NEVADA

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I. MECHANIC'S LIEN BASICS

Nevada Revised Statute Chapter 108 governs mechanics' and materialmen's liens on a primary building or other superstructure, together with all garages, outbuildings and other appurtenant structures. The law allows any contractor, subcontractor, laborer, supplier or other person who performs work or furnishes materials valued at $500.00 or more to be paid for his or her work or supplies. If unpaid, a lien may be placed on the home, land or property where the work was performed. The notice and recording requirements of the statute must be strictly followed.

A. Requirements

1. Notice of Right to Lien

Pursuant to NRS 108.245, a Notice of Right to Lien may be given at any time after commencement of work. A lien claimant required to give this notice has a right to lien for materials or equipment furnished or for work or services performed in the 31 days before the date the Notice of Right to Lien is given and for the materials or equipment furnished or for work or services performed anytime thereafter until the completion of the work of improvement.

2. Notice of Intent to Lien

NRS 108.226 (6) provides that before a mechanic's lien is placed on residential property, the claimant must provide a "Notice of Intent to Lien." This section states in pertinent part as follows:

> If a work of improvement involves the construction, alteration or repair of multifamily or single-family residences, including, without limitation apartment houses, a lien claimant, except laborers, must serve a 15-day notice of intent to lien incorporating substantially the same information required in a notice of lien upon both the owner and the reputed prime contractor before recording a notice of lien. Service of the notice of intent to lien must be by personal delivery or certified mail and will extend the time for recording the notice of lien described in subsection 1 by 15 days.

The statute additionally states that a lien on multifamily or single-family residences, "may not be perfected or enforced" unless the 15 day notice of intent to lien has been given. The law does not provide a statutorily required form of Notice of Intent to Lien, but only that it be substantially similar to the Notice of Lien.

3. The Notice of Lien and Recording

A Notice of Lien becomes the lien itself and must later be recorded in the county where the work or improvement is located. Pursuant to NRS 108.226(1), to perfect a lien, a lien claimant must record his notice of lien in the office of the county recorder of the county where the property or some part thereof is located as follows:

(a) Within 90 days after the date on which the latest of the following occurs:

(1) The completion of the work of improvement;

(2) The last delivery of material or furnishing of equipment by the lien claimant for the work of improvement; or

(3) The last performance of work by the lien claimant for the work of improvement; or

(b) Within 40 days after the recording of a valid notice of completion, if the notice of completion is recorded and served in the manner required pursuant to NRS 108.228.

Pursuant to NRS 108.226(2), the Notice of Lien must include a statement of the amount of the lien after deducting all just credits and offsets; the name of the owner, if known; the name of the person by whom he was employed or to whom he furnished the material or equipment; a brief statement of the terms of payment of his contract; and a description of the property to be charged with the Notice of Lien sufficient for identification. NRS 108.226(5) sets forth the form of the Notice of Lien.

B. Enforcement and Foreclosure

Pursuant to NRS 108.244, a lien claimant (or assignee) may not file a complaint for foreclosure of his Notice of Lien or the assigned Notice of Lien or Notices of Lien until 30 days have expired immediately following the recording of his Notice of Lien. This provision does not apply to or prohibit the filing of any statement of fact constituting a lien in an action already filed for foreclosure of a Notice of Lien; or in order to comply with the provisions of NRS 108.239, which limits foreclosure unless certain service requirements are met. The suit must be filed prior to the lapse of six (6) months from the recording of the lien.

At the time the lawsuit is filed, the lien claimant must record a Lis Pendens with the county recorder where the project is located. Furthermore, the lien claimant must also publish a notice of the suit once a week for three (3) successive weeks in a newspaper where the project is located. Finally, the lien claimant must serve a notice on the other lien holders of record.

The court shall cause the property to be sold in satisfaction of all liens and the costs of sale, including all amounts awarded to all lien claimants. Each mechanic's lien holder assumes priority based upon NRS 108.225.

> 1. The liens provided for in NRS 108.221 to 102.246, inclusive, are preferred to:
>
> > (a) Any lien, mortgage or other encumbrance which may have attached to the property *after* the commencement of construction of a work of improvement.
> >
> > (b) Any lien, mortgage or other encumbrance of which the lien claimant had no notice and which was unrecorded against the property *at* the commencement of construction of a work of improvement.
>
> 2. Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in NRS 108.221 to 102.246, inclusive, *after* the commencement of construction of a work of improvement are subordinate and subject to the liens provided for in NRS 108.221 to 108.246, inclusive, regardless of the date of recording the notices of liens.

Id (emphasis added).

Nevada courts determine the enforceability of lien waiver clauses "on a case-by-case basis by considering whether the form of the lien waiver clause violates Nevada's public policy to secure payment for contractors." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032, 1041, 124 Nev. 1102, 1116 (Nev. 2008).

C. Discharge or Release of Notice of Lien, Waiver and Release

Pursuant to NRS 108.2437, a discharge or release of the Notice of Lien must be recorded by a lien claimant, "as soon as practicable, but not later than 10 days after" the lean is discharged. A form is included in the statute. Once there has been full satisfaction of the lien amount, a Discharge or Release of Notice of Lien should be filed, but this should not be used for partial payments. The failure of a lien claimant to satisfy this requirement can lead to civil liability.

NRS 108.2457 states that the waiver and release given by any lien claimant is unenforceable unless it is in the proper form and made under the following four circumstances.

1. Conditional Waiver and Release Upon Progress Payment

Conditional Waiver and Release Upon Progress Payment is to be used "where the lien claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress billing," but has not yet been actually paid. NRS 108.2457(5)(a). The waiver is "conditional" upon receipt of the payment specified in the release or upon the check clearing the bank. *Id*.

2. Unconditional Waiver and Release Upon Progress Payment

Unconditional Waiver and Release Upon Progress Payment are to be used where the lien claimant has been paid a progress billing. NRS 108.2457(5)(b). In other words, the lien claimant has been paid a progress payment in good funds or a check has cleared the bank at the time the release is executed. *Id*.

3. Conditional Waiver and Release Upon Final Payment

Conditional Waiver and Release Upon Final Payment is to be used "where the lien claimant is required to execute a waiver and release in exchange for or to induce payment of a final billing and the lien claimant has not yet been paid the amount represented in the waiver." NRS 108.2457(5)(c). As provided in the document, it is only effective when good funds have been paid to the lien claimant or a check in the full amount cleared the bank. *Id*.

4. Unconditional Waiver and Release Upon Final Payment

Unconditional Waiver and Release Upon Final Payment are to be used where the lien claimant has been paid the final monies in good funds. NRS 108.2457(5)(d). Note that this document would be used prior to the actual recording of any mechanic's lien. *Id*.

II. PUBLIC PROJECT CLAIMS

Government contracts in Nevada, or construction contracts where a party is "the State, county, city, town, school district, or any public agency of the State," are governed by Nevada Revised Statutes Chapter 339. For new construction contracts exceeding $100,000.00, the contractor and contracting party must furnish a performance bond and payment bond, not less than 50 percent of the contract amount, respectively. NRS 339.025. A contractor "who has performed labor or furnished material" and has not been paid with 90 days after the date of performance "may bring an action on such payment bond in his or her own name to recover any amount due the [contractor] for such labor or material, and may prosecute such action to final judgment and have execution on the judgment." NRS 339.035(1). Subcontractors enjoy similar rights, but must first provide notice to the contractor as required by the statute. NRS 339.035(2).

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation

A party's claim arises when he discovers or should have discovered a construction defect. General notice of a construction defect claim given to the general contractor is sufficient to toll the statute of limitations for claims against a third-party subcontractor, even when the subcontractor is not involved in the initial proceedings against the general contractor. *Desert Fireplaces Plus, Inc. v. Dist. Ct.*, 120 Nev. 632, 635-36, 97 P.3d 607, 609 (2004).

B. Statutes of Repose

Regardless of when discovery of a defect occurs, Nevada prohibits construction defect claims made more than ten years after substantial completion of the project. NRS 11.202. However, statutes of limitation and repose "are tolled from the time notice of the claim is given, until the earlier of one year after notice of the claim is given; or 30 days after mediation is concluded or waived." NRS 40.695(1). Statutes of limitation and repose may be tolled for a period longer than one year after notice of the claim is given if the claimant demonstrates good cause. NRS 40.695(2).

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

In construction defect cases, pre-suit notices and the associated opportunity to cure are governed by Nevada Revised Statutes Chapter 40. As such, before a Chapter 40 claimant commences an action or amends a complaint to add a cause of action for a constructional defect, a contractor, subcontractor, supplier or design professional is entitled to notice of the claim, and must be given an opportunity to cure the alleged defects. Nevada requires a homeowner to provide the contractor, subcontractor, supplier or design professional with notice of defect by certified mail. The notice of defect must:

> (a) include a statement that the notice is being given to satisfy the requirements of this section; (b) specify in reasonable detail the defects or any damages or injuries to each residence or appurtenance that is the subject of the claim; (c) describe in reasonable detail the cause of the defects if the cause is known and the nature and extent that is known of the damage or injury resulting from the defects; and (d) include a signed statement, by each named owner of a residence or appurtenance in the notice, that each such owner verifies that each such defect, damage and injury specified in the notice exists in the residence or appurtenance owned by him or her.

NRS 40.645(2). Moreover, a representative of a homeowner's association may send the notice signed by a member of the executive board or an officer of the homeowners' association. NRS 40.645(2)(d)-(3).

A contractor has 30 days from the date on which notice of a construction defect was received to "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." NRS 40.646. The contractor may be precluded from filing suit against the subcontractor, supplier or design professional if the contractor fails to send the notice as required. Within 30 days of their receipt of the notice, the subcontractor, supplier or design professional must inspect the alleged construction defect and notify the contractor if it intends to repair the defect and, if so, the length of time required for the repairs and at least two dates for the commencement of the repairs. *Id.*

Following the notice, but before a claimant may commence an action or amend a complaint to add a cause of action for a construction defect, the homeowner must allow an inspection, be present or cause an expert to be present at the inspection to identify the exact location of each

alleged defect, and give the contractor "a reasonable opportunity to repair the construction defect or cause the defect to be repaired if an election to repair is made pursuant to NRS 40.6472." NRS 40.647(1).

If a claimant commences an action without providing the right to repair, the court shall, "[d]ismiss the action without prejudice and compel the claimant to comply..." or, "[i]f dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance..." NRS 40.647(2).

The Supreme Court of Nevada has held that a homeowner who is not the home's original purchaser can obtain the remedies available under NRS Chapter 40. *Anse, Inc. v. Eighth Judicial Dist. Court of State ex rel. County*, 124 Nev. 862 (2008). In *Anse,* the court ruled:

> A residence is new for constructional defect purposes if it is a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of its original sale. Thus, the subsequent owner of a home that is a product of original construction, unoccupied as a dwelling from the completion of its construction until the point of its first sale, is not precluded under NRS 40.615 from seeking NRS Chapter 40 residential constructional defect remedies, so long as he or she does so within the limitation period provided by the applicable statute of repose.

Id. at 872-73.

V. COVERAGE AND ALLOCATION ISSUES

Upon receipt of a claim, an insurer must promptly provide all necessary forms, items, statements, instructions, and necessary "reasonable assistance" within 20 working days. NAC 686A.665. If the insurer is unable to do so, it must, at a minimum, acknowledge the claim within the 10-day period. *Id.* An insurer must also reply within 20 working days to any later communication that suggests a response is expected. *Id*. Notice given to an agent is notice to the insurer. NAC 686A.645.

All denials must be in writing and accompanied by a statement with reference to any specific policy provisions relied upon. NAC 686A.675. If the claim is accepted, payment must be made within 30 days or interest will begin accruing on the payment. *Id.* Upon payment, the specific coverage under which payment is made should be referenced. *Id.*

Once a claim is made, an insurer must fully disclose all pertinent coverage and policy provisions under which the claim is presented. NAC 686A.660. Ideally, these disclosures should be made in the insurer's initial response.

For first-party property insurance claims, Nevada generally uses the "manifestation" trigger rule to determine what liability policy or policies have been triggered. *Jackson v. State Farm Fire and Cas. Co*., 108 Nev. 504 (1990). Under the "manifestation" rule, the occurrence which triggers coverage is when the complaining party became aware of facts such that a claim could

be made. *Id.* "Manifestation of loss is defined as 'that point when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.'" *Id.* The manifestation rule applies in first-party progressive property loss cases. *Id*. Thus, in allocating between multiple insurers, the carrier whose policy was effective when progressive damage became manifest is liable.

VI. CONTRACTUAL INDEMNIFICATION

As with most states, the duty to indemnify in Nevada is narrower than the duty to defend. *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.,* 127 Nev. 331, 255 P.3d 268 (2011). The duty to indemnify arises only in the event of final imposition and an express indemnification clause must clearly create an obligation to indemnify another for its own negligence. *Id.* In Nevada, limitations of liability provisions are recognized by the courts and are enforceable. *Id.; see also Bernstein v. GTE Directories Corp*., 827 F.2d 480 (9th Cir. 1987).

Nevada law recognizes contractual indemnity generally, without a separate analysis for construction contracts. "Contractual indemnity is where, pursuant to a contractual provision, two parties agree that one party will reimburse the other party for liability resulting from the former's work." *Medallion Dev., Inc. v. Converse Consultants*, 113 Nev. 27 (1997) (superseded by NRS 17.245 on other grounds). Indemnity is "a complete shifting of liability to the party primarily responsible." *Id*.

Indemnity is defined, as "an undertaking whereby one agrees to indemnify another upon the occurrence of an anticipated loss. A contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." *Medallion*, 113 Nev. at 32 (citing *Black's Law Dictionary* 326 (6th ed. 1991)).

Attorneys' fees and costs are generally recoverable in an indemnification action. Again, this depends upon the language of the contract and whether it includes recovery of attorneys' fees. The Nevada Supreme Court has held, "that where an indemnitee would be entitled to recover from an indemnitor the amount of a judgment paid to the plaintiff, as determined by the facts as found by the trier of fact, the indemnitee is entitled to recover in indemnity." *Piedmont Equipment Co., Inc. v. Eberhard Mfg. Co*., 99 Nev. 523 (1983) (discussing the right to recovery of attorneys' fees and costs). As such, even where silent as to attorneys' fees, there may still be a basis for recovery.

VII. CONTINGENT PAYMENT AGREEMENTS

Public policy in Nevada favors the prompt payment of subcontractors. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc*., 124 Nev. 1102, 1116, 197 P.3d 1032, 1041 (Nev. 2008); *see also* NRS 624.624-624.626. As such, subcontractors have the right to stop work if not paid within 45 days of a request for payment, regardless of contract language. NRS 624.626(1)(b).

VI. SCOPE OF DAMAGE RECOVERY

The damages available in a constructional defect case are limited to those listed in NRS 40.655. Specifically, the statute allows for the recovery of the following costs:

> (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;
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> (b) The reduction in market value of the residence or accessory structure, if any, to the extent the reduction is because of structural failure;
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> (c) The loss of the use of all or any part of the residence;
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> (d) The reasonable value of any other property damaged by the constructional defect;
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> (e) Any additional costs reasonably incurred by the claimant, including, but not limited to, any costs and fees incurred for the retention of experts to:
>
> (1) Ascertain the nature and extent of the constructional defects;
>
> (2) Evaluate appropriate corrective measures to estimate the value of loss of use; and
>
> (3) Estimate the value of loss of use, the cost of temporary housing and the reduction of market value of the residence; and
>
> (f) Any interest provided by statute.

NRS 40.652 sets forth offers of judgment rules applicable to construction defect cases. The law provides:

> At any time after a claimant has given notice pursuant to NRS 40.645 and before the claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant or any contractor, subcontractor, supplier or design professional who has received notice pursuant to NRS 40.645 or 40.646 may serve upon one or more other parties a written offer to allow judgment to be entered without action in accordance with terms and conditions of the offer of judgment.

Id. If an offer is not accepted within 10 days of service, it is deemed rejected. *Id.* If a party who rejects an offer fails to obtain a more favorable judgment, the court:

> (a) May not award to the party any costs or attorney's fees;

(b) May not award to the party any interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment; [and]

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer.

Id. The court may also order the rejecting party pay reasonable costs and attorneys' fees incurred by the offering party. *Id*.

VII. LEGISLATION UPDATE

Nevada Assembly Bill No. 125 was enacted on February 24, 2015, and incorporated into Nevada's construction defect statute, NRS chapter 40, as NRS 40.652. According to Governor Brian Sandoval, the law "discourages frivolous litigation and strengths Nevada's rebounding housing market." One significant change was the redefinition of "constructional defect."

> Constructional defect means a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance: (1) Which presents an unreasonable risk of injury to a person or property; or (2) 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.

NRS 40.615. Notably absent from the new definition is building code violations, which once provided a relatively easy basis for making construction defect claims.

The amended statute brought about several other substantial changes, which have been accounted for in this compendium. For example, with respect to recoverable damages, homeowners are no longer entitled to attorneys' fees. *See* NRS 40.655. Instead, homeowners must rely on the new offer of judgment rule to collect fees and costs. Moreover, the statute of repose, which previously provided varying time limitations for asserting construction defect claims, now prohibits most construction defect actions from being commenced after ten years from the time of substantial completion of an improvement to real property. NRS 40.695(1).