

DESIGN AND CONSTRUCTION AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael K. McKell

Senate Sponsor: _____

LONG TITLE

General Description:

This bill enacts provisions related to allocation of damages in design and construction cases.

Highlighted Provisions:

This bill:

- ▶ defines terms;
 - ▶ addresses allocation of liability in a binding dispute resolution process or procedure;
- and
- ▶ provides for the scope of the provision.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

78B-4-513.5, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-4-513.5** is enacted to read:

78B-4-513.5. Definitions -- Binding dispute resolution -- Allocation of damages --



28 **Applicability.**

29 (1) As used in this section:

30 (a) "Action" means a binding dispute resolution process or procedure wherein a person
31 seeks damages arising out of or related to:

32 (i) the surface or subsurface site investigation, design, engineering, architecture, plans,
33 drawings, specifications, cost or quantity estimating, surveying, staking, labor, materials,
34 construction, installation, maintenance, repair, commissioning, or testing of or for an
35 improvement to real property; or

36 (ii) equipment or other products incorporated into an improvement to real property.

37 (b) "Damages" means costs, expenses, or other financial or economic losses, including:

38 (i) lost profit;

39 (ii) lost opportunity costs;

40 (iii) delay;

41 (iv) acceleration or disruption costs;

42 (v) liquidated damages;

43 (vi) loss of bonding capacity;

44 (vii) diminution in value;

45 (viii) remediation or repair costs; or

46 (ix) other additional or unexpected design, construction, maintenance, repair, testing,
47 commissioning, or operation costs.

48 (c) "Liable" means legal responsibility based in:

49 (i) breach of express or implied contract;

50 (ii) breach of express or implied warranty;

51 (iii) product liability; or

52 (iv) indemnity, subrogation, or other actionable legal or equitable theory.

53 (d) "Participant" means a person who:

54 (i) owns all or a portion of an improvement to real property;

55 (ii) performs or provides, in whole or in part, the surface or subsurface site
56 investigation, design, engineering, architecture, plans, drawings, specifications, cost or quantity
57 estimating, surveying, staking, labor, materials, construction, installation, maintenance, repair,
58 commissioning, or testing of or for an improvement to real property; or

59 (iii) designs, manufactures, or sells equipment or a product incorporated into an
60 improvement to real property.

61 (2) This Subsection (2) applies to an action except as provided in Subsection (3) or (4).

62 (a) A participant or other party to an action may not be held liable for damages in an
63 amount in excess of the percentage or proportion of damages caused by:

64 (i) the participant or party; or

65 (ii) another person for whose conduct or actions the participant or party is contractually
66 or legally responsible, including an employee, subcontractor, consultant, or supplier of the
67 participant or party, regardless of tier.

68 (b) (i) If requested by a party to an action, the fact finder in an action shall:

69 (A) determine the total amount of damages sustained by each party seeking damages in
70 the action; and

71 (B) allocate the percentage or proportion of damages awarded to each person, whether
72 or not party to the action, if and to the extent the person caused or contributed to the damages.

73 (ii) The aggregate percentage or proportion of damages allocated may not exceed 100%
74 of the total amount of damages awarded.

75 (c) (i) Damages may be allocated to a person who is not a party to an action only if the
76 party seeking an allocation under Subsection (2)(b) timely files a notice of intent to allocate
77 damages to that person, that to the extent known or reasonably available to the party seeking
78 allocation:

79 (A) identifies the person by name, address, telephone number, and employer; and

80 (B) describes the factual and legal basis on which damages may be allocated to that
81 potentially liable person.

82 (ii) The party seeking an allocation under this Subsection (2)(c) shall file the notice
83 required by Subsection (2)(c)(i) in accordance with the Utah Rules of Civil Procedure or as
84 otherwise ordered by the tribunal before which the action is pending, but in no event less than
85 90 days before trial or evidentiary hearing.

86 (3) This section does not create a cause of action.

87 (4) This section does not apply to an action:

88 (a) for death or bodily injury;

89 (b) for physical damage to property other than the improvement to real property; or

90 (c) involving an improvement to real property as to which one or more participants
91 have contracted with each other before May 8, 2018.

92 (5) If the effective date of a contract between participants regarding an improvement to
93 real property is on or after May 8, 2018, if, and to the extent the contract purports to waive,
94 abrogate, or conflict with the requirements of this section, the contract is void as against public
95 policy.

Legislative Review Note
Office of Legislative Research and General Counsel