STATE OF NEVADA CONSTRUCTION LAW COMPENDIUM

Prepared by
Christopher J. Curtis
Thorndal Armstrong Delk Balkenbush & Eisinger
1100 East Bridger Avenue
Post Office Drawer 2070
Las Vegas, NV 89125
(702) 366-0622
www.thorndal.com

Revised 2016

THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER

The Law Firm of Thorndal Armstrong Delk Balkenbush & Eisinger has zealously defended contractors, subcontractors and manufacturers 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, in state and federal courts in every county in Nevada.

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 manufacturers, contractors and subcontractors of all trades into the 21st century.

Christopher J. Curtis, the head of the Construction Practice Unit and a shareholder in the Las Vegas office, spearheads this group. Charles L. Burcham and Katherine F. Parks are shareholders in the Reno and Elko offices and handle the majority of the construction 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.

TABLE OF CONTENTS

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)). Most recently, the legislature amended the statutes on by Assembly Bill 125, enacted on February 24, 2015.[1] 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.[2] After receiving the notice and inspecting the property, the contractor may then make an offer of settlement to the claimant.[3] If the contractor makes a reasonable offer, in good faith, the statute limits the claimant's potential damages.[4]

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.

[1] The codification of the Nevada Revised Statutes reflecting the amendments enacted in A.B. 125 is forthcoming. As such, some citations contained herein will reference sections of A.B. 125.

[2] NRS 40.645.

[3] NRS 40.645.

[4] NRS 40.655.

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 in arbitration, mediation, or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community. Common-Interest Community is defined as "real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration."[5] A.B. 125 added language to the statute which expressly restricts a Homeowners Association's standing to bring claims pertaining exclusively to common elements:

> The association may not institute, defend or intervene . . . in its own name or on behalf of itself or units' owners with respect to an action for a constructional defect pursuant to . . . this act *unless the action pertains exclusively to common elements*.[6]

A recent decision from the United States District Court for the District of Nevada illustrates the application of A.B. 125's added standing restrictions.[7]

In Platinum Unit-Owners' Ass'n v. Residential Constructors, LLC, the Court rejected defendants' arguments for dismissal, but nonetheless granted the motion to dismiss, applying the newly adopted language of A.B. 125 because the complaint did not specify which, if any, of the claims pertained exclusively to common elements.[8] The Court held that this was not a retroactive application of the statute, which applies to currently

[5] NRS 116.021.

[6] NRS 116.3102(d) (emphasis added).

[7] Platinum Unit-Owners' Ass'n v. Residential Constructors, LLC, 2015 U.S. Dist. LEXIS 33152 (D. Nev. 2015).

[8] *Id*.

pending cases, because "revocation of statutory standing is a procedural change regarding who may bring a claim and does not change the substantive rules regarding what conduct is mandated or prohibited nor limit the right of the injured party to recover . . ."[9] The Court explained that "standing is a jurisdictional issue, and standing must exist at all times until judgment is entered, not just the date that the complaint is filed."[10] The new restrictions of A.B. 125 removed plaintiffs' standing as of the date of enactment for any claims not pertaining exclusively to common elements. Because the complaint did not specify which claims were exclusively communal, the Court dismissed the complaint without prejudice.

However, the special standing statute only applies to common interest communities created on or after January 1, 1992.[11] For associations created before January 1, 1992, it would be necessary to file a class action lawsuit where the Homeowners Association Board of Directors is 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.[12] Further, residence is defined as "any dwelling in which title to the individual units is transferred to the owners."[13]

In *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court,*[14] the Nevada Supreme Court found that, for 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 defect 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.*,[15] 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

---

[9] *Id*. at *17 (*citing* Californians For Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 46 Cal.Rptr.3d 57, 138 P.3d 207, 212 (Cal. 2006).

[10] *Id*. (*citing* Californians For Disability Rights, *supra*, 138 P.3d at 212-13); Coal. for ICANN Transparency Inc. v. VeriSign, Inc., 771 F.Supp.2d 1195, 1200 (N.D. Cal. 2011).

[11] NRS 116.1201.

[12] NRS 40.610.

[13] NRS 40.630.

[14] 123 Nev. 349, 167 P.3d 421 (2007).

[15] 124 Nev. 862, 192 P.3d 738 (2008).

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 spirit 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.

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.[16] While an association may have standing to sue for areas to which it holds legal title,[17] or for matters affecting common-interest community,[18] it cannot bring actions based merely upon its contractual duty to maintain the property.[19] Standing requires that courts focus on the party seeking adjudication and not on the issues sought to be adjudicated.[20]

In *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*,[21] the Nevada Supreme Court held that where NRS 116.3102(1)(d) confers standing on a homeowners association to assert claims "on matters affecting the common-interest community," a homeowners' association has standing to assert construction defect claims that affect individual units.[22] The Court cautioned, though, that a homeowners association filing a suit on behalf of its members will be treated much the same as a plaintiff in class action litigation, meaning a suit must fulfill the class action requirements of NRCP 23 and the principles and concerns discussed in *Shuette v. Beazer Homes Holdings Corp.*[23][24] In view of the fundamental tenet of property law that land is unique, construction defect cases will rarely be appropriate for class action treatment.[25]

---

[16] NRCP 17 and NRS 116.3102.

[17] Painter vs. Anderson, 96 Nev. 941, 620 P.2d 1254 (1980).

[18] NRS 116 et seq.

[19] *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). *But see* Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Cosntr. Co., 118 Ill.App.3d 163, 169, 454 N.E.2d 363 (1983) (homeowner's association had standing to raise breach of implied warranty of habitability because it held title to common areas and had contractual obligation to maintain them); Starfish Condominium Ass'n v. Yorkridge Serv. Corp., 295 Md. 693, 708-09, 458 A.2d 805 (Ct. App. 1983) (association had standing to sue for breach of implied warranty).

[20] Szilagyi vs. Testa, 99 Nev. 834, 673 P.2d 495 (1993).

[21] 125 Nev. 449, 215 P.3d 697 (2009).

[22] Though the issue has not yet been addressed by the Nevada Supreme Court since its enactment, A.B. 125 arguably overturns this holding as discussed in *Platinum Unit-Owners' Ass'n v. Residential Constructors, LLC*, *supra*.

[23] Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005).

[24] D.R. Horton, Inc., at 700.

[25] *See* Shuette, 121 Nev. at 854, 124 P.3d at 542.

The ***Horton*** Court also asserted that a non-member developer may challenge whether the homeowners' association may properly institute a constructional defect action in a representative capacity, and whether the association's claims are subject to class certification.[26]

In 2012, ***Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court of Nev.***[27] overruled ***D.R. Horton, Inc.*** As discussed above, in ***Horton***, the Nevada Supreme Court decided that a homeowners' association should be treated much like a class action Plaintiff, meaning that the homeowners' association must conform to the requirements of NRCP 23, which governs class actions. However, ***Beazer*** altered the ***Horton*** decision by stating that actions brought in a representative manner can proceed without strictly meeting NRCP 23's class action requirements. The failure of a common interest community association to strictly satisfy the NRCP 23 class action factors does not automatically result in a failure of the representative construction defect action. In analyzing the NRCP 23 factors, district courts are not determining IF the action should proceed, but rather HOW the action should proceed, i.e., as a class action, as a joinder action, as a consolidation, or in some other manner.[28] As a matter of procedure, the district court is required, if requested by the parties, to thoroughly analyze and document its findings to support alternatives to class action. In doing so, the district court must determine, among other issues, which units represented by the association have constructional defects, that the alternative method to proceed will adequately identify factual and legal similarities between the claims and defenses, provide notice to members represented by the association, and confront how claim preclusion issues will be addressed.[29] In summary, NRS 116.3102(1)(d) standing does not obviate the need to evaluate the NRCP 23 requirements. Rather, NRCP 23's requirements must be examined upon request, and if a homeowners' association wishes to litigate its members' claims as a class action, it must demonstrate that it meets those requirements or provide an alternative method for doing so that achieves the objectives embodied in NRCP 23.[30]

[26] *See* 215 P.3d at 700.
[27] 291 P.3d 128 (2012).
[28] *Id.* at 135.
[29] *Id.* at 131.
[30] *Id.* at 137.

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.[31]

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.[32] To survive a motion for summary judgment, the plaintiff may need to present some evidence that the County had knowledge of the defects.[33]

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.[34]

---

[31] NRS 41.033 provides in pertinent part:

> ANo 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.@

[32] Butler vs. Bogdanovich, 101 Nev. 449, 705 P.2d 662 (1985).

[33] *See*, Lotter vs. Clark County Board of Commissioners, 106 Nev. 366, 793 P.2d 1320 (1990); Davenport v. County of Clark, 111 Nev. 467, 893 P.2d 1003 (1995); *but see also*, Tahoe Village Homeowners vs. Douglas County, 106 Nev. 660, 799 P.2d 556 (1990) (Motion for summary judgment denied where plaintiff merely alleged the County had knowledge of defects).

[34] 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.[35]

In 1983, the Nevada Supreme Court held that the then existing version of the six-year Statute of Limitation was unconstitutional as violating equal protection.[36] The legislature responded in 1983 by enacting the current versions of the Statutes of Repose. From 1983 until 1991, the Nevada Supreme Court refused to apply the Statutes of Repose retroactively to bar any claim based on construction substantially completed prior to 1983.[37]

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.

A.B. 125 repealed the four separate Statutes of Repose, each with varying limitation periods, and created a single Statute of Repose for all construction defect actions, limiting the period within which an action may be brought to six years.[38]

A.B. 125 also eliminates those provisions of law that previously extended the limitations period for two years, where the injury occurred in the last year of the respective limitations period.

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:

---

[35] Nevada Lakeshore Company vs. Diamond Electric, Inc., 89 Nev. 293, 511 P.2d 113 (1973).

[36] State Farm v. All Electric, Inc., 99 Nev. 222, 660 P.2d 995 (1983), *modified by* Wise v. Bechtel Corp., 104 Nev. 750, 766 P.2d 1317 (1988).

[37] Alsenz vs. Twin Lakes Village, 843 P.2d 834 (1992).

[38] NRS 11.202.

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, and observation of construction or construction services by each profession or trade rendering services to the improvement.[39]

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.[40] However, the Nevada Supreme Court has implied that substantial completion occurs when a Certificate of Occupancy is issued.[41]

A third party action for contribution adds yet another problem for litigants. NRS 11.203 - 205 provides that ANo 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.,[42] 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.

With the adoption of A.B. 125, NRS 11.203-205 have been repealed. NRS 11.202 clarifies the issue by creating a universal 6 year limitation period for bringing construction defect claims, and by explicitly exempting claims for indemnity or contribution from this limitation period.[43]

STATUTES OF LIMITATION

[39] Cal. Code Civ. Proc. § 337.15(g).
[40] *See*, G & H Associates vs. Hahn, 113 Nev. 265, 934 P.2d 229 (1997).
[41] Tahoe Village Homeowners Association vs. Douglas County, 106 Nev. 660 (1990).
[42] 89 Nev. 293 (1973).
[43] NRS 11.202 (as amended by A.B. 125 Sec. 17).

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.[44] 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.

NRS 11.202, as amended by A.B. 125, provides that no action may be brought for construction defects more than 6 years after substantial completion. Subject to NRS 11.202, NRS 11.220 may also 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.[45] This issue appears to be undecided.

TOLLING

"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 is given, until thirty days after mediation is concluded or waived in writing pursuant to NRS 40.680."[46]

A.B. 125 limits any allowable tolling to no more than one year, with the single exception that the tolling period can last more than one year if a homeowner commenced an action after the expiration of the statute of repose or limitation, and the homeowner can show good cause for the tolling to last for a longer period. This applies to any Chapter 40 Notice issued on or after February 24, 2015.[47]

[44] Allstate Insurance Company vs. Ferguson, 104 Nev. 772, 766 P.2d 904 (1998).
[45] Lotter v. Clark County Board of Commissioners, 106 Nev. 366, 793 P.2d 1320 (1990).
[46] NRS 40.69445(1).
[47] NRS 40.695 (as amended by A.B. 125 Sec. 16).

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
    b. 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 which presents an unreasonable risk of injury to a person or property, or which is not completed in a good and workmanlike manner and proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed. (Applicable only to claims arising on or after February 24, 2015).
    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 pursuant to NRS 40.645(4)
   c. Representative of a homeowner's association responsible for residences/appurtenances

2. Procedure
   a. Written notice to contractor - NRS 40.645
      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. Submit signed verification by each owner of residence or appurtenance in the notice, that each owner verifies each such defect, damage, and injury specified in the notice exists in the residence or appurtenance owned by him or her.
      v. If notice is sent on behalf of a homeowners' association, the verification statement must be signed by a member of the executive board or an officer of the homeowners' association under penalty of perjury.
      vi. Claimant must be present during inspection by contractor.
      vii. If expert opinion was rendered concerning the alleged defects, the expert must also be present during the inspection by the contractor.
      viii.. Complex matter
         (1) Expert opinion satisfies above requirements – must be based upon a valid and reliable representative sample
   b. Homeowners Warranty
      i. Claimant must submit a claim under the homeowner's warranty, and that claim must be denied, before a claimant may send a notice pursuant to NRS 40.650(3).
   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.

(2) 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 claimant's attorney's fees and costs

(ii) Award attorney's fees to contractor

d. Damages recoverable - NRS 40.655(1)

i. Reasonable cost of repairs

ii. Temporary housing

iii. Reasonable value of other property damaged
iv. Loss of use of all or part of residence
v. Reasonable value of other property damaged
vi. Additional Costs
(1) Expert fees
vii. Interest by statute

e. Mandatory mediation Requirement – NRS 40.680
i. Waiver
(1) Written waiver by contractor or subcontractor, and claimant
ii. 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
iii. 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
iv. Mediation
(1) Time
(a) Within 45 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) Claimant deposits $50 with mediator
(ii) Contractor and subcontractors share remaining 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 homeowner's 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. Addition of Third Party - NRS 40.690(2)[48]
(1) Contractor may require third parties to appear and participate as is party was a contractor
(a) Except 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[49]
a. Person, with or without license who:
i. Develops, constructs, alters, repairs, improves or landscapes residence or appurtenance

[48] NRS 40.690 provides in pertinent part:
"... The settlement of such a claim or cause of action does not affect 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 affect the rights or obligation of the claimant or contractor in any action brought by the claimant or contractor against the third party."

[49] NRS 40.620 defines Acontractor@ as a Aperson who is ... by himself or through his agents, employees or subcontractors: 1. Constructs, alters, repairs, improves or landscapes 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.@

ii. Develops a site for residence or appurtenance
iii. Sells a residence or appurtenance
(1) Where developed, constructed, altered repair, improved or landscaped 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) Reduction in market value
(4) Loss of use of all or part of residence
(5) Reasonable value of other property damaged
(6) Additional costs
(a) Expert fees
(7) 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 30 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.

v. NRS 40.645(1) states that before a claimant commences an action for a constructional defect, the claimant (a) must give written notice to the contractor; and (b) may give written notice to any subcontractor, supplier or design professional known to the claimant who may be responsible. However, in *Barrett v. Uponor*, 130 Nev. Adv. Opinion 65 (August 7, 2014) the Court held that under subsection (b), the claimant does not have the same obligation to notice the subcontractors or suppliers. The claimant does have permissive discretionary language in which they "may" give written notice to the subcontractors or suppliers but there is no compulsory language that requires notice be given prior to the commencement of an action.

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

(1) 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 equals the price sold

(ii) Value of any improvements by another

(iii) Reasonable attorney's 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 45 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) Claimant deposits $50 with mediator.

(ii) Contractor and subcontractors share remaining 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.

d. 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 homeowner's 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. Addition of Third Party - NRS 40.690(2)
    (1) Contractor or claimant may require third parties to appear and participate as if party was a contractor
        (a) Except 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(6)

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 – NRS 40.680(7)
    a. Any party may appeal to the court

3. Reports issued by Mediator or Master - NRS 40.680(8)
    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 et. al. before filing a lawsuit.

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 contractors last known address, specifying in reasonable detail the defects or damages or injuries that are the subject of the complaint.[50] The notice must also include a verification statement, signed by the

[50] NRS 40.645(1).

homeowner, stating that he or she has verified the existence of the defect, damage, and injury.[51] If the claimant is a homeowners association, this verification statement must be signed by a member of the association's executive board or an officer of the association under penalty of perjury.[52]

INSPECTIONS

During the 30 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.[53] The homeowner must be present during the contractor's inspection and must identify the exact location of each alleged construction defect specified in the notice.[54] If the Chapter 40 Notice includes an expert opinion, the expert, or a representative of the expert, must also be present and must identify the exact location of each alleged construction defect for which he or she provided an opinion.[55] 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.[56]

OFFER OF SETTLEMENT

Before a claimant may send a notice pursuant to NRS 40.645 or pursue a claim pursuant to NRS 40.600 to 40.695 inclusive, the claimant must first submit a claim under the homeowner's warranty.[57] Only after the insurer has denied the claim may the claimant send notice and pursue the claim, and only then for the claims that were denied by the insurer.[58] The statutes of limitations or repose otherwise applicable 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.[59]

It is unclear whether this requirement only applies when there is a possibility of coverage for the particular defect claim. And the requirement for a homeowner to tender the claim to the homeowner's warranty insurance company applies to any homeowner who provides a Chapter 40 Notice on or after February 24, 2015.

[51] NRS 40.645(2).
[52] *Id*.
[53] NRS 40.646.
[54] NRS 40.647.
[55] NRS 40.647.
[56] NRS 40.650(3).
[57] NRS 40.645 (as modified by A.B. 125 Sec. 14).
[58] *Id*.
[59] *Id*.

Within 60 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 claimants 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 contractor's expense, by another contractor who is licensed to make the repairs, bonded and insured. The repairs must be made within 150 days (or 105 days if fewer than five owners) 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. NRS 40.648.The claimant and the contractor may agree in writing to extend these periods. NRS 40.648(3).

An offer of settlement that is not accepted within 35 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 attorney's fees and costs. NRS 40.650[3].

OFFER OF JUDGMENT

Prior to A.B. 125, it was unclear whether offers of judgment could be made during the pre-litigation process. A.B. 125 provides that offers of judgment can be made, and will be enforceable, if issued during the pre-litigation process.[60]

Section 3 provides that at any time prior to the filing of an action for construction defect, any party may serve upon one or more of the other parties a written offer of judgment. The recipient has 10 days to accept. If the recipient fails to accept within the 10 days, the offer is deemed rescinded and rejected. "Evidence of a rejected offer is not admissible in any proceeding other than to determine costs and fees."[61]

If a party fails to accept an offer of judgment, and fails to obtain a more favorable judgment, the court may not award to that party their attorneys fees or any interest on the judgment from the date of service of the offer. Additionally, the court will order the party to pay the taxable costs of the offering party, the reasonable fees of the offering party's experts, any applicable interest on the judgment from the date of the offer to the date of entry of judgment, and reasonable attorney's fees incurred by the offering party from the date of the offer.[62]

If an apportioned offer of judgment is made to multiple parties, and is conditioned upon acceptance by all the parties, any party rejecting the offer will be sanction, and fails to obtain a more favorable verdict, will be sanctions as if that party was the only recipient of the offer of judgment.[63] The action must proceed as to all parties, even those that accepted the apportioned offer of judgment, although those parties will not be subject to the sanctions noted above.[64]

If an offer of judgment is accepted, one of the participating parties to the offer must file the offer, the notice of acceptance, and proof of service with the clerk of the district court, at which time the judgment is recorded as a compromise settlement.

---

[60] A.B. 125 Sec. 3.

[61] A.B. 125 Sec. 3.

[62] *Id*.

[63] I.e. precluded from receiving attorneys fees and interest, and liable for offering party's above mentioned costs and reasonable attorney's fees.

[64] *Id*.

MEDIATION

Before a complaint in a cause of action governed by NRS 40.600 et seq. 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 20 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 30 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, less the claimant's $50 share, 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].

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 40.680(5))

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(6).

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.[65]

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 by either party in the course of mediation is not admissible.[66]

DAMAGES

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

(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 a structural failure;
(c) The loss of the use of all or any part of the residence;
(d) The reasonable value of any other property damage by the construction defect;
(e) Any additional cost 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;
(f) Any interest provided by statute.[67]

Claims arising prior to February 24, 2015 may also warrant attorneys fees, though claims arising on or after February 24, 2015 will not.

[65] NRS 40.680(7).
[66] NRS 40.680(8).
[67] 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 alternative, 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 attorney's fees and costs for experts;
(3) any costs, including costs and expenses for moving and costs, points and fees for loans.[68]

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.[69] 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.[70] 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.[71]

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.[72]

---

[68] NRS 40.665.

[69] NRS 50.275; Cheyenne Construction vs. Hozz, 102 Nev. 308, 720 P.2d 1224 (1986); Levine v. Remolif, 80 Nev. 168, 390 P.2d 718 (1964).

[70] *Id*.

[71] Fernandez v. Admirand, 108 Nev. 963, 970, 843 P.2d 354 (1992). *See also* Higgs v. State, 126 Nev. Adv. Op. 1, 222 P.3d 648, 658 (2010) (stating that witness need only satisfy NRS 50.275's explicit textual language to qualify as an expert).

[72] 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 a contractor/builder is the exercise of the ordinary skill and competence of the members of the particular profession.[73] 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.[74] However, the modern trend is away from the locality rule, merely treating it as one of several factors.[75] 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.[76] In California, negligence causes of action can also arise for negligent failure to supervise.[77]

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."

[73] Gagne v. Bertran, 43 Cal.2d 481, 275 P.2d 15 (1954).
[74] Baji, No. 6.37.
[75] Prosser, Law of Torts, Section 32 at 164 (4th Edition 1971).
[76] *See*, Miller v. Los Angeles Flood Control, 8 Cal.3d 689, 505 P.2d 193, 106 Cal.Rptr. 1, (1973).
[77] Bayuk v. Edison, 236 Cal.App.2d 309, 46 Cal.Rptr. 49 (1965).

"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."[78]

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."[79] One of the prominent cases discussing the purpose of CGL coverage is *Maryland Casualty Co. v. Reeder*.[80] 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.*[81]

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?"

---

[78] *See*, United National Insurance v. Frontier Insurance, 120 Nev. 678, 99 P.3d 1153 (2004); Aetna Cas.& Sur. Company v. McIbs, Inc., 684 F. Supp. 246, 248 (Dist. Nev. 1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989).

[79] Western Employers Ins. Co. v. Arciero & Sons, Inc., 194 Cal. Rptr. 688, 690 (1983).

[80] 270 Cal. Rptr. 719, 722 (4th Dist. 1990).

[81] 396 N.W.2d 229, 233-234 (Minn. 1986).

A CGL provides it will "pay on behalf of the insured all sums which 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 concerning 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 assert claims beyond physical injury, such as diminution of market value, and 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 the insured would recover from the insurer even if diminution of value to the project arose solely due to defectiveness of its own work.[82]

[82] *Accord* United National, *supra.*

Actual physical injury to third parties is required for "property damage."[83] In this regard, breach of contract actions are not typically viewed as an occurrence, since they do not constitute "property damage."[84]

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 where 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 . . ."[85]

[83] *See*, New Hampshire Insurance Co. v. Vieira, 930 F.2d 696, 698 (9th Cir. Cal. 1991).
[84] *See*, *e.g.*, USF&G v. Advanced Roofing & Supply Co., 788 P.2d 1227, 1231 (Ariz. 1989).
[85] *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*.[86]

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.[87] This particular case, however, represents questionable authority in view of the 1986 ISO definition requiring tangible physical loss.[88]

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 to 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.[89] 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.*[90] 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 . . ."

[86] 108 Nev. 729, 837 P.2d 858 (Nev. 1992).

[87] *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).

[88] *See*, Ninth Circuit discussion in New Hampshire Insurance Co., *supra*.

[89] *See*, Jackson v. State Farm Fire & Casualty Co., 108 Nev. 504, 835 P.2d 786 (1992).

[90] 913 P.2d 878 (1995), *modified by* Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal.4th 645 (1995).

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*,[91] 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.*,[92] 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.*,[93] 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*,[94] 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*[95] 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*.,[96] the court of appeals in a post-*Montrose* decision addressed the

[91] 270 Cal.Rptr. 678 (1990).
[92] 41 F.3d 429 (9th Cir. 1995).
[93] 446 So.2d 1021 (Ala. 1984).
[94] 30 Cal.App.4th 969 (1994).
[95] 120 Nev. 678 (2004).
[96] 37 Cal App 4th 195, 43 Cal.Rptr.2d 518-524 (4th Dist. 1995).

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.[97]

The Court's only discussion regarding this topic was in the context of first party insurance company eventually adopting a manifestation doctrine.[98] 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.*[99] 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*.[100]

At the same time, the Court while discussing the duty of indemnification chose to rely on *Zurich Ins. Co. v. Raymark Industries*,[101] finding "*double trigger*" 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.*,[102] 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.

---

[97] *See, e.g.*, Gary Day Construction Co. v. Clarendon American Ins. Co., 459 F.Supp.2d 1039 (D. Nev. 2006).

[98] *Accord*, Jackson v. State Farm Fire & Casualty Co., 108 Nev. 504, 835 P.2d. 786 (1992).

[99] 913 P.2d 878 (1995) *modf'd on rehearing*, Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645 (1995).

[100] 647 P.2d 1249 (Ida. 1982).

[101] 514 N.E.2d 150 (Ill. 1987).

[102] 607 NE2d 1204 (Ill. 1992).

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.[103] 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[104]

c. Faulty Workmanship Exclusion

The faulty workmanship exclusion typically precludes coverage for:

(4)

[103] *See,* Maryland Casualty Co., *supra*.
[104] *See*, McKeller, *supra*.

> 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 "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.[105] 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*,[106] 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.[107] The *Reeder* court discussed the cases concerning the issue and was followed by the 9th Cir. in *Fire Guard Sprinkler Systems v. Scottsdale, Ins.*[108] 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*.

---

[105] *See*, LISN, Inc. v. Commercial Union Insurance Co., 615 N.E.2d 650 (Ohio Ct. of Appeals 1992).

[106] 157 Cal.App.3d 641 (1st Dist. 1984).

[107] Reeder, *supra*.

[108] 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).

B. THE INSURER'S DUTY OF DEFENSE/INDEMNIFICATION

1. Analysis of Obligations

The most typical concern which arises from the CGL liability insurance involves the question of 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 concern whether or not economic losses come into play versus actual property damage.[109]

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 pre-litigation events can constitute a lawsuit can create a significant coverage dispute. A number of courts have recognized that a suit should be interpreted narrowly to apply only to civil lawsuits.[110] A similar interpretation could apply to the unique mediation requirements under Nevada's construction defect statute.

In *Allstate Insurance Company v. Miller*,[111] the Nevada Supreme Court held that a primary liability insurer's right and duty to defend attaches when the insured tenders defense of the lawsuit to the insurer and carries with it the duty to communicate to the insured any reasonable settlement offer that could affect the insured's interest. Accordingly, the Court reasoned that if a liability insurer fails to adequately inform an insured of a known reasonable settlement opportunity after the filing of a claimant's lawsuit, then the insurer has breached its duty to defend the insured against law suits, which may be grounds for bad faith.[112]

---

[109] *See, Reeder*, *supra*.
[110] *See*, e.g., Foster Gardner, Inc. v. National Union Fire Insurance Co. of Pittsburgh, 18 Cal.4th 857 (1998).
[111] 212 P.3d 318 (Nev. 2009).
[112] *Id*. at 325-26.

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 the insured which potentially seeks damages within the coverage of the policy.[113]

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.[114]

The duty to defend is analyzed based upon a careful consideration of the actual complaint.[115]

The focus of the examination is upon the factual allegations rather than the causes of action.[116]

4. Does Nevada's Economic Loss Doctrine Impact the Duty of Defense in a Construction Defect Scenario?

In *Calloway v. City of Reno*,[117] 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 raises the issue of whether 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

---

[113] Rockwood Insurance Co. v. Federated Capital Corp., 694 F.Supp. 772, 776 (D. Nev. 1988); Capital Indemnity Corp. v. Blazer, 51 F.Supp.2d 1080, 1084 (D. Nev. 1999); United National, *supra*.

[114] 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*.

[115] *See*, Nevada VTN v. General Insurance Co. of America, 834 F.2d 770 (9th Cir. Nev. 1987); Montana Refining Co. v. National Union Fire Insurance Co., 918 F.Supp. 1395 (D. Nev. 1996).

[116] *See*, Rockwood, *supra*.

[117] 116 Nev. 250, 993 P.2d. 1259 (Nev. 2000).

Vanderberg v. Superior Court.[118] There, 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*.[119]

In commercial property construction defect cases, the Nevada Supreme Court has held that the economic loss doctrine is to be applied to preclude negligence-based claims against design professionals, such as engineers and architects, who provide valuable services in the commercial property development or improvement process, when the plaintiffs seek to recover purely economic losses.[120] Exceptions to the economic loss doctrine exist for negligent misrepresentation and other broad categories of cases in which the policy concerns about administrative costs and a disproportionate balance between liability and fault are insignificant.[121]

5. Insurer's Rights to Seek Reimbursement

Nevada's unfair claims practice act requires an insurer to promptly provide to its insured a reasonable explanation for any denial of a claim; notification of a reasonable offer to settle or compromise a claim; and to inform the insured of the facts of the insured's claim and the applicable law.[122] 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.[123]

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.[124] Nevada's doctrine does not require the demonstration of actual prejudice before invoking the clause as a forfeiture to insurance indemnification.[125]

---

[118] 21 Cal.4th 815, 840 (1999) (focusing upon the limitation of "legally obligated" to pay damages as being broad enough to include contractual claims).

[119] *See* Olson v. Richard, 120 Nev. 240, 89 P.3d 31 (2004).

[120] *See* Terracon Consultants Western, Inc. v. Mandalay Resort Group, 206 P.3d 81 (Nev. 2009).

[121] *Id*. at 88.

[122] *See* NRS 686A.310.

[123] *See* Capital Indemnity Corporation v. Blazer, 51 F. Supp. 2d 1080 (D. Nev. 1999).

[124] SB Corporation v. Hartford, 880 F. Supp. 751, 755 (D. Nev. 1995) *aff'd*, 100 F. 3d 964 (9th Cir. Nev. 1996)); Las Vegas Star Taxi, Inc. v. St. Paul Fire and Marine Insurance, 102 Nev. 11, 714 P.2d 562 (1986).

[125] *Id*.

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."[126] Thus, it is generally stated that the duty to indemnify is in fact quite narrower than the duty to defend.[127]

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.[128]

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.[129] 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.

The Supreme Court of Nevada recently held that an indemnity clause in a construction contract between a general contractor and a subcontractor does not obligate the subcontractor to indemnify the general contractor for its partial negligence for constructional defects unless the indemnity clause explicitly says the subcontractor will indemnify the contractor for the contractor's own negligence.[130] This holding builds upon another recent case, George L. Brown Ins. Agency v. Star Ins. Co., where, the Court held that an indemnity clause insuring against "any and all loss" does not indemnify against the indemnitor's own negligence.[131] And that a court will only consider an indemnity clause to include such negligence if it is explicitly stated in the contract.

However, A.B. 125 introduced Nevada's first anti-indemnity statute, superseding the holdings in *Reyburn Lawn & Lanscape Designers* and *George L. Brown Ins. Agency*. Section 2(a) of A.B. 125 prohibits any provision in a contract between a "controlling party" and a subcontractor, that requires the subcontractor to "indemnify, defend or otherwise hold harmless a controlling party from any liability, claim, action or cause of action resulting from a constructional defect caused by the negligence" of the controlling party.

---

[126] *See, e.g.,* Associated Aviation Underwriters Inc. v. Vegas Jet, LLC, 106 F. Supp. 2d 1051 (D. Nev. 2000).
[127] *Accord* United National, *supra*.
[128] *See*, *e.g*., Johansen v. California State Auto Association, 15 Cal.3d 9 (1975).
[129] *Accord*, Crystal Bay Gen. Impr. Dist. v. Aetna Cas. & Surety Company, 713 F. Supp. 1371 (D. Nev. 1989).
[130] Reyburn Lawn & Landscape Designers v. Plaster Dev. Co., 127 Nev. Adv. Op. 26, 255 P.3d 268 (2011).
[131] 126 Nev. Adv. Op. 31, 237 P.3d 92 (2010).

Such provisions are against public policy and are therefore void and unenforceable.[132] Note that the anti-indemnity provision only applies to a provision in a contract entered into on or after the effective date of A.B. 125 (February 24, 2015).[133]

The anti-indemnity provision does not apply to a contract provision requiring a subcontractor to indemnify a controlling party for damages resulting from constructional defect caused by the *subcontractor's* own negligence or intentional act or omission,[134] though it does apply to claims or cause of action "arising out of or connected with that portion of the subcontractor's work which has been altered or modified by another trade or the controlling party."[135]

A "controlling party" is defined as

> A person who owns real property involved in residential construction, a contractor or any other person who is to be indemnified by a provision in a contract entered into on or after the effective date of this act for residential construction.[136]

A subcontractor's duty to defend the controlling party arises upon presentment of a notice pursuant to NRS 40.646(1), containing a particular claim or cause of action "from which it can be reasonably inferred that an alleged constructional defect was caused by or attributable to the subcontractor's work, negligence, or wrongful act or omission."[137]

A.B. 125 provides that once a controlling party gives notice to a subcontractor of a claim that

> an alleged constructional defect was caused by or attributable to the subcontractor's work, negligence, or wrongful act or omission, the claim, action or cause of action is covered by the subcontractor's commercial general liability policy of insurance issued by an insurer, and the controlling party is named as an additional insured under that policy of insurance[138]

This provision must be read together with the anti-indemnity provision, meaning that additional insurance endorsements may trigger a duty to defend a "controlling party" only

[132] A.B. 125 Sec. 2(1)(a).
[133] *Id*.
[134] A.B. 125 Sec. 2(1)(b).
[135] A.B. 125 Sec. 2(1)(c).
[136] A.B. 125 Sec. 2(3)(a).
[137] A.B. 125 Sec. 2(1)(d).
[138] A.B. 125 Sec. 2(1)(e).

when it can be reasonably inferred that the cause of action for constructional defect is attributable to the subcontractor's work.

In cases where the subcontractor has general liability insurance coverage and the controlling party is named as an additional insured under that policy, the controlling party is required to seek its defense costs from the subcontractor's general liability insurer before pursuing the subcontractor for its defense costs.[139]

In the event that an additional insured tender is still pending at the conclusion of a case, A.B. 125 allows a contractor to bring suit directly against the subcontractor for reimbursement of attorneys fees and costs attributable to the defense of the claims implicating the subcontractor's scope of work.[140]

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 is defined by an endorsement, and 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.[141] The Ninth Circuit has recently predicted as a matter of first impression that

---

[139] A.B. 125 Sec. 2(1)(e)(1).

[140] A.B. 125 Sec. 2((1)(e)(2).

[141] *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 behalf of the named insured the court looked at the

Nevada law would adopt the majority rule, thus rejecting the vicarious liability limitation.[142] This precise issue was decided by the Nevada Supreme Court as an en banc panel by question certified from the Nevada Federal Court.[143]

In *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co*.—which was not a construction defect case—the Court considered the question: "Under Nevada law, does an additional insured endorsement provide coverage for an injury caused by the sole independent negligence of the additional insured?" The Court held in the affirmative. Much of the discussion focused on the ambiguous language of the policy, which the Court held must be read in favor of the insured because Nevada, like the majority of jurisdictions, applies a broad interpretation in insurance cases. Because the policy could be read to provide coverage and to preclude coverage under the facts of the case, and the parties had not provided concrete evidence of their intent, the Court read the policy broadly, that it covered damages resulting from the sole independent negligence of the additional insured.

While *Fed. Ins. Co.* is still good law, it is arguably not applicable in the construction defect context as A.B. 125's anti-indemnity provision would apply. The statute applies to any provision that requires the subcontractor to "*indemnify*, *defend* or otherwise hold harmless a controlling party from any liability, claim, action or cause of action resulting from a constructional defect caused by the negligence" of the controlling party.[144] Arguably, A.B. 125 will apply to both the duty to indemnify and the duty to defend, though this exact issue has yet to arise.

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 for 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.[145] This change is only applicable to contracts entered into on or

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...").

[142] *See* Jaynes Corp. v. Zurich American Insurance Company, 2007 US App. Lexis 18266 (9th Cir. 2007) (unpublished opinion).

[143] Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 124 Nev. 319, 184 P.3d 390 (2008).

[144] A.B. 125 Sec. 2(1)(a).

[145] *See*, Travelers Ins. Co. v. Lopez, 93 Nev. 463, 468, 567 P. 2d 471, 474 (1977).

after February 24, 2015.

10. A.B. 125 Disclosure Requirements

A "wrap-up insurance policy" is defined as

> [a]n insurance policy, or series of policies, written to cover risks associated with the construction, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance, and covering two or more of the contractors or subcontractors that work on that construction, repair or landscaping.[146]

A.B. 125 establishes numerous disclosures that must be made by a contractor to subcontractors. For WRAP and other consolidated insurance programs (OCIP), these include:

1. The total amount or method of calculation of any credit or compensation for the premium required from a subcontractor or other participant for that wrap-up insurance policy in the contract documents;
2. Policy documents;
3. The scope of policy coverage;
4. The policy terms;
5. The basis upon which the deductible or occurrence is triggered by the insurer;
6. The number of units, if any, indicated on the application for the policy; and
7. A good faith estimate of the amount of available limits remaining under the policy as of the date of disclosure.[147]

Disclosures may be made based on information available at the time of disclosure and in good faith. Disclosures are presumptively made in good faith if the disclosure is the same as provided to the insurer in the application for the wrap-up policy, or if it is obtained from the wrap-up insurance policy broker or insurer.[148]

Failure to disclose the total amount or method of calculation of the premium credit or compensation to be charged to a participant before the time the participant submits a bid may allow the participant to rescind the bid.[149]

---

[146] A.B. 125 Sec. 2.
[147] A.B. 125 Sec. 2.
[148] *Id*.
[149] A.B 125 Sec. 2(2)(g).

A.B. 125 also limits any self-insured retention or deductible allocated to a subcontractor under the WRAP/OCIP to an amount that cannot be greater than the self-insured retention or deductible that the subcontractor would have been required to pay under a traditional CGL policy.[150] This new requirement applies to contracts entered into on or after February 24, 2015.

11. Tender of Defense

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.[151] 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 Aactively negligent@ then the indemnity obligation may not be enforced depending upon the specific language of the indemnity agreement.[152] 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.

[150] A.B. 125 Sec. 2(2)(i).

[151] *See*, Piedmont Equipment v. Eberhard Manufacturing, 99 Nev. 523, 665 P.2d 256 (1983).

[152] *See*, Black & Decker v. Essex Group, 105 Nev. 344, 775 P.2d 698 (1989).

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.