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May 12, 2016

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: Senate Bill 234 and House Bill 871, "Agreements to Defend or Pay the Cost of Defense – Void"

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency, Senate Bill 234 and House Bill 871, identical bills entitled "Agreements to Defend or Pay the Cost of Defense - Void." In doing so, we have concluded that the application of the bills to contracts entered into before the effective date of the bills does not violate the Commerce Clause of the United States Constitution.

Senate Bill 234 and House Bill 971 add a new paragraph (2) to Courts and Judicial Proceedings Article ("CJP"), § 5-401(a) which currently provides that indemnity agreements in certain types of contracts are against public policy and void. The new paragraph provides an agreement to defend or pay the costs of defending the promisee or indemnitor against liability for damages resulting from the sole negligence of the promisee or the indemnitee is against public policy and void. It had apparently been believed that the existing law would also bar imposition of a duty to defend, but a case in California, *UDC-Universal Development, L.P. v. CH2M Hill*, 103 Cal.Rptr.3d 684 (Cal. App. 6th Dist. 2010), has raised questions about how a court in Maryland might rule on that issue.

Section 2 of the bills states:

> 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 a cause of action arising before the effective date of this Act.

This exact clause was used in House Bill 168 of 2010, which added architectural, engineering, inspecting, and surveying services to CJP § 5-401(a). In our bill review letter on that bill, we concluded that because the clause expressly barred retroactive application to causes of action arising prior to the effective date, but was silent with respect to application to indemnification clauses entered into prior to that date, it was "reasonable to read the bill to apply to clauses that predate the effective date. We reach the same conclusion with respect to Senate Bill 234 and House Bill 871.

The 2010 letter on House Bill 168 further concluded that the retroactive application to existing clauses did not violate the Contract Clause of the United States Constitution, which prohibits the states from impairing the obligation of contracts. We concluded that the bill could be upheld under the rule set out in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), which held that a State 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. Specifically, we found that 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." This conclusion is equally applicable to agreements to defend or pay for the defense of another in cases arising from the other's negligence. In addition, in this case, the bill reflects what was believed to be the meaning of the existing law. Therefore, it is our view that the application of Senate Bill 234 and House Bill 871 to existing contracts does not unconstitutionally impair those contracts.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KMR/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Warren Deschenaux