MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2061

2003 SENATE JUDICIARY

SB 2061

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2061

Senate Judiciary Committee

☐ Conference Committee

Hearing Date: January 15, 2003

Tape Number	Side A	Side B	Meter #
SB 2061	X		0.0 - 27.1
Committee Clerk Signature	Maria L Salberg		

Minutes: **Senator John T. Traynor, Chairman,** called the meeting to order. . Sen. Traynor requested meeting starts with testimony on the bill.

Testimony in support of SB 2061

Senator Thomas L. Trenbeath spoke on behalf of the bill- Attachment this is a uniform law that has been studied by the National Conferences of Commissioners on Uniform State Laws in which I am a member. The Committee has ten members in the state of ND (names meter .05). I will read my attached testimony (meter 1.1-6.4)

Senator John T. Traynor, Chairman asked what the difference is discussion between arbitration and mediation.

Senator Carolyn Nelson discussed "dispute resolution". (meter 6.8)

Testimony in opposition of SB 2061:

Douglas Bahr- attorney with Zuger Kirmis & Smith read Attachment (meter 13.0) Oppose to part of Bill-Arbitration Section 21 subsection 1-page 12 Minnesota has adopted these changes.

Sen. Trenbeath asked if a consumer could actually arbitrate with a big company? (meter 11.5 and 12.0)

Discussion between Mediation Vs Arbitration Douglas Bahr spoke that the primary differences:

Arbitration-you give up your right to make a decision or an appeal and a third party makes it

Mediation is non-binding and the two parties try to make a decision between themselves with a mediator who shuffles between rooms sometimes they can put pressure. Discussion of the awarding of attorneys fees. (meter 15.5)

Senator Dennis Bercier- would this effect Insurance companies from coming into the state or raise there premiums of ND? No

Testimony neutral to SB 2061:

Douglas Bahr - Civil Litigation Division, Office of the Attorney General to point out a "typo" page 4, line 2.

Discussion:

Amendment made by Sen. Trenbeath, seconded by Sen. Lyson

To correct page 4, line 1 as attached

Roll Call Vote: 6Yes. 0 No. 0 Absent

Motion carried, amendment passed.

Sen. Trenbeath moved a DO PASS as amended. Senator Dick Dever second the motion.

Roll Call Vote: 6Yes. 0 No. 0 Absent

Motion carried,

Carrier: Senator Thomas L. Trenbeath

30309.0101
Title.0200

Adopted by the Judiciary Committee
January 15, 2003

1-14-03

PROPOSED AMENDMENTS TO SENATE BILL NO. 2061

Page 4, line 1, replace "not" with "no" and after "may" insert "not,"

Page 4, line 2, after "2" insert a comma

Renumber accordingly

Date: January 15, 2003
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2061

Senate **JUDICIARY** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30309.0101

Action Taken Amended

Motion Made By Senator Thomas L. Trenbeath Seconded By Senator Stanley W. Lyson, Vice Chairman

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	X	
Sen. Stanley. Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) Six (6) No Zero (0)

Absent ALL PRESENT

Floor Assignment

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

Date: January 15, 2003
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2061

Senate **JUDICIARY** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass as Amended

Motion Made By Senator Thomas L. Trenbeath Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	X	
Sen. Stanley. Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) Six (6) No Zero (0)

Absent ALL PRESENT

Floor Assignment Senator Thomas L. Trenbeath

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

REPORT OF STANDING COMMITTEE (410)
January 17, 2003 9:23 a.m.

Module No: SR-09-0705
Carrier: Trenbeath
Insert LC: 30309.0101 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2061: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2061 was placed on the Sixth order on the calendar.

Page 4, line 1, replace "not" with "no" and after "may" insert "not,"

Page 4, line 2, after "2" insert a comma

Renumber accordingly

2003 HOUSE JUDICIARY

SB 2061

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2061

House Judiciary Committee

❑ Conference Committee

Hearing Date 3-3-03

Tape Number	Side A	Side B	Meter #
1	xx		45-end
1		xx	0-16.8
2	xx		12.9-13.5
Committee Clerk Signature	APenrose		

Minutes: 12 members present, 1 members absent (Rep. Klemin)

Chairman DeKrey: We will open the hearing on SB 2061.

Sen. Tom Trenbeath: Introduced the bill. Went through each section by section. We went through the National Conference on Uniform State Laws. SB 2061 relates to the Uniform Arbitration Act. The Uniform Arbitration Act was actually adopted by the Uniform Laws Commission back in 1955, it was adopted in ND in 1987. This is the first major revision of that body of law since that time. This is to modernize and update the current law. Arbitration is gaining popularity.

Rep. Delmore: You would say these two bills are more housekeeping bills.

Sen. Trenbeath: The first bill (SB 2061) are updates of existing law and 2nd bill (SB 2062) is housekeeping.

Rep. Kretschmar: Parties to a contract can agree to have differences decided by an arbitrator.

Sen. Trenbeath: That's right.

Rep. Kretschmar: No one can be forced into arbitration.

Sen. Trenbeath: That is the idea of arbitration. Thank you for that clarification. We are seeing this situation more and more, especially in situations where there are contractual agreement, disputes arise, they will arbitrated. There are situations where there are what we call "adhesion" contracts. That's the usual situation, and I see that in insurance contracts. Insurance on your car or house, you actually make a contract with the insurance company, but it is a contract that you are not able to negotiate other than levels of coverage.

Chairman DeKrey: Thank you. We will take further testimony in support of SB 2061.

Joel Gilbertson, American Insurance Association & Alliance of American Insurers:

Support (see attached testimony and amendments).

Rep. Delmore: I can understand that some insurance companies, but if we change that section of law, what does it do to the rights of appeal for others.

Mr. Gilbertson: What it does, if we take that out, what it does is allows it up to the parties to agree to whatever they want to do.

Rep. Delmore: It isn't a question of the insurance company, this law will apply to all kinds of circumstances beyond insurance.

Mr. Gilbertson: Yes. What I'm saying is that if we change it with the suggested change that we have submitted, that will not change that. Parties can still do whatever they want, set up non-binding arbitration, they can do that by agreement, if they want to set up binding arbitration they can do that as well.

Rep. Eckre: You said you wanted to add this amendment, because it raises havoc in the industry. So you are saying they both have to agree to this, or can one agree only.

Mr. Gilbertson: All parties have to agree to it. Everybody involved has to agree to it.

Rep. Onstad: Does this only affect insurance company to insurance company.

Mr. Gilbertson: No, it affects anybody involved in arbitration. All have to agree to arbitration.

The insurance industry usually wants binding arbitration.

Chairman DeKrey: Thank you. Further testimony in support.

Paul Sanderson, ND Domestic Insurance Co. and National Association of Independent Insurers: We support the Uniform Arbitration Act, but are opposed to this bill as it is currently written (see attached testimony and amendment).

Chairman DeKrey: Are you amenable to the Gilbertson amendments.

Mr. Sanderson: Yes.

Rep. Kretschmar: Under the current bill as it stands, you still have the right to appeal from a punitive damage award or attorney fees award.

Mr. Sanderson: The way I read the bill, the appeals process is limited to certain situations. As I understand the bill, you can't appeal the decision based on faulty law or that the arbitrator misapplied the law as it exists. The other problem in an arbitration proceeding is that the arbitrator is the sole determining factor on the discovery methods used and other evidence. In a case like punitive damage awards, under ND law, you have to show a history of discriminatory practice. Well, if the arbitrator doesn't allow that sort of evidence in, and then awards punitive damages based on a single occurrence. That's the problem we have based on the arbitrator's sole decision.

Rep. Kretschmar: In the initial agreement, in an arbitration, the parties set forth the agreement.

Mr. Sanderson: I believe they could set forth in their agreements whether or not punitive damage could be awarded.

Rep. Maragos: Did you folks provide any testimony in the Senate hearing on this.

Mr. Sanderson: I wasn't involved in the bill, but I believe we proposed the same amendments to the Senate.

Rep. Delmore: It seems to me that in arbitration, just like any other procedure we go through, it would be nice to have it both ways. I think if you're going to agree to set up things at the beginning, if things are awarded and things happen, if we take Joel's amendment, you are bound to this, then we take this amendment that says, yes but. What are we doing to the Uniform Law that we want to enact. We've had other uniform laws where frequently we haven't put in amendments to it because we are adopting uniform law.

Mr. Sanderson: How I would respond to that from the insurance industry is, if you passed a uniform arbitration act as exists it is fine. Insurance companies just won't use it. From our understanding and the people we represent, they say we're going to go and let one person decide to award $1 million dollars in punitive damages in a case, we won't take that chance and the result of that will be, instead of being cost efficient and quickly determined, if there is a dispute, it could lasts years in the court system. The injured party that should be getting the money from the insurance company, that's going to take a long time to get that money. If they went to arbitration, it is more quickly resolved. The insurance companies have said that they won't use it. We don't have to use it. Arbitration has to be agreed upon by all parties. They just won't use it, which is too bad because the process is set up for these types of situations. The insurance industry uses it far more than anybody else. That's their position and take on this.

Chairman DeKrey: Thank you for appearing. Further testimony in support of SB 2061.

Testimony in opposition to SB 2061. We will close the hearing.

(Reopened later in the afternoon session)

Chairman DeKrey: I am appointing a subcommittee to work on this matter, which consists of Rep. Kretschmar, Rep. Klemin and Rep. Onstad. Report back to the committee as soon as you have something.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2061

House Judiciary Committee

☐ Conference Committee

Hearing Date 3-18-03

Tape Number	Side A	Side B	Meter #
1		xx	9.6-14.7
Committee Clerk Signature	A Penrose		

Minutes: 13 members present.

Chairman DeKrey: What are the committee's wishes in regard to SB 2061.

Rep. Kretschmar: The subcommittee, which consisted of Rep. Klemin, Rep. Onstad and myself, met with both Paul Sanderson and Joel Gilbertson. They both had concerns with the bill regarding insurance company involved settlements. As far as Paul Sanderson's proposed amendments are concerned, we convinced him that the bill did exactly what he wants and that he had extra language. We want that to be reflected in the minutes for legislative intent so that it is the intent of our subcommittee and that the entire committee had Mr. Sanderson's proposed amendments are already a part of the bill, we don't have to adopt them. At least that is how the subcommittee felt. I told him that it would get into our minutes so that what the legislative intent on that, so that what they wanted, in our judgment, was a part of the way the bill currently written.

Rep. Klemin: Their concern was over the punitive damages and attorneys fees. The way the bill reads on page 12, section 21, the arbitrator does not have unbridled authority to award punitive damages or attorney fees. He can only do it if an award of that type would be authorized by law in a civil action involving the same plaintiff. Rep. Onstad, put the arbitrator on the same standards that would be in a court.

Rep. Kretschmar: The concern that Mr. Gilbertson had, he was representing American Insurance Association, is that insurance companies do make binding arbitration agreements all the time. The bill as we read it, binding arbitration is not an appealable action in an agreement that is made before a controversy arises. After a controversy arises, then binding arbitration's decisions could be appealed under this bill, and they wanted to make sure that their agreements would be upheld and the proposed amendment do this. On page 15, after line 27, the amendment drafted by Mr. Gilbertson and would fit in there, that it is clear in the bill that these insurance companies can make these agreements between themselves, and make them long before controversary's arise, so that they can agree that there is no right of appeal to the arbitration in those instances. In discussing it a little bit with the committee members and the subcommittee that we would propose that amendment to be placed on the bill. I move the Gilbertson amendment on page 15, are line 27, insert: "3. .....".

Rep. Grande: Seconded.

Voice vote: Carried.

Rep. Kretschmar: I move a Do Pass as amended.

Rep. Maragos: Seconded.

13 YES 0 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. Kretschmar

Date: 3/18/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2061

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30309.0201 .0300

Action Taken Do Pass As Amended

Motion Made By Rep. Kretschmar Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Vice Chairman Maragos	✓		Rep. Eckre	✓	
Rep. Bernstein	✓		Rep. Onstad	✓	
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrangham	✓				

Total (Yes) 13 No 0

Absent 0

Floor Assignment Rep. Kretschmar

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

REPORT OF STANDING COMMITTEE (410)
March 19, 2003 9:10 a.m.

Module No: HR-49-5157
Carrier: Kretschmar
Insert LC: 30309.0201 Title: .0300

REPORT OF STANDING COMMITTEE

SB 2061, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2061 was placed on the Sixth order on the calendar.

Page 1, line 6, after "In" insert "an"

Page 15, after line 27, insert:

"3. Agreements to arbitrate between and among insurers and self-insured entities which explicitly renounce a right of appeal are fully enforceable in this state. This chapter does not alter those agreements to create a right of appeal."

Renumber accordingly

2003 TESTIMONY

SB 2061

Treanbeath 1/15

Back | Word 97 Version | ASCII Version | PDF Version

POLICY STATEMENT

REVISED UNIFORM ARBITRATION ACT (RUAA)

1. Background and Objectives of RUAA

The Uniform Arbitration Act (UAA) was adopted by the Conference in 1955 and has been widely enacted (in 35 jurisdictions, and in similar form in additional 14 jurisdictions). UAA closely tracks the provisions of the Federal Arbitration Act (FAA) which was adopted in 1925. Neither UAA nor FAA have been amended since each were enacted. Therefore, for all practical purposes, American arbitration statutes have not been revised over the past 75 years. In 1995, the Conference appointed a Study Committee to study the feasibility of revising UAA. The Study Committee recommended 14 categories of subject matter for review by a Drafting Committee. The Revised Uniform Arbitration Act (RUAA) Drafting Committee has closely followed the Study Committee's report and revisions have been made in almost all of the categories identified by the Study Committee.

ND 1987

The prime objective of RUAA is to advance arbitration as a desirable alternative to litigation, but not to make arbitration simply another form of litigation. To this end, RUAA endeavors to render the arbitration process efficient, expeditious, and economical in a manner which is fair to the parties, and which promotes finality of the decision of the dispute submitted to arbitration. In accomplishing this goal, prime recognition is given to the agreement of the parties in the agreement to arbitrate. RUAA also recognizes that not only are more issues being submitted to arbitration, but they also have become increasingly complex, often involving higher monetary amounts. RUAA contains statutory coverage for a number of important issues that were not addressed in the UAA. RUAA also reflects aspects of arbitration practice as it has developed over the years. However, RUAA is a default Act on matters not covered by the agreement to arbitrate except for certain fundamental provisions which cannot be waived so as to insure fairness.

As of this writing, RUAA has been endorsed by the American Bar Association Section on Dispute Resolution.

2. Summary of the Revisions under RUAA

The following subjects were not addressed in the original UAA, and are now included in RUAA:

1. What forum (arbitrator or court) decides arbitrability of a dispute and by what criteria; (§ 6)
2. What forum issues provisional remedies such as attachments, restraining orders, etc.; (§ 8)
3. The process for initiating an arbitration; (§ 9)
4. Authority to consolidate arbitrations; (§ 10)
5. Requiring arbitrators to disclose facts which may affect impartiality; (§ 12)
6. Provisions for immunity of arbitrators and arbitration organizations; (§ 14)
7. Whether arbitrators can be required to testify in other proceedings; (§ 14)
8. Discretion of arbitrators to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences, and otherwise manage the arbitration

process; (§ 15)
9. Provisions for courts to enforce preaward rulings by the arbitrator; (§ 18)
10. Defining arbitration remedies including provisions for attorney's fees, punitive damages and other exemplary relief; (§ 21)
11. Specifying which sections of RUAA are not waivable or those that cannot be restricted unreasonably (this provision is designed to ensure fundamental fairness particularly in contract of adhesion situations); (§ 4)
12. Provisions for enforcing subpoenas to witnesses who reside in states other than the arbitration state; (§ 17)
13. Providing for vacatur when arbitrators fail to disclose facts which could reasonably affect impartiality; (§ 12 and § 23)
14. Standards for giving and receiving notice in arbitration proceedings. (§ 2)

3. **Federal Preemption**

In drafting and applying RUAA, the doctrine of federal preemption must be considered. Essentially, state arbitration acts must be consistent with the federal pro-arbitration policy; and cannot conflict with the provisions of the Federal Arbitration Act, when the underlying activity under consideration involves interstate commerce. The Supreme Court of the U.S. has developed the federal preemption doctrine so as to preclude state arbitration acts from containing provisions which restrict the availability of arbitration. The Drafting Committee feels that the provisions of RUAA do not conflict with the federal preemption doctrine. A more extensive discussion of federal preemption appears in pages II through IV of the prefatory note to RUAA.

4. **Contracts of Adhesion and Arbitration**

Much has been written about so-called contracts of adhesion involving arbitration. The Drafting Committee has discussed this subject at great length. It is the consensus that it would be desirable to be able to address this subject in RUAA. However, the federal preemption doctrine does not allow a state arbitration act to treat the validity of an arbitration agreement differently than would be the case for other types of contracts. Attached to this policy statement, is a brief report by a Task Force of the Drafting Committee which dealt with this subject and recommended that it not be addressed in RUAA because of federal preemption. Therefore, because of federal preemption, if the issue of contracts of adhesion is to be dealt with legislatively, it must be at the federal level, or possibly through state consumer protection acts.

5. **Opting in for Judicial Review**

The Drafting Committee also considered at great length whether provisions should be included to permit the parties to an arbitration agreement to contract to allow for judicial review of errors of facts or law in the arbitrator's award. The Drafting Committee was split on this issue, some members reasoning that such a provision would destroy a prime feature of arbitration which is its finality, and that judicial review should continue to be governed by the grounds for vacatur. It was also felt that such a provision would cause widespread drafting of such clauses in arbitration agreements so as to become common practice. On the other hand, some members felt that the party's agreement for appeals should be recognized if they chose to provide for it, and that parties might well wish to allow for appeals as a protective measure when agreeing to arbitration. The various U.S. Courts of Appeals that have taken up the issue have been evenly split 2-2. Two circuits upheld the validity of such an agreement for judicial review, and two circuits have held that it is not legally permissible. The Supreme Court of the U.S. has not ruled on this issue. Finally, at the first reading of RUAA last year, the issue was debated and considered by the Committee of the Whole. A sense of the house motion not to include an opting in for judicial review provision was adopted by an overwhelming vote of the Committee of the Whole. Because of this decisive sense of the house resolution, an opting in for judicial review provision has not been included in RUAA. The RUAA does not prohibit an opt in provision but essentially defers this issue to developing state and federal law. Also, under RUAA the parties continue to be free to agree on the review of the arbitrators' award by an arbitral panel, and to provide for this in their agreement. There is a growing tendency on the part of arbitration organizations to provide for this type of arbitral review in their arbitration rules.

May 15, 2000 Francis J. Pavetti

Chair

RUAA Drafting Committee

2061 Y/5

Testimony of Patrick Ward In Support of SB 2061 in the Senate Judiciary Committee

My name is Patrick Ward. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies and the National Association of Independent Insurers in opposition to portions of SB 2061.

The SB 2061 contains revisions to the Uniform Arbitration Act model act provided by the National Conference of Commissioners on uniform state laws.

We object to Section 21(1) which indicates an arbitrator may award punitive damages or other exemplary relief even in the absence of an agreement to that effect between the parties. This revision to the model act has apparently been introduced but not enacted in several states.

Many insurance companies include arbitration clauses in insurance contracts because of the lower costs associated with arbitration, the speed with which arbitration decisions can be made, the privacy of the proceedings, the efficiency of arbitration in resolving disputes, and the ability to select a federal forum which provides more uniform interpretation of contracts. If the revised Uniform Arbitration Act is adopted, it will deter insurance companies from entering into

arbitration agreements and greatly diminish the value of arbitration to efficiently, expeditiously, and economically resolve disputes regarding insurance policies.

Inadequate due process is afforded and poor public policy is created when an excessive punitive damages award is rendered by an arbitrator and not subject to appeal. Under this procedure, judicial review of all arbitration awards is extremely limited.

Likewise with the issue of attorneys' fees. Granting arbitrators the authority to award attorneys' fees would increase the cost of arbitration making it much less attractive to insurers.

Empowering arbitrators to award punitive damages and attorneys' fees creates a disincentive for insurance companies and consumers to resolve disputes through arbitration. Arbitration should be a user friendly and acceptable alternative to the courts. It should promote judicial economy, reduce the cost of litigation, and allow consumers the opportunity to choose a neutral person to resolve their disputes. The parties should have flexibility to set the ground rules. Unfortunately, with these amendments, the fear of unreasonable punitive damage awards or attorneys' fees awards would counter that.

The Insurance Industry would consider accepting amendments to the Uniform Arbitration Act such as were adopted in Minnesota to provide when an arbitrator

may award punitive damages or other exemplary relief "if punitive damages are authorized by the agreement of the parties to the arbitration proceeding," and if such an award is authorized by law in a civil action involving the same claim.

Likewise, with attorneys' fees. A similar provision should be added as an amendment in paragraph 2 of subsection 21 so that it would read as follows:

> An arbitrator may award reasonable attorneys' fees and other reasonable expenses of arbitration "if such an award is authorized by the agreement of the parties to the arbitration proceeding," and if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

We urge a Do Not Pass recommendation on SB 2061 as it is currently written.

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1/15

TESTIMONY BEFORE SENATE JUDICIARY COMMITTEE
NEUTRAL TOWARDS SENATE BILL 2061

Douglas A. Bahr
Director, Civil Litigation Division
Office of Attorney General

January 15, 2003

My name is Doug Bahr. I am the Director of the Civil Litigation Division of the Office of Attorney General. I am appearing today on behalf of the Attorney General Wayne Stenehjem to raise one concern regarding Senate Bill No. 2061.

Section 7 of Senate of SB 2061 provides when a court can grant a motion to compel or stay arbitration. Number 3 in that section (page 4, lines 1-2) states: "If the court finds that there is not enforceable agreement, it may pursuant to subsection 1 or 2 order the parties to arbitrate." It is possible that this language is a typo. As written, however, it appears to authorize the court to require parties to arbitrate even if the court finds that the parties did not agree to arbitrate. If that is the intent of this language, the Attorney General strongly opposes the court having authority to order state agencies to arbitrate even if they did not agree to do so.

The referenced language is also inconsistent with other provisions of SB 2061. For example, Section 3 of SB 2061 (page 1, line 24; page 2, lines 1-5) specifically provides that the Act only governs agreements to arbitrate. The referenced language would extend the Act's reach to cases where a court has specifically found that there was not an agreement to arbitrate. Similarly, Section 23 (page 13, lines 13-15) provides when a court can vacate an award made in an arbitration proceeding. That section specifically provides that an award made in an arbitration proceeding may be vacated if there was no agreement to arbitrate. Again, this language is inconsistent with the language contained in Section 7 at page 4, lines 1-2.

The Attorney General respectfully requests that Senate Bill 2061 be amended to make it clear that a court cannot order parties to arbitrate if the court finds that there is not an enforceable arbitration agreement.

Kathleen Vaughan brought in for Phil Gilbertson.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2061

Page 15, after line 27, insert:

"3. Agreements to arbitrate between and among insurers and self insured entities which explicitly renounce a right of appeal shall be fully enforceable in this state, and nothing in this chapter shall alter those agreements to create a right of appeal."

S.B. 2061
Testimony of Joel Gilbertson

Good morning, Mr. Chairman, I am Joel Gilbertson, an attorney with the Vogel Law Firm in Bismarck and Fargo. I am here on behalf of the American Insurance Association and the Alliance of American Insurers. AIA is a national association of property and casualty insurers with over 425 insurance carrier members around the country that write more than $103 billion in premiums every year. The Alliance is also a national association of property and casualty insurers, with over 325 members.

We support the bill with one change. Arbitration has always played a very important role in resolving disputes between insurance companies and recently has played an increasingly important role in resolving other types of disputes as well. Alternate Dispute Resolution (or "ADR", as it is typically called) is only beginning to reach the level of utilization it will ultimately obtain in our system of resolving disputes. Unfortunately, utilizing the judicial "trial by jury" system, in many cases, is simply too expensive and too slow.

Our problem with the bill is that it raises havoc with a practice that is widespread in the industry. It is only one problem, but it is a very big one.

On page 2, section 4, subsection 2(a) prohibits parties to an arbitration agreement from waiving the requirements of section 28 of the bill. Moving to section 28 on page 15 provides for appeals of an arbitrator's award. The net effect of this provision is that it outlaws binding arbitration, and transforms

agreements for binding arbitration into agreements for non-binding arbitration.

The insurance industry engages in great numbers of arbitrations every year, the vast majority of which are between carriers. The carrier-to-carrier arbitrations come about because of signatory agremeents to which the vast majority of carriers are parties. These agreements are all for binding, unappealable arbitration, and that is the way they want it to be. In addition, AIA is working with its members on a new binding arbitration agreement to sweep in very high value disagreements among them (up to $5 million).

The widespread effect of any change nationally on binding arbitration would be significant. I am told by AIA that the number of disputes between or among property casualty carriers that are settled by binding arbitration is not in the hundreds or thousands but in the hundreds of thousands.

The fix is simple -- delete reference to section 28 in subdivision 2(a). I have passed out amendments that will do just that.

Other than that, we support the bill and we particularly support utilizing arbitration and mediation even more and more as a relatively fast and more inexpensive way of resolving disputes in our present system of justice.

I would be pleased to respond to questions. Thank you.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2061

Page 2, line 14, after "17," insert "or"

Page 2, line 14, remove "or section 28"

Joel Gilbertson
On behalf of the American Insurance Association
and the Alliance of American Insurers

Testimony of Paul Sanderson in Opposition of SB 2061 in the House Judiciary Committee

My name is Paul Sanderson. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies and the National Association of Independent Insurers in opposition to portions of SB 2061.

The SB 2061 contains revisions to the Uniform Arbitration Act model act provided by the National Conference of Commissioners on uniform state laws.

We object to Section 21(1) which indicates an arbitrator may award punitive damages or other exemplary relief even in the absence of an agreement to that effect between the parties. This revision to the model act has apparently been introduced but not enacted in several states.

Many insurance companies include arbitration clauses in insurance contracts because of the lower costs associated with arbitration, the speed with which arbitration decisions can be made, the privacy of the proceedings, the efficiency of arbitration in resolving disputes, and the ability to select a federal forum which provides more uniform interpretation of contracts. If the revised Uniform Arbitration Act is adopted, it will deter insurance companies from entering into

arbitration agreements and greatly diminish the value of arbitration to efficiently, expeditiously, and economically resolve disputes regarding insurance policies.

Inadequate due process is afforded and poor public policy is created when an excessive punitive damages award is rendered by an arbitrator and not subject to appeal. Under this procedure, judicial review of all arbitration awards is extremely limited.

Likewise with the issue of attorneys' fees. Granting arbitrators the authority to award attorneys' fees would increase the cost of arbitration making it much less attractive to insurers.

Empowering arbitrators to award punitive damages and attorneys' fees creates a disincentive for insurance companies and consumers to resolve disputes through arbitration. Arbitration should be a user friendly and acceptable alternative to the courts. It should promote judicial economy, reduce the cost of litigation, and allow consumers the opportunity to choose a neutral person to resolve their disputes. The parties should have flexibility to set the ground rules. Unfortunately, with these amendments, the fear of unreasonable punitive damage awards or attorneys' fees awards would counter that.

The insurance industry would consider accepting amendments to the Uniform Arbitration Act such as were adopted in Minnesota to provide when an arbitrator

may award punitive damages or other exemplary relief "if punitive damages are authorized by the agreement of the parties to the arbitration proceeding," and if such an award is authorized by law in a civil action involving the same claim.

Likewise, with attorneys' fees, a similar provision should be added as an amendment in paragraph 2 of subsection 21 so that it would read as follows:

> An arbitrator may award reasonable attorneys' fees and other reasonable expenses of arbitration "if such an award is authorized by the agreement of the parties to the arbitration proceeding," and if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

We urge a Do Not Pass recommendation on SB 2061 as it is currently written.

Sanderson

PROPOSED AMENDMENTS TO SB 2061

Page 12, line 7, immediately after "relief" insert "if punitive damages are authorized by the agreement of the parties to the arbitration proceeding and"

Page 12, line 12, immediately after "arbitration" insert "if such an award is authorized by the agreement of the parties to the arbitration proceeding and"

Uniform Law Commissioners

Home

> A Few Facts About The...

UNIFORM ARBITRATION ACT (2000)

PURPOSE:
This act revises the Uniform Arbitration Act of 1956, adopted in 49 jurisdictions. The primary purpose of the act is to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area.

ORIGIN:
Completed by the Uniform Law Commissioners in 2000.

APPROVED BY:
American Bar Association

ENDORSED BY:
American Arbitration Association
National Academy of Arbitrators
National Arbitration Forum

STATE ADOPTIONS:
Hawaii
Nevada
New Mexico
Utah

2003 INTRODUCTIONS:

Alaska
Arizona
Connecticut
Indiana
Massachusetts
Minnesota
New Jersey
North Dakota
Oklahoma
Oregon
West Virginia

For any further information regarding the Uniform Arbitration Act, please contact

http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp 3/1/2003

UNIFORM ARBITRATION ACT
(Last Revised in 2000)

The Uniform Law Commissioners promulgated the original Uniform Artibration Act in 1955. It is the law in 49 jurisdictions, and the Federal Arbitration Act contains many similar provisions. In short, the Uniform Act is the fundamental substance of the law governing agreements to arbitrate in the law of the United States, currently.

The 1955 Uniform Arbitration Act does two fundamental things. First, it reverses the common law rule that denied enforcement of a contract provision requiring arbitration of disputes before there is an actual dispute. After a real dispute arises, the parties have always been able to agree to arbitrate. It is agreeing to arbitrate in anticipation of any possible disputes that the common law prohibited. Second, the 1955 Uniform Arbitration Act provides some basic procedures for the conduct of an arbitration. The Uniform Act does not mandate arbitration of any dispute. Its function is to let persons determine whether or not they want to use arbitration by agreement.

Arbitration is the original "alternative dispute resolution" or "ADR" mechanism made legitimate under American law. It is alternative to a judicial proceeding to resolve a dispute. Arbitration has traditionally been a means of resolving disputes when issues are specialized and technical. These kinds of disputes require specialist resolution and there is no desire for damage awards like those awarded by a court of law. A typical example is an arbitration that allocates costs of defects in a building project between architects, contractors and property owners. Arbitrators are chosen by the parties with construction expertise to determine responsibility for defects. The arbitration is conducted quickly. It is free of the constraints of court-room procedure, and may be tailored to adducing evidence for the specific kind of dispute. The parties all have a strong desire to avoid litigation and are normally satisfied with the results of arbitration. Construction disputes have been regularly resolved by arbitration for a long period of time.

However, provisions calling for arbitration occur in all kinds of contracts as the burgeoning caseload has slowed the civil justice process in the courts and as the costs of lawsuits have risen dramatically. As the arbitration process has been more utilized for resolving disputes that have traditionally been resolved by litigation, it has become clear that the limited procedural provisions of the Uniform Arbitration Act are no longer adequate. For that reason, the ULC has now promulgated a next generation state arbitration act, the 2000 Uniform Arbitration Act.

The 2000 Uniform Arbitration Act continues to authorize agreements to arbitrate disputes before they arise. However, the procedural side of arbitration is greatly augmented to meet modern needs. It deals with procedural issues not addressed in the 1955 Act. The effect should be more efficient and fair arbitrations as an alternative to litigation than is the case under the 1955 Act. The 1955 Act was a great advance in American law. The objective of the 2000 Act is to make the contribution of the 1955 Act even greater.

The 2000 Uniform Act has been drafted, also, against the significant and preemptive presence of the Federal Arbitration Act. The federal act applies to arbitration provisions in private contracts. The Federal Arbitration Act encourages arbitration as an alternative to litigation. Therefore, any state law that limits the availability of arbitration risks failure as a matter of federal preemption. Although there is not complete agreement about the relationship between federal and state law on certain specific issues, the 2000 Uniform Act is drafted to avoid preemption.

It is impossible to cover all the provisions in this important revision of a seminal uniform act. Suffice it to say that the revisions are an effort to provide more certainty in arbitration proceedings, to deal with preemption problems and to answer issues raised in the case law since 1955. There are many new provisions.

The 2000 Uniform Arbitration Act expressly provides that it is a default act. Most of its provisions may be varied or waived by contract. There are certain provisions that may not be waived or varied. These include the basic rule that an agreement to submit a dispute to arbitration is valid; the rules that govern disclosure of facts by a neutral arbitrator; the rules guaranteeing enforcement or appeal of the act, an arbitration agreement or an arbitration decision in a court; or, the standards for vacating an award. Declaring the default nature of the act is important because parties to an agreement may choose between federal or state law to govern their arbitration, notwithstanding the preemptive effect of federal law. Also, restrictions on waiving or varying certain statutory requirements are important to protect parties to these agreements.

The 2000 Uniform Act specifically allows a court to order provisional remedies during the course of an arbitration before an arbitrator is selected. The 1955 Uniform Act has no such provision. This prevents parties from delaying the selection of an arbitrator in order to delay proceedings and dissipate the effect of an arbitration award. An arbitrator, when selected, also has an express power to order provisional remedies, a power not expressly given in the 1955 Uniform Act. An arbitrator has the same powers as a court has in a judicial proceeding.

The 2000 Uniform Act allows consolidation of separate arbitration proceedings, a matter that was never contemplated in the 1955 Uniform Act. The existence of multiple parties, multiple agreements and complex litigation has made the issue of consolidation of arbitration actions very important. Courts have varied over consolidation. The 2000 Uniform Act expressly allows and governs consolidation.

The 1955 Uniform Act allows an award to be vacated because of an arbitrator's partiality - lack of neutrality. It does not specifically require disclosure of any interest that may give rise to a question of neutrality. The 2000 Uniform Act specifically addresses disclosure of known facts that give rise to questions of neutrality. Such facts include a financial or personal interest in the outcome of the arbitration proceeding or an existing or past relationship with a party. The lack of disclosure, itself, may be a ground for vacating an award, and there is a presumption of partiality when non-disclosure occurs. Upon disclosure, a party has the opportunity to object to the appointment of an arbitrator intended to be neutral. If there is no objection, that may affect the ability to raise partiality as a ground for vacating an award. These provisions provide substantial express

protection to parties to an arbitration proceeding that simply are not a part of the 1955 Uniform Act.

A crucial issue in arbitrations is the express immunity of arbitrators from civil liability. It is not an issue addressed in the 1955 Uniform Act, but is important to impartial and fair proceedings. An arbitrator who expects or fears a lawsuit simply because of a decision, cannot be counted upon to act fairly or competently. The 2000 Uniform Act provides arbitrators with immunity from civil liability "to the same extent as a judge of a court of this State acting in a judicial capacity."

An arbitrator under the 2000 Uniform Act may conduct the arbitration in such manner as the arbitrator considers appropriate to the fair and expeditious disposition of the proceeding. This express authority does not appear in the 1955 Uniform Act. The 1955 Uniform Act provides for subpoena of witnesses, and for depositions. Under the 2000 Uniform Act, an arbitrator also has the express power to make summary dispositions of claims or issues under appropriate procedures, to hold pre-arbitration proceeding meetings or to use any other discovery process (any process that adduces relevant evidence for the proceeding) applicable to resolution of the dispute. These provisions put arbitrators on the same level as judges in a judicial proceeding with respect to discovery of evidence.

The 2000 Uniform Act expressly permits an arbitrator to give punitive damages or other exemplary relief, "if such an award is authorized by law in a civil action involving the same claim." Attorney's fees may be awarded under the same standard. The 1955 Uniform Act does not expressly address either issue, but the case law has established the power to award punitive damages in most jurisdictions. The Federal Arbitration Act decisions, also, provide for punitive damages and some states have amended the 1955 Uniform Act to include attorney's fees. These new provisions put arbitrators on the same footing as judges in a court of law, and reflect the expansion of arbitration into disputes traditionally resolved in courts of law.

These are some highlights of the revision to the Uniform Arbitration Act in 2000. The number of disputes in arbitration grows yearly. The 2000 Uniform Arbitration Act responds to this growth with better and more complete arbitration procedures. It aligns state law with federal law, which decreases the potential for litigation on preemption grounds. This important advance in the law of arbitration should be enacted in all states as soon as feasible.