

## Amendment No. 955

Assembly Amendment to Assembly Bill No. 367 First Reprint (BDR 3-670)

**Proposed by:** Assembly Committee on Ways and Means**Amends:** Summary: No Title: Yes Preamble: No Joint Sponsorship: No Digest: Yes

Adoption of this amendment will REMOVE all appropriations from A.B. 367 R1.

| ASSEMBLY ACTION |                          |      |                          | Initial and Date | SENATE ACTION |                          |      |                          | Initial and Date |
|-----------------|--------------------------|------|--------------------------|------------------|---------------|--------------------------|------|--------------------------|------------------|
| Adopted         | <input type="checkbox"/> | Lost | <input type="checkbox"/> | _____            | Adopted       | <input type="checkbox"/> | Lost | <input type="checkbox"/> | _____            |
| Concurred In    | <input type="checkbox"/> | Not  | <input type="checkbox"/> | _____            | Concurred In  | <input type="checkbox"/> | Not  | <input type="checkbox"/> | _____            |
| Receded         | <input type="checkbox"/> | Not  | <input type="checkbox"/> | _____            | Receded       | <input type="checkbox"/> | Not  | <input type="checkbox"/> | _____            |

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) *green bold italic underlining* is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) *green bold underlining* is newly added transitory language.

BAW



Date: 6/2/2013

A.B. No. 367—Revises provisions relating to constructional defects. (BDR 3-670)



ASSEMBLY BILL NO. 367—ASSEMBLYMEN DALY;  
BENITEZ-THOMPSON AND BOBZIEN

MARCH 18, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to constructional defects. (BDR 3-670)

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 constructional defects; prohibiting a controlling party from seeking indemnification from a subcontractor, supplier, design professional or other person providing a service to a development project, ~~+~~ ***except under certain circumstances***; providing that certain indemnification and insurance provisions in certain contracts are void and unenforceable; revising ~~provisions governing certain cross claims arising under a claim for a~~ ***the definition of a*** constructional defect; ~~making an appropriation for a study;~~ and providing other matters properly relating thereto.

**Legislative Counsel's Digest:**

Under existing law, before an owner of a residence or appurtenance or certain other persons may commence a civil action against a contractor, subcontractor, supplier or design professional for certain defects in the residence or appurtenance, the claimant must provide notice of the defect to the contractor. (NRS 40.645) Under existing law, not later than 30 days after the date on which the contractor receives the notice, the contractor must forward a copy of the notice to each subcontractor, supplier or design professional whom the contractor reasonably believes is responsible for a defect specified in the notice. (NRS 40.646) The subcontractor, supplier or design professional who receives the notice must inspect the alleged constructional defect and may elect to repair the defect. (NRS 40.646, 40.647)

With respect to claims relating to certain defects in residential construction, **section 1** of this bill: (1) prohibits a controlling party for a development project from seeking indemnification from a subcontractor, supplier, design professional or any other person providing a service to the development project, ~~+~~ ***except under certain circumstances***; and (2) provides that any provision or clause of a contract that causes or is intended to cause any person to be responsible for the actions of another person is against public policy and is void and unenforceable. ~~Section 1 further provides that certain cross claims which arise under a claim for a defect in certain residential construction must be governed only by the Nevada Rules of Civil Procedure and not by existing law governing claims for a constructional defect.~~ Under **section 4** of this bill, the provisions of **section 1** apply only if the notice of a constructional defect which existing law requires a claimant to provide to the contractor is provided to the contractor on or after October 1, 2013.

~~This bill also makes an appropriation for a study of the effect of indemnification clauses in construction contracts on the litigation of claims relating to defects in residential construction.~~ ***Section 2.5 of this bill revises the existing definition of "constructional***

defect” to provide that a constructional defect is a defect: (1) which is done in violation of law and which adversely impacts the structural integrity or safety, or materially affects the fair market value, of the residence, an appurtenance or the real property to which the residence or appurtenance is affixed; (2) which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed; (3) which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; or (4) which presents an unreasonable risk of injury to a person or property.

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

**Section 1.** Chapter 40 of NRS is hereby amended by adding thereto a new section to read as follows:

*1. ~~With~~ Except as otherwise provided in this subsection, with respect to a claim governed by this section and NRS 40.600 to 40.695, inclusive, a controlling party shall not enter into any indemnification agreement with, or seek indemnification for a constructional defect from, a subcontractor, supplier, design professional or any other person providing a service for a development project. A controlling party may enter into an indemnification agreement with a subcontractor, supplier, design professional or any other person providing a service for a development project and may enforce that indemnification agreement to the extent that the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including, without limitation, breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees or delegates.*

*2. With respect to a claim governed by this section and NRS 40.600 to 40.695, inclusive, any provision of a contract or subcontract, any indemnification clause or agreement and any provision or clause of an agreement requiring a person to add another person as an additional insured in a policy of insurance that causes or is intended to cause any person to be responsible for the actions of another person is against public policy and is void and unenforceable.*

*3. ~~Any cross claim between a controlling party and a subcontractor, supplier, design professional or any other person providing a service for a development project, or between any subcontractor, supplier, design professional or any other person providing a service for a development project and any other subcontractor, supplier, design professional or other person providing a service for a development project, which arises in the context of a claim governed by this section and NRS 40.600 to 40.695, inclusive;~~*

*~~— (a) Is governed only by the Nevada Rules of Civil Procedure; and~~*

*~~— (b) Is not governed by this section and NRS 40.600 to 40.695, inclusive.~~*

*~~4. Any provision of a contract or subcontract, any indemnification clause or agreement and any provision or clause of an agreement requiring a person to add another person as an additional insured in a policy of insurance which is void and unenforceable pursuant to this section is void and unenforceable only to the extent provided in this section, and the remainder of the provision, clause or agreement is enforceable, unless the provision, clause or agreement cannot, standing alone, be given legal effect.~~*

*~~5. 4.~~ As used in this section:*

*(a) “Controlling party” means any person that:*

(1) Is responsible for the planning, oversight, supervision, management or selection of the design professionals or the first-tier subcontractors for a development project; or

(2) Receives, or controls the allocation of, the receipts or profits for a development project.

(b) "Development project" means 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.

Sec. 2. NRS 40.600 is hereby amended to read as follows:

40.600 As used in NRS 40.600 to 40.695, inclusive, *and section 1 of this act*, unless the context otherwise requires, the words and terms defined in NRS 40.603 to 40.634, inclusive, have the meanings ascribed to them in those sections.

Sec. 2.5. NRS 40.615 is hereby amended to read as follows:

40.615 "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 is done in violation of law, including, without limitation, in violation of local codes or ordinances ~~§~~, *and which:*

*(a) Adversely impacts the structural integrity or safety of the residence, an appurtenance or the real property to which the residence or appurtenance is affixed; or*

*(b) Materially affects the fair market value of the residence, an appurtenance or the real property to which the residence or appurtenance is affixed;*

2. Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed;

3. Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; or

4. Which presents an unreasonable risk of injury to a person or property.

Sec. 3. NRS 40.635 is hereby amended to read as follows:

40.635 NRS 40.600 to 40.695, inclusive ~~§~~, *and section 1 of this act:*

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

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

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

4. Do not create a new theory upon which liability may be based, except as otherwise provided in those sections.

Sec. 4. This act applies to any claim for which a notice is filed pursuant to NRS 40.645 on or after October 1, 2013.

Sec. 5. ~~1. There is hereby appropriated from the State General Fund to the Legislative Fund the sum of \$150,000 for the purpose of contracting with a consultant to conduct a study of the effect of indemnification clauses in construction contracts on the litigation of claims relating to defects in residential construction.~~

~~2. Any remaining balance of the appropriation made by subsection 1 must not be committed for expenditure after June 30, 2015, and any portion of the appropriated money remaining must not be spent for any purpose after September~~

1 ~~18, 2015, and must be reverted to the State General Fund on or before September~~  
2 ~~18, 2015.~~ **(Deleted by amendment.)**