North Dakota Retail Association
ND Petroleum Marketers Association
North Dakota Propane Gas Association

LEGISLATIVE BULLETIN

HB 1175

January 27, 2021 – House IBL Committee

Chairman Lefor and Members of the House IBL Committee:

For the record, my name is Mike Rud. I'm writing on behalf of NDRA, NDPMA and NDPGA. As leaders from North Dakota business associations representing over 1500 retail store fronts and thousands of employees across the state, the North Dakota Retail and Petroleum Marketers Association as well as the North Dakota Propane Gas Association urge a "DO PASS" recommendation on HB 1175.

Our associations have been on the front lines providing essential services such as household goods, clothing, food and fuels since the pandemic began. NDRA/NDPMA and NDPGA believe the health and safety of our members, their employees, our customers and the general public is of paramount importance and remains our top priority.

Our associations have been working with national leaders in Washington, DC for about this same period of time attempting to get some business liability language is place. We feel strongly some liability language needs to be passed at both the federal and state levels to balance public health and safety with the economic realities that our members are facing. As the private sector contributes to the response, it faces liability challenges that governments do not. As a result, private companies require protection from unreasonable exposure.

Retailers are continually balancing the welcome prospect of renewed business and cash flow against the fear and cost of claims that could be made against them by customers, vendors, subcontractors, and others. These "third-party" claims, fueled by hungry plaintiffs' lawyers and a "lawsuit happy" culture pose real threats to our emerging business recovery. **It's our**

Association's understanding that over 6,000 lawsuits of this nature are pending already nationwide. These threats are so obvious that Congress continues to contemplate legislation to protect companies from such claims. Similarly, insurers are girding for increased third-party claims, sharpening pencils to invoke exclusions and issue reservation of rights letters.

As businesses remain open, they will face inevitable claims their retail outlet failed to protect third parties from exposure to the virus. The claims will be made by customers, as well as invitees who come on site to service the business and premises.

The claims will be that the business failed to take adequate protective measures with respect to people management and facilities maintenance. On people management, the claims will include that the business did not reconfigure and structure the premises consistent with various guidelines (e.g., CDC, state, and local guidelines regarding social distancing, mask wearing, flow and physical structure of the business). On facilities maintenance, the claims will predominantly be a failure to disinfect and filter air adequately, likely in terms of frequency, scope, and manner. While the CDC has been the leader in defining guidelines, the fact is not all businesses are created equal. Akin to the Americans with Disabilities Act compliance space, there will be plenty of room for hyper-technical "failures" to give rise to claims.

Customer and third-party claims will usually sound in negligence. Vendor claims (and anyone else who is on premises pursuant to a contractual relationship) will typically be negligence claims as well. The standard against which business is conducted will be measured in a lawsuit with a negligence claim will be that of the reasonably prudent business: what would a reasonably prudent business in these circumstances have done to protect its customers and invitees from contracting the virus? "Comply with the applicable guidelines" is just a starting point to mitigate the claims, but, by itself, it's insufficient. This is because the standard of care against which your business will be measured in any third-party claim will be a moving target.

Secondly, there is not a one-size-fits-all solution. The current understanding of the risk of infection rests on two key variables—time of exposure and proximity of infection source—both of which will vary considerably depending on the nature of the business and on geographic the

location of the business (population density, current infection rate). For example, big box retailers have the luxury of space that small shops do not. Businesses involving brief transactions (gas stations) have lower risk than experiential businesses (movie theaters, hair salons). And the risk of customer touch varies considerably: compare high-touch stores that have items that are not easily disinfected like furniture and home goods stores, with lower-touch venues with limited or easily disinfected touch surfaces, like restaurants. Some retailers have combinations of these differential risks under one roof.

House IBL Committee Members, as you can see there are just so many variables to this battle. Bottom line, if a business is doing all it can in terms of following Federal, State and local guidelines set forth during this pandemic to protect customers, employees and other folks visiting their stores, the state should help see to it a retailer will not be subject to a frivolous lawsuit while providing essential services in these unprecedented times.

Please vote "DO PASS" on HB 1175.