

SB291 Testimony.pdf

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Position: FAV



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

**Testimony of Senator Jill P. Carter
In Favor of SB291
Courts – Prohibited Agreements – Recreational Facilities
Before the Judicial Proceedings Committee
On February 16, 2023**

SB-291 provides that any provision in a contract or agreement relating to the use of a recreational facility that purports to release the recreational facility from, or indemnify or hold it harmless from liability caused by its negligence or other wrongful act of its agents and/or employees is against public policy, null, void, and unenforceable.

Several recreational facilities in Maryland have contracts and/or waivers of liability provisions with their customers, in which the customer must agree to hold the recreational facility harmless for the ordinary negligence and other wrongful conduct of the facility's agents and employees. Customers have no choice but to sign the waiver of liability if they (or in most cases, their children) wish to participate.

Waivers of liability excuse recreational facilities of their ordinary negligence which cause harm to adults and children. A waiver would permit recreational facilities to negligently under-staff, fail to maintain equipment, fail to make necessary repairs, fail to follow manufacture's instructions for safe use, and NOT BE LIABLE to an

adult or child who is injured (sometimes severely injured) as a result of such negligence.

A recreational facility simply has no incentive to act in a reasonable and non-negligent manner if it is allowed to be excused of all liability and harm it caused by its negligence. An exculpatory contract that excuses unreasonable conduct will lead to more unreasonable conduct in the industry, which will, in turn, lead to a downward spiral of all standards in the industry. Lower standards will logically lead to more injuries. Also, the net effect of the exculpatory contract is to place the emotional and financial loss on the innocent participant. That is not fair and not right. Recreational facilities should be held to the SAME standards of reasonable care as all other businesses.

The law of torts is directed toward compensation of individuals for injuries sustained as the result of another's unreasonable conduct. In addition, tort law serves the "prophylactic" purpose of preventing future harm in that the payment of damages provides a strong incentive for potential future tortfeasors not to engage in the same conduct.

There are other factors, as well that support the conclusion that it is not good public policy to permit an owner/operator, who negligently injures another, to be able to contractually exculpate the owner/operator's unreasonable conduct. An exculpatory contract that excuses unreasonable conduct will lead to more unreasonable conduct in the industry, which will, in turn, lead to a downward spiral of all standards in the industry. Lower standards will logically lead to more injuries. Also, the net effect of the exculpatory contract is to place the emotional and financial loss on the innocent participant.

Adherence to principles of tort law tend to make a court reluctant to allow parties to shift by contract the burden of negligent conduct from the negligent actor to the innocent victim. As a consequence,

exculpatory contracts are generally not favored by the law because they tend to allow conduct below the acceptable standard of care applicable to the activity.

However, Maryland courts have held that such provisions are valid and enforceable. In *Seigneur v. Nat'l Fitness Institute*, 132 Md. App. 271 (2000), the Appellant Court of Maryland enforced an exculpatory agreement between a customer and a health club in which the customer sued the health club for negligence. In *BJ's Wholesale Club v. Rosen*, 429 Md. 528, 56 A.3d 1241 (2012), a divided Supreme Court of Maryland held that a waiver of liability signed by a parent excused the negligence of a play center which resulted in permanent brain damage to a child.

Maryland should join other states and make it very clear to the public and the courts that it is not the public policy of Maryland to exculpate an owner/operator from its negligence when providing opportunities for the public to participate in recreational activities. The legislatures and/or courts in the following states have declared exculpatory agreements to be null, void, and unenforceable, especially in situations where a parent executes a waiver on behalf of a minor child:

- **Florida**
- **Iowa**
- **Louisiana**
- **Maine**
- **Michigan**
- **Montana**
- **New York**
- **Utah**
- **Virginia**


This legislature has enacted statutes that prohibit exculpatory clauses as a matter of public policy in other contexts:

- **Md. Code Real Prop. Ann. §8-105 prohibits exculpatory clauses in leases that exonerate a landlord from negligence resulting in injury as void against public policy.**
- **Md. Code Real Prop. Ann. §8a-1502 (e) declares void as against public policy any provision in a mobile home park rental agreement that exonerates the owner from liability for negligence.**

Maryland should likewise protect consumers and declare that commercial recreational facilities are subject to the same standards of safety applicable to other businesses, by prohibiting waivers and exculpatory clauses that allow commercial recreational facilities to disregard their basic duty to act with reasonable care, especially where children are involved.

I respectfully request that the Committee grant a favorable report on SB291.

Sincerely,



Jill P. Carter, Esq.



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Sincerely,



Jill P. Carter, Esq.

SB 291.Illegal hold harmless indemnification clau

Uploaded by: John Woolums

Position: FAV

BILL: Senate Bill 291
TITLE: Courts - Prohibited Liability Agreements - Recreational Facilities
DATE: February 16, 2023
POSITION: SUPPORT
COMMITTEES: Judicial Proceedings
CONTACT: John R. Woolums, Esq.

The Maryland Association of Boards of Education (MABE) supports Senate Bill 291 to ensure that school system contracts with operators of recreational facilities will no longer be permitted to include clauses that inappropriately allow these operators to be held harmless and not liable for injuries to our students when participating in activities at locations completely outside the control of school systems.

This bill would clearly make void and unenforceable provisions in contracts or agreements relating to the use of a recreational facility that would 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 employees.

Local school systems value the benefits of services provided by outside recreational facilities, and yet are continuously confronted with contract language that includes precisely the types of hold harmless and indemnification clauses that Senate Bill 291 would prohibit. This bill is needed to protect students, parents and guardians, educators and administrators, and taxpayers from the risks posed by the effect of such contract language.

Contracts presented to school systems should no longer be allowed to include provisions that would inappropriately shift liability away from the operator of a recreational facility and their staff responsible for ensuring the safety of our students through prudent investments and management decisions relating to these facilities. Again, local school systems recognize the merits of ensuring student access to recreational activities, including visiting and participating in activities at outside locations and facilities, and we believe Senate Bill 291 will meaningfully improve the process of routinely entering into reasonable agreements to do so.

For these reasons, MABE requests a favorable report on Senate Bill 291.

SB0291-JPR_MACo_SWA.pdf

Uploaded by: Dominic Butchko

Position: FWA



Senate Bill 291

Courts - Prohibited Liability Agreements - Recreational Facilities

MACo Position: **SUPPORT**

To: Judicial Proceedings Committee

WITH AMENDMENTS

Date: February 16, 2023

From: Dominic J. Butchko

The Maryland Association of Counties (MACo) **SUPPORTS SB 291 WITH AMENDMENTS**. This bill limits the use of liability waivers for certain commercial recreational facilities. Amendments could better confirm the bill language to this intent and avoid effect on governmental facilities.

According to the advocates, the intent of SB 291 is to eliminate the use liability waivers for certain for-profit recreational facilities. While not the original intent of the advocates, the use of the term commercial within the bill may be interpreted by the courts to also include county programs and facilities. This interpretation could put at risk dozens of county-led programs meant for after school care and youth recreation.

Counties suggests amendments to specify that the limitations of the bill should not apply to publicly owned facilities, but to also avoid any unintended consequences to expand or limit a potential plaintiff's rights under existing laws to file tort lawsuits against governments.

During the House hearing, the bill sponsor recognized the concerns of local jurisdictions and indicated interest in amending local governments out of the bill. MACo has been working with advocates to try and find some middle ground and is hopeful that the amendment language on the following page will accomplish this goal.

Without further clarifying language, SB 291 puts youth and after school care programs at risk, but clarifying language could fully assuage local government concerns. Accordingly, MACo urges the Committee to issue a **FAVORABLE WITH AMENDMENTS** report for SB 291.

(proposed amendment language on next page)

AMENDMENTS TO SENATE BILL 291

Suggested by the Maryland Association of Counties

On page 1, in line 18 strike "COMMERCIAL" and substitute "PRIVATELY OWNED" and on line 19 before "AMUSEMENT ATTRACTION" insert "PRIVATELY OWNED";

On page 2, before line 1, insert "(3) RECREATIONAL FACILITY" DOES NOT INCLUDE A FACILITY OWNED BY A STATE OR LOCAL GOVERNMENT, INCLUDING WHEN UNDER THE DIRECTION OR OPERATION OF A NONPROFIT AGENCY UNDER CONTRACT WITH THE STATE OR LOCAL GOVERNMENT OWNER.";

On page 2, after line 7, insert "(C) NOTHING IN THIS SECTION SHALL BE INTERPRETED TO AFFECT, EXTEND, OR LIMIT THE LIABILITY OF A GOVERNMENTAL ENTITY FOR A TORT OR OTHER CLAIM SUBJECT TO TITLE 12, SUBTITLE 1 OF THE STATE GOVERNMENT ARTICLE (MARYLAND TORT CLAIMS ACT) OR TITLE 5, SUBTITLE 3 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE (LOCAL GOVERNMENT TORT CLAIMS ACT).".