

Arizona to Study Indemnity Provisions in Construction Contracts

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On May 16, 2018, Governor Doug Ducey signed [Senate Bill 1271](#), which created a “construction liability apportionment study committee” (the “Committee”) to “research and make recommendations for the apportionment of liability in the construction industry.”

Except for the construction of public buildings or improvements, there currently is no legal restriction on the way parties to construction contracts in Arizona can structure the apportionment of liability via indemnity provisions. As it was [originally introduced](#), Senate Bill 1271 would have changed that, with language prohibiting indemnity provisions in construction, architecture, and engineering contracts that require one contractor to pay for another contractor’s negligence. The Bill would have created a system of comparative fault, similar to Arizona’s version of the Uniform Contribution Among Tortfeasors Act ([A.R.S. §§ 12-2501](#), et seq.), in which each party involved in the construction of a project bears responsibility only for its portion of fault.

The Bill was, however, substantially amended before it was passed to remove the proposed restrictions on indemnity provisions, and instead created the Committee that will study the issue before making a recommendation to the Governor and legislative leadership by the end of the year. The Committee will be comprised of three members of the Senate and three members of the House, and will be responsible for researching and making recommendations regarding the apportionment of liability in the construction industry, to include:

- 1) The use of indemnity provisions in construction contracts;
- 2) The allocation of liability based on degrees of fault;
- 3) The assignment of financial responsibility to negligent parties;
- 4) The opportunity to address and remedy alleged construction defects before litigation;
- 5) The frequency of construction defect litigation; and
- 6) The affordability of insurance costs associated with construction claims.

The Bill allows the study Committee to hold hearings, conduct fact finding tours and to receive testimony from witnesses to assist the



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Committee fulfilling its responsibilities. The Committee must meet in public and will be supported by legislative staff. The Bill also requires the Committee to submit its final report to the Governor, the President of the Senate, the Speaker of the House, and the Secretary of State by December 15, 2018.

Regardless of the outcome of the Committee's investigation, its recommendation to the Governor and Legislature could have a significant impact on construction contractors, architects, engineers, owners, and developers. If the Committee recommends legislation similar to what was initially introduced as SB1271, contractors and designers higher in the contractual chain will potentially bear more financial responsibility for their role in construction defects, and will no longer be able to look to minimally involved sub-contractors for indemnification. If, on the other hand, the Committee recommends no change to the current scheme, sub-contractors will continue to be enticed to agree to risky indemnification provisions in pursuit of large value contracts where the general contractor has shifted the risk of defect. More likely, the Committee will take a more balanced approach, recommending a compromise that takes into account certain liability apportionment principles, but does not completely prohibit contractors from shifting risk in exchange for lucrative sub-contracts.

However the Committee's recommendation ends up, its work will frame the allocation of risk in Arizona's construction and real estate industry over the coming years. To the extent your business has an interest in how risk can be allocated in construction contracts, now is the time to act. Contact your industry and trade organizations to make sure they are aware of the issue and take the forthcoming opportunities to be involved in the Committee's investigative process and recommendation.

We will continue to monitor the Committee's work and will issue a supplement to this article when the Committee members are named. If you have any questions in the meantime about the Committee, the Bill, or how to get involved in the process, please contact Greg Harris (gharris@lrrc.com or 602-262-0218) or Jared Sutton (jsutton@lrrc.com or 602-262-0259).

For more information about SB1271, please visit: (<https://apps.azleg.gov/BillStatus/BillOverview/70382>). Lewis Roca Rothgerber Christie maintains active construction, real estate, litigation and government relations practices. For more information, please visit <http://www.lrrc.com>.

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