

Nevada Justice Association Proposed Amendment

ASSEMBLY BILL NO. 421—COMMITTEE ON JUDICIARY

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to construction. (BDR 3-841)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~[omitted material]~~ is material to be omitted.

AN ACT relating to construction; revising the definition of “constructional defect”; revising provisions relating to the information required to be included in a notice of a constructional defect; removing provisions requiring the presence of an expert during an inspection of an alleged constructional defect; establishing provisions relating to a claimant pursuing a claim under a builder’s warranty; revising provisions governing the tolling of statutes of limitation and repose regarding actions for constructional defects; revising provisions relating to the recovery of damages proximately caused by a constructional defect; increasing the period during which an action for the recovery of certain damages may be commenced; revising the prohibition against a unit-owners’ association pursuing an action for a constructional defect unless the action pertains exclusively to the common elements of the association; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY,
DO ENACT AS FOLLOWS:

Section 1. NRS 40.615 is hereby amended to read as follows:

40.615 “Constructional defect” means 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 and includes, without limitation, 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:

~~1. Deleted by amendment~~

Sec. 1.5. NRS 40.625 is hereby amended to read as follows:

40.625 ~~["Homeowner's"]~~ *“Builder’s* warranty” means a warranty ~~for policy of insurance:~~

~~1. Issued] issued~~ or purchased by or on behalf of a contractor for the protection of a claimant. ~~[-; or~~

~~2. Purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive.~~

~~- →] The term [includes] :~~

1. Includes a warranty contract issued by *or on behalf of a contractor whose liability pursuant to the warranty contract is subsequently insured by* a risk retention group that operates in compliance with chapter 695E of NRS and insures all or any part of the liability of a contractor for the cost to repair a constructional defect in a residence.

2. Does not include a policy of insurance for home protection as defined in NRS 690B.100 or a service contract as defined in NRS 690C.080.

Sec. 2. NRS 40.645 is hereby amended to read as follows:

40.645 1. Except as otherwise provided in this section and NRS 40.670, before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant:

(a) Must give written notice by certified mail, return receipt requested, to the contractor, at the contractor's address listed in the records of the State Contractors' Board or in the records of the office of the county or city clerk or at the contractor's last known address if the contractor's address is not listed in those records; and

(b) May give written notice by certified mail, return receipt requested, to any subcontractor, supplier or design professional known to the claimant who may be responsible for the constructional defect, if the claimant knows that the contractor is no longer licensed in this State or that the contractor no longer acts as a contractor in this State.

2. The notice given pursuant to subsection 1 must:

(a) Include a statement that the notice is being given to satisfy the requirements of this section;

(b) ~~Identify~~ *Specify* in ~~specific~~ *reasonable* detail ~~each defect, damage and injury~~ *the defects or any damages or injuries* to each residence or appurtenance that is the subject of the claim ~~;~~ *including, without limitation, the exact location of each such defect, damage and injury;*;

(c) Describe in reasonable detail the cause of the defects if the cause is known and the nature and extent that is known of the damage or injury resulting from the defects; and

(d) Include a signed statement, by each named owner of a residence or appurtenance in the notice, that each such owner verifies that each such defect, damage and injury specified in the notice exists in the residence or appurtenance owned by him or her.

If a notice is sent on behalf of a homeowners' association, the statement required by this paragraph must be signed under penalty of perjury by a member of the executive board or an officer of the homeowners' association.

3. A representative of a homeowners' association may send notice pursuant to this section on behalf of an association if the representative is acting within the scope of the representative's duties pursuant to chapter 116 or 117 of NRS.

4. Notice is not required pursuant to this section before commencing an action if:

(a) The contractor, subcontractor, supplier or design professional has filed an action against the claimant; or

(b) The claimant has filed a formal complaint with a law enforcement agency against the contractor, subcontractor, supplier or design professional for threatening to commit or committing an act of violence or a criminal offense against the claimant or the property of the claimant.

Sec. 3. NRS 40.647 is hereby amended to read as follows:

40.647 1. After notice of a constructional defect is given pursuant to NRS 40.645, before a claimant may commence an action or amend a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or

design professional, the claimant must:

- (a) Allow an inspection of the alleged constructional defect to be conducted pursuant to NRS 40.6462;
- (b) Be present *or have a representative of the claimant present* at an inspection conducted pursuant to NRS 40.6462 and, *to the extent possible, reasonably* identify the *proximate location(s) of the* ~~[exact location of each alleged constructional defect]~~ *defects, damages or injuries* specified

in the notice ; ~~[and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert, or a representative of the expert who has knowledge of the alleged constructional defect, must also be present at the inspection and identify the exact location of each alleged constructional defect for which the expert provided an opinion;]~~ and

- (c) Allow the contractor, subcontractor, supplier or design professional a reasonable opportunity to repair the constructional defect or cause the defect to be repaired if an election to repair is made pursuant to NRS 40.6472.

2. If a claimant commences an action without complying with subsection 1 or NRS 40.645, the court shall:

- (a) Dismiss the action without prejudice and compel the claimant to comply with those provisions before filing another action; or
- (b) If dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance with those provisions by the claimant.

Sec. 4. NRS 40.650 is hereby amended to read as follows:

40.650 1. If a claimant unreasonably rejects a reasonable written offer of settlement made as part of a response pursuant to paragraph (b) of subsection 2 of NRS 40.6472 and thereafter commences an action governed by NRS 40.600 to 40.695, inclusive, the court in which the action is commenced may:

- (a) Deny the claimant's attorney's fees and costs; and
- (b) Award attorney's fees and costs to the contractor.

↳ Any sums paid under a ~~[homeowner's]~~ *builder's* warranty, other than sums paid in satisfaction of claims that are collateral to any coverage issued to or by the contractor, must be deducted from any recovery.

2. If a contractor, subcontractor, supplier or design professional fails to:

- (a) Comply with the provisions of NRS 40.6472;
- (b) Make an offer of settlement;
- (c) Make a good faith response to the claim asserting no liability;
- (d) Agree to a mediator or accept the appointment of a mediator pursuant to NRS 40.680; or
- (e) Participate in mediation,

↳ the limitations on damages and defenses to liability provided in NRS 40.600 to 40.695, inclusive, do not apply and the claimant may commence an action or amend a complaint to add a cause of action for a constructional defect without satisfying any other requirement of NRS 40.600 to 40.695, inclusive.

3. If a residence or appurtenance that is the subject of the claim is covered by a ~~[homeowner's]~~ *builder's* warranty ~~[that is purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive:~~

~~(a) A claimant may not send a notice pursuant to NRS 40.645 or pursue a claim pursuant to NRS 40.600 to 40.695, inclusive, unless the claimant has first submitted a claim under the homeowner's warranty and the insurer has denied the claim.~~

~~(b) A claimant may include in a notice given pursuant to NRS 40.645 only claims for the constructional defects that were denied by the insurer.~~

~~(c) , a claimant shall diligently pursue a claim under the [if coverage under a homeowner's warranty is denied by an insurer in bad faith, the homeowner and the contractor, subcontractor, supplier or design professional have a right of action for the sums that would attorney's fees and costs.~~

~~(d) Statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, are tolled from the time notice of the claim under the homeowner's warranty is submitted to the insurer until 30 days after the insurer rejects the claim, in whole or in part, in writing.]~~
builder's warranty.

4. Nothing in this section prohibits an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure or NRS 40.652.

Sec. 5. NRS 40.655 is hereby amended to read as follows:

40.655 1. Except as otherwise provided in NRS 40.650, in a claim governed by NRS 40.600 to 40.695, inclusive, the claimant may recover only the following damages to the extent proximately caused by a constructional defect:

(a) The reasonable cost of any repairs already made that were necessary and of any repairs yet to be made that are necessary to cure any constructional defect that the contractor failed to cure and the reasonable expenses of temporary housing reasonably necessary during the repair;

(b) The reduction in market value of the residence or accessory structure, if any, to the extent the reduction is because of structural failure;

(c) The loss of the use of all or any part of the residence;

(d) The reasonable value of any other property damaged by the constructional defect;

(e) Any additional costs reasonably incurred by the claimant , ~~[for constructional defects proven by the claimant,]~~ including, but not limited to, any costs and fees incurred for the retention of experts to:

(1) Ascertain the nature and extent of the constructional defects;

(2) Evaluate appropriate corrective measures to estimate the value of loss of use; and

(3) Estimate the value of loss of use, the cost of temporary housing and the reduction of market value of the residence; and

(f) Any interest provided by statute.

2. If a contractor complies with the provisions of NRS 40.600 to 40.695, inclusive, the claimant may not recover from the contractor, as a result of the constructional defect, any damages other than damages authorized pursuant to NRS 40.600 to 40.695, inclusive. contractual rights between a contractor and a subcontractor, supplier or design professional.

4. As used in this section, "structural failure" means physical damage to the load-bearing portion of a residence or appurtenance caused by a failure of the load-bearing portion of the residence or appurtenance.

Sec. 5.5. NRS 40.687 is hereby amended to read as follows:
40.687 Notwithstanding any other provision of law:

1. A ~~claimant shall, within 10 days after commencing an action against a contractor, disclose to the contractor all information about any homeowner's warranty that is applicable to the claim.~~

~~2. The~~ contractor shall, no later than 10 days after a response is made pursuant to this chapter, disclose to the claimant any information about insurance agreements that may be obtained by discovery pursuant to rule 26(b)(2) of the Nevada Rules of Civil Procedure. Such disclosure does not affect the admissibility at trial of the information disclosed.

~~3. 2.~~ Except as otherwise provided in subsection ~~4. 3,~~ if ~~either party~~ *the contractor* fails to provide the information required pursuant to subsection 1 ~~or 2~~ within the time allowed, the ~~other party~~ *claimant* may petition the court to compel production of the information. Upon receiving such a petition, the court may order the ~~party~~ *contractor* to produce the required information and may award the ~~petitioning party~~ *claimant* reasonable attorney's fees and costs incurred in petitioning the court pursuant to this subsection.

~~4. 3.~~ The parties may agree to an extension of time *for the contractor* to produce the information required pursuant to this section.

~~5. 4.~~ For the purposes of this section, "information about insurance agreements" is limited to any declaration sheets, endorsements and contracts of insurance issued to the contractor from the commencement of construction of the residence of the claimant to the date on which the request for the information is made and does not include information concerning any disputes between the contractor and an insurer or information concerning any reservation of rights by an insurer.

Sec. 6. Deleted by amendment

Sec. 7. NRS 11.202 is hereby amended to read as follows:

11.202 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more *than 10*
~~than 6, 8, 10~~

years after the substantial completion of such an improvement, for the recovery of damages for:

- (a) ~~Any~~ *Except as otherwise provided in subsection 2, any* deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement;
- (b) Injury to real or personal property caused by any such deficiency; or
- (c) Injury to or the wrongful death of a person caused by any such deficiency.

2. *An action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for any intentional act any act of fraud in causing a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement ~~which he or she fraudulently concealed.~~ Notwithstanding the foregoing, however, this provision shall not apply to a lower-tiered contractor or subcontractor whose work or workmanship covers a defect or deficiency in another*

contractor's trade if that lower-tiered contractor or subcontractor does not know nor reasonably should know of the alleged defect or deficiency existence at the time of covering-up said work or workmanship.

3. The provisions of this section do not apply:

- (a) To a claim for indemnity or contribution.
- (b) In an action brought against:
 - (1) The owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house in this State on account of his or her liability as an innkeeper.
 - (2) Any person on account of a defect in a product.

Sec. 8. NRS 116.3102 is hereby amended to read as follows:

116.3102 1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

- (a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.
- (b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.
- (c) May hire and discharge managing agents and other employees, agents and independent contractors.
- (d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community. The association may not institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners with respect to an action for a constructional defect pursuant to NRS 40.600 to 40.695, inclusive, unless the action pertains ~~exclusively~~ to common elements ~~[-]~~ *or any portion of the common-interest community that the association owns or has an obligation to maintain, repair or replace.*
- (e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.
- (f) May regulate the use, maintenance, repair, replacement and modification of common elements.
- (g) May cause additional improvements to be made as a part of the common elements.
- (h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:
 - (1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and
 - (2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.
- (i) May grant easements, leases, licenses and concessions through or over the common elements.
- (j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312

- (k) May impose charges for late payment of assessments pursuant to NRS 116.3115.
 - (l) May impose construction penalties when authorized pursuant to NRS 116.310305.
 - (m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
 - (n) May impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.
 - (o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.
 - (p) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.
 - (q) May exercise any other powers conferred by the declaration or bylaws.
 - (r) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.
 - (s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:
 - (1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or
 - (2) Poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community.
 - (t) May exercise any other powers necessary and proper for the governance and operation of the association.
2. The declaration may not limit the power of the association to deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons.
3. The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commence an action for a violation of the declaration, bylaws or rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:
- (a) The association's legal position does not justify taking any or further enforcement action;
 - (b) The covenant, restriction or rule being enforced is, or is likely to be construed as, inconsistent with current law;
 - (c) Although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or
 - (d) It is not in the association's best interests to pursue an

enforcement action.

4. The executive board's decision under subsection 3 not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

5. Notwithstanding any provision of this chapter or the governing documents to the contrary, an association may not impose any assessment pursuant to this chapter or the governing documents on the owner of any property in the common-interest community that is exempt from taxation pursuant to NRS 361.125. For the purposes of this subsection, "assessment" does not include any charge for any utility services, including, without limitation, telecommunications, broadband communications, cable television, electricity, natural gas, sewer services, garbage collection, water or for any other service which is delivered to and used or consumed directly by the property in the common-interest community that is exempt from taxation pursuant to NRS 361.125.

Sec. 9. (Deleted by amendment.)

Sec. 10. (Deleted by amendment.)

Sec. 11. 1. The provisions of NRS 40.615 and 40.655, as amended by sections 1 and 5 of this act, respectively, apply to any claim for which a notice of constructional defect is given on or after October 1, 2019.

2. The provisions of NRS 40.645 and 40.650, as amended by sections 2 and 4 of this act, respectively, apply to a notice of constructional defect given on or after October 1, 2019.

3. The provisions of NRS 40.647, as amended by section 3 of this act, apply to an inspection conducted pursuant to NRS 40.6462 on or after October 1, 2019.

4. The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019.