

Las Vegas: Boom Town for Construction Defect Litigation



by [REDACTED]

We've all heard the statistics. Las Vegas is one of the fastest growing areas in the nation; current estimates have 7,000 people a month moving to Nevada's most populous city.

Outside the growth of general legal services to assist the burgeoning population, at least one very specific area of law is showing phenomenal growth: construction defect litigation.

It's no surprise this area is expanding. The greatest potential employment area in the Southern Nevada city is in construction. "A combination of factors is behind the construction woes," explained attorney Paul H. Schofield, senior partner at Schofield & Grant, a law firm which represents homeowners in construction defect litigation. "Obviously the

population explosion is the driving factor, but the rush to build housing as quickly and profitably as possible, and the lack of qualified tradesmen, are just as responsible."

Schofield, who handled his first construction case in Las Vegas in the 1970s, has watched this area of law grow with the valley, particularly with the introduction of Nevada Revised Statute Chapter 40.600 et seq. "The Nevada legislature has wisely tried to prevent the housing problems that occurred in California with its housing boom of the 1980s. While we've always had laws to handle construction defects, NRS Chapter 40 codified these laws," Schofield said.

NRS 40.600 et seq. is unique in that it specifies certain damages which are recoverable in a con-

struction defect case that other jurisdictions do not. Attorney fees, expert costs, loss of use of a home during repairs, and diminution of value in cases involving structural failure are all recoverable in a construction defect case brought pursuant to the statute. In addition, the statute forces both the plaintiff and defense sides of a case to mediate prior to filing a lawsuit.

"In general, even before the statutes guiding construction defect cases were developed, the majority of cases did not go to trial," Schofield noted. "However, the pre-suit requirement of NRS 40 keeps the costs of a construction defect case down, by giving warning of possible ramifications to those builders who might have previously ignored the homeowners or their attorneys' letters demanding repair."



Left: One of the first signs of defects in construction is water damage. (Photo courtesy of CBI Construction, Las Vegas.)

Below: It's hard to believe a home could reach this level of construction defect damage, but hidden behind the water leaks and cracked slabs can be a homeowner's worst nightmare. (Photo courtesy of CBI Construction, Las Vegas.)

Taking a lesson from California with regard to construction defect litigation is necessary in analyzing the future of this area of law. "The construction defect market in California is drying up," explained attorney Roger J. Grant, also with Schofield & Grant, but who gained his early construction defect experience in California. "Many of California's lawyers are moving here. A majority of the firms in Las Vegas practicing in construction defect law were previously based in California. The reasons are obvious: There are few cases to be had in San Diego, and the construction defect market in other Southern California cities is very limited."

Metropolitan Las Vegas is the pot of gold at the end of California's rainbow. With a current population at 1.1 million, official estimates claim Las Vegas will reach 2 million within 10 years. For the home-building market, the statistics are staggering. According to the 1997 Las Vegas Perspective by Metropolitan Research Associates, nearly 20,000 new homes were sold in 1996 — that's 55 new homes a day. The

most profitable area of construction defect litigation, homeowners associations, is expected to rise in number as well with more homeowners choosing to live in common interest ownership communities. In 1996, more than 50 percent of homes were sold in planned developments, up from 36 percent in 1995, and 30 percent in 1994. Future sales can be estimated by the number of building permits issued. Almost 19,000 single family homes and another 11,200 multi-family units are under construction from 1996 permits, a 20 percent increase in permits since 1993.

Lest a law firm change their whole business overnight to practicing in construction defect law, Grant offered financially sobering advice. "Expert costs alone can often exceed \$500,000 in a large multi-unit construction defect case, an amount that the homeowners cannot afford to pay for out of pocket while waiting for their case to settle. Often the law firm must front these costs for the homeowners," he said. "In addition, it's not uncommon to spend



thousands of hours preparing a construction defect case."

Time is an important factor in the filing of a construction defect case. "The statutes require that a claim for latent defects be initiated within eight years of the completion of your home," Schofield explained. "The statute of repose is extended to 10 years in a situation where the developer had knowledge of the defects. Patent defects are limited to six years. In either latent or patent defect cases, the statutes of repose can be extended an additional two years, if the defects are discovered in the last year of the statute."

After determining that a case meets the time constraints imposed by law, case preparation includes a number of steps involving experts in the construction industry. "Good experts, who are familiar with Nevada standards and have worked with applicable codes, are critical to a case," Schofield noted. "We bring in a team of experts in various fields of construction to determine the nature and extent of the construction defect problems."

Experts provide impartial third-person testimony to these cases that begin small and often grow after a case is investigated. Their impartiality plays a critical role as the construction experts can represent either plaintiff or defense and are often involved in the mediation process.

Construction experts first get called into a construction defect case by the attorneys of the homeowners. "Water intrusion is the number one defect in construction defect cases," noted Keith Daniels, president of CBI in Las Vegas, consultants and reconstruction experts in construction defect cases. "The homeowners don't notice all the other things, just the huge stain on their wall or the water leaks."

"Window leaks and roof leaks. They're the top reason we get called," Grant agreed. Other common defects include cracked slabs, soil movement, drainage problems, cracks in walls, defective plumbing, cracked stucco, structural deficiencies, and improperly installed mechanical and electrical equipment.

Grant attributes these problems to a number of factors: "Poor supervision by the developer or general

contractor; improper sequencing of the trades, and shoddy work by subcontractors; any or all these factors will lead to a major construction repair problem," he said.

Making sure all construction defects are found is the role of the construction experts. "Our first task is to visit the site and do a visual observation," explained Daniel Cervenak, vice president of PinnacleOne, formerly High-Point Rendel. His company manages the construction defect team in identifying and cost-analyzing the problems. The experts make a general examination of the homes prior to a case even being started.

"We're looking for visual manifestations, the overall craftsmanship, and to see how the finished product may have contributed to the manifestation," he said. "In a sense, we're beginning a forensic engineering analysis of the construction defects of a home."

From this observation, the expert will make a recommendation from the severity of the case to the attorneys on whether to proceed. Once a case is opened, firms like Cervenak's will then review pertinent documentation, including plans and specifications, the questionnaires that homeowners fill out noting their complaints, and any other reports that have been done over previous years, including other expert reports. With such documentation, the experts are ready to begin a second, closer observation.

"Once we have the documentation, we're more focused on what areas to do invasive testing," Cervenak explained. Invasive testing involves opening up the walls, roofs and decks. About 15 to 20 percent of the homes will need to be tested for a good analysis. This field test includes both exteriors and interiors, and will enable the experts to determine the frequency of the manifestation and what additional issues will be included when the case is pursued. The expert team may include architects, civil and structural engineers, licensed general contractors, and cost estimators, among others.

Once invasive testing has begun by the experts, they will look for

problems that aren't obvious to the homeowner. "The problems the homeowner isn't aware of are under the stucco," Daniels said. Defects that become apparent during the invasive testing include electrical, plumbing, and heating and ventilation duct work. "We look for everything. We'll even core the concrete slab to ensure codes were met."

After the experts have completed their investigation, they'll put together a report estimating the costs of repair, and present a methodology for repair. This presentation is presented to the defense, which may include as many as 35 to 40 people brought in by the contractor. "The developer receives the homeowner association's complaint and then turns around and files a cross-complaint to his subcontractors," Cervenak said. It's not uncommon for the developer to release some subcontractors from the case if there isn't any fault on their part, or for a small settlement if their fault is minor.

"Our job at this presentation is to convince the defendants and their insurance carriers that there are serious problems," Cervenak added.

Randall Gustafson, an attorney with Lincoln, Gustafson and Cercos, handles the defense in construction defect cases, for developers, contractors and their insurance companies. "Our job is to get the most cost-effective solution for the insurers and the insured," he said. His firm has been in Las Vegas since 1994, but established their reputation as construction defect defense attorneys in California. "Generally, it's better for us to settle a case informally without the litigation," he added.

For the defense, experts are needed to reduce the repair cost estimates, as well as disprove the plaintiffs' claims. "You need to have quality experienced experts look at allegations and especially to look at the owners' extrapolations of the problems," Gustafson said. "We need to find out which homeowners really have the problems."

NRS 40.600 et seq. has made the fact-finding part of construction defect similar for both defense and plaintiffs. "If the repair demands

are unreasonable, you sometimes have to go to trial," Gustafson said. "In fact-driven cases such as construction defect, you can settle once everyone is dealing with the same facts. The difficulty in Nevada is that much of the law is new, so you can have everyone agree to the facts and no one agree to the interpretation of the law."

Expert involvement in the defense case begins after the presentation by the plaintiffs. "If we're working for the defense, a list of deficiencies will be delivered to us by both written and visual presentation," explained Cervenak. "The defense has the right to go out and do their own testing. As defense experts, we'll walk through the homes with the plaintiffs' experts to see what they've done, and then we may do more testing while the plaintiffs' experts observe."

When working for defense, PinnacleOne tries to disprove the plaintiffs' findings through their own field investigations, or — if those findings are real — minimize the damage to their client. "Our job, whether for plaintiff or defendant, is to find a better way to fix the problem for less while still getting the same result," Cervenak said.

NRS 40.600 comes into action after the experts complete their work. "We begin a series of negotiations and mediation with the developer and its insurance carriers," Schofield explained. The law also provides for the contractor to pay for the mediation. "If a developer chooses not to settle the claim through mediation, the case will proceed to litigation and possibly trial. However, in some cases, NRS Chapter 40 mediation is successful, and both parties avoid expensive and time-consuming litigation," he added.

Both Cervenak and Daniels agree that the home-building market in Las Vegas is destined to repeat the errors of builders in California. "You can't get insurance to build condos in California now," noted Daniels.

"Developers don't want to pay for quality control," he said. "If they would hire a quality control person during construction full-

time, the builder would never find himself facing a construction defect attorney." As a result of the rising construction defect claims in Las Vegas, insurance for builders is rising, a trend that is sure to continue.

"If builders would repair their homeowners' problems when

they are initially discovered, there would be no need for construction defect litigation," noted Grant.

As housing demands continue to pressure builders to build faster and more affordable homes, expect to see Las Vegas replace Southern California as the hottest market for construction defect litigation.