

# SENATE BILL REPORT

## SHB 1559

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As Reported by Senate Committee On:  
Labor, Commerce & Consumer Protection, February 23, 2012

**Title:** An act relating to indemnification agreements involving design professionals.

**Brief Description:** Limiting indemnification agreements involving design professionals.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Haigh, Dammeier and Goodman).

**Brief History:** Passed House: 2/14/12, 98-0.

**Committee Activity:** Labor, Commerce & Consumer Protection: 2/20/12, 2/23/12 [DPA].

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### SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

**Majority Report:** Do pass as amended.

Signed by Senators Kohl-Welles, Chair; Conway, Vice Chair; Holmquist Newbry, Ranking Minority Member; King, Assistant Ranking Minority Member; Hewitt, Keiser and Kline.

**Staff:** Mac Nicholson (786-7445)

**Background:** Indemnity provisions in contracts require one party (the indemnitor) to reimburse or compensate the other party (the indemnitee) for expenditures paid to a third party for injuries resulting from a violation of a common-law duty. Indemnity provisions also may impose a duty on the indemnitor to defend the indemnitee in any action brought against the indemnitee.

Currently, state law limits the enforcement of indemnification clauses in contracts relating to construction, maintenance, or other work on any structure, project, development, or improvement attached to real estate. In these contracts, a clause that indemnifies against liability for damages arising out of bodily injury or damage to property caused by or resulting from the sole negligence of the indemnitee is void. A clause that indemnifies against liability for damages caused by or resulting from the concurrent negligence of the indemnitee and indemnitor is enforceable only to the extent of the indemnitor's negligence and only if specifically and expressly provided for in the agreement.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Summary of Bill (Recommended Amendments):** The duty and cost to defend is considered part of an indemnity agreement subject to enforceability restrictions in construction-related and design professional contracts.

The enforceability of indemnification agreements for architectural, landscape architectural, engineering, or land surveying services is limited.

A contract for architect, landscape architect, engineer, or land surveyor services purporting to indemnify against damages caused by the sole negligence of the indemnitee is unenforceable. A contract for architect, landscape architect, engineer, or land surveyor services purporting to indemnify against damages caused by the concurrent negligence of the indemnitee and the indemnitor is enforceable only to the extent of the indemnitor's negligence.

**EFFECT OF CHANGES MADE BY LABOR, COMMERCE & CONSUMER PROTECTION COMMITTEE (Recommended Amendments):** Instead of creating new indemnity enforceability language for design professionals, the striking amendment incorporates contracts for design professional services into the existing statute restricting the enforceability of indemnity clauses in construction related contracts. Consequently, the restrictions on the enforceability of indemnity clauses for design professional services would be the same as those restrictions that apply in construction related contracts and would apply to all contracts for design professional services.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony as Heard in Committee:** PRO: This bill holds people responsible only for their part of the problem. Design professionals won't be held responsible beyond their share of the problem. Overly broad indemnity clauses for actions that are beyond the control of the design professional are uninsurable and expose the design professional to personal liability for the negligence or fault of others. This bill will hold design professionals accountable for their own actions and is not responsible for the actions of others. The bill restores a fair balance of project risk. Design professionals are forced to accept contracts with overly broad indemnity clauses which can threaten the survival of the design professional firm. The risk should be allocated to those who can most effectively assume that risk. Public owners should not be able to divert all of their risk.

CON: This bill shifts liability from private sector design professionals to public agencies. The bill limits public agencies from negotiating contracts with design professionals on issues including indemnification and duty to defend. Public agencies shouldn't have to pay design professionals to defend their work. Indemnity clauses have been around and used for decades and aren't new. They are useful because it allows the agency to figure out where the risks are before the project starts. The bill impairs the freedom of contract. The public agency should have the ability to order their affairs in contracts. This bill will lead to

litigation where the city or county will have to figure out whether the agency is negligent or the design professional. It is better when everybody is sitting together rather than fighting among themselves. This is a broad fix to a small problem.

OTHER: This bill goes back to tort reform in the 1980s. Prior to tort reform subcontractors generally are the indemnitor and are asked to indemnify those above them on the chain. The only thing subcontractors could avoid liability is if the indemnitee is solely negligent or if there is proportional negligence. There is new language that is acceptable.

**Persons Testifying:** PRO: Representative Haigh, prime sponsor; Cliff Webster, Architects and Engineers Legislative Council; David Peters, HDR Engineering; Van Collins, Associated General Contractors; Steve Reinmuth, WA State Department of Transportation; Stan Bowman, American Institute of Architects.

CON: Michael Shaw, Pierce County; Brian Enslow, WA State Assoc of Counties; Candice Bock, Assoc. of WA Cities.

OTHER: Larry Stevens, Mechanical Contractors and Electrical Contractors.