

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1146
Judiciary

(Delegate Stein)

Courts - Unenforceable Indemnity and Costs of Defense Agreements

This bill expands existing statutory provisions to establish that certain indemnity agreements and agreements to pay the costs of defense made in connection with an agreement for the management or operation of a building, a structure, an appurtenance, or an appliance are against public policy and are void and unenforceable.

Fiscal Summary

State Effect: The bill may have an operational effect on State agencies and *may* increase State expenditures, 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

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 Expenditures: The full extent to which State agencies enter into contracts that include clauses affected by the bill is unknown at this time. While the bill may have a fiscal impact on affected State agencies, the magnitude of any such impact cannot be readily determined at this time.

Department of General Services

The Department of General Services advises that its Office of Real Estate regularly enters into contracts that would likely be affected by the bill. From the office's perspective, the State requires that outside parties indemnify the State. The office advises that its standard lease language contains language designed to cover the State in unforeseen circumstances (indemnification and defense) that would be rendered unenforceable under the bill.

Maryland Department of Transportation

The Maryland Department of Transportation (MDOT) advises that the bill may have an impact on MDOT and the Maryland Transportation Authority. However, the extent of the impact is not quantifiable at this time.

For example, the State Highway Administration (SHA) reports that it was not able to review all of its contracts to determine if they include the types of provisions rendered unenforceable under the bill. However, SHA advises that if it has contracts with those types of clauses, the quantification of impact would be difficult to estimate and would depend on (1) whether any such potential loss is still covered by insurance and (2) the amount of the loss caused by SHA's sole negligence (including the cost of defense), which could no longer be shifted to the other contractual party.

The Maryland Transit Administration (MTA) observes that the bill may limit its ability to recover under its management and operations contracts in cases of accidents or other instances where there is damage when the State is solely negligent. According to MTA, the frequency at which this occurs is unknown, but the State would not be able to shift this risk

to its contractors, which might be of fiscal concern and lead to a greater number of disputes about whether the incident occurred solely because of the State's actions.

Other Agencies

The Office of the Attorney General and the Department of Juvenile Services do not anticipate a fiscal or operational impact from the bill.

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. Baltimore and Frederick counties do not anticipate a fiscal impact from the bill. The Maryland Municipal League advises that the bill will not significantly impact municipal government operations or finances.

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 defense costs and (2) are no longer indemnified or no longer have their defense/defense costs provided/funded.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Baltimore and Frederick counties; Maryland Municipal League; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of General Services; Department of Juvenile Services; Department of Public Safety and Correctional Services; Maryland Department of Transportation; Department of Legislative Services

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