

“TO SUE OR NOT TO SUE”: THE PAST, PRESENT AND FUTURE OF CONSTRUCTION DEFECT LITIGATION IN NEVADA

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I. INTRODUCTION

Since 1996 the state of Nevada has been buffeted by a dramatic rise in construction defect litigation.¹ In Clark County, which includes the greater Las Vegas area, there were nearly 170 construction defect lawsuits filed between 2000 and 2001.² This surge of legal activity has triggered a number of profound economic consequences for the county and the state. Proponents of the homebuilding industry, who vigorously oppose the litigation, argue that one outcome has been a dramatic increase in insurance costs, estimated at a 500 percent increase between 1999 and 2003,³ due to rising outlays for premiums and fewer choices of carriers.⁴ According to Jim Wadhams, general counsel for the Southern Nevada Home Builders Association, the Las Vegas Valley formerly had eight standard insurers issuing residential policies. Yet by 2002, the Valley only had three.⁵ Moreover, partially in response to the cost of insur-

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¹ Michael M. Edwards et al., *A Defense Perspective to Construction Defect Litigation and the Upcoming Legislative Session*, NEV. LAW., Jan. 2001, at 30.

² Robert Gavin, *Home Builders Face Insurance Woes*, WALL. ST. J., Feb. 27, 2002, at B7.

³ Min. of Assemb. Comm. on Judiciary for May 8, 2003: *Hearing on S.B. 241 Before the Assemb. Comm. on Judiciary*, 2003 Leg. 72d Sess. Ex. E. *Construction Defect Litigation and the Residential Housing Market* (citing HOMEBUILDERS RESEARCH, INC. 2003) (hereinafter “Min. Assemb. Comm. on Judiciary”); see also Conference, *The Law and Politics of Tort Reform Justice and Democracy Forum*, 4 NEV. L.J. 377, 385 (2003/2004) (hereinafter “Politics of Tort Reform”) in which speaker Steve Hill, Chairman of the Coalition for Fairness in Housing Construction and President of Silver State Materials, claimed that there has been as much as a 1600 percent increase for the cost of insurance for subcontractors in the construction business.

⁴ Edwards et al., *supra* note 1, at 30.

⁵ Gavin, *supra* note 2, at B7. Wadhams, in a later interview in a May 2003 *Las Vegas Sun* article, stated further that there was once 15 licensed construction liability insurers in Nevada, but now none are left selling insurance in the state. Contractors must buy their insurance from out-of-state or offshore companies, which he argues, “offer those contractors little protection if the insurers go out of business.” See Steve Kanigher, *Builders Hammer Away for Changes in Defect Law*, LAS VEGAS SUN, May 4, 2003, at 1D, 5D.

ance the number of builders, defined as those who build ten or more homes, plummeted from 157 to 110 between the years 1996 and 2001.⁶

Nevada is not alone in coping with insurance increases for homebuilders.⁷ In a number of other western and Sunbelt states, such as California, Colorado and Florida, lawsuits have forced many insurance providers out of business and many builders have turned to secondary or relatively unregulated insurers.⁸ The latter typically charge more, but provide less coverage.⁹ Other builders are simply freezing their activities.¹⁰ All of this has caused housing shortages in some parts of the country and likely increased the price of homes.¹¹

Property owners, on the other hand, have argued that the increase in lawsuits is attributable in part to “[p]oor supervision by the developer or general contractor; improper sequencing of the trades and shoddy work by subcontractors;”¹² They maintain that if builders really did wish to avoid the perils of litigation, they should correct these systemic industry problems.¹³ Exactly what factors and to what extent these and other causes may have contributed to the explosion of claims for construction defects invites an objective inquiry. Part II of this article explores the historical and legal roots of construction defect litigation in Nevada. Part III presents a discussion, both pro and con, of Nevada’s latest construction defect statute by various experts about how it and other recent construction defect statutes in neighboring states may fare in the

⁶ *Min. Assemb. Comm. on Judiciary*, *supra* note 3.

⁷ Robert Aalberts, *Will California’s New “Fix It” Law Cure the Rash of Construction Defect Litigation?* 32 *REAL EST. L. J.* 335, 335 (2004).

⁸ Gavin, *supra* note 2, at B7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Andree J.B. Swanson, *Las Vegas: Boom Town for Construction Defect Litigation*, *NEV. LAW.*, Dec. 1997, at 15, 18. The Las Vegas popular press has offered local “horror stories” by homeowners who have allegedly been victimized by faulty construction. *See* Kanigher, *supra* note 5, at 1D. “Hulet said ‘his year-old \$300,000 home has major structural defects.’ He said, ‘a gap between the foundation of his house and the soil has caused one corner of the residence to sink nearly four inches.’ He also said, ‘inch-wide cracks running four to five feet in length cover some of his walls and that he has windows that don’t fit frames or close properly.’” *Id.* at 1D, 5D. *See also* *Politics of Tort Reform*, *supra* note 3, in which another victim of shoddy construction related his experience with local builders. “The experts that went into our complex found, for example, that cardboard boxes had been used as construction materials in what were supposedly waterproof areas of our complex. They found that the roof had not been constructed properly. The air conditioners were up on the roof had not been structurally designed to hold the weight of the air conditioners. Every time someone turned the air conditioner on and there was vibration, it was ripping apart the plywood or cardboard that was used to construct the roof. The tiles that were used to construct the roof weren’t up to code and any time anybody stepped on them, they just shattered.” *Id.* at 382 (relating the experiences of homeowner William J. Robinson).

¹³ The issue of defectively built homes has stirred the passions of the labor unions as well as those who argue that home construction defects can also be attributed to builders using unskilled labor in the Las Vegas Valley. *See* David Hare, *Domestic Abuse: Unions Rally Against Local Home Builders*, *LAS VEGAS CITY LIFE*, Oct. 1, 2003, at http://www.lasvegascitylife.com/articles/2003/10/01/local_news/news03homes.txt. As one of the union consultants, John Wilson, commented “[t]here are about 20,000 residential construction workers in Las Vegas Only a small portion of them are state-approved or qualified to be working.” *Id.*

future. Part III also explores the economic loss doctrine and its future role in construction defect litigation. This statute, in effect since 2003, will hopefully take the state in the right direction for addressing the state's construction defect litigation problem.

II. HISTORICAL AND LEGAL ROOTS OF CONSTRUCTION DEFECT LITIGATION IN NEVADA

A. *The Arrival of California Construction Defect Lawyers*

Some observers claim that at least part of the state's rising numbers of construction defect lawsuits is due to the arrival of large numbers of construction defect attorneys from California. As one local attorney candidly noted in a 1997 feature article in the state's bar journal, *Nevada Lawyer*, "[m]etropolitan Las Vegas is the pot of gold at the end of California's rainbow."¹⁴ Indeed, with unprecedented growth, a population estimated to rise to 2 million by 2007, and fifty-five new houses being constructed daily, the Las Vegas Valley in the 1990s was viewed by California construction defect lawyers as a lawyer's equivalent to Eureka.¹⁵ Paul Scofield, a former Californian and trial attorney for homeowners explained in a 1997 article:

[t]he construction defect market in California is drying up. Many California's lawyers are moving here. A majority of the firms in Las Vegas practicing in construction defect law were previously based in California. The reasons are obvious: there are few cases to be had in San Diego, and the construction defect market in other Southern California cities is very limited.¹⁶

B. *Builders' Reluctance to Cure Defects*

The increase in construction defect litigation can also be attributed to problems caused by the contractors themselves. In the mid-1990s, buyers of new homes discovered that some contractors were uncooperative when asked to repair defects in homes they sold.¹⁷ Those owners who were financially able to survive the typically expensive and drawn out litigation process, resorted to lawsuits.¹⁸ Developers, perhaps predictably, complained that many of the suits

¹⁴ Swanson, *supra* note 12, at 16.

¹⁵ *Id.*

¹⁶ *Id.* See also *infra* text accompanying note 46 (discussing the solicitation of Nevada homeowners by California construction defect lawyers).

¹⁷ James Beasley, *Calloway and NRS 40.600: Two Sides of the Same Coin*, NEV. LAW., Feb. 2001, at 10. See also Kanigher, *supra* note 5, at 5D. "Despite these [construction] problems he [homeowner Paul Hulet] hasn't heard from the builder in nearly three months. He said he is getting ready to file a lawsuit." *Id.* See also *Politics of Tort Reform*, *supra* note 3. "So we went through the destructive testing. When the defense came in you'd have two subcontractors there with their own experts, and many a time I was treated to the two defense experts sitting there arguing, one saying 'This can be fixed,' and the other saying, 'No, we can't fix it. We can do it differently.' They were up in my attic doing this. I was hearing these diametrically opposed arguments about whether the problem could be fixed or whether the entire complex needed to be replaced. Fortunately, it turned out they could fix what was wrong with my house. But it was an unbelievable pain." *Id.* at 382 (relating the experiences of homeowner William Robinson).

¹⁸ Beasley, *supra* note 17, at 11.

were nuisance lawsuits being fought over minor defects.¹⁹ Of course, the costs of litigation and the negative publicity further added to the builders' resentment over the lawsuits.²⁰ These kinds of problems pressed both the Southern Nevada Home Builders and the Nevada Trial Lawyers to seek legislation to address the problems.²¹ The result was the passage of Senate Bill 395 (Chapter 40-1995), and the establishment of Nevada's first construction defect law.²²

C. Nevada's 1995 Construction Defect Statute

Nevada's construction defect statute became law in July 1995. It was intended to signal a compromise between the competing interests of homeowners and homebuilders. As one experienced Las Vegas construction defects lawyer observed shortly after its passage:

[Chapter 40-1995's] clear purpose is to give the homeowner and contractor a relatively brief window of opportunity to investigate and settle construction defect cases before they blossom into full-blown, heels-dug-in-litigation. There's plenty of carrot and stick in the new law as it clearly has broadened homeowner rights, but only after they traverse hurdles designed to make available cheaper and faster alternatives to litigation.²³

The statute, with an important exception pertaining to housing complexes,²⁴ generally worked in the following manner. To remedy a construction defect problem, a homeowner drew up a complaint in reasonable detail and notified the contractor by certified mail within sixty days that his property contained a construction defect.²⁵ A construction defect was broadly defined as a defect "... in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance."²⁶ The contractor could respond within sixty days to the homeowner's notice with a written settlement offer that could either include compensation or an offer to repair the defect at the contractor's expense.²⁷ If the offer to repair was accepted it was to be completed within forty-five days.²⁸ The contractor could also offer to repurchase the property.²⁹ If a claimant unreasonably rejected a settlement offer the court could later deny him attorney's

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² NEV. REV. STAT. 40.600-695 (1995).

²³ Lynde Selden, II, *SB 395 — The New Nevada Construction Defect Statute: Changes in Form and Substance*, NEV. LAW., Nov. 1995, at 18, 18.

²⁴ NEV. REV. STAT. 40.613 (1995). "Complex matter" means a claim: (1) In which the claimant is a representative of a homeowner's association that is responsible for a residence or for an appurtenance and is acting within the scope of his duties pursuant to chapter 116 or 117 of NRS; or (2) That involves five or more separate residences at the time the action is commenced or at any time during the subsequent action. In a complex matter, the claimant did not have to give notice first. *See* NEV. REV. STAT. 40.682(1) (1995). "Notwithstanding the provisions of subsection 1 of NRS 40.680, a claimant may commence an action in district court in a complex matter." *Id.*

²⁵ NEV. REV. STAT. 40.645(1).

²⁶ NEV. REV. STAT. 40.615.

²⁷ NEV. REV. STAT. 40.645(3)(c)(1-3).

²⁸ NEV. REV. STAT. 40.645(3)(c)(3).

²⁹ NEV. REV. STAT. 40.665.

fees and costs as well as force him to pay the contractor's attorney's fees and costs.³⁰ A contractor who failed to make a reasonable offer, respond in good faith, failed to repair the defect adequately, or agree to or participate in mediation³¹ would lose the limitations and defenses to liability provided in Chapter 40.³² If a voluntary settlement could not be reached on non-complex matters, the parties would submit their dispute to mediation.³³

If a homeowner exhausted these procedural remedies, he could then commence a lawsuit. Still, the statute limited damages to the following:

- reasonable attorney's fees;
- costs of repairs and costs to relocate while repairs were being made;
- lost value of the property due to structural failure;
- reasonable value of any property damaged by the constructional defect;
- cost of experts;
- interest provided by statute.³⁴

While Nevada's new construction defect statute sought to satisfy the conflicting interests of homeowners and homebuilders by providing both a forum and a fair remedy, the discontent did not subside. If anything, the litigation appeared to accelerate because Chapter 40-1995 failed to properly address the many problems caused by construction defects.³⁵ Litigation also erupted over how to interpret Chapter 40-1995. In general, the legal problems stemmed from two sources. The first source of confusion was the holding in *Calloway v. City of Reno*³⁶ (*Calloway II*), a case predating Chapter 40-1995. The second was the "complex matter" exception created in the statute for construction defects arising in housing complexes.³⁷

D. The "Complex Matter" Exception

Chapter 40-1995 provided a very important exception to the requirement that homeowners first give notice to homebuilders to cure alleged construction defects.³⁸ While the homebuilders initially supported the complex matter exception, they have now acknowledged it was a serious error in judgment. In reality, the complex matter exception only added to the rash of litigation, particularly class action suits.³⁹

³⁰ NEV. REV. STAT. 40.650(1)(a)(b).

³¹ NEV. REV. STAT. 40.650(2)(a-e).

³² NEV. REV. STAT. 40.650(e).

³³ NEV. REV. STAT. 40.680.

³⁴ NEV. REV. STAT. 40.655(1)(a-g).

³⁵ According to testimony made to the Committee on Judiciary regarding construction defect litigation and the proposed Senate Bill (SB) 241, Chapter 40-1995 was a failed law that produced many problems including declining property values, increases in construction costs, the delay and denial of repairs and injuries to both homeowners and contractors. See *Min. of the Assemb. Comm. on Judiciary, supra* note 3, at Ex. G.

³⁶ *Calloway v. City of Reno*, 993 P.2d 1259 (Nev. 2000) (hereinafter "*Calloway II*").

³⁷ See *supra* text accompanying note 24.

³⁸ See *supra* text accompanying notes 24-34 discussing in general the pre-litigation procedures for non-complex matters.

³⁹ See Kanigher, *supra* note 5, at 5D.

Southern Nevada home builders said litigation didn't become much of a problem for them until after the 1999 amendment that allowed the "complex matter" cases involving at least five homes to result in immediate lawsuits. Builder representatives testified before the Legislature at the

Chapter 40-1995 defined a "complex matter" as a claim that originated from a representative of a homeowner's association or that "involves five or more separate residences at the time the action is commenced."⁴⁰ The provision covered planned unit developments (PUD) and condominiums, both of which have and are currently being built extensively throughout the Las Vegas Valley. Complex matters were exempt from the notice and right-to-repair requirements.⁴¹ Under non-complex cases, such as single-family housing, however, claimants still had to give contractors the right-to-repair.⁴²

The method for initiating complex matters under Chapter 40-1995 was governed by chapter 40, section 682 of Nevada Revised Statutes.⁴³ The provision stated that claimants could file an action *directly* in district court without first informing the builder.⁴⁴ It also provided ground rules for the exchange of information, bringing additional parties into the suit, voluntary mediation, selection of a special master and other procedures meant to expedite the process.⁴⁵

According to some in the building industry, the complex matter exception afforded construction defect litigants both a greater bargaining position and a potential for recovering more in damages. This was particularly true of class action suits, often initiated at the behest of homeowner's association who may have been encouraged to sue by lawyers seeking their business.⁴⁶ Moreover,

time that because they figured they were going to get sued anyway it was best to have such cases go through the referee process provided by the courts as soon as possible. Las Vegas building supplier Steve Hill, chairman of a coalition of builders and developers that supports SB 241, said the industry now realizes that the amendment was a big mistake for them because it resulted in a flood of class-action lawsuits. "The industry did not anticipate abuse of that law," Hill said. The industry played a role in trying to improve that law. We just didn't know what kind of loophole that would turn out to be.

Id. Another viewpoint on why homebuilders supported the complex matters exception comes from Scott K. Canepa, an attorney who has represented homeowners. Canepa maintains that homebuilders asked the Legislature for the exception because "[b]uilders claimed their insurance companies were not acknowledging a pre-lawsuit Chapter 40 notice as triggering their legal duty to defend and/or pay claims." Scott K. Canepa, *Should Construction-Defect Laws be Overhauled?* LAS VEGAS SUN, Jan. 5, 2003, at 1D.

⁴⁰ NEV. REV. STAT. 40.613.

⁴¹ See *supra* text accompanying notes 24-34.

⁴² *Id.*

⁴³ NEV. REV. STAT. 40.682.

⁴⁴ *Id.* "Notwithstanding the provisions of subsection 1 of NRS 40.680, a claimant may commence an action in district court in a complex matter." NEV. REV. STAT. 40.682(1).

⁴⁵ See generally NEV. REV. STAT. 40.680.

⁴⁶ See *supra* discussion in note 39. See also *Min. of Assemb. Comm. on Judiciary, supra* note 3, at Ex. K. For example, Deanna Forbush testified to a legislative committee regarding class action suits by homeowner's association:

I am an attorney here in Las Vegas and am appearing as a private citizen today in support of Senate Bill 241. About a year and a half ago, a construction defect attorney solicited my former neighbors and me for legal work and asked that we complete a survey identifying defects in our homes. The solicitation was sent in the form of a letter addressed to the homeowner's association and was printed on the letterhead of a firm based in California. The letter had also listed this firm's website as www.constructiondefects.com.

Id. at 59. She further testified that "[i]t seems clear that a few of these out-of-state lawyers are simply trolling homeowners associations to generate legal business for their out-of-town firm while leaving the practice of law in general in disrepute." *Id.*

construction defect litigation typically takes a long time and is very expensive.⁴⁷ A defense of the suit all the way to trial incurred costs and burdens on all the parties possibly greater than the trouble and cost of settlement.⁴⁸ Accordingly, insurance companies often found it prudent to settle before trial.⁴⁹ Since claims for construction defects in complex matters could be commenced in court, it is likely that the exception was directly responsible for not only some of the increased amount of construction defect litigation in Nevada, but for the insurance increases as well.⁵⁰

Still, the complex matters exception, as mentioned, had not been the only apparent reason why construction defect litigation is commonplace in Nevada. The case of *Calloway II*⁵¹ also added uncertainty and perhaps may have emboldened those asserting construction defect claims.

E. The Calloway II Case and the Construction Defect Statute: Confusion and Confrontation

Some of the confusion and contentiousness surrounding construction defect litigation in Nevada had also been caused by the holding in *Calloway II* and subsequent attempts by lawyers representing aggrieved homeowners to limit its effect by exploiting certain ambiguous provisions found in the Chapter 40-1995 construction defect statute. To understand fully the impact of this case, it is necessary to briefly trace the Nevada case law leading up to *Calloway II*.

⁴⁷ See John Boyden, *Chapter 40 and Construction Defect Litigation – Boom or Bust?* NEV. LAW., Jan. 2002, at 10. Boyden discusses, in particular, the high cost of experts who conduct lengthy inspections of the alleged defective conditions. Homeowners could recover the cost of experts under Chapter 40-1995. See *supra* text accompanying note 34 for discussion of the damages that can be awarded to a plaintiff.

⁴⁸ See, e.g., *Politics of Tort Reform*, *supra* note 3.

To start with, as I said, homes do not get fixed once they get into these complex cases, which are either cases brought by associations or by five or more individual homeowners. NTLA [the Nevada Trial Lawyers Association] distributed a list to the Governor-appointed Construction Liability Insurance Task Force, of which I was the chair, illustrating 120 complex cases in which no repairs were made to as a result of the lawsuits. Settlements happened later, but those cases dragged on for years.

Id. at 385-86 (relating the experiences of Steve Hill).

⁴⁹ Hubble Smith, *Falling Between the Cracks*, LAS VEGAS REV.-J., Feb. 2, 2003, at 1E. "These insurance companies, they have their own lawyers and experts. 'They go out and see these problems firsthand. When they go out and see these are not trumped-up charges, they start laying out millions because they know if they go to trial, they're going to lose nine times out of 10.'" *Id.* at 4E (quoting attorney Thomas Miller).

⁵⁰ See *Politics of Tort Reform*, *supra* note 3.

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

Id. at 386 (observations of Steve Hill, Chairman of the Coalition for Fairness in Housing and President of Silver State Materials).

⁵¹ *Calloway II*, 993 P.2d at 1259.

The genesis of the controversy is the adoption of the so-called "economic loss doctrine" in Nevada's products liability law. The economic loss doctrine was created in order to distinguish remedies afforded in contract from those recoverable in tort. As the Nevada Supreme Court stated in *Calloway II* "[t]he economic loss doctrine marks the fundamental boundary between contract law which is designed to enforce the expectancy interest of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others."⁵² The court further stated that

[u]nder the economic loss doctrine "there cannot be recovery in tort for *purely economic losses*." Purely economic loss is generally defined as "the loss of the benefit of the user's bargain . . . including . . . pecuniary damage for inadequate value, the cost of repair and replacement of the defective product, or consequent loss of profits, without any claim of personal injury or damage to other property."⁵³

Contract remedies are generally less than what can be recovered in tort.⁵⁴ This difference in the amount of potential recovery increased the stakes in this heated controversy. As explained by Keeton, contract damages "are limited to those within the contemplation of the defendant at the time the contract is made, and in some jurisdictions, at least, to those for which the defendant has tacitly agreed to assume responsibility. They may be further limited by the contract itself, where a tort action might avoid the limitations."⁵⁵ In respect to tort, however, the commentators explain that "[i]n the tort action the only limitations are those of 'proximate cause,' and the policy which denies recovery to certain types of interests themselves."⁵⁶ As the *Calloway II* court further points out, "[p]ermitting plaintiffs to recover in tort for purely economic losses would result in open-ended liability, since it is virtually impossible to predict all the economic consequences of a given act."⁵⁷

Unfortunately, the rule has created confusion in products liability practice over the true meaning of the doctrine. This, in turn, has caused confusion in construction defect litigation. As one court maintains, the term "economic loss" is a "poor choice of words – all the losses for which tort victims sue are economic."⁵⁸ On the other hand, drawing the distinction between recovery in contract for purely economic losses versus remedies in tort for negligence and strict liability can be pivotal. As the *Calloway II* court argued "if this development [the blurring between tort and contract remedies] were allowed to pro-

⁵² *Id.* at 1263.

⁵³ *Id.* (citations omitted).

⁵⁴ Jeffrey Stempel, *Recent Court Decisions*, 68 J. RISK & INS. 519 (2001).

⁵⁵ W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 665 (West Publ'g Co. 5th ed. 1984).

⁵⁶ *Id.*

⁵⁷ See, Stempel, *supra* note 54, at 520. As Stempel explains it, in a construction defect lawsuit in tort a victim may attempt to prove the builder was willfully indifferent to the buyer's rights and thereby seek punitive damages. Victims may also allege that they suffered mental distress and should therefore collect non-economic damages for loss of the use of their homes while they are being repaired.

⁵⁸ *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 811 (7th Cir. 1992).

gress too far, contract law would drown in a sea of tort.”⁵⁹ As stated above, this can result in a significant difference in a plaintiff’s recovery for damages.⁶⁰

Nevada case law, moreover, has not always been consistent in adequately delineating the boundaries between contract and tort. Starting in 1982 in *Culinary Workers Union, Local 226 v. Stern*,⁶¹ the Nevada Supreme Court adopted the economic loss rule and held that the plaintiff cannot recover in tort under negligence or strict liability for purely economic losses. However, eight years later in *Charlie Brown Construction Co. v. City of Boulder City*,⁶² the court created an exception providing that if the damages were “foreseeable,” then tort recovery was possible.⁶³ The doctrine was further eroded a year after *Charlie Brown*, when the court, in *National Union Fire Insurance Company v. Pratt & Whitney*,⁶⁴ held that the economic loss doctrine does not apply to construction projects since they involve the products and efforts of many different parties, such as laborers, manufacturers, inspectors, etc.⁶⁵ The issue arose again in 1997 in the first *Calloway v. City of Reno (Calloway I)*.⁶⁶ *Calloway I* held that homeowners could recover in tort for damages caused to their negligently constructed home.⁶⁷

The *Calloway I* ruling, however, was short-lived. In 1998, the court granted a rehearing, paving the way for *Calloway II*.⁶⁸ As two Nevada commentators, Menter and Argue, assert “[i]n *Calloway II*, the Nevada Supreme Court swept away prior precedent and adopted a strict ‘no exceptions’ approach to the Economic Loss Rule.”⁶⁹

Moreover, the *Calloway II* case clarified another important issue in construction defect litigation. Can an action lie in tort when so-called defective products in a house, such as its framing, cause damage to other property in the house, such as the floors and ceiling? The court explained that these are all integrated and necessary component parts of the whole.⁷⁰ Hence, if one component part, such as the defective framing, damages another part, such as the floor, it still incurs an economic loss only unto itself. Accordingly, an action

⁵⁹ *Calloway II*, 993 P.2d at 1264.

⁶⁰ See *supra* text accompanying notes 54-57.

⁶¹ *Culinary Workers Union Local 226 v. Stern*, 651 P.2d 637 (Nev. 1982). See also *Oak Grove Investors v. Bell & Gossett Co.*, 668 P.2d 1075, 1080 (Nev. 1983) (in which the Nevada Supreme Court stated in dicta that a property owner could sue in tort in a construction defect case).

⁶² *Charlie Brown Const. Co. v. City of Boulder City*, 797 P.2d 946 (Nev. 1990).

⁶³ *Id.* at 953.

⁶⁴ *Nat’l Fire Ins. Co. v. Pratt & Whitney*, 815 P.2d 602 (Nev. 1991).

⁶⁵ *Id.* at 603.

⁶⁶ *Calloway v. City of Reno*, 939 P.2d 1020 (Nev. 1997), *reh’g granted*, 971 P.2d 1250 (Nev. 1998).

⁶⁷ *Id.* at 1023.

⁶⁸ *Calloway v. City of Reno*, 971 P.2d 1250 (Nev. 1998).

⁶⁹ Timothy S. Menter & Matthew W. Argue, *The Economic Loss Rule and Construction Defect Litigation*, NEV. LAW., Sept. 2000, at 18, 20.

⁷⁰ *Calloway II*, 993 P.2d at 1269. “Here, the townhouses are part of larger, integrated structures, and the framing was an integral component of these structures. The damage caused by the allegedly defective framing therefore constituted damage to the structures themselves – no ‘other’ property damage resulted, and appellants suffered purely economic losses.” *Id.* The *Calloway II* case, however, did reserve the right to use tort theories in cases involving personal injuries or damage to property other than the defective entity itself. *Id.* at 1267.

would lie solely in contract or warranty law, not in tort. As one commentator, discussing the case law in Florida which has adopted the economic loss rule in a similar manner, explains:

[w]hile tort recovery is available when a product has damaged "other property," the legal transmutation of building materials from "goods into realty" upon incorporation into a project effectively forestalls the argument that tort law may be invoked because the defective product damaged the other products with which it was installed.⁷¹

F. Calloway II Versus Nevada's Construction Defect Statute: Which Governed?

While some may view *Calloway II* as the case that finally put to rest the issue of whether tort remedies were generally recoverable for construction defects, the issue, if anything, became more clouded. The confusion was largely due to Nevada's 1995 construction defect statute. The *Calloway II* case and the law that was applied to it predated the 1995 statute. Some of the statute's provisions were arguably inconsistent with the language of the case and it was unclear whether the economic loss rule as created in *Calloway II* applied to post-1995 construction defect cases.⁷²

James Beasley, a lawyer representing the framing subcontractors in both *Calloway* cases, argued that the ruling did not conflict with the 1995 statute. Indeed, much of the controversy essentially came down to the meaning of a number of words in several of the statute's provisions. The first was language in chapter 40, section 635(2) of the Nevada Revised Statutes providing that the statute shall "[p]revail over any conflicting law otherwise applicable to the claim or cause of action."⁷³ Beasley argued this included the application of the economic loss rule. Another argument involved the words "proximately caused" which appeared in chapter 40, section 655 of the Nevada Revised Statutes (NRS).⁷⁴ Critics contended those words were uniquely applied to tort law.⁷⁵ A third argument was that language limiting recovery to just contract and warranty law simply did not appear anywhere in the statute.⁷⁶

Beasley's response relied on legislative history and other statutory language. He pointed out that in an earlier version of Senate Bill (SB) 395, contractors and their agents could be subject to a suit for "negligence."⁷⁷ That word, however, was later replaced with the words "acts or omissions" which appeared in chapter 40, section 460 of Nevada Revised Statutes.⁷⁸ Beasley contended that if the legislature had intended to permit a suit in tort, the word "negligence" would have been left in the statute.⁷⁹ Moreover, he pointed to

⁷¹ H. Hugh McConnell, *Diminished Capacity – Owner's Ability to Sue for Construction Defects in Florida*, FLA. BAR J., June 1997, at 64, 65-66 (citing *Casa Clara Condo. Ass'n. v. Charley Toppino & Sons, Inc.*, 620 S.2d 1244, 1246 (Fla. 1993)).

⁷² See *infra* text accompanying notes 84-86.

⁷³ NEV. REV. STAT. 40.635(2) (1995).

⁷⁴ NEV. REV. STAT. 40.655 (1995).

⁷⁵ Beasley, *supra* note 17 at 11.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

NRS 40.635(1) which provided that the statute applied to any claim arising after July 1, 1995 "except a claim for personal injury or wrongful death" limiting a claimant to contract and warranty law.⁸⁰ Beasley also dismissed the argument that "proximately caused" applies exclusively to tort law. He maintained that "[t]he phrase is as equally applicable in tort law as it is in contract law."⁸¹

Beasley's arguments have been refuted by at least one commentator representing the interests of claimant-homeowners. In a letter published in the April 2001 issue of the *Nevada Lawyer*, Robert Maddox, who represented one of the plaintiffs in *Calloway II*, sought to counter Beasley's contentions.⁸² Maddox relied strongly on chapter 40, section 655 of Nevada Revised Statutes, a provision that provided for a limitation on how claimants could recover for construction defects. He pointed out that chapter 40, section 655 permits a homeowner to recover the "'cost of repair' in addition to all other costs related to the claim."⁸³ He also downplayed the importance of legislative history by noting that the statute's language is clear that a homeowner's "'economic damages' are recoverable without regard to the nature of the 'claim or cause of action.'"⁸⁴

Maddox further argued that when the statute was enacted in 1995, tort remedies were available under case law.⁸⁵ *Calloway II*, which excludes tort remedies, had not yet been decided. While the statute provided that it would prevail over conflicting law, the tort law remedies that existed at that time were simply not contrary to the language of the statute.⁸⁶

G. Construction Defect Litigation and the Economic Loss Doctrine: A Growing Trend or Destined to Die?

Of course, Nevada is not the only state experiencing problems from an environment of rapid building and construction defect litigation. Other western and Sunbelt states have similarly felt the pinch, in some cases, years before such problems occurred in Nevada.⁸⁷ In response, some of these states also adopted the economic loss doctrine in order to avoid tort suits in construction defect cases.⁸⁸ The *Calloway II* court noted that the economic loss doctrine has been applied by courts in Arizona (in an action against a builder),⁸⁹ in Illinois (in an action against an architect),⁹⁰ in Washington (in an action for negligent

⁸⁰ *Id.* (citing NEV. REV. STAT. 40.635(1) (2003)).

⁸¹ *Id.* at 12.

⁸² Robert C. Maddox, *Chapter 40 Preserves All Claims*, NEV. LAW., Apr. 2001, at 9.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Maddox' prescience should be noted. See *infra* text accompanying notes 124-33, discussing *Olson v. Richard*, 89 P.3d 31 (Nev. 2004), in which the Nevada Supreme Court ruled that the plaintiff could maintain an action in tort under Chapter 40-1995, despite the economic loss doctrine enunciated in *Calloway II*, in a construction defect case.

⁸⁶ *Id.*

⁸⁷ See generally Aalberts, *supra* note 7.

⁸⁸ See *infra* text accompanying notes 123-132 (discussing *Olson*, 89 P.3d 31, which ruled that the economic loss doctrine conflicts with the language of Chapter 40-1995 and so no longer applies in Nevada).

⁸⁹ *Calloway II*, 993 P.2d at 1266 (citing *Nastri v. Wood Bros. Homes, Inc.*, 690 P.2d 158 (Ariz. Ct. App. 1984)).

⁹⁰ *Id.* (citing *Lincoln Park West Condo. v. Mann*, 555 N.E. 2d 346 (Ill. 1990)).

construction),⁹¹ and in Florida (in an action against a building material supplier).⁹² In addition, since *Calloway II*, both California⁹³ and Colorado⁹⁴ have adopted a version of the economic loss doctrine in construction defect cases. However, the doctrine, at least in its application to construction defect litigation in Nevada, may be dead in the wake of the 2004 case of *Olson v. Richard*.⁹⁵ The doctrine may very well have met the same fate in California.⁹⁶

III. NEVADA'S NEW CONSTRUCTION DEFECT STATUTE: WILL IT FIX THE LITIGATION PROBLEMS?

Nevada's new construction defect statute, SB 241 (Chapter 40-2003) was passed in 2003 to address the apparent deficiencies of Chapter 40-1995.⁹⁷ Indeed, instead of addressing construction defect problems, Chapter 40-1995 spawned even more litigation.⁹⁸ To the extent Chapter 40-2003 is intended to stem the rising tide of construction defect lawsuits, the statute's most important component is the ability of contractors and subcontractors to repair or cure construction defects before a homeowner can initiate a lawsuit.⁹⁹ As discussed

⁹¹ *Id.* (citing *Atherton Condo. Bd. v. Blume Dev.*, 799 P.2d 250 (Wash. 1990)).

⁹² *Id.* (citing *Casa Clara Condo. Ass'n. v. Charley Toppino & Sons*, 620 S.2d 1244 (Fla. 1993)).

⁹³ *Aas v. Superior Court of San Diego*, 12 P.3d 1125 (Cal. 2000).

⁹⁴ *Town of Alma v. Azco Constr. Inc.*, 10 P. 3d 1256 (Colo. 2000).

⁹⁵ *Olson v. Richards*, 89 P.3d 31 (Nev. 2004). See *infra* text accompanying notes 124-33.

⁹⁶ Although the *Aas* case, 12 P. 3d at 1125, has not been expressly overruled yet on the issue of the economic loss doctrine, its future applicability is in serious doubt. For example, an article in the *Los Angeles Lawyer* opined:

[t]he California Supreme Court's 2000 decision in *Aas v. Superior Court* became the impetus for SB 800 [California's new construction defect law]. In *Aas*, the supreme court seemingly settled a longstanding issue: whether developers, contractors, and their insurers were liable to homeowners for repairs of construction defects that had not manifested damage. The court ruled that construction defect plaintiffs were not allowed to recover damages for economic loss when the alleged defects had not caused property damage. The court's holding, however, was met with derision from trial lawyers and many in the real estate industry. Many people echoed the sentiments of Chief Judge George, who, in dissent, asked why a homeowner should "have to wait for a personal tragedy to occur in order to recover damage to repair known serious building code safety defects caused by negligent construction?" In 2002, the California legislature answered Chief Justice George's question and passed SB 800. The principal purpose of SB 800 is to specify the rights and requirements of a homeowner seeking to bring an action for construction defects. The bill includes applicable standards for home construction, the statute of limitations, the burden of proof, the damages that are recoverable, applicable prelitigation procedure, and the obligations of the homeowner. By its Purpose and Provisions, SB 800 Overrules the *Aas* Court's Interpretation of What Constitutes Actionable Damage."

L.M.S. & R.P.E., *In the Wake of Aas*, L.A. LAW., Jan. 2003, at 40 (emphasis added).

⁹⁷ Tony Illia, *Right-to-Repair not Likely to Bring Insurance Rates Down*, LAS VEGAS BUS. PRESS, June 27, 2003, at 8. Chapter 40-2003 went into effect on August 1, 2003.

⁹⁸ See *supra* parts I and II.

⁹⁹ This portion of the article focuses on the claimant's duty under Chapter 40-2003 to give notice to a contractor and afford it the chance to fix the defect before a lawsuit can be initiated. However, there are other issues that may also arise under the new statute. For example, NEV. REV. STAT. 40.615 (2003) defines "defect" in greater detail than the 1995 Act. This was a contentious issue in the bill's passage. See Craig Carlston, Comment, *Senate Bill 241: Reining in Nevada's Construction Defect Litigation-Fixing Homes Without Lawsuit*, available at <http://nevadalawjournal.org/pdf/sb241.pdf> (last visited May 15, 2004)

earlier, under Chapter 40-1995 if a complainant possessed a so-called "complex case" – a claim that originated from a representative of a homeowner's association or that involved "five or more separate residences at the time the action is commenced"¹⁰⁰ – she was able to bring the case directly into state district court.¹⁰¹ This likely was one of the primary causes of the proliferation of construction defect cases after 1996.¹⁰²

Under Chapter 40-2003, the homeowner must now give notice of the construction defects to those allegedly responsible, including the contractor, the subcontractor, supplier, and design professionals.¹⁰³ These parties, in turn, must now respond to the homeowner's allegations.¹⁰⁴ The statute further provides in detail the manner in which the responsive parties should take action after receiving the claimant's notice. For example, the contractor has ninety days to answer the notice of defect.¹⁰⁵ The responsive parties may also propose monetary compensation¹⁰⁶ or disclaim liability, but must state the reasons why.¹⁰⁷ If the responsive parties decide not to repair the construction defect, the claimant (or the contractor seeking remedies against the other responsive parties) is provided with a cause of action and may proceed with a lawsuit.¹⁰⁸ If the responsive parties elect to repair, however, the homeowner must give them a "reasonable opportunity to repair the constructional defect."¹⁰⁹ If the claimants do not allow the contractor or other parties to cure the defect, but instead commence a lawsuit first, the court *shall* dismiss the suit, without prejudice, to force the claimant to comply.¹¹⁰

(discussing the controversies over the amended definition of constructional defect in statements submitted to the Assembly Committee on the Judiciary, *Min. Assemb. Comm. on Judiciary*, *supra* note 3). See also *supra* text accompanying notes 17-22.

¹⁰⁰ NEV. REV. STAT. 40.613. See *supra* text accompanying notes 38-51.

¹⁰¹ NEV. REV. STAT. 40.613. "Complex Matter" defined, was repealed in 2003.

¹⁰² See *supra* text accompanying notes 38-69. See also Joe Wheeler, "Right-to-Repair" Means Work for Contractors, CONSTRUCTION ZONE, Aug. 2003, at http://www.nvconstructionzone.com/Right_To_Repair_August_2003htm (last visited Mar. 1, 2005). "A major victory was that the distinction between complex cases and non-complex cases was thrown out. In the past, any suit involving five or more homes was considered to be a complex case and such a case jumped right into the court upon filing, with no repairs allowed. SB 241 changes that with contractors allowed to repair defects in all cases." *Id.*

¹⁰³ NEV. REV. STAT. 40.645. This section also provides, in detail, the manner in which the notice should be given to these parties and the particulars that should be contained in the notice of a defect.

¹⁰⁴ *Id.*

¹⁰⁵ NEV. REV. STAT. 40.6472. It should be noted that, under Chapter 40-2003, a responding party, such as a contractor, may present the claim to its insurer who then must treat the claim as a civil action. NEV. REV. STAT. 40.649. The possible benefit is that, formerly, some contractors encouraged litigation in order to draw in their insurers. This provision eliminates that incentive. See Kanigher, *supra* note 39.

¹⁰⁶ NEV. REV. STAT. 40.6472(2)(b). See also NEV. REV. STAT. 40.650(1)(a)(b) which imposes penalties on claimants who reject reasonable offers of settlement as well as penalties on contractors and other parties who fail to respond to the claimant's notice of a construction defect. See NEV. REV. STAT. 40.650(2)(a-e).

¹⁰⁷ NEV. REV. STAT. 40.6472(2)(c).

¹⁰⁸ NEV. REV. STAT. 40.6472(4).

¹⁰⁹ NEV. REV. STAT. 40.6472(5).

¹¹⁰ NEV. REV. STAT. 40.647(2)(a).

Like Chapter 40-1995, the newest version also contains provisions to encourage mediation.¹¹¹ Unlike the 1995 Act, however, the new statute also seeks to involve the State Contractors Board. For example, a claimant or any responding party “may submit a question or dispute to the State Contractors’ Board . . . concerning the need for repairs, the appropriate method for repairs, the sufficiency of any repairs that have been made and the respective rights and responsibilities of homeowners, claimants, contractors, subcontractors, suppliers and design professionals.”¹¹² Although these State Contractors Board decisions are not binding and subject to judicial review¹¹³ or admissible in a judicial or administrative hearing,¹¹⁴ inclusion of this process in the statute was met with controversy. Opponents, for example, felt that the Board would favor the construction industry, while the Board itself felt that it did not have sufficient resources or ability to handle the disputes.¹¹⁵

A. Election to Repair

If the contractor or other parties choose to fix the defects, the manner in which the repairs are to be performed is specifically laid out in the statute. For instance, the repairs must be performed on reasonable dates and times agreed to in advance¹¹⁶ under applicable building codes and in a “good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of repair.”¹¹⁷ Moreover, the repairs must be finished within 105 days of the time the contractor received the notice if four or fewer owner were named in it,¹¹⁸ or 150 days if there were five or more owners¹¹⁹ with a provision to extend the period to repair for a reasonable time if all the parties agree.¹²⁰

B. Olson v. Richard: *The Future of the Economic Loss Doctrine in Nevada*

As discussed earlier, construction defect litigation from 1995 until the passage of the new Act in 2003 was clouded by differing legal interpretations of how Chapter 40-1995 was impacted by the ruling in *Calloway II*.¹²¹ Since *Calloway II* predated the passage of the 1995 Act, the court did not address how that case squared with the statute.¹²² However, in the wake of the Nevada Supreme Court’s decision in *Olson v. Richard*,¹²³ the conflict is apparently being laid to rest.

¹¹¹ NEV. REV. STAT. 40.680.

¹¹² NEV. REV. STAT. 40.6887(1).

¹¹³ NEV. REV. STAT. 40.6887(3)(a).

¹¹⁴ NEV. REV. STAT. 40.6887(3)(b).

¹¹⁵ Carlston, *supra* note 99 and text accompanying notes 52-60.

¹¹⁶ NEV. REV. STAT. 40.648(1)(b)(1).

¹¹⁷ NEV. REV. STAT. 40.648(1)(b)(2).

¹¹⁸ NEV. REV. STAT. 40.648(2)(a).

¹¹⁹ NEV. REV. STAT. 40.648(2)(b).

¹²⁰ NEV. REV. STAT. 40.648(3).

¹²¹ See *supra* text accompanying notes 36, 52-60.

¹²² See *supra* text accompanying notes 72-86.

¹²³ *Olson v. Richard*, 89 P.3d 31 (Nev. 2004)

In *Olson*, decided in May 2004, James and Candance Olson sued the contractor, Aztech Plastering and its owner, Thomas Richard, for construction defects they alleged existed on their property. They advanced both theories of contract and tort law alleging water intrusion, as well as other problems, caused by inferior stucco applications.¹²⁴ The lawsuit was commenced in 1997 when Chapter 40-1995 was clearly in effect. At the trial level the defendants successfully dismissed the negligence action, citing *Calloway II*, which bars such claims under the economic loss doctrine unless there is personal injury or property damage to property other than the structure itself.¹²⁵

However, on appeal, the Nevada Supreme Court reversed and remanded the case back to the district court.¹²⁶ The court, calling the issue one "of first impression related to construction defects case brought under Chapter 40,"¹²⁷ justified its ruling by stating that "it is reasonable to infer that the Legislature did not intend for the economic loss doctrine to preclude a homeowner from alleging a negligence claim in a construction defect cause of action initiated pursuant to Chapter 40."¹²⁸

The court based its reasoning on two of the 1995 statute's provisions. The first, chapter 40, section 640 of Nevada Revised Statutes, provided that a contractor would be liable for its "acts or omissions or the acts or omissions of his agents, employees, or subcontractors"¹²⁹ which the court argued does not limit a claimant to only contract and warranty remedies.¹³⁰ The second statutory provision, chapter 40, section 635(2) of Nevada Revised Statutes, stated that Chapter 40 would preempt "any conflicting law otherwise applicable to the claim or cause of action."¹³¹ However, when Chapter 40 was passed in 1995, the court pointed out, it "was consistently reluctant to apply the economic loss doctrine to construction defects cases."¹³² The *Olson* case does not directly involve Chapter 40-2003 since the lawsuit arose in 1997. Still, it is important to note that the relevant provisions of chapter 40 – sections 640 and 635(2) – are the same in both the 1995 and 2003 Acts, indicating that the court would likely rule the same for cases arising under Chapter 40-2003.

¹²⁴ *Id.* at 32.

¹²⁵ *Id.* at 32-33.

¹²⁶ *Id.* at 33-34.

¹²⁷ *Id.* at 31. Up to the time of this case, the state supreme court had not had the opportunity to "address whether a negligence claim could be brought under Chapter 40." *Id.* at 33.

¹²⁸ *Id.* at 33. As discussed earlier, the *Calloway II* case was decided five years after Chapter 40-1995, however, its facts predated the statute's passage. See *supra* text accompanying notes 72-86.

¹²⁹ NEV. REV. STAT. 40.640.

¹³⁰ *Olson*, 89 P.3d at 33. The court based its logic on the fact if the Legislature had intended to limit plaintiffs to just contract remedies it would have indicated so. "[T]hus, we presume that the Legislature envisioned that Chapter 40 would provide more than just contractual remedies." *Id.*

¹³¹ NEV. REV. STAT. 40.635(2).

¹³² *Olson*, 89 P.3d at 33. The court cited both *Calloway I*, 939 P.2d at 1025, as well as *Oak Grove*, 668 P.2d at 1080-81, as examples of cases in which the court was reluctant to apply the economic loss doctrine to construction defect cases. *Olson*, 89 P.3d at 33 n.6. See also, *supra* text accompanying notes 61-65. (discussing pre-1995 product liability cases).

C. Nevada's Right-to-Repair Statute: Will it Work?

Since the ink on Chapter 40-2003 is barely dry, it is difficult to predict whether it will succeed. Still, Nevada is definitely not alone in its experiment with a right-to-repair statute. By September 2003, fifteen states had enacted right-to-repair legislation, including Nevada's neighbors – Arizona and California.¹³³ Moreover, four states had filed legislation,¹³⁴ four had considered it¹³⁵ but did not ultimately pass an act, and Texas set up an alternative dispute forum for residential contractor disputes.¹³⁶

Despite their recent origins, the right-to-repair statutes have sharply divided the legal community. Indeed, there are no easy solutions to problems that simultaneously affect one person's home and another's livelihood but Chapter 40-2003 seeks to strike the proper balance. Steve Hill, president of Silver State Materials Corporation, chair of the Coalition for Fairness in Construction, and an outspoken supporter of Chapter 40-2003, sees benefits accruing to all parties involved. Homeowners in complex matters, he contends, were being "forced" into lawsuits before having the chance to have their defects repaired, as part of an association class action suit.¹³⁷ As a result their homes were "tainted by a lawsuit" which caused them to decline in value.¹³⁸ Moreover, he argues, these lawsuits precluded homeowners from refinancing or a buyer from receiving financing with a FHA or VA mortgage, nor would real estate brokers normally show a home with a lawsuit pending on it.¹³⁹

Some feel that Chapter 40-2003 will also begin to bring down the spiraling costs of insurance for contractors and subcontractors. Nevada's Insurance Commissioner, Alice Molasky-Arman, in an address at the West Coast Casualty's Construction Defect Seminar in May 2004, noted that "many contractors have noticed a positive change in being able to get a[n insurance] quote – although the pricing was prohibitive to accepting coverage."¹⁴⁰

The statute is not without its detractors. Plaintiff attorney Scott Canepa has been highly critical of Chapter 40-2003. Canepa argues that the construction industry relied too heavily on insurers to bail them out after they requested that the Legislature create the complex matters exception in 1999.¹⁴¹ This, he claims, caused insurance costs to spiral out of control when contractors began "dumping the problems on the insurance companies and demanding they pay

¹³³ Sylvia Hsieh, 'Right to Cure' Law Could Slow Construction Defect Claims, *LAW. WKLY. U.S.A.*, Sept. 29, 2003, at 14. These states are Alaska, Arizona, California, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Michigan, Montana, Nevada, South Carolina, Washington, and West Virginia.

¹³⁴ *Id.* These states are Illinois, Ohio, Oregon, and Pennsylvania.

¹³⁵ *Id.* These states are Arkansas, Mississippi, New Mexico, and Oklahoma.

¹³⁶ *Id.*

¹³⁷ See Canepa, *supra*, note 39, at 1D, 6D. See also *supra* text accompanying note 46 (discussing lawyer solicitation of homeowner's associations).

¹³⁸ *Id.* at 6D.

¹³⁹ *Id.*

¹⁴⁰ Joe Wheeler, *Construction Defect Seminar Largest of Its' [sic] Kind*, *CONSTRUCTION ZONE*, at http://www.nvconstructionzone.com/West_Coast_Casualty_CDSeminar_June_2004%20.htm (last visited Mar. 2, 2005).

¹⁴¹ See Canepa, *supra* note 139, at 6D.

the claims.”¹⁴² Of particular concern is that 40-2003 does not really force the contractor to respond effectively to demands for repair. Canepa does not like “SB 241 because it gives the builder the opportunity to make non-specific repairs . . . If you have a crack in a wall, he can put in putty and then in two years you’ll have to do the same repairs again.”¹⁴³ Canepa adds “SB241 gives the contractor the ability to not be responsible for construction defects, instead putting it all on the homeowner, [as opposed to a lawyer] who does not know what is involved to correct the problems. It does a lot for the benefit of the builder and absolutely nothing for the homeowner.”¹⁴⁴

Arizona, which passed its right-to-repair statute one year before Nevada,¹⁴⁵ may also offer clues as to the new statute’s future. Kevin O’Malley, who represents Arizona homebuilders, stated in an interview in *Lawyers’ Weekly USA*, that his state’s “Fix It”¹⁴⁶ law has shown “‘a positive effect’ on smaller claims.”¹⁴⁷ He further maintains that “[o]ur impression right now is that it is a useful tool and it is working where the problem is manageable, such as one or two homes as opposed to 500 homes, or if there is one problem, such as a stucco or soil problem, even if it affects multiple homes”¹⁴⁸ O’Malley adds that it may take years to know “whether the statute will stave off larger defect claims, such as a large homeowner’s association with a ‘laundry list’ of complaints.”¹⁴⁹ Indeed, O’Malley’s concerns may be telling since some of the most drawn out and contentious disputes in past construction defect litigation have involved homeowner’s associations that have had the resources and resolve to wage spirited battles against homebuilders.¹⁵⁰

While O’Malley takes a cautious “wait and see” position, other lawyers perceive “Fix It” statutes as failing already. Attorney Dan Bryson, who represents homeowners in the southeastern U.S., feels that builders simply won’t respond and will just wait to be sued despite these new laws.¹⁵¹ Calling the new rules “just another ‘procedural hoop’ for homeowners” O’Malley said that once a general contractor is put on notice to cure a problem, he often will not get involved until the insurance company or sub-contractors get on board.¹⁵²

California enacted a right-to-repair statute in January 2003 which is similar to Nevada’s.¹⁵³ Most notable is the fact that the contractor must have a

¹⁴² *Id.*

¹⁴³ Kanigher, *supra* note 5, at 5D.

¹⁴⁴ *Id.*

¹⁴⁵ See generally ARIZ. REV. STAT. § 12-1361-1366 (2003). Arizona’s law went into effect on August 22, 2002.

¹⁴⁶ Various articles refer to these statutes as “Fix it” laws or “Right to Cure” laws. For purposes of this article, the “right-to-repair” will be applied. See, e.g., Hsieh, *supra* note 133, at 14.

¹⁴⁷ Hsieh, *supra* note 133, at 14.

¹⁴⁸ *Id.* at 17.

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* text accompanying notes 38-50 concerning the problems that resulted from complex matters cases which often involved homeowner’s association.

¹⁵¹ Hsieh, *supra* note 133, at 17.

¹⁵² *Id.* See also *supra* notes 103-110 regarding Nevada’s statutory requirements when a contractor is put on notice of a defect.

¹⁵³ See generally, Hsieh, *supra* note 133, at 14 (discussing the major points of California’s right-to-repair statute).

chance to repair the defect before a lawsuit can be commenced, as well as a very specific list of what constitutes "actionable defects."¹⁵⁴ California attorney Tom Miller, relates that homebuilders will cynically manipulate the statute delaying the process while they prepare their defenses.¹⁵⁵ For example, he stated in a recent case he handled that "[t]he builder said 'I really want to try and work this out. I don't want to go into litigation.' They sent experts out and met with the [condo] board. That took six to nine months and in the end the offer was zero. All along he was setting up his defenses."¹⁵⁶

However, another California attorney, Roger Coven, is cautiously optimistic about California's law. He explains that for relatively small problems that can be fixed easily, the statute will work well.¹⁵⁷ Still, for more serious defects, Coven is not as certain, stating:

[f]or serious problems SB 800 [California's new right-to-repair statute] provides builders with opportunities to solve problems before they become litigation issues. If a builder manages to follow all of the procedures set forth in the Act, a homeowner would be compelled to allow repairs to be made and to engage in at least a short mediation before any action could be filed. But unless the builder is successful in satisfying the homeowners, SB 800 may do little more than delay the inevitable.¹⁵⁸

IV. CONCLUSION

In the mid-1990s, Chapter 40-1995, although passed to manage the rising fear of construction defect litigation, ironically made it much easier for certain plaintiffs to file construction defect litigation against homebuilders. As a result, the number of such cases, particularly in fast-growing Clark County, Nevada, rose dramatically. The legislation made it especially easy for plaintiffs to target builders of condominiums and planned unit developments because of the exception for complex matters.

In 2003, the Nevada Legislature amended Chapter 40 to require notice and a chance to repair for contractors and other parties, before a lawsuit could be filed. Although opinions vary, some observers are cautiously optimistic that the new law will begin the process of lowering the number of lawsuits, cost of insurance, and hopefully even slow the accelerating cost of housing.

The success of the new construction defect statute, like many laws, will depend on effective communication and the exercise of good faith and fair dealing by both homeowners and homebuilders. Indeed, with the contractor and similar parties now in initial control of the repair process, how these parties react is more important than ever. Likewise, how the homeowner lists and portrays the seriousness of the defects will have a profound effect on how the contractor reacts. Perhaps the 2003 statute's inclusion of a more detailed definition¹⁵⁹ will rein in exaggerated defect claims. However, if contractors do not

¹⁵⁴ CAL. CIV. CODE §§ 896-897, 910 (West 2003).

¹⁵⁵ Hsieh, *supra* note 133, at 17.

¹⁵⁶ *Id.*

¹⁵⁷ Roger B. Coven, *California Attempts to Resolve Residential Construction Defect Claims Without Litigation*, 23 CONST. LAW 35, 36 (2003).

¹⁵⁸ *Id.* at 36.

¹⁵⁹ NEV. REV. STAT. 40.615 (2003).

repair the defects in a reasonable and professional manner, but instead use the time to stall and to prepare their defenses, Chapter 40-2003 will fail. If the parties do not avail themselves of the pre-litigation remedies provided by the statute, the lawyers will enter the fray.¹⁶⁰ History has shown us that once this happens, an even greater gulf of distrust between the parties will emerge.¹⁶¹ Moreover, with the elimination of the economic loss doctrine in the wake of the *Olson v. Richard* case,¹⁶² there are greater monetary incentives for attorney

¹⁶⁰ Proponents of Nevada's new Right-to-Repair statute might take heart by the results of a November 2004 ballot referendum in Colorado. Amendment 34 pitted plaintiff attorneys who sought the passage of a new constitutional provision that would have effectively overruled the state's Fix-It statute, against homebuilders, insurers and others who wished to retain the existing limits placed on construction defect litigation and damages under its Right-to-Repair law. See Tom Ross, *Voters Faced with Complex Amendment*, THE STEAMBOAT PILOT, Oct. 14, 2004, at <http://www.steamboatpilot.com/section/archive/story/26240> (last visited Mar. 2, 2005).

Amendment 34 lost by the huge margin of 77 percent to 23 percent and did not carry a single county. See Election 2005, http://election.rockymountainnews.com/results_issuesDetail.cfm?issuid=2055 (last visited May 28, 2005).

The text of the amendment read as follows:

Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

Section 15. Protection of property owner's right to workmanlike construction. NO LAW SHALL LIMIT OR IMPAIR A PUBLIC OR PRIVATE PROPERTY OWNERS'S RIGHT TO RECOVER DAMAGES, OTHER THAN PUNITIVE DAMAGES, CAUSED BY THE FAILURE TO CONSTRUCT AN IMPROVEMENT TO REAL PROPERTY IN A GOOD AND WORKMANLIKE MANNER. STATUTES OF LIMITATION OF NOT LESS THAN TWO YEARS AND STATUTES OF REPOSE OF NOT LESS THAN SIX YEARS, AS WELL AS LAWS AFFORDING GOVERNMENTAL IMMUNITY, SHALL BE PERMITTED. CONSTRUCTION IN A "GOOD AND WORKMANLIKE MANNER" SHALL INCLUDE, WITHOUT LIMITATION, CONSTRUCTION SO THAT THE IMPROVEMENT TO REAL PROPERTY IS SUITABLE FOR ITS INTENDED PURPOSES. THIS SECTION SHALL BE STRICTLY ENFORCED.

See Legislative Counsel Bureau of the Colorado General Assembly, Analysis of the 2004 Ballot Proposals, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2004/ballot/2004BluebookforInternet.PDF, at 30 (last visited May 28, 2005).

¹⁶¹ See, e.g., Boyden, *supra* note 47, at 10. Boyden, a Reno, Nevada lawyer who has represented homebuilders, discusses the interaction between homeowners and homebuilders when a construction defect is alleged to exist and how this can lead to a bitter lawsuit:

after failing to resolve issues on his or her own, the homeowner retains an attorney, who in turn hires an expert. This expert dutifully inspects the home creating a prodigious list of defects — many of which were not known to the homeowner, or even considered a problem by the homeowners — nor do they present any danger to the homeowner. This long list then makes its way to the contractor via a transmittal letter from the homeowner attorney. This letter contains the usual verbiage about requiring immediate repair of all these tremendous defects, and if not, the contractor will be saddled with significant repair costs, loss in value of the home costs, payment of attorney's fees, payment of court cost, and of course payment of all expert fees. Normally, this letter catches the contractor completely off guard. Although potentially imprudent, the contractor often reacts emotionally and defensively (i.e., quite human) and dismisses this written onslaught by the homeowner as offensive. Chapter 40 thus commences. The consequences of this initial unpleasant encounter are dire. Through this initial procedure, any potentially real defects have been washed away by the created defects. The huge list forces the parties to "square off" and retreat into their respective corners. Any ability to negotiate over the true issues in the case terminates; Chapter 40 procedures have effectively polarized the parties.

Id.

¹⁶² *Olson v. Richards*, 89 P.3d 31 (Nev. 2004).

involvement. The end result may be action for negligent contraction, among other tort theories, seeking ever-greater consequential damages.

To the extent the law aims to amicably resolve construction defect disputes, Nevadans should wish for the new law's success. Growth has brought prosperity not seen in Nevada since the Comstock gold rush. Whether the "good-times" continue for Southern Nevada may very well hang on the success of Chapter 40-2003.