Maryland Association for Justice, Inc.
2021 Position Paper

COVID-19 Claim – Civil Immunity
SB 311 – UNFAVORABLE

LEGISLATION THAT RETROACTIVELY IMPAIRS, INTERFERES WITH, OR ABOLISHES A RIGHT VESTED IN AN ACCRUED CAUSE OF ACTION IS UNCONSTITUTIONAL

SB311 ignores this ancient constitutional principle, and would abrogate vested rights of victims of unreasonably unsafe conduct ***retroactively*** to March 5, 2020. As such, SB 311 violates the Maryland Constitution and the Declaration of Rights, and would be unconstitutional.

The Maryland Association for Justice respectfully requests an UNFAVORABLE report on SB 311.

SB311 would create a new, broader, and more expansive statutory immunity, retroactive to March 5, 2020, for health care providers and their employees, agents, and contractors. This new, broader statutory immunity would shield such persons from liability for their unreasonably unsafe conduct "in the provision of health care services resulting from a catastrophic health emergency occurring on or after March 5, 2020." SB 311, at page 2, lines 27-31.

The proponents of SB 311 have been clear – they want immunity from liability with respect to ***all*** health care by ***all*** health care providers, their agents, employees, and contractors, to ***all*** patients (not just COVID patients). The immunity in SB 311 is new, broader, and much more onerous than the currently existing immunity in Md. Pub. Safety Code Ann. § 14-3A-06.

By definition, negligence claims precluded by the new, broader, and more expansive immunity that SB 311 seeks to create would include causes of action accruing on or after March 5, 2020. Accordingly, SB 311 would ***retroactively*** impair, interfere with, and/or abolish vested rights to maintain an accrued common law cause of action for negligence, and is unconstitutional under longstanding Court of Appeals precedent for that reason.

Md. Declaration of Rights, Article 19. Relief for injury to person or property
That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

Md. Declaration of Rights, Article 24. Due process
That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

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Definition of Vested Right
A vested right, as that term is used in relation to constitutional guarantees, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. *Langston v. Riffe*, 359 Md. 396, 420 (2000).

An Accrued Cause of Action is a Vested Right
A cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong. *Poffenberger v. Risser*, 290 Md. 631, 636 (1981).

There is a vested right in an accrued cause of action and the Maryland Constitution precludes the impairment of such right. Furthermore, this principle applies to both common law and statutory causes of action. *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 633 (2002).

***Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604 (2002).**

The *Dua* case arose from two separate and consolidated appeals regarding retroactive statutes, one of which retroactively established subrogation rights for HMO's, and the other which retroactively changed the law applicable to late fee charges by cable TV providers. The Court of Appeals conducted an detailed and exhaustive analysis of the constitutionality of the two legislative acts which, it held, were unconstitutional because they retroactively impaired, interfered with, or abolished accrued causes of action and deprived plaintiffs of vested rights.

In *Dua*, the Court of Appeals reviewed and or cited roughly 40 of its own prior decisions, spanning more than 180 years of consistent jurisprudence, to conclude that retroactive legislation is unconstitutional if it impairs vested rights. In addition to those Maryland cases, the Court of Appeals approvingly cited and adopted similar holdings in cases from other States.

The Court's description of the holding in *Gibson v. Commonwealth of Pennsylvania*, 490 Pa. 156, 160-162, 415 A.2d 80, 83-84 (1980), illustrates conclusively that the retroactivity in SB 311 is unconstitutional:

> In an opinion by Justice Roberts, the Court held that a constitutional provision, like Article 19, providing that persons are entitled to justice "by the law of the land" means "that the law relating to the transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered, in substance, by any subsequent law." *Dua*, 370 Md. at 645.

In this instance, the "law of the land" is the existing law at the time when a cause of action for negligence accrued, and that law cannot be "altered, in substance, by any subsequent law." Because SB 311 retroactively impairs accrued causes of action, it is clearly unconstitutional.

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The unconstitutionality of SB 311 is not remedied by the fact that plaintiffs still may recover for "gross negligence[1] or intentional wrongdoing." Such claims are much more difficult to prove, and are not in any way equivalent to negligence claims.

Nor does "good faith" save SB 311 from unconstitutionality. The application of a "good faith" standard itself abolishes the right vested in an accrued cause of action for negligence:

> [N]egligence and lack of good faith are not equivalent. Simply put, if good faith immunity can be overcome by establishing negligence, then good faith immunity is a meaningless concept as one would have to be free from negligence, and thus not liable in any event, to also avail one's self of the doctrine of good faith immunity. . . To further illuminate the definition of "good-faith," we found it most instructive to compare the definition of "bad-faith." "Bad-faith" is the opposite of good faith; it is not simply bad judgment or negligence, but it implies a dishonest purpose or some moral obliquity and a conscious doing of wrong. *Rite Aid Corp. v. Hagley*, 374 Md. 665, 680-682 (2003).

Even if it did not completely abolish causes of action for negligence that accrued in the past (which it does), SB 311 is still unconstitutional. As *Dua* makes clear, a retroactivelaw is unconstitutional if it merely *impairs or interferes with* an accrued cause of action. Plainly, that is precisely what SB 311 does, and what it intends to do.

The constitutional standard for determining the validity of retroactive civil legislation "is whether vested rights are ***impaired***." *Dua*, 370 Md. at 623 (emphasis added). The provision of the Maryland constitution cited "for ***the principle that retroactive legislation impairing vested rights is invalid*** is Article 24 of the Declaration of Rights, which is often referred to as the Maryand Constitution's due process clause." *Dua*, 370 Md. at 628 (tracing history of Article 24 to the Magna Carta). This ancient principle of constitutional law precludes passage of SB 311.

Nobody (except perhaps lawyers who charge by the hour) benefits when the Legislature enacts an unconstitutional law. Such legislation would spawn endless litigation over its validity until, finally, the Court of Appeals declares what everyone already knew – that the law does not pass constitutional muster. Unconstitutional laws – like SB 311 – must not be enacted.

The Maryland Association for Justice respectfully requests an UNFAVORABLE report on SB 311.

[1] "[A] wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist." *Stracke v. Estate of Butler*, 465 Md. 407, 422 (2019).

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