in terms of policy. It seems to make less sense in automobile accident cases, given the way people are insured or not insured. The economic concerns in the health care system have little applicability in the automobile accident collision context.

I also think that litigation financing is critical. We must remember what it costs to bring a case and how that often can influence the system or, as Michael suggests, may shut down the system. Moreover, procedure is important. Tort reform is not only substantive tort law. Legislatures also often enact procedures that may drive the substance of tort law or at least have significant impact. I want to tell a cautionary tale from last summer's special session of the Nevada Legislature, which enacted tort reform. This was ostensibly substantive medical malpractice reform. The classic example is the \$350,000 cap, which includes two exceptions. However, that legislation also includes procedural provisions. Thus, we must keep in mind substance and procedure in tort law and the kind of procedures that should apply in these cases.

I'll afford two examples. One is sanctions. The new statute includes a provision for mandatory attorney fee sanctions. There was a statute in Nevada that made those attorneys' fees discretionary. If the litigation were frivolous, the winning party could ask the court to shift the fees. This reform might be sensible in the medical malpractice area, or not, for the policy reasons that I stated earlier. However, it makes little sense in all litigation, especially public law litigation vindicating, for instance, civil rights. Yet, the new reform now covers all litigation and does not accord the judge any discretion. It states that when the particular standard is satisfied, attorney fee sanctions must be imposed. The second example is joint and several liability, which can be considered procedural or substantive. It seems particularly inappropriate to abolish joint and several liability in automobile accident cases, even though abrogation might be proper in the medical malpractice area.

D. *Class Action and Civil Procedure Changes as Tort Reform*

CONSTANCE AKRIDGE:³⁶ I'm going to address legislation, currently pending in Congress, that proposes reform of class actions. This kind of legislation has sort of been swirling around Congress since 1998.

There are two bills currently pending, one in the Senate, S. 274³⁷, and one in the house, H.R. 115.³⁸ The Senate Bill is sponsored by a number of Senators including our Nevada state senator, John Ensign. It essentially has two sections to it. The first one – probably the most controversial – would expand federal court jurisdiction so that all of the large multi-state class actions would go to federal court. As you know, a lot of the actions end up in state court because of the complete diversity rule: each plaintiff has to have a different state of citizenship than each defendant. Then you have the jurisdictional amount of \$75,000, which keeps some of the cases out of federal court. This new rule, if passed – and it has already made it through the Senate Judiciary Committee – would make it so that there would be what they call “minimal diversity.” This means that as long as any plaintiff was a citizen of a different state from any defendant, and as long as the amount in controversy was more than \$5,000,000, the case would go to federal court.

There are some exceptions to this general rule. If two-thirds of the class members are citizens of one state, then it would stay in the state court. Where fewer than one-third of the plaintiffs are from the same state as the primary defendant, the action would be moved automatically to federal court. There are some limitations. Where you have between one-third and two-thirds of the plaintiffs from the same state as the defendant, they may stay in state court based on judicial discretion.

The other part of the Bill is what they sort of call a “Class Action Bill of Rights.” It has to do with more administrative aspects of class actions. One is a plain English requirement for notices. The proponents of this bill complain that notices sent to class members are usually so incomprehensible or nondescript that the class members mistake them for junk mail and throw them away. Another aspect of the “Bill of Rights” calls for more judicial scrutiny applied to settlements. The intent of that provision is to curb what they call coupon settlements – like the *Blockbuster* case³⁹ – where the class members ended up receiving coupons for Blockbuster rentals while the attorneys got quite a bit more in attorneys' fees. The other thing it would outlaw is the payment of bounties, which is essentially giving the class representatives a greater stake in the settlement proceeds than out-of-state members. It would also provide assurance that out-of-state class members would not be disadvantaged just because they're out of state.

The other interesting part of this Bill is that it would require the U.S. Attorney General and the state Attorney General, or the appropriate regulatory official in any state where there's a class member, to be notified of a proposed

³⁶ Partner, Wadhams & Akridge, Las Vegas, Nevada.

³⁷ S. 274, 108th Cong. (2003).

³⁸ H.R. 115, 108th Cong., 1st Sess. (2003).

³⁹ See Terry Maxon, *Bill Would Give Attorneys Same Class-Action Payout as Clients*, DALLAS MORNING NEWS, May, 5, 2003, available at <http://www.dallasnews.com/sharedcontent/dallas/business/stories/050503dnbuslawfees.6aae1.html> (last visited Jan. 22, 2004).

class settlement. The court would be required to wait ninety days to allow for comment on the settlement by the appropriate state or federal official. It would also require the Federal Judicial Conference to prepare a report on class action settlements, including recommendations for improvements. The Federal Judicial Conference intends to take that action to implement the report's recommendations. It's a pretty dramatic change over what we currently have.

H.R. 115 is very similar. In addition, it has an immediate appeal of certification decisions as a matter of right. The proponents of this Bill indicate that the framers established diversity jurisdiction to insure that significant disputes between citizens of different states would be adjudicated in federal court as opposed to locally-elected state courts, which may be biased in favor of the local parties. They say that compared to state courts, federal courts tend to have fewer cases per judge and more resources.

Under the present regime, say the proponents of this legislation, class counsel can avoid federal courts in favor of certain magnet states. I think we know who those are. Certain states have reputations for unfairly applying class certification standards to impose their own laws on other states' citizens or to approve class settlements that benefit class counsel and not class members.

One case pointed to is *Avery v. State Farm Mutual Automobile Insurance Co.*,⁴⁰ an Illinois case. *Avery* involved a nationwide class covering 4.7 million State Farm policy holders in forty-eight states and the District of Columbia. They alleged that an automobile insurance company had breached its contracts with policyholders by requiring the use of less expensive, non-original equipment and manufactured parts as standard industry practice. Insurance commissioners came in to court and testified that this practice was permitted and encouraged in other states. Yet, the court still ruled adverse to State Farm in those states where the practice was permitted. The proponents say this shows that state courts reach beyond their borders to regulate things they have no business regulating. The proponents also say that the current system is causing substantial increases and overlapping, with conflicting and duplicative class actions pending simultaneously in state and federal courts.

The opponents of this legislation say that state courts are capable of conducting complex class action litigation. Most of the effective class actions are based on state law, which state courts are best equipped to interpret and apply, and which federal courts can only guess about. Opponents say that it denies victims a convenient state forum and allows defendants to forum shop through removal to federal courts. Federal courts are already overloaded and should not be further burdened with large class actions. The legislation, say the opponents, would sweep many cases, in which no particular federal interest is superior to the state interest, into federal court. They say there are cases, like *Enron*, where the people who suffered harm and lost their pension benefits should have an opportunity to have some redress for those wrongs.

Last year the ABA commissioned a task force on class action reform. That task force studied the issue and thought there was some merit to the federal court having increased jurisdiction, although they said that decision should be made very carefully so that the federal courts wouldn't be over-burdened.

⁴⁰ 786 N.E.2d 180 (Ill. 2002).

They said, however, that because the federal courts already have judicial panels on multidistrict litigation, they would be well-prepared to handle these national class actions. With regard to the “Bill of Rights” legislation, however, the ABA believed the amendments to Federal Rule of Civil Procedure 23, the class action rule, would sufficiently take care of the notice provisions and those sorts of administrative things that the second part of the Act is designed to protect.

Those amendments were transmitted from the Supreme Court to Congress last month. It will be interesting to see what happens with this legislation. It looks like there’s more interest in it this year since it actually passed out of the House last year. We’ll see what happens. Thanks.

E. A Lawyer-Judge’s View on Tort Reform

STANLEY FELDMAN:⁴¹ Reform: it means changing things for the better. Very little of what is now called tort reform has anything to do with changing things for the better in the tort system. If you listen to the speakers today, the changes we’re talking about are not to make the system better but to do something about ever increasing, ever multiplying insurance premiums. That is a different problem than reforming the tort system. God knows the tort system, like every other branch of the law, does need to change, but we’ve had reform.

I have a choice now. I can do one of two things. I think the better thing would be to say I agree with everything Professor Green said and sit down. I’m tempted, but I think in order to earn my outrageous fee of a drink during the reception, I’d better talk. I’ve had a fairly unusual perspective over the last thirty-five or forty years of my career in the law. First, I wasn’t a trial lawyer. I did mostly plaintiff personal injury work – mostly malpractice and products liability. Then I spent twenty years on the Supreme Court of the State of Arizona, part of that time as Chief Justice. Now I’m back in practice again. So I have known the reality of the war in the trenches and have seen it from the perspective of the state. I now see the reality again. So, from that perspective, I’d like to talk a little bit about tort reform.

We keep hearing about tort reform, but let’s take a look at just what it is we’re talking about. One of the main projects in tort reform, as Professor Tobias mentioned, is ending the joint and several liability rule. This rule says that any defendant who contributes to an event and is a negligent cause of the event is liable for all of the damages which occurred. Ending that rule and making a regime of only several liability means that the jury is told to allocate fault between the different defendants. Each defendant to whom fault is allocated has to pay only that share of damages. If you’re allocated ten percent of the fault – and it’s very difficult to decide percentages of fault – you only have to pay ten percent of the jury award. We were told this was going to bring premiums down. The effect in the real world is that everybody gets sued – everybody. It’s a bonanza for defense lawyers – and I have nothing against defense lawyers – but it gives them a lot more business. No plaintiff’s lawyer who knows what he or she is doing can afford to not sue everybody that could be involved in the event. If you only sue one of them – the one you think is a

⁴¹ Law Offices of Stanley Feldman, Tucson, Arizona. Retired Justice and Chief Justice, Supreme Court of Arizona.

major cause of the damage – that defendant will defend in court by saying: “Oh no, it wasn’t us. It was Green that did it. He’s the one.” Lawyers call that the “empty chair” argument or pointing the finger at the empty chair.

As a plaintiff you can’t afford to do that. If the defendant you want to sue says Green’s at fault, then you have to sue Green too. If Green blames it on someone else, you need to sue them. If that person blames someone else, you need to sue the additional person as well. You end up with everybody in the lawsuit. This does not bring premiums down. The effect on medical malpractice cases in Arizona has been just the opposite. You sue the doctor because you think the doctor was negligent. The doctor says the nurse failed to give him all the information. Then you sue the hospital that employs the nurse and the hospital says: “Well the lab tests didn’t come back right.” So then you sue the lab and it just goes on forever.

Everybody gets sued. The defense costs go up like a balloon. We have adopted a system in many states that changes the statute of limitations. Under the discovery rule, the statute of limitations starts to run at the time you discover you have been injured. Perhaps somebody leaves an instrument in your body – you may not know it for two years. If there’s a two year statute of limitations, you can’t sue until you find out what the problem is and how it happened. If the statute has already run, it’s too late. What we have adopted, and what has been adopted partially in Congress in the past, is a so-called statute of repose, which says that no matter when the accident occurs, the statute of limitations barring your suit will run by a certain number of years after the product was manufactured, or in medical malpractice cases, after the event occurred.

For example, the statute of repose for private planes – not yet for commercial planes – is twelve years. The average life of the planes being used is much, much longer than that. So if a defect manifests itself and an accident occurs, you will have had your case barred by the statute of limitations before you have even been injured. In other words, it’s just an absolute abrogation of the cause of action for damages. That is not tort reform. It is manifestly unfair. That’s insurance reform. It was supposed to change the problem as far as premiums were concerned, but it did not. I could go on forever.

We also have affidavits of merit – we have them in Arizona, and I gather you have them in Nevada. Before you file, you must have an affidavit from someone licensed in the profession saying they have examined the case and they believe there is negligence. That sounds easy. That sounds like something you should do if you know the facts. But, sometimes you don’t know the facts until after you have filed and have the opportunity for discovery. Someone walks in your office having gone in for a tonsillitis operation and is now unable to move anything on the right side of their body – they may well have a case. You may well have to file it before the statute of limitations runs, and you may need to have discovery to find out how good of a case it is. Sometimes you can’t even get the records until you have filed the case and can subpoena them. We have that system, but that hasn’t brought down insurance premiums either.

Affidavits of merit were followed by limits on punitive damages. We have court-imposed limits, as recently illustrated by the United States Supreme

Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*.⁴² It is one of the worst opinions I have ever read. In response to the majority's limitation on punitive damages, Justices Scalia and Thomas – who are hardly considered stalwarts for tort plaintiffs – were motivated to say: “Why were we into this case? Why is it that the cruel and unusual punishment clause has anything to do with punitives in civil cases?” There is no good answer to that question.

We have compulsory mediation and arbitration in Arizona, and many other places, yet insurance premiums keep going up. We are not talking about changing the system in order to make the tort system fairer. Yes, in some ways we have improved it, but in many ways we have made it less fair. And we have made it less fair in order to reduce insurance premiums. Yet we haven't seen any reduction in insurance premiums. They keep going up.

I was here two years ago and I spoke about the same subjects. At that time the current statute governing malpractice cases in Nevada was still under consideration by the Legislature. I suggested we should get a commitment from the insurance companies that, if [certain reforms were passed], they would reduce premiums and hold the reduction in place for a number of years. That's not what happened. The tort reform measures were passed. They are now in effect, and two years later we're talking about a huge rise in insurance premiums. And we are going to reform the tort system again in order to control insurance premiums; yet there is no commitment from the insurance companies that they'll stay in the market, hold the line on prices, or hold the line in any way for any number of years. It seems we are at cross-purposes here. If something needs to be done to save the insurance companies, let's [concentrate on that]. When we start talking about it in terms of tort reform, I get shivers up my spine. We have had tort reform, and it still hasn't cured the problem we were trying to address.

Furthermore, if ever there was something we do not need, it is class action reform. This may be radical, but I think we need a few more class actions. I'd like to be a member of the class that is suing WorldCom. I happen to be the proud holder of what was a double, triple-A bond when I bought it from WorldCom. Two weeks later it wasn't worth twelve cents on the dollar. Then I found out the board of directors and the lawyers in WorldCom loaned Mr. Ebers, the chief executive officer, \$400 million unsecured. How is that for a business decision? Then there's Enron – I can go on and on.

There has been, and there is, a lot of corporate greed in America. We've got to get class actions and get rid of the coupon cases as previously mentioned. But the idea of limiting the right of people to sue by limiting class action relief is just a mistake if you look at what we have learned from the recent past. It just won't work, and I think if the people of America knew what was really involved they would rise up in anger. We have lost trillions of dollars on the stock market, \$400 to \$500 billion in pension funds, and several million jobs – all because of greed, lack of good conscience, and lack of morals in corporate boardrooms.

⁴² 123 S. Ct. 1513 (2003).

This is not the time to limit the right of people to sue. The idea that I, with my little \$50,000 bond, could sue WorldCom all by myself without being a member of a class is just ridiculous. The fees involved are out of sight.

Let me close with some comments about fees. We all know that firms charge fees but cut it by a thousand to the guy who walks in your office and has been hit by a car, had his brakes fail, or had his tire tread separate and is badly injured. He has thousands and thousands of dollars in medical bills, can't work, and may never work again. The lawyer is going to charge hundreds of dollars an hour. That person cannot pay you and may never be able to pay. If you abolish the contingent fee there is no access to the courts. Translate that not just to the victims of accidents; translate that to other businesses. We get people in the office all the time – businesspeople running small businesses – who want us to work on a contingent fee because they cannot afford to pay the fees that lawyers charge. If you know what it costs to run a law office and if you know what it costs to run a medical office, I don't think there's anything you can do about the fee that lawyers charge, unless you do what I call the "ultimate tort reform." The one thing nobody thinks about, that will make it so you won't have to pay a penny in malpractice premiums or any other kind of liability insurance premiums, is to abolish the law of torts. First of all, you know that is not a good justice system. It's not fair and the insurance companies would fight like hell because there would be no liability insurance claims, no liability insurance, and no liability insurance premiums.

I was very interested in Ms. Udell's comments this morning. We have to find some better system. That system must include the right of access so you can hire lawyers and afford to have them. There must be some way of fair adjudication of your claims. There must be some way to put a clamp on some of the discovery costs. We've tried that in Arizona and it hasn't worked. It hasn't worked at all.

Ms. Udell mentioned neutral decision makers. I was a neutral decision maker for twenty years, or tried to be. I'm not in favor of neutral decision makers in most cases. The reason is simply that most of us who are neutral decision makers are not familiar with the realities of life for the ordinary people who come before the courts and the tribunals. We're insulated from it. We don't know their problems. We don't understand their problems. We just don't appreciate it as much as we should. I'm a great believer in the jury institution. Much of [the neutral decision maker] argument is fueled by a distrust of juries. Why is it we trust juries for so many other things; the whole criminal justice system is based upon faith in the jury system.

If you want to see a complex case, try looking at a case in which DNA analysis is at issue. The jurors sit there and they are taught by the lawyers, if they are good lawyers, and we trust jurors to do this job. We trust them in almost every area of criminal law. Why is it we can't trust them with civil law? Why is it that we believe jurors are biased in civil cases? I think just the opposite. The figures you got earlier from Professor Tobias and Professor Correales are quite the contrary. They indicate that most tort claims are won by the defendant. It's never been my experience that jurors are prone to favor people who sue doctors. Quite the contrary.

My final word is to let us trust the jury system. It has done well by us. Thank you.

VIII. PANEL V: PROSPECTS FOR TORT REFORM IN THE
NEVADA LEGISLATURE

JEFFREY STEMPEL: Let me introduce the panelists. Rick Harris is a founding partner in the firm of Mainor & Harris and a graduate of the McGeorge School of Law. Rick has also been an adjunct faculty member at the Boyd School of Law, teaching law office management, and we're always grateful for his input in that regard. His partner, Nancy Quon, is a graduate of California Western Law School and has been a long-time lawyer representing plaintiffs in the Mainor & Harris firm. Mark Ferrario, of O'Reilly & Ferrario, is – don't call him a lobbyist. He's a lawyer for the Nevada Home Builders Association, and he's been very active in representing them both in the courtroom and in matters legislative and political. He's a graduate of UCLA Law School. I hope I am not putting him on the spot, but he is perhaps one of the master minds behind Senate Bill 241 that you've heard so much about during the course of our discussion today.

A. *Current Nevada Law Does Not Unfairly Disadvantage Defendants*

NANCY QUON:⁴³ Good afternoon. I want to talk a little bit about legislation that's pending for construction defects. I practice primarily in the area of construction defect. I represent homeowners. I represented homeowners in this arena solely for the last six years. I got into construction defect litigation because I owned one of the first condominiums here in Las Vegas that went through a construction defect matter prior to us having any laws enacted in the State, and it's a very difficult procedure.

As a single parent at the time, I thought nobody should ever have to go through this. When I got through law school that was my emphasis, and this is what I do. We have pending legislation that's going to supposedly change law that has been in place since 1995 here in Las Vegas. For anyone who wants to take the opportunity to look at that law, it's what we like to call Chapter 40. It's NEVADA REVISED STATUTES 40.600, and it's a pretty comprehensive set of statutes that governs what happens for homeowners when they have construction issues and how they have to work with their developer to get them fixed.

The original idea in 1995, when this was enacted, was actually put forth by a local developer, Bob Lewis. The home builders at that time were trying to curb what they were seeing in California as a lot of construction defect litigation. The 1995 statute was actually negotiated between the Nevada Trial Lawyers Association, Mr. Lewis, and home builders to try and make it fair to homeowners and to the developer when home construction issues arise. The one thing we all have to realize is that you're never going to get a perfect

⁴³ Partner, Mainor & Harris, Las Vegas, Nevada. *Editor's Note:* In the time since this forum took place, Mainor & Harris has split into two different firms: Harris Injury Lawyers and Mainor Eglet Cottle.

product in a large track of homes. I don't really know if it's possible. The question is: when something goes wrong what do we do?

I think we heard this mantra here several times today: the right to repair. We have developers up in the legislature this session that are putting forth this idea that all they really want is the right to repair. I find this concept rather interesting. I think to myself, as a homeowner, if I'm laying in bed and all of a sudden a crack opens in my ceiling and water starts coming through, the first thing I do isn't to pick-up the phone and call a lawyer. Not only do I not think I'll get a lawyer to answer the phone in the middle of the night but I also don't think it's the appropriate person to call.

The person to call is the developer. My experience in doing this for the last six years here in Las Vegas is that homeowners ask the developer to come out and help them. Unfortunately, it's when the developer doesn't respond and they can't get help that they eventually call an attorney. I think when they say right to repair, what they're actually asking for is a second right to repair. Interestingly enough, if you look back at the 1995 statute that was enacted here in Nevada, it had a provision that developers had the right to repair.

Any homeowner who went forward with a claim against their developer had to send the developer a notice of the defects. It was a very simple system. You sit down and answer: "Where did you identify that defect? Where do you think the defect is?" You send it by certified mail to the developer, and you give them an opportunity to come back in, take look at it, and make you some type of an offer – whether it was an offer to repair or a monetary offer. That was the Nevada statute as it stood in 1995. We had that second right to repair.

It was the developers who went back up to the legislature a couple of years ago and said, "You know, for complex litigation cases of five or more homeowners in a construction defect suit, that right to repair doesn't work. We want those homeowners to just go ahead and file their complaints against us; we need to get our insurance companies involved; our subcontractors need to be brought in at the beginning." So it was developers who asked to take away that right to repair and the mandatory letter that had to go out to developers.

Now we're in the 2003 legislative session and guess what? The developers are again asking for the right to repair. What else is contained in this bill that's being put forth as a right to repair? There is a provision of this proposed statute that, like Mr. Canepa, I find morally repugnant. I don't know how any developer could look you in the face, trying to sell you their product, and say: "This is a definition of a defect should something go wrong with your home." The definition says that before it's going to be considered a defect, some injury has to occur, whether it be an injury to a person or to property. Until that happens it is not considered a defect.

Let's take, for example, a missing fire wall in multi-stacked homes. That is not going to be considered a defect until there is a fire that breaks out, until somebody is injured, or until property is damaged as a result of that missing firewall. That is not a defect? We cannot make that the law in this state. I can think of a million examples – electrical problems that we see over and over in construction defect case – that would not be considered a defect until that electrical component caused injury or damage to the property. That should not pass in this state.

Let's talk about their concept of the right to repair. S.B. 241 would give the developer the right to come back in and make some type of a repair within 150 days. They must make that repair and then tell the homeowner what that repair was. At the time you let them into your home, you have no idea what they're going to do, and you won't know until 30 days after they're done.

Let's say you don't like that particular repair. Your next step would be the State Contractors Board. The developer has 150 days to make the repair, but the State Contractors Board has an indefinite period of time to make a decision, which will be admissible in a state court. The State Contractors Board – which consists of contractors and one member at large – is going to make a decision that's going to be read to the jury if the case goes forward. They also have immunity, pursuant to this statute, for whatever decision they make.

Let's say that you don't agree with the State Contractors Board decision. Then you have to go through the entire mandatory mediation process. If you make it through this and you still own your home – because it could be years down the line – you can finally file a complaint against the developer for that defect, but only for that defect. Let's say you've gone through this entire process, you filed your complaint, you're now in court, and as you're going out to investigate, you find another defect. That other defect cannot be joined into the complaint that's on file. That other defect now goes back to square one: 150 days of repair, State Contractors Board, and mediation.

An interesting thought: what if during this process of repair, you get to the State Contractors Board, you get to mediation, they make the repair, and it's wrong? Do you go back to square one – come back and repair it again, State Contractors Board, and mediation? The point is that you may never, ever go forward. That's only, once again, if the defect is defined as something within the statute's boundaries.

One of the other big problems that I see with this legislation is: what is the recovery? Originally in 1995, our legislature was concerned with what was happening in California. The only thing you recovered in California was the cost of repair to your home. That means out of that cost of repair you took out the attorney's fees, you took out your cost, and whatever was left was what you had to fix your house. In Nevada, we set forth a list of recoveries. We had recoveries for your cost of repairs. Over and above that, you got your attorney's fees, your costs, and interest on your case. The idea was to make the homeowner whole.

This year what's being put forth in S.B. 241 is something we call diminution in value. That means we're going to have a battle of appraisers. If you have a missing fire wall in your home, and that's the defect you bring forth, the developer may hire an appraiser. If homes are selling regardless of this missing fire wall, and they're selling for a higher price than what you've paid, you don't get anything. You have no diminution in value to your home. You need to have somebody say your house is worth less because of the defects that are found. That is the recovery.

We heard this morning about the importance of contingency fee agreements for homeowners – especially for low income families. S.B. 241 proposes to take away contingency fee agreements because it only allows the court to determine the fees for an attorney on an hourly basis. These cases will never

go forward. They are so expensive to litigate. When we talk about costs in a construction defect matter, you can spend between \$800,000 and \$1,000,000 on some cases depending on the size of the project. That's a lot of money and a lot of risk to the plaintiffs' attorneys. So look at S.B. 241 – it's going to the Assembly Judiciary. Take an interest in it. Pull it up, read it, listen to what we have said today.

B. The Need for Amending Nevada's Construction Defect Statute

MARK FERRARIO:⁴⁴ I didn't know I was such an evil person. Luckily, I am a homeowner as well. I assure you I wouldn't do anything I wouldn't want to live with myself. I'm going to address a lot of what Nancy said.

I think you need to understand the history behind the whole construction defect "industry" in this state. This industry began in Southern California and started to migrate here in 1995. In 1995, the building industry got together and proposed a bill to the Nevada Legislature without any input from the trial lawyers, like myself, that were handling construction defect cases here before it became all the rage. They put forth this bill that started out like a thoroughbred and came out of the Legislature looking something like a camel.

What happened was that the legislature thought they had given builders an opportunity to address construction defects before they got sued. We found out that wasn't what they did. Instead, they drastically changed the rules related to prosecuting construction defect suits. Most importantly, they changed the rules that exist in every other area of tort law in regard to attorneys' fees. They made attorneys fees and expert fees a recoverable element of damages, which is a drastic, drastic change.

Now, what happened? In 1995 the law passed. People started to look at the law and, pretty soon, some lawyers started to say: "This is the greatest thing going." About halfway through the 1997 Legislative Session there was an influx of construction defect cases. Some of the trial lawyers that were dealing with this new law said: "Oh, my God. This is a disaster." So from 1997 up through this session, the home building industry, with input from [trial lawyers] now handling these cases, tried to right the ship. We were unsuccessful in 1999 and we were unsuccessful in 2001. I hope we're not unsuccessful in 2003 because the area does need – and I hate to use this word "reform" because I don't view it as tort reform – but it does need change. You need to bring some balance back to this system.

I think it helps to understand how these laws come about. The building industry asked for input from a number of sources. The input came to me, I condensed the input, drafted what I thought would be an acceptable bill, and handed it over to a bill drafter. These are people at the Legislature who take what you give them and churn it out. We got the bill maybe twenty-four hours before it was to be introduced and we were asked to give all of our comments. It was impossible to do.

There are some unintended consequences in this bill which are being rectified as we speak. The first thing that the trial lawyers said was: "Oh, my God – you're changing the defect definition to make it in line with a case that came

⁴⁴ Partner, O'Reilly & Ferrario, Las Vegas, Nevada.

out of California known as *Aas*.” *Aas v. Superior Court*⁴⁵ is a horrible case. *Aas* says that you can’t sue a builder for a defect until that defect causes damage. Taken literally, as Nancy said, if you had all kinds of problems in the homes with fire walls, you couldn’t sue your builder until your house burned down. That’s absurd. We are not advocating that position. If you read S.B. 241 in its entirety, you can see that was not our intent. We are not advocating for the passage of *Aas*-type legislation in this state.

The second thing that the trial lawyers said is that we’re abolishing contingent fee agreements. Wrong again. We are not abolishing contingent fee agreements. What we are trying to do is get courts to take a closer look at the fees generated in these cases because we believe in many instances they are far out of line with the work that went into the case. We want the court to look at the time invested in the case: what work went into the case, the contingent fee agreement, and the risk. Then the court will make a determination as to whether the fees are reasonable or not. That’s what we’re asking on that point.

In terms of the right to repair, Nancy and I have a drastically different view of whether this is a first right or a second right to repair. This whole idea started in 1995 when the builders thought they had a chance to engage in the repair process as a prelude to litigation. That didn’t come about. I spoke to a group of twenty-five or so Northern Nevada legislators – I think it was in 1999. I asked those that were in the session in ‘95 how many of them thought they gave builders the right to repair. Every one raised their hand. I told them they were all wrong. What they gave the builder was the right to make an offer for repair. That’s what they gave the builders in 1995.

The trial lawyer would say repairs are never made. I’ll tell you why repairs are never made – because of lawyers, plain and simple. When Nancy gets her client, she’s got to advocate for her client. The builder gets a lawyer and who starts to talk? The lawyers. Nancy says: “What you’re proposing is a Band-Aid repair.” I say: “That’s crazy, Nancy.” She wants it done a certain way. She wants a Cadillac; I want a Chevy. We debate and debate because that’s what lawyers do. Who’s lost in this debate? The homeowner and the home builder. They’re not even talking to anybody anymore. In the vast majority of cases, if they had the economic horsepower to do it, the client would address the real concerns of the customer. The problem was that we could never engage in a debate. There was a severing of that customer relationship. We ended up looking at this from a business perspective and tried to maintain the link between the home builder and homeowner. That’s what this does.

So what people in Nevada will have to do – if they have a problem with their home and it’s leading to litigation – is they’re going to have to give that builder notice. They’re going to have to say: “Mr. Builder, my roof leaks, and if you don’t fix it, I’m going to sue you. As a matter of fact, even if you fix it, I can still sue you.” We haven’t taken away any rights because I’m not in favor of tort reform. So this is a no risk proposition to the homeowner.

Thus, the homeowner says: “Mr. Builder, my roof leaks.” The builder gets that notice. If the builder has an ounce of sense, the builder is going to go

⁴⁵ 24 Cal.4th 627 (2000).

ahead and fix that home [rather than try to defend his poor workmanship]. That's what this bill is designed to do. It's important to note that the builder extracts nothing from the homeowner. The only risk here is a little time. The whole right to repair concept came out of practical experience that I, and some other lawyers representing builders, had in this community. We found that when we got our clients back out in the community when we knew there were problems, clients typically make the right business decision and homeowners typically make an intelligent consumer decision. When those two things happen, we don't end up with class actions or complex cases bogging things down in the courthouse. We end up with people enjoying their home without the burden of three or four years of acrimonious litigation. That's what the right to repair concept in this bill is meant to achieve.

Nancy spoke about complex litigation [and the concerns developers expressed regarding right to repair]. I actually was part and parcel of that. In 1999 we did not go up to the Legislature and say, "Just sue us." In 1999, we recognized that the Chapter 40 process was a miserable failure in terms of getting cases settled before they got to litigation. We had such a dramatic increase in cases that it became useless to engage in the Chapter 40 process because no cases were getting settled. We needed a vehicle to get all the parties together before we talked settlement. The vehicle we chose at that time was the litigation process because you could bring in all the subcontractors as third-parties. It was a practical decision made in negotiation with the trial lawyers.

In terms of going to the Contractors Board, all this legislation does is give the home builder the right to call the Contractors Board and say: "Look, will you come out and opine on whether my repair is adequate or not?" It's not mandatory. Previously, the only person that could go to the Contractors Board and trigger their jurisdiction was the homeowner. We now make it so the contractors can also go to the Contractors Board. I find it interesting that the trial lawyers do not like the idea that we can go to the Contractors Board. The Board is charged with disciplining and licensing contractors and presumably should know about workmanship issues. I don't find that offensive at all.

On the [construction defect] issue, the home building industry in this state is taking away no rights. That's not our intent. We're trying to get some balance back to a process that really, quite frankly, hasn't worked. You can see this if you go back to the benchmark legislation in 1995 that was designed to get cases out of the system and get homes repaired. That's not what occurred.

Instead, what we had was a huge jump in people suffering from litigation, home values decreasing, insurance premiums going up 500% - 600%, and people being put out of business. This statute is designed to reconnect the builder of a home with his or her customer so that things can get done without the intervention of lawyers and the courts. Thank you.

C. Fairness in Construction Defect – Legislative Changes

RICHARD HARRIS:⁴⁶ Last year, after the special session that ruined my summer and this draconian tort reform took place in med-mal, I had the opportunity to sit with one of my doctor friends. We were lamenting about what happened in the special session and the give and take that occurred. He said: “You know, my malpractice rates went up from about \$75,000 a year to \$175,000 a year.” I was shocked – that’s a tremendous increase. I asked him: “What did you make last year?” He said, “I made about \$3 million after expenses.” “What about your partner? I saw he was on the forefront of all this med-mal reform. What about his income?” My friend replied: “My partner works a lot harder than I do. He made \$6 million last year.”

When you look at these premium increases in medical malpractice, you really have to compare that with the actual income of these physicians and see if it’s really that big of a burden. I admit that if a physician is only grossing \$200,000 a year, and he’s got to pay \$150,000 in med-mal premiums, that could be a little difficult. That is not the typical case. Perhaps that physician should work a little harder or find something else to do. Typically, the medical malpractice premiums are less than the rent these physicians pay. It certainly is no excuse to have Congress or the Legislature try to recoup the misguided investment efforts of insurance companies on the backs of the innocent victims.

In the United States Congress, H.R. 5⁴⁷ – the House Bill on health liability reform – has passed. After the spring break in Congress it will be introduced in the Senate, where it will have a tough fight but there is a potential it could pass. That particular bill goes well beyond what California, the supposed model of health insurance or medical malpractice reform, gives us. I urge you to study that Bill. It also goes beyond medical malpractice. It goes into pharmaceutical and product liability – relative to health care as well as nursing home care – with a \$250,000 cap that is more restrictive than California. The Bill has restrictions on the statute of limitations, contingency fees, and punitive damages to the point where it’s absolutely ludicrous. It is nothing more than a bailout of the insurance industry that President Bush is beholden to.

If we consider history as being the best indicator of what’s to come, we see that we have had volcanic eruptions of this so called “crisis” in the ‘70’s, ‘80’s, and now again in the 21st Century. It is the economy, plain and simple. In every state that has submitted to these false reasons for tort reform, there has been no significant decrease in premiums because it’s due to the economy.

Medical malpractice represents less than one percent of the entire cost of health care. We should not attempt to extract something from the very few victims of medical malpractice in order to bail out an insurance company that already enjoys freedom from antitrust laws that allow it to fix prices and control the health industry. I suggest that doctors team up with the lawyers rather than the insurance companies to undertake meaningful reform in the insurance

⁴⁶ Partner, Mainor & Harris, Las Vegas, Nevada. *Editor’s Note:* In the time since this forum took place, Mainor & Harris has split into two different firms: Harris Injury Lawyers and Mainor Eglet Cottle.

⁴⁷ H.R. 5, 108th Cong. (2003).

industry, while at the same time trying to make the world a safer place relative to medical mistakes. Thank you for your attention.

D. Audience and Panel Discussion

WILLIAM ROBINSON: I find the comment [by Mark Ferrario] that he didn't mean to require "actual damage" in the bill to be somewhat disingenuous. That was in the '99 bill that was proposed by the home builders and that same statement was in the 2001 bill proposed by home builders. So if you didn't mean it, did you not mean it in 2001 when you proposed it? That's rhetorical – I don't really expect an answer because I know the answer. Let me go with a better question. Should I be required by law to let a developer come in and allegedly fix my house that he built with cardboard? Why can't I, as a homeowner, find a reputable, quality builder to come in at that man's expense to fix my cardboard? Why is it that I have to let that guy back in my house?

MARK FERRARIO: Why did you buy a house made out of cardboard?

WILLIAM ROBINSON: How would I know?

JEFFREY STEMPEL: Are we blaming the victim, Mark?

MARK FERRARIO: No, I'm not. When I first went to the Legislature, the first person that the trial lawyers put on was a woman who bought a home from a fly-by-night builder who went bankrupt, who had no insurance, who was nowhere to be found, and the home was falling down around her. You know what? All the legislation they were passing was never in a million years going to help that woman. If there's a builder out there who's fly-by-night and built your house out of cardboard, he's probably not going to be there to do repairs anyhow, and it's not going to help.

WILLIAM ROBINSON: I knew who my builder was. I knew where his office was. The Contractors Board knew him. I went to the Contractors Board.

MARK FERRARIO: And your home was inspected by the City. It was approved. Your plans were inspected and somebody made a mistake. This bill says somebody made a mistake. Somebody dropped the ball somewhere.

WILLIAM ROBINSON: It's a mistake putting in cardboard.

MARK FERRARIO: And all this bill says is that the builder has a chance to come back in. If he put cardboard in your house he can take it out and, if has to relocate you, he pays for the relocation costs. He puts you up somewhere and he fixes your house. If you don't like it when it's done, at the end of 150 days, sue him. If he comes in and puts gold plated drywall in your house and increases the value of your home astronomically, sue him. You give up nothing. This law is designed to address a broad spectrum of cases. You can always pull one or two out of either end of the spectrum that are going to distort the debate. We found that many times the first notice of a problem in a community came on the letterhead from a lawyer, not from complaints from the home buyers.

Every time a client calls me and says: "We have a problem in the community," the first thing I ask them to do is pull out all their records and make a matrix of all customer complaints for the last three, four, or five years. I want to know what's going on in that community. We found that a disconnect was occurring somewhere. This bill was designed to right that problem.

There are always going to be builders that will never address your situation. There are always going to be bad builders and bad subcontractors, but you don't penalize the good builder and the good subcontractor because of the bad. This bill is designed to get back to the middle. Good builders and good subcontractors have been caught in the crunch of construction defect litigation.

WILLIAM ROBINSON: What have you done in that bill to deal with the bad builders other than to ask the Contractors Board, which is a captive agency of the contractors, to deal with it?

MARK FERRARIO: You know, it's funny you say that because the other day we were arguing in court to have a case go in front of the Contractors Board. Someone made that comment to me – that they're somehow captive of the builders. That's a fallacy. I represent contractors that had their license on the line in front of the Contractors Board. That is not a fun prospect. The thing I never understood is why more plaintiff's lawyers don't drag builders in front of that licensing body.

WILLIAM ROBINSON: We did.

MARK FERRARIO: What happened?

WILLIAM ROBINSON: They let them go.

MARK FERRARIO: Then you've got a problem with the licensing body.

JEFFREY STEMPEL: Let me interject for a second. A lot of the problem appears to be builders who just aren't there anymore and, one might even argue, abuse of the limited liability of corporate firms. The companies dissolve and don't have an office anymore. You can't find them. The worst offenders are often the subcontractors. If you can't find the general [contractor], good luck finding the sub. They're on a flat bed truck in another state somewhere. Has any consideration been given to simply requiring that there be more responsibility down the line as opposed to worrying about the liability procedure?

NANCY QUON: There has been none. I want to respond to Mark's comment of: "Why didn't you check out your developer better?" I sat through weeks and weeks of insurance task force hearings that were put on by the State. One of the suggestions by the Nevada Trial Lawyers Association was that homeowners be given information at the time of sale of their home regarding the status of the developer as an insured entity and additional information on the builder. The response from the insurance task force was: "We're not going to recommend that to the Governor. We don't think that makes good business sense." That was the quote from the Insurance Task Force. So when you ask homeowners to investigate their home builders, it's not that easy. What you get is the literature the home builder gives you over and over again.

I had a case that went to trial where the plaintiff was given literature saying they had fire walls. Guess what? They didn't. How does the homeowner know that? They rely on what the developer tells them. I also have to disagree with Mark that home builders are just waiting to get in there and make repairs. Before the law changed, I would give homeowners the Chapter 40 notice and tell them: "Here's the notice. Fill it in. Send it to your developer. Certify return receipt. Take your best shot. If they come back and fix it, that's wonderful for you."

I would say ninety percent of those people called me back. They never got a response from the developer – not even under a formal procedure, and that's part of the law. I had a complex case. We put it into prelitigation and gave the developer a chance to come back out and fix the problem. We said: "Please, the association doesn't want to get into litigation, here's your opportunity." We participated with them for seven months in prelitigation. We let them come in and do their testing. At the end of the seven months, we said: "Please give us an offer." They said: "We're not giving you an offer – you should have filed your complaint in the first place pursuant to the law. Go file that complaint." That's the written response we got from the developers.

There are some developers that are great, that will come back and fix it. They don't need additional legislation to do that. They have the right to do it now. They work with their homeowners and they fix it. It's the developers who won't to do it that are being punished by Chapter 40 because they won't respond to the people they sold their homes to. That's the way it should be.

MARK FERRARIO: I disagree with that. Look at the legislation and ask: what are you giving up? You're giving up 150 days and, in some respects, not even 150 days.

WILLIAM ROBINSON: Does the statute of limitations extend another 150 days and through the Contractors Board review?

NANCY QUON: Only for the defect you identified.

MARK FERRARIO: Here's the deal. As soon as you send a notice of that defect to the contractor or developer, which presumably is causing you problems, you have everything tolled until the process runs its course. You give up no rights in regard to that defect by allowing the home builder to come in your home and fix that roof. That's all this is. That's what this is designed to do.

WILLIAM ROBINSON: Let me give you a situation. I'm right at the edge of my statute of limitations. I tell my builder it's a leaky roof. He comes out and patches the roof. It doesn't rain for two years.

MARK FERRARIO: It starts over as to the fix.

WILLIAM ROBINSON: Now it rains, it leaks, and we find out it's not the roof. We find out it was the balconies. If you poured water on the balconies, the water ran right through the floor of the balcony into the wall down into my house. Now my statute of limitations is gone on that balcony.

MARK FERRARIO: You were on the eighth or tenth year – whatever it is?

WILLIAM ROBINSON: Right at the edge. I lost my balcony even though the balcony turns out to be the final cause. I can't get it fixed now because of the lawsuit.

MARK FERRARIO: If you were beyond the statute of repose under that scenario, which is what would be operative here, you would probably be precluded from moving forward.

WILLIAM ROBINSON: So you've taken away my right to have my house fixed.

MARK FERRARIO: But it depends on what you identified as the problem in the first instance. If it's water intrusion into your home and the builder –

WILLIAM ROBINSON: So I have to get a lawyer to write the –

MARK FERRARIO: No, you don't. You have water coming into your home. The builder goes out and slaps mastic on your roof and the next time it rains, water comes into your home. The builder will never prevail on a statute of repose defense because what they were there to address was the water intrusion into your home. The repair didn't work. The statute of repose runs anew from the time the repair is completed. So I think, quite frankly, that the scenario you pose will never come to pass.

JEFFREY STEMPEL: I assume if the judge were to rule to the contrary, the Nevada home builders would be part of an amicus brief to get that reinstated. Let me just ask a quick question: what is the magic of the 150 day period?

MARK FERRARIO: We tried to look at the types of repairs that are normally involved here. The numbers are somewhat arbitrary, and it was just a bunch of folks getting in a room. I've had discussions with trial lawyers on these numbers and they've ranged from 90 to 180. There's no magic to 150.

JEFFREY STEMPEL: And I assume our plaintiffs bar would not be any more predisposed to that part of the bill if they were rather 30 or 60 days.

NANCY QUON: I think 150 days to fix a leak letting water in the roof is a problem.

MARK FERRARIO: The problem I have with this debate is the premise that the home builder wants to basically screw his customer. I don't agree with that. I'm not telling you there aren't bad builders. This bill is not going to protect the bad builder because you can still sue the bad builder. You're giving up nothing. Again, we're trying to get this thing more in balance than it has been the last few years.

We have found that when you encumber the process with lawyers, insurance companies, and the like, repairs don't get made and litigation goes rampant. You'll have twenty to a hundred lawyers defending these cases while the homes sit unrepaired. You know what's also interesting? Nobody ever moves out – people live in these houses for years. The plaintiff's lawyer gives me a demand and says: "Mark, this case is worth \$10,000,000." And my defense lawyer says that the insurance company says it's worth \$2,000,000. After we dance around for four or five years, the case settles for about \$4,000,000. What have we achieved? The defense lawyers made a lot of money. Plaintiff's lawyers make a lot of money. The experts make a lot of money because they know they're getting paid. And the homeowners sat there. At the end, where does that money go? Sometimes it goes back into the house, sometimes it goes into a pool in the backyard, sometimes it goes into a new car. The premise here was they want their houses fixed. We tried to set up a process that's going to result in more of the houses getting fixed – not all, maybe not yours, but more.

AUDIENCE MEMBER: Would the home builder support some kind of subsidization of local agency inspectors or independent inspection teams to come in, inspect, and sign off on the quality.

MARK FERRARIO: Well, you actually have a debate with the home builders right now that they are already doing that. They pay for the inspection process from the City and the County.

AUDIENCE MEMBER: Everyone knows they don't inspect every single home.

MARK FERRARIO: They don't inspect every home, and you also have some third party inspectors that have been hired by home builders to do exactly what you've said – to protect themselves against what they believe will be inevitable litigation.

I don't know if that issue has ever come up. I don't know what the industry would do in response to that. I know there's a lot of consternation because builders get hit with these inspection fees. I know there's a lot of debate that these inspectors don't do their job. That's not my experience typically. They can't see everything, but they're not as bad as they're portrayed to be. If you're paying for something, it ought to be worth something. And we made a provision in the bill that if an inspector comes out from a local agency and looks at this structure and says it passes, that ought to mean something. Right now, it means nothing.

AUDIENCE MEMBER: Nancy, may I ask you a question? When you represent a client suing a contractor, what sort of arrangement do you agree to with that client in terms of fees?

NANCY QUON: We work on a contingency fee. It depends on how many homes you're representing and how many problems they have. We've negotiated that fee with associations depending on their situation. We advance the costs on behalf of them. That's one thing I insisted when I came over to Mainor & Harris, given my previous experience in an association where the attorney would only work at an hourly rate and we had to have special assessments to pay costs. It's impossible to maintain these suits that way.

AUDIENCE MEMBER: You work on the contingent fee and at the end of the day if you're successful you get back from the builder some amount of court awarded fees?

NANCY QUON: If you go to trial. Typically these cases go into settlement. Maybe one percent of these cases actually end up in the courthouse.

AUDIENCE MEMBER: I assume you settle in the shadow of what would have happened at trial, which includes recovery of your fees.

NANCY QUON: Sure.

AUDIENCE MEMBER: Your fees are independent of court awarded fees?

MARK FERRARIO: They are added on as damages. If you agree it's a \$3,000,000 cost of repair, the average add-on for Chapter 40 entitlements is about a million and a half. That's how these cases settle. It's typically not a question of if they win. It's a question of whether they win because it's virtually impossible to defend these cases.

AUDIENCE MEMBER: I was fairly sympathetic, Nancy, to your position of who a homeowner calls when the roof starts to leak: Call my lawyer? All that does is start the clock ticking, and I've got to pay. But now, as I understand with loser pays, along with your willingness to accept a contingent fee, all of a sudden hiring that lawyer costs me very little. In fact, all of the impediments to sue are gone. I then find myself sympathetic to Mark's position, which is give us a chance first to try and solve this problem, although 150 days sounds like a long time to fix a roof leak. But the notion of let's hold off for some time given how costly it is for the homeowner to sue, makes some sense.

NANCY QUON: You need to understand that you're starting from the premise that homeowners are litigious and want to put the largest investment of their life into litigation. That hasn't been my experience. There are downfalls for a homeowner who has to go into litigation to get problems fixed. The disclosures put forth in Chapter 40, as it stands now, are quite stringent. They are more than standard disclosures for sale in real estate. The homeowner has to disclose every defect identified, every report, every expert, and more. That doesn't encourage them to go into litigation unless there were some other reasons to do it.

Secondly, it's extremely difficult for homeowners' associations because they lose their FHA financing in many cases. We have an association who could only sell their homes through FHA because the values of the condos were maybe \$50,000 – \$60,000. Those people wanting to purchase could only purchase through FHA loans. Fannie Mae⁴⁸ pulled the financing because the association went into litigation. That is a very difficult decision for associations. Associations and homeowners only sue as a last resort. These associations don't call attorneys right away; they attempt to work with the developer.

In fact, the developer sits on the board of directors of these associations for several years before the entire project is sold out and they have the opportunity to make those repairs while they're there. My experience for the last six years is that homeowners are not that litigious; they don't want to put their houses into litigation. They are basically tainting the title to their own home. They don't want to do that, and they do it as a last resort. We do a contingency fee to help those homeowners who would never afford to get the houses fixed without the help of an attorney. That is true of any type of litigation. It's true of the medical malpractice that Mark does on behalf of injured patients. He takes his percentage of the recovery from whatever the settlement or verdict is and, in those cases, receives lawyer fees because it comes out of whatever the pot is. This is additional recovery to make that person whole.

JEFFREY STEMPEL: Isn't there an additional problem that, if you don't have a homeowners' association and there is a widespread problem that infects an entire area, the contingency fee can't be a very attractive option for your firm? Do you have any individual or small groups of homeowners that you would even take on for a contingency fee?

NANCY QUON: We've taken some, but it's very difficult. I'll give you an example. We took eleven homeowners whose homes were on expansive soil and were just falling apart – a horrible case for these homeowners. The court wouldn't let them join in a class. The only way to let them do it, because there were only eleven, was through a joinder case. The cost, because we had to investigate every house, got so high that at the end of the day to get that case settled, to get those people enough money to get their homes fixed, this firm ended up doing it pro bono. We did not take a fee on that case because there was no way to get enough recovery for those homeowners to fix those houses. We do many cases where there isn't enough money at the end of the day, and our goal is to get the homeowner enough money to get the houses fixed. That's

⁴⁸ Financial investment company. See <http://www.fanniemae.com>. (last visited Jan. 22, 2004).

why I do construction defect. It's a matter of getting repair dollars to these homeowners to fix a very objective problem.

It's not like personal injury where it's very subjective as to pain and suffering. They get no emotional distress in these cases. They get the actual cost of the repair. That's what they need to fix their homes and that's what our goal is. I understand your concern, but I can tell you that my experience is they don't just call a lawyer because: "Gee, they'll work on a contingency fee." They call a lawyer when they don't get help from their developer and they have tried. I have never, in six years, had a case where there weren't documented requests made by those homeowners to the developers for repairs.

IX. CONCLUSION

DMITRI SHALIN: It took a bit of time to create this forum. I want to thank all the people who made it possible: Jeff Stempel and Connie Akridge; Dean Morgan, who offered the facilities; our corporate sponsors – especially John Murtoch, President of Lawnford Homes; Flanders McMillan Group – John Curtas in particular. He was very instrumental in putting this together. Thank you very much for being here at four o'clock on Friday night. I think it was a riveting discussion and I'm personally grateful for all of those who made it. Thank you.