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Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401-1991

RE: SB 368 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and Members of the Committee:

I am pleased to introduce Senate Bill 368.

In connection with a construction project, there are generally numerous contracting parties. There is the owner, the contractor, the architect, the engineer, subcontractors and other professionals. When an accident occurs resulting in significant losses, the responsible party and/or its insurance carrier is normally expected to pay for the damages. Where there are multiple defendants, there may be multiple insurers. In this situation the insurers will usually negotiate an equitable allocation of the losses.

But there are situations in which the owner of the project or the prime contractor is so dominant that it can force the architect and the engineer associated with the project to execute contracts containing an onerous provision requiring the design professional firm to indemnify the owner or the prime contractor, as the case may be, for all of the damages and expenses associated with the loss, irrespective of the fact that the design professional firm was not the proximate cause of the loss. Of course, the design professional firm has its own insurance, but the insurance companies issuing insurance to design professionals customarily refuse to reimburse them for any indemnification payments to the owner in such situations because the losses were not proximately caused by the design professionals. So the design professionals in these situations end up shouldering the burden of paying all of the losses resulting from an accident, including all of the attorney's fees associated with the trial of the case, even though the design professional were not the proximate cause of the loss.

Fortunately, contracts containing such clauses are not customary. But some Maryland State procurement contracts and some other construction contracts used by very large construction companies contain such indemnification provisions. These are virtually contracts of adhesion because the design professional firm knows that if it wants the work, it will have to sign an unfair contract.

Now let me discuss Senate Bill 368. Maryland law currently provides that a provision in an architectural or engineering contract purporting to indemnify the other party to the contract for damages arising due to the ***"sole negligence"*** of the other party is against public policy and is void and unenforceable. Maryland law also currently provides that a provision in an architectural or engineering contract purporting to require the design professional firm to pay for the costs of defending the other party to the contract against liability for damages resulting from the ***"sole negligence"*** of the other party is against public policy and is void and unenforceable.

Senate Bill 368 just adds language to the existing statute stating that a provision in an architectural or engineering contract requiring the design professional to indemnify the other party to the contract against loss is void and unenforceable unless the fault of the design professional is ***the proximate cause*** of the loss. In other words, under the new language added by Senate Bill 368, the design professional can only be required to indemnify the other party to a contract if the fault of the design professional is ***the proximate cause*** of the loss but not if the design professional was not the proximate cause of the loss.

Finally, Senate Bill 368 adds two additional provisions dealing with the obligation of the design professional firm to pay the attorney's fees and other defense costs of the other party to the contract attributable to an allegation of liability. They provide that the design professional will not have to pay for such costs until such time as a determination is made that the fault of the design professional is ***the proximate cause*** of the defense costs. At that point, the design professional will have to indemnity the other party to the contract for all reasonable attorney's fees and other defense costs.

I urge a favorable report on Senate Bill 368.