TESTIMONY OF STACY BERGENDAHL

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DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

In opposition to L.D. 1761

Originally titled An Act to Prohibit Indemnification Agreements

Presented by Representative Joshua Morris

Before the Joint Standing Committee on Judiciary

January 7, 2026 at 2:00 p.m.

Senator Carney, Representative Kuhn, and members of the Judiciary Committee, I am Stacy Bergendahl, Senior Staff Attorney at the Bureau of Insurance. I am here today to testify in opposition to LD 1761 as amended by the amendment considered by the Joint Standing Committee on Health Coverage, Insurance and Financial Services and circulated for consideration by this committee as of December 15, 2025.

Our opposition stems from the inability to predict the universe of unintended consequences that could result from the variety of contractual provisions that the bill would prohibit. The risk of legal liability is a fact of modern life, not only for businesses but also for drivers and homeowners.

One common purpose of indemnification agreements is to allocate responsibility for damages to third parties that might accidentally be harmed by some joint activity engaged in by the parties to the agreement. An example of this is a corporation indemnifying its directors and officers for the consequences of actions taken on behalf of the corporation.[1] As another example, indemnification clauses in construction contracts often provide protection to property owners and general contractors against "deep pocket" lawsuits seeking to hold them responsible for the actions of a subcontractor. The contract also could make the general contractor responsible for providing liability insurance and workers' compensation insurance.

In general, any indemnification clause that a contract might contain is one of the matters the parties consider in their negotiations. Supporters of the bill are concerned about the potential for abuse when these clauses appear in contracts of adhesion, where one party has little or no bargaining power. Essentially, a "take it or leave it" situation.

However, as drafted, the bill would apply more broadly. Furthermore, the question of the validity of a contract of adhesion and the presence or absence of good faith negotiation has traditionally been a matter for the courts in Maine. There is already a remedy available to companies who assert that a contract provision should not be enforced because the other party has violated its duty of good faith and fair dealing. Adding statutory restrictions of this kind would not streamline the process or eliminate the need for judicial action, because parties

[1] See 13-C M.R.S. § 852, 857.

would still have to prove whether their particular contract language fit within the confines of the statute in the event of a challenge.

Currently, in Maine and in other states, restrictions on indemnification clauses are limited to particular industries to address specific issues. For example, Maine has a statute limiting indemnification clauses that is applicable only to contracts involving motor carriers.[2] This is consistent with the approach taken in many other states, where similar provisions are limited to industries such as construction, engineering and design, and snow removal.[3] Should the bill move forward, we ask the committee to consider limiting the applicability to industries where the problems are most prevalent.

There are also drafting problems with the insurance-related exemptions that would need to be corrected if the bill moves forward in a form where those exemptions remain necessary. Although the bill exempts insurance policies, it is also necessary to exempt similar types of risk transfer agreements such as workers' compensation group self-insurance and municipal liability risk pools. It is also important to preserve the ability of Party A to promise to include Party B as an additional insured in Party A's insurance policy. The bill incorrectly describes this as an agreement "including" Party B as an additional insured. That is not something A and B have the power to do. What A and B can do is enter into an "agreement to include" B as an additional insured. Party A will then fulfill that agreement through a separate agreement with their insurance company. And finally, if a particular type of insurance is to be mentioned at all as the illustrative

[2] 10 MRS § 1459.

[3] See https://www.mwl-law.com/resources/anti-indemnity-statutes-50-states/ for a chart listing the applicability of provisions in other states.

example of what the bill does not prohibit, it should be liability insurance, not workers' compensation, which is a no-fault system in which the policyholder's negligence is a concept with no legal meaning.

Thank you, I would be glad to answer any questions now or at the work session.