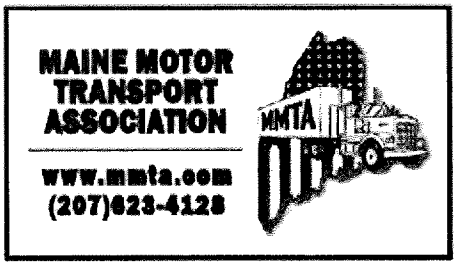
TESTIMONY OF
Brian Parke
L.D. 1761, "An Act to Prohibit Indemnification Agreements"



Good afternoon, Senator Bailey, Representative Mathieson, and members of the Committee on Health Coverage, Insurance and Financial Services. My name is Brian Parke and I am the President and CEO of the Maine Motor Transport Association and a resident of Brunswick. The Association is comprised of more than 1,870 member companies, whose employees make up a large portion of the almost 34,000 people who make their living in the trucking industry in Maine.

I am also the Trust Administrator of our group self-insurance program, the MMTA Workers' Compensation Trust which has given me a front row seat to the abuse of indemnification agreements and I am here today to testify in support of LD 1761.

We want to start by thanking Rep. Morris for bringing this issue to the forefront because it provides a more level playing field for businesses – many small businesses in particular – who do not have the buying power and leverage of the larger companies they do business with.

Much of my testimony today comes from testimony I delivered in the 125th legislature fourteen years ago. At that time, MMTA was pursuing legislation similar to this one and we were able to successfully accomplish the goals of LD 1761, but it was specific to transportation contracts and not all contracts. For reference, you can find the result of our successful advocacy in Title 10 MRSA Chapter 215-A: §1459 with the heading **Indemnity agreement in motor carrier transportation contract void**.

However, our non-trucking members have not benefitted from such protection and they have been forced into difficult negotiating positions when it comes to contracts that would not be considered a "Motor carrier transportation contract" that is defined in §1459. It is important to note that since implementation, we have not seen any negative unintended consequences, nor have we heard of any from our members, from insurers, or from the shippers our members contract with.

So we are supporting this bill because the principles that make it good public policy for trucking are easily transferrable to all Maine contracts as is proposed in LD 1761. In our case, the effect of these indemnification clauses before §1459 was to eliminate the incentive for the shipper to meet its responsibilities and duties in a prudent and reasonable manner. In essence, such a clause made the

motor carrier the shipper's insurer and such a shifting of liability through contract completely contradicted sound public policy. And this is true for electricians working for a developer on a jobsite, excavators working on large-scale solar projects, landscapers working on commercial properties and even independent consultants asked to show up to a company facility to train employees. If you can think of a situation where a small company contracts with a large company, it is somewhat likely that the large company will include an indemnification provision in the contract knowing the small company needs the work more than the large company needs them to be the ones to perform it.

When you get down to the heart of the issue, one of the primary reasons for assigning legal liability is to persuade the offending party to regulate its behavior. So in the case of trucking prior to §1459, where the shipper was at fault but was nevertheless indemnified by the motor carrier, there was nothing the motor carrier could do to change its own behavior to make things safer. That ability lay solely with the shipper before 2011.

And this is not just a theoretical exercise – these indemnification agreements are negatively impacting Maine companies. At the back of my testimony, I share a real-life example that happened to a Maine trucking company where a large national retailer negligently loaded a trailer that injured the truck driver, but due to an indemnification provision in the contract, the small Maine trucking company was responsible for the civil judgement and workers' compensation claim because the liability had been transferred to them. We also provide another example of how indemnification agreements can discourage safety and we would highly recommend you reading those examples.

The takeaway from providing those examples is that situations like those can't happen now due to §1459 which means it is in the large retailer's self-interest to play an active role in load securement and safety which didn't exist before. And we are here today advocating for this same protection in all Maine contracts impacting all other industries.

Finally, we do have a suggestion for a possible amendment to the bill for you to consider. One of the objections to our bill back in 2011 was that the moment the law passed, existing contracts that expired in the future needed to be opened up and possibly be renegotiated. I'm not a lawyer, but I think the fact that it is only that ***provision*** within a contract is ***unenforceable*** makes it pretty clear that existing unexpired contracts do not have to be re-done if this bill passes. But it is something for you to consider in an effort to be transparent and address any concerns going forward.

Thank you for your consideration and for allowing us to testify today. I would be happy to answer any questions the committee has throughout this process.

EXCERPT FROM MMTA's LD 727 TESTIMONY – MARCH 2011

Examples of why this issue was so important to many of our members then and why LD 1761 is so important to our non-trucking members now.

Floyd Thayer is the President of Ed Thayer, Inc. out of Oxford, Maine who would have been here today if he wasn't out of state. He is also on the Board of Directors of the MMTA, as well as a Trustee for our self-insured workers' compensation Trust and he asked that I try to personalize this issue by shining a light on how this unfair practice impacted him.

Floyd's father started Thayer's Express in 1977 and in 1982 he incorporated it as Ed Thayer, Inc. in Oxford Maine. As a small, family-run business, the company struggled for many years to provide meaningful employment to truck drivers, mechanics and office personnel and they are proud to now employ about 40 people.

The economic pressures that his father worked through to build a self-sustaining trucking company were not much different than they are today. The increasing cost of diesel fuel, the ability to afford to pay good wages and offer decent benefits, escalating insurance premiums and keeping safe equipment on the road are all things that caused sleepless nights both then and now.

Operating a business is not for the weak of heart because there are a lot of things that can go wrong – some that you can control, and some you can't. Mr. Thayer described one of the more frustrating moments of his career that happened in 2002 when one of his drivers was injured at a large retailer in Auburn when he was unloading the trailer and product fell on him. This caused serious injury to the driver's shoulders and his back, and triggered multiple surgeries.

Everyone knew from the beginning that the retailer who loaded the freight did so in a careless way and admittedly didn't take reasonable steps to secure the cargo and ETI's driver was the unfortunate victim of their negligence. What became apparent, however, was that in the company's haste to build their book of business and keep their fleet moving freight, they had entered into an indemnification provision when they signed the contract with the retailer.

I remember vividly the surprise and dismay in Floyd's voice when he called me to ask if this unscrupulous provision in the contract that was signed by his dispatcher could possibly mean that his small trucking company in Oxford, Maine would be responsible for the negligence of the large, national retail chain. And I wish I had a better answer for him.

The result of this injury was that the driver got $700,000 in his civil claim against the retailer, which was Floyd's company's responsibility due to the indemnification provision in their contract. If they had to pay $700,000 out of their pocket, there is little doubt that they would have had to declare bankruptcy because there is no way they could have afforded it operating on such slim profit margins. As it was, they were fortunate to have had general liability coverage that paid the claim, but the underwriter undoubtedly noticed the huge payout and the claim also caused a significant increase in their workers' compensation experience modification factor because they didn't get reimbursed for the entire value of the claim – and this impacted the company for the three years it showed up on the calculation.

In both cases (general liability and workers' compensation insurance) this adverse experience caused their premiums to increase all because the national retailer passed their liability on to ETI and I submit to you that this is not fair. Sure, they could have turned down the business had they known of the indemnification provision, but why should they have to decide on increasing their potential liability or laying off their drivers simply because the retailer holds more leverage in the business relationship?

In the trucking industry, you don't make money if the wheels aren't turning with freight on board. Like many other industries, margins are tight and good paying loads are at a premium because it seems many shippers focus solely on price and not on a carrier's quality and reputation for service. If a carrier doesn't agree to haul a load under certain terms, there is a good chance someone else will, which means the shipper holds most of the cards in a contractual relationship.

With your indulgence, I would like to provide another example of how detrimental these provisions can be to the safety of not only the carrier's driver, but the general public as well, has to do with the shipment of hazardous materials.

By law, a shipper is required to notify the carrier when the cargo the shipper is offering for transportation contains hazardous materials. Without this legislation and with the common type of contractual indemnification clause this bill would address, a shipper could mistakenly fail to notify the carrier of the presence of hazardous materials, which would also probably result in a lower cost for the transportation.

Such failure to notify the carrier (which, in turn is how emergency responders are notified) could lead to serious consequences in the event of an accident, and the motor carrier would be obligated to cover the damages resulting from the accident or a spill. As in Mr. Thayer's example, since the shipper would not be out of pocket, it would have no incentive to ensure mistakes like this aren't made in the future.