

SENATE BILL 189

D3
SB 368/20 – JPR

(PRE-FILED)

1lr1318
CF HB 213

By: **Senator West**

Requested: October 30, 2020

Introduced and read first time: January 13, 2021

Assigned to: Judicial Proceedings

A BILL ENTITLED

1 AN ACT concerning

2 **Courts – Prohibited Indemnity and Defense Liability Agreements**

3 FOR the purpose of prohibiting a provision in a contract or an agreement with a design
4 professional for professional services that requires the design professional to
5 indemnify or hold harmless certain parties unless the design professional is at fault
6 for causing the loss, damage, or expense indemnified; prohibiting a provision in a
7 contract or an agreement with a design professional for professional services that
8 requires the design professional to defend certain parties against liability or certain
9 claims; providing that certain provisions of law may not be interpreted to prohibit a
10 certain otherwise enforceable indemnity or hold harmless agreement from including
11 recovery of certain attorney's fees and defense costs in cases where the fault of the
12 promisor or its derivative parties is determined to be the proximate cause of the
13 defense costs to be indemnified; defining certain terms; and generally relating to
14 indemnity and defense liability agreements.

15 BY repealing and reenacting, with amendments,
16 Article – Courts and Judicial Proceedings
17 Section 5–401(a)
18 Annotated Code of Maryland
19 (2020 Replacement Volume)

20 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
21 That the Laws of Maryland read as follows:

22 **Article – Courts and Judicial Proceedings**

23 5–401.

24 (a) (1) **(I) IN THIS SUBSECTION THE FOLLOWING WORDS HAVE THE**

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 MEANINGS INDICATED.

2 (II) "DEFEND" MEANS TO PAY FOR DEFENSE COSTS OR TO
3 FURNISH COUNSEL AT THE EXPENSE OF THE PROMISOR FOR THE PURPOSE OF
4 DEFENDING A PROMISEE OR THE PROMISEE'S INDEPENDENT CONTRACTORS,
5 AGENTS, EMPLOYEES, OR INDEMNITEES AGAINST CLAIMS ALLEGED OR BROUGHT
6 AGAINST THE PROMISEE OR THE PROMISEE'S INDEPENDENT CONTRACTORS,
7 AGENTS, EMPLOYEES, OR INDEMNITEES BY A THIRD PARTY IN ANY COURT OR OTHER
8 TRIBUNAL, INCLUDING FORMS OF ALTERNATIVE DISPUTE RESOLUTION REQUIRED
9 BY LAW OR CONTRACT, BEFORE THE COURT OR TRIBUNAL HAS REACHED A FINAL
10 DETERMINATION OF FAULT.

11 (III) "DEFENSE COSTS" MEANS REASONABLE FEES OF
12 ATTORNEYS AND EXPERT WITNESSES, COURT COSTS, AND RELATED EXPENSES
13 ACTUALLY INCURRED BY A PARTY IN THE DEFENSE OF A CLAIM OR AN ALLEGATION
14 OF LIABILITY IN CONNECTION WITH LITIGATION, ARBITRATION, OR ALTERNATIVE
15 DISPUTE RESOLUTION PROCEEDINGS.

16 (IV) "DERIVATIVE PARTIES" MEANS A PARTY'S
17 SUBCONTRACTORS, AGENTS, EMPLOYEES, OR OTHER PERSONS FOR WHICH THE
18 PARTY MAY BE LIABLE OR RESPONSIBLE AS A RESULT OF ANY STATUTORY, TORT, OR
19 CONTRACTUAL DUTY.

20 (V) "DESIGN PROFESSIONAL" MEANS:

21 1. A LICENSED ARCHITECT, AS DEFINED IN § 3-101 OF
22 THE BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE;

23 2. A CERTIFIED INTERIOR DESIGNER, AS DEFINED IN §
24 8-101 OF THE BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE;

25 3. A LICENSED LANDSCAPE ARCHITECT, AS DEFINED IN
26 § 9-101 OF THE BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE;

27 4. A PROFESSIONAL ENGINEER, AS DEFINED IN § 14-101
28 OF THE BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE; OR

29 5. A PROFESSIONAL LAND SURVEYOR, AS DEFINED IN §
30 15-101 OF THE BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE.

31 (VI) "FAULT" MEANS:

32 1. A BREACH OF CONTRACT;

1 **2. A NEGLIGENT, RECKLESS, OR INTENTIONAL ACT OR**
2 **OMISSION CONSTITUTING A TORT; OR**

3 **3. A VIOLATION OF APPLICABLE STATUTES OR**
4 **REGULATIONS.**

5 **(VII) “PROFESSIONAL SERVICES” MEANS SERVICES OR WORK**
6 **THAT CONSTITUTE THE PRACTICE OF A PROFESSION REGULATED BY, OR FOR WHICH**
7 **LICENSURE IS REQUIRED UNDER, TITLE 3, TITLE 8, TITLE 9, TITLE 14, OR TITLE 15**
8 **OF THE BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE.**

9 **(2)** A PROVISION, covenant, promise, agreement, or understanding in, or
10 in connection with or collateral to, a contract or agreement relating to architectural,
11 engineering, inspecting, or surveying services, or the construction, alteration, repair, or
12 maintenance of a building, structure, **HIGHWAY, ROAD**, appurtenance or appliance,
13 including moving, demolition, and excavating connected with those services or that work,
14 purporting to indemnify the promisee against liability for damages arising out of bodily
15 injury to any person or damage to property caused by or resulting from the sole negligence
16 of the promisee or indemnitee, or the agents or employees of the promisee or indemnitee, is
17 against public policy and is void and unenforceable.

18 **[(2)] (3)** A PROVISION, A covenant, a promise, an agreement, or an
19 understanding in, or in connection with or collateral to, a contract or an agreement relating
20 to architectural, engineering, inspecting, or surveying services, or the construction,
21 alteration, repair, or maintenance of a building, a structure, **A HIGHWAY, A ROAD**, an
22 appurtenance, or an appliance, including moving, demolition, and excavating connected
23 with those services or that work, purporting to require the promisor or indemnitor to defend
24 or pay the costs of defending the promisee or indemnitee against liability for damages
25 arising out of bodily injury to any person or damage to property caused by or resulting from
26 the sole negligence of the promisee or indemnitee, or the agents or employees of the
27 promisee or indemnitee, is against public policy and is void and unenforceable.

28 **(4)** A PROVISION IN, OR IN CONNECTION WITH, A CONTRACT OR AN
29 **AGREEMENT WITH A DESIGN PROFESSIONAL FOR PROFESSIONAL SERVICES**
30 **PURPORTING TO REQUIRE THE DESIGN PROFESSIONAL TO INDEMNIFY OR HOLD**
31 **HARMLESS THE PROMISEE, THE PROMISEE’S INDEPENDENT CONTRACTORS,**
32 **AGENTS, EMPLOYEES, OR INDEMNITEES, OR ANY OTHER PERSON AGAINST LOSS,**
33 **DAMAGES, OR EXPENSES IS VOID AND UNENFORCEABLE UNLESS THE FAULT OF THE**
34 **DESIGN PROFESSIONAL OR ITS DERIVATIVE PARTIES IS THE PROXIMATE CAUSE OF**
35 **THE LOSS, DAMAGE, OR EXPENSE INDEMNIFIED.**

36 **(5)** A PROVISION IN, OR IN CONNECTION WITH, A CONTRACT OR AN
37 **AGREEMENT WITH A DESIGN PROFESSIONAL FOR PROFESSIONAL SERVICES**
38 **PURPORTING TO REQUIRE THE DESIGN PROFESSIONAL TO DEFEND A PROMISEE,**

1 THE PROMISEE'S INDEPENDENT CONTRACTORS, AGENTS, EMPLOYEES, OR
2 INDEMNITIES, OR ANY OTHER PERSON AGAINST LIABILITY OR CLAIMS FOR DAMAGES
3 OR EXPENSES, INCLUDING ATTORNEY'S FEES, ALLEGED TO BE CAUSED, IN WHOLE
4 OR IN PART, BY THE PROFESSIONAL NEGLIGENCE OF THE DESIGN PROFESSIONAL
5 OR ITS DERIVATIVE PARTIES, WHETHER THE CLAIM IS ALLEGED OR BROUGHT IN
6 TORT OR CONTRACT, IS AGAINST PUBLIC POLICY AND IS VOID AND
7 UNENFORCEABLE.

8 (6) THIS SUBSECTION MAY NOT BE INTERPRETED TO PROHIBIT AN
9 OTHERWISE ENFORCEABLE INDEMNITY OR HOLD HARMLESS PROVISION IN ANY
10 CONTRACT OR AGREEMENT FROM INCLUDING RECOVERY OF REASONABLE
11 ATTORNEY'S FEES AND DEFENSE COSTS ACTUALLY INCURRED BY THE PROMISEE TO
12 DEFEND AGAINST THIRD-PARTY CLAIMS FOR DAMAGES, LOSSES, OR EXPENSES,
13 ALLEGED IN ANY COURT, TRIBUNAL, OR ALTERNATIVE DISPUTE RESOLUTION
14 PROCEDURE REQUIRED OF THE PROMISEE BY LAW OR BY CONTRACT, IN CASES
15 WHERE THE FAULT OF THE PROMISOR OR ITS DERIVATIVE PARTIES IS DETERMINED
16 TO BE THE PROXIMATE CAUSE OF THE DEFENSE COSTS TO BE INDEMNIFIED.

17 [(3)] (7) This subsection does not affect the validity of any insurance
18 contract, workers' compensation, any general indemnity agreement required by a surety as
19 a condition of execution of a bond for a construction or other contract, or any other
20 agreement issued by an insurer.

21 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
22 October 1, 2021.