

Department of Legislative Services  
Maryland General Assembly  
2020 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 368 (Senator West)  
Judicial Proceedings

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Courts - Prohibited Indemnity and Defense Liability Agreements

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This bill expands the prohibitions in § 5-401 of the Courts and Judicial Proceedings Article against certain agreements in construction or construction-related contracts by prohibiting the inclusion of (1) specified indemnification or hold harmless clauses and (2) specified provisions requiring a “design professional” to defend parties against liability or certain claims. The prohibitions in § 5-401, as amended by the bill, may not be interpreted to prohibit an otherwise enforceable indemnity or hold harmless provision from including recovery of reasonable attorney’s fees and defense costs under specified circumstances. The bill also incorporates contracts or agreements relating to highways and roads into existing statutory prohibitions.

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Fiscal Summary

**State Effect:** The bill is not anticipated to materially affect State finances or operations, as discussed below.

**Local Effect:** The bill is not anticipated to materially affect local finances or operations.

**Small Business Effect:** Potential meaningful.

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Analysis

**Bill Summary:** A “design professional” is a licensed architect, certified interior designer, licensed landscape architect, professional engineer, or a professional land surveyor. “Professional services” means services or work that constitute the practice of a profession regulated by, or for which licensure is required under specified statutes governing these professions. “Derivative parties” means a party’s subcontractor, 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 the proximate cause of the loss, damage, or expense indemnified.

The bill also prohibits any clause requiring the design professional to defend a promisee, the promisee's independent contractors, agents, employees, or indemnities, or any other person against liability for 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 clause is void and unenforceable and against public policy.

In addition, the bill specifies that the prohibitions under § 5-401, as amended by the bill, may not be interpreted to prohibit an otherwise enforceable indemnity or hold harmless provision in any contract or agreement. These provisions may include recovery of reasonable attorney's fees and defense costs (as that term is defined in the bill) actually incurred by the promisee to defend against third party claims for damages, losses, or expenses in cases where the promisor's or its derivative parties' fault is determined to be the proximate cause of the defense costs to be indemnified.

**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, contracts or agreements relating to architectural, engineering, inspecting, or surveying services or the construction, alteration, repair, or maintenance of property that indemnify the promisee against property damage or bodily injury caused by or resulting from the sole negligence of the promisee or indemnitee (or their agents or employees) are against public policy and are void and unenforceable. The prohibition also applies to promises, agreements, or understandings connected to these contracts or agreements. Moving, demolition, and excavation services are among the service contracts to which the prohibition applies.

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:** 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. Assuming that other State agency contracts do not contain these clauses and the bill's addition of highways and roads to existing statutory prohibitions do not affect existing State contracts, the bill is not expected to materially affect State finances or operations.

The Treasurer's Office advises that the bill is unlikely to have a fiscal impact on claims paid out of the State Insurance Trust Fund.

**Small Business Effect:** The bill may have 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.

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### **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** HB 681 (Delegate Parrott) - Judiciary.

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

**Fiscal Note History:** First Reader - February 10, 2020  
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