STATE OF NEVADA
CONSTRUCTION LAW
COMPENDIUM

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The Law Firm of Thorndal, Armstrong, Delk, Balkenbush & Eisinger has zealously defended contractor and subcontractors since its formation in 1971, and this practice has grown since 1996, when it created a distinct unit dedicated to defending contractors in the construction law arena. This litigation team represents the construction industry in mediation, appearances before Special Masters, appearances in other forms of alternative dispute resolution, and in complete litigation scenarios, through trial and appeal.

Thorndal, Armstrong, Delk, Balkenbush & Eisinger has gained extensive experience in this unique area of the law over its three decade history. The firm has represented major participants in such notable cases as the MGM Fire Litigation and Hilton Fire Litigation in the 1980’s, and the Pepcon Litigation in the 1990’s, and continues in its long history of representing contractors and subcontractors of all trades into the 21st century.

Brian K. Terry, the current president of the firm, and Christopher J. Curtis, the head of the CD unit, both shareholders in the Las Vegas office, spearhead this group for southern Nevada. Charles L. Burcham and Brent T. Kolvet are shareholders in the Reno and Elko offices who head up the construction defense work in the northern portion of Nevada. Aside from experienced attorneys in the construction arena, the law firm also employs law clerks, paralegals and other support staff who have actively participated in the construction trade prior to their legal careers. This insures the firm’s understanding of complex construction issues and affords the construction department a hands-on approach to defending its clients.

Meeting with clients and discussing Nevada law is ongoing, as is the law firm’s commitment to educating the construction trade via participation on panels and continuing education programs. With Thorndal Armstrong’s wealth of experience in the construction defect arena, the firm has committed the time and resources necessary to handle the volume of materials inherent in construction defect litigation, as well as in-house continuing
education to maintain and increase the firms understanding of the rapidly changing case law and statutory law in Nevada.

**SUMMARY OF NEVADA CONSTRUCTION DEFECT LAW**

I. INTRODUCTION

In 1995, the Nevada Legislature, in response to a growing concern regarding lawsuits involving construction defects, enacted several provisions related to actions arising out of construction defects to residential property. NRS 40.600-695 (West 1997). The legislature again amended the statutes in 1997 (actions concerning property-construction defect claims, Chapter 559, S.B. 480 (1997)). The statutes do not create any new theories of liability, but develop various procedural steps that parties must follow before bringing a construction defect lawsuit in District Court. Most importantly, the statutes provide that before bringing suit, a claimant must give notice of the defects to the contractor. NRS 40.645. After receiving the notice and inspecting the property, the contractor may then make an offer of settlement to the claimant. NRS 40.645. If the contractor makes a reasonable offer, in good faith, the statute limits the claimants potential damages. NRS 40.655.

Provided herein is a summary of the applicable Nevada Law, both from the Nevada Supreme Court and the Nevada legislature, which pertains to the analysis involved in a construction defect claim.
II. GENERAL INFORMATION

Initially, it should be determined whether the claims fall within the purview of NRS 40.600. If the claims arose prior to July 1, 1995, the filing of a District Court complaint is appropriate. If the claims arose after July 1, 1995, mediation is required pursuant to NRS 40.600. Claims for personal injury or wrongful death are exempt from the applicability of NRS 40.600, et al.

III. STANDING TO SUE

NRS 116.3102(d) provides the requisite standing for a Homeowners Association to institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more units owners on matters effecting the common interest community. Common-Interest Community is defined as real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit. NRS 116.110323. This statute arguably gives the association standing to sue for all claimed defects to the common area and to all items integrally related to the common areas. However, the special standing statute only applies to common interest communities created on or after January 1, 1992 (NRS 116.1201). For associations created before January 1, 1992, it would be necessary to file a class action lawsuit where the Homeowners Association Board of Directors are certified as class representatives for common area defects.
For causes of action arising after July 1, 1995, it is arguable that NRS 40.600 et seq., further provides requisite standing for the Homeowners Association to make a claim pursuant to the guidelines and procedures for this statute. Specifically, NRS 40.610 defines a claimant as the owner of a residence or appurtenance or a representative of a Homeowners Association that is responsible for a residence or appurtenance. (NRS 40.610) Further, residence is defined as a dwelling designed for not more than four families or unit in such a dwelling in which the title to the individual unit is transferred to the owners pursuant to Chapter 116 or 117 of NRS (NRS 40.630).

A condominium owners association has no ownership in the privately owned units of the community, and therefore has no standing to pursue claims for alleged damages to them. NRCP 17 and NRS 116.3102. While an association may have standing to sue for areas to which it holds legal title (Painter vs. Anderson, 96 Nev. 941, 620 P.2d 1254 [1980]), or for matters affecting common-interest community (NRS 116 et seq.), it cannot bring actions based merely upon its contractual duty to maintain the property. See, e.g, Springmill Townhouses Association vs. OSOA Financial Services, 465 NE 2d 490 (Ill. App. 1983); Summerhouse Condominium Association, Inc. vs. Majestic Savings & Loan Association, 615 P.2d 71 (Colo. App. 1980); Jablonski vs. Kelmn, 377 NW 2d 560 (N.D. 1985). Standing requires that courts focus on the party seeking adjudication and not on the issues sought to be adjudicated. Szilagyi vs. Testa, 99 Nev. 834, 673 P.2d 495 (1993).

In Westpark Owners’ Ass’n v. Eighth Judicial Dist. Court, 123 Nev. Adv. Rep. 37, 167 P.3d 421 (2007), the Nevada Supreme Court has found that, for the purposes of Chapter 40, a residence would be considered “new” only if it was the result of original construction that has been unoccupied as a dwelling from the completion of construction to the point of sale. The Court sought to balance the competing interests in providing homeowners’ an expansive and efficient remedy for construction default litigation and
avoiding loopholes where houses could remain rentals for several years and then spring into newness upon sale.

In ANSE, Inc. v. Eighth Judicial Dist. Court of Nev., 124 Nev. Adv. Rep. 74, 192 P.3d 738 (2008), the Nevada Supreme Court clarified its earlier definition of a “new residence” so as not to preclude subsequent owners from Chapter 40 remedies, so long as the statutory period for bringing an action had not passed. The Court indicated that to deny remedy to this class of homeowners’ due to a change in title in a relatively short period of time would be against the sprint of the statute and lead to disparate treatment among similarly situated homeowners. The Court held that a subsequent owner of a residence that is the result of original construction and was unoccupied from the completion of its construction until the point of its first sale would not be barred from Chapter 40 remedies, so long as he or she brings the action before the statutory period terminates.

CLAIMS AGAINST THE GOVERNMENT.

In certain circumstances it is possible to bring a successful lawsuit against the County for negligently approving construction when it does not meet building code standards. Although NRS 41.033 provides a measure of immunity to governmental agencies and their employees, this immunity is not complete.[1]

If the County has knowledge of the defects, the County owes a duty to take action as a result of the discovery of the deficiencies. Immunity will not bar action, based upon the public entity’s failure to act reasonably after learning of the hazard. Butler vs. Bogdanovich, 101 Nev. 449, 705 P.2d 662 (1985). To survive a motion for summary judgment, the plaintiff may need to present some evidence that the County had knowledge of the defects. See, Lotter vs. Clark County Board of Commissioners, 106 Nev. 366, 793
IV.

STATUTES OF REPOSE AND LIMITATION

In every construction defect case, an analysis must be made as to the potential statute of repose and statute of limitation issues. The state of Nevada has both statutes of repose and statutes of limitation applicable to construction defect cases.

Statutes of repose are distinguishable from statutes of limitation:

Statutes of repose bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. In contrast, statutes of limitation foreclose suits after a fixed period of time following occurrence or discovery of an injury. *Allstate Insurance Company vs. Furgerson*, 104 Nev 772, 775 Fn. 2, 776 P.2d 904, 906 Fn. 2 (1988).

STATUTES OF REPOSE.

The Nevada legislature enacted the Statutes of Repose to protect developers and builders who would otherwise endure unending liability, even after they had lost control over the use and maintenance of the improvement. *Nevada Lakeshore Company vs. Diamond Electric, Inc.*, 89 Nev. 293, 511 P.2d 113 (1973).

Additionally, Alsenz held that the Statutes of Repose were still unconstitutional because they did not provide a grace period in which a claimant could file an existing cause of action. However, on April 10, 1991, the Nevada legislature solved both of these problems by enacting a statute declaring that the Statutes of Repose apply retroactively to actions in which substantial completion occurred before July 1, 1983. The legislature also provided that any action accrued before April 10, 1991, and commenced before July 1, 1994, would not be barred by the Statutes of Repose. (Chapter 40, Stats. 1991, as amended by Chapter 449, Stats. 1993) It thus stands that the Statutes of Repose apply to all new construction defect cases, regardless of the date of substantial completion.

There are four relevant Statutes of Repose that should be reviewed in every case: a ten year limitation for defects which are known or should be known to the developer/contractor; an eight year limitation for latent defects; a six year limitation for patent defects; and a statute allowing a claimant to file at any time for fraudulent concealment.

TEN YEAR LIMITATION (Known Deficiencies).
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 ten years after the substantial completion of such an improvement, for the recovery of damages for:

(a) Any deficiency in the design, planning, supervision or observation of construction of the construction of such an improvement which is known or through the use of reasonable diligence should have been known to him;
(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.

Where the injury occurs in the tenth year after the substantial completion of such an improvement, an action for damages for injury to property or person, damages for wrongful death resulting from such injury or damages for breach of contract may be commenced within two years after the date of such injury, irrespective of the date of death, but in no event may any action be commenced more than twelve years after the substantial completion of the improvement. (NRS 11.203)

EIGHT YEAR LIMITATION (Latent Deficiencies).

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

(1) Any latent deficiencies in the design, planning, supervision or observation of construction or the construction of such an improvement;
(2) Injury to real or personal property caused by any such deficiency; or
(3) Injury to or the wrongful death of a person caused by any such deficiency.

Where injury occurs in the eighth year after substantial completion of an improvement, an action for damages for injury to property or person, damages for wrongful death resulting from such injury or damages for breach of contract may be commenced within two years after the date of such injury, irrespective of the date of death, but in no event may an action be commenced more than ten years after substantial completion of the improvement. (NRS 11.204)

**SIX YEAR LIMITATION (Patent Deficiencies).**

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 the improvement to real property more than six years after the substantial completion of such an improvement, for the recovery of damages for:

(1) Any patent deficiencies in the design, planning, supervision or observation of construction or the construction of such an improvement;
(2) Injury to real or personal property caused by any such deficiency; or
(3) Injury to or the wrongful death of a person caused by any such deficiency.

Where injury occurs in the sixth year after substantial completion of an improvement, an action for damages for injury to property or person, damages for wrongful death resulting from such injury or damages for breach of contract may be commenced within two years after the date of such injury, irrespective of the date of death, but in no event may an action be commenced more than eight years after substantial completion of the improvement. (NRS 11.205)
FRAUDULENT CONCEALMENT (No Time Limit).

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 the improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or the construction of such improvement which is the result of his willful misconduct or which he fraudulently concealed;

(2) Injury to real or personal property caused by any such deficiency; or

(3) Injury to or the wrongful death of a person caused by any such deficiency. (NRS 11.202).

Merely alleging willful misconduct will be insufficient to survive a motion for summary judgment when the plaintiff relies on NRS 11.202 to prevent the cause of action from being time barred by NRS 11.203, 11.204, or 11.205. In order to avoid summary judgment, a plaintiff must show that a material issue of fact exists about willful misconduct, and must provide some evidence to support these allegations. Elley vs. Stevens, 760 P.2d 768 (1988).

SUBSTANTIAL COMPLETION.

There are presently no Nevada Supreme Court opinions defining the term substantial completion. In California, the term substantial completion as used in similar statutes of limitation is defined by statute. California Code of Civil Procedure, Sec. 337.15(g) provides:
The ten year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:

(1) The date of final inspection by the applicable public agency.
(2) The date of recordation of a valid notice of completion.
(3) The date of use or occupation of the improvement.
(4) One year after termination or cessation of work on the improvement.

The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.

It is unclear how similar Nevada’s definition of substantial completion will relate to that codified in California, but California’s definition may serve as a guide as to how Nevada courts will interpret this phrase. See, G&H Associates vs. Hahn, 113 Nev. 265, 934 P.2d 229 (1997). However, the Nevada Supreme Court has implied that substantial completion occurs when a Certificate of Occupancy is issued. Tahoe Village Homeowners Association vs. Douglas County, 106 Nev. 660 (1990).[3]

STATUTES OF LIMITATIONS.

In addition to complying with the time restrictions provided by the various statutes of repose discussed above, Nevada’s statutes of limitation require that a cause of action be brought within a certain time of occurrence or discovery of an injury. Allstate Insurance Company vs. Ferguson, 104 Nev. 772, 766 P.2d 904 (1998). Thus, it is critical to
determine as early as possible which statute of limitation period applies to a given cause of action to ensure that suit was brought within the applicable time limitation.

TOLLING.

Any statutes of limitations or repose applicable to a claim or cause of action governed by NRS 40.600 to 40.695, inclusive, are tolled from the time a claimant provides notice of the claimed defect, damage or injury to the contractor pursuant to NRS 40.645, until thirty days after a mediation is concluded or waived in writing pursuant to NRS 40.680 (NRS 40.645(1)).

V.
PROCEDURE GUIDELINES AND DAMAGES
(Under NRS 40.600 et seq.)

OUTLINE

Provided below is an outline of the statutory provisions of NRS 40.600 et seq., followed by discussion of the pertinent provisions.

General Information

1. Applicability of Statutes - NRS 40.635
a. Any claim arising before, on or after July 1, 1995

**EXCEPT:** Claim for personal injury or wrongful death if claim is subject of an action commenced on or after July 1, 1995

c. Does not create a new theory upon which liability may be based.

2. Construction Defect Defined - NRS 40.615

a. Defect in design, construction, manufacture, repair or landscaping

b. Application

i. New residence

   (1) Dwelling in which title to individual unit is transferred to the owners - NRS 40.630

ii. Appurtenance

iii. Alteration or addition to existing residence

c. Defect that creates imminent health or safety threat - NRS 40.670

i. Contractor must take reasonable steps to cure

   (1) Only make repairs licensed to do

   (2) Failure to cure

      (a) Effect

         (i) Damage limitation

      (b) Good faith inspection of threat

         (i) Damages limited by statute unless

            1) Government inspector certified imminent threat to health or safety.

**Plaintiff/Claimant**

1. Claimant Defined - NRS 40.610

a. Owner of residence or appurtenance
b. Each owner of a residence or appurtenance to whom a notice applies – NRS 40.645(4)
c. Representative of homeowners association responsible for residences/appurtenances

2. Procedure
a. Written notice to contractor - NRS 40.645(4)
i. Must give written notice to contractor, may give written notice to any subcontractor, supplier or design professional known to the claimant who may be responsible for the construction defect
ii. Specify defects, damages, injuries with reasonable detail
iii. Describe cause of defects, if known, with reasonable detail
iv. Complex matter
   (1) Expert opinion satisfies above requirements – must be based upon a valid and reliable representative sample
b. Homeowners Warranty
   i. Claimant must diligently pursue claim under warranty
c. Settlement
   i. Acceptance
      (1) Accept within 35 days of offer - NRS 40.660
         (a) Add 60 days if complex matter - NRS 40.645(4)
         (i) Under NRS 40.646, within 30 days after the date on which a contractor receives notice of a constructional defect pursuant to NRS 40.645, the contractor shall forward a copy of the notice by certified mail, return receipt requested, to the last known address of each subcontractor, supplier or design professional whom the contractor reasonably believes is responsible for a defect specified in the notice.
(ii) If the contractor does not provide notice within the time period provided, the contractor will not be allowed to commence an action against the entity unless the contractor can demonstrate that after a good faith effort, the contractor was unable to locate the entity.

(iii) Within 30 days of receiving notice from the contractor, the subcontractor, suppliers or design professional must inspect the alleged constructional defect and provide the contractor with a written statement indicating whether the applicable entity intends to conduct repairs or provide two proposed dates for making any repairs that are intended.

(3) Submit offer of all association members if claimant is representative of associate

ii. Rejection - NRS 40.650

(1) Reasonable rejection if:

(a) Contractor fails to:
   (i) make an offer of settlement
   (ii) make good faith no liability response

(b) Damages not limited by statute if:
   (i) No offer
   (ii) Bad faith no liability response
   (iii) Repairs not complete per offer of settlement
   (iv) Contractor fails to agree to mediator
   (v) Participate in mediation

(2) Unreasonable rejection - NRS 40.650(1)

(a) Effect - Court may:
   (i) Deny claimants attorneys fees and costs
   (ii) Award attorneys fees to contractor

d. Damages recoverable - NRS 40.655(1)

i. Reasonable cost of repairs
ii. Temporary housing

iii. Reasonable attorneys fees – amount of fees must be approved by the court pursuant to NRS 40.655(2)

iv. Reasonable value of other property damaged

v. Loss of use of all or part of residence

vi. Reasonable value of other property damaged

vii. Additional Costs

(1) Expert fees

viii. Interest by statute

e. Mandatory mediation Requirement - NRS 40.680

i. Waiver

(1) Written waiver by contractor and claimant

ii. Mediator

iii. Parties must agree upon a mediator within 20 days after a mediator is first selected by a claimant

(1) A decision will be issued by the mediator within 45 days of receiving the matter

(a) Either party may petition service to appoint

iv. Exchange of information - NRS 40.681

(1) 15+ days prior to mediation

(2) All relevant reports, photos, correspondence, plans, specifications, warranties, contracts, subcontracts, work orders, videotapes and soil or other engineering reports not privileged

v. Mediation

(1) Time

(a) Within 60 days of submission to mediator, unless parties agree to extend

(2) Fees
(a) Fee cap of $750 per day, unless higher amount agreed by parties

(b) Payment of fees
   (i) Single claimant
      1) $50 deposit with mediator
      2) Contractor deposits remaining amount
   (ii) Complex
      1) Each party shares fees equally

(3) Effect of No Agreement - NRS 40.680(5)
   (a) Commence action in court
      (i) Reasonable costs and fees of mediation recoverable to prevailing party as costs
      (ii) Either party may petition court for appointment of Special Master

f. Commencement of action
   i. Disclosure of Information concerning warranties - NRS 40.687
      (1) Claimant - within 10 days after commencement - parties may agree to extension
         (a) All information about homeowners warranty
      (2) Contractor - within 10 days after commencement - parties may agree to extension
         (a) Insurance agreements discoverable under NRCP 26(b)(2)
      (3) Failure to comply
         (a) Either party may petition court to compel production
   ii. Preference - NRS 40.689
      (1) Either party may:
(a) Petition court for preferential trial setting
(b) Petition court for assignment to senior judge
   (i) Additional expenses born equally, or
   (ii) Judge may apportion expenses

iii. Limitation on Claim - NRS 40.690
   (1) Claimant may not bring claim against third parties, including governmental agency during period in which claim is being settled, mediation or resolved under this chapter.

iv. Additional of Third Party by Contractor - NRS 40.690(2)
   (1) Contractor may require third parties to appear and participate as is party was a contractor
      (a) Except insurer or government

v. Statutes of Limitation/Repose - NRS 40.695
   (1) Tolled from time to time notice is given until 30 days after conclusion or waiver of mediation
      (a) Applies to third parties whether required to appear or not.

**Defendant/Contractor**

1. Contractor Defined - NRS 40.620
   a. Person, with or without license who:
      i. Develops, constructs, alters, repairs, improves or landscapes residence or appurtenance
      ii. Develops a site for residence or appurtenance
      iii. Sells a residence or appurtenance
         (1) Must develop, construct, alter repair, improve or landscape through self, agent, employee or subcontractor
2. Liability of Contractor - NRS 40.640
   a. Liable
      i. Acts or omissions of self, agent, employee or subcontractor for damages resulting from construction defect
   b. Not Liable
      i. Act or omission or person other than self, agent, employee or subcontractor
      ii. Failure of other person to take reasonable action to reduce the damages (failure to mitigate)
      iii. Normal wear, tear or deterioration
      iv. Normal shrinkage, swelling, expansion or settlement
   v. Construction defect disclosed to owner
      (1) before purchase
      (2) clear language
      (a) UNDERLINED AND BOLDFACED TYPE WITH CAPITAL LETTERS
   c. Damages - NRS 40.655.(1)
      i. Good faith
         (1) Costs of repairs
         (2) Temporary housing
         (3) Attorneys fees
            (a) Approved by court - NRS 40.655(2)
         (4) Reduction in market value
         (5) Loss of use of all or part of residence
         (6) Reasonable value of other property damaged
         (7) Additional costs
            (a) Expert fees
(8) Interest by statute

ii. Bad faith

(1) Damages not limited by statute if:
   (a) No offer
   (b) Bad faith no liability response
   (c) Repairs not complete per offer of settlement
   (d) Contractor fails to agree to mediator
   (e) Participate in mediation

3. Procedure

a. Notice
   i. Contractor must respond within 90 days of receiving notice of a construction defect
   ii. Under NRS 40.646, within 30 days after the date on which a contractor receives notice of a constructional defect pursuant to NRS 40.645, the contractor shall forward a copy of the notice by certified mail, return receipt requested, to the last known address of each subcontractor, supplier or design professional whom the contractor reasonably believes is responsible for a defect specified in the notice.
   iii. If the contractor does not provide notice within the time period provided, the contractor will not be allowed to commence an action against the entity unless the contractor can demonstrate that after a good faith effort, the contractor was unable to locate the entity.
   iv. Within 30 days of receiving notice from the contractor, the subcontractor, suppliers or design professional must inspect the alleged constructional defect and provide the contractor with a written statement indicating whether the applicable entity intends to conduct repairs or provide two proposed dates for making any repairs that are intended.
b. Offer to settle - NRS 40.6472
   
i. Response to notice of defect may include a proposal for monetary compensation

   ii. The proposal may include contribution from a subcontractor, supplier or design professional

      (2) Respond to each defect, stating cause, if known, and extent of damage or injury

   iii. Type of Offer

      (1) Monetary compensation

      (2) Agreement to make repairs if licensed to do so

      (3) Agreement to cause repairs to be made by another

      (4) Repurchase of property - NRS 40.665

         (a) Per se good faith offer if includes provision for reimbursement of

                (i) Market value if no defect existed

                1) if residence less than two years old and purchased from contractor, market value = price sold

                (ii) Value of any improvements by another

                (iii) Reasonable attorneys fees

                (iv) Reasonable expert fees

                (v) Costs, including moving costs, loan fees

                (vi) Offer is considered rejected under NRS 40.660 if not accepted within 35 days

   iv. Accepted by Claimant

      (1) Repair

         (a) Must be performed within 105 days from the date when the contractor received notice if there are less
than five owners named in the notice or 150 days if there are 5 or more – NRS 40.648

(b) Parties can agree to extend time

(c) Proof of repair allowed - NRS 40.675

(2) Defective Repairs –NRS 40.667

(a) Settlement Agreement

(i) Waiver not binding if repairs defective

1) Claimant must:
   - Obtain expert opinion of defect
   - Written notice to contractor of defect
   - and copy of opinion
   - Claimant and Contractor comply with inspection requirements

(ii) Failure to prevail subsequent action, court may: (NRS 40.667)

1) Deny claimants fees and costs

2) Award fees and costs to contractor

c. Mediation Requirement - NRS 40.680

i. Waiver

(1) Written waiver by contractor and claimant

ii. Mediator

(1) Select within 20 days of after mediator is first selected by a claimant, or

   (a) Either party petition service to appoint

   (b) A decision will be issued by the mediator within 45 days of receiving the matter

iii. Exchange or information - NRS 40.681

(1) 15+ days prior to mediation
(2) All relevant reports, photos, correspondence, plans, specifications, warranties, contracts, subcontracts, work orders, videotapes and soil or other engineering reports not privileged

iv. Mediation

(1) Time
   (a) Within 60 days of submission to mediator, unless parties agree to extend

(2) Fees
   (a) Fee cap of $750 per day, unless higher amount agreed by parties
   (b) Payment of fees
      (i) Single claimant
         1) $50 deposit with mediator
         2) Contractor deposits remaining amount
      (ii) Complex
         1) Each party shares fees equally

(3) Effect of No Agreement - NRS 40.680(5)
   (a) Commence action in court
      (i) Reasonable costs and fees of mediation recoverable to prevailing party as costs
      (ii) Either party petition court for appointment of Special Master.

d. Commencement of action

i. Disclosure of Information - NRS 40.687
   (1) Claimant - within 10 days after commencement - parties may agree to extension
      (a) All information about homeowners warranty
(2) Contractor - within 10 days after commencement - parties may agree to extension
   (a) Insurance agreements discoverable under NRCP 26(b)(2)

(3) Failure to comply
   (a) Either party may petition court to compel production

ii. Preference - NRS 40.689
   (1) Either party may:
      (a) Petition court for preferential trial setting
      (b) Petition court for assignment to senior judge
         (i) Additional expenses born equally, or
         (ii) Judge may apportion expenses

iii. Limitation on Claim - NRS 40.690
   (1) Claimant may not bring claim against third parties, including governmental agency during period in which claim is being settled, mediation or resolved under this chapter.

iv. Additional of Third Party by Contractor - NRS 40.690(2)
   (1) Contractor may require third parties to appear and participate as is party was a contractor
      (a) Except insurer or government

v. Statute of Limitation/Repose - NRS 40.695
   (1) Tolled from time notice is given until 30 days after conclusion or waiver of mediation
      (a) Applies to third parties whether required to appear or not

*Special Master - NRS 40.680(5)*
1. Responsibilities
   a. Review all pleadings, papers or documents filed with court
   b. Coordinate discovery
   c. Order site inspections
   d. Order settlement conferences
      i. Special Master may not conduct
   e. Require any attorney to provide statement of legal and factual issues
   f. Refer to appointing judge for matters requiring assistance

2. Appeal of Master’s decision
   a. Any party may appeal to the court

3. Reports issued by Mediator or Master - NRS 40.680(6)
   a. Admissible
      i. Report that party acted in bad faith
   b. Inadmissible
      i. Statements of admission of liability

DISCUSSION

LIST OF DEFECTIVE CONDITIONS.

For residential construction, including condominium units, the claimants must follow the procedural guidelines of 40.600 before filing a lawsuit.
At least sixty days before a claimant brings a cause of action against a contractor for damages arising from a construction defect, the claimant must give written notice by certified mail, return receipt requested, to the contractor at the contractor's last known address, specifying in reasonable detail the defects or damages or injuries that are the subject of the complaint (NRS 40.645(1)).

INSPECTIONS.

During the 35 day period after the contractor receives the notice, on his written request, the contractor is entitled to inspect the property that is the subject of the complaint to determine the nature and cause of the defect, damage or injury and the nature and extent of repairs necessary to remedy the defect. If the residence is covered by a warranty or contract of insurance issued by an insurer authorized by the State of Nevada to issue such a warranty or contract, a claimant must diligently pursue a claim under the warranty or contract (NRS 40.645(1)).

OFFER OF SETTLEMENT.

Within 45 days after the contractor receives the notice, the contractor may make a written offer of settlement to the claimant. The offer:

(a) Must be served to the claimant by certified mail, return receipt requested, at the claimant's last known address.

(b) Must respond to each construction defect set forth in the claimant's notice and describe in reasonable detail the cause of the defect, if known, the nature of extent of the damage or injury resulting from the defect, and, unless the offer is limited to a proposal for monetary compensation, the method, adequacy and estimated cost of the proposed repair.
(c) May include:

1. A proposal for monetary compensation.

2. If the contractor is licensed to make the repairs, an agreement by the contractor to make the repairs.

3. An agreement by the contractor to cause the repairs to be made at the contractors expense, by another contractor who is licensed to make the repairs, bonded and insured. The repairs must be made within 45 days after the contractor receives written notice of the acceptance of the offer, unless completion is delayed by the claimant or by other events beyond the control of the contractor. The claimant and the contractor may agree in writing to extend these periods. (NRS 40.645(2))

An offer of settlement that is not accepted within 25 days after the offer is received by the claimant is considered rejected if the offer contains a clear and understandable statement notifying the claimant of the consequences of his failure to respond or otherwise accept or reject the offer of settlement. An affidavit certifying rejection of an offer of settlement may be filed with the court. (NRS 40.660)

If a claimant unreasonably rejects a reasonable written offer of settlement made pursuant to NRS 40.645, or does not permit the contractor or independent contractor a reasonable opportunity to repair the defect pursuant to an accepted offer of settlement and thereafter files a cause of action governed by NRS 40.600 to 40.695, inclusive, the court in which the cause of action is filed may:

(a) Deny the claimants attorneys fees and costs; and

(b) Award the attorney fees and costs to the contractor. Any sums paid under a homeowners warranty, other than the sums paid in satisfaction of claims
that are collateral to any coverage issued to or by the contractor, must be deducted from any recovery (NRS 40.650[1]).

If a contractor fails to make a reasonable offer of settlement pursuant to NRS 20.645 or fails to complete, in a good and workmanlike manner, the repairs specified in an accepted offer, the limitation on damages and defenses to liability provided in NRS 40.600 to 40.695, inclusive, do not apply. (NRS 40.650)[2])

If coverage under a warranty or contract of insurance is denied by an insurer in bad faith, the homeowner and the contractor have a right of action for the sums that would have been paid if the coverage had been provided, plus reasonable attorneys fees and costs. (NRS 40.650[3][4]

MEDIATION.

Before a complaint in a cause of action governed by NRS 40.600 et seq. inclusive may be filed in court, the matter must be submitted to mediation, unless mediation is waived in writing by the contractor and the claimant. (NRS 40.680[1]).

The claimant and contractor must select a mediator by agreement. If the claimant and contractor fail to agree upon a mediator within 45 days after a mediator is first selected by the claimant, either party may petition the American Arbitration Association, the Nevada Arbitration Association, Nevada Dispute Resolution Services or any other mediation service acceptable to the parties for the appointment of a mediator. The mediator so appointed may discover only those documents or records which are necessary to conduct the mediation. The mediator shall convene the mediation within 60 days after the matter is submitted to him, unless the parties agree to extend the time. The contractor shall deposit with the mediator before the mediation begins the entire amount estimated by the mediator as necessary to pay the salary and expenses of the mediator, and shall deposit
additional amounts demanded by the mediator as incurred for that purpose. The total fees for each day of mediation and the mediator must not exceed $750.00 per day. (NRS 40.680[2])

There is no statutory requirement compelling the participation of the subcontractor in the settlement/mediation under NRS 40.600 et seq. However, the general contractor/developer will frequently require the subcontractor to indemnify the general subcontractor/developer for damages or costs arising from defective work. If the subcontractor elects not to participate in the proceeding under NRS 40.600 et seq., nothing that occurs in that proceeding can have an effect on the obligations of the subcontractor.[5] If the subcontractor does elect to participate in the proceedings under NRS 40.600 et seq., the subcontractor will be governed by the same deadlines as those imposed upon the general contractor. Given the definition of contractor, it is arguable that the subcontractor may participate in the process with the general contractor/developer.[6]

As the contractor generally will include an indemnity provision requiring the subcontractor to hold the general contractor/developer harmless for any failure of the clients work, it may be more cost effective to participate in the resolution of the claim at this time.[7]

If, after undergoing mediation, the parties do not reach an agreement concerning the matter, the claimant may file his complaint and:

(a) The reasonable cost and fees of the mediation are recoverable as costs of the action.

(b) The claimant may petition the court in which the complaint is filed for the appointment of a Special Master. (NRS 40.690(3))
An appointed Special Master may:

(a) Review all pleading, papers or documents filed with the court concerning the cause of action.
(b) Coordinate the discovery of any books, records, papers or other documents by the parties, including the disclosure of witnesses and the taking of the deposition of any party.
(c) Order any inspections on the site of the property by a party in any consultants or experts of a party.
(d) Order settlement conferences and attendance at those conferences by any representative of the insurer of a party.
(e) Require any attorney representing a party to provide statements of legal and factual issues concerning the cause of action.
(f) Refer to the judge who appointed him or to the presiding judge of the court in which the cause of action was filed any matter requiring assistance from the court. The Special Master may not, unless otherwise agreed by the parties, personally conduct any settlement conferences or engage in any ex parte meetings regarding the action. (NRS 40.680(4))

Upon application by a party to the court in which the cause of action is filed, any decision or other action taken by a Special Master appointed pursuant to this section may be appealed for a trial de novo. (NRS 40.680(5)).

A report issued by a mediator or a Special Master that indicates that either party has failed to appear before him or to mediate in good faith is admissible in the cause of action, but a statement or admission made either party in the course of mediation is not admissible. (NRS 40.680(6)).
DAMAGES

As set forth in NRS 40.655, damages for residential construction against a developer/contractor may include:

(a) Any reasonable attorneys fees;
(b) The reasonable cost of repairs necessary to cure any constructional defect that the contractor failed to cure and the reasonable expenses of temporary housing reasonable necessary during the repair;
(c) The reduction of market value of the residence or accessory structure, if any, to the extent the reduction is because of a structural failure;
(d) The loss of the use of the residence during the time of the repair;
(e) The reasonable value of any other property damage by the construction defect;
(f) Any additional cost incurred by the claimant, including any costs and fees incurred for hiring experts reasonably necessary to ascertain the nature and extent of the construction defect; and
(g) Any interest provided by statute. (NRS 40.655)

ALTERNATIVE DAMAGES.

Nevada law provides an alternative method for settling a claim under NRS 40.600 et seq. by allowing the parties to enter into a written agreement whereby the contractor may repurchase the property from the homeowner. Under this opinion, the agreement may include provisions which reimburse the homeowner for:
(1) the value of any improvement made to the property by a person other than the contractor;
(2) reasonable attorneys fees and costs for experts;
(3) any costs, including costs and expenses for moving and costs, points and fees for loans. (NRS 40.665).

VI.

EXPERT TESTIMONY

A decision concerning the competency of witnesses to offer an opinion as an expert is within the sound discretion of the trial court, and the ruling will not be disturbed unless a clear abuse of the courts discretion is shown. NRS 50.275 Cheyenne Construction vs. Hozz, 102 Nev. 308, 720 P.2d 1224 (1986). Levine vs. Remolif, 80 Nev. 168, 390 P.2d 718 (1964). A court may permit an expert to testify based on his or her practical experience, however, it is within the courts discretion to refuse to qualify a witness because the witness is not a licensed engineer. Cheyenne Construction, ld. However, under NRS 50.275, an expert need only possess special knowledge, training and education to enable him to testify to matters within the scope of that knowledge, and the court will not necessarily require that that expert be licensed in the field expertise. Fernandez vs. Admirand, 108 Nev. 963, 970, 843 P.2d 354 (1992).

VII.

STANDARD OF CARE
Nevada law does not currently include mass produced tract homes as a product under a strict liability cause of action. Instead, the case typically proceeds under general negligence theories wherein the plaintiff must establish by a preponderance of the evidence that the defendant violated the applicable standard of care.

For residential construction, the general contractor is liable for the negligence of his agents, employees and subcontractors. (NRS 40.640)

Nevada case law does not provide a useful explanation of the proper standard of care to be applied for a negligence cause of action in a construction defect case. In California, the duty of care owed by contractor/builder is the exercise of the ordinary skill and competence of the members of the particular profession. _Gagne vs. Bertran_, 43 Cal.2d 481, 275 P.2d 15 (1954). To an extent, California has followed the locality rule, where a professional has a duty to have that degree and skill ordinarily possessed by a reputable professional practicing in the same or similar locality under similar circumstances (_Baji_ No. 6.37). However, the modern trend is away from the locality rule, merely treating it as one of several factors. (_Prosser_, Law of Torts, Section 32 at 164 (4th Edition 1971). It should be noted that the court will consider the standard prescribed by law or prevailing in the industry at the time of the construction. See, _Miller vs. Los Angeles Flood Control_, 8 Cal.3d 689, 505 P.2d 193, 106 Cal.Rptr. 1, (1973). In California, negligence causes of action can also arise for negligent failure to supervise. _Bayuk vs. Edison_, 236 Cal.App.2d, 309, 46 Cal.Rptr. 49 (1965).

VIII.

INSURANCE ISSUES
INSURANCE & INDEMNIFICATION CONSTRUCTION PROJECTS

A. KEY INSURANCE ISSUES IN CONSTRUCTION

1. Is General Comprehensive Liability Insurance Available for Construction Defect Claims

The policy typically purchased by either a contractor or an owner/developer is defined as a comprehensive or commercial general liability (“CGL”) policy.

These policies are typically issued in a form provided by the Insurance Service Office (“ISO”), and obligates the insurer to defend and/or indemnify the insured contractor for claims against it alleging “property damage,” that are a result of an “occurrence . . .”

The insuring coverage grant obligates the insurer to pay “all sums” the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence. This grant, however, has a number of significant exclusions.

“Occurrence” is generally defined as “an accidental event, including continued through repeated exposure to substantiate the same general harmful conditions.” “Property damage” is defined to include “physical injury to or destruction of tangible property . . . or loss of use of tangible property without physical damage or destruction.” See, United National Insurance v. Frontier Insurance, 120 Nev. 678, 99 P.3d 1153 (2004); Aetna Cas.& Sur. Company v. Mclbes, Inc., 684 F. Supp. 246, 248 (Dist. Nev. 1988), aff’d, 878 F.2d 385 (9th Cir. Nev. 1989).
The underwriting purpose of CGL policies is to require the contractor ("insured") to absorb "its own replacement or repair losses while the insurer takes the risk of injury to property of others." Western Employers Ins. Co. v. Arciero & Sons, Inc., 194 Cal. Rptr. 688, 690 (1983). One of the prominent cases discussing the purpose of CGL coverage is Maryland Casualty Co. v. Reeder, 270 Cal. Rptr. 719, 722 (4th Dist.1990). That case held:

The risk of replacing and repairing defective materials or poor workmanship is generally been considered a commercial risk which is not passed onto the liability insurer. Rather, liability coverage comes into play when the insured’s defective materials or work cause injury to property other than the insured’s own work or products. . . . This distinction is significant. Replacement and repair costs are to some degree within the control of the insured. They can be minimized by careful purchasing, inspection of materials, quality control, and hiring practices. If replacement or repair costs were covered, the incentive to exercise care or to make repairs at the least possible cost would be lessened since the insurance company would be footing the bill for all scrap. . . ."

This particular doctrine has been the issue of several important cases including Knutson Construction Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 233-234 (Minn. 1986).

2. The Impact of the Broad Form Endorsement in the 1986 ISO Policy Form
The insurance industry, as a whole, started to offer broad form property damage endorsement, together with a package for policyholders including contractors, as part of the reform to the 1986 ISO general liability coverage forms. The 1986 CGL forms, therefore, added coverage broader than the limited coverage under the 1973 CGL forms. It is highly unusual that a current tender will generate a review of a 1973 CGL policy form. However, there is also a possibility an insurer will exclude the broad form endorsement.

3. **When Does a Construction Defect Constitute an “Occurrence?”**

A CGL provides it will “pay on behalf of the insured all sums with insured shall become legally obligated to pay his damages because of . . . property damage to which this insurance applies caused by an occurrence.” “Occurrence” is defined as “an accident, including injurious exposure to conditions which results during the policy period and bodily injury or property damage neither expected nor intended from the standpoint of the insured . . .” In most instances, a claim against a general contractor or owner/developer does not allege property damage but rather seeks damages for breach of contract resulting from the contractor’s faulty workmanship.

Furthermore, typically property damage is alleged but may not necessarily be apparent until after a contractor’s policy of insurance is no longer in force.

These pose significant coverage issues in terms when there has been an “occurrence” and if so, what years of the CGL insurance is obligated to respond, i.e., what policy is effectively “triggered?”

a. **When Is There a Physical Injury to Tangible Property?**
A CGL policy typically affords coverage for “property damage” that occurs during the policy period. Property damage is defined as including physical injury to, destruction of, or loss of use of tangible property. Often an allegation against a policyholder contractor will not reference or allege tangible property damage during an insured’s policy period. This is especially true when the actions involve negligent misrepresentation, breach of fiduciary duty, breach of conditions, covenants, and restrictions, or seeks to asserts claims beyond physical injury, such as diminution of market value, various economic losses. Consequently, property damage coverage in a CGL policy generally does not apply to such claims.

Strict economic losses like lost profits, loss of good will, loss of anticipated benefit of a bargain, loss of investment, and diminution of market value do not fall into damage or injury to tangible property covered by a CGL policy.

As the Federal Court noted in McIbes, supra, an opposite conclusion would transform a general liability insurance policy into a guarantee of a contractual performance bond. In that event, the insured would not be discouraged from defective workmanship, since he or she would recover from the insurer even if diminution of value to the project arose solely due to defectiveness of its own work. Accord: United National, supra.


Comprehensive liability coverage can be triggered when the insured’s defective materials or work causes injury to property other than the insured’s own work or products.
For example, when the defect has caused physical injury to or loss of use of tangible property.

The seminal case in this area is Maryland Casualty Co. v. Reeder, supra.

In Reeder, the case involved a lawsuit against a contractor and a developer alleging construction defects in a condominium project and in which general liability policies have been issued for the contractor and developers. Reeder involved three underlying complaints. In the first complaint, the plaintiffs allege that their condominium was “suffering from severe cracks in the walls and the settling of the slab.” In the second complaint, the plaintiffs allege that their units have been “damaged to the extent they are rendered valueless . . .” In the third complaint, the homeowners’ association alleged that damage caused by “cracking and separation in the concrete floor slabs, foundations, retaining wall, interior and exterior wall, ceilings, and exterior concrete patios.” The homeowners’ association had further alleged that the roofing system had failed “causing rainwater and moisture to penetrate the roofs, causing damage to the building structures and contents of the affected condominium unit living spaces . . .” Based on these factual allegations, the Reeder court held that while inferior workmanship itself is not property damage, where the affect has caused physical injury to property or the loss of its use, there is insurance coverage. The court stated:

“We have allegations of physical harm to tangible property. As we have seen, the homeowners and their association have alleged soil subsidence as cracked concrete floor slabs, foundations, retaining walls, interior and exterior walls and ceilings, and exterior patio areas. Moreover, failure of the roofing system has allegedly allowed rain water to damage building structures and the contents of living areas. Thus . . . the owners and their association have gone beyond allegations
of defects in materials and workmanship exist at the project . . .

See, Reeder, supra, at 970-971.

The Reeder case was last discussed by the Nevada Supreme Court in McKeller Development of Nevada, Inc. v. Northern Insurance Co. of New York, 108 Nev. 729, 837 P.2d 858 (Nev. 1992).

Finally, the issue of whether property damage exists may also arise in the context of a defective product being incorporated into tangible property. In the past, some courts have concluded that this can constitute property damage, especially under the prior 1973 CGL policy form. See, e.g., United States Fidelity & Guaranty Co. v. Nevada Cement, 93 Nev. 179, 561 P.2d 1335 (1977) (defective cement sold by manufacturer to concrete supplier cause injury to or destruction of tangible property within coverage of manufacturer’s general liability policy, even though financial loss was minimized by and limited to installation). This particular case, however, represents questionable authority in view of the 1986 ISO definition requiring tangible physical loss. See, Ninth Circuit discussion in New Hampshire Insurance Co., supra.

4. When Is the CGL Policy Triggered for Property Damage?

CGL policies require that in order for an occurrence resulting in property damage to be covered the property damage must result “during the policy period.” Often in the context of construction defect litigation, this leads to the issue of whether property damage occurred during the policy term and consequently which policy year(s) is required to respond by the claim against the named insured.
The majority of decisions that have considered when property damage results under first party property insurance policy have concluded it is when the property damage “manifests” itself. Nevada is in accord with this approach. See, Jackson v. State Farm Fire & Casualty Co., 108 Nev. 504, 835 P.2d 786 (1992). However, our court has yet to identify what is the appropriate trigger of occurrence when a third-party claim has been presented under “property damage that is continuous or progressive and continuing throughout several policy periods...” Our court did note that there was a pending California decision, which eventually came down in 1995, Montrose Chemical Corporation v. Admiral Insurance Co., 913 P.2d 878 (1995), modified at 10 Cal.4th 645 (1995)), In Montrose, the California Supreme Court stated that the CGL insurance at issue:

“. . . unambiguously provides potential coverage for the continuous and progressive deteriorating bodily injury and property damage alleged to have occurred during Admiral’s policy periods . . . turning to the express language Admiral contracted with Montrose to ‘pay on behalf of the insured all sums which the insured shall become legally obligated to pay his damages because . . . bodily injury or . . . property damage to which the insurance applies caused by an occurrence . . .”

Courts in several jurisdictions as well as the post-Montrose California courts have adopted a variety of other triggers in the property damage context. Throughout the country, these decisions are not uniform in their trigger theories and trigger decisions.

Varying claims have been presented for delayed injury, whether construction defect, asbestos, or environmental.
For example, in Garriott Crop Dusting Co. v. Superior Court, 270 Cal.Rptr. 678 (1990) (the court applied an exposure trigger that requires each policy from the time of exposure to the damage-causing condition to respond to their claims).

In Chemstar, Inc. v. Liberty Mutual Insurance Co., 41 F.3d 429 (9th Cir. 1995) (the 9th Cir. Court of Appeals interpreting California law applied a manifestation trigger).

The federal courts in Nevada in prior unpublished decisions have also predicted Nevada would adopt a manifestation trigger.

In USF&G v. Warwick Development Co., 446 So.2d 1021 (Ala. 1984) (the court applied an injury in fact trigger which triggers policies when actual damage occurs to the property but usually does not trigger policies after manifestation).

Finally, in American Cyanide Co. v. American Home Assurance, 30 Cal.App.4th 969 (1994) (the court analyzed triggers based on when wrongful act was committed and when there was an injury in fact).

In Nevada, the issue of when property damage results is far from resolved. The most recent decision in United National implies an actual physical injury trigger but this was not clearly discussed. However, United National’s holding is not consistent with an exposure theory.

Reference to California decisions suggest that the issue remains one of significant controversy even in terms of the post-Montrose precedent.

Furthermore, courts can provide separate triggers for the duty of defense (which exists when there is a potentiality for coverage and a separate trigger when there was a
duty to indemnify). For example, in Insurance Company of North America v. National America Assurance Co., 43 Cal.Rptr. 2d 518-524 (4th Dist. 1995) (the court of appeals in a post-Montrose decision addressed the duty to indemnify in the context of progressive property case and concluded “we must examine the date injury became appreciable . . .”).

Needless to say, our Nevada Supreme Court remains remarkably silent on this complex trigger of occurrence theory. At this juncture, our Nevada Supreme Court has yet to adopt a clear precedent in terms of trigger of occurrence for purposes of third-party liability claims involving continuous or progressive property damage claims. See, e.g., Gary Day Construction Co. v. Clarendon American Ins. Co., 459 F.Supp.2d 1039 (D. Nev. 2006).

The Court’s only discussion regarding this topic was in the context of first party insurance company eventually adopting a manifestation doctrine. Accord: Jackson v. State Farm Fire & Casualty Co., 108 Nev. 504, 835 P.2d. 786 (1992). However, there remains controversy as to what trigger of occurrence would be adopted in the context of third party liability policies. The Supreme Court in the Jackson case noted that pending decision before the California Supreme Court in Montrose Chemical Corp. v. Admiral Ins. Co., 913 P.2d 878 (1995) modf’d on rehearing at 10 Cal. 4th 645 (1995). Eventually, the California Supreme Court decided to adopt a continuous trigger or exposure theory for progressive damages over multiple periods of consecutive policy years as to the duty of defense.

As United National defined occurrence and property damage, the court concluded there must be a finding that there is tangible, physical injury to property which occurs during the policy period in order for coverage to be triggered both in terms of a duty of defense. The court relied on a number of discovery/manifestation cases. In particular, Miller’s Mutual Fire Ins. Co. v. Ed Bailey, 647 P.2d 1249 (Ida. 1982).
At the same time, the Court while discussing the duty of indemnification chose to rely on Zurich Ins. Co. v. Raymark Industries, 514 N.E.2d 150 (Ill. 1987). (A “double trigger” finding indemnification for both when the injury occurs and when injury is later detected or discovered but not necessarily the intervening period). Then added Outboard Marine v. Liberty Mut. Ins., 607 NE2d 1204 (Ill. 1992) which is a classic *continuous trigger exposure* case.

Ultimately, the court in Nevada adopted an analysis which restricts indemnification to when injury actually occurs rather than when the negligent event occurred without discussing the actual *injury in fact* trigger. The ultimate irony is that the *en banc* decision by Justice Gibbons is hopelessly muddled as to which trigger should apply.

5. Discussion of Certain Exclusionary Provisions

a. Claims for Poor Workmanship

CGL policies are not intended to provide coverage for claims of faulty workmanship asserted against a contractor when the risk at issue is within the control of the contractor. Based on this premise the insurance industry has successfully invoked a faulty workmanship exclusion.

This issue was crystallized in Maryland Casualty Co. v. Reeder, *supra*.

b. Work Performed Exclusion

The 1973 “work performed exclusion” and CGL policies typically provides that it excludes coverage:
(1) To property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of materials, parts, or equipment furnished connection therewith;
The 1986 CGL form modified this language to exclude coverage for:

Property damage to “your work” arising out of it or any part of it included in the “products completed operation hazard.” This exclusion does not apply to the damage work or the work out of which a damage arises as performed on your behalf by a subcontractor.

Without a broad form endorsement of the 1986 modified language, the 1973 work performed exclusion unambiguously eliminates coverage for claims made by property owners for damage to any part of the goods and services provided by or on behalf of the named insured, for example, the “work performed” exclusion would apply to work performed by a subcontractor on behalf of the named insured general contractor. See, Maryland Casualty Co., supra. However, the Reeder case has noted that this particular conclusion is otherwise applicable if there is no broad form endorsement. However, most policies now contain a broad form endorsement which provides for additional coverage. See, McKeller, supra.

c. Faulty Workmanship Exclusion

The faulty workmanship exclusion typically precludes coverage for:

(4)

Personal property in the care, custody, and control of the insured;

That particular part of real property in which you or any contractors or subcontractors working directly or indirectly on your behalf of forming operations if the “property damage” arises out of these operations; or
That particular part of any property that must be restored, repaired, or replaced because of “your work” was incorrectly performed on it.

The clear intent of the faulty workmanship exclusion is to preclude coverage for business risks within the control of the policy holder. See, LISN, Inc. v. Commercial Union Insurance Co., 615 N.E.2d 650 (Ohio Ct. of Appeals 1992). There a policy holder was required to replace certain telephone cables with the understanding that he was not to disturb the functioning cable. In the process of performing the work, the policy holder harmed the functioning cable, and the claimant requested damages for repair and replacement. The court found that because the policy holder incorrectly performed the work coverage for the damage was precluded.

In Economy Lumber Co. v. Insurance Company of North America, 157 Cal.App.3d 641 (1st Dist. 1984), the court was asked to interpret the exclusion when property damage was the result of the installation of a defective siding. Even though there was no coverage for defective siding as such, the work activity is limited to the defective siding and not necessarily to the claims arising from the loss of value of the eight residential units.

d. Work Product Exclusion

CGL policies also can contain an exclusion for property damage due to the insured’s work product. A policy typically provides “this property does not apply to property damage of the named insured’s product arising out of such products or any part of such products. Normally, a question is then imposed as to when a contractor’s entire project was the product of the named insured thus barring
coverage from property damage claims. California courts have rejected such a broad interpretation of this particular exclusion. Reeder, supra. The Reeder court discussed the cases concerning the point and was followed by the 9th Cir. in Fire Guard Sprinkler Systems v. Scottsdale, Ins., 864 F.2d 648 (9th Cir. 1998) (applying Oregon law, which held that coverage exists when services as opposed to discreet tangible components have caused injury). The Reeder court concluded that because of damages claimed in the underlying lawsuits may have been caused by faulty services provided to the policy holders by the subcontractors (not named as insureds in the policy) the product exclusion did not apply as a matter of law. The Nevada Supreme Court in McKeller agreed with this approach, supra.

B. THE INSURER’S DUTY OF DEFENSE/INDEMNIFICATION

1. Analysis of Obligations

However, the most typical concerns which arise from the CGL liability insurance as previously noted involves whether or not an occurrence has been triggered and whether or not there is actual property damage as defined by standard CGL policy. As previously indicated, property damage is normally defined as including:

“1. Physical injury to tangible property including all resulting loss of use of that property . . .
2. Loss of use of tangible property that is not physically injured.”

Most of the disputes involve whether or not economic losses come into play versus actual property damage. See, Reeder, supra.
2. Duty of Defense

a. Procedural Requirements

Almost all CGL policies have a provision that the insurer has a duty to defend “any suit seeking damages” covered under the terms of the policy. Most of these definitions are limited, therefore, to “civil proceedings including arbitration proceedings,” whether or not pre-litigation events can constitute a lawsuit and create a significant coverage dispute. A number of courts have recognized that a suit should be interpreted narrowly to apply only to civil lawsuits. (See, e.g., Foster Gardner, Inc. v. National Union Fire Insurance Co. of Pittsburgh, 18 Cal.4th 857 (1998). A similar interpretation could apply to the unique mediation requirements under Nevada’s construction defect statute.

3. Nevada Test for Scope of Duty of Defense

The Supreme Court has recently amplified the test for a duty of defense in United National.

Nevada courts have defined general principles regarding the scope of a duty of defense.

An insurance company’s duty to defend and/or to indemnify its insured arises from the provisions of the insurance policy. The insurer must defend any lawsuit brought against his insured which potentially seeks damages within the coverage of the policy. Rockwood Insurance Co. v. Federated Capital Corp., 694
The duty to defend rule provides that the insurer must defend any suit brought against its insured that potentially seeks damages within coverage of the policies; if facts are alleged which if proven would give rise to indemnity. Insurance Co. of North America v. Hilton Hotels U.S.A., Inc., 908 F.Supp. 809, 814 (D. Nev. 1995), aff'd, 110 F.3d 715 (9th Cir. Nev. 1997); United National, supra.


The focus of the examination is upon the factual allegations rather than the causes of action. See, Rockwood, supra.


In Calloway v. City of Reno, 116 Nev. 250, 993 P.2d. 1259 (Nev. 2000), the Nevada Supreme Court adopted the economic loss doctrine as a general proposition to construction defect litigation. As such, owners who suffer purely economic losses were barred from seeking recovery against the developer and a number of subcontractors.
A homeowners association would not be barred from seeking direct breach of express or implied warranties for those contracting parties within privity. Otherwise, the doctrine of economic loss would be deemed applicable. The limitation, therefore, to a contractual remedy potentially raised whether or not these lawsuits would fall within the definition of an occurrence. These issues were raised in the California courts culminating in a California Supreme Court decision which was entered in the case of Vanderberg v. Superior Court, 21 Cal.4th 815, 840 (1999) (focusing upon the limitation of "legally obligated" to pay damages as being broad enough to include contractual claims). Therein, the California Supreme Court said that the cause of action should not necessarily obviate the possibility that property damage was implicated. Underlying this particular decision is a general proposition that the duty of defense is traditionally broader than the duty to indemnify. The impact of Calloway has been limited due to the Nevada Supreme Court’s recent decision recognizing that a claim for negligence may be stated directly under Nevada’s Construction Defect Statute NRS 40.600 et seq. See Olson v. Richard, 120 Nev. 240, 89 P.3d 31 (2004).

5. Insurer’s Rights to Seek Reimbursement

Nevada requires through its unfair claims practice act that an insurer must promptly provide to its insured a reasonable explanation of the basis on the insurance policy with respect to the facts of the insured’s claim and the applicable law and for any denial of his claim or for an offer to settle or compromise his claim. (See NRS 686A.310). A reservation of rights letter may be employed where there are covered and uncovered claims as well as to seek reimbursement for costs incurred in defending non-covered claims related to costs and investigation and/or defense. See Capital Indemnity Corporation v. Blazer, 51 F. Supp. 2d 1080 (D. Nev. 1999).
6. **Insured’s Duty to Provide Notice**

Nevada law recognizes that the cooperation clause contained in the policy providing full notice and forwarding of suits is a condition precedent to indemnification. Nevada’s doctrine does not require the demonstration of actual prejudice before invoking the clause as a forfeiture to insurance indemnification. See *SB Corporation v. Hartford*, 880 F. Supp. 751 (D. Nev. 1995) aff’d, 100 F. 3d 964 (9th Cir. Nev. 1996)); *Las Vegas Star Taxi, Inc. v. St. Paul Fire and Marie Insurance*, 102 Nev. 11, 714 P.2d 562 (1986).

7. **Nevada’s Duty to Indemnify and/or Settle.**

As previously discussed, the duty of defense is extremely broad and triggered by the potential for coverage. “The duty to indemnify in contrast, relies only on the event of final placement of coverage, non-excluded liability upon the insured through judgment or settlement.” See, e.g., *Associated Aviation Underwriters Inc. v. Vegas Jet, LLC*, 106 F. Supp. 2d 1051 (D. Nev. 2000). Thus, it is generally stated that the duty to indemnify is in fact quite narrower than the duty to defend. Accord: *United National*, *supra*.

In construction defect litigation, these duties to indemnify typically become apparent once global settlement or mediation is invoked. The Nevada Supreme Court has not clearly defined the duty to settle when there are significant coverage questions. Most courts have held that an insurance carrier has the duty to accept the settlement offer within limits if there is a likelihood that the insurance coverage liability exceeds policy limits. See, e.g., *Johansen v. California State Auto Association*, 15 Cal.3d 9 (1975).
One federal court predicted Professor Keeton’s statement regarding “equal consideration” (requiring each insurer to bear total risk without reference to their coverage concerns) would be adopted by Nevada. Accord: Crystal Bay Gen. Impr. Dist. v. Aetna Cas. & Surety Company, 713 F. Supp. 1371 (D. Nev. 1989). This case implicates the use of “Johansen” non-waiver agreements where the parties have an interest in resolving the suit within limits and subsequently litigating the merits of coverage obligations.

8. Additional Insurance and Obligations to Defend

Historically, in the context of construction litigation most parties to the contract have sought to require subordinates to provide for indemnification and to hold them harmless but also typically to require what is called an additional insurance endorsement under the indemnity propositions of a CGL policy. Most additional insurance coverage are defined by an endorsement. It is recognized that the endorsements vary widely. The most typical common insurance endorsement is found in CG 202685 as follows:

“Who is an insured (Section 2) is amended to include as an insured the person or organization shown in the schedule as an insured but only in respect to liability arising out of your operations or premises owned by or rented to you.”

This is the broadest additional insurance endorsement since there is no express limitation to the vicarious liability of the additional insured or to liability limited to negligent supposition of the named insured. These additional insurance endorsements have become a focus of concern as a result of the growth of the construction defect litigation. The most critical question is whether or not a duty of
defense arises from the nature of the additional insurance endorsement. Some courts have taken the position that under a narrow additional insurance endorsement that if at any time facts are alleged that could lead to the imposition of vicarious liability, the additional insured is entitled to a defense. See First Interstate Insurance Company v. State, 665 P.2d 648 (1983) (additional insured not covered for its sole negligence but that coverage fact cannot be established until conclusion of the litigation and the insurer owed a duty of defense for the additional insured until coverage is determined by the underlying litigation); but cf. Hartford Accident and Indemnity Company v. U.S. Natural Resources, 897 F. Supp. 466 (D. Oregon 1995) (anticipating Oregon law) (construing the phrase “the additional insured will qualify as an insured with respect to operations performed by and on behalf of the named insured the court looked at the variety of these cases and held that additional insured is covered for its own negligence and not just for its vicarious liability for the acts of the named insured...”). The Ninth Circuit has recently predicted as a matter of first impression that Nevada law would adopt the majority rule, thus rejecting the vicarious liability limitation. See Jaynes Corp. v. Zurich American Insurance Company, 2007 US App. Lexis 18266 (Ninth Cir. Nev. 2007) (unpublished opinion). This precise issue is currently pending for decision before the Nevada Supreme Court as an en banc panel by question certified from the Nevada Federal Court.

Recent authority has suggested that these additional insurance endorsements may trigger a duty to defend the entire developer action under a subcontractor’s commercial general liability policy. Accord: Presley Homes Inc. v. American States Insurance Company, 108 Cal.Rptr. 24 686 (4th Dist., June 11, 2001), rehearing denied, review denied (September 19, 2001). Nevada has yet to adopt such a broad interpretation of the duty of defense under any individual additional insurance endorsement provisions.
9. What is the Impact of Other Insurance or Excess or Escape Clauses on Additional Insurance Obligation

It is not unusual that an additional insurance endorsement may contain an excess or escape clause in terms of its obligations. Often this is an attempt to shift the liability to another co-insurer and to determine the rights in terms of who is primary or secondary from indemnification purposes and/or defense. It is doubtful that under Nevada law that these escape clauses would survive in the context of co-insurance. Nevada has recognized the application of the Lamb-Weston rule which concludes that whereas “the other insurance clauses are in conflict with the other clauses in another policy, the clause is deemed null and void.” Nevada has adopted a rule that mutually repugnant escape or excess clauses will be disregarded and the obligation would be prorated according to the limits of both policies. See, Travelers Ins. Co. v. Lopez, 93 Nev. 463, 468, 567 P. 2d 471, 474 (1977).

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[1] NRS 41.033 provides in pertinent part:

No action may be brought under NRS 41.031 or against an officer or employee of the State or any of its agencies or political subdivisions which is based upon: 1. Failure to inspect any building, structure or vehicle, or to inspect the construction of any street, public highway or other public work to determine any hazards, deficiencies or other matters, whether or not there is a duty to inspect; 2. Failure to discover such hazard, deficiency or other matter, whether or not an inspection is made. (NRS 41.033)

[2] Although NRS 11.202 appears to provide no time limit to file when the builder/developer has fraudulently concealed the existence of defects, NRS 11.220 may apply, requiring the claimant to file within four years of the time
the claimant learns, or in the exercise of reasonable diligence should have learned, of the harm to his property caused by a construction defect. *(Lauder vs. Clark County Board of Commissioners* 106 Nev. 366, 793 P.2d 1320 (1990)). This issue appears to be undecided. Arguably, the NRS 11.220 statute of limitation could apply to all construction defect cases regardless of which statute of repose also applies.

[3] A third party action for contribution adds yet another problem for litigants. NRS 11.203 - 205 provides that “No action may be commenced... outside the prescribed period of time.” However, under NRS 17.285, a party may bring an action for contribution against a third party within one year of a final judgment. The Nevada Supreme Court, in *Nevada Lakeshore Company vs. Diamond Electric, Inc.* 89 Nev. 293 (1973), held that an action for indemnity was precluded by the statute of repose. The Court, in dicta, addressed appellant=s analogy of indemnity to contribution citing NRS 17.210 et seq., stating only that appellant=s contention was without merit. It is unclear whether the Court rejected appellant=s analogy of indemnity to contribution based on the contract right of indemnification versus the statutory right of contribution. Hence, no clear answer has been provided regarding the conflict between NRS 11.203 through 205 and NRS 17.285.

[4] Arguably, this provision may provide standing for a property owner to sue the insurance carrier of the developer/contractor directly without the necessity of an assignment of rights or an enforceable judgment.

[5] NRS 40.690 provides in pertinent part:

“... The settlement of such a claim or cause of action does not effect the rights or obligations of any person who is not a party to the settlement, and the failure to reach such a settlement does not effect the rights or obligation
of the claimant or contractor in any action brought by the claimant or contractor against the third party."

[6] NRS 40.620 defines a contractor as a person who is ... by himself or through his agents, employees or subcontractors: 1. Constructs, alters, repairs, improves or landscaping a residence, appurtenance or any part thereof; or 2. Sells a residence or appurtenance, any part of which the person, by himself or through his agents, employees or subcontractors has constructed, altered, repaired, improved or landscaped.

[7] If the subcontractor has received a tender of defense pursuant to the subcontract from the general contractor/developer, it is important that a response to the tender be given. The Nevada Supreme Court has recognized the situation where only a portion of the alleged liability may arise as a result of the conduct on which the tender is based. See, Piedmont Equipment vs. Eberhard Manufacturing, 99 Nev. 523, 665 P.2d 256 (1983). In addition, the potential negligence of the general contractor/developer should be considered prior to the decision on the tender. If the general contractor/developer is arguable actively negligent then the indemnity obligation may not be enforced depending upon the specific language of the indemnity agreement. See, Black & Decker vs. Essex Group, 105 Nev. 344, 775 P.2d 698 (1989). If the tender is accepted, for that portion of the work associated with the subcontract, the subcontractor will lose (as a practical matter) the ability to argue that the general contractor/developer was partially at fault for the condition. The importance of the decision on the tender at this point is that it may result in substantial exposure in addition to that claimed by the claimant at the end of the proceeding, including stipulated judgment liability.
This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.