2011 HOUSE JUDICIARY

HB 1121

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1121
January 10, 2011
12677

☐ Conference Committee

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will open the hearing on HB 1121.

Carole Kessel, Chief Examiner and Director of the Examinations and Company Licensing Division of ND Insurance Dept.: Sponsor, support (see attached testimony 1). At this point I need to explain, that late last Friday the Dept. was advised of concerns held by the State Bar Association and the State Attorneys Association. After meeting with Bill Newmann and Jack McDonald, we understand that that language on lines 12 through 14 of the bill, specifically the language following referenced to section 44-04-18 on line 12, could be considered a restriction of the judicial branches constitutional powers relating to discovery, and an admission of evidence. We are currently looking at options to address these concerns, but options that will not jeopardize ND's accredited status. The importance of maintaining our accreditation status relates to the reliance that our licensed insurers and regulators from other states, place on ND's adoption of Uniform Laws and Rules. On our Uniform Enforcement of requirements and our Uniform Practices of performing financial analysis and examinations. If ND loses accredited status, other states in which ND domestic insurers are doing business, will increase their regulatory attention and demands, resulting in higher costs for our domestic insurers, and a competitive disadvantage in the market. If ND loses accredited status because we don't provide confidential treatment that is provided by other states, some of our domestic insurers could withdraw from ND to ensure that their proprietary information isn't accessible through ND's Open Records, and that would also disrupt the ND market, by reducing the pool of insurance companies that do business in our state. We will be working with the various associations and I understand that a friendly amendment will be submitted by the Property and Casualty Insurers Association to add some language, not addressing the confidentiality concerns, but adding other language. We will certainly work with these associations to come up with language that will satisfy the concerns, but not jeopardize our accredited status.

Rep. Delmore: As I look at this, it seems to be more of an insurer's bill than a people's bill. I'm very concerned with the part about court access; it's not

admissible, there's nothing even to get it by subpoena. I think that's carrying it quite a ways. Why would you need them closed to that degree.

Carole Kessel: This bill does not prevent access to the same materials directly from the insurer. It's to prevent the ND Insurance Dept from getting into the middle of that battle, between the litigator and the courts.

Rep. Delmore: Part of what the Insurance Commissioner does is to take disciplinary action, all kinds of matters which deal with the insurers. I just don't understand why this is needed, and you reference what happens with the life insurers. Did you model this bill out after what protection they have. To me, it seems more wide open and I haven't looked at the statute, it isn't provided in here, so I don't know what it says.

Carole Kessel: The life insurers' provision is not altogether similar. It does provide confidentiality but it doesn't contain the language relating to discovery and admissibility of evidence. That section of the law was enacted in 1993, I don't know why there has been a change in the model laws adopted by the National Insurance Commissioners Association. We are in the process of trying to determine whether the exact language regarding discovery and admissibility of evidence needs to be adopted by ND, or whether we can modify the law. When we have worked that out with the legal staffs, we will come back with a modification if necessary.

Rep. Koppelman: The NAIC is a national association, it's not a body of government and the United States Congress has allowed states to regulate the insurance industry through Insurance Commissioners and the laws that the legislature passes and we've been doing that for a long, long time in ND. Why do all of the states need to snap to when the NAIC passes a piece of model legislation. It seems to me, that by definition, model legislation says "we think is a good idea, take a look at it, and you may want to pass it". There are good reasons for that. We have an entire organization designed to uniform state laws, we have other organizations that put forth model legislation, suggested legislation and all the rest. But it is still up to the states to decide, and yet here we have the implication it seems to me, that if you don't do this, we're going to be out in the cold. I've been around long enough to have heard that a number of times and sometimes that's saber-rattling that doesn't really occur. Could you shed a little light on why the NAIC seems to hold so much sway and we have to do what they say.

Carole Kessel: The NAIC does not require states to snap to in all regards. The accreditation program focuses on 18 model laws and acts relating financial solvency of insurers. It provides licensed insurers across the country with similar basic requirements so that ND does not have different reporting requirements than other states, or different risk limitations or different holding company statutes; there has to be some consistency in order for insurers to operate efficiently; or they are going to be doing 50 different state reports. It's only in the area of financial solvency laws and model acts, but there is also a big focus in the accreditation program and how

the Dept., specifically my Division, performs financial analysis and examinations of our domestic industry. That allows other states, in which our domestic insurers are licensed , to rely on our work. To be able to say, ND's following all of the standards and we can rely on ND's conclusions and actions in regulating the financial condition of insurers.

Rep. Koppelman: If this were purely perfunctory, I don't think it would raise many eyebrows, but the reason that it may, is that ND is different from other states in a lot of ways. One of which is that we have very broad, open records and open meetings laws in our state. Having said that, I don't have any problem withholding information that is personal, of a confidential nature, be that for an insurance company or an individual. You talked about some of this information, including information about a company's insured clients. I don't have a problem with that, but it seems to me that this is broader than that. I think the reason that some of us pay attention is that we are proud of that fact. Isn't is sufficient if insurance companies know that what they submit in these cases, is subject to open records and open meetings laws in ND. Don't they prepare those documents a little differently accordingly or is there some requirement that they disclose information, that they may not be comfortable sharing when they share this information with the Commission.

Carole Kessel: Some of the underlying supporting documents of the actuarial opinion statement are quite detailed and quite sensitive. Insurers support retaining the confidentiality of this. If it came to a request for this documentation, I think an insurer might want to take action to protect the details.

Rep. Koppelman: You said retain the confidentiality, but we're not talking about making these matters public when they haven't been in the past. My reading of the bill says you are trying to make them confidential when now they're not. How do things work now. Are you not able to get the information you need because companies know that in ND its public record.

Carole Kessel: To date, we've had no requests for this information. Because there is broad-based confidentiality in other states; other states have already adopted this, I think there is an impression that ND has gone along with it. But if it became well known, it could be problematic for domestic industry.

Rep. Klemin: I understood you to say that the language on lines 12-14 is basically for the benefit of the Insurance Dept and does not preclude an action against the insurance company itself to discover that information in a private, civil action, is that correct.

Carole Kessel: I don't understand your question.

Rep. Klemin: You said that that language does not preclude a separate discovery against the insurance company to get the same information.

Carole Kessel: That's correct.

Rep. Klemin: And to keep the Insurance Dept. from getting in the middle of a case, is that correct.

Carole Kessel: Yes, that is correct.

Rep. Klemin: So this is really a convenience matter for the Insurance Dept. so that you don't have to respond to discovery requests. Is that it.

Carole Kessel: This is really a convenient thing to get full cooperation from insurers in obtaining this data without having to jump through certain hoops. Under an open records scenario, when we request detailed information, companies may resist providing that information without confidentiality. We would have to have the companies go through the process of, under our open records statutes, there are provisions that if a company evidences that this is proprietary information, a company could evidence and present a case that this is proprietary information and should be restricted from public access. But that would have to be on a case-by-case basis, going through that situation with each one of our domestic companies. If there was resistance to providing the information, it wouldn't be a very efficient process.

Rep. Klemin: To continue along those same lines, what is in here that would prevent the insurance companies, who provided this information, from relying on this statute and claiming that it's confidential information and therefore not subject to disclosure in court by them either.

Carole Kessel: I think they probably could, would the judicial system allow that. That's the question that the State Bar Association has raised, that the courts wouldn't be looking at that very favorably.

Rep. Klemin: While it's confidential on the one hand, you can't get it from the Insurance Dept under this bill; on the other hand, on lines 20-23 at the bottom, nothing in here prevents the Insurance Dept. from using that very same information in a legal action against the Insurance Company.

Carole Kessel: Yes, that's correct. The Dept. could use that same information to bring some legal action against an insurer.

Rep. Klemin: That legal action, of course, would be public.

Carole Kessel: Yes, it would.

Rep. Klemin: I would appreciate it if you could provide us with the standard that you are referring to from the NAIC so that we can actually see that standard.

Carole Kessel: Yes, I certainly will.

Rep. Delmore: Have you had specific cases where insurance companies have come to you and said, "courts took this information, and they used it against my company", it's not a good consumer bill. Have you had a problem or is this a bill waiting for a problem. I just have some real problems with this bill and what it allows the Insurance Commissioner to do and says to the courts, sorry you and any lawyers of any type have no right to this information. It concerns me, is there a specific case where you have seen a problem that warrants this.

Carole Kessel: I have not seen a specific case. I think you should be aware that the insurance industry and trade groups have played a big part in the development of the model act that underlies this bill and have raised their objections and supported the confidentiality provision. That's my only direct knowledge.

Rep. Onstad: Going back to section 1, lines 6-11, lead up to that part. Every insurance company basically turns in actuarial certification to the insurance commissioner to determine rates. Is that currently the method.

Carole Kessel: That is correct. A statement of actuarial opinion is required, yes.

Rep. Onstad: So, when you get on line 6, it talks about documents and materials in support of that actuarial certification, it's left up to the insurance commissioner whether that is confidential or not, according to this bill.

Carole Kessel: The law would determine, the insurance commissioner would not determine whether it was kept confidential, and I'm talking about those underlying documents, the actuarial support summary, the actuarial report, and work papers. It would be that group of materials that would be held confidential under this bill. The statement of actuarial opinion is a very high level description that is public information.

Rep. Onstad: So that's public information, but it's still left up to the Commissioner; documents which are considered by the commissioner to be confidential, in support of this certification, it's still being left up to the commissioner to determine what is subjective or not. Is that correct.

Carole Kessel: I read this language to say that the documents and materials that are considered to be an actuarial report, actuarial work papers, actuarial opinion summary, that are provided in support of, that's the material that would be kept confidential. The "considered by the Commissioner" means those materials that are considered to be these items.

Rep. Onstad: So the commissioner, it's not specific what's considered confidential or not, it's really left up to the commissioner, when he looks at documents that

supports an actuarial change in rate, you're really saying that it's up to the commissioner to say that this is confidential or not. It's not specific to the law, it's subjective to the Commissioner whether he wants to say this is confidential or not. Is this correct.

Carole Kessel: I don't think it's up to the Commissioner to decide what's confidential, I think where we are hung up is, what is labeled as an actuarial report or work papers, or actuarial opinion summary. Those documents don't always take a standard form. It's up to the company to put together those documents, given some guidance in the annual statement instructions. They are not a form type, so that is where the commissioner needs some latitude to decide whether the actuarial report submitted by the company as an actuarial report is sufficient, if it really is complete and meets the industry standards for an actuarial report. To take it a bit further, these underlying documents are addressed in actuarial guidelines, and that's outside of the NAIC process. It's the Property and Casualty actuaries and the Life actuaries that determine for their own profession what standards and what considerations have to go into the preparation of an actuarial report or underlying work papers. The Dept. is simply following that understanding.

Rep. Onstad: So basically, if I as an insured person wants to go after the insurance company, could I still get access to this information that the Commissioner said was confidential; or could they be subpoenaed so I could get the information.

Carole Kessel: Yes, in a civil action, the insured could subpoena the information under this bill. You couldn't subpoena it from the Dept., from the commissioner, but it could be subpoenaed directly from the insurance company.

Rep. Onstad: It seems to be kind of a roundabout way, if the Insurance Commissioner has that information, because he holds that information, it doesn't in any way affect him, I don't know why the consumer couldn't go to the Insurance Commissioner and say I would like to see that information.

Carole Kessel: Frankly, we haven't had that kind of inquiries. As I explained in the testimony, not all insurers are required to file in the depth of the actuarial report or the work papers. It is only when flags are raised during the financial analysis process that we would be asking for these papers. The public could not be assured that the Dept. would be holding that information for every licensed insurer, because we wouldn't be. It would only be in certain instances.

Rep. Klemin: Under our ND open records law, we basically have three kinds of records as I understand it. We have open records, which are the general standard; then we have confidential records, which are what you are looking for in this bill, which means they are confidential and cannot be disclosed to the public period. Then we have exempt records, which are somewhere in between, in that, they could be opened at the discretion of the agency. Is there some reason why you chose to use confidential in this bill, rather than exempt.

Carole Kessel: This is language from the model law, on which the accreditation standards are based, so that was why we picked up the language from the model law. We are looking into whether there is some modification that can be made that won't jeopardize our accreditation standard. We've had the request for comments out since late last Friday, and haven't had any responses yet.

Rep. Delmore: Are you aware of any other states that have adopted this particular set of codes.

Carole Kessel: It is my belief it has. Our legal counsel did do a search and she did find some.

Rep. Delmore: I would be interested in seeing what states have adopted this language. Where did the model legislation wording come from, who provided it.

Carole Kessel: The model legislation is readily available on the NAIC website and is provided to every state regulator directly.

Rep. Delmore: I understand that, I have model legislation that I can pull up on my computer too, I'm just wondering does it come out of your national organization, who wrote the model legislation draft language.

Carole Kessel: This model legislation was adopted by the National Association of Insurance Commissioners.

Chairman DeKrey: Thank you. Further testimony in support.

Patrick Ward representing Property and Casualty Insurance Association of America: Support (see attached testimony and draft amendments 2). I am going to deviate from my testimony and try to answer some of the questions I have heard already. The insurance industry is heavily regulated by states through the Commissioners of Insurance. Commissioners belong to the NAIC; but my understanding from the experts at PCI is that this is a model act that was put together by the NAIC and has been adopted in 16 states. I think one of the problems with the bill, that the committee is having, is the concern that the courts have, on lines 14-16 and I have a feeling that when this bill was drafted to be reconciled with the ND open records law, that there was a glitch in the drafting that we're going to need to fix. I would offer to get together with the Commissioner's office and courts to try and work out the proper language on that. My understanding of the intent of this bill, is to protect the confidentiality of this information from being available, through the open records law, to anyone upon request because this is highly proprietary information. Basically everything an insurance company uses, in terms of its investment information, its projections of trends for future claims, its loss experience, its expense adjustments, the cost of what they pay the adjustors and everything else, is factored into these actuarial opinions. I searched on the Internet on Sunday afternoon, to find a

statement of actuarial opinion and the first thing that came up was the standards for actuaries which was 37 pages, and then in searching for a document that was shorter. The next item down was 117 page standard for actuaries. This is pretty complex, detailed information. In response to Rep. Koppelman's question, the industry is highly regulated by states. This is an industry, at this time, is not federally regulated. One of the things that the NAIC has been very aware of, is the federal government has been threatening to take away the regulation of insurance. So there has been a real move in the industry and amongst the NAIC towards both modernization and standardization so that the standards are the same from state to state. Many insurance companies are intra and interstate now, there are some that sell in all 50 states, and there are some of our domestics that sell in 3 or 4 of the neighboring states as well as ND. Normally, these documents are required to be filed with the Commissioner. We have provision in law that our Commissioner can share that information with other commissioners through the NAIC. Sometimes there is even direct filing with the NAIC, and it's in a depository there. The concern really, is that the type of information we are talking about here is not useful to consumers. It is really only useful to competitors. This is proprietary information as to how you come up with your rates, how you come up with your pricing; the only one that would ever be requesting it from the Insurance Dept. under the open records law, would possibly be if State Farm wanted to find out what American Family is doing with their investments or how they are setting their prices. That's why the industry is too protective of this data. They don't mind providing it to commissioners for regulatory purposes, and we certainly wouldn't mind having to provide it to the courts, which is something we can work out, because we have provisions in court procedure laws to protect trade secrets. We already have that in the court rules. The main thing is, because we have to file all of this data, we want to be sure that when we file the data, it's not going to be there where a competitor can go look and see what we're doing and then they can set their prices based on what we're doing and try to be 50 cents or 50 dollars cheaper.

Rep. Koppelman: I understand the role of the NAIC and I know that they perform a necessary and functional role, because as you indicated in your testimony, the one clear area where the federal government has the constitutional authority to regulate under interstate commerce, but it currently does not as insurance. We all understand that. Yet, it has chosen one of the rare cases of a federal government restraint on areas where it could intrude. It said states do this. I know the importance of the role that the NAIC plays, which has a loose affiliation with the Council of State Governments, which I used to chair, so I respect them, I'm not anti-NAIC. Having said that, is there a danger of the NAIC, in your opinion, becoming a de facto quasi-government entity, in and of itself, by creating rules and regulations and standards and model legislation, telling the states you have to adopt this or you're running afoul of our favor.

Patrick Ward: Certainly, I think there is always that danger. I think that's why the industry is in favor of state regulation, in that we would rather deal with the states, than have to deal with the federal beaurocracy that would be created to enact these

laws. Because many of these companies do business in all 50 states, it's very difficult for them to tailor all of their models and all their procedures and all their practices to a standard that is the most restrictive based on a combination of what all the states are doing. The industry does monitor what goes on at the NAIC and try to participate when these model laws are enacted. As you know, from the committees you serve on with various legislative groups, there is a lot of input from various consumer groups, various other people including industry, before one of these model bills is finally agreed on and then taken around to the states to try and adopt it. I think one of the biggest concerns that the committee has expressed here, has to do with the language that tried to incorporate our open records law into this model bill and I do think we need to sit down and try and fix it before the Committee does anything with this bill. I brought today an amendment which is a couple of additional paragraphs of language from the NAIC model that we would like to add to the bill before the bill is adopted, if it's going to be adopted. One more thing, if the bill is not adopted, there are already some confidentiality provisions in state law, like Rep. Klemin alluded to, that apply to protect this kind of trade secret information. We're really trying to protect against, because we are now required to disclose this information to the commissioner or to the NAIC, we want to make sure that the information does not, by that act, become available to competitors. I'm trying to envision a situation where a consumer would want to know this information. The only person I can see where it would useful would be to a competitor. If there was ever some type of litigation where it would relevant, certainly the courts would have the authority to protect that, but to look at that information as well. That's what happens with trade secrets in litigation now.

Rep. Koppelman: In regards to the point Rep. Klemin brought up, that in this bill, it appears that no one can use this information except the Commissioner, legally. Is that a concern to you. In other words, an insurance company can't get at this information by subpoena but the commissioner can use it in a legal action. Is that an appropriate distinction because of the commissioner's role as a regulator, do you think or is that a concern to the industry.

Patrick Ward: Yes, that's an appropriate use of the information.

Rep. Delmore: It does go back to, when information that is part of open records becomes inaccessible. Do you not think that the court should have access in some cases to this information.

Patrick Ward: Yes, I think the court should, again I think that is something we need to fix in the draft of the bill. I don't think that courts should have the authority to require the Insurance Commissioner to provide the information if someone goes to him and asks for it under the open records law. If there is a dispute between an individual and the insurance company or between two insurance companies, then yes, the court should definitely have the ability to look at that information. The courts already have their own procedures for protecting this type of information.

Rep. Delmore: Do you perceive that under this bill, the Insurance Commissioner, if he thought it should be shared with somebody, could do so, be it the court system or whatever.

Patrick Ward: I believe that the Commissioner has the authority now, under existing law, to share this information with the NAIC or with a Commissioner in another state. The way the papers are usually filed is, we call them domestic companies. We have certain companies who are based here in ND, one in Bismarck, one in Rugby. They tend to file these types of documents with their own Commissioner, who will then either file it with the NAIC, or at the same time cross-file it with NAIC, and then other states where you do business, can look at the regulation that is being done by our commissioner or through the NAIC repository and have access to that. But let's say the ND Commissioner gets State Farm's domesticated in Illinois. So they would do these filings in IL. If the ND Commissioner, for some reason, needs to look at, if he's doing a market conduct exam or something like that, he would have access to it. The concern companies have, is once he has that information, that someone else, like a competitor, like a Wisconsin American Family or some other company, would come and say, ND has this liberal open records law, and we are just going to request all of that actuarial opinion documents from ND on State Farm so we know what they're doing. That's what we are trying to protect. The bill does need some fixing because there is a problem with it right now. I think the bill has gone further than what they really intended to do under the model.

Rep. Koppelman: The proposed amendment that you handed out, did you say that this is what the NAIC model actually contains and was omitted from the bill.

Patrick Ward: Yes, the language that I've provided would be added on page 2 of the bill before subsection c, that says this does not apply to actuarial opinions required under 26.1-35. The reference in the current subsection c is to life insurance which has different standards that are already in statute. This particular bill applies to property and casualty actuarial opinions. This new language is additional, and it's my understanding that this language which was emailed to me from a client who is an expert on this. This is additional language according to what was heard in the model act, that needs to be added if we're going to be consistent with the model act.

Rep. Delmore: So this would not allow our Commissioner to share this information with Commissioners of other states.

Patrick Ward: They can share the information amongst themselves, as commissioners.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Jack McDonald, ND Broadcasters Association and the ND Newspaper Association: We oppose this bill. A lot of the reasons we oppose it have already been brought

up. I will summarize our opposition. First of all, this is a very broad grant. When we deal with open meetings and open records, we try to zero in and say if you want to make an exception, let's make a very specific exception, like this particular record and that particular record. Line 6 says documents, materials or other information, in the possession or control of the Commissioner, which are considered by the Commissioner. So what we're saying is, that any other information the Commissioner has that he wants to keep secret, that has to do with these actuarial reports he can do so. This is just a very broad grant of very subjective power. Secondly, these documents are open now, the world hasn't ended, and they have been open for a long time. I'm not sure why right now we are worried about it, because no specific problem has been brought forward, other than it coming as a model law, and saying we have to jump to it and get a model law and we'll pass it. Thirdly, as the other people testified, there is already provisions in state law, that cover trade secrets and proprietary information. This very subject comes up all the time in the Public Service Commission. The PSC requires all the companies before it to file all the information about their financial status, their projects, and their goals. Then they can say that they want the materials to be classified as proprietary information. The PSC says yes or no. They make those decisions based on the current law. So this information can be protected right now. Fourthly, this is really going to add to the cost of ND consumers because what you're saying in effect, is that if a ND consumer decides to sue an insurance company for some reason, they want to get these records. You're saying you can't get them if they are on the 8th or 6th floor of the Capitol, but if want to go to Connecticut or New York, or Georgia, you can go and get those and it's going to cost you a lot more money to get them. I don't think that's fair to the ND consumers. So for those reasons, we'd ask for opposition to this bill. We ask for a Do Not Pass.

Rep. Koppelman: So it's your legal opinion, that under current law, the Commissioner could take a set of documents like this, and say no I'm not going to share those because they are propriety, confidential, and trade secrets' information and he could succeed in shielding those from public view now.

Jack McDonald: I believe so. Usually it works the other way around. I'm fairly familiar with the Public Service Commission model. Usually it's not the PSC that is making the declaration, it's the companies that are asking for it. Then the Commissioner decides yes or no under those provisions. Yes, I believe it can.

Rep. Koppelman: So then that provision wouldn't be much different, would it, because it looks like from the first couple of lines which you referenced, the Commissioner has the latitude under this bill, or as you've explained, under current law, to pretty much decide whether it's a matter of the company requesting that he/she make that determination, or whether they just do it on their own.

Jack McDonald: Yes, that's correct. Except that this goes much further than just trade secrets and proprietary information. This is everything. This could be the name and address of the company, the phone number, the president, anything that

is in those papers. I don't think at this time, with the financial problems that are coming on, bank failures that are happening. I don't know if this is the time that we should be keeping information from the consumers, the financial status or the soundness of insurance companies.

Chairman DeKrey: Thank you. Further testimony in opposition.

Aaron Birst, NDACo: The Association of Counties is the umbrella group. Under the umbrella, we have a number of county states attorneys, county auditors, sheriffs. One of the member groups that I heard strongly regarding this bill was the states attorneys group. You've already heard the testimony I did have. I did prepare a proposed amendment that was specific to criminal justice agencies. I have even had email dialog with the insurance commissioner himself. Maybe this is something that will get worked out all right. We had strong opposition to an interpretation of this law that would prohibit criminal investigation, potential subpoenas.

Chairman DeKrey: Thank you. Further testimony in opposition. Neutral testimony.

Bill Newmann, Executive Director, State Bar Association: Neutral (see attached testimony 3).

Chairman DeKrey: Thank you. Further testimony in opposition or neutral. We will close the hearing. We will have a subcommittee to look at this, Rep. Koppelman, Rep. Brabandt, and Rep. Delmore.

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1121
January 31, 2011
13703

☐ Conference Committee

Committee Clerk Signature D Penrose

Minutes:

Chairman DeKrey: We will take a look at HB 1121.

Rep. Koppelman: I am passing around the proposed amendment to the bill. This is the bill that has to do with the Insurance Dept and confidential information coming from the insurance companies which is now filed with their department and a desire to ensure the secrecy of those documents, because they are proprietary and contain information that the insurance companies don't want their competition to have and so on. This amendment doesn't make everyone happy, but the amendment does is to clarify that this is still fair game for subpoena's. The insurance industry would like that closed a little more. The State Bar Association says if we really tried to limit the court's ability to hear certain kinds of evidence or subpoena certain kinds of documents it would be found unconstitutional so he didn't want that included. So we went back and forth, we couldn't reach agreement with the parties, so the subcommittee elected to offer the amendment before you, which doesn't close it as much as the insurance companies want, but makes it clear that it is available for subpoenas and so on and they'll have to live to fight another day on the Senate side.

Rep. Delmore: We decided if everybody wasn't totally happy, it probably was a good compromise.

Rep. Koppelman: I move the amendment.
Rep. Delmore: Seconded the motion.

Chairman DeKrey: We will take a voice vote. Motion carried. We now have the bill before us as amended. What are the committee's wishes in regard to HB 1121.

Rep. Koppelman: I move a Do Pass as Amended.
Rep. Delmore: Seconded.

13 YES 0 NO 1 ABSENT DO PASS AS AMENDED
CARRIER: Rep. Koppelman

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Adopted by the Judiciary Committee

January 31, 2011

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1121

Page 1, line 7, remove "considered by the commissioner to be"

Page 1, line 12, replace the first underscored comma with "and"

Page 1, line 12, remove ", is not subject to"

Page 1, remove line 13

Page 1, replace line 14 with ". This subsection may not be construed to limit the authority to subpoena or otherwise discover the documents, materials, or other information or to limit use of the documents, materials, or other information in criminal investigations or proceedings."

Renumber accordingly

Date: 1/31/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1121

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☑ Do Pass ☐ Do Not Pass ☑ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Koppelman Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg	✓	
Rep. Beadle	✓		Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury					
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Steiner	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. Koppelman

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

REPORT OF STANDING COMMITTEE

HB 1121: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1121 was placed on the Sixth order on the calendar.

Page 1, line 7, remove "considered by the commissioner to be"

Page 1, line 12, replace the first underscored comma with "and"

Page 1, line 12, remove ", is not subject to"

Page 1, remove line 13

Page 1, replace line 14 with ". This subsection may not be construed to limit the authority to subpoena or otherwise discover the documents, materials, or other information or to limit use of the documents, materials, or other information in criminal investigations or proceedings."

Renumber accordingly

2011 SENATE JUDICIARY

HB 1121

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1121
2/15/11
Job #14541

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to the insurable interest of a trustee

Minutes: *There is attached written testimony*

Senator Nething – Chairman

Carole Kessel – Chief Examiner and Director of the Examinations and Company Licensing Division of the ND Insurance Dept. – See written testimony.

Senator Nething – Questions the purpose of the bill. He understands it to be the confidentiality of the work paper.

Kessel – Explains the confidentiality of documents supporting the actuarial statement of actuarial opinion is fairly new accreditation standard. She says states are currently in the process of adopting it and to maintain their accreditation status they need to have this additional protection.

Senator Nething – Asks if currently we do not have confidentiality with those papers and if it has been a problem.

Kessel – Replies that is correct and it has not been a problem to date. She says if ND is the only one to not adopt this it could become problematic.

Melissa Hauer – General Counsel for the ND Insurance Dept. – Explains there isn't confidentiality but arguably the open records law could apply. She says it has a section that gives an exception for trade secret or propriety or commercial information that could hurt a business if it was given out.

Senator Nething – Asks who gives this accreditation.

Hauer – Replies it is the National Association of Insurance Commissioners (NAIC).

Opposition – 0
Neutral – 0

Jack McDonald – Explains the confidentiality provisions were narrowed to certain documents. He says it really is no different than what is in current law, Chapter 44.04 that provides for the confidentiality of propriety trade secrets and other financial information.

Senator Olafson moves a do pass
Senator Sitte seconds

Roll call vote
6 yes, 0 no

Senator Nething will carry

Date: 2/15/11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1121

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Sitte

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		**Carolyn Nelson**	X	
Curtis Olafson – V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 6 No 0

Absent _____

Floor Assignment Senator Nething

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

REPORT OF STANDING COMMITTEE

HB 1121: Judiciary Committee (Sen. Nething, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1121 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HB 1121

HOUSE BILL NO. 1121

Presented by: **Carole Kessel**
Company Licensing Director
North Dakota Insurance Department

Before: **House Judiciary Committee**
Representative Duane DeKrey, Chairman

Date: **January 10, 2011**

TESTIMONY

Good morning, Chairman DeKrey and Committee Members. For the record, my name is Carole Kessel and I am Chief Examiner and Director of the Examinations and Company Licensing Division of the North Dakota Insurance Department.

You have before you House Bill No. 1121 which provides for the confidentiality of documents and any related materials that are filed in support of an insurance company's statement of actuarial opinion, including an actuarial opinion summary, actuarial report, and work papers. The bill also gives the Insurance Commissioner specific authority to release and share this information in certain circumstances.

Each year insurance companies are required to file financial statements with the Insurance Department that are highly complex. Key issues and risk factors affecting the insurer's financial condition are not always readily apparent, so along with the financial statement the insurance company must provide a statement of actuarial opinion prepared by its appointed actuary. The primary purpose of the statement of actuarial opinion is to present the appointed actuary's opinion regarding the reasonableness of the unpaid claims liability reflected on the insurance company's financial statement. The unpaid claims liability is usually the insurer's largest liability and the greatest source of financial uncertainty on its financial statement.

By way of background, the insurance policy is a promise to pay claims related to an insured event that usually takes place during the time the policy is in effect. But in many cases, it may be months or years after the insured event has occurred that the insurer is notified of the claim, such as an asbestos claim. Even after a claim is filed, the determination of negligence and damages often involve legal issues that can take many years to resolve. When these issues are eventually settled, the insurer must have the funds to pay the claim and any related expenses. Prior to settlement, insurance accounting rules require that the insurer set aside adequate funds to cover such reported claims, along with an estimate of claims that have occurred but have not been reported, and related claim expenses. These funds are posted as an unpaid claims liability on the insurer's financial statement and are used to pay the claims in the future. The time lags and uncertainties involved in the claims settlement process make it necessary for the unpaid claims liability to be based on estimates.

Our administrative rules and annual statement instructions specify that an actuarial opinion summary, an actuarial report, and underlying work papers must be prepared in support of the statement of actuarial opinion. Each type of document provides claim and expense statistical data in progressively greater detail. The actuarial opinion summary is submitted annually by property and casualty insurers; it provides the actuary's point estimate and a reasonable range of the unpaid claims liability and compares the insurer's reported liability to the actuary's estimate. If the reported liability is low in the range, or substantially below the point estimate, this could signal that a more in-depth regulatory review of the liability is needed.

The actuarial report and work papers are submitted as necessary at the request of the Commissioner. The actuarial report contains a narrative detailing the actuary's findings, recommendations and conclusions, as well as an explanation of their significance, and a technical component that reconciles the actuary's analysis from the basic data to the conclusions. The actuarial work papers typically comprise spreadsheets and memorandum that provide a separate analysis of the insurer's products, such as its

personal auto or homeowner's book of business, or of the insurer's business segments, such as its gas station policies or Pizza Hut franchise policies.

These supporting documents contain detailed information about the insurer's historic claims and expense experience that would reveal profitable niches of business to its competitors as well as sensitive pricing data. Consequently, disclosure of the highly competitive and proprietary information contained in these documents could harm the insurers.

The insurance industry and state regulators have supported a uniform standard, as included in the National Association of Insurance Commissioners (NAIC) accreditation program, to keep the documents supporting the actuarial opinion statements confidential. Under the accreditation program, established by the NAIC in 1990, the goal is for each state to adopt certain laws and rules so that multistate life, health and property and casualty insurers are subject to consistent solvency regulation requirements. North Dakota has maintained it accredited status since 1992 by adopting and implementing the necessary standards to effectively regulate an insurer's corporate and financial affairs. The accreditation program is instrumental in promoting and maintaining state-based regulation of the insurance industry.

Enacting this bill would provide confidentiality to the supporting actuarial documents filed by property and casualty insurers, title insurers, health entities and fraternal societies. Life insurers are excluded from the provisions of this bill because they already have specific requirements to file an actuarial opinion under N.D.C.C. Chapter 26.1-35 which also grants confidential treatment to supporting actuarial documents.

Mr. Chairman, members of the committee, I am happy to answer any questions and urge a vote of "do pass" on House Bill No. 1121. Thank you.

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TESTIMONY OF PATRICK WARD IN SUPPORT OF HB 1121 AND SUGGESTED AMENDMENTS

My name is Patrick Ward. I am an attorney here in Bismarck with the Zuger Kirmis & Smith law firm. I represent the Property and Casualty Insurance Association of America (PCI) in support of HB 1121. We support this bill but suggest a friendly amendment to make the bill conform to NAIC model language.

PCI is composed of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. PCI members write over $180 billion in annual premium, 37.4 percent of the nation's property casualty insurance. Member companies write 44 percent of the U.S. automobile insurance market, 30.7 percent of the homeowners market and 35.1 percent of the commercial property and liability market.

The insurance industry is heavily regulated by states through commissioners of insurance. Commissioners belong to the National Association of Insurance Commissioners or NAIC. The NAIC adopts model laws for reporting and regulation of Interstate insurance companies.

HB 1121 is based on one of those model laws. Actuarial opinions and actuarial summaries contain highly sensitive proprietary data relating to an insurer's investments, operations, expenses, projections, and other information. Companies protect this information from their competitors. They do not object to being required to produce this data and information to commissioners or the NAIC; however, they strongly need confidentiality protection to preserve the integrity of the data and keep their competitive edge and unique business model from competitors.

The purpose of this bill is to insure candor in these disclosures for regulatory purposes but not to make the data easily accessible to competitors and others. HB 1121 contains part but not all of the confidentiality provisions of the NAIC model law. The language we would like to have added is the following:

> Neither the commissioner nor any person who received documents, materials or other information while acting under the authority of the commissioner shall be permitted or required to testify in any private civil action concerning any confidential documents, materials or information subject to Subsection b.
> d. In order to assist in the performance of the commissioner's duties, the commissioner:
> (1) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection b with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material or other information and has the legal authority to maintain confidentiality;
> (2) May receive documents, materials or information, including otherwise confidential and privileged documents, materials or information, from the National Association of Insurance Commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and

(3) May enter into agreements governing sharing and use of information consistent with Subsections b to d.
e. No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in Subsection d.
f.

We support Commissioner Hamm and ask you to adopt HB 1121 but offer the attached friendly amendment to keep this bill consistent with the law in other states that have adopted this provision. We urge a Do Pass as Amended.

PCI PROPOSED AMENDMENTS TO HOUSE BILL 1121

Page 2, Line 1, insert the following before " This":

Neither the commissioner nor any person who received documents, materials or other information while acting under the authority of the commissioner shall be permitted or required to testify in any private civil action concerning any confidential documents, materials or information subject to Subsection b.

d. In order to assist in the performance of the commissioner's duties, the commissioner:

(1) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection b with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material or other information and has the legal authority to maintain confidentiality;

(2) May receive documents, materials or information, including otherwise confidential and privileged documents, materials or information, from the National Association of Insurance Commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and

(3) May enter into agreements governing sharing and use of information consistent with Subsections b to d.

e. No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in Subsection d.

f.

Renumber accordingly

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January 10, 2011

House Judiciary Committee

House Bill No. 1121

CHAIRMAN DeKREY AND COMMITTEE MEMBERS:

My name is Bill Neumann, I appear on behalf of the State Bar Association of North Dakota. The Bar Association neither supports nor opposes this bill generally, but we are concerned about language at lines 13, 14 and 15, that says a record "is not subject to subpoena, and is not subject to discovery or admissible in evidence in any private civil action." Those words seek to use the authority of the Legislative Assembly to declare certain records in the possession of the Insurance Commissioner beyond the reach of the courts of North Dakota, and inadmissible as evidence in court.

The problem I have with those words is that they are contrary to the first sentence of Article VI, Section 3 of the North Dakota Constitution, which says "The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state; . . . ." That procedural authority includes rules of evidence, and the language in HB 1121 clearly attempts to create a rule that regards both procedure and evidence.

I understand the reasons the Insurance Commissioner seeks to have these documents obtained from insurance companies, and not from the Commissioner's files, and I agree they are good reasons. But good reasons cannot justify passage of an unconstitutional law.

I bring this up now only to alert you to the problem. As you have already heard, members of the Insurance Commissioner's office were kind enough to meet with me last Friday to discuss this problem, and they have agreed to work on a solution. I am sure in the days to come we will agree on an amendment that will satisfy the Commissioner's needs and at the same time avoid the constitutional problem raised by the present language. My only purpose at this point is to alert you to the potential unconstitutionality of the language as it presently exists in the bill.

If you have any questions, I will try to answer them.

Prepared for: House Judiciary Subcommittee on House Bill 1121
Chairman Rep. Koppelman, Rep. Delmore and Rep. Brabandt
Prepared by: Jessica Braun, Legislative Intern, House Judiciary Committee

PROPOSED AMENDMENT TO HOUSE BILL 1121

Page 1, line 7, remove "considered by the commissioner to be"

Page 1, line 12, replace the first comma with "and"

Page 1, line 12, remove the second occurrence of ", is not subject to"

Page 1, remove line 13

Page 1, line 14, replace "private civil action" with ". This section may not be construed so as to limit the authority of law enforcement, prosecution, or defense counsel to subpoena or otherwise discover such documents, materials, or other information; nor to limit use of such documents, materials, or other information, in criminal investigations or proceedings"

HOUSE BILL NO. 1121

Presented by: **Carole Kessel**
Company Licensing Director
North Dakota Insurance Department

Before: **Senate Judiciary Committee**
Senator David Nething, Chairman

Date: **February 15, 2011**

TESTIMONY

Good morning, Chairman Nething and Committee Members. For the record, my name is Carole Kessel and I am Chief Examiner and Director of the Examinations and Company Licensing Division of the North Dakota Insurance Department.

You have before you House Bill No. 1121 which provides for the confidentiality of documents and any related materials that are filed in support of an insurance company's statement of actuarial opinion, including an actuarial opinion summary, actuarial report, and work papers. The bill also gives the Insurance Commissioner specific authority to release and share this information in certain circumstances.

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Mr. Chairman, members of the committee, I am happy to answer any questions and urge a vote of "do pass" on House Bill No. 1121. Thank you.