

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 291

(Senator Carter)

Judicial Proceedings

Judiciary

Courts - Prohibited Liability Agreements - Recreational Facilities

This bill establishes that any provision in a contract or agreement relating to the use of a “recreational facility” that purports to release the recreational facility from, limit, indemnify, or hold harmless the recreational facility against, liability for injury caused by or resulting from the negligence or other wrongful act of the recreational facility or its agents or employees is against public policy and is void and unenforceable. Under the bill, a “recreational facility” is a commercial recreational facility, a commercial athletic facility, or an amusement attraction. While gymnasiums and swimming pools are specifically included as recreational facilities under the bill, a unit of State or local government that leases land or facilities to a recreational facility is specifically excluded from the definition of a “recreational facility.” The bill’s provisions may not be interpreted to affect, extend, or limit the liability of a governmental entity for a tort or other claim subject to the Maryland Tort Claims Act (MTCA – Title 12, Subtitle 1 of the State Government Article) or the Local Government Tort Claims Act (LGTCA – Title 5, Subtitle 3 of the Courts and Judicial Proceedings Article).

Fiscal Summary

State Effect: Depending on judicial interpretation of the bill and overall use by State entities of the applicable provisions in contracts or agreements, the bill may increase special fund expenditures and general fund expenditures, as discussed below. Revenues are not affected.

Local Effect: Depending on judicial interpretation of the bill, local expenditures may increase due to increased liability exposure, as discussed below. Revenues are not affected.

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. Statute contains multiple provisions that specifically establish certain types of provisions or agreements to be void and against public policy. For example, under § 8-105 of the Real Property Article, if the effect of any provision of a lease is to indemnify the landlord, hold the landlord harmless, or preclude or exonerate the landlord from any liability to the tenant, or to any other person, for any injury, loss, damage, or liability arising from any omission, fault, negligence, or other misconduct of the landlord on or about the leased premises or any appurtenances used in connection with them that are not within the exclusive control of the tenant, the provision is considered to be against public policy and void. Similar provisions exist regarding rental agreements between mobile park owners and mobile home residents.

Maryland Tort Claims Act

In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under MTCA, the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by State personnel performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially “waives sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort.” *Lee v. Cline*, 384 Md. 245, 262 (2004).

MTCA covers a multitude of personnel, including some local officials and nonprofit organizations. In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State’s color of authority or sovereign immunity and may be held personally liable.

In general, MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident. Higher liability limits apply to claims involving law enforcement officers that arise on or after July 1, 2022.

Local Government Tort Claims Act

In general, LGTCA limits the liability of a local government to \$400,000 per individual claim and \$800,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). Higher liability limits apply to claims involving law enforcement officers that arise on or after July 1, 2022.

LGTCa further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment, so long as the employee did not act with actual malice. Thus, LGTCa prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

State and Local Fiscal Effect: Depending on judicial interpretation of the bill and the use by State and local entities of the provisions deemed void and unenforceable under the bill, State expenditures and local expenditures may increase due to increased liability exposure, as discussed below.

Application of the Bill – In General

While the bill includes a “commercial recreational facility” and a “commercial athletic facility” in the definition of a “recreational facility,” it does not define “commercial.” Nor is that term specifically defined elsewhere in the Courts and Judicial Proceedings Article. While the bill establishes an exemption for a “unit of State or local government that leases land or facilities to a recreational facility,” it does not explicitly and completely exempt State and local governments and their land and facilities. The bill further states that its provisions “may not be interpreted to affect, extend, or limit the liability of a governmental entity for a tort or other claim subject to [MTCA or LGTCa].” However, it is unclear whether this provision functions to completely exempt State or local governments (because they are covered under MTCA or LGTCa) or establishes that claims against State and local governments that proceed under the bill are subject to MTCA and LGTCa (because State and local governments are not completely exempted under the bill, and the use of indemnification and hold harmless provisions is independent of MTCA and LGTCa, which address the liability of and procedures for an action in tort against the State or a local government or its employees). Thus, it is unclear whether the bill applies to indemnification and hold harmless provisions in contracts and agreements in non-leasing situations involving State or local government recreational facilities or land when a monetary transaction is involved (*e.g.*, admissions, entry, or use charges).

The State Treasurer’s Office (STO) advises that while the bill’s application to State and local governments is not entirely clear, it surmises that based on the provisions referring to MTCA and LGTCa, the bill does not apply to State and local governments. The Department of Agriculture (MDA) advises that based on its interpretation of the bill’s definition of a “recreational facility,” the bill does not apply to MDA, but may indirectly affect MDA, as discussed in additional detail below. The Department of Natural Resources (DNR) advises that, as written, it is unclear whether this bill’s definition of “recreational facility” covers any of DNR’s property or facilities. However, DNR further notes that based on the total language of the bill, the department could continue to use indemnification and liability waiver language in its lease and use agreements for its properties and facilities

because the exemption clauses in the bill appear intended to ensure that they would not be rendered void by the other provisions of this bill. The University System of Maryland (USM) advises that it is unclear whether the bill would apply to its recreational facilities.

Potential Expenditures – State Agencies

Information is not readily available on the full extent of the inclusion of the types of provisions rendered void and unenforceable by the bill in contract or agreements pertaining to State-owned recreational facilities. To the extent that State entities use such provisions and are exposed to increased liability under the bill, special fund expenditures increase for the State Insurance Trust Fund (SITF). General fund expenditures may increase if State agencies experience higher SITF assessments under the bill.

STO advises that it is not aware of the use of such provisions by State agencies. USM was not able to provide information on the use of indemnification and hold harmless provisions in contracts or agreements pertaining to its recreational facilities in time for the preparation of this fiscal and policy note. As noted above, DNR agreements to lease and/or authorize the use of some of its properties and facilities for recreational purposes contain indemnification and liability waiver provisions. To the extent that DNR uses provisions in agreements that would be rendered void and unenforceable under the bill, the bill may lead to increased liability exposure for the department.

MDA advises that the bill may indirectly affect MDA if its promotion/regulation of specified activities constitutes a recreational facility. For example, the State of Maryland, through MDA, provides financial assistance to agricultural fairs in the State, including the State Fair administered by the Maryland State Fair and Agricultural Society, Inc., a non-profit organization. MDA advises that these fairs likely fall within the definition of a recreational facility. In addition, the Maryland Horse Industry Board, which is housed at MDA, regulates and promotes the State's horse industry. The board, in accordance with its statutory charge, promotes horse exhibitions, horse shows, rodeos, pony clubs, etc. held in the State. MDA advises that horse establishments likely fall within the definition of a recreational facility under the bill, and horse exhibitions and horse shows may also be subject to the bill's provisions.

Potential Expenditures – Local Governments

Local governments use indemnification and hold harmless provisions in contracts and agreements pertaining to their recreational facilities, including non-leasing situations. For the reasons stated above, depending on judicial interpretation, local expenditures may increase if the bill increases liability exposure for local governments.

Small Business Effect: The bill has a meaningful impact on small business recreational facilities whose contracts contain these provisions and who face increased liability, insurance costs, and/or litigation under the bill.

Additional Information

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

Designated Cross File: HB 207 (Delegate Moon, *et al.*) - Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); State Treasurer's Office; Department of Natural Resources; Maryland Department of Agriculture; Maryland Association of Counties; University System of Maryland; Department of Legislative Services

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