

LATE

DATE: February 16, 2009

TO: CPNtestimony@Capitol.hawaii.gov

HEARING DATE: Tuesday, February 17, 8:30 a.m., Conference Room 229

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

SUBJECT: SB 154, Relating to Torts

Dear Chair Baker, Vice Chair Ige, and Committee Members:

The American Council of Engineering Companies of Hawaii (ACECH) is an organization of more than 65 consulting engineering firms in Hawaii that employ approximately 1,300 professional, technical and administrative support personnel in the state of Hawaii. Our member firms play an essential role in the planning, design and construction management of our state's infrastructure and residential and commercial development.

As president of ACECH, I appreciate this opportunity to express our **support of SB 154, Relating to Torts**. SB 154 brings fairness to the judicial system for engineering design professionals. For most our member firms, the current professional liability risk for design professionals far outweighs their financial compensation from these projects.

For a small business engineering design firm, potential professional and personal liability is at the forefront in every project. A certain amount of risk is a reality of doing business, but the current situation under joint and several liability is unfair. This is particularly so for highway projects where the claims and awards are usually large, creating risks under joint and several liability that far outweigh an engineering firm's potential profit. Under the current law with joint and several liability, a design professional who is named in a claim (even frivolously), and who may be found by a jury to be only one percent (1%) liable for damages, can be forced to pay far more than their fair share of damages.

Engineering design work on projects is performed in accordance with State and Federal design standards and codes, and are reviewed and approved by government agencies. For a small business engineering firm serving as a subconsultant on a State project, the contract is typically less than \$50,000 (with an accompanying profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional from the design of these projects, and some protection for small business design professionals is warranted.

SB 154 provides for fairness in allocation of risk while still keeping the design professional responsible for their work product. Design professionals who are found less than 25% at fault will be responsible only for the percentage of damages attributed to them, and will not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability will apply.

The fear on the part of small business design professionals significantly reduces the available pool of qualified design professionals willing to participate in State projects. With the many infrastructure projects anticipated in the near future, the impact of having small business firms declining work on State projects will divert this work go to large, predominately mainland firms who self-insure and are able to absorb more risk, but who take their profits out of the state.

We appreciate the continuing efforts of your committee and the members of the Senate to assist the small businesses in Hawaii. Thank you for this opportunity to testify in support of SB 154.

Norman M. Kawachika, P.E.
President, American Council of Engineering Companies of Hawaii



THE LIMTIACO CONSULTING GROUP
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

February 16, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229

Honorable Senators Rosalyn Baker (Chair), David Ige (Vice Chair), and Members of the Committee on Commerce and Consumer Protection

Subject: SB 154, Relating to Torts

Dear Chair Baker, Vice Chair Ige, and Committee Members:

The Limtiaco Consulting Group, Inc., a Hawaii-owned small business engineering firm, appreciates this opportunity to **support of SB 154, Relating to Torts.**

As a small business owner and design professional, every project has the potential to impact my professional and personal livelihood, not to mention that of my employees and subconsultants. While a risk is a reality of business, the current joint and several liability conditions are unfair when particularly when considering negligence is not required.


Under current law, a design professional who is pulled into a claim (even frivolously) and is found by a jury to be only one percent (1%) liable for damages could be forced to pay far more in damages. For example, a project worth \$50,000 could generate \$5,000 in profit; however, if found only 1% liable for a claim, the design professional could be forced to pay \$1,000,000 worth of damages.

SB 154 promotes fairness in risk allocation, but SB 154 does not eliminate liability as design professionals. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and would not be subject to joint and several liability. Joint and several liability would apply if the design professional is twenty-five percent (25%) or more liable.

This bill will improve our business climate and will result in job growth, particularly with the many small business that make up a large portion of Hawaii's engineering industry.

As a life-long resident, I sincerely appreciate your commitment to protect and enhance our beautiful Hawaii. Thank you for the opportunity to testify.

Best Regards,
The Limtiaco Consulting Group, Inc.


John H. Katahira
Principal



Gray • Hong • Nojima & Associates, Inc.
CONSULTING ENGINEERS

Daniel S.C. Hong, PE
Sheryl E. Nojima, PhD, PE
Michael H. Nojima, PE, LEED AP
Paul T. Matsuda, PE, LEED AP
Rusty B. Bungeyao
Gavin Y. Masaki, PE

841 Bishop Street, Suite 1100
Honolulu, Hawaii 96813-3915
Telephone: (808) 521-0306
Fax: (808) 531-8018
email@grayhongnojima.com

February 17, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229
(Senate Committee on Commerce & Consumer Protection)

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

Subject: SB 154, Relating to Torts

Dear Chair Baker, Vice Chair Ige, and Committee Members,

Gray, Hong, Nojima & Associates, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to our **support of SB 154, Relating to Torts.**

SB 154 brings a measure of fairness to the judicial system for design professionals, whose work results in beneficial public works projects that greatly improve the quality of life for the State's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects.

Under joint and several liability, a design professional who may be found to be only one percent (1%) liable for damages in a lawsuit related to a highway accident may be forced to pay far more than his/her share of damages. Often before going to trial, insurance companies settle for the design professional's insurance coverage for claims on particular projects. It is important to keep in mind that our work on such projects is performed to State and Federal design standards and codes, and is reviewed and approved by government agencies.

We are chiefly concerned with the risks of third-party lawsuits; for example, those filed on behalf of the passenger who is injured by a drunk or speeding driver. When the responsible party's limited insurance is exhausted, it is simply unfair to consider design professionals as "deep pockets" and their professional liability insurance policies as a means to compensate the third party(ies) behold and amount proportional to the design professionals' degree of negligence. While firms may be able to obtain professional liability insurance, deductibles are high (>\$25,000) and the cost of fighting the lawsuit can be crippling to small businesses like ours. And if a firm has a claim, it becomes more difficult to obtain insurance coverage in the future.

This burden to small design firms is particularly troublesome when our role in the life of a highway (and our profits from these projects is so small. We are typically involved for a short window of only one or two years, while the State has the long-term responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. The risk to our small firms is simply out of balance with their involvement and the profits they receive. However, while we favor the full abolition of joint and several liability, we believe this bill is a reasonable compromise, with the design professional still subject to joint and several liability if they are greater than 25% at fault.

RE: SB 154, Relating to Torts

February 17, 2009

Page 2

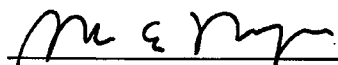
Because of the risks and escalating professional liability insurance premiums associated with doing highway work, many of our small firms no longer participate in highway projects. This reduces the pool of qualified consultants available to do the work, reduces innovation and quality design, and also favors large, predominately mainland firms. These large firms essentially self-insure and are able to absorb more risk, but their profits go out of the state. With the upcoming anticipated increases in infrastructure funding, the damage to the State's economy from out small firms not participating is a real negative impact for the State.

SB 154 provides for more fairness in allocation of risk. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and not be subject to joint and several liability. If the design professional is twenty-five (25%) or more liable, joint and several liability would still apply. We have looked at tort reform legislation in other states and feel SB 154 is a reasonable and fair compromise to the full abolition of joint and several liability enacted in a number of states.

ACECH appreciates the opportunity to testify in support of SB 154. Please contact me if you have any questions regarding our testimony.

Sincerely,

GRAY, HONG, NOJIMA & ASSOCIATES, INC.



Sheryl E. Nojima, PhD, PE
President



KAI HAWAII
STRUCTURAL & FORENSIC ENGINEERS

Ken K. Hayashida, P.E.
Michael P. Hunnemann, P.E.

February 13, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

Subject: SB 154, Relating to Torts

Dear Chair Baker, Vice Chair Ige, and Committee Members,

KAI Hawaii, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to express our **support of SB 154, Relating to Torts**. SB 154 attempts to bring fairness to the judicial system for design professionals, whose work results in design beneficial public highway projects that greatly improve the quality of life for the State's citizens. However, for most firms, the professional liability risk for design professionals far outweighs their financial reward from these projects.

As a small business owner and design professional, my potential professional and personal liability is at the forefront of my mind in every project I consider. While a certain amount of risk is a reality of doing business, the current situation under joint and several liability seems very unfair, especially for small firms. This is particularly so for highway cases, where the claims and awards can be large, creating risks under joint and several liability that far outweigh our firm's potential profit. Under the current law, a design professional who is pulled into a claim (even frivolously), but who may be found by a jury to be only one percent (1%) liable for damages, could be forced to pay far more than his/her share of damages.


It is unfair that my company should be so at risk because of my minor involvement in a public works project, especially if I am not in any way negligent. Engineering work on such projects is performed to State and Federal design standards and codes, and are reviewed and approved by government agencies. As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

SB 154 provides for more fairness in allocation of risk, but certainly does not allow us to escape our responsibilities. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and would not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants willing to participate in State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

We appreciate the continuing efforts of your committee and the members of the Senate to assist small businesses in Hawaii. Thank you for the opportunity to testify in support of SB 154.

Sincerely,


Ken Hayashida, P.E.
President

31 North Pauahi Street, Second Floor * Honolulu * Hawaii * 96817
Telephone: (808) 533-2210 * Facsimile: (808) 533-2686 * E-mail Address: mail@kaihawaii.com

SB 154

RELATING TO TORTS

**KEN HIRAKI
VICE PRESIDENT - GOVERNMENT & COMMUNITY AFFAIRS
HAWAIIAN TELCOM**

FEBRUARY 17, 2009

Chair Baker and Members of the Senate Commerce and Consumer Protection and
Committee:

I am Ken Hiraki, Vice President of Government and Community Relations,
testifying on behalf of Hawaiian Telcom on SB 154, "RELATING TO TORTS."

Hawaiian Telcom does not oppose providing protection to the design
professional but cannot support this bill unless it is amended to clarify that public utilities
are also exempt from joint and several liability. As currently drafted, this measure
exempts design professionals from joint and several liability in tort cases involving a
public road or rights of way, without providing a similar exemption for public utilities.
Without an exemption, this bill discriminates against public utilities by unfairly exposing
utilities to assume greater risk and legal liability in tort lawsuits than what was originally
intended under current law.

By way of background, Hawaiian Telcom utilizes the state and county roads and
rights of way to provide telecommunication services to the public. In tort cases involving
an accident involving a utility pole along the public roads and highways, utilities (joint
owners of the pole—telephone, electric, cable) such as Hawaiian Telcom, are often
sued together with the state and county government as well as others responsible for
the highway. Should the design professionals become exempt from joint and several
liability, by default plaintiffs will then target the only parties remaining such as utilities.

As a practical matter, this disparate shift in liability means that a utility will end up paying more than its assigned share of liability despite the fact that it is usually the government entity that determines where and under what conditions a utility pole may be placed along a road or highway.

The passage of this bill in this form will inevitably lead to increased lawsuits and expenses for utilities such as Hawaiian Telcom. As a matter of fairness, we request that SB 154 be amended to include a public utility exemption from joint and several liability as follows :

"§663-10.5 Government entity as a tortfeasor; public utility as tortfeasor; abolition of joint and several liability. [Notwithstanding] Any other law to the contrary notwithstanding, including but not limited to sections 663-10.9, 663-11 to 663-13, 663-16, 663-17, and [section] 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity. In any such case, where one of the other tortfeasors is a public utility, then, likewise, the public utility shall be liable for no more than that percentage share of the damages attributable to the public utility.

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county government, or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county. For purposes of this section, "public utility" shall have the meaning set forth in section 269-1.

For purposes of this section, the liability of a government entity shall include its vicarious liability for the acts or omissions of its officers and employees."

Based on the aforementioned, unless the bill is amended to provide an exemption for utilities from joint and several liability, Hawaiian Telcom is opposed to the passage of SB 154.

Thank you for the opportunity to testify.