

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 56

(Senator West)

Judicial Proceedings

Judiciary

Courts – Prohibited Indemnity and Defense Liability Agreements

This bill expands the prohibitions in § 5-401(a) of the Courts and Judicial Proceedings Article by prohibiting a contract or agreement with a “design professional” for “professional services” from including specified provisions requiring a design professional to defend parties against liability or certain claims. The bill also incorporates contracts or agreements relating to highways and roads into existing statutory prohibitions. The bill clarifies that § 5-401(a) may not be construed to prevent enforcement of a provision to require a design professional to indemnify a promisee or indemnitee for defense costs incurred for third-party claims, except to the extent that the provision is against public policy and is void and unenforceable under § 5-401(a).

Fiscal Summary

State Effect: While the bill may have an operational effect on State agencies and *may* increase State expenditures, the bill is not anticipated to have a material effect on overall State finances, 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

Bill Summary: A “design professional” is a licensed architect, certified interior designer, licensed landscape architect, professional engineer, or professional land surveyor. “Professional services” means services or work that is the practice of a profession or

requires licensure under specified statutory provisions applicable to these design professionals. “Derivative parties” means a party’s subcontractors, agents, employees, or other persons for which the party may be liable or responsible as a result of any statutory, tort, or contractual duty.

The bill prohibits a contract or agreement with a design professional (or in connection with such a contract or agreement) from including any provision requiring the design professional to defend a promisee or any other person against liability or claims for damages or expenses, including attorney’s fees, alleged to be caused by the professional negligence of the design professional or its derivative parties. This type of provision is void and unenforceable and against public policy.

The bill clarifies that § 5-401(a) may not be construed to prevent enforcement of a provision in a contract or agreement that purports to require a design professional to indemnify a promisee or indemnitee for defense costs incurred in connection with third-party claims for loss or damages caused by or resulting from the fault of the design professional or its derivative parties, except to the extent the provision is against public policy and is void and unenforceable under § 5-401(a).

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 Fiscal Effect: The bill has an operational effect and *may* result in increased litigation expenditures for affected State agencies. Due to the irregular occurrence of these claims and the broad range and complexity of potential claims, potential expenditures under the

bill cannot be reliably determined at this time but are not expected to have a material effect on State finances overall.

According to the Maryland Transportation Authority (MDTA), the duty to defend provision under the bill is a standard provision contained in its design professional and construction contracts. MDTA advises that the proposed legislation may have an impact on MDTA, but the amount is not determinable. While claims involving construction contracts do occur periodically, MDTA cannot recall a claim involving a design professional in at least 11 years.

MDTA previously advised that the bill (1) requires MDTA to change its existing contract language and (2) requires MDTA to defend claims initially, which is contrary to current practice. Under the current “duty to defend,” the Office of the Attorney General counsel within MDTA acts in a consulting capacity; the bill requires MDTA to take a more active role in its legal defense. MDOT advises that although the bill appears to allow for the State to recover defense costs, it also ties the State’s ability to seek indemnification to a determination of fault by the design professional or its derivative parties. According to MDOT, associated costs could include increased litigation expenses and a potential increase in insurance premiums due to the prohibition of the duty to defend provisions.

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.

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, no longer have to legally defend or pay defense costs for a promisee/indemnitee.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See SB 161 and HB 79 of 2022; SB 189 and HB 213 of 2021; and SB 368 and HB 681 of 2020.

Designated Cross File: HB 256 (Delegate Cardin, *et al.*) - Judiciary.

Information Source(s): Maryland State Treasurer’s Office; Judiciary (Administrative Office of the Courts); Department of General Services; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - January 31, 2023
js/jkb Third Reader - April 4, 2023
Revised - Amendment(s) - April 4, 2023

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