

# SENATE BILL 368

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0lr1565  
CF 0lr1684

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By: **Senator West**

Introduced and read first time: January 24, 2020

Assigned to: Judicial Proceedings

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## 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 (2013 Replacement Volume and 2019 Supplement)

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  
25 MEANINGS INDICATED.

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



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

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

(IV) “DERIVATIVE PARTIES” MEANS A PARTY’S SUBCONTRACTORS, AGENTS, EMPLOYEES, OR OTHER PERSONS FOR WHICH THE PARTY MAY BE LIABLE OR RESPONSIBLE AS A RESULT OF ANY STATUTORY, TORT, OR CONTRACTUAL DUTY.

(V) “DESIGN PROFESSIONAL” MEANS:

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

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

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

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

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

(VI) “FAULT” MEANS:

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,**  
39 **THE PROMISEE'S INDEPENDENT CONTRACTORS, AGENTS, EMPLOYEES, OR**

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

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

16           **[(3)](7)** This subsection does not affect the validity of any insurance  
17 contract, workers' compensation, any general indemnity agreement required by a surety as  
18 a condition of execution of a bond for a construction or other contract, or any other  
19 agreement issued by an insurer.

20           SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect  
21 October 1, 2020.