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ASSEMBLY BILL NO. 1—ASSEMBLYMEN  
KIRKPATRICK AND HANSEN

PREFILED DECEMBER 18, 2014

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JOINT SPONSOR: SENATOR KIECKHEFER

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Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to constructional defects.  
(BDR 3-584)

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.

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AN ACT relating to constructional defects; enacting provisions governing the indemnification of a controlling party by a subcontractor for certain claims for constructional defects; enacting provisions governing wrap-up insurance policies or consolidated insurance programs covering certain claims for constructional defects; 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 **Section 1** of this bill establishes the circumstances under which a provision in a  
13 residential construction contract requiring a subcontractor to indemnify, defend or  
14 otherwise hold harmless a controlling party for the negligence or intentional acts or  
15 omissions of the controlling party is void and unenforceable. Under **section 1**, if  
16 such a provision is not void and unenforceable, the subcontractor’s duty to defend  
17 the controlling party must arise upon the presentment to the subcontractor of a



18 notice containing a claim, action or cause of action from which it can be reasonably  
19 inferred that an alleged constructional defect was caused by or attributable to the  
20 subcontractor's work, negligence, or wrongful act or omission.

21 **Section 1** also enacts provisions governing: (1) the manner in which a  
22 controlling party may pursue indemnification from a subcontractor when the  
23 controlling party is named as an additional insured in the commercial general  
24 liability insurance policy of the subcontractor; and (2) wrap-up insurance policies  
25 or consolidated insurance programs that cover two or more contractors or  
26 subcontractors who perform work on residential construction for risks associated  
27 with the construction.

28 Under **sections 1 and 4** of this bill, the provisions of this bill apply only to  
29 residential construction for which a contract is entered into on or after October 1,  
30 2015.

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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. In any action or other proceeding involving a*  
4 *constructional defect asserted by a claimant and governed by this*  
5 *section and NRS 40.600 to 40.695, inclusive:*

6 *(a) Except as otherwise provided in paragraph (b), any*  
7 *provision in a contract entered into on or after October 1, 2015,*  
8 *for residential construction that requires a subcontractor to*  
9 *indemnify, defend or otherwise hold harmless a controlling party*  
10 *from any liability, claim, action or cause of action resulting from a*  
11 *constructional defect caused by the negligence, whether active or*  
12 *passive, or intentional act or omission of the controlling party is*  
13 *against public policy and is void and unenforceable.*

14 *(b) Except as otherwise provided in paragraph (c), a provision*  
15 *in a contract entered into on or after October 1, 2015, for*  
16 *residential construction is not against public policy and is not void*  
17 *and unenforceable under paragraph (a) to the extent that the*  
18 *provision requires a subcontractor to indemnify, defend or*  
19 *otherwise hold harmless a controlling party from any liability,*  
20 *claim, action or cause of action resulting from a constructional*  
21 *defect arising out of, related to or connected with the*  
22 *subcontractor's scope of work, negligence, or intentional act or*  
23 *omission.*

24 *(c) A provision in a contract entered into on or after October 1,*  
25 *2015, for residential construction is against public policy and is*  
26 *void and unenforceable under paragraph (a) to the extent that it*  
27 *requires a subcontractor to defend, indemnify or otherwise hold*  
28 *harmless a controlling party from any liability, claim, action or*  
29 *cause of action resulting from a constructional defect arising out*  
30 *of, related to or connected with that portion of the subcontractor's*



1 *work which has been altered or modified by another trade or the*  
2 *controlling party.*

3 *(d) Except as otherwise provided in paragraph (e), if a*  
4 *provision of a contract entered into on or after October 1, 2015,*  
5 *for residential construction that requires a subcontractor to*  
6 *indemnify, defend or otherwise hold harmless a controlling party*  
7 *is not against public policy and is not void and unenforceable*  
8 *under this subsection, the duty of the subcontractor to defend the*  
9 *controlling party arises upon presentment of a notice pursuant to*  
10 *subsection 1 of NRS 40.646 containing a particular claim, action*  
11 *or cause of action from which it can be reasonably inferred that*  
12 *an alleged constructional defect was caused by or attributable to*  
13 *the subcontractor's work, negligence, or wrongful act or omission.*

14 *(e) If a controlling party gives a notice to a subcontractor*  
15 *pursuant to NRS 40.646 that contains a claim, action or cause of*  
16 *action from which it can be reasonably inferred that an alleged*  
17 *constructional defect was caused by or attributable to the*  
18 *subcontractor's work, negligence, or wrongful act or omission, the*  
19 *claim, action or cause of action is covered by the subcontractor's*  
20 *commercial general liability policy of insurance issued by an*  
21 *insurer, and the controlling party is named as an additional*  
22 *insured under that policy of insurance:*

23 *(1) The controlling party, as an additional insured, must*  
24 *pursue available means of recovery of its defense fees and costs*  
25 *under the policy before the controlling party is entitled to pursue a*  
26 *claim against the subcontractor.*

27 *(2) Upon the final settlement of or issuance of a final*  
28 *judgment in an action involving a claim for a constructional*  
29 *defect, if the insurer has not assumed the controlling party's*  
30 *defense and reimbursed the controlling party for the defense*  
31 *obligation of the subcontractor, or if the defense obligation is not*  
32 *otherwise resolved by the settlement or final judgment, the*  
33 *controlling party has the right to pursue a claim against the*  
34 *subcontractor for reimbursement of that portion of the attorney's*  
35 *fees and costs incurred by the controlling party which are*  
36 *attributable to the claims, actions or causes of action arising out*  
37 *of, related to or connected with the subcontractor's scope of work,*  
38 *negligence, or intentional act or omission.*

39 *(3) The provisions of subparagraphs (1) and (2) do not*  
40 *prohibit a controlling party from:*

41 *(I) Following the requirements of this section and NRS*  
42 *40.600 to 40.695, inclusive, relating to providing notice of an*  
43 *alleged constructional defect or any other procedures set forth in*  
44 *those provisions; or*



1           (ii) Filing a third party complaint against the  
2 subcontractor if a claimant commences an action or amends a  
3 complaint to add a cause of action for a constructional defect  
4 against a controlling party which arises out of, relates to or is  
5 otherwise connected with the subcontractor's scope of work,  
6 negligence, or wrongful act or omission.

7           2. For any wrap-up insurance policy or other consolidated  
8 insurance program that covers a subcontractor who performs  
9 work on residential construction for which a contract is entered  
10 into on or after October 1, 2015, for claims, actions or causes of  
11 action for a constructional defect governed by this section and  
12 NRS 40.600 to 40.695, inclusive:

13           (a) The controlling party obtaining the wrap-up insurance  
14 policy or other consolidated insurance program shall disclose the  
15 total amount or method of calculation of any credit or  
16 compensation for the premium required from a subcontractor or  
17 other participant for that wrap-up insurance policy in the contract  
18 documents.

19           (b) Except as otherwise provided in paragraph (c), the contract  
20 documents must disclose, if and to the extent known:

21               (1) The policy limits;

22               (2) The scope of policy coverage;

23               (3) The policy term;

24               (4) The basis upon which the deductible or occurrence is  
25 triggered by the insurer;

26               (5) If the policy covers more than one work of  
27 improvement, the number of units, if any, indicated on the  
28 application for the insurance policy; and

29               (6) A good faith estimate of the amount of available limits  
30 remaining under the policy as of a date indicated in the disclosure  
31 obtained from the insurer.

32           (c) The disclosure requirements of subparagraphs (1) to (4),  
33 inclusive, of paragraph (b) may be satisfied by providing the  
34 participant with a copy of the binder or declaration.

35           (d) The disclosures made pursuant to subparagraphs (5) and  
36 (6) of paragraph (b):

37               (1) May be based upon information available at the time  
38 the disclosure is made and are not inaccurate or made in bad faith  
39 solely because the disclosures do not accurately reflect the actual  
40 number of units covered by the policy or the amount of insurance  
41 available, if any, when a later claim is made.

42               (2) Are presumptively made in good faith if:

43               (I) The disclosure pursuant to subparagraph (5) of  
44 paragraph (b) is the same as that contained in the application to  
45 the wrap-up insurance policy insurer; and



1           (ii) *The disclosure pursuant to subparagraph (6) of*  
2 *paragraph (b) was obtained from the wrap-up insurance policy*  
3 *insurer or broker.*

4           ↳ *The presumptions stated in subparagraph (2) may be overcome*  
5 *only by a showing that the insurer, broker or controlling party*  
6 *intentionally misrepresented the facts identified in subparagraph*  
7 *(5) or (6) of paragraph (b).*

8           (e) *Upon the written request of any participant in the wrap-up*  
9 *insurance policy or consolidated insurance program, a copy of the*  
10 *insurance policy must be provided, if available, that shows the*  
11 *coverage terms and items in subparagraphs (1) to (5), inclusive, of*  
12 *paragraph (b). If the policy is not available at the time of the*  
13 *request, a copy of the insurance binder or declaration of coverage*  
14 *may be provided in lieu of the actual policy.*

15           (f) *Any party receiving a copy of the policy, binder or*  
16 *declaration shall not disclose it to third parties other than the*  
17 *participant's insurance broker or attorney unless required to do so*  
18 *by law. The participant's insurance broker or attorney may not*  
19 *disclose the policy, binder or declaration to any third party unless*  
20 *required to do so by law.*

21           (g) *If the controlling party obtaining the wrap-up insurance*  
22 *policy or other consolidated insurance program does not disclose*  
23 *the total amount or method of calculation of the premium credit or*  
24 *compensation to be charged to the participant before the time the*  
25 *participant submits its bid, the participant is not legally bound by*  
26 *the bid unless that participant has the right to increase the bid up*  
27 *to the amount equal to the difference between the amount the*  
28 *participant included, if any, for insurance in the original bid and*  
29 *the amount of the actual bid credit required by the controlling*  
30 *party obtaining the wrap-up insurance policy or other*  
31 *consolidated insurance program. This paragraph does not apply if*  
32 *the controlling party obtaining the wrap-up insurance policy or*  
33 *other consolidated insurance program did not require the*  
34 *subcontractor to offset the original bid amount with a deduction*  
35 *for the wrap-up insurance policy or program.*

36           (h) *The subcontractor's monetary obligation for enrollment in*  
37 *the wrap-up insurance policy or consolidated insurance program*  
38 *shall cease upon the subcontractor's satisfaction of its agreed*  
39 *contribution percentage which may have been paid either as a*  
40 *lump sum or on a pro rata basis throughout the subcontractor's*  
41 *performance of the work.*

42           (i) *In the event of an occurrence, the dollar amount required*  
43 *to be paid by a subcontractor as a self-insured retention or*  
44 *deductible must not be greater than the amount that the*  
45 *subcontractor would have otherwise been required to pay as a*



1 *self-insured retention or deductible under a commercial general*  
2 *liability policy of comparable insurance in force during the*  
3 *relevant period for that particular subcontractor and within the*  
4 *specific market at the time the subcontract is entered into.*

5 3. As used in this section:

6 (a) "Controlling party" means a person who owns real  
7 property involved in residential construction, a contractor or any  
8 other person who is to be indemnified by a provision in a contract  
9 entered into on or after October 1, 2015, for residential  
10 construction.

11 (b) "Residential construction" means the construction of a  
12 new residence, of an alteration of or addition to an existing  
13 residence, or of an appurtenance.

14 (c) "Wrap-up insurance policy" is an insurance policy, or  
15 series of policies, written to cover risks associated with the  
16 construction, repair or landscaping of a new residence, of an  
17 alteration of or addition to an existing residence, or of an  
18 appurtenance, and covering two or more of the contractors or  
19 subcontractors that work on that construction, repair or  
20 landscaping.

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

22 40.600 As used in NRS 40.600 to 40.695, inclusive, *and*  
23 *section 1 of this act*, unless the context otherwise requires, the  
24 words and terms defined in NRS 40.603 to 40.634, inclusive, have  
25 the meanings ascribed to them in those sections.

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

27 40.635 NRS 40.600 to 40.695, inclusive ~~H~~, *and section 1 of*  
28 *this act*:

29 1. Apply to any claim that arises before, on or after July 1,  
30 1995, as the result of a constructional defect, except a claim for  
31 personal injury or wrongful death, if the claim is the subject of an  
32 action commenced on or after July 1, 1995.

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

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

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

39 **Sec. 4.** This act applies only to residential construction, as  
40 defined in section 1 of this act, for which a contract is entered into  
41 on or after October 1, 2015.

