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May 3, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 168

Dear Governor O'Malley:

We have reviewed, and hereby approve for constitutionality and legal sufficiency, House Bill 168, "Architectural, Engineering, Inspecting, or Surveying Services - Indemnity Agreements - Void." In doing so, we have concluded that the bill applies to indemnity clauses in contracts entered into before its effective date, and that this application does not violate the Contract Clause of the United States Constitution.

House Bill 168 provides that an indemnity clause in a contract relating to architectural, engineering, inspection, or surveying services "purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to any property caused by or resulting from the sole negligence of the promisee," "is against public policy and is void and unenforceable." Section 2 of the bill provides:

> AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before the effective date of this Act.

Because this clause expressly bars retrospective application to causes of action arising before the effective date, but is silent with respect to application to indemnity clauses in contracts entered into before that date, it is reasonable to read the bill to apply to clauses that predate the effective date. *Helms v. State*, __ Md. App. __ (March 2, 2010) ("Maryland has long accepted the doctrine of expressio (or inclusio) unius est exclusio alterius, or the expression of one thing is the exclusion of another."). This reading is

consistent with the holding of *Commission on Human Relations v. Amecom Div.*, 278 Md. 120, 127 (1976), in which the Court of Appeals held that a statute creating an interlocutory remedy for employment discrimination should apply to employment that commenced before the effective date of the statute, in order to better effectuate the purposes of the General Assembly. That case also held, however, that the statute would not apply to acts of discrimination occurring before the effective date.[1]

It is our view that the application of House Bill 168 to existing contracts does not violate the Contract Clause, which prohibits the States from impairing the obligation of contracts. State regulations may permissibly create even substantial impairments of existing contractual obligations if (1) the state has a significant and legitimate public purpose behind the regulation, and, (2) the impairment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the statute's adoption. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983). In *Moser v. Aminoil, U.S.A., Inc.*, 618 F. Supp. 774, 780 (W.D. La. 1985), the court considered whether the retroactive application of the Louisiana Oilfield Anti-Indemnity Act met this test, and concluded that it did. Specifically, the Court found that the act was prompted by a significant and legitimate public interest in protecting "Louisiana workers and the oil industry in general from less than optimum safety measures," and further found that any consequent impairment was "based upon reasonable conditions and appropriately related to the public purpose. Emphasizing the importance of the industry, and the hazardous nature of the work involved, the court went on to state that:

> the public interest in oilfield safety is sufficiently broad to support any consequent impairment of indemnity provisions set forth in master service agreements can not be seriously doubted. Not only is the safety of workers engaged in the industry implicated, but the threat to person and property in the general public from unsafe oilfield operations is involved as well. Application of the Act to work orders issued after its effective date directly furthers the goal of the Act by encouraging oilfield safety in the future.

Id. See also Meche v. Kerr McGee, 1990 WL 482798 (W.D. La. 1990) *affirmed* 43 F.3d 668 (5th Cir. 1994) (Table) (Texas Anti-Indemnity Statute applied to situations where the indemnity agreement was entered into before the effective date, but the accident occurs

[1] In fact, it has been held that application of an anti-indemnity clause to contracts that predate the effective date is "not retroactive." *Lirette v. Union Texas Petroleum Corp.*, 467 So.2d 29, 33 (La. App. 1985).

(or the rights thereunder otherwise become fixed) after the effective date, but not to those where the accident occurred before the effective date); *Tobin v. Gulf Oil Corporation*, 535 F. Supp. 116, (E.D. La. 1982) ("While the statute may be constitutional and apply to contracts executed prior to the effective date and existing after it with respect to accidents occurring after September 11, 1981, we hold that it is not applicable to accidents or injuries such as Mr. Tobin's which occurred prior to that date.").

Like the Oilfield Anti-Indemnity provision at issue in the *Moser* case, anti-indemnity statutes in the construction field serve the significant and legitimate public purpose of preventing parties to contracts in the large and hazardous construction field "from eliminating their incentive to exercise due care." *1800 Ocotillo, LLC v. The WLB Group, Inc.*, 196 P.3d 222, 225 (Ariz. 2008). And, as in the *Moser* case, broad application of the limitation to existing contracts is reasonable and necessary to accomplish the full objectives of the legislation. For that reason, it is our view that application of House Bill 168 to existing contracts does not unconstitutionally impair those contracts in violation of the Contract Clause of the United States Constitution.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Samuel I. "Sandy" Rosenberg
The Honorable John P. McDonough
Joseph Bryce
Karl Aro