UNDER CONSTRUCTION: THE PAST, PRESENT, AND FUTURE OF CHAPTER 40, NEVADA’S CONSTRUCTION-DEFECT LAWS

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INTRODUCTION

Since its creation in 1995, Nevada’s construction defect laws—colloquially referred to as Chapter 40—have undergone many revisions and have been subject to significant criticism. Most agree that Chapter 40 needed substantial revisions, with construction-defect claims thirty-eight times the national average,\(^2\) exploding costs of construction-defect litigation, lawsuits involving trivial defects that constituted no or minimal harm, and legitimate construction defects not being fixed. However, disagreements abound as to what specific reforms should have been implemented. Reform has been difficult because of three distinct parties in construction defect actions and their competing concerns: the homeowners who want their homes repaired, the contractor who managed the project, and the subcontractors and suppliers who performed the actual work.\(^3\) In 2015, the Re-

\(^1\) Hearing on S.B. 395 Before the Assemb. Comm. on Judiciary (June 23, 1995), 1995 Leg., 68th Sess. 10 (Nev. 1995) (stating in a committee hearing that representatives of both the Southern Nevada Homebuilders and the Nevada Trial Lawyers had negotiated and drafted S.B. 395, the original enacting legislation for Chapter 40).


\(^3\) See Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. 19, 23 (Nev. 2009).
publican-held Nevada legislature finally enacted reform measures by passing Assembly Bill (A.B.) 125. Chapter 40 was significantly revised, enacting many proposed reforms; some controversial, some original.

This note will examine Chapter 40, its history, problems, and recent overhaul. Part II of this note examines Chapter 40’s history, operation, and revisions. Part III examines the enacted revisions to Chapter 40 and discusses the possible benefits and consequences of those revisions. It also will recommend and discuss other possible solutions.

I. HISTORY, OPERATION, AND REVISION OF NEVADA’S CONSTRUCTION DEFECT LAWS

A. Original Purpose and Enactment of Chapter 40

Chapter 40 was born out of a compromise between homebuilders and trial attorneys in Nevada’s booming construction industry. In the 1990s, construction-defect litigators from Southern California turned their focus to Southern Nevada for three reasons: (1) a lack of construction defect cases in Southern California, (2) an increase in construction in Las Vegas, and (3) substandard and shoddy construction work. Prior to the enactment of Chapter 40, contractors who refused to repair their work either went out of business in order to limit liability or deliberately protracted litigation to deter future lawsuits. More effective legal mechanisms for resolving disputes did not exist for several reasons. First, the

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6 See Andree J.B. Swanson, Las Vegas: Boom Town for Construction Defect Litigation, 5 NEV. LAW. 15, 16 (1997).

7 See id. at 15.

8 See generally James Beasley, Calloway and NRS 40.600: Two Sides of the Same Coin, 9 NEV. LAW. 10, 11 (2001).

9 Hearing on S.B. 395 Before the S. Comm. on Judiciary (May 10, 1995), 1995 Leg., 68th Sess. 10 (Nev. 1995) (stating that Mr. Ashleman’s testimony was that lawyers and home builders “find themselves jointly in an undesirable situation” because there is “no mechanism for resolving disputes”).
cost to fix defects was not worth the cost of litigation,\textsuperscript{10} and second, due to the economic-loss doctrine, the only viable legal theory was breach of contract, which limited recovery.\textsuperscript{11} When homeowners sought an administrative remedy, they turned to the Nevada State Contractor’s Board (Contractor’s Board or Board). However, resolution was either significantly delayed or not forthcoming.\textsuperscript{12}

Chapter 40 began as a proposal by the Southern Nevada Home Builders Association (SNHBA) and was modeled after Texas’s construction-defect laws.\textsuperscript{13} Originally opposed by the Nevada Trial Lawyers Association (NTLA), both groups negotiated to create a compromise bill.\textsuperscript{14} The NTLA had several concerns, including addressing the differential between cost of repair and litigation.
expenses. In response, both the SNHBA and the NTLA agreed to lift the cap on recovery of expert fees, expert investigations, and attorney fees. Second, the economic-loss doctrine, which had prevented most construction defect claims due to lack of privity of contract between buyers and subcontractors, was superseded by statute. The SNHBA responded with two requests: the elimination of punitive damages in construction defect actions and the inclusion of mandatory mediation. The compromise was reflected in Nevada Revised Statute (N.R.S.) 40.655 and N.R.S. 40.635, and Chapter 40 was enacted on July 5, 1995.

The intent of Chapter 40 is to resolve construction defect claims between the homeowner and contractor, encourage settlement, and fix defects, while also providing an avenue for homeowners if the contractor is unresponsive or refuses to fix a construction defect. Chapter 40 requires the homeowner to notify the contractor in writing of discovered construction defects. The contractor then has a reasonable amount of time to respond to the notice and to investigate the defects by repairing the defects, disclaiming the defects, or offering a settlement. If the contractor fails to respond, fails to repair the defect, disclaims the

15 Id.
16 Id. at 13; see also Nev. Rev. Stat. § 18.005 (2013) (limiting recovery of expert witness fees to $1,500 per witness).
17 See Maddox, supra note 10; cf. Calloway v. City of Reno, 993 P.2d 1259, 1265–66 (Nev. 2000) (stating that the economic loss doctrine prevents recovery of purely economic losses in tort action). The economic loss doctrine prohibits recovery in tort law of economic losses if there is no damage to property or person. Construction defect claims may involve neither; the structure may simply have been built incorrectly. See id. Thus, overcoming the economic loss doctrine in construction defect cases, where the cause of action is usually negligence or negligence per se, is critical to creating a comprehensive and effective statutory system of recovery.
18 Maddox, supra note 10, at 13.
19 Id.
20 Id.; see also Nev. Rev. Stat. § 40.635 (2013); § 40.655 (limiting recoverable damages if the contractor complies with Chapter 40, and removing the limits if the contractor does not). By stating that Chapter 40 claims “[p]revail over any conflicting law otherwise applicable to the claim or cause of action[,]” it was thought that the economic loss doctrine no longer applied to construction defect claims. § 40.635(2). This was affirmed by the Nevada Supreme Court. Olson v. Richard, 89 P.3d 31, 33 (Nev. 2004) (holding that negligence claims may be brought under Chapter 40, and thus the economic loss doctrine no longer applies to construction defect cases); see also Hearing on S.B. 395 Before the S. Comm. on Judiciary (May 10, 1995), 1995 Leg., 68th Sess. 15 (Nev. 1995) (testimony from Bob Maddox, attorney and member of the NTLA) (stating that he was “adamantly opposed” to the original bill but supported the final version).
22 Westpark Owners’ Ass’n v. Eighth Judicial Dist. Court, 167 P.3d 421, 427 (Nev. 2007) (“NRS Chapter 40 provides a comprehensive procedural process for resolving constructional defect disputes between contractors and homeowners.”).
24 Nev. Rev. Stat. § 40.6452 (2013) (stating that the contractor has sixty days to respond to a homeowner’s notice); see also § 40.6462 (stating that the homeowner shall allow the contractor to inspect the alleged defects and damages); § 40.647 (stating that the homeowner must
defect, or fails to make a reasonable settlement offer, then the contractor is subject to damages, including cost to repair, expert witness fees, and attorneys’ fees.  

To understand the Chapter 40 process, it is first necessary to understand the complex contractual relationships that occur on a construction project. Typically, on a residential construction site, the owner and contractor initially act as the same entity. The contractor is responsible for supervising and coordinating all aspects of the construction project, including the sequence of construction, the quality of construction, the coordination of subcontractors and suppliers, resolving conflicting or missing information in the plans and specifications, ensuring that building inspections are performed, and other tasks necessary for a successful construction project. Generally, a contractor that specializes in homebuilding does not self-perform most of the work. Instead, the homebuilder relies on a multitude of subcontractors.

The contractor hires subcontractors to perform a specific scope of work for the project, such as mass grading, concrete foundations, doors and trim, electrical, plumbing, mechanical, flooring, or any number of different tasks that need to be completed during the course of construction. Contractors typically hire subcontractors by soliciting proposals, called bids, at the beginning of a project.

allow the contractor a reasonable opportunity to repair the defect); § 40.650 (stating that failure to make a settlement may remove the limitations to damages).

§ 40.650 (stating that if a contractor failed to respond to a notice within the statutory time period, make a settlement offer, deny liability, agree to mediation, or participate in mediation, then the liability limitations were removed); see also § 40.655 (limiting recovery to attorneys’ fees, cost of repairs, the home’s loss of market value, the use of any part of the residence, expert costs, and interest).

CHRIS HENDRICKSON, PROJECT MANAGEMENT FOR CONSTRUCTION: FUNDAMENTAL CONCEPTS FOR OWNERS, ENGINEERS, ARCHITECTS AND BUILDERS § 1.3 (2.2 ed. 2008), http://pmbook.cce.cmu.edu/01_The_Owners%27_Perspective.html [https://perma.cc/9REC-L796] (stating that for residential projects, “the developers or sponsors who are familiar with the construction industry usually serve as surrogate owners and take charge,” and act as contractors). However, practically, in the author’s professional experience, the company that owns the land and is developing the project, and the company that acts as the contractor are two different corporate entities for liability purposes.

Id. § 1.5 (“The function of a general contractor is to coordinate all tasks in a construction project.”).

See id. § 1.3 (stating that “construction [is] executed by builders who hire subcontractors for the structural, mechanical, electrical and other specialty work”). At the height of the building boom I observed that a few developers, such as Pulte, started to create subsidiaries that handled specialty subcontractor work, such as concrete foundation, framing, plumbing, and electrical. However, for the most part, all of these highly specialized trades are not performed by contractors but rather are left to subcontractors who are experts in their field of construction. Id.

The types of work that subcontractors specialize in is as diverse as the types of tasks that need to be completed on a construction project. Everything from the mundane, including daily site cleanup, to highly specialized trades such as audio visual infrastructure and components; each trade has a subcontractor that specializes in that type of work. See id. § 1.5.
The contractor and subcontractor then negotiate the price and the scope of the work, eventually reaching agreement, which is formalized in a written contract. Once the contract is executed, the contractor will notify the subcontractor when to mobilize on a construction site to begin work. During the subcontractor’s time on-site, the contractor will typically hold weekly meetings to coordinate schedules of that subcontractor and the other subcontractors on site, to review the subcontractor’s safety plans and performance, and to monitor the subcontractor’s work progress and quality. Subcontractors purchase most of the materials directly from suppliers, although most of what is purchased is determined by other people, such as the architect or engineer, the owner, or the developer.

The sales contract between the developer and the homeowner may be equally as convoluted. The homeowner may have a contract to purchase the home from the local development, which eliminates privity of contract between the owner and the homebuyer. For example, when a pipe springs a leak in a home, it is the plumber’s fault. However, the homeowner’s privity of contract is not with the plumber. It is with the local development subsidiary of the owner, who is wholly owned by the owner, who also owns the developer / contractor (usually, but not always, especially with large multi-family developments such as condominiums or apartment buildings), and the developer hires each subcontractor separately. Thus, no cause of action based on breach of contract can exist between the homeowner and the subcontractor because there is no privity of contract. The homeowner must sue the contractor.

It is arguable that the real target of Chapter 40 is not large residential construction-defect cases, such as the Harmon Tower at City Center, where both sides can afford attorneys and multi-year litigation, but rather small defect claims that need to be corrected but otherwise would not be worth pursuing in court.

30 See id. (noting that more specialized items assembled off-site have a less direct link between subcontractors and material suppliers). This trend changed as well during the height of the building boom in the mid-2000s. While working as a construction manager, I learned that many developers began to institute programs where the developer would purchase materials directly from the suppliers or even the manufacturers in an effort to save money. While a subcontractor could commit to purchasing 500 toilets per development, for example, a developer could commit to purchasing 5000, thus leading to better pricing. This further complicates construction defect matters as it must also be established who supplied the materials, and if the materials are defective, the workmanship is defective, or some combination thereof.

31 See id. § 1.3 (stating that for residential projects, “the developers or sponsors who are familiar with the construction industry usually serve as surrogate owners and take charge,” and act as contractors); see also Hearing on Assemb. B. 367 Before the S. Comm. on Judiciary (June 3, 2013), 2013 Leg., 77th Sess. 25 (Nev. 2013).

32 See Maddox, supra note 10. Chapter 40 pertains only to residential projects. Non-residential projects (such as commercial or industrial projects) are not covered by Chapter 40. See Nev. REV. STAT. §§ 40.615, 40.630 (2013). Harmon Tower was a planned forty-seven story condominium building at MGM’s City Center project. During construction, building inspections revealed that some reinforcing steel, necessary to give the building its required strength, was either missing or not correctly placed. Thus, in the event of a “code-level earthquake,” it was possible that the tower would structurally fail. Construction was halted; litigation ensued.
It may cost $19,000 to fix a construction-defect problem, which would put the cost of repair beyond the average homeowner.33 However, litigation may approach $100,000 or more and take years before a resolution is achieved.34 By allowing the automatic recovery of reasonable attorneys’ fees, pre-reform Chapter 40 (Pre-A.B. 125 Chapter 40) permitted smaller defect claims to be addressed in court without concern as to the cost to repair the defects. However, A.B. 125 removed the automatic recovery of attorneys’ fees for successful construction-defect actions.35

Construction defects are widespread for several reasons, including unskilled construction workers; unskilled construction supervision; fixed price contracts that encourage corner-cutting; and incomplete construction documents that fail to properly show details, materials, and equipment needed to complete a construction project.36 Additional factors may include plain mistake or accident, inadvertent surpassing of a code,37 the enactment of an exact measure rather than a range (or tolerance),38 and unforeseeable circumstances.39


34 See id. at 15.
36 See NEV. JUSTICE ASS’N, NRS CHAPTER 40 WORKS 5 (attached as Exhibit C to Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 11, 2009), 2009 Leg., 75th Sess. (Nev. 2009)).
37 See generally Hearing on S.B. 161 Before the S. Comm. on Judiciary (April 5, 2013), 2013 Leg., 77th Sess. 12 (Nev. 2013). The way that Chapter 40 was written is that it does not matter if construction surpasses the building code. If the construction does not meet the code, plans or specifications exactly, then it was considered a construction defect. Therefore, if the plans called for cheap carpet and the subcontractor installed a higher grade carpet that would be considered a construction defect under the Pre-A.B. 125 statutory scheme, even though the carpet installed is a better carpet than what was specified. See id.
38 For example, the architect’s drawings may call for the bathroom vanity countertop to be 42 inches in height. A small variance of a quarter inch would result in the countertop height being at a height other than 42 inches, and thus a construction defect because the height is in violation of the architect’s plans. That the defect is harmless does not change the fact that it was a defect under Chapter 40. See generally id.
39 Such as putting a drywall screw through a water line. That is the worst kind of luck. Other than leaving an inflated sewer plug where the lowest building drain is lower than the lowest manhole rim. That’s worse. I’m not going to cite this. You’ll just have to take my word for it.
B. The Chapter 40 Process Before A.B. 125

The Pre-A.B. 125 Chapter 40 process began with the discovery of a construction defect by the homeowner or Home Owner Association (HOA), the claimant. If the claimant hired an attorney, then the attorney retained construction experts and performed a visual inspection of the property. Before the claimant instigated litigation, he or she had to provide written notice to the contractor describing the defect and its extent. The contractor had thirty days after receipt of the notice to notify all subcontractors, suppliers or design professionals (collectively, subcontractors), and either sixty or ninety days to respond to the claimant’s notice.

The notified subcontractors then had thirty days after receipt of the contractor’s notice to inspect the alleged defects and respond. The contractor could elect to perform repairs to the alleged constructional defects; these repairs had to be performed by a licensed contractor or subcontractor on reasonable dates and times and they had to be done to the building code and in a good workman-like manner. The repairs had to be completed within a specified time period, and the subcontractor could not make such a repair conditioned on the release of liability. Once all repairs were completed, the contractor and its subcontractors had to send the claimants a written statement “describing the nature and extent of the repair, the method used to repair . . . and the extent of any materials or parts that were replaced during the repair.” If the claimant refused to allow the

41 See generally Leon F. Mead II, Nevada Construction Law 151 (2016).
42 Nev. Rev. Stat. § 40.645 (2013) (stating that the claimant “[m]ust give written notice by certified mail . . . to the contractor,” and “[m]ay give written notice . . . to any subcontractor, supplier or design professional known . . . , if the claimant knows that the contractor is no longer licensed” in the state or out of business). The notice must describe the defects observed, the cause of defects if known, the extent of damage or injury, and the location of each defect. Id. The notice may include an expert witness’ report. Id.
43 See § 40.646 (stating that the contractor must forward the notice to all responsible subcontractors, suppliers or design professionals, or the contractor forfeits the right to commence an action against subcontractors); § 40.6472 (stating that for non-common defects, the contractor has ninety days to respond); see also § 40.6452 (stating if the alleged defects “pose an imminent threat to health and safety,” then the contractor has twenty days to respond instead of sixty days). Further, if the contractor fails to respond to claimants’ notice, then the claimant may initiate proceedings. Id.
44 § 40.646(3).
45 § 40.648(1)(a).
46 § 40.648(1)(b).
47 § 40.648(2) (stating that if there are four owners or less, then the contractor has 105 days; if more than four owners, then the contractor has 150 days to complete repairs); see also § 40.648(3) (stating that if the repairs cannot be completed within the timeframes specified by statute, then all parties shall agree on a reasonable time to complete repairs).
48 § 40.648(4).
49 § 40.648(5).
contractor or the subcontractor to inspect or repair the alleged defect, then the claimant was barred from pursuing the matter any further.  

However, the contractor faced a dilemma when responding to the notice. He could choose to respond to just the claimants listed on the notice, or the contractor could choose to respond to the listed claimants and disclose the defect to each owner within the development. If the contractor chose to disclose the defect to the entire development, such a disclosure could notify potential claimants about trivial defects, thus increasing the contractor’s liability. Or the disclosure could encourage potential claimants to search their homes for other possible construction defects. If the contractor chose to not disclose the defects to the development, then the contractor forewent the right to inspect and repair any construction defects for unnamed homeowners that was common with the notice. If the contractor decided to notify the development of the alleged common construction defects, then the process for alleged defect notification, inspection, and right to repair was generally the same, albeit on a shortened timetable.

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50 § 40.647.
51 § 40.6452(1).
52 § 40.6452(3). If the contractor chooses to disclose this notice to the development, he must include the following information by statute:

(a) A description of the alleged common constructional defects identified in the notice . . . ;
(b) A statement that notice alleging common constructional defects has been given to the contractor which may apply to the owner;
(c) A statement advising the owner that the owner has 30 days within which to request the contractor to inspect the residence or appurtenance to determine whether the residence or appurtenance has the alleged common constructional defects;
(d) A form which the owner may use to request such an inspection or a description of the manner in which the owner may request such an inspection;
(e) A statement advising the owner that if the owner fails to request an inspection pursuant to this section, no notice shall be deemed to have been given by the owner for the alleged common constructional defects; and
(f) A statement that if the owner chooses not to request an inspection of the owner’s residence or appurtenance, the owner is not precluded from sending a notice . . . or commencing an action or amending a complaint to add a cause of action for a constructional defect . . . .

Id.

53 § 40.6452(6). Further, the unnamed homeowner does not have to send a notice to the contractor upon discovery of construction defects common to the notice, nor do homeowners have to allow contractors the opportunity to inspect and/or repair those defects. Id.
54 See § 40.6452(3) (stating the information the contractor must disclose to non-claimants); see also § 40.6452(4) (stating that if a non-claimant owner requests inspections for alleged common constructional defects, the contractor must do so within forty-five days); § 40.646(4)(b) (stating that upon notification by the contractor, a subcontractor shall have twenty days to inspect an alleged construction defect in a non-claimant’s home and decide if it wants to exercise its right to repair).
If these steps were unsuccessful in settling the dispute or fixing the construction defect, the last step before litigation was mandatory mediation. Parties agreed upon the mediator and limited discovery was conducted. However, both parties could waive mediation and proceed to litigation.

C. The Chapter 40 Process After A.B. 125

Similar to the old law, the Chapter 40 process now begins with the discovery of a construction defect by the claimant. Unlike Pre-A.B. 125 Chapter 40, however, before a Chapter 40 notice is sent, the claimant must first submit the claim to his home-warranty company for repair. The statute of limitations or repose is tolled once the claim is submitted, until thirty days after the warranty company rejects the homeowner’s claim. Only after the warranty company has refused the homeowner’s claim may the homeowner send the Chapter 40 notice to contractors and subcontractors, and the notice may only include the alleged defects that the warranty company denied.

The Chapter 40 notice must now state, with specificity, the locations of each defect and must additionally describe in reasonable detail the damage and injury that each defect has caused. The notice must include a statement that each homeowner verifies that each defect listed and described in the notice actually exists. The notice must be sent to the contractor or, if the contractor’s current address is unknown, to the State Contractor’s Board.

Once the contractor receives the notice, he has thirty days to notify each subcontractor that he reasonably believes is responsible for each listed defect. If the contractor fails to notify a subcontractor, the contractor cannot add them in a Chapter 40 action unless: (1) the contractor shows that he made a good-faith effort to identify the subcontractor and (2) “the contractor was unable to identify

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55 § 40.680(1); see also Bradley A. Wilkinson, Committee Counsel, Remarks to the Senate Committee on Judiciary (attached as Exhibit F to Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. (Nev. 2009)).
57 See Bradley A. Wilkinson, Committee Counsel, Remarks to the Senate Committee on Judiciary (attached as Exhibit F to Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. (Nev. 2009)).
58 See generally MEAD II, supra note 41.
60 Id.
61 Id. (specifying “contractor, subcontractor, supplier or design professional”). For brevity, I refer to these four groups as contractors and subcontractors.
62 Id.
63 Id. § 8.
64 Id.
65 Id.
66 Id. § 9.
the subcontractor” within the allotted thirty-day time period. The subcontractor then has thirty days to respond to the contractor’s notice. When responding, the subcontractor must declare whether he intends to repair the defect and the length of time necessary to complete the repairs. He must additionally propose two dates when he is available to start repairs.

The homeowner must allow each contractor and subcontractor to inspect each alleged defect. At the inspection, the homeowner or his representative must be present and must identify the exact location of each defect. If the notice includes an expert report, then the expert or his representative must be present and must be able to identify the exact location of each defect contained in the expert report.

The contractor has ninety days from receipt of the homeowner’s notice to respond in writing back to the homeowner. The response must state whether the contractor or subcontractor will repair the defect. The response may include a settlement offer, or it may state that the contractor or subcontractor disclaims the defect. If the contractor or subcontractor elects to repair the defect, the homeowner must allow them to do so, and the contractor or subcontractor has either 105 days or 150 days, depending on the number of contractors and subcontractors implicated, to complete repairs; otherwise, the homeowner may file a Chapter 40 action.

D. Chapter 40 Litigation

If, after the notices, inspections, and the contractors’ and subcontractors’ exercise of right-to-repair, the alleged defects are still not corrected or a settlement has not been reached, litigation may commence in state district court. The claimant begins by filing a complaint. Claimants are required to provide all insurance information about any homeowner’s warranty within ten days of filing. Similarly, a contractor and subcontractors must disclose insurance companies used

67 Id.
68 Id.
69 Id.
70 Id. § 10.
71 Id. § 11.
72 Id.
73 Id. § 12.
74 Id.
75 Id.
76 Id. § 13. If the notice was sent to four or fewer contractors, subcontractors, or designers the homeowner must allow them 105 days. Id. If the notice was sent to five or more contractors, subcontractors or designers, then they have 150 days to complete repairs. Id. If repairs cannot be completed within these allotted time periods, then the homeowner, contractor, subcontractors, and designers may agree to a longer period; if they are unable to agree, then the court may set a reasonable time to complete repairs. Id.
on the project within ten days of filing a response.\(^78\) From this point, litigation proceeds as a normal action. Parties must hold an early case conference within thirty days of filing an answer.\(^79\) The conference requires that the parties develop a discovery plan.\(^80\) Once the discovery plan is completed, a Case Conference Report must be finalized and submitted to the court.\(^81\) Then, a special master may be appointed to the case.\(^82\)

Now, any time after the Chapter 40 notice has been sent, and up to ten days before trial, a party may present an offer of judgment (OOJ) to another party.\(^83\) An OOJ is a tool used to encourage settlement before trial, where one side offers a settlement amount that is inclusive of all damages, costs, and monetary awards.\(^84\) In construction defect cases, an OOJ generally must include all damages and all costs that a party is entitled to recover, such as reasonable attorneys’ fees and cost of repairs.\(^85\) If an OOJ is presented to a homeowner, the homeowner rejects it, and the case proceeds to trial and verdict, the court must determine, once the verdict is rendered, if the homeowner rejected a reasonable OOJ.\(^86\) If a homeowner does not receive a verdict greater than a rejected OOJ, the homeowner is prohibited from obtaining attorneys’ fees, regardless of the statute.\(^87\) Further, the party that offered the rejected OOJ may be awarded attorneys’ fees.\(^88\)

**E. Examining Chapter 40**

1. **What Was Wrong with Chapter 40 Pre-A.B. 125**

Pre-A.B.125 Chapter 40 had several problems. First, the combination of a fee-shifting structure and a broad definition of what constituted a construction defect encouraged lawsuits for trivial or harmless defects. The generous fee recovery provision incentivized plaintiffs’ attorneys to bring claims and to delay

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\(^78\) *Id.*

\(^79\) *NEV. R. CIV. P. 16.1(b).*

\(^80\) *Id.*

\(^81\) *Id. at 16.1(c).*

\(^82\) *Id. at 53(a).*

\(^83\) *NEV. REV. STAT. § 17.115 (2013).*


\(^86\) See Gunderson v. D.R. Horton, Inc., 319 P.3d 606, 610 (Nev. 2014) (stating that most homeowners rejected the OOJs, and upon examination of the jury verdict for homeowners, the verdict amount was less than the OOJ).

\(^87\) See *id.* at 616 (holding that the district court properly denied attorney fees for the homeowners despite a favorable jury verdict).

\(^88\) See *id.* (holding that the district court erred when it denied the builder’s motion for attorneys’ fees, and reversed and remanded to the district court to conduct a new analysis to determine if awarding attorneys’ fees is appropriate).
the process to accrue fees. Indeed, the automatic recovery of attorneys’ fees led to lopsided judgments, resulting in costs to repair being dwarfed by attorneys’ fees. The actual result of Pre-A.B. 125 Chapter 40’s fee-shifting structure was that when the homeowner could not fix the problem on his own, he hired an attorney, which promoted litigation. This ran contrary to the original intent of the fee-recovery provision, which was to promote settlement by encouraging the contractor to respond with a reasonable offer and to encourage a homeowner to accept a reasonable offer and thus avoid trial. This litigious effect is reflected in the fact that new construction-defect claims in Nevada are thirty-eight times the national average.

The fee-shifting structure of pre-A.B. 125 Chapter 40 often led to absurd results. For example, in one case, an estimated cost of repair of $48.05 resulted in a total judgment against the subcontractor of $43,476.53 when legal and expert fees were included. In another situation, an electrical subcontractor was included in proceedings because the shut-off breaker was six-feet-three-inches off of the adjacent ground instead of six feet, as required by the building code. The defect was fixed with a shovel full of dirt. In yet another situation, a homeowner sued, alleging that the integral color he picked out for his concrete deck was a shade off from what was actually provided. Finally, after the Contractor’s Board became involved and determined that the color was what the homeowner agreed to, the

90 See Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 548 (Nev. 2005) (holding that anytime the fact finder finds that the “claimant is entitled to recover damages” due to a construction defect, the “court can presume that the claimant is entitled to the recovery of attorney fees”).
91 See COALITION FOR FAIRNESS IN CONSTRUCTION 1 (attached as Exhibit H to Hearing on S.B. 161 Before the S. Comm. on Judiciary (April 5, 2013), 2013 Leg., 77th Sess. (Nev. 2013) (advocating for the removal of automatic recovery of attorneys’ fees)).
93 Hearing on S.B. 395 Before the S. Comm. on Judiciary (May 10, 1995), 1995 Leg., 68th Sess. 11–12 (Nev. 1995). By the way the minutes read, it appears that the drafters thought that S.B. 395 would more closely resemble a loser-pays statute. However, what was missed is that with a broad definition of construction defect, the plaintiff(s) were almost always guaranteed a win, thus making the loser-pays provision a de facto incentive to file a lawsuit.
94 BROWN & KENNELLY, supra note 2.
95 Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 4, 2009), 2009 Leg., 75th Sess. 5 (Nev. 2009).
96 Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. 29 (Nev. 2009).
97 Id.
98 Id. at 30.
99 Id.
homeowner revealed that he was objecting because the color did not match the trim of his house. By abusing Chapter 40, the homeowner was simply trying to extort the contractor and subcontractor into changing the product into what was closer to the homeowner’s expectation.

The second problem under pre A.B. 125 Chapter 40 was that the right-to-repair provision did not function as intended because too many defects were going unrepaired before the start of litigation. Chapter 40’s notification provisions were criticized for being too generic or too broad to allow the contractor to quickly determine the location of the defect to inspect and repair it. Under the reasonable notification standard and the allowance of common notices, alleged defects were allowed to be extrapolated to other dwellings—sight unseen and without inspection—and a single notice to all similarly situated homeowners could be sent notifying those owners of the extrapolated defects. To add confusion, contractors could be financially unable to investigate or repair defective work, or a contractor could intentionally limit its liability by forming a single-purpose corporation and not purchasing liability insurance. Further, homeowners might have been reluctant to allow contractors who performed the substandard work in the first place back into their homes for repair work. Worse, some insurance companies and legal counsel advised contractors and subcontractors not to make any repairs because repairing construction defects reset the statute of limitations under Pre-A.B. 125 Chapter 40 statutes, thus extending their liability. Even if repairs were completed, contractors and subcontractors were still liable for all attorneys’ fees, and there was no guarantee that the subcontractor would be released from the case. “Once the attorneys are involved, it’s not about repairing the house, it’s about collecting fees,” said

100 Id.
101 Id. at 8 (stating that almost every subcontractor involved in a project is brought into the construction defect process).
102 See NEV. REV. STAT. § 40.6452(2) (2015).
103 Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. 8 (Nev. 2009).
104 See id.
105 Forster, supra note 40.
the president of one construction firm.\textsuperscript{110} All of these problems stood in the way of repairing defects without litigation.

Third, developers and contractors were forcing subcontractors whose work was not implicated to participate in the defense of developers, contractors, and other subcontractors through broadly written contractual indemnity provisions. Subcontractors who were not responsible for defective work were sued because broad contractual indemnity provisions, contained in their subcontracts, required subcontractors to defend the contractor, regardless of if the individual subcontractor’s work was actually implicated in a Chapter 40 notice or litigation.\textsuperscript{111} Failure to provide notice to any subcontractor generally barred the contractor from bringing a claim against the unnamed subcontractor at a later date.\textsuperscript{112} Therefore, it was safer to notify every conceivable subcontractor and eliminate the risk of not including a party than it was to only include subcontractors who were reasonably believed to have been involved in the alleged defective work and risk missing a subcontractor who actually performed the defective work.\textsuperscript{113}

Reasons vary for broad subcontractor implication, but generally either the contractor is trying to comply with Chapter 40 provisions, which have harsh consequences if notification is not sent to a subcontractor within thirty days of receiving the notice from the claimant (there is no incentive for the contractor to not send a notice to all subcontractors); or the contractor is uncertain as to who caused the defect. In some instances, a subcontractor’s work may have been affected by another subcontractor’s defective work, thus leading to the impleading of both subcontractors, even though only one performed substandard work.\textsuperscript{114} In other situations, the contractor may have no longer possessed relevant contracts or payment records and was unable to determine which subcontractor performed what work on a project. For example, in one instance, a door-and-trim company was held responsible for a flooded basement simply “"[b]ecause [it] stepped foot on the job.""\textsuperscript{115} Similarly, a company that specialized in earthwork and grading testified that it was being dragged into lawsuits over defective roofs.\textsuperscript{116} Both these instances show that innocent subcontractors may have ended up paying an unjust price.

\begin{itemize}
\item \textsuperscript{110} Coolican, \textit{supra} note 89.
\item \textsuperscript{111} \textsc{Coalition for Fairness in Construction 1} (attached as Exhibit H to \textit{Hearing on S.B. 161 Before the S. Comm. on Judiciary} (April 5, 2013), 2013 Leg., 77th Sess. (Nev. 2013)) (advocating for the removal of automatic recovery of attorneys’ fees).
\item \textsuperscript{112} Forster, \textit{supra} note 40.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{See Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary} (Mar. 11, 2009), 2009 Leg., 75th Sess. 6 (Nev. 2009).
\item \textsuperscript{115} \textit{Hearing on N.R.S. 116 Before the S. Comm. on Judiciary} (Feb. 3, 2009), 2009 Leg., 75th Sess. 32 (Nev. 2009).
\item \textsuperscript{116} \textit{Id.} at 35.
\end{itemize}
Fourth, pre-A.B. 125 Chapter 40 made business for contractors more difficult because the high risk of litigation increased the difficulty in finding affordable general liability insurance. In 2006, it was estimated that Chapter 40 increased the average cost for insurance by $8,500 per home.117 Indeed, although Nevada’s insurance rates are about 85 percent of California’s, other similarly situated states, such as Texas, have insurance rates at half of California’s rates, thus indicating that Nevada’s insurance rates are significantly above similarly situated states.118 This is amazing considering that construction defect claims in Nevada outnumber claims in California119 and further demonstrates that construction-defect laws are causing an increase in contractor insurance.120 Since the 2007 housing peak, Nevada’s home closings have fallen dramatically, but its construction defect claims have skyrocketed, likely pushing insurance rates even higher for contractors and subcontractors.121

Fifth, even if a case was settled, the construction defects were not being fixed. Money was handed to the homeowner and the defect remained uncorrected. The Coalition for Fairness in Construction, a homebuilder trade industry group, provided several examples where construction defect cases were settled and money was provided for repairs for the alleged defects, but no building permits were ever pulled, which strongly suggests that the alleged defects were never corrected.122 In an accounting of Chapter 40 cases since the right to repair was enacted in 2003 until 2009, the majority of cases had no repairs performed,

118 BROWN & KENNELLY, supra note 2.
119 Id. at 17–18.
120 Id. at Executive Summary.
121 Id. at 17–18. The report states that while Nevada’s home closings have fallen 86 percent since 2007, its settlement costs on defect claims have risen by 80 percent. Id. at 17. California, in comparison, has seen its closings fall by 87 percent, but its settlement costs on construction defect claims have remained relatively flat. Id. at 18; see also id. at 18–19 (showing that while the construction defect claims per closing has remained well below 0.20 for all states, in Nevada, the ratio has skyrocketed from a similar rate to that of all other states to just under 1.40 construction defect claims per closing).
122 See generally COAL. FOR FAIRNESS IN CONST., LEGISLATIVE BRIEFING BOOK 8 (attached as Exhibit D to Hearing on S.B. 86 Before the S. Comm. on Judiciary (Mar. 4, 2009), 2009 Leg., 75th Sess. (Nev. 2009)). The Coalition alleges that Case Nos. 1, 2, 3, and 4 did not have any building permits pulled after settlement to correct the alleged constructional defects. However, in at least one instance, other permits have been pulled. Over 500 homes were included in those four cases.
and a minority had partial repairs performed.\(^{123}\) Sometimes, subcontractors just did not have the time to repair all of the homes within the statutory time period.\(^{124}\)

Sixth, the large upfront costs for complying with Chapter 40 may have precluded or discouraged settlement.\(^{125}\) In one situation, plaintiffs spent over $850,000 in expert witnesses in the preliminary stages.\(^{126}\) Defense counsel felt the need to hire rebuttal experts, and the combination of spending by both sides made litigation more likely.\(^{127}\)

These problems combined into a perfect storm of corruption, conspiracy, and fraud, known as the HOA construction defect fraud scandal.\(^{128}\) It began with a construction-company owner named Leon Benzer. Benzer bought ownership interests in condominium developments and then put his friends and cronies up for election to the HOA board. After being elected, the Benzer-controlled HOA board started a construction-defect lawsuit. The attorneys hired were associated with Benzer, and Benzer’s company would receive the repair contracts. Both Benzer and his handpicked attorneys received illegal kickbacks.\(^{129}\) After indictments, four members of the conspiracy died by suicide.\(^{130}\) Benzer pled guilty to the charges on January 23, 2015\(^{131}\) and was sentenced to over fifteen years in prison.\(^{132}\) It is estimated that he embezzled over $8 million in this scheme.\(^{133}\)

\(^{123}\) See generally NEV. JUSTICE ASS’N, POST “RIGHT TO REPAIR” (2003) HISTORY OF NRS 40.600 ET. SEQ. NOTICES OF CONSTRUCTION DEFECTS (attached as Exhibit D to Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. (Nev. 2009)) (stating that out of 104 known construction defect cases, twenty-eight elected to partially repair, nine elected to repair, and sixty-seven elected not to repair).

\(^{124}\) Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. 19 (Nev. 2009).

\(^{125}\) Letter from Michael D. Hoy to Judiciary Subcomm. on Constr. Defects (Mar. 3, 2009) (attached as Exhibit C to Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 4, 2009), 2009 Leg., 75th Sess. (Nev. 2009)).

\(^{126}\) Id.

\(^{127}\) Id.

\(^{128}\) Steve Green, HOA Scandal Involving Millions of Dollars and Thousands of Homes Cuts Wide Swath Across Las Vegas Valley, VEGAS INC. (June 3, 2012, 2:00 AM), http://www.vegasinc.com/business/tourism/2012/jun/03/hoa-scandal-involving-millions-dollars-and-thousan/ [https://perma.cc/4W3A-MXMN]; see also Coolican, supra note 89.

\(^{129}\) Green, supra note 128.

\(^{130}\) Id.


\(^{133}\) German, supra note 131.
2. What Was Right with Chapter 40 Pre-A.B. 125

However, to portray Pre-A.B. 125 Chapter 40 as an unusable mess is not accurate either. Chapter 40 was enacted because of shoddy construction work and contractors not standing by their product. Homeowners who requested contractors to fix constructional defects were ignored.\(^\text{134}\) As a result, they turned to attorneys, who are able to get contractors to make or pay for repairs.\(^\text{135}\) Advocates believed that Chapter 40 deterred litigation, rather than encouraged it, since the recovery of attorneys’ fees was automatic, which provided an incentive for contractors and subcontractors to settle.\(^\text{136}\) Advocates further contended that, because Chapter 40 gave contractors and subcontractors the right to inspect and repair defects, it encouraged them to do so. It was only after a contractor or subcontractor failed to respond or failed to make repairs that litigation was threatened.\(^\text{137}\) If a defect was frivolous, the subcontractor or contractor could refuse to repair and put the claimant on notice.\(^\text{138}\)

In many cases, Chapter 40 functioned as intended. In one case, a homeowner found that his house was installed with defective pipes.\(^\text{139}\) His case dragged on for four-and-a-half years and repairs cost over $19,000, but he was eventually fully compensated.\(^\text{140}\) In another case, an attorney invoked Chapter 40 after his house started settling due to improper grading or foundation work.\(^\text{141}\) His custom house was built for $500,000, but the cost to shore the foundation was an additional $400,000.\(^\text{142}\) If he had been unable to recover attorneys’ fees, he would have had to pay $133,000 out of pocket, a very difficult sum for most individuals to pay.\(^\text{143}\) In another example, a homeowner noticed that the stucco was defective within two months of moving into a new house.\(^\text{144}\) After waiting six years to have

\(^{134}\) See e.g., Ted Duzan, Testimony at the Subcommittee of the Senate Committee on Judiciary (Mar. 11, 2009) (attached as Exhibit E to Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 11, 2009), 2009 Leg., 75th Sess. (Nev. 2009)); Art Hoage, Testimony at the Subcommittee of the Senate Committee on Judiciary (Mar. 11, 2009) (attached as Exhibit F to Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 11, 2009), 2009 Leg., 75th Sess. (Nev. 2009)).

\(^{135}\) See e.g., sources cited supra note 134.

\(^{136}\) NEV. JUSTICE ASS’N, NRS CHAPTER 40 WORKS 8 (attached as Exhibit C to Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 11, 2009), 2009 Leg., 75th Sess. (Nev. 2009)).

\(^{137}\) See id. at 1.

\(^{138}\) See id. at 8.


\(^{140}\) Id. at 14.

\(^{141}\) Id. at 14–15.

\(^{142}\) Id.

\(^{143}\) Id. at 15.

\(^{144}\) Id.
the defect corrected, the homeowner eventually had to sue the contractor under Chapter 40.\textsuperscript{145}

\section{Actual and Suggested Revisions to Chapter 40}

Chapter 40 was significantly revised in 2003 when the right to repair clause was added. Numerous amendments were also proposed, including the elimination of the automatic recovery of attorneys’ fees, changing the definition of construction defect, shortening the statute of limitations, and limiting broad indemnification provisions found in construction contracts. These proposed revisions failed to pass\textsuperscript{146} until the Nevada legislature passed A.B. 125 in 2015, a comprehensive reform bill that addresses most of the failings of Chapter 40.\textsuperscript{147}

\subsection{2003 Revisions to Chapter 40}

The most significant revision to Nevada’s Chapter 40 laws, prior to A.B. 125, was the 2003 addition of the right to repair for complex cases.\textsuperscript{148} Senate Bill (S.B.) 241 amended Chapter 40 in several important aspects. First, the amendment gave ninety days for the contractor to respond to the homeowner’s notice of defect before a lawsuit could be filed.\textsuperscript{149} The response permitted the contractor to elect to repair the defect rather than allowing the controversy to proceed immediately to litigation.\textsuperscript{150} Should the contractor elect to not repair the defect, the contractor could propose a settlement or disclaim the defect altogether.\textsuperscript{151} If the contractor failed to respond or disclaimed the defect, then litigation could proceed.\textsuperscript{152}

Second, the contractor had to inform its subcontractors within thirty days that it had received a construction-defect notice or forfeit the right to file a third-party claim against a non-notified subcontractor.\textsuperscript{153} After receiving this notice, subcontractors had the opportunity to inspect the alleged defects.\textsuperscript{154} When the inspections were finished, the subcontractor could then provide dates and times

\begin{footnotes}
\item[145] \textit{Id.}
\item[146] I include previous proposed revisions to document the long history of attempted revisions. I believe that such an accounting is necessary to show the considerable effort expended to reform Chapter 40, which cumulated in the passing of A.B. 125.
\item[147] Assemb. B. 125, 2015 Leg., 78th Sess. (Nev. 2015).
\item[149] \textit{Id.} at 2037; \textit{see also} \textit{Id.} at 2039.
\item[150] \textit{Id.} at 2037.
\item[151] \textit{Id.}
\item[152] \textit{Id.} at 2035.
\item[153] \textit{Id.} at 2035–36.
\item[154] \textit{Id.} at 2036.
\end{footnotes}
that the subcontractor would be available to repair the work.\(^{155}\) If the subcontractor repaired the defects, then the contractor was prohibited from pursuing damages from the subcontractor.\(^{156}\)

Critically, the 2003 revision also changed the definition of construction defect under N.R.S. 40.615, which was the standard until it was revised by A.B. 125.\(^{157}\) Under the revised definition, a construction defect was defined as “a defect in design, construction, manufacture, repair or landscaping” when building a new residence or renovating an existing residence, and

1. Which is done in violation of law, including, without limitation, in violation of local codes or ordinances;
2. Which proximately causes physical damage to the residence, . . .
3. Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry . . . or
4. Which presents an unreasonable risk of injury to a person or property.\(^{158}\)

The effect of this disjunctive test was that trivial and harmless defects were covered by Chapter 40.\(^{159}\)

2. 10 Years of Failed Attempts to Revise Chapter 40

The Nevada Legislature created a special subcommittee in 2009 to address the issue of construction defects.\(^{160}\) Several bills were proposed, but they ultimately failed to pass.\(^{161}\) S.B. 349 would have revised Chapter 40 in several important ways. First, construction defect would have been defined as:

\(1\) [a defect] which presents an unreasonable risk of injury to a person or property; or \(2\) [a defect] which violates the law, unless the workmanship exceeds the standards set forth in any applicable codes and ordinances, which causes physical damages and which is not completed in a good and workmanlike manner.\(^{162}\)

\(155\) Id.
\(156\) Id. However, if the repair fails, then the contractor may pursue damages against the subcontractor. Id. at 2036–37.
\(157\) Id. at 2041.
\(158\) Id. (emphasis added). The “or” makes the test disjunctive, and thus a broad array of issues that would otherwise be considered trivial were now defined as construction defects because the work violated a building code or wasn’t performed to manufacturer’s recommendations.
\(160\) Coolican, supra note 89.
\(161\) See e.g., S.B. 349, 2009 Leg., 75th Sess. (Nev. 2009); S.B. 337, 2009 Leg., 75th Sess. (Nev. 2009). S.B. 349 was introduced on Mar. 23, 2009 and passed the Senate 19-1 on April 16. It died in Committee in the Assembly. S.B. 337 was introduced on Apr. 1, 2009 and passed the Nevada Senate 20-0 on April 15. It died in Committee in the Assembly.
\(162\) S.B. 349 (emphasis added).
Second, the recovery of attorneys’ fees provision would have been removed.\textsuperscript{163} Third, S.B. 349 would have required plaintiffs’ attorneys to obtain an affidavit from their clients, stating that the clients had been informed of “certain provisions relating to constructional defects” pertaining to Chapter 40.\textsuperscript{164} S.B. 337 would have shortened the statute of limitations by as much as 70 percent in some instances.\textsuperscript{165} The changes in these two bills would have left Chapter 40 a shadow of its former self. There was widespread criticism that the proposed changes were not intended to improve the law, but rather were an outright gutting of the law.\textsuperscript{166} One construction defect lawyer said that the aim of construction firms was not to revise Chapter 40 and make it better, but rather to take the law back to a time when homeowners “had no rights against faulty construction.”\textsuperscript{167}

In 2013, the 77th Session of the Nevada Legislature brought forth revisions similar to the 2009 proposals, which would have both restricted and expanded construction-defect actions, but they were met with the same political fights.\textsuperscript{168} A.B. 107 would have eliminated the fee-shifting provision.\textsuperscript{169} A.B. 184 combined the previous session’s S.B. 349 and S.B. 337, specifically by redefining what constituted a defect, as well as eliminating attorneys’ fees, shortening the statute of limitations, and requiring claimants to sign an affidavit acknowledging that they had to disclose to future buyers that the home was subject to a construction

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\end{itemize}
defect action.\textsuperscript{170} A.B. 504 sought to limit indemnification from a “subcontractor, supplier, design professional or any other person” performing work on a project for the “sole negligence or willful misconduct” of the general contractor or developer, unless that indemnification was expressly stated in the contract or subcontract.\textsuperscript{171} A.B. 367 sought to eliminate insurance indemnification altogether.\textsuperscript{172} S.B. 417 would have expanded construction defect lawsuits to include manufactures, suppliers, and distributors.\textsuperscript{173} However, none of these proposed revisions passed the legislature.

II. DISCUSSION OF CHAPTER 40 REVISIONS, ADVANTAGES, PROBLEMS, AND POTENTIAL SOLUTIONS

Recommendations for fixing Nevada’s construction defect laws generally have fallen within three categories. The first recommendation has been to raise the bar of what constitutes a construction defect sufficiently to discourage litigation of harmless defects and technical code violations or to eliminate incentives to for homeowners to sue rather than fix the defect. This recommendation includes changing the definition of construction defect, removing the automatic recovery of attorneys’ fees, and eliminating universal indemnification provisions in construction contracts, all of which were enacted in A.B. 125.\textsuperscript{174} The second recommendation has been to facilitate the right to repair. Specific recommendations include increasing the specificity required when stating a defect, involving the Contractor’s Board, eliminating extrapolated defects and common notices, and requiring the homeowner to submit his alleged construction defects to his warranty company before starting the Chapter 40 process. These recommendations were partially adopted by A.B. 125; however, for reasons discussed below, the proposal regarding the involvement of the Contractor’s Board was not considered.\textsuperscript{175} The third recommendation is to implement technical changes to Chapter 40 that make it perform more efficiently or that align it more towards its policy goals. These recommendations include requiring mandatory dismissal of a


\textsuperscript{171} Assemb. B. 504, 2013 Leg., 77th Sess. § 1 (Nev. 2013). This bill also sought to redefine what constituted a construction defect and would have required the claimant to sign an affidavit acknowledging that she or he had to disclose that his or her home was involved in a construction defect claim. \textit{Id.} §§ 3, 5.

\textsuperscript{172} Assemb. B. 367, 2013 Leg., 77th Sess. § 1 (Nev. 2013). This bill sought elimination of subcontractor indemnification of general contractors or developers in order to eliminate the large pool of insurance policies that the general contractor or developer may use when defending itself from a construction defect action. \textit{Id.} A.B. 367 would have also made cross claims between a general contractor or developer and the subcontractor or supplier subject not to Chapter 40, but rather subject to the Nevada Rules of Civil Procedure. \textit{Id.}


\textsuperscript{174} See generally Assemb. B. 125, 2015 Leg., 78th Sess. (Nev. 2015).

\textsuperscript{175} \textit{Id.} § 8.
claim if the Chapter 40 process is not complete at the time of filing the complaint and requiring proof of work early in the process. These recommendations were not adopted under A.B. 125. Of course, it is also possible to completely repeal Chapter 40. In this section, I examine each of the enacted or proposed revisions in detail and discuss the strengths and weaknesses of each.

A. Significant Changes to Chapter 40 Under A.B. 125

Signed into law on February 24, 2015, A.B. 125 significantly revised Chapter 40 in several important ways. Beginning, the bill changed what litigation costs could be recovered by eliminating the automatic recovery of attorneys’ fees. The definition of construction defect is changed as well. Rather than the four-part disjunctive test discussed above, the test is now whether a defect “presents an unreasonable risk of injury to a person or property[,]” or “is not completed in a good and workmanlike manner and proximately causes physical damage to the residence.” Thus, harmless defects or technical code violations are no longer actionable under Chapter 40. Further, the statutes of limitations have been changed to a singular six-year statute of repose, which starts to run either upon substantial completion or issuance of the certificate of occupancy.

Offers of judgments may now be made before litigation is filed. Additionally, A.B. 125 targets broad contractual indemnification clauses by prohibiting broad indemnification provisions in construction contracts, unless the subcontractor’s work was responsible for the damage. Notably, if another subcontractor’s work was responsible for the damage.

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176 Id. § 11.
177 See Assemb. B. 125.
178 Id.
179 Id. § 14.
180 Id. § 6.
181 Offers would constitute a harmless defect will probably have to be defined in litigation. For example, the Americans with Disabilities Act of 1990 (ADA) requires that concrete sidewalk panels have no more than a half-inch vertical displacement. DEP’T OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN § 303.3 (Sept. 15, 2010), http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm [https://perma.cc/NRX4-UQ56]. See 36 C.F.R. § 1191.1 (2015) for the authorizing regulations. If the displacement was more than a half-inch, whether the additional displacement constituted an unreasonable risk would need to be established by expert witnesses and ruled on by the court.
182 Assemb. B. 125 § 16. Statutes of repose are stricter than statutes of limitation. With a statute of repose, a plaintiff is barred from bringing suit after a defined time period from an event, regardless if the injury has occurred. Statute of Repose, BLACK’S LAW DICTIONARY (9th ed. 2009). In other words, while a statute of limitations runs from the date the injury occurs; a statute of repose runs from another specified date. Statute of Limitations, BLACK’S LAW DICTIONARY (9th ed. 2009).
183 See Assemb. B. 125 § 3.
184 Id. § 2.
185 Id.
tor’s work caused the damage, then the first subcontractor’s indemnification provision is voided under Nevada law.\textsuperscript{186} Furthermore, the standing and notification requirements for Chapter 40 are changed. HOAs lack standing to bring lawsuits on behalf of owners unless the claim constitutes only common elements.\textsuperscript{187} A.B. 125 prohibits even sending a Chapter 40 notice to the contractor until a homeowner submits the construction defect claim to the homeowner’s warranty company, and the warranty company subsequently rejects that claim.\textsuperscript{188}

When a Chapter 40 notice is sent, A.B. 125 raises the standard of specificity of defects from “reasonable detail” to “specific detail” for all defects, damage, and injuries.\textsuperscript{189} Similarly, A.B. 125 eliminates commonly situated construction defects, meaning that defects can no longer be extrapolated without physical inspection.\textsuperscript{190} When sending the notice, the claimant has to sign an affidavit stating that the defect and damage exists.\textsuperscript{191} When the contractor and/or the subcontractor conduct inspections, the expert (or a representative) who identified the defects, has to be present to identify the specific locations of the defects contained in the report.\textsuperscript{192}

1. The Definition of Construction Defect was Changed

A.B. 125 changed the definition of a construction defect to a defect “[w]hich presents an unreasonable risk of injury to a person or property; or [w]hich is not completed in a good and workmanlike manner and proximately causes physical damage to the residence[,]”\textsuperscript{193} It is easy to see why this change will reduce the amount of construction-defect claims. For example, many previous construction-defect claims involved trivial defects where construction did not meet code, such

\textsuperscript{186} Id. This point may be confusing, so an illustration may be helpful. Suppose there is a leaky water pipe. This leak clearly constitutes a construction defect under either the current definition or the proposed definition, and it is reasonable that the plumbing subcontractor would be identified. However, for this hypothetical, suppose the water-pipe leak was not caused by any product or workmanship by the plumber, but rather an errant screw by the drywall subcontractor. While an accident, this provision would mean that the plumbing subcontractor’s indemnification clause could not be invoked, but the drywall subcontractor’s indemnification clause could be.

\textsuperscript{187} Id. § 20. This means that HOAs would be barred from many types of construction defect actions. For example, an HOA would no longer be able to sue if all the windows were defective in a development of single-family homes, because windows would not be part of the common element; perhaps not even if all of the windows were a part of a condominium building. Instead, a defect would have to be a common element of the building or area of responsibility of the HOA, such as a roof on a condominium complex.

\textsuperscript{188} Id. § 14. The statute of limitations or repose would be tolled during this time frame. Id.

\textsuperscript{189} Id. § 8.

\textsuperscript{190} Id. This prevents the inspection of one house, for example, then extrapolating a discovered defect to all other houses in the same development.

\textsuperscript{191} Id.

\textsuperscript{192} Id. § 11.

\textsuperscript{193} Id. § 6 (emphasis added).
as a countertop not being exactly thirty-six inches in height. Under the new definition, because the countertop’s slight height variance does not constitute an unreasonable risk of injury to person or property and does not cause physical damage to the residence, it would not be considered an actionable defect under Chapter 40. This change in the definition of what constitutes an actionable construction defect will exclude many of the construction defects that are currently used as a basis to bring a Chapter 40 action and will thus reduce the number of Chapter 40 notices and actions brought to court.

However, what constitutes an “unreasonable risk to person or property” and what defects “proximately causes physical damage to the residence” will have to be defined by the courts. For example, cracks in drywall would be considered a defect under the previous N.R.S. definition of a construction defect, exposing the contractor and subcontractor to considerable liability. Under the revised definition, however, such cracks may not be considered construction defects. If the cracks occurred in a firewall, thus compromising the fire rating of the firewall, the cracks could constitute an unreasonable risk to person or property. However, because such cracks are cosmetic (in this hypothetical), they would not cause physical damage to the residence.

2. The Automatic Recovery of Attorneys’ Fees has been Eliminated

A.B. 125 also eliminated the automatic recovery of attorneys’ fees upon prevailing under Chapter 40. Recall that the automatic recovery of attorneys’ fees, coupled with the expansive definition of construction defect, all but guaranteed victory for construction-defect plaintiffs and a big payoff for plaintiffs’ attorneys, regardless of the level of harm or the trivial nature of the defect. The removal of the automatic recovery of attorneys’ fees eliminates that perverse incentive and will reduce frivolous construction defect lawsuits. Simply put, because the automatic recovery of attorneys’ fees is no longer a possibility and

194 See supra note 38.
195 The difference in height would, arguably, satisfy the “not completed in a good and workmanlike manner” element of the second prong. Assemb. B. 125 § 6. However, to avoid satisfaction of this prong, an architect could easily insert a tolerance provision into the building specifications. For example, in the plans, the architect could specify a countertop height of thirty-six inches, then in the specifications, state that all countertops must be built +/− ½ inch to the height from finished floor specified on the plans.
196 Cracks in the drywall are a violation of N.R.S. § 40.615(3) because the taping and mudding of the drywall joints should eliminate any drywall cracks. If cracks develop, it is usually because of poor workmanship. WORKMANSHIP STANDARDS FOR LICENSED CONTRACTORS, ARIZ. REGISTRAR OF CONTRACTORS 15 (June 2009), http://www.azroc.gov/acrobat/public/workmanship_standards.pdf [https://perma.cc/4BB5-8P78].
197 See example supra note 186.
199 Id.
most construction defect damages are relatively small (below $20,000), the cost of litigation will dwarf the amount of possible recovery, thus making it very difficult to justify construction-defect litigation.

However, elimination of the automatic recovery of attorneys’ fees does not mean that attorneys’ fees cannot be recovered. Parties may recover attorneys’ fees at the court’s discretion if the prevailing party has recovered less than $20,000. Parties may also recover attorneys’ fees if the claim or defense was baseless. Construction defect plaintiffs could use both provisions for small-dollar Chapter 40 suits. However, the risk is tremendous to both the plaintiff and the plaintiff’s attorney that they will not recover attorneys’ fees, and thus possible fee recovery is not likely to be a significant factor in future litigation consideration.

The danger exists that, by tightening the definition of construction defect and removing the automatic recovery of reasonable attorneys’ fees, Chapter 40 has become too strict to allow homeowners to bring any construction-defect action, thus removing the contractor’s incentive to repair. Simply put, without the automatic recovery of attorneys’ fees, contractors know that it is unlikely that any homeowner will risk considerable litigation costs that may be awarded at the court’s discretion, and homeowners will be forced to live with shoddy work. Time will tell if contractors and subcontractors will continue to repair their work, or if they will simply walk away because they know that the homeowner is unlikely to bring litigation due to certain exorbitant litigation costs.

3. Specificity is Now Required for Each Notice of Defect

One of the criticisms regarding the Pre-A.B. 125 Chapter 40 notification process was that construction defects could be extrapolated across plan, floor model, and development. Extrapolations occurred when one defect was discovered and it was reasonably believed that the defect occurred, or would occur, in similarly situated models and floor plans. This practice allowed for a Chapter 40 notice that could implicate numerous dwellings with construction defects without physical inspection. Rather than allowing a description of defects in “reasonable detail” (as under the old standard), A.B. 125 now requires a heightened

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202 The counter-argument to this possibility is simple. Contractors do not want to perform shoddy work; the contracting community is small and a contractor or subcontractor that continually performs deficient work will soon find itself without work, and out of business. However, the possibility that the lack of litigation will also factor into a contractor’s decision cannot be discounted.
standard of listing each defect in specific detail. This new standard eliminates extrapolation and guessing by requiring a physical inspection of each defect.

The benefits of a specific-detail standard are easy to see. First, it requires actually known defects to be listed on the notification. The practice of inspecting one residence and then extrapolating the defect to all residences, uninspected, is no longer allowed. Second, it facilitates the contractor’s right to repair by giving the contractor a list of defects that the contractor could easily identify, inspect, and repair. Requiring specificity and eliminating extrapolation allows the contractor, subcontractors, and their expert to examine each defect and eliminates the dilemma of whether to notify other similarly situated homeowners.

4. Each Homeowner Is Required to Comply with Chapter 40 Notifications Before Joining a Construction-Defect Action

As discussed above, the revisions to Chapter 40 under A.B. 125 require each homeowner to comply with Chapter 40 notifications. Under the old standard, a homeowner did not have to provide a Chapter 40 notice, allow the contractor to inspect the property, or give the contractor an opportunity to repair the alleged defect if certain conditions were met: (1) the homeowner’s neighbor was a claimant; (2) the neighbor complied with Chapter 40; and (3) the neighbor extrapolated defects that could or could not affect the rest of the development. Now each claimant is required to individually comply with the Chapter 40 process before beginning litigation. Further, A.B. 125 eliminated common notices, thus removing the dilemma for contractors to determine if they should notify everyone in the development regarding a potential defect that may or may not exist or to not provide notification and risk losing the right to repair.

The advantage of this revision is that it will eliminate the contractor’s dilemma regarding notification to properties that have not alleged the existence of defects. Further, as each structure and dwelling is unique, determining the existence of construction defect should be an individual investigation and examination. Requiring each dwelling to go through the Chapter 40 process upholds the contractor’s right to repair and furthers the policy of preferring fixing the construction defect over litigation. Additionally, these requirements will save contractors and subcontractors time, effort, and expense due to: (1) less time being required for locating and examining alleged defects, and (2) the elimination of the risk of missing defects in other houses not currently involved in the Chapter 40 notice or litigation. Finally, this revision does not bar any potential claimant from Chapter 40 relief. It simply prevents guessing if a construction defect is

204 See discussion supra Part I.B., on the dilemma contractors faced when choosing whether or not to notify homeowners not a party to a Chapter 40 action; but by not notifying those non-party homeowners, contractors and subcontractors waived their right to repair.
206 Assemb. B. 125 § 8.
present on an uninspected property. Since this provision requires each homeowner to go through the Chapter 40 pre-litigation notice and inspection process, and preserves the contractor’s right to repair, this revision will eliminate commonly-situated defects, thus reducing litigation.

5. *Broad Indemnity Agreements Are Prohibited in Construction Contracts*

One of the reasons that subcontractors were brought into construction defect litigation even though their work was not alleged to be defective was due to contractual indemnity provisions that required defense of the contractor in its construction subcontracts. Such indemnification requirements incentivized the contractor to involve as many subcontractors as possible at the beginning of the Chapter 40 process. A.B. 125 now prohibits contractors from using universal indemnification clauses to require subcontractors to defend them, regardless of if the subcontractor’s work was implicated as defective.207 A subcontractor only has to indemnify the contractor if the subcontractor’s work is implicated and another party did not alter its work.208

Eliminating broad indemnifications requirements, which mandate that contractors involve all subcontractors in litigation, will result in fewer innocent subcontractors being dragged into the Chapter 40 process. Indeed, one purpose of Chapter 40 is to ensure that a contractor and its subcontractors stand by their work after the project has been completed. It is counterproductive to have a system where subcontractors are brought into the action solely because of a broad indemnification provision in a subcontract. Prohibiting broad indemnification clauses unless the subcontractor’s work was actually implicated will limit the incentive of contractors to involve subcontractors, unless that subcontractor’s work was alleged as defective. However, there is a risk that contractors will continue to notify subcontractors whose work is not alleged to be defective because contractors may not want to risk failing to notify a subcontractor, then later find that the omitted subcontractor is the source of the defective work, then show good cause as to why the omitted subcontractor should be added as a party to the litigation. Simply put, it may be safer for contractors to continue to name every possible subcontractor and let the courts figure out who is, and who is not, a proper party than to run the risk of inadvertently leaving a subcontractor off of a notice.

207 *Id.* § 2.
208 *Id.*
6. Claimants Are Required to First Submit Defects to Homeowner’s Warranty for Repair

A.B. 125 changes how the Chapter 40 notification process occurs and preserves the right to repair. First, A.B. 125 requires that a homeowner submit all alleged defects to the homeowner’s warranty company. The warranty company must then reject that claim before the homeowner may send a Chapter 40 notice. The notice may only include the claims the warranty company rejected. This revision furthers the policy goal of fixing construction defects rather than litigating them. According to a survey of homeowners involved in construction-defect litigation, half of them did not know they had warranty coverage for their home, and two-thirds did not contact the builder about the alleged defects. Requiring the homeowner to determine if the alleged defect is covered by a warranty and having the alleged defect rejected by the warranty company before sending a Chapter 40 notice is a prudent step in reducing litigation, increasing the correction of construction defects, and furthering the policy goal of fixing defects.

7. The Statute of Limitations and Repose Have Been Shortened

The old statute of limitations for a Chapter 40 action varied between six years to twelve years after substantial completion, depending on the type of defect and when it was discovered. A.B. 125 shortened these statutes of limitations to six years from the notice of completion, regardless of the type of defect or deficiency. However, there are certain circumstances where the statutes of repose may be tolled. The first is when the homeowner submits a construction defect claim to his warranty company; then the statutes of repose are tolled while the warranty company makes a decision whether the defects are covered.

209 Id. § 14.
210 Id.
211 Id.
213 See NEV. REV. STAT. §§ 11.203–11.205 (2013). N.R.S. § 11.203 established a ten-year statute of limitations for any construction defect, unless the injury occurred in the tenth year; then, the claimant had two additional years to file a claim. N.R.S. § 11.204 established an eight-year statute of limitations for any latent construction defect, unless the defect was discovered in the eighth year; then the claimant had two additional years to file a claim. N.R.S. § 11.205 established a six-year statute of limitations for any readily discoverable deficiency in the design, supervision, or construction of a project, unless the deficiency was discovered in the sixth year; then the claimant had two additional years to file a claim.
214 Assemb. B. 125 § 17.
215 Id. § 14.
statutes are additionally tolled for one year after notice of the claim is given.\textsuperscript{216} Further, the statutes of limitation and repose may be tolled for longer than the year after notice is given if the homeowner shows good cause why they should be tolled.\textsuperscript{217}

However, outside of these exceptions, the six-year statute of repose after substantial completion is absolute.\textsuperscript{218} This may pose several problems. First, a defect may take more than six years to manifest itself. In such cases, the statutes of repose would bar the homeowner from bringing a Chapter 40 action in court. There does not appear to be a discovery-rule exception to the revised statutes of repose.\textsuperscript{219} This provision may lead to severe consequences if materials are defective and those defects do not manifest themselves until the six-year statute of repose has run. For example, in the Kitec cases, where the plumbing in numerous homes was found to be defective, some homes would have been covered under the new Chapter 40 and others not, even if all the homes suffered the same defective plumbing pipes.\textsuperscript{220}

B. Potential Future Revisions to Chapter 40

Overall, A.B. 125 appears to have done an excellent job in addressing most of Chapter 40’s shortcomings. However, a few additional changes would further improve Nevada’s construction-defect statutes. This section discusses potential changes that should be considered in upcoming legislative sessions to address some of A.B. 125’s shortcomings, anticipated problems, and other unresolved issues. These issues include: (1) reinstating the automatic recovery of attorneys’ fees when the damages are less than $25,000; (2) designating a neutral governmental agency that would determine what constitutes a construction defect under Chapter 40; (3) requiring state district courts to dismiss any action brought under Chapter 40 where the notice requirements have not been complied with; and (4) excluding any expert witness report where the cited construction standards are not the same construction standards as when the building was constructed.

\textsuperscript{216} Id. § 16. However, it is unclear whether that notice is to the warranty company, or the actual Chapter 40 notice to contractors, subcontractors, and designers.

\textsuperscript{217} Id.

\textsuperscript{218} Id. § 17.

\textsuperscript{219} The discovery rule states that the statute of limitations is tolled until the facts of the injury are discovered by the homeowner. See Siragusa v. Brown, 971 P.2d 801, 806–07 (Nev. 1998) (“The rationale behind the discovery rule is that the policies served by statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries . . . .”) (citations omitted). However, latent defects are specifically included in the revised statutes of repose in A.B. 125. See Assemb. B. 125 §§ 3, 16. Therefore, presumably, the discovery rule would not apply, setting a hard limit of six years from substantial completion for the homeowner to send his notice, regardless whether or not the defect has actually been or should have been discovered.

\textsuperscript{220} See infra Part II.B.5, for a further explanation.
1. Allow the Automatic Recovery of Attorneys’ Fees If the Judgment Is Below a Specific Dollar Amount

A.B. 125 removed the automatic recovery of attorneys’ fees. The argument against removing the automatic recovery of attorneys’ fees is simple. Most constructional defects are of such a low dollar value that litigation costs will quickly exceed repair costs, thus leaving no remedy to the homeowner. Without the fee-shifting provision, bringing a construction-defect suit becomes much more difficult—perhaps prohibitively so. It is the ability to recover attorneys’ fees that gave Chapter 40 teeth, providing a strong motivation for a contractor or subcontractor to inspect or repair work upon notice and to not ignore that notice. By removing the automatic recovery of attorneys’ fees, the Nevada Legislature may have given contractors an easy out; if they refuse to repair the defect, it is now extremely unlikely that homeowners will start a Chapter 40 action because attorneys’ fees will be in the court’s discretion and thus variable.

Some would argue that it was the automatic recovery of attorneys’ fees that led to the problem of excessive construction litigation. However, the automatic recovery was not the sole reason for the explosion in construction defect litigation, as the loose definition of what constituted an actionable construction defect was also a contributing factor. The new construction defect standard is significantly tighter; allowing the automatic recovery of attorneys’ fees will, therefore, not effectively undermine A.B. 125’s goals. Instead, the automatic award would provide a counterbalance for homeowners who have a construction defect that requires more money than the homeowner is able to afford, but is still not adequate to justify the litigation expenses necessary to prosecute a Chapter 40 action.

An alternative proposal would be to allow the automatic recovery of attorneys’ fees for successful actions under $25,000, and recovery at the trial court’s discretion for successful actions over $25,000, if the court finds that the burden of attorneys’ fees would prohibit the homeowner from making repairs to the defects. This would ensure that more severe construction-defect actions, such as subsidence, are included. This option may be attractive to those who are concerned about balancing the need to ensure that the average homeowner has the practical option to bring a Chapter 40 action with the concern that if automatic recovery of attorneys’ fees is reinstated, construction defect litigation would continue to explode.

There are several problems with the removal of attorneys’ fees after repairs have been performed. First, who would determine when a repair is adequately performed? Perhaps the Contractor’s Board would be able to provide the expertise and inspection services. Second, what would happen if a repair was performed and was found to be defective years later? Would the previously accrued

221 See supra Part II.A.2.
222 NEV. REV. STAT. § 18.010 (2013).
223 See supra Part II.A.
attorneys’ fees be reinstated? Stating that no additional attorneys’ fees may be obtained once repairs are completed may alleviate the problem. This would allow for recovery of previous attorneys’ fees but would prohibit additional attorney fees from accruing, thus providing no additional incentive to keep the contractor or subcontractor in litigation. The contractor could buy his way out of litigation, leaving plaintiffs with a repaired home, and plaintiff’s attorneys would be fully compensated.

2. Shift Responsibility to the Contractor’s Board or Building Department

Another suggestion is to use the Contractor’s Board as an independent third-party to determine if a construction defect actually exists and if it meets the legal definition of a construction defect under Chapter 40, and if so, to determine the responsible party. The argument is that since the Contractor’s Board already controls the contracting licenses, they should be central to any defect claims. Presumably, after sending a Chapter 40 notice, the claimant would either have the opportunity to or be required to notify the Board regarding all the alleged defects. The Board would then function as a preliminary reviewing body, sending out an independent inspector to determine: (1) if the alleged defect is actually a construction defect under Chapter 40; and (2) which trade is implicated in the defective work. If this step was mandatory prior to filing a construction-defect suit, and if third party complaints where the contractor files suit against the subcontractor were dependent upon the Board inspector’s findings, this would become a powerful tool in reducing the shotgun approach of implicating every subcontractor. Further, this provision could be drafted to allow the contractor or subcontractors to request an advisory opinion from the Contractor’s Board if their work was deficient. It may present a deterrent effect as well; if the Board discovers a pattern of defective work being performed by a contractor, the Board may order the contractor to fix the work or could revoke the contractor’s license. The Board could be a more effective deterrent than litigation because the Board could revoke a contractor’s license.

\[\text{224 Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 4, 2009), 2009 Leg., 75th Sess. 15 (Nev. 2009).} \]
\[\text{225 Id. at 4.} \]
\[\text{226 I imagine that Nevada would adopt something similar to Texas’ Residential Construction Committee. See supra Part I.A.} \]
\[\text{227 Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 4, 2009), 2009 Leg., 75th Sess. 15 (Nev. 2009).} \]
\[\text{228 Id.} \]
\[\text{229 See Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. 9 (Nev. 2009).} \]
\[\text{230 Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 4, 2009), 2009 Leg., 75th Sess. 15–16 (Nev. 2009).} \]
There may be several problems with involving the Contractor’s Board so thoroughly. First, the power to control which subcontractors may be brought into a lawsuit may invest the Board with too much power. Perhaps a better method would be to create a rebuttable presumption based upon evidence that a subcontractor is predominantly responsible when the Board inspection is completed and the findings are released. Second, the Board would need a considerable increase in funding to be able to provide inspections and issue reports. It is unclear from where this funding would come. Third, the Board has been subject to the criticism of industry protection in the past; such a charge may be leveled in the future. Finally, it is notable that Texas attempted to perform a similar revision, but it abandoned the experiment within six years. Such a result does not bode well for similar proposals in Nevada.

A related proposal would be to make the individual building departments liable for improperly built projects. Building departments usually review the plans, approve the plans and construction type, and inspect each project while under construction. Thus, building departments would be the natural choice for preventing construction defects, as they are involved in design approval and construction-permit inspections. However, advocates do not fully expound on how such a system would be paid for, the extent of liability the building departments would have—building departments disclaim any liability for missed inspections or constructional defects—or exactly how such a system would work. A clear drawback of this system is that the costs would be distributed to taxpayers and not directed at the party that performed the defective work.

3. Require the Mandatory Dismissal of a Chapter 40 Action If the Notice is Deficient

Some plaintiff’s lawyers send the Chapter 40 notice and initiate a lawsuit at the same time. The purpose of doing so is to accrue pre-judgment interest while

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231 See generally id. at 16.
232 See generally Hearing on S.B. 395 Before the S. Comm. on Judiciary (May 10, 1995), 1995 Leg., 68th Sess. (Nev. 1995) (recording Ms. Cherie Johnson’s testimony stating that the Contractor’s Board was protecting the contractor).
233 See generally supra Part I.A.
236 NEV. REV. STAT. § 41.033 (2015).
the Chapter 40 process progresses.\textsuperscript{238} District courts generally do not dismiss the lawsuit, but rather issue orders to stay the action until the Chapter 40 process is completed.\textsuperscript{239} Requiring a Chapter 40 complaint to include an affidavit that attests that the statutory process has been complied with would avoid the automatic filing of lawsuits.\textsuperscript{240} Similarly, Chapter 40 could be amended so that pre-judgment interest could not begin to accrue until the day after the Chapter 40 notification process has been satisfied. This change would be procedural and would simply require that the Chapter 40 process be adhered to prior to filing a lawsuit.

4. \textit{Require Proper Construction Standard in Expert Witness Reports}

One of the problems with expert reports is that experts sometimes use the wrong construction codes when inspecting dwellings for defects.\textsuperscript{241} Many times, the construction codes referenced by experts on the construction-deficiency reports are not the same codes that were in force at the time of the construction of the building.\textsuperscript{242} This may lead to a situation where a defect under a newer code was not a defect under the old code. A dwelling should be evaluated based upon the construction codes that were in effect at the time the dwelling was built, not when the construction defect inspection was performed. The solution would be to require the court to exclude any expert witness report that evaluates the dwelling with an incorrect code. Such a change would be simple to make and would eliminate alleged defects that were not actually defects at the time the dwelling was built.

5. \textit{Reinstate the Discovery Rule, Which Would Toll the Statute of Repose}

As discussed above, other than a few narrow exceptions, a notice must be sent within six years of the notice of completion; otherwise, a Chapter 40 action is barred.\textsuperscript{243} This creates an artificial restriction where latent defects, including manufacturers defects in products and materials, may not be covered if it takes those products more than six years to manifest. While it makes sense to have a statute of limitations or repose, six years is too short. In the Kitec case, defective plumbing pipe was installed in over 30,000 Las Vegas homes from 1995 until 2005.\textsuperscript{244} The first lawsuit that this author was able to find was filed in 2005.\textsuperscript{245}

\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.}
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Id. at 16.}
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} See supra Part II.A.7; Assemb. B. 125, 2015 Leg., 78th Sess. § 17 (Nev. 2015).

Assuming this is the earliest case filed, this means that no home that was completed before January 4, 1999, would have been covered under Chapter 40. This is a clear indication that the discovery rule needs to be reinstated for Chapter 40 actions. The statute should be amended to allow a homeowner six months to file a claim with his home-warranty company if discovery of a defect occurred after the six-year statute of repose had run, but prior to twelve years after the date of substantial completion. If the home warranty company refuses to correct the problem, then the homeowner should be allowed to send a Chapter 40 notice and pursue litigation, if necessary.

C. Complete Repeal of N.R.S. Chapter 40

Finally, the last remaining option to address the issues caused by Chapter 40 would be a complete repeal of N.R.S. Chapter 40. This would restore the traditional causes of action of negligence and negligence per se with no need for a right to repair, right of notification, shotgun notices, or compliance with any other of the current provisions required to get a construction-defect action into court. Because the economic-loss doctrine would be reinstated, homeowners would not be able to recover for negligent workmanship absent actual bodily injury or physical damage to property. In short, the only remedy to homeowners would be recovery under breach of contract; tort claims (such as negligence) and associated damages would not be available. There would be no incentive to repair defective construction work. Total repeal would simply restore the problems that existed prior to the original 1995 enactment of the Chapter 40 provisions. This option should only be considered if the results of Chapter 40 are so terrible that no law is better than Chapter 40. Despite all the problems that Chapter 40 possesses, this does not appear to be the case.

CONCLUSION

Nevada’s construction-defect laws have been repaired by A.B. 125, but they remain under construction. There have been clear abuses of Chapter 40, and construction defects continue to go uncorrected, even after a monetary settlement. Costs for contractors and subcontractors have skyrocketed, and both have been improperly implicated in construction-defect actions. The amount of new construction defect claims has been staggering, clogging the courts and putting an unfair burden on contractors and subcontractors. However, Chapter 40 is not a parade of horribles. It has assets and deserves to be fixed rather than thrown out.

246 JAMES WADHAMS & JONES VARGAS, COAL. FOR FAIRNESS IN CONSTR., AMENDMENT TO NRS 40.600 ET SEQ., (Mar. 11, 2009) (attached as Exhibit I to Hearing on N.R.S. 40 Before the Subcomm. of S. Comm. on Judiciary (Mar. 11, 2009), 2009 Leg., 75th Sess. (Nev. 2009)).
247 Hearing on N.R.S. 116 Before the S. Comm. on Judiciary (Feb. 3, 2009), 2009 Leg., 75th Sess. 6 (Nev. 2009).
248 Id.
It helps homeowners and offers an avenue of redress when no other redress appears available.

While repairing Chapter 40, we must be careful that we do not make it impossible to invoke it. We must sufficiently raise the standards to eliminate harmless defects or technical code violations but keep them low enough that real defects fall under the law. The recovery of attorneys’ fees should be reinstated, either completely or in part. The stricter definition of what constitutes a construction defect means that Chapter 40 is no longer a cash cow due to trivial defects. Mandatory dismissal of any Chapter 40 action where the warranty process or the Chapter 40 notice process is not complete should be adopted to encourage compliance with the statute. The discovery rule should be an exception to the statutes of repose, and expert witnesses must use the proper construction code if their reports are to be admitted into evidence. Other structural and technical revisions should be considered if those provisions further the policy goal of encouraging a builder to stand by its product and giving the homeowner a remedy where the builder does not.