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January 7, 2026

Senator Anne Carney, Chair
Representative Amy Kuhn, Chair
Members of the Judiciary Committee

Testimony in OPPOSITION to LD 1761, An Act to Prohibit the Transfer of Liability Relating to a Party's Own Negligence or Liability in Contracts, As Amended

Dear Senator Carney, Representative Kuhn, and Members of the Judiciary Committee:

On behalf of the Retail Association of Maine and the Maine Grocers and Food Producers Association, we appreciate the opportunity to testify in opposition to LD 1761, as amended.

At the outset, we want to be clear: we share the stated intent of this legislation. We agree that businesses should not be forced to assume liability for negligent or wrongful acts they did not cause and could not control. As the bill's sponsor articulated, fairness in contracting and protection against inappropriate risk shifting are legitimate and important policy objectives.

In practice, however, many Maine retailers, grocers, and food producers already operate in full alignment with those principles. Our concern is not with the goal of the bill, but with its execution. Even as amended, LD 1761 remains overbroad, imprecise, and legally ambiguous, and risks producing consequences that directly undermine business certainty, risk management, and economic stability in Maine.

Indemnification provisions commonly used by Maine businesses are narrowly tailored and well-established, both in Maine and nationally. They do not require vendors or service providers to indemnify a company for that company's own negligence or misconduct. Instead, indemnification is typically limited to risks squarely within the vendor's control, such as:

- The vendor's own negligence
- Failure to comply with applicable law
- Breach of representations or warranties
- Breach of confidentiality or data-security obligations
- Infringement of third-party rights
- Discriminatory or unlawful employment practices
- Information-security incidents originating with the vendor

These provisions are not punitive or unfair. They are risk-allocation tools, designed to ensure that responsibility rests with the party best positioned to prevent harm or obtain appropriate insurance coverage. This is a foundational principle of commercial contracting and a critical component of doing business responsibly.

While the committee amendment meaningfully improves upon the original bill, it introduces new ambiguity rather than resolving core concerns. The amended bill voids provisions that transfer "liability for negligence arising out of a party's own negligence" while simultaneously creating an exception for agreements related to "a party's own assumption of risk or indemnification." The use of the term "indemnification" in the exception, without clarification as to how it differs from the prohibited "transfer of liability," creates internal inconsistency.

From a business and legal perspective, this lack of precision invites confusion in contract drafting, uncertainty in risk management, and costly litigation to divine legislative intent. Maine businesses should not be forced to operate in a gray area where standard, good-faith contractual provisions may later be deemed void.

Indemnification clauses typically include both an obligation to indemnify and an obligation to defend. These are distinct concepts. The duty to defend is triggered by allegations, not by a final determination of fault. Under the current language, businesses may be forced to absorb substantial defense costs in cases where they are not the responsible or knowledgeable party—precisely the opposite of what sound risk allocation is intended to achieve. This outcome discourages efficient contracting and places Maine businesses at a competitive disadvantage.

The amended bill also fails to address scenarios involving concurrent or proportional fault, which are common in real-world commerce. For example, if a manufacturer provides contaminated food and a retailer is alleged to have contributed to harm by not removing the product quickly enough during a peak period, is proportional indemnification permitted? The bill offers no clarity. This uncertainty makes it difficult for businesses to structure contracts that fairly reflect shared responsibility and creates unnecessary exposure.

Importantly, courts already possess the authority to void indemnification provisions that attempt to shield parties from intentional wrongdoing, fraud, or unconscionable conduct. Additional statutory restrictions are unnecessary and risk overreaching into private, arms-length contracting between sophisticated parties. Private businesses should retain the ability to mutually agree upon lawful, well-understood mechanisms for managing liability, subject to existing judicial oversight.

In short, while we respect and support the intent behind LD 1761, the bill— even as amended— goes too far and lacks the clarity necessary to avoid unintended harm. It introduces uncertainty where stability is essential and disrupts long-standing, responsible contracting practices relied upon by Maine's retailers, grocers, and food producers.

For these reasons, we respectfully urge the Committee to oppose LD 1761 as amended, or to further refine the language to narrowly and clearly target only those indemnification practices that truly violate the bill's stated purpose.

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