HAWAII INSURERS COUNCIL
A trade association of property and casualty insurance companies

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TESTIMONY OF MICHAEL TANOUE

COMMITTEE ON CONSUMER PROTECTION AND COMMERCE
Rep. Angus L.K. McKelvey, Chair
Rep. Derek S.K. Kawakami, Vice Chair

Monday, January 27, 2014
2:10 p.m.

HB 2048

Chair McKelvey, Vice Chair Kawakami, and members of the Committee on Consumer Protection and Commerce, my name is Michael Tanoue, counsel for the Hawaii Insurers Council, a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately one third of all property and casualty insurance premiums in the state.

The Hawaii Insurers Council **opposes** Section 2 of HB 2048.

Section 2 of HB 2048 seeks to amend Section 431:10-242, Hawaii Revised Statutes, to empower an arbitrator (in addition to the court) to award attorneys' fees and costs to a policyholder or beneficiary when an insurer which has contested its liability under the policy is ordered by the arbitrator to provide coverage. The current version of Section 431:10-242 and decisions of the Hawaii appellate courts only permit a court (not an arbitrator) to order an insurer to pay attorneys' fees and costs when the insurer is ordered to pay benefits.

The Hawaii Insurers Council opposes this expansion of Section 431:10-242 for at least four reasons.

First, while a court's order awarding attorneys' fees and costs is appealable by either the insured or the insurer as to both entitlement and amount, a similar decision of an arbitrator would not be appealable under Hawaii law.

Second, when contending parties seek a judicial ruling regarding an actual controversy between them (e.g., disputes over interpretations of business contracts, statutes, rules, and regulations) they file a complaint for declaratory relief pursuant to Section 632-1, Hawaii Revised Statutes. Section 632-1, itself, does not empower a court to award attorneys' fees or costs to the prevailing party in a declaratory relief action. Disputes between insurers and their policyholders regarding coverage under insurance policies are also adjudicated in declaratory relief actions filed pursuant to Section 632-1, Hawaii Revised Statutes. Section 2 of HB 2048 would empower arbitrators to award attorneys' fees and costs to policyholders who prevail, a power that is not granted to courts or arbitrators in other, non-insurance-related declaratory relief situations. Put another way, Section 2 of HB 2048 would treat insurance disputes differently from all other declaratory relief cases.

Third, Section 2 of HB 2048 is a one-way street. Only policyholders who prevail in insurance coverage disputes are awarded attorneys' fees and costs by the arbitrator. Insurers that prevail are not similarly entitled to an award of attorneys' fees and costs.

Fourth, while the Hawaii Insurers Council has not analyzed or quantified the effect Section 2 of HB 2048 would have on insurance premiums, awards of attorneys' fees in arbitration disputes could adversely impact the cost of insurance to the detriment of policyholders in the State.

Based on the foregoing, the Hawaii Insurers Counsel opposes HB 2048 and requests that it be held. Thank you for the opportunity to testify.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF H.B. 2048

To: Chairman Angus McKelvey and Members of the House Committee on Consumer Protection and Commerce:

My name is Bob Toyofuku and I am presenting testimony on behalf of the Hawaii Association for Justice (HAJ) in support of H.B. 2048.

This bill is protects consumers and helps alleviate the burden on our courts.

Under current law, when an insurance company unjustifiably forces a consumer to go to court to receive their benefits under an insurance policy, the judge makes the insurance company pay for the reasonable attorney's fees incurred by the insured customer. However, if the insured customer chooses arbitration as a means to force the insurer to provide benefits, a consumer does not receive an award of reasonable attorney's fees and costs if the insured customer wins. Therefore, insured customers who are improperly denied benefits are, from a practical perspective, forced to file a lawsuit in court rather than seek arbitration.

The proposed bill would allow consumers the same right to reasonable attorney's fees and costs as currently is provided in court cases. This bill will allow more insurance matters to be decided by arbitration without burden upon our courts. Additionally, this bill will allow consumers to enforce their rights under the insurance contract without being forced to go through the more costly and burdensome route of filing a lawsuit.

This bill also makes clear that insurance companies that sell insurance to Hawaii consumers covering local Hawaii risks must comply with Hawaii law. While the vast majority of insurance companies comply with Hawaii law, there are some that claim to be exempt under the existing statutory language. This bill will close that loophole.

Thank you for the opportunity to testify on this measure. Please feel free to contact me should there be any questions.

National Association of
Professional Surplus Lines
Offices, Ltd.

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To: Rep. Angus L.K. McKelvey, Chair
House Committee on Consumer Protection and Commerce

From: Keri Kish, Director of Government Relations

Re: **HB 2048 – Insurance Contracts**
NAPSLO Position – Oppose

Date: Monday, January 27, 2014
2:10 p.m., Conference Room 325

Aloha Chair McKelvey and Members of the Committee:

The National Association of Professional Surplus Lines Offices (NAPSLO) is opposed to HB 2048. If enacted, this bill will adversely affect the sale of surplus lines insurance products in Hawaii.

NAPSLO is the national trade association representing the surplus lines industry and the wholesale distribution system. Our membership consists of approximately 400 brokerage member firms, 100 company member firms and 200 associate member firms, all of whom operate over 1,500 offices representing approximately 15,000 to 20,000 individual brokers, insurance company professionals, underwriters and other insurance professionals in the 50 states and the District of Columbia.

The surplus lines market plays an important role in providing insurance for hard-to-place, unique or high capacity (i.e., high limit) risks. Often called the "safety valve" of the insurance industry, surplus lines insurers fill the need for coverage in the marketplace by insuring those risks that are declined by the standard underwriting and pricing processes of admitted insurance carriers. With the ability to accommodate a wide variety of risks, the surplus lines market acts as an effective supplement to the admitted market.

Surplus lines insurers are able to cover unique and hard-to-place risks because, as nonadmitted insurers, they are not required to comply with rate and form filing regulations that apply to admitted insurance carriers. As a result of this flexibility, surplus lines insurers are able to react to market changes and accommodate the unique needs of insureds that are unable to obtain coverage from admitted carriers. This results in cost-effective solutions for consumers that are not "one size fits all," but are instead skillfully tailored to meet specific needs for non-standard risks.

Section 1 of HB 2048, as drafted, would severely restrict the regulatory flexibility historically granted to surplus lines insurance and is the fundamental difference between admitted and non-admitted (surplus lines) insurance. Specifically, this bill will make applicable approximately 50 statutory provisions previously inapplicable to surplus lines policies. Indeed, many of which are actually incompatible with the surplus lines market.

We believe adopting this bill will have numerous unintended consequences and the current statute should be left as is. Amending the statute as proposed in Section 1 of HB 2048 will impose unnecessary procedural requirements on surplus lines placements, which are already regulated under the surplus lines laws, increasing the difficultly of compliance, and making it virtually impossible to write certain types of policies that need to be delivered or issued in Hawaii as the home state. For example, HB 2048 would apply the statutory provision requiring use of the standard fire policy form to surplus lines policies, unlike what is required currently. This causes problems for surplus lines policies when there is a unique policy that must be customized to the individual characteristics of the risk. A good example in Hawaii would be homes near volcanos that require fire coverage. If the admitted carriers decline to write this coverage, the risk comes to the nonadmitted market/surplus lines market. The surplus lines market would underwrite these unique risks individually. If required to use the standard form, the surplus lines market cannot fulfill the role of filling the gaps where unique insurance requirements may exist. Passing this bill could eliminate the surplus lines market for fire policies and many other risks as well.

If passed, this bill could drastically reduce insurance options to Hawaii consumers.

For these reasons, NAPSLO asks the committee to hold this bill in committee.

PCI

Property Casualty Insurers
Association of America
Advocacy. Leadership. Results.

To: Rep. Angus L.K. McKelvey, Chair
House Committee on Consumer Protection and Commerce

From: Mark Sektnan, Vice President

Re: **HB 2048 – Insurance Contracts**
PCI Position – Oppose

Date: Monday, January 27, 2014
2:10 p.m., Conference Room 325

Aloha Chair McKelvey and Members of the Committee:

The Property Casualty Insurers Association of America (PCI) is opposed to HB 2048 which would adversely affect the sale of surplus lines insurance products in Hawaii.

PCI is a national trade association that represents over 1,000 property and casualty insurance companies. In Hawaii, PCI member companies write approximately 34.6 percent of all property casualty insurance written in Hawaii. PCI member companies write 42.2 percent of all personal automobile insurance, 43.5 percent of all commercial automobile insurance and 58.9 percent of the workers' compensation insurance in Hawaii.

Section 1 of HB 2048, as drafted, would severely restrict the regulatory flexibility historically granted to surplus lines insurance is recognition of the fundamental difference between accepted and non-admitted (surplus lines) insurance. By definition, surplus lines insurance is only available through specialized brokers to consumers who are looking to cover unique risks and cannot find coverage in the admitted (regulated) market. Specifically, this bill makes applicable to any surplus lines policy issued or delivered into Hawaii, approximately 50 statutory provisions, many of which are incompatible with the surplus lines market. This would impose unnecessary procedural requirements on surplus lines placements, which are already regulated under the surplus lines laws, increasing the difficulty of compliance, and would make it virtually impossible to write certain types of policies that need to be delivered in Hawaii (i.e., Hawaii home state policies) on a surplus lines basis. For example, HB 2048 would apply the statutory provision requiring a fire policy to follow the standard fire form policy to surplus lines policies, which would essentially eliminate the surplus lines market for fire policies, since surplus lines would only provide rate, not form flexibility for such a policy. The bill would make it difficult

for surplus lines carriers to fill their traditional role of filling the gaps where the insurance need is unique (e.g., expensive home near a volcano that needs fire cover).

The bill would therefore significantly reduce access to this important form of insurance for Hawaii consumers.

For these reasons, PCI asks the committee to hold this bill.

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LATE

HOUSE COMMITTEE
ON
CONSUMER PROTECTION AND COMMERCE

January 27, 2014

House Bill 2048 Relating to Insurance Contracts

Chair McKelvey and members of the House Committee on Consumer Protection and Commerce, I am Rick Tsujimura, representing State Farm Mutual Automobile Insurance Company (State Farm).

State Farm opposes House Bill 2048. House Bill 2048 does two things:

- First, it changes the nature of the decision that entitles an insured to attorneys' fees from "an order to pay benefits" to "an order to provide coverage". This appears to be an effort to address the Hawaii Supreme Court's decisions in Labrador v. Liberty Mut. Group and Mikelson v. United Services Auto. Ass'n. In both of those decisions, the Court noted that there must be an order to "pay benefits".

- Second, it broadens the application of this provision to include arbitrations as well as court proceedings. In Labrador v. Liberty Mut. Group, the Court made clear that there must be a judicial proceeding for HRS § 431:10–242 to apply.

State Farm believes that:

- Arbitration is intended to avoid the formalities, delays, expense, and vexation of ordinary litigation. It is not a suit, and the Hawaii Supreme Court recognized that in Labrador v. Liberty Mut. Group

- The purpose of the statute is to encourage insurers to resolve matters short of a lawsuit. Changing the law to require attorneys' fees in arbitration would defeat that.

- The net result of this will be for more matters to be taken to Court, resulting in greater burdens and costs on the court system.

We strongly urge the committee to hold this bill as it will not only abrogate case law, but it will work to undercut the established public policy to encourage out of court settlements by arbitration.

Thank you for the opportunity to present this testimony.