

1999 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2283

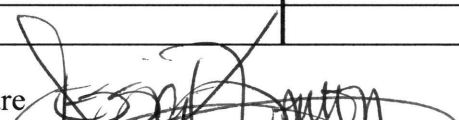
1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2283

Senate Industry, Business and Labor Committee

Conference Committee

Hearing Date February 1, 1999

Tape Number	Side A	Side B	Meter #
1	x		0-1800
Committee Clerk Signature 			

Minutes:

Senator Mutch opened the hearing on SB2283. All senators were present.

Senator Traynor introduced SB2283.

Calvin Rolfson, Bismarck attorney, testified in support of SB2283. His testimony is included.

Joel Gilbertson, Executive Vice President and General Counsel for the Independent Community

Banks of North Dakota, testified in support of SB2283.

Senator Mutch closed the hearing on SB2283.

Senator Sand motioned for a do pass committee recommendation. Senator Mathern seconded his motion. The motion for a do pass recommendation carried with a 7-0-0 vote.

Senator Thompson will carry the bill.

28510278

Date: 2/1/99

Roll Call Vote #: 2283

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate INDUSTRY, BUSINESS AND LABOR COMMITTEE Committee

- Subcommittee on _____
- or
- Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By SANO Seconded By MATHELN

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Sand	X				
Senator Klein	X				
Senator Krebsbach	X				
Senator Heitkamp	X				
Senator Mathern	X				
Senator Thompson	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment THOMPSON

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 1, 1999 11:59 a.m.

Module No: SR-20-1582
Carrier: Thompson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2283: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2283 was placed on the Eleventh order on the calendar.

1999 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2283

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2283

House Industry, Business, and Labor Committee

Conference Committee

Hearing Date February 8, 1999

Tape Number	Side A	Side B	Meter #
1	x		41.0-54.0
1		x	0-17.0
Committee Clerk Signature <i>Lisa Horner</i>			

Minutes:

CHAIRMAN BERG OPENED THE HEARING ON SB 2283; A BILL RELATING TO ATTORNEY'S FEES IN ACTIONS TO COLLECT DEBTS OR ENFORCE OBLIGATIONS IN COMMERCIAL LOAN TRANSACTIONS.

SENATOR TRAYNOR, Dist. 15, introduced SB 2283. He noted that it was good bill that he supported and would appreciate fair consideration from the committee.

CAL ROLFSON, Bismarck, testified in support of SB 2283 on behalf of the North Dakota Bankers Association. (See written testimony).

CHAIRMAN BERG asked about the distinction of the bill. Why is it good for commercial and not for Agriculture.

CAL said that the assumption was that in consumer loans, there may be a banker that may overshadow the contractor. They have negotiated with the Attorney General Office so it would not cause problems.

REP. KEISER asked if the lending institutions are going to require this. It sounds mutually but in reality the leverage is obviously with the lender.

CAL said that lending commercially today makes it not uncommon for every agreement to be negotiated.

REP. FROSETH asked if there was a set rule of thumb as to a reasonable attorney fee.

CAL said that it is set out by the court in a four prong test.

REP. THORPE asked if it makes the lenders more accessible.

CAL noted that it essentially makes borrowers 99% more responsible. There is the possibility of creating an additional cost but he could only stipulate.

REP. STEFONOWICZ asked why it is in the code as it is.

CAL said that historically, you could go back to the 1920's and 1930's where the banks were not corporate citizens of the state.

REP. KLEIN questioned the hourly rate paid to attorneys today.

CAL said it varies but is right around \$70 to \$90 per hour as a set amount. Most attorneys or companies do not operate on a per hour rate - rather they are held on retainer at \$100 to \$1000 a month or year. They do a number of foreclosures.

REP. GLASSHEIM asked why they should make the debtor pay the cost of prosecuting.

CAL said that other contract situations include payment of loans plus penalty.

CHAIRMAN BERG asked if it applies to second mortgages too as well as contracts for deeds.

CAL said that not contracts for deeds.

CHAIRMAN BERG asked if market value of building is below the amount of the debt, do you go after the debtor?

CAL said yes, commercially but not agriculturally related.

REP. LEMIEUX asked why this is changing now?

CAL said that they can't rely on history for the only reason it remains. We would like to get even with other states.

REP. LEMIEUX asked where someone would pay attorney fees.

CAL referred him to the instances in pages four and five of his written testimony.

JOEL GILBERTSON, Bismarck, testified in support of SB 2283 on behalf of the Independent Counsel of Banks of North Dakota. He simply stated that it should be a matter of contract law.

CHAIRMAN BERG asked what loan loss is. Is it declining?

JOEL said it varies place to place and bank to bank.

REP. ECKSTROM asked if the public should have trust in banks. If the wrong choices are made by the bank, it won't be a bank for long.

JOEL agreed and noted north Dakota's high success rate with their banks.

REP. STEFONOWICZ mentioned that he thinks it is a discriminatory application of the law to go after some and not others. Commercial versus agriculture.

REP. LEMIEUX asked what it cost in attorneys fees to collect. What does it cost the bank?

JOEL said it depends on the stage of the process. It can vary from \$500 to \$15,000. He said he would get further information for the committee.

REP. KEISER asked if this is a reciprocal relationship.

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House Transportation Committee

Bill/Resolution Number Sb 2283

Hearing Date February 8, 1999

JOEL said it depends on the cost.

CHAIRMAN BERG CLOSED THE HEARING ON SB 2283.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2283

House Industry, Business and Labor Committee

Conference Committee

Hearing Date 3-1-99

Tape Number	Side A	Side B	Meter #
2		x	471 - 1170
Committee Clerk Signature <i>Lisa Horner</i>			

Minutes: **SB 2283**

Chairman Berg opened the discussion of SB 2283.

Rep. Lemieux made a motion for a Do Not Pass.

Rep. Klein second the motion.

The roll call vote was 8 yea, 6 nay, 1 absent.

The motion carried.

Rep. Lemieux will carry the bill.

Date: 3-1-99
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2283

House Industry, Business and Labor Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken do not pass

Motion Made By Lemieux Seconded By Klein

Representatives	Yes	No	Representatives	Yes	No
Chairman Berg	/		Rep. Thorpe	/	
Vice Chairman Kempenich	/				
Rep. Brekke		/			
Rep. Ekstrom	/				
Rep. Froseth		/			
Rep. Glassheim					
Rep. Johnson		/			
Rep. Keiser		/			
Rep. Klein	/				
Rep. Koppang	/				
Rep. Lemieux	/				
Rep. Martinson		/			
Rep. Severson		/			
Rep. Stefonowicz	/				

Total (Yes) 8 No 6

Absent 1

Floor Assignment Lemieux

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 8, 1999 1:04 p.m.

Module No: HR-41-4213
Carrier: Lemieux
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2283: Industry, Business and Labor Committee (Rep. Berg, Chairman) recommends **DO NOT PASS** (8 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). SB 2283 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

SB 2283

**TESTIMONY BY
CALVIN N. ROLFSON
LEGISLATIVE COUNSEL,
NORTH DAKOTA BANKERS ASSOCIATION
IN SUPPORT OF
SENATE BILL NO. 2283**

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS CAL ROLFSON; I AM AN ATTORNEY PRACTICING LAW IN BISMARCK AND I AM ALSO THE LEGISLATIVE COUNSEL FOR THE NORTH DAKOTA BANKERS ASSOCIATION. I APPEAR IN SUPPORT OF SENATE BILL NO. 2283.

CURRENTLY IT IS UNLAWFUL FOR TWO CONTRACTING PARTIES IN CONTRACTS EVIDENCING DEBT (SUCH AS MORTGAGES AND PROMISSORY NOTES) TO MUTUALLY AGREE TO INCLUDE AN ATTORNEY'S FEES PROVISION IN THEIR CONTRACT. EVEN IF BOTH PARTIES WANTED TO DO SO, THEY COULD NOT UNDER OUR CURRENT LAW. THIS BILL PROPOSES TO AMEND NDCC §28-26-04 TO MODIFY THAT CURRENT RESTRICTION.

IN ALL OTHER CONTRACTS, IT IS LAWFUL TO MUTUALLY CONTRACT TO INCLUDE AN ATTORNEY'S FEES PROVISION. THAT MEANS THAT IN SOME CONTRACTS SUCH A PROVISION IS SUPPORTED BY LAW AND IN OTHER CIRCUMSTANCES IT IS NOT. THAT DISPARITY WOULD BE CORRECTED BY THIS BILL.

IT HAS BEEN THIS WAY FOR MANY YEARS. IN THE PAST THERE HAVE BEEN SOME ABUSES OF THIS PROVISION BY DEBTORS. HOWEVER, THINGS ARE CHANGING NOW, AND BANKS ARE BEGINNING TO MORE TIGHTLY EVALUATE

THEIR LENDING PRACTICES IN SOME CASES BECAUSE OF THIS LAW.

HISTORICAL NOTE

LAST SESSION SENATORS TRAYNOR AND KREBSBACH INTRODUCED A BILL NEARLY IDENTICAL TO THIS BILL, EXCEPT IT PERMITTED THE BORROWER AND LENDER TO AGREE TO A REASONABLE ATTORNEYS FEES PROVISION IN ALL CONTRACTS EVIDENCING DEBT, INCLUDING AGRICULTURAL LOANS, CONSUMER LOANS AND COMMERCIAL LOANS. THAT BILL (SB 2259) PASSED THE SENATE BY A VOTE OF 49-0, BUT WAS DEFEATED IN THE HOUSE DUE IN PARTICULAR TO A CONCERN THE ATTORNEY GENERAL'S CONSUMER FRAUD DIVISION HAD THAT THE BILL WAS TOO BROAD WHEN IT INCLUDED ALL LOANS (AG, COMMERCIAL AND CONSUMER LOANS). FOR THE PAST SEVERAL MONTHS, NDBA HAS WORKED WITH THE ATTORNEY GENERAL'S OFFICE AND NDBA HAS AGREED WITH THE ATTORNEY GENERAL TO HAVE THIS BILL ONLY APPLY TO COMMERCIAL LOANS AND NOT AGRICULTURAL OR CONSUMER LOANS. SINCE THIS BILL ONLY PERMITS THE CHARGING OF REASONABLE ATTORNEYS FEES IN COMMERCIAL LOAN TRANSACTIONS, THE ATTORNEY GENERAL'S OFFICE HAS NO OBJECTION TO THIS BILL. THEREFORE, THE CHANGES THIS BILL WILL MAKE IN THIS LAW WILL ONLY APPLY TO COMMERCIAL LOAN TRANSACTION. SUCH ATTORNEY FEE PROVISIONS IN AG AND CONSUMER LOANS WILL REMAIN UNLAWFUL AND VOID UNDER THIS BILL.

DEBTORS ARE INCREASINGLY AND OFTEN DELIBERATELY DELAYING PAYMENTS ON THEIR DEBTS IN THESE CASES IN ORDER TO USE THE FUNDS

ELSEWHERE. IN SOME CASES, THEY KNOW THERE IS NO WAY THAT BANKS CAN COLLECT REASONABLE ATTORNEY'S FEES IN THESE CLASSES OF DEBT - EVEN WHERE THE DEBTOR CAN CLEARLY MAKE TIMELY PAYMENTS, BUT CHOOSES NOT TO DO SO TO LEVERAGE HIS FINANCIAL POSITION IN HIS OTHER FINANCIAL AFFAIRS.

THE NEW LANGUAGE IN THIS BILL WILL GIVE THE LENDER SOME LIMITED LEVERAGE IN ORDER TO ALLOW THE LENDER TO BETTER ENCOURAGE COLLECTION OF THE COMMERCIAL LOAN PAYMENT WHEN IT IS DUE - SINCE THE BORROWER WOULD BE AWARE OF THE REASONABLE ATTORNEY'S FEES THAT MAY BE ADDED TO THE AMOUNT OWED. ATTORNEYS FEES WOULD BE ALLOWED ONLY IF THE BORROWER HAS NO DEFENSE TO THE ACTION.

HOW DOES THE COLLECTION OF ATTORNEY'S FEES TYPICALLY WORK?

NOTE THAT THE LANGUAGE OF SENATE BILL 2259 ONLY PERMITS COURTS TO ASSESS ATTORNEY'S FEES BY THE USE OF THE WORD "MAY." THAT MEANS THAT IT IS THE COURTS THAT DECIDE. ALSO, ONLY THE COURT DECIDES THE REASONABLENESS AND AMOUNT OF ANY ATTORNEY'S FEES THAT MAY BE ASSESSED. IN OTHER WORDS, IT IS NOT THE ATTORNEY FOR THE LENDER THAT MAKES THE DECISION AS TO WHAT AMOUNT IS REASONABLE - IT IS THE COURT. IT IS THEREFORE THE JUDGE THAT DECIDES WHAT IS REASONABLE, AND ONLY IF THE JUDGE DECIDES TO ASSESS AN AMOUNT AT ALL. TYPICALLY WHERE THERE IS A DEFENSE TO THE ACTION, NO FEES ARE ASSESSED.

ANY DEBTOR HAS THE RIGHT TO OBJECT TO THE PAYMENT OF

ATTORNEY'S FEES AND THE AMOUNT OF ATTORNEY'S FEES. THE COURT MAKES THE DECISION BASED UPON THE EVIDENCE PRESENTED BY BOTH LENDER AND DEBTOR.

IN ADDITION, REASONABLE ATTORNEY'S FEES WOULD BE AWARDED (IF ANY) ONLY WHEN THE LENDER PREVAILS IN AN ACTION TO COLLECT A NOTE, DEBT, OR FORECLOSURE OF A MORTGAGE OR SECURITY INSTRUMENT AS CURRENTLY SET OUT IN THE LAW.

OFTEN MANY DEFAULTING DEBTORS ARE "JUDGMENT PROOF" AND THEY WOULD ALSO THEN NOT BE AFFECTED BY AN AWARD OF ATTORNEY'S FEES, FOR OBVIOUS REASONS.

THEREFORE, UNDER THIS BILL, THERE WOULD BE MANY HURDLES A LENDER WOULD STILL NEED TO OVERCOME BEFORE SUCCESSFULLY HAVING REASONABLE ATTORNEY'S FEES ADDED TO ANY DEFAULTING COMMERCIAL DEBTOR'S COLLECTION AMOUNT:

- A. THE BORROWER WOULD NEED TO HAVE THE FUNDS TO MAKE PAYMENT, BUT WOULD HAVE CHOSEN NOT TO DO SO.
- B. THE BORROWER WOULD HAVE NO DEFENSE TO THE COLLECTION EFFORT.
- C. THE BORROWER COULD OBJECT TO ANY EFFORT BY THE LENDER TO RECOVER ATTORNEY'S FEES.
- D. THE COURT WOULD DECIDE IF ANY ATTORNEY'S FEES WOULD BE ASSESSED IN THE FIRST PLACE.

E. IF SO, THE COURT WOULD DETERMINE THE AMOUNT OF ATTORNEY'S FEES.

F. IF THE DEBTOR WAS JUDGMENT PROOF - THE LENDER WOULD STILL RECEIVE NOTHING.

THE NORTH DAKOTA BANKERS ASSOCIATION HAS SURVEYED SOME AREA STATES AND DETERMINED THAT THE SURROUNDING STATES OF MINNESOTA, KANSAS, WISCONSIN, AND MICHIGAN, ONLY TO NAME A FEW, DO ALLOW PAYMENT OF REASONABLE ATTORNEY'S FEES IN ALL CASES OF DEFAULT, INCLUDING AGRICULTURAL, CONSUMER AND COMMERCIAL LOAN DEFAULTS.

IT IS CURRENTLY UNFAIR LEGISLATIVE POLICY TO ALLOW SOME CONTRACTS TO INCLUDE ATTORNEY'S FEES PROVISIONS AND TO PROHIBIT PARTIES TO CONTRACT FOR ATTORNEY'S FEES IN OTHER CASES. THAT DISPARITY WOULD BE CORRECTED BY THIS BILL.

LENDERS ARE CONCERNED ABOUT THOSE BORROWERS WHO CONTRACT FOR A LOAN, BUT CANNOT PAY THE DEBT, IN WHICH CASE THE LENDER TYPICALLY GETS THE SHORT END OF THE RISK ANYWAY. HOWEVER, LENDERS ARE ARBITRARILY HANDCUFFED BY BORROWERS WHO CAN PAY THE DEBT, BUT DON'T DO SO - KNOWING THE LENDER DOES NOT WANT TO INCUR ATTORNEY'S FEES TO COLLECT OR LEVERAGE COLLECTION BECAUSE THEY WILL NEVER RECOVER THAT EXPENSE IN THESE TYPE OF CASES. LENDERS ALWAYS TRY TO WORK WITH A BORROWER HAVING PAYMENT DIFFICULTIES. THE LAST THING THE BANK WANTS IS A GOOD CUSTOMER WHO DEFAULTS ON A LOAN. THE NEXT

TO THE LAST THING LENDERS WANT IS TO HAVE A COMMERCIAL BORROWER WHO CAN PAY REFUSE TO DO SO BECAUSE HE KNOWS THE LENDER WON'T COLLECT IT BECAUSE THE BORROWER CAN'T RECOVER ATTORNEYS FEES DUE TO THIS LAW.

THERE IS NO LONGER A NEED TO CARVE OUT THIS SPECIAL AREA OF PROTECTION. THE RESTRICTIONS SET OUT IN THIS LAW AGAINST LENDERS IN THIS ONE CONTRACT AREA IS NO LONGER NEEDED OR APPROPRIATE. AMPLE JUDICIAL PROTECTION EXISTS TO CREATE A LEVEL PLAYING FIELD FOR BOTH DEBTOR AND THE LENDER IN COMMERCIAL LENDING TRANSACTIONS. UNDER OUR NORTH DAKOTA SUPREME COURT'S CURRENT INTERPRETATION OF THIS RESTRICTIVE STATUTE, LENDERS ARE EVEN PROHIBITED FROM ENFORCING CONTRACTS WITH ATTORNEY'S FEES PROVISIONS IN THEM THAT WERE WILLINGLY EXECUTED BY BOTH PARTIES IN ANOTHER STATE WHERE SUCH PROVISIONS ARE VALID, BUT WHEN THE ENFORCEMENT IS NECESSARY IN NORTH DAKOTA.

ON BEHALF OF THE NORTH DAKOTA BANKERS ASSOCIATION, I URGE YOUR FAVORABLE CONSIDERATION OF SENATE BILL 2283.