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—  
SPEAKER PRO TEM  
—

Environment and Transportation  
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*Subcommittees*

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## **Delegate Stein Testimony in Support of HB 1146**

### **Courts - Unenforceable Indemnity and Costs of Defense Agreements**

Chairman Clippinger, Vice Chairwoman Bartlett, and Members of the Judiciary Committee:

Since 1974 Maryland has had a statute (Section 5-401(a) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland) 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.

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

But the current law has a loophole (you might call it a technical omission) in that this prohibition of indemnification, whereby the first party must indemnify the second party if the second party is 100% negligent and the first 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 first party should not have to indemnify the second party whenever the second party is 100% negligent and the first party is 0% negligent. Whether or not this prohibition of indemnification is unenforceable should not be based upon the type of real estate activities involved.

This bill, HB 1146, would correct that loophole by saying that the prohibition on this type of indemnification does apply to the MANAGEMENT or OPERATION of a building or structure.

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 first party — the indemnitor — is required to indemnify the second party — the indemnitee — and the first 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.