

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 256
Judiciary

(Delegate Cardin, *et al.*)

Courts – Prohibited Indemnity and Defense Liability Agreements

This bill expands the prohibitions in § 5-401(a) of the Courts and Judicial Proceedings Article by prohibiting a contract or agreement with a “design professional” for “professional services” from including (1) specified indemnification or hold harmless clauses and (2) specified provisions requiring a design professional to defend parties against liability or certain claims. The bill also incorporates contracts or agreements relating to highways and roads into existing statutory prohibitions.

Fiscal Summary

State Effect: While the bill may have an operational effect on State agencies and *may* increase State expenditures, the bill is not anticipated to have a material effect on overall State finances, as discussed below.

Local Effect: The bill may have an operational effect on local governments and increase local expenditures, as discussed below.

Small Business Effect: Meaningful.

Analysis

Bill Summary: A “design professional” is a licensed architect, certified interior designer, licensed landscape architect, professional engineer, or professional land surveyor. “Professional services” means services or work that is the practice of a profession or requires licensure under specified statutory provisions applicable to these design professionals. “Derivative parties” means a party’s subcontractors, agents, employees, or

other persons for which the party may be liable or responsible as a result of any statutory, tort, or contractual duty.

The bill prohibits the inclusion of indemnification or hold harmless provisions in, or in connection with, contracts or agreements with a design professional for professional services. The prohibition exists unless the fault (as that term is defined in the bill) of the design professional or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

The bill also prohibits a contract or agreement with a design professional (or in connection with such a contract or agreement) from including any provision requiring the design professional to defend a promisee or any other person against liability or claims for damages or expenses, including attorney's fees, alleged to be caused by the professional negligence of the design professional or its derivative parties. This type of provision is void and unenforceable and against public policy.

Current Law: At common law, a contract can be unenforceable if it has an illegal purpose, is contrary to public policy, or is unconscionable, among other reasons. In general, under § 5-401(a) of the Courts and Judicial Proceedings Article, construction or property maintenance contracts or agreements indemnifying the promisee against liability for damages arising out of bodily injury or property damage resulting from the sole negligence of the promisee or indemnitee, or their agents or employees, are against public policy and are void and unenforceable. This prohibition also applies to architectural, engineering, inspecting, and surveying services.

Also, with respect to these same types of contracts or agreements, an agreement to defend or pay the costs of defending promisees or indemnitees against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or the indemnitee, or their agents or employees, is void and unenforceable as a matter of public policy under State law.

However, these prohibitions do not apply to an insurance contract, a general indemnity agreement required for a surety bond, worker's compensation, or any other agreement issued by an insurer.

State Fiscal Effect: The bill has an operational effect and *may* result in increased litigation expenditures for affected State agencies. Due to the irregular occurrence of these claims and the broad range and complexity of potential claims, potential expenditures under the bill cannot be reliably determined at this time but are not expected to have a material effect on State finances overall.

According to the Maryland Transportation Authority (MDTA), the indemnification and duty to defend provisions under § 5-401(a)(4) and (a)(5) of the bill are standard provisions contained in its design professional and construction contracts. MDTA advises that the proposed legislation may have an impact on MDTA, but the amount is not determinable. While claims involving construction contracts do occur periodically, MDTA cannot recall a claim involving a design professional in at least 11 years.

According to MDTA, the bill (1) requires MDTA to change its existing contract language; (2) imposes a higher standard (proximate cause) before seeking indemnity from specified types of vendors/contractors; and (3) requires MDTA to defend claims initially and then seek reimbursement for costs of defense if the contractor is determined to be the proximate cause. Current MDTA contractual language requires a contractor to indemnify MDTA/State for actions “arising out of or resulting from [their] errors, omissions, negligent acts....” Also, MDTA has previously advised that under the current “duty to defend,” the Office of the Attorney General counsel within MDTA acts in a consulting capacity; the bill requires MDTA to take a more active role in its legal defense, as discussed above.

Provisions in the State Highway Administration (SHA) requests for proposals appear to contain provisions that would be affected by the bill. SHA advises that the bill has an effect to the extent it requires SHA to change that language.

According to the Department of General Services (DGS), which is the control agency for architectural and engineering procurements, indemnity is a legal and equitable remedy that, when negotiated, will alleviate the State from having to pay out claims and damages that were not the State’s fault but the fault of the consultant, contractor, or other party. However, DGS also acknowledges that with the exception of instances involving patents, copyrights, and records, its architectural and engineering contracts do *not* contain the clauses rendered void and enforceable under the bill.

The Treasurer’s Office (STO) advises that it does not anticipate a fiscal impact from the bill. According to STO, economic damages would be generally included as part of any bodily injury or property damage claim and paid if the State were negligent. STO is unaware of any claims whereby the State was negligent but was able to pass the economic losses off to a State contractor. STO also notes that contributory negligence remains a mitigating factor in negligence cases.

Local Fiscal Effect: To the extent that local government contracts contain provisions affected by the bill, the bill may have an operational effect on local governments and may increase local expenditures.

Small Business Effect: The bill has a meaningful impact on small businesses that have entered into these types of agreements and that, as a result of the bill, (1) no longer have to

indemnify, legally defend, or pay losses, damages, or expenses for a promisee/indemnitee or (2) are no longer indemnified or no longer have their losses, damages, or expenses provided/funded by a promisor/indemnitor.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See SB 161 and HB 79 of 2022; SB 189 and HB 213 of 2021; and SB 368 and HB 681 of 2020.

Designated Cross File: SB 56 (Senator West) - Judicial Proceedings.

Information Source(s): Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Department of General Services; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - January 31, 2023
js/jkb

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510