2011 HOUSE JUDICIARY

HB 1166

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1166
January 17, 2011
12961

☐ Conference Committee

Committee Clerk Signature D Penrose

Minutes:

Chairman DeKrey: We will take a look at HB 1166.

Rep. Klemin: Sponsor, support, explained the bill. There are some other people here who are going to go into some detail about HB 1166 and the rationale for it. Basically it relates to indemnity agreements. An indemnity is a contract whereby one person agrees to save the other person from a legal consequence, as a result of conduct of one of the parties. For example, an insurance contract is an indemnity agreement, whereby in addition to some other duties on the insurance company, if a person is found liable then the insurance company agrees to indemnify that person for the liability. In the context of what we're doing here, an oil company may require a subcontractor by contract to indemnify the oil company for that oil company's own negligence, not the negligence of the subcontractor. This bill would make that kind of indemnity agreement void whereby one party agrees to indemnify the other party for the other party's own negligence. That is contrary to the general policy that we follow, where each party is responsible for their own negligence and you can't make someone else responsible for the first party's negligence. We've done this before in other situations, for example in 2007, we adopted a law relating to the State of ND. The State of ND would require subcontractors with the State of ND to indemnify the State of ND for the negligence of the State of ND. In 2007 we passed 32-12.2-17 which says that we can't do that in a contract anymore unless there are special reasons for a more stringent indemnification as found by director of OMB. There is also a similar provision in 22-02-10 relating to indemnity agreements in motor carrier transportation contracts. It's the same kind of thing where, in that section, it's declared against public policy and void for one party to require agreeing as a condition of getting a contract to indemnify a guilty party for the guilty party's own negligence.

Chairman DeKrey: Thank you. Further testimony in support.

Paul Sanderson, for the Association of ND Insurers: Support (see attached 1).

Rep. Onstad: Will this bill also include surface use agreements that an oil company signs with the landowner.

Paul Sanderson: In subsection 4, we've excluded the landowner, with respect to allowing the landowner to enter into an indemnity provision with the oil companies. I think landowners are in a different position than the oil companies and contractors. The landowner's not a part of the operation that's occurring on the oil field on their property. With respect, to them indemnity provisions could make sense for the landowner to enter into with the company and nothing in HB 1166 should prevent those types of agreements from being entered into with the owner.

Rep. Onstad: In respect to the landowner, many times they ask for that particular provision because a lot of time the surface use agreement is a little one-sided on who ends up with full liability. Why were landowners excluded from that; do they sign with a separate agreement. If you've seen surface use agreements and I'm not sure if you have or not, but many times that's their biggest question is future liability from the expiration of that particular contract.

Paul Sanderson: I have to admit that I'm not familiar with any surface use agreements between the oil companies and the landowners, only with respect to master service agreements between the oil field companies and the contractors. I think with respect to subsection 4, it does not preclude the landowner from going to the oil company and saying you indemnify us for anything that occurs on my land. I do not know if that is the current practice in western ND at this time or not. Nothing in this bill should prevent the landowner from being able to gain that indemnification provision if they so choose.

Rep. Koppelman: I'm looking at line 10 of the bill and it strikes me that maybe it is a little unusual for us to state that a particular practice is against public policy, which is a broad statement of a particular kind of activity, and then limits it to one industry. If we think is the wrong thing to do, should we be limiting it to oil companies in these kinds of transactions.

Paul Sanderson: Obviously a public policy issue is something that this Assembly could decide. In other states the scope of anti-indemnity provisions are significantly broad as I've discovered through research. It's not being done; we're not here asking anything more at this time, than the oil field. As you said, tort law in this state and when ND passed a comparative fault statute, everybody's responsible for their own damage, their own negligence. I believe that is good public policy. I think a lot of other people do, that's why we passed it. In situations such as this, you find certain industries and certain companies trying to get around that being responsible and want to shift the cost and the burden, such as the oil companies do in the master service agreements. Would it be good public policy with respect to other contracts, perhaps, but that's your decision.

Rep. Koppelman: If you're looking at this and it was the law, and you had a case come to you that dealt with a different kind of industry, could you at all try to or perhaps try to hang your hat on that language in line 10 to say, when ND passed this, this went far beyond the specificity of dealing with the oil industry, even though that's what the statute deals with, because the statement is clearly in the Century Code now that says this kind of practice is against public policy and could you then through the tort/case law, apply to other areas.

Paul Sanderson: Yes, that would be something we would argue, that it's public policy. The problem arises and the bigger picture we see here is while tort law is one thing, the courts also recognize that a party has a right to contract and that if they've entered into this contract, then that contract should be controlling. I believe if there is opposition here today, they are going to argue well the parties should be free to contract as they so choose. The real issue and what other courts have found in other states, the inequity in the bargaining position. When a big oil company comes in and says that either you sign this contract or you don't do work for me, and you're a small contractor that makes their living providing business and services to the oil field, what position are you in. As the legislative assembly, we're here asking you to protect the small businesses and the people of ND. A lot of times, people haven't thought about it, or they think that as a business owner, I have insurance. After I finish, Bob Saunders, the marketing manager for EMC Insurance is going to testify about a specific example that has happened here in ND. When you have an oil/gas explosion that significantly injures or kills a person or multiple people, the coverage of your liability, if you a million dollar commercial policy it isn't going to go very far, you may be out of business, when you're holding and being responsible for the oil company and the damages that can occur from that. When we're dealing with a dangerous industry such as oil and gas, a provision like this, everybody should be responsible for themselves.

Rep. Onstad: You mentioned that an oil company approaching a small contractor doing business and they want to continue to do business, I think that the oil company has that hammer. How is that different from the oil company approaching the surface owner saying, agree to our surface use agreements, this is it, you can't prevent us or stop our drilling operations, so how that is different from what your example is with the small business contractor.

Paul Sanderson: I don't think it is much different. When they come in and dictate to a surface owner, sign this surface agreement, or else. I believe there are going to be some bills on some of those surface issues in here. That's a problem and why we're seeking protection, is that when we have ND consumer or ND business that's put in that inequitable position, and they make their living, we ask the legislative assembly to step in and enforce public policy to make sure that these companies aren't being taken advantage of in these industries. I'm not sure how that would necessarily apply to surface owners, but I can see the questions you raised could also be an issue with them and I think it gets back to 1166, nothing would prevent

the landowner from negotiating that, but how we get the landowners to enforce or protect their rights, I'm not exactly sure.

Rep. Onstad: It comes back to subsection 4, if they could also be included. I'll give you an example, the subcontractor or the contractor is to clean up an oil spill. If the subcontractor doesn't fulfill it in such a way, that 10 years from now, then we see some impact from that oil spill because it wasn't done properly. In your opinion, who's really liable for that situation, the subcontractor because they had an agreement with the oil company, or the oil company themselves, how does that work.

Paul Sanderson: I'm having difficulty answering that question. I think a lot would depend on the facts and circumstances. I think I understand the heart of where you are going with your questions. I think in not being familiar with the land surface agreements that you're talking to, I don't know if the oil companies are demanding that the landowners indemnify them for any damages as well. If that's the case, that may be something that you want to look at as well. I'm not familiar with that. What subsection 4 indicates is that a landowner is not bound by the anti-indemnity provision if they seek it against oil company. I don't think it necessarily addresses your concern with the oil company to the landowner.

Chairman DeKrey: Thank you. Further testimony in support of HB 1166.

Robert Saunders, Marketing Mgr for EMC Insurance Company: Support (see attached 2).

Rep. Maragos: Did this suit that ended up in Texas court happen before they passed their law. I believe that Mr. Sanderson testified that Texas was one of the states that had this law. How did this come into play?

Robert Saunders: This law was in ND and went to court in ND. The only assumption we could make was because they are in ND, they can have a different contract than they can in Texas.

Rep. Delmore: Have you asked the Insurance Dept. to address this issue at all, have you worked with Adam Hamm and his office.

Robert Saunders: We have met with the Insurance Dept. but they feel it is an issue for the legislature; it's not one that can be done through the Insurance Dept. regulations.

Rep. Delmore: Is it always clear in these cases who is liable; is there ever a case where it could be 20% the small business and 80% the oil company, is it ever split in that way.

Robert Saunders: I would say that there have got to be times when this might happen. We look at claims and ask who is at fault.

Chairman DeKrey: Thank you. Further testimony in support.

Rep. Klemin: Rep. Drovdal brought in an email that he received from an insurance agent in Williston, supporting this bill and asked me to hand it out (see attached 3).

Chairman DeKrey: Testimony in opposition to HB 1166.

Todd Kranda, with ND Petroleum Council: Opposed (see attached 4).

Rep. Koppelman: Why would it be appropriate for one party to make another party responsible for its own liability or misdeeds?

Todd Kranda: There are a number of situations that probably arise out in the oil industry or any other arrangement that it's a responsibility that can be contracted and insured for and covered. So the liability and risk exists. If you have two parties involved, a subcontractor involved with the operations, the general or person overseeing that, doesn't have as much hands-on operational activity, yet if there is something that may have been missed, the subcontractor is out there operating doing whatever their task is and they're determining the risk and determining the risk and determining who is going to bear that burden of risk and insurance is available and so these indemnity provisions come up to define and explain who is going to cover that. It certainly is a provision that is again negotiated. If a party doesn't accept it or doesn't want to, they don't have to. That's their choice they can walk away. I don't have any specific examples that I can think of.

Rep. Koppelman: On that point, what about the David and Goliath scenario that's been painted in terms of a contractor in Williston, ND, or wherever they happen to be trying to do business with this mammoth oil company and the take it or leave it scenario. If they want to put bread on the table, they have to accept this in contracts.

Todd Kranda: You do have large companies out there, but they need the services. Who's going to provide the services if this David isn't stepping up. One David or another will step up and take care of the responsibilities. We haven't heard that the insurance isn't available to the Davids of the world. They are insuring that liability risk right now. There may have been one example that we heard of, that was a situation that was a difficult, unexpected explosion of a situation. I am not familiar with it, those are apparently rare incidents. You have to tread lightly when you are looking at changing for one industry; will other litigators start saying he it's good for one industry, why isn't it good for other dangerous industries in ND. Why are we doing this?

Rep. Delmore: First, in what other non-oil related contracts is this commonly done?

Todd Kranda: I've only heard of a couple of statutes that exist that were cited to you that prohibit them. I guess the last time I was involved with some state contracts, I even thought that those had indemnity provisions. So you name it, if there's any industry out there, any other contracts, there isn't a specific law that exists other than the two that I've heard of for the State and the Motor Carriers.

Rep. Delmore: What is the cost to the second party to take out this insurance?

Todd Kranda: I don't know the insurance rates and costs. I think it's obviously part of the entire bundle, it's the negligence that exists and they write the policies. I haven't heard of problems. Sometimes you hear that there is a need for policies, that companies won't write them. We don't hear that, that's not happening. Part of our association, those 250 companies do involve these contractors, these David contractors that you're referring to. They haven't said that they have a problem insuring that risk. I don't think there is a problem out there that needs to be addressed.

Rep. Klemin: You're familiar with the term "contract of adhesion".

Todd Kranda: I've heard it.

Rep. Klemin: What is it?

Todd Kranda: It's the David and Goliath type situation I suppose; you're putting a contract in front of you.

Rep. Klemin: Basically it's one where we don't have equal bargaining positions and a contract of adhesion would be one where you either sign this contract the way it is, or go someplace else, and that's due to the fact that the parties don't have bargaining positions. Would that be a contract of adhesion?

Todd Kranda: I guess your example is fine. But again, in terms of whether those exist or not, I suppose of them do. It's a free choice, why is the state stepping in and saying you can in this industry but not in those industries. I just don't see the public policy of making this void an exception.

Rep. Klemin: But the kinds of contracts that we're talking about in this case are contracts of adhesion, correct.

Todd Kranda: I don't know, I don't deal with the actual contracts themselves. I would assume that there are some contracts that are out there, that have been developed by the industry, and the industry has been around for many, many years, and I think that anybody in the industry is familiar with those types of contracts and they cover a lot of things. I don't know to the extent that provisions can be negotiated in and out depending on the relationship, and also the need. I think there

is a significant need for these small companies to provide services. We're short of workers, there are employment situations out in the oil fields. I think there is more negotiating opportunities that will help the Davids' of the world to provide services and operating out in the oil field area.

Rep. Klemin: You said you haven't seen one of these contracts yourself.

Todd Kranda: I haven't looked at any of the specific master service agreements. I've heard them discussed and I assume that there are provisions in there that cover a variety of things.

Rep. Koppelman: The testimony we heard earlier indicated that the insurance industry may be offering liability protection, as I assume most insurers would, based upon the perceived risk of the folks they are insuring. But the concern seems to be that if these contracts are out there and they also basically the liability of another, much larger interest, that maybe they need to go back and revisit and whether involves increasing rates, premiums, not insuring if those provisions are in contracts that this company, this insured enters into. Have you heard any rumblings about that.

Todd Kranda: I don't think so. I guess that was commented that they might have to look back, but that's an incident. This is a history on this person's insurance now that they need to look at and say what happened here, and do the rates need to be changed. It's just like you and me, if we have a car accident. I assume the underwriters will look at that and say do the rates need to be increased. Are there situations here that are going on that we need to change the price of this policy. We don't hear that, in terms of the representation that we have at the council, we've got hundreds of these smaller entities. We're not hearing that they have the rates skyrocketing. We're not hearing that they don't have the insurance possible already to obtain. I'm sure the underwriters have looked at these master service agreements with the insurance companies and they have their lawyers looking at it and saying yes, here is the risk factor, here are the rates.

Rep. Koppelman: I think the reference, while you are correct in stating that it probably came to attention because of one incident, I think the point that was made in the testimony was, that because of those kinds of things they might have to take a look at a blanket stance with regard to the entire industry. It's no different than when mold became a factor a few years ago for the insurance industry. It was one or two cases that brought that to attention, but it affected the entire industry.

Rep. Steiner: Do you know, do we have oil companies in ND who are also working in TX, WY, LA and NM under these anti-indemnity statutes already.

Todd Kranda: I don't have personal knowledge of their operational scope. I would assume that several of these companies operate in numerous states and have

production operations and business in various states, but I don't know of any specifically.

Rep. Steiner: Could you provide a list to the Committee.

Todd Kranda: A list of...

Rep. Steiner: The companies that would be operating in those four states and also in ND.

Todd Kranda: You're asking for a list of our 250+ members who might have operations outside of ND, specifically those four states.

Rep. Steiner: Can you query them and ask what companies in ND, also have operations in other states and are already working with this anti-indemnity statute in TX, LA, WY, and NM.

Todd Kranda: I can try to blast a question out to see if that is information we can obtain and provide that to the committee. In terms of working in other states, all states have different quirks to their laws. I suppose they have their little aspects of each state that they have to comply with and look at. This might be just one of the aspects in those four states, and I'm not sure when they were implemented.

Rep. Brabandt: I'm a recently retired contractor who worked out in the oil fields. We didn't necessarily work at the well head or right in the field, we were involved in building construction and we worked out there for a number of years without any hesitation, no problems. If we were told, take it or leave it, most of them we took, some we left but it was our option. There wasn't a problem, we never incurred any problem at all. We were working basically on corporate buildings, we were putting in glass. I think it's my opinion that we should let the private sector work. I think to a certain extent we should stay out of it.

Rep. Onstad: Part of the comments were that small contractor has to agree to indemnify the larger company. You made reference to why we're not identifying all industries. Let's take a road contractor, I'm sure they have master service agreements with subcontractors who have large building contracts. Do they have the same typical language in there.

Todd Kranda: I think that's the same question as Rep. Delmore asked, basically it's available. As Rep. Brabandt said, it's the private industry that determines what type of provisions, indemnity provisions are in existing law, are available to these private entities, just like you have indicated these other types of industries. It is available, whether they have them in each contract, I guess it depends upon the negotiations that occur.

Chairman DeKrey: Thank you. Further testimony in opposition. Let's take a look at HB 1166.

Rep. Klemin: In this specific case, we are talking about an ultra hazardous type of activity where there is a significant risk of substantial harm or death to people who are involved. It's not a typical type of business that we're involved with here. We're looking at an ultra-hazardous activity. It seems to me that if we've got four of the other largest states that are engaged in oil and gas production already have this same statute, I don't understand why that should be a problem here in little ND for these major oil companies.

Rep. Koppelman: I know that Rep. Steiner had asked for some information on this, maybe we should wait until we get that.

Rep. Maragos: Before you move away from this, since Rep. Klemin brought up the other four states, I was wondering if he had any thoughts on the question that I had asked, regarding that particular instance that was cited by the insurance people, since his testimony said directly that it was moved to Texas court, why the Texas statute did not prevail in this instance, if they're one of the four states that have adopted this.

Rep. Klemin: I think that is probably the way it should have happened. We do have conflict of laws, provisions and typically a contract might say something like, this contract shall be interpreted in accordance with the laws of the state of TX; and it's signed in ND. In that case, the judge would have to look at the law of the state of TX to interpret the contract and I think you're right, if the law of the state of TX says this is against public policy and void in TX, then that should have been the result, but it may be that at the time it happened, that wasn't the law in TX.

Rep. Maragos: I don't know if we got a satisfactory answer to it.

Rep. Onstad: I believe that the case they are talking about happened in the Parshall area and it was kind of a conflict between the subcontracting people who were doing the work, and were asked by an oil company official to do a certain task, and I don't think the proper gas detection equipment was in place for that particular company and then that is where the discussion went on that. There was an explosion and a couple of individuals got burnt.

Rep. Maragos: I think I understand exactly what the ramifications of the case were and there may have been some good legal questions to be decided, but I was just alluding to this idea that, according to the testimony, the ND judge determined that the contract was written in TX and TX law had to prevail. I don't know if that meant that they had to move the case to TX, or then the judge had to look at TX law and then make the interpretation. The only thing I was asking if TX law was needed in interpreting the facts, why the oil company could not have been brought in as a third party end of the suit.

Rep. Onstad: On the second page, I brought up the question in section 4 on that, the same, signing off their own liability is in the surface use agreements with land owners, the same thing. I think we should put a friendly amendment on the bill that might make some corrections that would also include the surface owner when they sign their surface use agreements, because it is one of the conditions that the surface owner asks to get removed, and that's the main sale point that they want to keep it there.

Rep. Maragos: That begs a wonderful question. If that agreement with the surface owner and the oil company and then the oil company hires someone to fix the land or is that something that is strictly between the surface owner and the subcontractor. Why can't the surface owner make the oil company sign that.

Rep. Onstad: That's a point of refusal, and because of current law, their agreement is with the mineral owner and they have to sign into a surface agreement with the surface owner to go on that particular property. So the situation is, I'm going to develop the mineral owners' interests. All it has with the surface owner that they sign an agreement with the surface owner, a surface use agreement, that they can use this property for exploration of oil. All we have is damages for you, and hopefully maybe some lost production going forward. In that surface use agreement, it's a contract between the oil company and the surface owner. My line of questioning goes back to the surface owner who wanted a section of that surface use agreement removed, that said that future liability and land condition is not the responsibility of the oil exploration company and I guess I'm willing to bring in a couple of surface use agreements if you would like to see that. It's a point of contention between the surface owner and the oil company.

Chairman DeKrey: We'll move on then.

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1166
January 25, 2011
13375

☐ Conference Committee

Committee Clerk Signature D Penrose

Minutes:

Chairman DeKrey: We will take a look at HB 1166.

Rep. Steiner: I move a Do Pass on HB 1166.

Rep. Klemin: Seconded.

Rep. Koppelman: Can you refresh my memory.

Chairman DeKrey: This is the bill where the oil/gas subcontractor doesn't have to sign a Master Service Agreement saying that he is carrying the liability insurance for risks that the oil company incurs.

Rep. Klemin: Each party is responsible for their own actions; the subcontractor is not responsible for the negligence for the oil company.

Chairman DeKrey: Clerk will call the roll on a DP motion on HB 1166.

7 YES 6 NO 1 ABSENT DO PASS CARRIER: Rep. Steiner

Date: 1/25/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1166

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 _____ Seconded By _____

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) 7 No 6

Absent 1

Floor Assignment Rep. Steiner

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

REPORT OF STANDING COMMITTEE

HB 1166: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). HB 1166 was placed on the Eleventh order on the calendar.

2011 TESTIMONY

HB 1166

TESTIMONY OF PAUL SANDERSON IN SUPPORT OF HOUSE BILL 1166

HOUSE JUDICIARY COMMITTEE

JANUARY 17, 2011

Chairman Dekrey and Members of the House Judiciary Committee, my name is Paul Sanderson. I am an attorney in the Bismarck law firm of Zuger Kirmis & Smith. I represent the Association of North Dakota Insurers (ANDI) in support of House Bill 1166. The Association of North Dakota Insurers is a group composed of North Dakota domestic insurance companies

HB 1166 is needed to address an inequity that has arisen in the oil industry in North Dakota. As part of the oil production efforts, oil companies typically enter into master service agreements with contractors who supply various services and materials used in the oilfield operations. These agreements usually require the contractors to indemnify the oil company against any claims arising out of the services or materials provided by the contractor, even if caused by the oil company's own negligence. The indemnity provisions usually have some form of the following language: "Contractor agrees to protect, defend, indemnify and hold harmless company and its employees from all damages, loss, claims, costs, and liability of any kind including the negligence of the company". The contractors are often required to carry certain levels of insurance coverage for the benefit of the oil company. In effect, the oil companies are shifting the liability and costs for their own actions to the smaller contractors and their insurance companies.

HB 1166 would declare that any agreement in an oil and gas service contract which requires one party to indemnify another party for that party's own negligence is void. This bill will ensure that both parties, the oil company and the contractor, will only be responsible for their own fault or negligence. The oil company will not be responsible to pay for any negligence on the part of the contractor. Likewise, the contractor will not be responsible to pay for the negligence of the oil company. HB 1166 will ensure that all parties will be responsible for their own negligence. Any contractual provisions to the contrary will be void.

This bill mandates that the public policy behind North Dakota's current tort laws are followed and applied in this state. As part of the tort-reform movement of the mid 1980's, the Legislative Assembly determined that North Dakota would follow a comparative fault tort system. Under comparative fault, each party is only responsible for its own negligence. When two or more parties are found to have contributed to an injury, each party is only liable for the amount of damages attributable to the percentage of fault for that party. This has been the public policy governing North Dakota tort law for over twenty years. HB 1166 will ensure that this policy continues to apply in North Dakota's oilfields.

Subsection 1 of the bill makes any indemnity agreement that seeks to indemnify a party for its own negligence or the negligence of its employees void.

Subsection 2 of the bill limits the anti-indemnity provision to oilfield activities. Subsection 3 ensures that this bill does not interfere with the laws of workforce safety. Subsection 4 of the bill does not preclude a land owner from securing any indemnity agreements related to operations on the owner's land.

HB 1166 is similar to the Oilfield Anti-Indemnity statutes enacted in four of the largest oil producing states in the country: Texas, Wyoming, Louisiana, and New Mexico. These states recognized the ultra-hazardous nature of the work performed in the oil industry. These statutes were enacted to prevent oil companies from shifting liability for its own negligence to smaller contractors. No longer are oil companies in these states permitted to require the smaller contractors to indemnify them when people are injured because of the oil company's own negligence. HB 1166 is modeled after Wyoming's Anti-Indemnity statute, W.S. 1977 § 30-1-132.

Anti-indemnity statutes are not a new concept in North Dakota. Anti-indemnity statutes similar to HB 1166 have been enacted in North Dakota to govern other contracts and industries. In 2009, the Legislative Assembly enacted N.D.C.C. § 22-02-10 which declares that any indemnification provision in a motor carrier transportation contract is void. In addition, the Legislative Assembly has declared in N.D.C.C. § 26.1-04-03(16) that any contract requiring a health care provider to indemnify any entity for the entity's own negligence is void. Indemnification provisions were also restricted in state service contracts in

N.D.C.C. § 32-12.2-17. These statutes all ensure that North Dakota's comparative fault system is followed.

For the foregoing reasons, the Association of North Dakota Insurers supports HB 1166 and urges a Do Pass on this bill.

January 17, 2011

HOUSE JUDICIARY COMMITTEE HEARING ON HOUSE BILL NO. 1166

Robert Saunders
716 9th St NW
Minot, ND

Chairman Dekrey and Members of the House Judiciary Committee, my name is Bob Saunders. I am from Minot and I am the marketing manager for EMC Insurance Company in our Bismarck Branch office. I am here to ask for your support of House Bill No. 1166.

The House Bill 1166 deals with what I would describe as one of the negative impacts of the oil and gas development in North Dakota. As with any economic development issue there is both positive and negative impacts to be dealt with. We have all seen the effects of many of the positive impacts that oil and gas development have brought our state. One of the major positive impacts has been on employment in the state.

The company I work for, EMC Insurance Companies, insures many of the small independent oil field contractors that employ many of the people working in North Dakota's oil fields. These small contractors must first sign what is called a "master service contract" with the large national and multi-national oil companies before they can work on the well sites.

One of the common requirements found in the "master service contracts" is a requirement for the small oil field contractor to agree to indemnity the large oil companies against loss or liability even for actions that occur due to the negligence of the large oil company, it agents, employees or subcontractors.

A small insured contractor of ours was on a well site that had been drilled but not yet completed and set up for production. They were working under the direct supervision of a large oil company through their consultant on site. An explosion and fire occurred due to no fault of our insured or his employees. Three of our insured's employees were injured. They later brought suit against the large oil company. The large oil company stated they could not be held responsible as our small insured contractor agreed to indemnify them even for their negligent acts. During the trial a judge ruled the master service agreement was signed in Texas and that because of that Texas law applied over North Dakota's comparative fault law. Our insured was held responsible to defend the large oil company and indemnity his own three employees for their claims against the large oil company.

The result of this litigation could have placed our insured in financial trouble if the policy limits were not high enough. He could have his insurance premiums increased dramatically and or his insurability could become an issue due to no fault of his own or his employees which could affect his ability to work in the oil field and continue to employ the people he has working for him.

At EMC we take pride in taking the time to underwrite our business. That is to say we take the time and effort to review our accounts and get to know them and their operations before we offer our insurance products and services. We feel comfortable with what they are doing and how they are operating and we price our products and services based on that underwriting effort.

If our small oil field service contractors are going to continue to be held responsible for negligent actions of the large oil companies they work for we may be forced to reevaluate offering our competitively priced products and service to these small independent North Dakota businesses. This action could have a negative effect on North Dakota's oil field insurance market place.

North Dakota has a long history of protecting our citizens for being taking advantage of by large out of state organizations. The Bank of North Dakota, the North Dakota State Mill and Elevator and the North Dakota Work Force Safety workers compensation program are living examples of that citizen protection.

I personally feel it is wrong for anyone not to be held responsible for their own negligent actions and for someone else to be held accountable for them. This is not good public policy and goes against North Dakota's legislative intent of comparative fault and that is why I am asking for your support of House Bill 1166.

3

Drovdal, David O.

[redacted]m: Craig Oksol [craig@mangerins.com]
[redacted]t: Monday, January 17, 2011 8:51 AM
To: Andrist, John M.; Lyson, Stanley W.; Oehlke, H. Dave; Klemin, Lawrence R.; Drovdal, David O.; Sukut, Gary
Cc: ddekery@nd.gov; Klemin, Lawrence R.; Boehning, Randy G.; Kingsbury, Joyce M.; Koppelman, Kim A.; Kretschmar, William E.; Maragos, Andrew G.; Steiner, Vicky L.; tbeadie@nd.gov; Brabandt, Roger L.; ldeimore@nd.gov; Guggisberg, Ron L.; Hogan, Kathy L.; Onstad, Kenton B.
Subject: House Bill No. 1166

Honorable Senators Andrist, Lyson and Oehlke and Representatives Klemin, Drovdahl and Sukut,

My name is Craig Oksol. I have been employed by Manger Insurance, Inc in Williston ND for over 30 years. As you might imagine, as a licensed agent, I have had the opportunity to be exposed to and provide insurance contracts to the oil service contractors in the Williston area and beyond. After over 30 years of service I feel that I have some experience regarding the issues in the bill that you will be discussing/debating and acting on.

The indemnity agreements that you are addressing are contained in what the industry generally refers to as the Master Service Agreement or MSA. Rarely does a day not go by when one of my clients will bring in a MSA for my review. However, because I am not licensed to practice law I instruct them to have the MSA reviewed by their attorney. My parting words are usually 'make sure you know what you are signing' because I know that the language in the MSA is usually such that the contractor will held legally liable or responsible for someone else's negligence/liability (i.e.. Oil company). I cannot answer whether or not my clients attorneys ever review the MSAs. However, my clients are put in the unenviable position of signing the MSA and exposing themselves to financial loss that in many cases is not insurable or not getting any work. It is clearly a position of the 'little guy' being at the mercy of the 'big guy' who because of his position [redacted]call the shots and make the rules regardless of 'rightness' or 'fairness'.

When I first saw that this bill was being introduced I said that ' it is about time'. My research of this issue led me to the State of Wyoming where a similar law has been in place for decades. So why hasn't the come up before now? I think there are three primary reasons. 1) Ignorance - the contractor simply does not recognize the importance of what he is signing and doesn't have the time or money to have his attorney interpret every MSA. 2) If the contractor doesn't sign he doesn't work - he has little choice if he is going to work. 3) The contractors really do not have a voice - they are not organized and have no lobbyist that might otherwise do this work for them. They are very good at what they do - but, enacting laws or organizing with their counterparts is not a strong suit. They are quite an indepèndent group of hard workers.

So you might ask yourself as a legislator - is the law necessary or are we trying to fix something that is not broken? In my opinion the system is broken, unfortunately those people who are affected by this the most just are not educated in the matter or are resigned to the fact that there is nothing that they can do. It is certainly a broken system when someone can suffer financial ruin for incidents that they are not responsible for. The insurance industry has made some effort to provide coverage for the contractors assuming the risks of others, however, not all assumed contractual liability incidents are covered by insurance and it is not without cost. As you might imagine, my clients expense of providing coverage for someone else's negligence can be significant.

You might wonder why I would be railing in favor of this law when in fact the current situation does bring many premium dollars in to my agency. The simple answer is that at some point 'fairness' and 'rightness' need to be a part of the mix. The 'little guy' has no bargaining power and is at the mercy of the 'big guy'. In my opinion this is clearly a situation where you as legislators can level the playing field and put 'fairness' and 'rightness' to the mix.

Thank you for allowing me a chance to voice my opinion.

[redacted]

Craig Oksol
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[redacted]

[redacted]

Testimony in Opposition to
HOUSE BILL NO. 1166
House Judiciary Committee
January 17, 2011

Chairman DeKrey, House Judiciary Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Law Firm in Mandan and I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council to oppose HB 1166.

As some of you may know, the North Dakota Petroleum Council represents more than 250 companies involved in all aspects of the oil and gas industry and has been representing the industry since 1952. I am including a North Dakota Oil Facts handout with my testimony to provide you with some additional general background information.

The North Dakota Petroleum Council is opposed to HB 1166 because it is an interference with the private rights of parties to contract for indemnification responsibilities. As you may know, "indemnity" is generally defined as a duty, typically arising from a contract, in which one person promises to make good on another's financial loss or liability, resulting from a particular event or contingency.

The North Dakota Petroleum Council is not aware of any major problem with indemnification provisions in the oilfield related contracts that HB 1166 is trying to address or solve that would be any different in any other contractual arrangement.

These types of indemnity arrangements are permitted in other non-oilfield related contracts. The parties involved in oilfield negotiations should have the same freedom to

contract as exists in other contractual arrangements and there does not appear to be a compelling reason for this legislation which would prohibit these indemnity arrangements in oilfield contracts.

The types of questions that arise with HB 1166 include: Why single out and limit this to only oilfield contracts and the oil and gas industry? Who will benefit from such legislation? Is this simply a benefit to the insurance industry? and, Will this legislation result in lower premiums for North Dakota citizens?

HB 1166 simply is not necessary and is an inappropriate interference with private right of parties to enter into such contracts with indemnity provisions.

Accordingly, I would urge a **DO NOT PASS** recommendation for **HB 1166.** I would be happy to try to answer any questions.

TH DAKOTA
TROLEUM
COUNCIL

NORTH DAKOTA OIL FACTS

Did You Know?

- **North Dakota is the fourth largest oil producing state.** The state's average production in 2009 was more than 218,000 barrels of oil per day, totaling nearly 80 million barrels for the year, up more than 17 million from 2008.

- All-time production of crude oil in North Dakota amounts to more than 1.7 billion barrels.

- At the end of 2009, there were 5,200 wells capable of producing oil and gas in North Dakota. The average North Dakota well produced approximately 47 barrels per day.

- During 2009, **92.5 billion cubic feet of natural gas were produced** and 56.4 billion cubic feet of natural gas were processed in North Dakota.

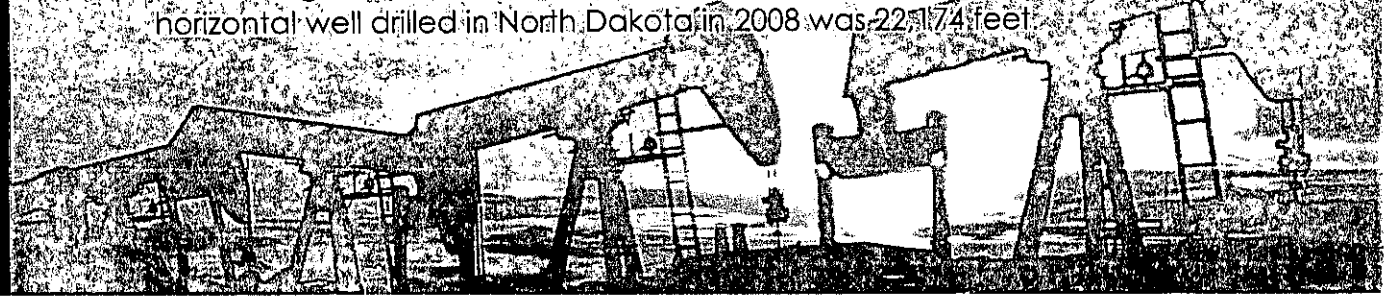
- The drilling rig count, a prime barometer for measuring new oil and gas activity, averaged 52 rigs a day in 2009. The peak year for drilling rigs was 1981, with an average monthly rig count of 119. The all-time high was in October of 1981, with 146 operating rigs.

- There were 627 drilling permits issued during 2009, down 319 from 2008. Approximately 517 wells were completed in 2009.

- **Horizontal, or directional, drilling accounted for 95% of the new wells drilled in 2009** and 84.7% of the state's total oil production.

- The success ratio for new wells in existing fields in 2009 was 99% and for wildcat wells was 94%. A wildcat well is a new well drilled at least one mile from existing production. The overall industry success rate for new wells in North Dakota for 2009 was 98%.

- The deepest vertical well drilled in North Dakota in 2008 was 13,805 feet. **The average depth for a North Dakota well in 2009 was 17,035.** The longest horizontal well drilled in North Dakota in 2008 was 22,174 feet.



- The average cost of completing an oil well in North Dakota was approximately **$5.6 million** during 2009. The average cost of completing a well in 2008 was about $5.4 million.

- There were **17 counties in the state in 2009 with commercial oil production.** Oil and gas exploration has occurred at some point in every county in the state except Traill County.

- **Mountrail County** was the top-producing county in 2009, accounting for 37% of the state's oil production. The other top-producing counties were Bowman, McKenzie, Dunn and Williams.

Employment

- The state averaged more than **5,508 North Dakotans** at work in the oil patch in fiscal year 2008-09. Peak oil field employment occurred in late 1981, when more than 10,000 people were working in the oil patch.

- **Each drilling rig results in approximately 120 direct and indirect jobs.**

- Other sectors of the petroleum industry include refineries, gas plants, pipelines, retail gasoline stations, wholesalers, and transporters. The industry altogether employed approximately 12,747 people in North Dakota during fiscal year 2008-09.

- In 2008, Job Service North Dakota reported the average yearly wage in the oil and gas extraction industry was **$82,803**. That wage is 132.5% above the statewide average wage of $35,618.

Oil Tax Revenues

- Production tax revenues for 2009 were more than $392.9 million, representing a 25% decrease from 2008.

- Over the past 57 years, **the State of North Dakota has received more than $791 million from oil and gas leases, bonuses, royalties and rentals on state land.** During 2009, more than $36.4 million went to the Lands and Minerals Trust and more than $120 million to the Board of University and School Lands Trust.

- U.S. Forest Service administered lands in the Little Missouri National Grasslands provided federal oil and gas revenues of $34,184,078 during fiscal year 2009. Of that amount, one fourth, or $8,546,019, was returned to McKenzie, Billings, Golden Valley and Slope Counties for schools and roads. In addition, Bureau of Land Management administered land produced $54,067,250 during fiscal year 2009. Approximately half of that amount, $26,492,948 (adjusted for new receipts sharing), was returned to the state's general fund and is the first money expended for education statewide.

North Dakota Petroleum Council
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