

SENATE BILL NO. 273—SENATOR SCHNEIDER

MARCH 13, 2003

Referred to Committee on Commerce and Labor

SUMMARY—Enacts provisions relating to inspections and claims for constructional defects. (BDR 3-252)

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

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

AN ACT relating to real property; providing that a contractor must be given notice of and a reasonable opportunity to be present at certain inspections which involve conditions or damage that have the potential to result in a claim for a constructional defect; and providing other matters properly relating thereto.

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

- 1 **Section 1.** Chapter 40 of NRS is hereby amended by adding
2 thereto a new section to read as follows:
3 ***1. If an owner of a residence or appurtenance, a***
4 ***homeowner's association that is responsible for a residence or***
5 ***appurtenance or a representative of such an owner or***
6 ***homeowner's association has hired, contracted with or paid any***
7 ***person to inspect the residence or appurtenance to obtain***
8 ***information related to any condition or damage which has the***
9 ***potential to result in a claim for a constructional defect, the person***
10 ***may not conduct the inspection of the residence or appurtenance***
11 ***unless the contractor who is allegedly responsible for the***
12 ***condition or damage has been provided with:***
13 ***(a) Notice of the inspection not less than 3 working days***
14 ***before the date that the inspection is conducted; and***



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1 ***(b) A reasonable opportunity to be present or to have a***
2 ***representative of the contractor present when the inspection is***
3 ***conducted.***

4 ***2. The provisions of this section apply to an inspection***
5 ***regardless of whether a claim has been made or an action has***
6 ***been commenced against the contractor pursuant to NRS 40.600***
7 ***to 40.695, inclusive.***

8 **Sec. 2.** NRS 40.600 is hereby amended to read as follows:
9 40.600 As used in NRS 40.600 to 40.695, inclusive, ***and***
10 ***section 1 of this act,*** unless the context otherwise requires, the
11 words and terms defined in NRS 40.605 to 40.630, inclusive, have
12 the meanings ascribed to them in those sections.

13 **Sec. 3.** NRS 40.635 is hereby amended to read as follows:
14 40.635 NRS 40.600 to 40.695, inclusive ***[-]***, ***and section 1 of***
15 ***this act:***

16 1. Apply to any claim that arises before, on or after July 1,
17 1995, as the result of a constructional defect, except a claim for
18 personal injury or wrongful death, if the claim is the subject of an
19 action commenced on or after July 1, 1995.

20 2. Prevail over any conflicting law otherwise applicable to the
21 claim or cause of action.

22 3. Do not bar or limit any defense otherwise available except as
23 otherwise provided in those sections.

24 4. Do not create a new theory upon which liability may be
25 based.

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

27 40.650 1. If a claimant unreasonably rejects a reasonable
28 written offer of settlement made as part of a response made pursuant
29 to NRS 40.645 or 40.682 or does not permit the contractor or
30 independent contractor a reasonable opportunity to repair the defect
31 pursuant to an accepted offer of settlement and thereafter
32 commences an action governed by NRS 40.600 to 40.695, inclusive,
33 ***and section 1 of this act,*** the court in which the action is
34 commenced may:

35 (a) Deny the claimant's attorney's fees and costs; and

36 (b) Award attorney's fees and costs to the contractor.

37 Any sums paid under a homeowner's warranty, other than sums paid
38 in satisfaction of claims that are collateral to any coverage issued to
39 or by the contractor, must be deducted from any recovery.

40 2. If a contractor fails to:

41 (a) Make an offer of settlement;

42 (b) Make a good faith response to the claim asserting no
43 liability;

44 (c) Complete, in a good and workmanlike manner, the repairs
45 specified in an accepted offer;



1 (d) Agree to a mediator or accept the appointment of a mediator
2 pursuant to NRS 40.680 or subsection 4 of NRS 40.682; or

3 (e) Participate in mediation,
4 the limitations on damages and defenses to liability provided in
5 NRS 40.600 to 40.695, inclusive, *and section 1 of this act* do not
6 apply and the claimant may commence an action without satisfying
7 any other requirement of NRS 40.600 to 40.695, inclusive ~~H~~, *and*
8 *section 1 of this act*.

9 3. If coverage under a homeowner's warranty is denied by an
10 insurer in bad faith, the homeowner and the contractor have a right
11 of action for the sums that would have been paid if coverage had
12 been provided, plus reasonable attorney's fees and costs.

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

14 40.655 1. Except as otherwise provided in NRS 40.650, in a
15 claim governed by NRS 40.600 to 40.695, inclusive, *and section 1*
16 *of this act*, the claimant may recover only the following damages to
17 the extent proximately caused by a constructional defect:

18 (a) Any reasonable attorney's fees;

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

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

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

28 (e) The reasonable value of any other property damaged by the
29 constructional defect;

30 (f) Any additional costs reasonably incurred by the claimant,
31 including, but not limited to, any costs and fees incurred for the
32 retention of experts to:

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

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

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

39 (g) Any interest provided by statute.

40 2. The amount of any attorney's fees awarded pursuant to this
41 section must be approved by the court.

42 3. If a contractor complies with the provisions of NRS 40.600
43 to 40.695, inclusive, *and section 1 of this act*, the claimant may not
44 recover from the contractor, as a result of the constructional defect,



1 anything other than that which is provided pursuant to NRS 40.600
2 to 40.695, inclusive ~~§~~, *and section 1 of this act.*

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

7 **Sec. 6.** NRS 40.665 is hereby amended to read as follows:

8 40.665 In addition to any other method provided for settling a
9 claim pursuant to NRS 40.600 to 40.695, inclusive, *and section 1 of*
10 *this act*, a contractor may, pursuant to a written agreement entered
11 into with a claimant, settle a claim by repurchasing the claimant’s
12 residence and the real property upon which it is located. The
13 agreement may include provisions which reimburse the claimant
14 for:

15 1. The market value of the residence as if no constructional
16 defect existed, except that if a residence is less than 2 years of age
17 and was purchased from the contractor against whom the claim is
18 brought, the market value is the price at which the residence was
19 sold to the claimant;

20 2. The value of any improvements made to the property by a
21 person other than the contractor;

22 3. Reasonable attorney’s fees and fees for experts; and

23 4. Any costs, including costs and expenses for moving and
24 costs, points and fees for loans.

25 Any offer of settlement made that includes the items listed in this
26 section shall be deemed reasonable for the purposes of subsection 1
27 of NRS 40.650.

28 **Sec. 7.** NRS 40.667 is hereby amended to read as follows:

29 40.667 1. Except as otherwise provided in subsection 2, a
30 written waiver or settlement agreement executed by a claimant after
31 a contractor has corrected or otherwise repaired a constructional
32 defect does not bar a claim for the constructional defect if it is
33 determined that the contractor failed to correct or repair the defect
34 properly.

35 2. The provisions of subsection 1 do not apply to any written
36 waiver or settlement agreement described in subsection 1, unless:

37 (a) The claimant has obtained the opinion of an expert
38 concerning the constructional defect;

39 (b) The claimant has provided the contractor with a written
40 notice of the defect pursuant to NRS 40.645 or 40.682 and a copy of
41 the expert’s opinion; and

42 (c) The claimant and the contractor have complied with the
43 requirements for inspection and repair as provided in NRS 40.600 to
44 40.695, inclusive ~~§~~, *and section 1 of this act.*



1 3. If a claimant does not prevail in any action which is not
2 barred pursuant to this section, the court may:

3 (a) Deny the claimant's attorney's fees, fees for an expert
4 witness or costs; and

5 (b) Award attorney's fees and costs to the contractor.

6 **Sec. 8.** NRS 40.668 is hereby amended to read as follows:

7 40.668 1. Notwithstanding the provisions of NRS 40.600 to
8 40.695, inclusive, *and section 1 of this act*, a claimant may not
9 commence an action against a subdivider or master developer for a
10 constructional defect in an appurtenance constructed on behalf of
11 the subdivider or master developer in a planned unit development, to
12 the extent that the appurtenance was constructed by or through a
13 licensed general contractor, unless:

14 (a) The subdivider or master developer fails to provide to the
15 claimant the name, address and telephone number of each contractor
16 hired by the subdivider or master developer to construct the
17 appurtenance within 30 days of the receipt by the subdivider or
18 master developer of a request from the claimant for such
19 information; or

20 (b) After the claimant has made a good faith effort to obtain full
21 recovery from the contractors hired by the subdivider or master
22 developer to construct the appurtenance, the claimant has not
23 obtained a full recovery.

24 2. All statutes of limitation or repose applicable to a claim
25 governed by this section are tolled from the time the claimant
26 notifies a contractor hired by the subdivider or master developer of
27 the claim until the earlier of the date:

28 (a) A court determines that the claimant cannot obtain a full
29 recovery against those contractors; or

30 (b) The claimant receives notice that those contractors are
31 bankrupt, insolvent or dissolved.

32 Tolling pursuant to this subsection applies only to the subdivider or
33 master developer. Notwithstanding any applicable statute of
34 limitation or repose, the claimant may commence an action against
35 the subdivider or master developer for the claim within 1 year after
36 the end of the tolling described in this subsection.

37 3. Nothing in this section prohibits the commencement of an
38 action against a subdivider or master developer for a constructional
39 defect in a residence sold, designed or constructed by or on behalf of
40 the subdivider or master developer.

41 4. Nothing in this section prohibits a person other than the
42 claimant from commencing an action against a subdivider or master
43 developer to enforce his own rights.

44 5. The provisions of this section do not apply to a subdivider or
45 master developer who acts as a general contractor or uses his license



1 as a general contractor in the course of constructing the
2 appurtenance that is the subject of the action.

3 6. As used in this section:

4 (a) "Master developer" means a person who buys, sells or
5 develops a planned unit development, including, without limitation,
6 a person who enters into a development agreement pursuant to
7 NRS 278.0201.

8 (b) "Planned unit development" has the meaning ascribed to it in
9 NRS 278A.065.

10 (c) "Subdivider" has the meaning ascribed to it in
11 NRS 278.0185.

12 **Sec. 9.** NRS 40.675 is hereby amended to read as follows:

13 40.675 1. A contractor who makes or provides for repairs
14 under NRS 40.600 to 40.695, inclusive, *and section 1 of this act*
15 may take reasonable steps to prove that the repairs were made and to
16 have them inspected.

17 2. The provisions of NRS 40.600 to 40.695, inclusive, *and*
18 *section 1 of this act* regarding inspection and repair are in addition
19 to any rights of inspection and settlement provided by common law
20 or by another statute.

21 **Sec. 10.** NRS 40.680 is hereby amended to read as follows:

22 40.680 1. Except as otherwise provided in this chapter,
23 before an action based on a claim governed by NRS 40.600 to
24 40.695, inclusive, *and section 1 of this act* may be commenced in
25 court, the matter must be submitted to mediation, unless mediation
26 is waived in writing by the contractor and the claimant.

27 2. The claimant and contractor must select a mediator by
28 agreement. If the claimant and contractor fail to agree upon a
29 mediator within 45 days after a mediator is first selected by the
30 claimant, either party may petition the American Arbitration
31 Association, the Nevada Arbitration Association, Nevada Dispute
32 Resolution Services or any other mediation service acceptable to the
33 parties for the appointment of a mediator. A mediator so appointed
34 may discover only those documents or records which are necessary
35 to conduct the mediation. The mediator shall convene the mediation
36 within 60 days after the matter is submitted to him, unless the
37 parties agree to extend the time. Except in a complex matter,
38 the claimant shall, before the mediation begins, deposit \$50 with the
39 mediation service and the contractor shall deposit with the
40 mediation service the remaining amount estimated by the mediation
41 service as necessary to pay the fees and expenses of the mediator for
42 the first session of mediation, and the contractor shall deposit
43 additional amounts demanded by the mediation service as incurred
44 for that purpose. In a complex matter, each party shall share equally
45 in the deposits estimated by the mediation service. Unless otherwise



1 agreed, the total fees for each day of mediation and the mediator
2 must not exceed \$750 per day.

3 3. If the parties do not reach an agreement concerning the
4 matter during mediation or if the contractor fails to pay the required
5 fees and appear, the claimant may commence his action in court
6 and:

7 (a) The reasonable costs and fees of the mediation are
8 recoverable by the prevailing party as costs of the action.

9 (b) Either party may petition the court in which the action is
10 commenced for the appointment of a special master.

11 4. A special master appointed pursuant to subsection 3 may:

12 (a) Review all pleadings, papers or documents filed with the
13 court concerning the action.

14 (b) Coordinate the discovery of any books, records, papers or
15 other documents by the parties, including the disclosure of witnesses
16 and the taking of the deposition of any party.

17 (c) Order any inspections on the site of the property by a party
18 and any consultants or experts of a party.

19 (d) Order settlement conferences and attendance at those
20 conferences by any representative of the insurer of a party.

21 (e) Require any attorney representing a party to provide
22 statements of legal and factual issues concerning the action.

23 (f) Refer to the judge who appointed him or to the presiding
24 judge of the court in which the action is commenced any matter
25 requiring assistance from the court.

26 The special master shall not, unless otherwise agreed by the parties,
27 personally conduct any settlement conferences or engage in any ex
28 parte meetings regarding the action.

29 5. Upon application by a party to the court in which the action
30 is commenced, any decision or other action taken by a special
31 master appointed pursuant to this section may be appealed to the
32 court for a decision.

33 6. A report issued by a mediator or special master that indicates
34 that either party has failed to appear before him or to mediate in
35 good faith is admissible in the action, but a statement or admission
36 made by either party in the course of mediation is not admissible.

37 **Sec. 11.** NRS 40.688 is hereby amended to read as follows:

38 40.688 1. If a claimant attempts to sell a residence that is or
39 has been the subject of a claim governed by NRS 40.600 to 40.695,
40 inclusive, *and section 1 of this act*, he shall disclose, in writing, to
41 any prospective purchaser of the residence, not less than 30 days
42 before the close of escrow for the sale of the residence or, if escrow
43 is to close less than 30 days after the execution of the sales
44 agreement, then immediately upon the execution of the sales
45 agreement or, if a claim is initiated less than 30 days before the



1 close of escrow, within 24 hours after giving written notice to the
2 contractor pursuant to subsection 1 of NRS 40.645 or subsection 1
3 of NRS 40.682:

4 (a) All notices given by the claimant to the contractor pursuant
5 to NRS 40.600 to 40.695, inclusive, *and section 1 of this act* that
6 are related to the residence;

7 (b) All opinions the claimant has obtained from experts
8 regarding a constructional defect that is or has been the subject of
9 the claim;

10 (c) The terms of any settlement, order or judgment relating to
11 the claim; and

12 (d) A detailed report of all repairs made to the residence by or
13 on behalf of the claimant as a result of a constructional defect that is
14 or has been the subject of the claim.

15 2. Before taking any action on a claim pursuant to NRS 40.600
16 to 40.695, inclusive, *and section 1 of this act*, the attorney for a
17 claimant shall notify the claimant in writing of the provisions of this
18 section.

19 **Sec. 12.** NRS 40.6882 is hereby amended to read as follows:

20 40.6882 “Complainant” means a person who makes a claim or
21 files an action against a design professional pursuant to NRS 40.600
22 to 40.695, inclusive ~~§~~, *and section 1 of this act*.

23 **Sec. 13.** NRS 40.6884 is hereby amended to read as follows:

24 40.6884 1. Except as otherwise provided in subsection 2, in
25 an action governed by NRS 40.600 to 40.695, inclusive, *and section*
26 *1 of this act* that is commenced against a design professional or a
27 person primarily engaged in the practice of professional
28 engineering, land surveying, architecture or landscape architecture,
29 including, without limitation, an action for professional negligence,
30 the attorney for the complainant shall file an affidavit with the court
31 concurrently with the service of the first pleading in the action
32 stating that the attorney:

33 (a) Has reviewed the facts of the case;

34 (b) Has consulted with an expert;

35 (c) Reasonably believes the expert who was consulted is
36 knowledgeable in the relevant discipline involved in the action; and

37 (d) Has concluded on the basis of his review and the
38 consultation with the expert that the action has a reasonable basis in
39 law and fact.

40 2. The attorney for the complainant may file the affidavit
41 required pursuant to subsection 1 at a later time if he could not
42 consult with an expert and prepare the affidavit before filing the
43 action without causing the action to be impaired or barred by the
44 statute of limitations or repose, or other limitations prescribed by
45 law. If the attorney must submit the affidavit late, he shall file an



1 affidavit concurrently with the service of the first pleading in the
2 action stating his reason for failing to comply with subsection 1 and
3 the attorney shall consult with an expert and file the affidavit
4 required pursuant to subsection 1 not later than 45 days after filing
5 the action.

6 3. In addition to the statement included in the affidavit
7 pursuant to subsection 1, a report must be attached to the affidavit.
8 Except as otherwise provided in subsection 4, the report must be
9 prepared by the expert consulted by the attorney and include,
10 without limitation:

11 (a) The resume of the expert;

12 (b) A statement that the expert is experienced in each discipline
13 which is the subject of the report;

14 (c) A copy of each nonprivileged document reviewed by the
15 expert in preparing his report, including, without limitation, each
16 record, report and related document that the expert has determined is
17 relevant to the allegations of negligent conduct that are the basis for
18 the action;

19 (d) The conclusions of the expert and the basis for the
20 conclusions; and

21 (e) A statement that the expert has concluded that there is a
22 reasonable basis for filing the action.

23 4. In an action brought by a claimant in which an affidavit is
24 required to be filed pursuant to subsection 1:

25 (a) The report required pursuant to subsection 3 is not required
26 to include the information set forth in paragraphs (c) and (d) of
27 subsection 3 if the claimant or his attorney files an affidavit, at the
28 time that the affidavit is filed pursuant to subsection 1, stating that
29 he made reasonable efforts to obtain the nonprivileged documents
30 described in paragraph (c) of subsection 3, but was unable to obtain
31 such documents before filing the action;

32 (b) The claimant or his attorney shall amend the report required
33 pursuant to subsection 3 to include any documents and information
34 required pursuant to paragraph (c) or (d) of subsection 3 as soon as
35 reasonably practicable after receiving the document or information;
36 and

37 (c) The court may dismiss the action if the claimant and his
38 attorney fail to comply with the requirements of paragraph (b).

39 5. An expert consulted by an attorney to prepare an affidavit
40 pursuant to this section must not be a party to the action.

41 6. As used in this section, "expert" means a person who is
42 licensed in a state to engage in the practice of professional
43 engineering, land surveying, architecture or landscape architecture.



1 **Sec. 14.** NRS 40.6885 is hereby amended to read as follows:
2 40.6885 1. The court shall dismiss an action governed by
3 NRS 40.600 to 40.695, inclusive, *and section 1 of this act* that is
4 commenced against a design professional or a person primarily
5 engaged in the practice of professional engineering, land surveying,
6 architecture or landscape architecture, including, without limitation,
7 an action for professional negligence, if the attorney for the
8 complainant fails to:

- 9 (a) File an affidavit required pursuant to NRS 40.6884;
10 (b) File a report required pursuant to subsection 3 of NRS
11 40.6884; or
12 (c) Name the expert consulted in the affidavit required pursuant
13 to subsection 1 of NRS 40.6884.

14 2. The fact that an attorney for a complainant has complied or
15 failed to comply with the provisions of NRS 40.6884 is admissible
16 in the action.

17 **Sec. 15.** NRS 40.689 is hereby amended to read as follows:

18 40.689 1. Upon petition by a party:

19 (a) The court shall give preference in setting a date for the trial
20 of an action commenced pursuant to NRS 40.600 to 40.695,
21 inclusive, ~~§~~ and *section 1 of this act; and*

22 (b) The court may assign an action commenced pursuant to NRS
23 40.600 to 40.695, inclusive, *and section 1 of this act* to a senior
24 judge.

25 2. If the action is assigned to a senior judge upon petition by a
26 party:

27 (a) Any additional expenses caused by the assignment must be
28 borne equally by each party involved; or

29 (b) The judge may distribute any additional expenses among the
30 parties as he deems appropriate.

31 **Sec. 16.** NRS 40.690 is hereby amended to read as follows:

32 40.690 1. A claim governed by NRS 40.600 to 40.695,
33 inclusive, *and section 1 of this act* may not be brought by a
34 claimant or contractor against a government, governmental agency
35 or political subdivision of a government, during the period in which
36 a claim for a constructional defect is being settled, mediated or
37 otherwise resolved pursuant to NRS 40.600 to 40.695, inclusive ~~§~~,
38 *and section 1 of this act*. The settlement of such a claim does not
39 affect the rights or obligations of the claimant or contractor in any
40 action brought by the claimant or contractor against a third party.

41 2. A contractor or claimant may require a party against whom
42 the contractor or claimant asserts a claim governed by NRS 40.600
43 to 40.695, inclusive, *and section 1 of this act* to appear and
44 participate in proceedings held pursuant to those sections as if the
45 party were a contractor and the party requiring him to appear were a



1 claimant. The party must receive notice of the proceedings from the
2 contractor or claimant.

3 **Sec. 17.** NRS 40.695 is hereby amended to read as follows:

4 40.695 1. Except as otherwise provided in subsection 2,
5 statutes of limitation or repose applicable to a claim based on a
6 constructional defect governed by NRS 40.600 to 40.695, inclusive,
7 *and section 1 of this act* are tolled from the time notice of the claim
8 is given, until 30 days after mediation is concluded or waived in
9 writing pursuant to NRS 40.680 or subsection 4 of NRS 40.682.

10 2. Tolling under this section applies:

11 (a) Only to a claim that is not a complex matter.

12 (b) To a third party regardless of whether the party is required to
13 appear in the proceeding.

14 **Sec. 18.** NRS 113.135 is hereby amended to read as follows:

15 113.135 1. Upon signing a sales agreement with the initial
16 purchaser of residential property that was not occupied by the
17 purchaser for more than 120 days after substantial completion of the
18 construction of the residential property, the seller shall:

19 (a) Provide to the initial purchaser a copy of NRS 11.202 to
20 11.206, inclusive, and 40.600 to 40.695, inclusive ~~§~~, *and section 1*
21 *of this act*;

22 (b) Notify the initial purchaser of any soil report prepared for the
23 residential property or for the subdivision in which the residential
24 property is located; and

25 (c) If requested in writing by the initial purchaser not later than
26 5 days after signing the sales agreement, provide to the purchaser
27 without cost each report described in paragraph (b) not later than 5
28 days after the seller receives the written request.

29 2. Not later than 20 days after receipt of all reports pursuant to
30 paragraph (c) of subsection 1, the initial purchaser may rescind the
31 sales agreement.

32 3. The initial purchaser may waive his right to rescind the sales
33 agreement pursuant to subsection 2. Such a waiver is effective only
34 if it is made in a written document that is signed by the purchaser.

35 **Sec. 19.** The amendatory provisions of this act do not apply to
36 a claim initiated or an action commenced pursuant to NRS 40.600 to
37 40.695, inclusive, and section 1 of this act, unless the claim was
38 initiated or the action was commenced on or after October 1, 2003.

