



LEGAL ALERT

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Nevada Supreme Court Establishes "Reasonable Threshold Test" to Measure Sufficiency of Pre-Litigation Extrapolated Construction Defect Notice

In 2003, the Nevada Legislature gave residential developers and contractors the right to repair alleged construction defects before the homeowner could commence litigation against them. In practice, however, the right to repair seemed realistically limited to defect claims involving only a couple of homes. Once the number of homes increased, the right to repair was essentially lost. Plaintiff construction defect attorneys would provide extrapolated defect lists, which in most cases did not adequately inform the affected contractors of any actual defects, nor their supposed locations within the residence. Without such information, the contractor had to guess where any actual defect may be discovered. The cost, time and futility of such exercises effectively deprived the contractors of their statutorily mandated right to repair.

To compound this issue, the extrapolated defect notices provided by plaintiffs rarely met statutory requirements. An extrapolated notice required the defect claims to be based on a "valid and reliable representative sample" of the homes involved in the defect claims. Only if the sample provided



a statistically valid determination that the defects were common within the community could the notice be sufficient to put the contractor on notice. But defect experts rarely attempted to justify their allegations of common constructional defect claims with statistically reliable examinations. Rarely, if ever, were contractors provided with data to verify the claims of valid and reliable sampling, and there was little if any care taken to assure that the units sampled for testing were representative of the entire community. Most of the time, a contractor could not tell from the reports which units were tested, let alone what defects were found in those units. Plaintiffs' attorneys would refuse to allow the contractors to question the homeowners to determine what was wrong. With these impediments, few multi-unit constructional defect claims ended up being repaired without years of litigation.

Finally, the issue has been addressed by the Nevada Supreme Court. In *D.R. Horton, Inc. v. District Court*, 123 Nev.Ap.Op. 45 (Oct, 2007) (in which the Associated General Contractors, Las Vegas Chapter participated), the court determined that an "adequate extrapolated pre-litigation notice must have a reasonable statistical basis to describe the alleged defects and their locations in reasonable detail sufficient to afford contractors a meaningful opportunity to repair the alleged defects," and established the Reasonable Threshold Test "to guide district courts in making written findings on whether a pre-litigation notice satisfies that threshold." If the extrapolated constructional defect notice meets the test, district courts

have wide discretion to determine the adequacy of the notice, if challenged by the contractor.

The court found that it was clear that the legislature intended to preserve an opportunity for contractors to repair the homes they construct, and that contractors are entitled to reasonable notice of alleged defects in their homes so that they can verify and repair those defects before litigation begins. While contractors are responsible for the costs of making repairs if they choose to do so, the homeowners asserting defects exist have "a duty to provide reasonable notice of what defects exist and a reasonable approximation of the location of those defects."

Using an extrapolated defect notice was intended by the legislature to allow homeowners to use expert opinion and extrapolation to give notice of common defects in multiple homes, so long as the notice satisfies the "reasonable detail" requirements of NRS 40.645(2). Extrapolation encompasses the statistical use by an expert witness of a valid and reliable representative sample to formulate an opinion that similarly situated residences may have common constructional defects. However, the court determined that the scope of the extrapolated notice must be narrow. Homes must be divided into subsets. Homes included within the scope of an extrapolated notice typically will be similarly situated only if they are part of a subset of homes within the development that demonstrate the defect. They may be subset by a particular product or type of construction used. Regardless of the limited



category, an extrapolated notice is valid only if it identifies the subset or characteristics of the subset to which it applies.

The district court should require the claimants' expert to test and verify the existence of the alleged defect in at least one of the homes in each subset of homes included within the scope of the extrapolated notice. The claimants must thereafter provide the address of each home tested and clearly identify the subset of homes to which the pre-litigation notice applies, and investigate further to narrow their notice to an identified subset of homes within the community that has the purported defect. Thereafter, the claimants should test and verify the defect in at least one home from each subset of homes in the community, and then extrapolate the percentage of homes within each subset that they believe are likely to contain the defect. The district courts must then employ their wide discretion in determining whether a valid and representative sample has been used for the size and make-up of each subset, and may determine that a notice is not

reasonable unless a defect is confirmed in more than one home in each subset.

The court indicated that these guidelines merely set the minimum threshold that an extrapolated pre-litigation notice must satisfy. Once the district court determines that a notice is reasonable, the contractor bears the burden of verifying and repairing the alleged defects in every home in the subset of homes identified in the extrapolated notice.

This reasonable threshold test increases the burden on construction defect plaintiffs to ensure that alleged defects are actually common throughout the community. Contractors have to be vigilant and not be afraid to challenge the sufficiency of construction defect claims by filing declaratory relief lawsuits if the expert reports fail to provide a valid and reliable basis to assert the defect is common throughout a community.

This alert is for the information of our clients and friends and does not constitute legal advice.

“REASONABLE THRESHOLD TEST” BASED ON ASSOCIATED GENERAL CONTRACTOR’S AMICUS BRIEF

The basis of the Nevada Supreme Court’s “Reasonable Threshold Test” was largely adopted from the amicus brief written for the Associated General Contractors by Snell & Wilmer, LLP and Leon F. Mead II, Esq. The AGC’s amicus brief focused on the statistical invalidity of the Plaintiff’s expert witness reports from which the alleged defect notice was extrapolated, and suggested that the Court adopt a test which would objectively test whether the expert reports were based on statistically valid and reliable representative samples. A copy of the filed AGC amicus curiae brief can be reviewed at the following link: http://www.swlaw.com/publications/files/article_drhorton_amicus.pdf



AMERICAN INSTITUTE OF ARCHITECTS (AIA) DOCUMENT UPDATE SEMINAR

Join Leon Mead, Jason Ebe and other Snell & Wilmer attorneys as they discuss and interpret the latest AIA documents and help industry professionals fully understand the impact these changes have on their respective business operations. December 4, 2007, 11:30 a.m. – 1:00 p.m., Snell & Wilmer, 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, NV, 89169. Please RSVP to Katy Ramsey, 702.784.5200.

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Mr. Mead is a partner with Snell & Wilmer's Las Vegas office. Ranked as one of the top Construction Lawyers in Nevada by Chambers USA, Best Lawyers in America and Super Lawyers, he has represented clients in construction related matters for nearly twenty years. He primarily represents public and private owners, contractors and others in the construction industry in their construction-related legal matters.

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