

Approved: March 14, 2006

Date

MINUTES OF THE HOUSE INSURANCE COMMITTEE

The meeting was called to order by Chairman Clark Shultz at 3:30 P.M. on March 7, 2006 in Room 527-S of the Capitol.

All members were present except:

Representative Steve Brunk- excused
Representative Ray Cox- excused
Representative Nile Dillmore- excused
Representative Joe McLeland- excused

Committee staff present:

Melissa Calderwood, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Ken Wilke, Revisor of Statutes Office
Sue Fowler, Committee Secretary

Conferees appearing before the committee:

Bill Miller, American Sub-Contractors Association, Olathe, KS
Ken Keller, Western Extralite, Company, Kansas City, KS
Chris Wilson, Kansas Building Industry Association, Topeka, KS
Rick Dodds, Spirit AeroSystems, Inc, Wichita, KS
Tom Whitaker, Kansas Motor Carriers Association, Topeka, KS

Others attending:

See attached list.

Hearing on:

Sub for SB 338: **Construction contracts; indemnification clauses and additional insured requirements contained therein void**

Melissa Calderwood, Kansas Legislative Research Department, gave a brief overview for on **Sub for SB 338** and **Sub for SB 149**.

Proponents:

Bill Miller, American Sub-Contractors Association, (Attachment #1), gave testimony in support of **Sub for SB 338**.

Ken Keller, Western Extralite Company, (Attachment #2), appeared before the committee in support of **Sub for SB 338**.

Chris Wilson, Kansas Buildings Industry Association, (Attachment #3), presented written testimony in support of **Sub for SB 338**.

Opponent:

Rick Dodds, Spirit AeroSystems, Inc., (Attachment #4), presented written testimony in opposition to **Sub for SB 338**.

Hearing on **Sub for SB 338** to be continued at a later date.

Hearing on:

Sub for SB 149: **Motor carrier transportation contracts; indemnification clauses contained therein void**

Proponent:

Tom Whitaker, Kansas Motor Carriers Association, (Attachment #5), gave testimony in support of **Sub for SB 149**.

CONTINUATION SHEET

MINUTES OF THE House Insurance Committee at 3:30 P.M. on March 7, 2006 in Room 527-S of the Capitol.

Patrick Hubbell, Kansas Railroads, commented briefly on the proposed balloon associated with Sub for SB 149.

Hearing on Sub for SB 149 to be continued at a later date.

Discussion and action on:

SB 405: **Insurance Commissioner; discretion to waive certain requirements for foreign insurance companies to operate in Kansas**

Representative Kelsey moved to favorably pass SB 405 and place on the consent calendar. Seconded by Representative B. Sharp. Motion carried.

Representative Grant recommended without objection the committee members approve the committee minutes of March 2, 2006.

Next meeting will be Thursday, March 9, 2006, at 3:30 P.M., in Room 527-S.

Meeting adjourned at 4:10 P.M.

**House Insurance Committee
Guest Sign In Sheet
Tuesday, March 7, 2006**

Name	Representing
Bill Miller	MEMBER SUBCONTRACTORS ASSOC.
Tom Whitaker	KS MOTOR CARRIERS ASSN.
John Prather	Grendyko Transport, Inc.
Eric Stoffel	AGC of KS
Pat Hehlert	KS Railroad
Dominic Krjawa	KCLIA
Alex Kotykatz	PIA
Ken Keller	Western Entulil Company
Bill Sneed	ANIP
Tom Burgess	ASA - NACM
Noah Weinert	Roo. Trimmer
James Ann Raver	KATP
Chris Wilson	KBIA
Scott Heidner	ACEC Kansas
Jim Mazag	Spirit Aero Systems
Carli Watkins	Rep Kirk
Dorck Helm	Helm Law Firm
J.P. Small	Koch Industries, Inc.

BUILDING ERECTION SERVICES COMPANY

15585 S. KEELER • P.O. BOX 970 • OLATHE, KANSAS 66051-0970
(913) 764-5560 • FAX (913) 764-2317

March 7, 2006

To: The House Insurance Committee
Re: SB-338

Chairperson Shultz, Vice- Chairperson Carter, and Committee:

My Name is William Miller. I thank all of you for the opportunity to speak to you today. I am here today representing The Greater Kansas City Area American Subcontractors Association and myself as a business owner with locations in Topeka and Olathe, Kansas. The American Subcontractors Association is a national association with 6000 plus subcontractor and supplier members. This chapter has 86 members from Wichita to the south, Salina to the west and the Greater Kansas City area to the east.

I am here to speak in favor of SB-338. This much needed legislation will plug the loophole in the anti-indemnity bill that this committee produced and submitted to the full legislature in 2004. It was passed and became law in July, 2004.

Unfortunately, by contractually requiring a party to a contract to additionally insure one or more parties to the contract, the intent of the anti- indemnity law has been circumvented.

SB-338 will prevent this practice of shifting risk and liability of one or more parties to another party who has no ability to control the risk.

There is absolutely no incentive to maintain a safe operation if someone else is forced to assume all of the liability and pay all claims. Accountability is what this Bill is all about and it is certainly time for it.

SB-338 will over time reduce insurance cost for good safe contractors and force the bad and unsafe contractors to re-think their practices when their premium is based upon their loss run.

This Bill will not delete or reduce coverage provided in subcontractors and suppliers general liability policies. Any testimony to the contrary is simply untrue. Completed operations coverage which covers the resultant damage caused by defective work is not affected in any way.

On behalf of myself and the thousands of contractors, subcontractors, and suppliers who do business in Kansas, I urge your support of SB-338

William R. Miller
President
Greater Kansas City American Subcontractors Assoc.
Building Erection Services Co.
Midwest Crane & Rigging Co.



Certified Steel Erector



House Insurance
Date: 3-7-06
Attachment # 1

January 23, 2006

Mr. Chairman, I want to thank you and your committee for the opportunity to speak to you in support of SB 338. I'm Ken Keller, controller of Western Extralite Company with locations in Topeka, Lawrence, Leavenworth, Manhattan, Lenexa and various locations in Missouri. I also represent the Electric League of Greater Kansas City, with a membership of 325, and the National Association of Credit Managers, Kansas City Division, with a membership of 560, plus other interested organizations. Western Extralite Company sells electrical supplies to the construction industry. Two years ago the Kansas Legislation passed a bill that eliminated hold harmless and indemnification agreements from construction contracts. Without question this was good and necessary legislation that prohibited owners and general contractors from unfairly transferring risk from those in control of the contract to the sub-contractors and sometimes the supplier.

This was an enormous step forward; however, it failed to solve the problem entirely. What it didn't cover will be eliminated by SB 338. That being the current practice of requiring the sub-contractor to name the owner, general contractor etc. as additional insured on their insurance policies. This effectively transfers the risk to the sub-contractor and his insurance company to be responsible for claims for problems out of their control and for which they are not responsible.

This is indeed unfair and needs to be eliminated just as hold harmless and indemnification was two years ago. SB 338 will accomplish exactly that. I urge your support of SB 338.

Thank you

Ken Keller, controller

Western Extralite Company

816-421-8404

House Insurance
Date: 3-7-06
Attachment # 2



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**STATEMENT OF THE KANSAS BUILDING INDUSTRY ASSOCIATION
TO THE HOUSE INSURANCE COMMITTEE
REPRESENTATIVE CLARK SHULTZ, CHAIR
REGARDING Substitute for S.B. 338**

March 7, 2006

Mr. Chairman and Members of the Committee, I am Chris Wilson, Executive Director of the Kansas Building Industry Association. Our over 2300 members are involved in the state's residential building industry. KBIA is in support of S.B. 338.

KBIA supported H.B. 2154, which was passed by this Committee in 2004, subsequently passed the Senate 39-0 and is now embodied in the current law. That bill provided the language regarding indemnification provisions. S.B. 338 extends the same public policy to provisions which would require a party to provide liability coverage to another party as an additional insured for such other party's own negligence or intentional acts or omissions, rendering them void and unenforceable. For the same reasons we supported H.B. 2154 in 2004, we support S.B. 338. Parties should be responsible for their own acts and not rely upon the liability protection of others. We do not see this language as prohibiting provisions in a contract providing for coverage of party A by party B for party B's negligence or intentional acts or omissions.

Thank you for the opportunity to provide this statement in support of S.B. 338.

House Insurance
Date: 3-7-06
Attachment # 3



TESTIMONY

TO: House Committee on Insurance
RE: Sub. for SB 338

Mr. Chairman and Members of the Committee:

This statement is presented on behalf of Spirit AeroSystems, Inc. Spirit is an aerospace manufacturer and employs approximately 8,500 persons in Wichita. Spirit's facility in Wichita consists of 600 acres and 10.5 million square feet of covered space in over 150 buildings. Spirit devotes a large budget to maintenance and improvement of its facility in order to remain competitive in the marketplace. Accordingly, we enter into many construction contracts as an owner.

We wish to provide a statement in opposition to the provision in Senate Bill 338 which would outlaw as against public policy a very common and reasonable practice in construction contracts. We are referring specifically to the provision forbidding the common practice of requiring that a contractor name another party as an additional insured under the contractor's insurance policy.

Almost every business in Kansas buys Commercial General Liability insurance. These insurance policies are generally referred to as CGL policies. Businesses purchase policy limits that have some relationship to the degree of risk associated with the business they normally conduct. For instance, the risk associated with running a corner bookstore is less than that of manufacturing fireworks. Presumably, the bookstore owner and the fireworks manufacturer each purchase CGL coverage appropriate to their respective risk.

When a business contracts to have a building constructed or remodeled, the risk associated with that project may have no correlation with the risk associated with the underlying business. Take that corner bookstore. Assume it decides to remodel the premises and finds that asbestos will have to be removed. The removal of asbestos carries with it a far greater liability risk than that associated with operating a bookstore. In theory, a savvy bookstore owner could purchase additional insurance to cover the temporary risks of the construction project, but in many cases business owners will

have no experience in either identifying or evaluating the nature or degree of risk associated with the construction project.

The construction contractor, however, does have that expertise. In the hypothetical, the asbestos abatement company is in the business of removing asbestos. It understands the risks and purchases appropriate coverages and limits of liability insurance for all of its projects.

Over the past two decades the reasonable practice has developed for facility owners to require their construction contractor to add the owner as an additional insured under the contractor's insurance policy, to protect the owner from the additional risks associated with the construction project.

The insurance market has long recognized this practice and typically will provide the coverage for a modest additional premium. The construction contractor is aware of the requirement at the time it bids the project and adds the cost to its contract bid.

Contrary to the proponents of this legislation, we do not believe this practice contravenes public policy. The proponents do not suggest that the owner could not purchase the insurance directly. Why is it against public policy for the parties to agree who will purchase insurance to cover the project? The current practice is the most efficient way of identifying and evaluating the risks associated with a particular project and insuring against those risks.

Furthermore, this legislation could have an unintended consequence. Owners inexperienced in evaluating risks associated with construction projects may end up underinsured. Injured parties could find there is inadequate insurance coverage to compensate them for their injuries.

Respectfully, we urge that the language on additional insureds be rejected and contracting parties be permitted to continue to enjoy the freedom Kansas allows to enter into contracts with provisions that suit their particular circumstances.

Rick Dodds
Deputy General Counsel



Kansas Motor Carriers Association

Trucking Solutions Since 1936

LEGISLATIVE TESTIMONY

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Allied Industries Chairman

Tom Whitaker
Executive Director

**Presented by the Kansas Motor Carriers Association
Before the House Insurance Committee
Representative Clark Shultz, Chairman
Tuesday, March 7, 2006**

MR. CHAIRMAN AND MEMBERS OF THE HOUSE INSURANCE COMMITTEE:

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. I appear here this afternoon representing our 1,250 member-firms in support of Senate Substitute for Senate Bill No. 149. Senate Substitute for SB 149 prohibits indemnification clauses in motor carrier transportation contracts which require one party to indemnify and hold harmless a second party's negligence or wrongful acts.

This legislation is the result of action by the Special Interim Committee on Judiciary. The bill was approved by the Senate on a vote of 40 to 0. Along with our testimony, our folders include two separate transportation contracts to illustrate the use of indemnification clauses; a power point presentation entitled "Abusive Indemnification and Hold Harmless Agreements," presented by Mr. Hoffman, an attorney with the law firm of Blackwell Sanders Peper Martin LLP in Kansas City and an Allied member of the Kansas Motor Carriers Association, to the Special Interim Committee on Judiciary; a copy of the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) and, a balloon amendment requested by Mr. Pat Hubbell on behalf of the railroad industry.

The purpose of Senate Substitute for SB 149 is to promote safety in the carriage of goods by motor carriers by eliminating clauses that shield shippers and others who perform their obligations negligently or wrongfully. The bill does not shield a motor carrier from their own liability or negligence.

More and more frequently, shippers are pressuring motor carriers to provide transportation under contracts by which the motor carrier contractually agrees to indemnify and hold harmless the shipper for the shipper's failure to meet its duties or responsibilities. In other words, shippers are not taking responsibility for their own negligent acts. The effect of these indemnification clauses is to eliminate the incentive for the shipper to meet its responsibilities in a prudent or reasonable manner. The motor carrier in essence becomes an insurer for the shipper. This shifting of liability through contract completely contradicts sound public policy. Kansas is a "comparative fault" state.

One of the primary reasons for assigning liability is to persuade the offending party to change its behavior. In these instances, where the shipper is at fault but is indemnified by the motor carrier, there is nothing the motor carrier can do to change the shipper's behavior.

What the proposed legislation does:

- It voids contractual provisions in motor carrier transportation contracts that indemnify promisees (shippers) for the promisee's own negligent or intentional acts or omissions that lead to claims.
- It maintains the incentive for promisees engaged in motor carrier transportation contracts to perform their obligations or duties in a prudent reasonably safe manner.

What the legislation does not do:

- It does not void contractual provisions whereby a motor carrier indemnifies a promisee for the motor carrier's own negligent or intentional acts that lead to claims.
- It does not establish any new duties or responsibilities other than those already established by law.
- It does not prohibit the shipper from requiring certain levels of liability insurance or special safety equipment.
- It does not apply in those instances where both parties are signatories to the Uniform Intermodal Interchange and Facilities Access Agreement. (UIIA) or other intermodal agreement.

The UIIA is an agreement that is uniformly used nationwide, and governs the interchange of intermodal equipment (chassis, containers) between different modes of transport. A typical situation would be one at a rail terminal where motor carriers interchange and accept chassis and other equipment, which may be owned or maintained by the tendering party. The UIIA spells out responsibilities and liability. All modes of transportation are parties to this agreement, and it is modified from time to time.

Mr. Chairman, we are not requesting this legislation for the large motor carriers, both for-hire and private. These companies have the legal staff to review these contracts and the clout to negotiate these contracts. The small carrier is the one most affected by the indemnification clauses in transportation contracts. If the small carrier wants the freight, they must sign these agreements. Over 90% of Kansas motor carriers operate 19 or fewer trucks.

The Kansas Motor Carriers Association respectfully requests that the House Insurance Committee report Senate Substitute for SB 149, with the proposed amendment, favorable for passage. We thank you for the opportunity to appear before you today. I will be pleased to stand for questions.

KANSAS RAILROADS

PATRICK R. HUBBELL

800 SW JACKSON
TOPEKA, KS 66612

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Session of 2006

SENATE Substitute for SENATE BILL No. 149

By Committee on Judiciary

2-6

9 AN ACT relating to motor carriers; prohibiting requirements of indem-
10 nification from motor carriers for certain acts or omissions; exception.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) Notwithstanding any other provision of law, a provi-
14 sion, clause, covenant or agreement contained in, collateral to, or affecting
15 a motor carrier transportation contract that purports to indemnify, defend
16 or hold harmless, or has the effect of indemnifying, defending or holding
17 harmless, the contract's promisee from or against any liability for loss or
18 damage resulting from the negligence or intentional acts or omissions of
19 the contract's promisee, or any agents, employees or independent con-
20 tractors who are directly responsible to the contract's promisee, is against
21 the public policy of this state and is void and unenforceable.

22 (b) As used in this section with respect to a motor carrier as defined
23 in K.S.A. 66-1,108, and amendments thereto, "motor carrier transporta-
24 tion contract" means a contract, agreement or understanding covering:
25 (1) The transportation of property by a motor carrier; (2) the entrance on
26 property by the motor carrier for the purpose of loading, unloading or
27 transporting property; or (3) a service incidental to activity described in
28 paragraphs (1) or (2) including, but not limited to, storage of property.

29 (c) Nothing contained in this section affects a provision, clause, cov-
30 enant or agreement where the motor carrier indemnifies or holds harm-
31 less the contract's promisee against liability for damages to the extent that
32 the damages were caused by and resulting from negligence of the motor
33 carrier, its agents, employees or independent contractors who are directly
34 responsible to the motor carrier.

35 ~~(d) Notwithstanding the other provisions contained in this section, a~~
36 ~~motor carrier transportation contract shall not include the uniform inter-~~
37 ~~modal interchange and facilities access agreement administered by the~~
38 ~~intermodal association of North America, as that agreement may be~~
39 ~~amended by the intermodal interchange executive committee.~~

40 (e) A provision in a motor carrier transportation contract which re-
41 quires a party to provide liability coverage to another party, as an addi-
42 tional insured, for such other party's own negligence or intentional acts
43 or omissions is against public policy and is void and unenforceable.

New (d) Motor carrier transpor-
tation contract shall not
include the Uniform Intermodal
Interchange and Facilities
Access Agreement administered
by the Intermodal Association
of North America or other
agreements providing for the
interchange, use or possession
of intermodal chassis, con-
tainers or other intermodal
equipment.

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- 1 (f) This section applies only to indemnification and additional insured
- 2 provisions entered into after the act takes effect.
- 3 Sec. 2. This act shall take effect and be in force from and after its
- 4 publication in the statute book.