**HB 1146: Courts – Unenforceable Indemnity and Costs of Defense Agreements**

**FAVORABLE**

By: Jay Radov, Esq.
Lawyer and Managing General Partner, Unimatrix Capital, LLLP, an investment partnership
2800 Stone Cliff Dr, Unit 403
Baltimore, MD 21209

Chair Clippinger, Vice Chair Bartlett, and members of the Judiciary Committee, my name is Jay Radov. I am a lawyer and small business owner. I am here today in Support of HB 1146.

1. Since 1974 Maryland has had a statute (Section 5-401(a) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland) in place that says, in various real estate contracts, it is against public policy and thus void and unenforceable for one party – the indemnitor – to indemnify the other party – the indemnitee – if the indemnitee is 100% negligent.

2. Maryland is one of 45 states that has enacted various anti-indemnity language associated with various real estate contracts. These 45 states have done so in order to prevent the party with the superior bargaining power from taking advantage of the party with the inferior bargaining power.

3. But the current law has a loophole (you might call it a technical omission) in that this prohibition of indemnification [whereby the 1st party must indemnify the 2nd party if the 2nd party is 100% negligent and the 1st party is 0% negligent] applies to the alteration, repair, or maintenance of a building or structure, but this prohibition of indemnification does NOT apply to the MANAGEMENT or OPERATION of a building or structure. This loophole is completely unfair. The 1st party should not have to indemnify the 2nd party whenever the 2nd party is 100% negligent and the 1st party is 0% negligent, period! Whether or not this prohibition of indemnification is unenforceable should not be based upon the type of real estate activities involved.

4. I am on the Finance Committee of our condo association and have been asked to review our Management Agreement. The current Management Agreement says that the condo association must indemnify the Property Management Company for damages arising out of MANAGEMENT, OPERATION, OR MAINTENANCE of the condo association unless the Property Management Company is both (a) solely liable and (b) grossly negligent. Here is my hypothetical example:

Our Property Manager is late for a meeting. He gets in his car and gets distracted by a text from his spouse. He inadvertently runs a red light and T-Bones a minivan with 6 occupants in an intersection – seriously injuring all of them. A jury subsequently awards those 6 occupants, collectively, $15 million.

Does the condo association have to pay $15 million to the Property Management Company [whose employee was 100% negligent in the scope of his employment] pursuant to this indemnification clause?

The answer is: IT DEPENDS!

a. To be specific, the answer is NO, the condo association need not pay $15 million to the Property Management Company if the purpose of the Property Manager's meeting was about the alteration, repair, or maintenance of the condo association. Why? Because such language is indeed included in the current Maryland anti-indemnity statute, which prohibits such indemnification.

b. But the answer is YES, the condo association must indeed pay $15 million to the Property Management Company if the purpose of the Property Manager's meeting was about the management or operation of the condo association. Why? Because such language in not included in the current Maryland anti-indemnity statute and thus such indemnification is not prohibited by current Maryland law. HB 1146 would solve that anomaly / loophole.

5. I should note that 23 States (NOT including Maryland) have enacted anti-indemnity statutes in the real estate context that are considerably more stringent than both Maryland law and HB 1146. Those 23 other States also prohibit indemnification in various real estate contracts when the 1st party – the indemnitor – is required to indemnify the 2nd party – the indemnitee – and the 1st party is partially negligent. Thus, these 23 other States (but not Maryland) also prohibit indemnity provisions in various real estate contracts even if, for example, the indemnitor is 1% at fault and the indemnitee is 99% at fault.