

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 the definition of a constructional defect; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 Under existing law, before an owner of a residence or appurtenance or certain
2 other persons may commence a civil action against a contractor, subcontractor,
3 supplier or design professional for certain defects in the residence or appurtenance,
4 the claimant must provide notice of the defect to the contractor. (NRS 40.645)
5 Under existing law, not later than 30 days after the date on which the contractor
6 receives the notice, the contractor must forward a copy of the notice to each
7 subcontractor, supplier or design professional whom the contractor reasonably
8 believes is responsible for a defect specified in the notice. (NRS 40.646) The
9 subcontractor, supplier or design professional who receives the notice must inspect
10 the alleged constructional defect and may elect to repair the defect. (NRS 40.646,
11 40.647)

12 With respect to claims relating to certain defects in residential construction,
13 **section 1** of this bill: (1) prohibits a controlling party for a development project
14 from seeking indemnification from a subcontractor, supplier, design professional or
15 any other person providing a service to the development project except under
16 certain circumstances; and (2) provides that any provision or clause of a contract
17 that causes or is intended to cause any person to be responsible for the actions of
18 another person is against public policy and is void and unenforceable. Under



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19 **section 4** of this bill, the provisions of **section 1** apply only if the notice of a
20 constructional defect which existing law requires a claimant to provide to the
21 contractor is provided to the contractor on or after October 1, 2013.

22 **Section 2.5** of this bill revises the existing definition of "constructional defect"
23 to provide that a constructional defect is a defect: (1) which is done in violation of
24 law and which adversely impacts the structural integrity or safety, or materially
25 affects the fair market value, of the residence, an appurtenance or the real property
26 to which the residence or appurtenance is affixed; (2) which proximately causes
27 physical damage to the residence, an appurtenance or the real property to which the
28 residence or appurtenance is affixed; (3) which is not completed in a good and
29 workmanlike manner in accordance with the generally accepted standard of care in
30 the industry for that type of design, construction, manufacture, repair or
31 landscaping; or (4) which presents an unreasonable risk of injury to a person or
32 property.

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. Except as otherwise provided in this subsection, with*
4 *respect to a claim governed by this section and NRS 40.600 to*
5 *40.695, inclusive, a controlling party shall not enter into any*
6 *indemnification agreement with, or seek indemnification for a*
7 *constructional defect from, a subcontractor, supplier, design*
8 *professional or any other person providing a service for a*
9 *development project. A controlling party may enter into an*
10 *indemnification agreement with a subcontractor, supplier, design*
11 *professional or any other person providing a service for a*
12 *development project and may enforce that indemnification*
13 *agreement to the extent that the underlying injury or damage is*
14 *attributable to the negligent or otherwise wrongful act or*
15 *omission, including, without limitation, breach of a specific*
16 *contractual duty, of the promisor or the promisor's independent*
17 *contractors, agents, employees or delegates.*

18 *2. With respect to a claim governed by this section and NRS*
19 *40.600 to 40.695, inclusive, any provision of a contract or*
20 *subcontract, any indemnification clause or agreement and any*
21 *provision or clause of an agreement requiring a person to add*
22 *another person as an additional insured in a policy of insurance*
23 *that causes or is intended to cause any person to be responsible for*
24 *the actions of another person is against public policy and is void*
25 *and unenforceable.*

26 *3. Any provision of a contract or subcontract, any*
27 *indemnification clause or agreement and any provision or clause*
28 *of an agreement requiring a person to add another person as an*
29 *additional insured in a policy of insurance which is void and*



1 *unenforceable pursuant to this section is void and unenforceable*
2 *only to the extent provided in this section, and the remainder of*
3 *the provision, clause or agreement is enforceable, unless the*
4 *provision, clause or agreement cannot, standing alone, be given*
5 *legal effect.*

6 4. *As used in this section:*

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

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

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

13 (b) *“Development project” means the design, construction,*
14 *manufacture, repair or landscaping of a new residence, of an*
15 *alteration of or addition to an existing residence, or of an*
16 *appurtenance.*

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

18 40.600 As used in NRS 40.600 to 40.695, inclusive, *and*
19 *section 1 of this act*, unless the context otherwise requires, the
20 words and terms defined in NRS 40.603 to 40.634, inclusive, have
21 the meanings ascribed to them in those sections.

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

23 40.615 “Constructional defect” means a defect in the design,
24 construction, manufacture, repair or landscaping of a new residence,
25 of an alteration of or addition to an existing residence, or of an
26 appurtenance and includes, without limitation, the design,
27 construction, manufacture, repair or landscaping of a new residence,
28 of an alteration of or addition to an existing residence, or of an
29 appurtenance:

30 1. Which is done in violation of law, including, without
31 limitation, in violation of local codes or ordinances ~~†~~, *and which:*

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

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

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

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



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

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

4 40.635 NRS 40.600 to 40.695, inclusive ~~H~~, *and section 1 of*
5 *this act:*

6 1. Apply to any claim that arises before, on or after July 1,
7 1995, as the result of a constructional defect, except a claim for
8 personal injury or wrongful death, if the claim is the subject of an
9 action commenced on or after July 1, 1995.

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

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

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

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

18 **Sec. 5.** (Deleted by amendment.)

