Testimony of Phil Goldberg for the American Tort Reform Association

Senate Judicial Proceedings Committee, SB 680
"State Government—Public Welfare Actions—Determinations and Settlements"
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Good afternoon. My name is Phil Goldberg. I am a resident of Montgomery County and have been proud to call this state my home since my wife and I bought our home here in 1998. I also am a member of the Maryland Bar, practicing in the Washington, D.C. office of Shook Hardy & Bacon, LLP. Today, I am testifying on behalf of the American Tort Reform Association (ATRA), which is a broad-based coalition of businesses, municipalities, associations, and professional firms that promote fairness, balance, and predictability in civil litigation, in opposition to this legislation.

ATRA opposes SB 680 because it would give the Attorney General unprecedented authority to sue individuals and companies that do business in this State. As you know, the Maryland Constitution empowers the Attorney General to investigate, commence, and prosecute civil actions in which the State may be interested, *as directed by the General Assembly*. Md. Const. Art. V, § 3. The bill, however, would effectively grant the Attorney General open-ended authority. It would create a new, vague and novel cause of action that is unparalleled in scope and power and abandons bedrock legal principles including fault and causation. Specifically, the bill invents a "public welfare action" in which the Attorney General could unilaterally decide what is or is not in the public's welfare and bring a civil enforcement action against any person or entity that it decides should pay the State.

Of significant concern is that under SB 680, a person or entity would no longer have to have wrongfully caused an alleged public welfare injury for which it is sued. Rather, the Attorney General would have sole authority to decide who can be forced to pay for a public welfare condition in the State irrespective of the law and facts. And, the person sued could no longer defend itself by showing it did not unlawfully cause the alleged problem.

Instead, a factfinder would determine "total liability" for the alleged public welfare condition. But, the bill provides no criteria defining what that liability entails, how it is determined, or how damages the State collects from the lawsuits could be spent. It then gives the factfinder the authority to apportion those damages among the entities the Attorney General decided to sue. Again, the bill offers no guidance for how to do so. As discussed below, this "comparative responsibility" concept is not the law in *any* state. In addition, the factfinder could make one person or entity pay for the *entire* public welfare problem if "equity requires," but does not define when this would be appropriate.

In these lawsuits, it would be irrelevant if the defendant did nothing to unlawfully cause the situation at issue, that other people or businesses are actually responsible, or if nobody is at fault. The Attorney General could still decide to sue people and entities over the alleged public welfare condition and make them pay money to the State.

In addition, the legislation gives the Attorney General the ability to pursue litigation over the same public welfare condition into perpetuity—even after getting settlements and awards from a batch of defendants. There is no end to how many lawsuits the Attorney General can file over an alleged public welfare condition and who the Attorney General can sue. But, the bill exempts these cases from the Joint Tortfeasor Act so those who are sued cannot bring others into the case. As a

result, the Attorney General would have unfettered authority to decide who should have to pay these public welfare claims, which can lead to *political*, not purely legal decisions as to who the State sues.

Liability law, particularly when pursued by the State, is supposed to be objective, with clear guidelines for what conduct may give rise to liability and how to engage in activities in the State in a lawful, non-liability inducing way. When the Attorney General brings the legal weight of the State against anyone, it must result from a dispassionate assessment of the law and facts, not political interests. This bill is not an appropriate way to deal with matters affecting the public welfare.

The Comparative Responsibility Provisions in SB 680 Have No Foundation in American Law

As indicated, one of the chief problems ATRA has with this legislation is that it can require a person or entity to pay the State money damages even it did not unlawfully cause the alleged public welfare condition at issue in the case. Causation has long been considered the bedrock of all liability law. *See* Dan B. Dobbs, *The Law of Torts* § 180, at 443 n.2 (2001) ("proximate cause limitations are fundamental" to tort liability). Yet, SB 680 seeks to replace causation with a vague notion of "comparative responsibility" that, as used in this legislation, is a version of "enterprise liability" that has no basis in the legal history in Maryland or any other state. These theories seek to impose liability on an entire industry, abandoning the need to establish the responsibility of a particular company.

When it comes to determining liability for damages, Maryland has followed contributory negligence since the doctrine was first adopted over 175 years ago in *Irwin v. Sprigg*, 6 Gill 200, 205 (Md. 1847). The defendant must have unlawfully caused the injury for which it is sued. Maryland has never and does not follow enterprise liability of any kind, including market share, risk contribution or comparative responsibility—as sought here. And, for good reason. Getting rid of causation, regardless of why or how, has been widely discredited around the country.

There have only been a handful of courts that have experimented with causation alternatives; none would apply in this situation. In these states, the courts did not merely apportion liability according to a share of the market or some vague concept of comparative responsibility. The goal was to reverse the burden of proof under the belief that the defendants in these narrow situations were better positioned to determine whose product actually harmed the plaintiff. That litigation involved a highly unusual fact pattern: expecting mothers were administered the drug DES during pregnancy, which caused injury to their daughters that would not be diagnosed for decades. By reversing the burden of proof on causation, the courts figured that the manufacturers would likely have records of where and when their drugs were sold and could exculpate themselves from liability.

The most expansive version of this liability was adopted in Wisconsin's DES litigation. *See Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984). However, the court expressly warned against expanding this concept to create liability, where merely offering a product for sale could give rise to liability. Even then, the Wisconsin legislature stepped in to ensure it could <u>not</u> be used in situations like those envisions in SB 680. The Legislature stated that it needed "to assure[] that business may conduct activities in [the State] without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sol or promoted, or which were made and sold decades ago." Wis. Stat. § 895.046(1g). Yet, that is what SB 680 would do.

SB 680's "comparative responsibility" provisions are simply outside of the legal mainstream. The overwhelming majority of courts have rejected all enterprise liability theories, including when applying Maryland law. There is no support for these provisions and they should not be enacted.

The Attorney General Already Has Extensive Consumer Protection Authority

ATRA also opposes SB 680 because it would delegate expansive authority to the Attorney General to pursue anyone for any reason, simply by invoking the vague concept of "consumer protection." That is because the new public welfare claim can include any claim "for consumer protection," but that term, like many terms in this bill, is not defined. However, in Maryland, as in other states, the Attorney General already has extensive, well-defined consumer protection authority.

Specifically, the Attorney General has the authority to pursue any entity that violates the Maryland Consumer Protection Act (MCPA). *See* Md. Code Ann., Com. Law §§ 13-201, et seq. The Maryland Supreme Court has stated that the Attorney General has extensive leeway with respect to these public enforcement actions. *See Wheeling v. Selene Finance LP*, 250 A.3d 197, 218 (Md. 2021) (recognizing that MCPA's "public enforcement mechanisms are set up to prevent potentially unfair or deceptive trade practices from occurring, even before any consumer is injured"); *State v. Philip Morris Inc.*, 1997 WL 540913, at *17 (Md. Cir. Ct. May 21, 1997) ("Under the CPA, the State is entitled to pursue any and all causes of action that reasonably fall within the broad scope of the statute."). In addition, the Attorney General has broad investigatory authority through its Division of Consumer Protection. There is no indication that these authorities are too restrictive and need to be augmented by enacting the new and entirely unbounded consumer protection action in SB 680.

Indeed, ATRA has long been concerned with the misuse of consumer protection acts. Creating this vague new consumer protection public welfare claim with few, if any, limitations would provide no safeguards against its abuse. It is ATRA's experience that when attorneys general have too much discretion, they have brought lawsuits in the name of consumer protection that have nothing to do with protecting consumers. *See* generally Cary Silverman & Jonathan Wilson, *State Attorneys General Unforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. Kan. L. Rev. 209 (2016). They are political in nature.

For example, in the District of Columbia, the Attorney General is suing energy companies over climate change. Among other things, the Attorney General is alleging that it is misleading, and therefore a violation of the District's Consumer Protection Procedures Act, for the energy companies to earnestly discuss their sustainability efforts, commitment to developing alternative energy sources, and work related to fighting climate change—solely because they produce and sell fuels that emit carbon. The lawsuit asserts that it should not matter that these are truthful statements about the companies' investments, goals and policy positions. These cases have nothing to do with protecting real consumers; they are an abuse of government enforcement actions. *See* Phil Goldberg, *The Weaponization of Consumer Protection Laws*, The Legal Intelligencer, Jan. 25, 2024.

The Maryland General Assembly should not facilitate this type of litigation abuse by expressly giving the Attorney General the ability to bring a public welfare claim for any reason against anyone in the name of consumer protection. State lawsuits should have to adhere to the rule of law.

Conclusion

Liability law in Maryland, as in other states, must continue to be objective, with well-defined elements and defenses. People and business must have notice and a clear understanding of what conduct is lawful activity and what is considered misconduct that can give rise to liability. This objectivity also safeguards the liability system from abuse—regardless of who files the claims.

ATRA appreciates that there are many issues of importance to consumer protection and public welfare. ATRA's opposition to this legislation does not, in any way, suggest otherwise. The answer, though, is not empowering the Attorney General to subjectively decide who to sue, based on concepts that do not exist in any other jurisdiction.

No other state in the country has given its attorney general the authority included in SB 680. They understand that courts are places of law and are not to be turned into ATM machines for the state to take private money for solving public problems irrespective of facts or law. SB 680 should be rejected because it does not adhere to these longstanding legal principles.

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