

CHRIS WEST
Legislative District 42
Baltimore County

Judicial Proceedings Committee

Vice Chair, Baltimore County
Senate Delegation



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Annapolis Office
James Senate Office Building
11 Bladen Street, Room 303
Annapolis, Maryland 21401
410-841-3648 · 301-858-3648
800-492-7122 Ext. 3648
Chris.West@senate.state.md.us

District Office
1134 York Road, Suite 200
Lutherville -Timonium, MD 21093
410-823-7087

January 26, 2022
Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401

Re: SB 161 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and Members of the Committee,

In connection with a construction project, there are generally numerous contracting parties. There is an owner, prime contractor, architect, engineer, subcontractors and other professionals. When an accident occurs resulting in significant losses, the responsible party and or its insurance carrier is normally expected to pay for the damages. So if a subcontractor causes an accident resulting in personal injuries the damages are shouldered by the subcontractor or the insurance company.

But there are situations in which the owner of a project or the prime contractor is so dominant that it can force the other professionals associated with the project to execute contracts containing an onerous provision requiring the much smaller design professional firm to indemnify the owner or the prime contractor, as the case may be, for all of the damages and expenses associated with a loss on the project irrespective of the fact that the design professional firm was not the proximate cause of the loss. So in the case of the accident caused by the subcontractor, the indemnification provision would force the design professional to pay the damages even though it had nothing to do with the accident.

Of course, the design professional firm has its own insurance, but insurance companies issuing insurance to design professionals refuse to reimburse the design professionals for any indemnification payments in such situations because the losses were not proximately caused by the design professionals. So the design professionals in these situations end up shouldering the burden of paying all of the losses from an accident, including all of the attorney's fees associated with the case, even though the design professionals were not the cause of the loss.

Fortunately, contracts containing such clauses are not customary. But some Maryland State procurement contracts and some other construction contracts used by very large construction

companies contain such indemnification provisions. These are de-facto contracts of adhesion because the design professional firm knows that if it wants the work, it will have to sign an unfair contract.

Current Maryland law provides that in an architectural or engineering contract purporting to indemnify the other party to the contract for damages arising due to the "sole negligence" of the other party is against public policy and is void and unenforceable. Senate Bill 161 adds language to the existing statute stating that a provision in an architectural or engineering contract requiring the design professional to indemnify the other party to the contract against loss is void and unenforceable unless the fault of the design professional is the proximate cause of the loss. Simply stated, under SB 161, the design professional can only be required to indemnify the other party to a contract if the fault of the design professional is the cause of the loss but not if the design professional was not the cause of the loss.

Senate Bill 161 ensures that small construction contractors aren't footing the bill for accidents they did not cause.

I appreciate the committee's consideration of Senate Bill 161 and will be more than happy to answer and follow-up questions the committee may have.