Hawaii Transportation Association
Driving Hawaii's Economy

March 21, 2011

TESTIMONY BEFORE THE HOUSE COMMITTEE ON TRANSPORTATION ON SB 824 SD2 RELATING TO MOTOR CARRIERS

Thank you Chair Souki and committee members. I am Gareth Sakakida, Managing Director of the Hawaii Transportation Association (HTA) with over 400 transportation related members throughout the state of Hawaii.

Hawaii Transportation Association supports this bill which seeks to correct an unfair situation where motor carriers are required to sign contracts / agreements indemnifying entities for claims or liabilities regardless of fault.

These entities are generally the motor carriers' customers, or facilities where the loading or unloading of cargo, or pick up or drop off of passengers, take place.

Motor carriers are primarily small, locally owned businesses who cannot afford to be barred from the facilities that require indemnification. No matter how one-sided or onerous, they must sign the agreements. However, it is very unfair that the motor carriers must defend and hold harmless these indemnitees in cases where the motor carriers are not at fault in the matter.

Motor carriers in essence becomes an insurer for the indemnitees. This shifting of liability through contract completely contradicts sound public policy. One of the primary reasons for assigning liability is to persuade the offending party to change its behavior. In these instances, where another entity is at fault but is indemnified by the motor carrier, there is nothing the motor carrier can do to change its behavior and make things safer.

These types of provisions are against the common law tradition in the United States that each person is responsible for his or her own actions. It is simply unfair for motor carriers to be forced to cover the losses that arise through no fault of their own.

Unfortunately, motor carriers have no leverage in the matter making it next to impossible to negotiate these provisions without the assistance of state statute.

Hawaii's motor carriers are not alone in this suffrage as 25 other states have recognized the injustice and passed anti-indemnity legislation.

All we want is fairness. If the motor carrier is negligent, then the motor carrier should pay. If another party is negligent, that other party should pay and should not be shielded from their obligations or negligence.

Thank you.

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TESTIMONY OF ALISON POWERS

HOUSE COMMITTEE ON TRANSPORTATION
Representative Joseph M. Souki, Chair
Representative Linda Ichiyama, Vice Chair

Monday, March 21, 2011
9:00 a.m.

SB 824, SD 2

Chair Souki, Vice Chair Ichiyama and members of the Committee, my name is Alison Powers, Executive Director of Hawaii Insurers Council. Hawaii Insurers Council is a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately 40% of all property and casualty insurance premiums in the state.

Hawaii Insurers Council supports the intent of SB 824, SD 2, which would prohibit transportation service contracts requiring motor carriers to indemnify other parties, often commercial property owners, regardless of fault. We believe that Section 2 of the bill creates a more level playing field.

However, Hawaii Insurers Council **strongly opposes Section 3**, which mandates premium rebates to motor carriers, presumably from their commercial motor vehicle insurers. Section 3 of SB 824, SD 2 is confusing, impossible for insurers to implement, and unnecessary.

Section 3 of SB 824, SD 2 is confusing. Part of this section states (page 4, lines 14 – 18) that "any coverage for the indemnification described in section 2 of this Act...shall be deemed to terminate as to any transportation services contracts." Does this mean that even fault-based liability of the motor carrier is terminated? Does this mean that if

indemnity to the motor carrier is in the policy that it automatically voids the transportation services contact in its entirety? The insurance coverages in question are the bodily injury and property damage liability coverages contained in a commercial motor vehicle policy, which protect the motor carrier in the event one of their drivers is at fault in causing the damage. We do not believe it is in the best interests of anyone to void these coverages because of the presence of a transportation services contract; we do not think that the presence or lack of a transportation services contact changes the fundamental purpose of the insurance policy.

Section 3 also states (page 4, lines 18 – 19) that "the motor carrier shall not be liable to the insurer for such terminated coverage." Insurers provide insurance coverage to motor carriers. We do not understand how or why an insured motor carrier would be liable to its insurer. The rights and responsibilities of the insurer and motor carrier are contained in the insurance policy; the insurer protects its insured against certain liabilities, not the other way around.

The last part of this section of the bill states that the insurer must provide indemnification to the motor carrier for things contained in the transportation services contract. Therefore, part of this section states that the insurers must return money for coverage, while another part states that said coverage must still be provided.

Section 3 of the bill is also impossible for insurers to implement. Subject to various terms and conditions, the coverages contained in commercial motor vehicle insurance policies provide protection for the insured against the liability of its drivers. Section 3 assumes that there is some specific premium-bearing coverage or endorsement in the policy that directly deals with issues referenced in Section 2 of the bill. This is not the case. There is no way for an insurer to determine how much premium, if any, to return to the motor carrier. In addition, many insurers of motor carriers will have never paid additional indemnity or paid additional defense costs on a claim that is the subject of this bill.

Finally, Section 3 of SB 824, SD 2 is unnecessary. The testimony of the HTA and some of its members indicate that insurers have defended and/or paid claims that they would not have under this bill. However, the instance of such "extra" payments is very infrequent and would not result in a change in the insurers' premiums. Mandating a premium rebate for potential coverage that is or was unused is akin to a taxpayer seeking a tax refund for not using a state park or state service.

For these reasons, we respectfully request that Section 3 be deleted in its entirety.

Thank you for the opportunity to testify.