Approved: May 3, 2006
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:37 A.M. on January 25, 2006, in Room 123-S of the Capitol.

All members were present,
Les Donovan arrived 9:42 a.m.
Phil Journey arrived 9:43 a.m.
Dwayne Umbarger arrived 9:43 a.m.
Kay O'Connor arrived, 9:43 a.m.
Derek Schmidt arrived 10:04 a.m.

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Helen Pedigo, Office of Revisor of Statutes
Karen Clowers, Committee Secretary

Conferees appearing before the committee:
Tris Felix, Kansas Independent Oil & Gas Association
Stan Jackson, Kansas Independent Oil & Gas Association
Tom Whitaker, Executive Director, Kansas Motor Carriers Association
William Miller, American Sub-contractors Association
Ken Keller, Controller, Western Extralite Company
Bob Totten, Public Affairs Director, Kansas Contractors Association
Dan Haake, President, Haake Foundations
Doug Smith, Southwest Kansas Royalty Owners Association
Ron Heim, Occidental Oil & Gas
Cory Peterson, Executive Vice President, Associated General Contractors of Kansas
Larry Magill, Kansas Association of Insurance Agents

Others attending:
See attached list.

Introduction of Bills
Senator Nick Jordan introduced a bill concerning civil procedure relating to attorney fees. Senator Betts moved, Senator Goodwin seconded, to introduce the bill. Motion carried.

Dan Hermes, Kansas Coordinators of Alcohol Safety Action Projects, requested the introduction of a bill concerning purchase or consumption of alcoholic beverage by a minor and associated penalties. Senator Betts moved, Senator Goodwin seconded, to introduce the bill. Motion carried.

The hearing on **SB 339--Joint committee on corrections and juvenile justice oversight; repealing the sunset of December 31, 2005** was opened. Senator Vratil gave a brief overview of the bill. There were no conferees present.

Senator Haley moved, Senator Bruce seconded, to recommend **SB 339** favorably for passage and place it on the consent calendar. Motion carries.

The Chairman opened the hearing on **SB 338--Contracts; indemnification clauses and additional insured requirements in certain contracts void**.
Senator Vratil provided background on the bill and the issues concerning additional insured requirements.

Tris Felix spoke as a proponent (Attachment 1). He indicated that it is very difficult to apply all of the provisions of **SB 338** to both construction and the oil and gas industries. Therefore, he requested several amendments to meet the needs of the oil and gas industry. They include:

- exclusion of joint operating agreements
- addition of an indemnification provision
- additional insured provisions to exclude construction and preservation of the right of an Operator to obtain liability overage

MINUTES OF THE Senate Judiciary Committee at 9:37 A.M. on January 25, 2006, in Room 123-S of the Capitol.

Stan Jackson spoke in support of the bill (Attachment 2). His concern is that when an oil company has put in place an indemnity agreement with the service contractor, the responsibility for negligence is shifted from the oil company to a service contractor and the oil company has no incentive to provide a safe work place. While use of the additional insured endorsement is needed in construction contracts, it is not in the best interest of the oil and gas industry. He suggested that the best solution would be to separate the definition of "construction contracts" and the definition of the oil and gas industry.

Tom Whitaker appeared in support of the bill (Attachment 3). The purpose of **SB 338** is to promote safety in the carriage of goods by motor carriers by eliminating clauses that shield shippers and others who perform their obligation negligently or wrongful. The bill does not shield a motor carrier from their own liability or negligence. The effect of indemnification clauses eliminates the incentive for the shipper to meet their responsibilities in a prudent or reasonable manner. The motor carriers in essence becomes an insurer for the shipper. This legislation will assist small carrier companies who are generally forced to sign such agreements in order to get and keep contracts.

Bill Miller spoke as a proponent stating that **SB 338** will plug a loophole in the anti-indemnity bill passed in 2004 (Attachment 4). Failure to close this loophole removes the intended effect of the statue to prevent risk transfers. This bill will not delete or reduce coverage provided in contractors', subcontractors' or suppliers' general liability policies.

Ken Keller testified as a supporter of **SB 338** (Attachment 5). The current practice of requiring the sub-contractor to name the owner, general contractor, etc. as additional insured on their insurance policies effectively transfers the risk to the sub-contractor and his insurance company. They are made responsible for problems out of their control. This is unfair and needs to be eliminated just as hold harmless and indemnification was two years ago.

Bob Toten, a proponent, raised concern about language regarding confusion with Section 1, lines 20 and 22 (Attachment 6). Another concern is with page 1, lines 26 and 27 regarding right of entry provision. He indicated that highway construction contractors fear that this may require them to provide entry to anyone desiring access to a construction project. When questioned by the Chairman, Mr. Toten stated that he did not feel the additional insured provision necessary at this point in time.

Dan Haake spoke as a proponent by sharing his experience involving a fatality accident (Attachment 7). He felt the general contractor was able to shift the risk and responsibility to others and eliminates the incentive to provide a safe work environment.

Doug Smith spoke as a neutral party seeking clarification to language regarding right of entry provisions (Attachment 8).

Ron Heim appeared as an opponent stating several reasons as they pertained to the oil and gas insustry (Attachment 9). **SB 338** will have unintended consequences with respect to many of the contracts that are unique and standard to the industry today. Mr. Heim proposed several amendments to address these issues.

Cory Peterson spoke as an opponent raising concerns that the language could create serious gaps in insurance coverage for general contractors (Attachment 10). He stated that this was not necessarily a construction issue, but an insurance issue and requested amending the bill so that page 2, line 11, reads "(c) A provision in a contract, except construction contracts".

Larry Magill testified as an opponent stating that while it is good public policy to require each party be responsible for their own negligence it is good policy to support the continued use of reciprocal indemnification clauses, where each party protects the other from the results of their own negligence (Attachment 11). He proposed an amendment to except construction contracts from the additional insured prohibition in **SB 338** because general contractors are experiencing problems finding completed operations coverage.

MINUTES OF THE Senate Judiciary Committee at 9:37 A.M. on January 25, 2006, in Room 123-S of the Capitol.

Written testimony in support of the bill was submitted by:

Keith Oliver, President, Oliver Insurance Agency (Attachment 12)
Chris Wilson, Executive Director, Kansas Building Association (Attachment 13)
Janet Stubbs, Administrator, Kansas Building Industry Workers Compensation Fund (Attachment 14)

Written testimony in opposition of the bill was submitted by:

Will Larson, General Council, Associated General Contractors of Kansas (Attachment 15)

Following questions by the Committee, the Chairman indicated his concern that despite ample notice of this issue for twelve months, parties requesting amendments to the bill at the last minute was not a good way to craft legislation. He had hoped to address the interests of the transportation and the oil & gas industries in the bill but now feels that it is inappropriate to do so. **SB 338** should be broken into three bills, one for construction, one for transportation and one for the oil & gas industries and he will consult with the Revisor.

There being no further conferees the Chairman closed the public hearing on **SB 338**.

The meeting adjourned at 10:32 a.m. The next scheduled meeting is January 26, 2006.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-25-06

NAME	REPRESENTING
LARRY MAGILL	KS ASSN of INS AGENTS
DANIEL MAGILL	KAIA
Ken Hoffman	Blackwell Sanders Peper Martin LLP
Tom Whitaker	KS Motor Carriers Assn.
John Prather	Groendyke Transport, Inc.
Ernie Dam	Dam Oil Co., Inc.
Roy T. Ortman	KS Bldg Industry WC Fund
Janet Stubbs	" "
Kathy Olsen	KS Bankers Assn.
Tois Felix	KIOGA
Stanley Jackson	KIOGA
Steve Johnson	Kansas Gas Service/ONEOK
Dana Walsh	OJA
Mark Bozanich	Capitol Strategies
Trudy Aron	Am Inst of Architects
Eric Stafford	AGC of KS
Jeff Glendenning	Kansas Chamber
Whitney Damron	KS Gas Service

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-25-06

NAME	REPRESENTING
Jeff Bottenberg	State Farm
JIM CLARKE	KBA
Tom Burgess	ASA - NACM
DANIM HANKE	ASA
Chris Mechler	OJA
Nancy Strouse	Judicial Council
Ed Cross	KIOGA
Chelsea Harris	Intern
Bob Totten	K-C-A
Mark Schreiber	Westar Energy
Tom Bruno	EKOGA
Allie Devine	Ks. Livestock Assoc.
Steve Solomon	TFI Family Services
Ron Hein	Occidental Oil and Gas
Lindsey Douglas	Hein Law Firm
Randy Rogers	Kansas Sheriffs Assoc.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-25-06

NAME	REPRESENTING
Wendy Harms	KRMCA
Woody Moses	KAPA

THE KANSAS INDEPENDENT OIL & GAS ASSOCIATION'S POSITION & TESTIMONY ON SENATE BILL NO. 338
JANUARY 25, 2006

Please be advised that the Kansas Independent Oil & Gas Association (KIOGA) previously offered written testimony regarding indemnification issues at the legislative hearing on November 4, 2005. That testimony is attached hereto for reference purposes. Rather than duplicate our prior testimony, our intent below is to provide specific critical comments on Senate Bill No. 338.

BACKGROUND – CURRENT INDEMNIFICATION TREND

Generally speaking, the freedom to contract is essential to our free market economy and the overall health of commerce in this state. However, as outlined in our prior testimony, we believe there exists a fundamental imbalance of bargaining power between two constituencies within the Oil & Gas industry which deserves legislative attention. This unequal bargaining power in favor of the oil lease owners and operators (Operators) over the well servicing contractors (Contractors) allows Operators to demand that Contractors indemnify the Contractors' negligence. We believe that this recent trend, where the Operators are able to shift all of their liability exposure for workplace injuries and civil claims, to the Contractors, threatens the health of our industry, in that this shift of risk creates:

1. A "moral hazard" for Operators in that there is no longer any incentive (tort liability) to take reasonable measures to maintain safe worksites;
2. An uninsured risk for servicing contractors in that most general liability insurers refuse to provide insurance coverage for the sole negligence or intentional acts of the Operators, even when the Operators are Additional Insureds under the Contractors' policies; and,

Therefore, if left unaddressed, this burdensome shift of risk, may have dire consequences for:

1. The health of the Oil & Gas industry in terms of threatening the viability of small businesses (Contractors) who are simply not equipped to handle uninsured losses for the sole negligence of an Operator;
2. The health of the Oil & Gas industry in terms of threatening to drive potential insurers for Contractors from the state, and/or more severely restricting coverages; and,
3. The truly injured citizens and taxpayers of this state who remain exposed to unsafe worksites because the incentive (tort liability) to maintain safe premises and worksites has been removed.

Senate Judiciary
1-25-06
Attachment 1

SENATE BILL NO. 338

Definition of Oil & Gas Contract:

Under the current proposed version of Senate Bill No. 338, it is problematic to apply all the provisions of the statute to both Construction, as well as Oil & Gas, with only one comprehensive definition of "Construction Contract". That definition includes Oil & gas contracts within it.

Amendment -

For reasons made more clear below, we believe the best course to take is to separately define an Oil & Gas contract, which will in turn be included within the definition of a "Contract" at KSA 16-121 (a)(6). Please refer to the attached amendment to Senate Bill No. 338.

Joint Operating Agreements:

We propose that Joint Operating Agreements (JOA's) should be specifically excluded from the application of KSA 16-121. JOA's typically control the relationships of multiple Operators and other working interests in a well, and do not involve contractual agreements for well services by contractors. We do not believe there is any need for the restrictions on indemnification and Additional Insured coverage to be applied to this sector of the Oil & Gas industry. On the contrary, KSA 16-121 needs to be clear that it does not apply to these types of contracts in order to avoid any confusion or litigation on this issue at a later date.

Amendment -

Accordingly, we recommend adding an exclusion of JOA's to the definition of an "oil and gas contract." Failing to exclude JOA's from the application of this statute may have unintended consequences to sectors of this industry that are not problematic. Please refer to the attached amendment to Senate Bill No. 338.

Indemnification Provision – KSA 16-121(b):

This statutory language effectively addresses the problem with unequal bargaining power and the ills that flow from it. KSA 16-121(b) voids any clause or provision in a covered contract which requires a Contractor to indemnify an Operator for the Operator's own negligence or intentional acts. The language is certainly appropriate in scope as it simply voids the offending portion of the contractual indemnification provision while keeping the remaining contract in place. Perhaps more importantly, the statutory language still allows an Operator the ability to obtain indemnification from a Contractor for those instances where the Operator faces vicarious liability for a Contractor's negligence.

Amendment -

We propose to add a subpart to section (b) which expressly preserves the right of the parties to a covered contract to engage in indemnification agreements which are not otherwise prohibited by the statute. Please refer to the attached amendment to Senate Bill No. 338.

Additional Insured Provision:

This statutory language effectively closes a potential loophole to the indemnification prohibition found in KSA 16-121(b). Subsection (c) of the proposed statute voids any clause or provision in a covered contract which requires a Contractor to provide an Operator with Additional Insured liability insurance coverage for the Operator's own negligence or intentional acts. This language is appropriate in scope as it simply voids the offending portion of the Additional Insured provision while keeping the remaining contract in place.

This restriction on the use of Additional Insured coverage is necessary to preserve the integrity and intent of the indemnification restriction. Otherwise an Operator/Indemnitee may be able to circumvent the anti-indemnification provisions to a certain extent by attaining Additional Insured status under the subcontractor's liability policy.

The following hypothetical is provided for illustration purposes. Without the prohibition contained in section (c), an Operator/Indemnitee could settle a bodily injury case (negligence claim) with a Contractor's/Indemnitor's employee, that was predicated on the independent negligence of the Operator/Indemnitee. The Operator/Indemnitee could then attempt to sue for indemnification and coverage under the Contractor's/Indemnitor's general liability policy. Despite the prohibition in the KSA 16-121(b) on indemnification for the Indemnitee's own negligence, the Operator/Indemnitee in this hypothetical could attempt to claim that the injured worker contributed in some manner to his own injury. And therefore, as the claim would go, the injured worker's negligence must be imputed to the Contractor/Indemnitor as the employer. The Operator/Indemnitee could then argue that the Contractor's/Indemnitor's (Named Insured's) negligence contributed to the Operator/Indemnitee's liability which is then covered by the Additional Insured provisions of the policy. Accordingly, an anti-indemnification statute, which does not also close the Additional Insured loophole will not truly be effective.

Amendment -

It is critical to note that this "loophole" situation is more specific to the Motor Carriers and the Oil & Gas industry, but not the construction industry. **Therefore, we propose to change section (c) to exclude construction contracts. We have spoken to counsel for the AGC, and he has indicated agreement with this modification.** Please refer to the attached amendment to Senate Bill No. 338.

Amendment -

In addition, we propose to add a subpart to section (c) which expressly preserves the right of an Operator to obtain liability overage as an Additional Insured under the Contractor's policy for those instances where the Operator faces vicarious liability for a Contractor's negligence. Please refer to the attached amendment to Senate Bill No. 338.

Tris Feler

Session of 2006

SENATE BILL No. 338
By Special Committee on Judiciary
1-6

Proposed amendment
Kansas Independent Oil & Gas Assn.
1-25-06

AN ACT concerning contracts; relating to indemnification provisions and additional insured parties; amending K.S.A. 2005 Supp. 16-121 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2005 Supp. 16-121 is hereby amended to read as follows: 16-121. (a) When used in this section:

(1) ''Construction contract'' means an agreement for the design, construction, alteration, renovation, repair or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or, excavation, except that no deed, lease, easement, license or other instrument granting an interest in or the right to possess property shall be deemed to be a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair or maintain improvements on such real property. *Such contract shall include a right of entry provision.*

(2) ''Damages'' means personal injury damages, property damages or economic loss.

(3) ''Indemnification provision'' means a covenant, promise, agreement, *clause* or understanding in connection with, *contained in or collateral to,* a ~~construction~~ contract that requires the promisor to hold harmless, indemnify or defend the promisee or others against liability for *loss or* damages.

(4) ''Motor carrier'' has the meaning ascribed thereto in K.S.A. 66-1,108, and amendments thereto.

(5) ''Motor carrier transportation contract'' means an agreement covering:

(A) The transportation of property by a motor carrier;

(B) the entrance on property by the motor carrier for the purpose of loading, unloading or transporting property; or

(C) a service incidental to activity described in paragraph (A) or (B) including, but not limited to, storage of property.

Deleted: *oil or gas lease or other contract pertaining*¶
. to oil and gas exploration, development, operations and production activ-¶
. ities on or in connection with an oil and gas lease,

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(6) ''Contract'' means a construction contract and motor carrier transportation contract.

(7) ''Indemnitee'' shall include an agent, employee or independent contractor who is directly responsible to the indemnitee.

(b) An indemnification provision in a ~~construction~~ contract ~~or other agreement, including, but not limited to, a right of entry, entered into in connection with a construction contract~~, which requires the indemnitor to indemnify the indemnitee for the indemnitee's negligence *or intentional acts or omissions* is against public policy and is void and unenforceable.

(c) A provision in a contract which requires 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 is against public policy and is void and unenforceable.

(d) Nothing contained in this section shall affect a provision, clause, covenant, promise or agreement where the motor carrier indemnifies or holds harmless the contract's promisee against liability for damages to the extent that the damages were caused by and resulting from negligence of the motor carrier, its agents, employees or independent contractors who are directly responsible to the motor carrier.

(e) Notwithstanding the other provisions contained in this section, a motor carrier transportation contract shall not include the uniform intermodal interchange and facilities access agreement administered by the intermodal association of North America, as that agreement may be amended by the intermodal interchange executive committee.

~~(c)~~ *(f)* This act shall not be construed to affect or impair the contractual obligation of a contractor or owner to provide railroad protective insurance or general liability insurance.

~~(d)~~ *(g)* This section applies only to indemnification provisions entered into after the act takes effect.

Sec. 2. K.S.A. 2005 Supp. 16-121 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

Comment [I1]: Proposed addition to section (a)(1) of KSA 16-121:

(6)(1) "Oil and gas contract" means:
(a) oil and/or gas lease; or,
(a) other contract pertaining to oil and gas exploration, development, operations and production activities on or in connection with an oil and gas lease;
(2) Notwithstanding the provisions contained in section 6(1), "oil and gas contract" shall not include Joint Operating Agreements between or among holders of working interests or operating rights for the joint exploration, development, operation, or production of minerals.

Comment [I2]: Proposed addition to the definition of "Contract":

... oil and gas contract, ...

Comment [I3]: Proposed addition to section (b) of KSA 16-121, to appear as subpart (2):

(2) This section does not affect any provision in a contract that requires an Indemnitee to indemnify an Indemnitor against liability for damage arising out of personal or bodily injury to persons or damage to property to the extent that the damages arise out of the fault of the Indemnitor, or the fault of the Indemnitor's agents, representatives or subcontractors;

Comment [I4]: Proposed addition to beginning section (c) of KSA 16-121:

(1)With the exception of a construction contract defined above,...

Proposed addition to be subpart (2) of subsection (c):

(2) With the exception of a construction contract defined above, this section does not affect any provision in a contract which requires 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 arising out of personal or bodily injury to persons or damage to property to the extent that the damages arise out of the fault of such other party, or the fault of such other party's agents, representatives or subcontractors.

Testimony on Senate Bill 338
Before the Senate Judiciary Committee
By Stanley Jackson
Insurance Planning Inc.
January 25, 2006

Thank you Mister Chairman and members of the Committee for the opportunity to appear today in support of Senate Bill 338 that prohibits indemnification clauses requiring the contractor to assume another's negligence. My name is Stanley Jackson and I am the Executive Vice President of Insurance Planning Inc. We are one of the major writers of insurance for the oil and gas industry in Kansas and deal firsthand with the problems that indemnity agreements cause for our oil and gas customers.

When an entity such as an oil company is allowed to pass the responsibility of their negligence to a service contractor through the use of an indemnity agreement, I feel that action is not in the best interest of public policy. Many of our customers have developed comprehensive safety programs to insure their employees have a safe work place. When the oil company that they are working for has put in place an indemnity agreement with that service contractor, thus shifting the responsibility for negligence to the service contractor, the oil company has no incentive to provide a safe work place. The service contractor does not have control over the location, but now has had to assume the liability exposure of negligence.

If it were a level playing field where the service contractor was given indemnification back from the oil company, it might seem more equitable. That is not the case and the service contractor is forced to assume risk with nothing in return. The larger the oil company, the more likely that the service contractor will be forced to sign an indemnity agreement. Most small independent oil and gas producers will have a master service agreement that they sign with their service contractors, but I do not have one customer that has an indemnity agreement is place. The larger oil companies are able to literally force a service contractor to sign the indemnity agreement due to the volume of work involved. I do not feel that it is in the best interest of public policy to allow someone in a superior bargaining position to force a small company to assume responsibility for the negligence of the entity that is in that superior position.

The large oil company would have coverage for the negligence under their own general liability policy. They have just transferred the risk, and ultimately the cost, to the service contractor. It is my position that the responsible party should ultimately pay for their negligence and not be allowed to force someone else to make that payment

Several states have found that once the anti indemnification legislation has been put in place, the larger entities have found a loophole and use the Additonal Insured Endorsement to circumvent the anti-indemnity statute. I realize that completely eliminating the use of the Additonal Insured Endorsement in "construction contracts" is

Senate Judiciary
1-25-06
Attachment 2

not in the best interest of public policy. I believe that the best solution would be to separate the definition of "construction contracts" and the definition of the oil and gas industry. Mr. Tris Felix who is testifying before you today has outlined the separation that we fell is equitable.

The service contractors in the oil and gas industry are not asking for anything but a level playing field. If they are responsible for an act of negligence, they are willing to be held accountable for those actions. What they are asking for is that they not be forced to assume the responsibility of another entity.

Go stuff
BRING IT

Kansas Motor Carriers Association

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Cummins Central Power, LLC
Allied Industries Chairman

Tom Whitaker
Executive Director

LEGISLATIVE TESTIMONY

Presented by the Kansas Motor Carriers Association
Before the Senate Judiciary Committee
Senator John Vratil, Chairman
Wednesday, January 25, 2006

MR. CHAIRMAN AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. I appear here this morning representing our 1,250 member-firms in support of Senate Bill No. 338. Senate Bill No. 338 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. We will be addressing only the portion of the bill concerning motor carriers.

Joining me today to assist in answering any questions you may have is Mr. Ken 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. In addition, 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 to the Special Committee on Judiciary; and a copy of the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA).

The purpose of Senate Bill No. 338 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. 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.

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Senate Judiciary
1-25-06
Attachment 3

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)

As Applied to Intermodal Agreements: This legislation would not affect equipment interchange agreements subject to the UIIA. Section (e) on Page 2, beginning on line 21of Senate Bill No. 338 exempts those situations from the definition of what constitutes a contract.

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 Senate Judiciary Committee report Senate Bill No. 338 favorable for passage. We thank you for the opportunity to appear before you today. Mr. Hoffman and I will be pleased to stand for questions.

Abusive Indemnification/Hold Harmless Agreements

Bad Public Policy

Before the Special Committee on Judiciary
Senator John Vratil, Chairman
Friday, November 4, 2005

Kenneth R. Hoffman, Attorney

An indemnification/hold harmless agreement is:

A contractual provision in which the parties agree to an allocation of responsibility for liabilities that might arise from the activities contemplated by the contract.

Some shippers/facility operators demand indemnification from motor carriers:

- As a condition to shipping goods
- As a condition to entering property for pickup or delivery

Abusive agreements force carriers to:

- Accept all responsibility even for events *partially* caused by a shipper or facility operator
- Accept all responsibility even for events *solely* caused by a shipper or facility operator

4

Carriers are forced to assume liability for:

- Personal injuries
- Property damage
- Worker's compensation
- Environmental damage and restoration
- Fines and penalties
- Attorneys fees
- Other liabilities covered by the agreement

5

The Bottom Line: A One Way Street

Some shippers/facility operators require carriers to indemnify them again a host of liabilities even if the problem was caused partially or completely by the shipper/facility operator

6

Industry-Wide Issue-Both Private and For-Hire:

- Hazmat carriers
  - Tanks
  - Truckload
  - LTL
  - Agricultural
- Non-Hazmat
  - Workers' compensation
  - Vehicle damage
  - Environmental damage

7

A Nightmare Example

- A motor carrier's vehicle is being loaded with flammable material at the shipper's facility
- The shipper's employee sets off a spark
- An explosion occurs, destroying buildings and burning several workers
- The carrier must pay for all damages– even though the explosion was the shipper's fault

8

An Everyday Example

- A motor carrier's driver is injured at the shipper's facility as a result of the shipper's negligence
- The driver collects under the motor carrier's Worker's Compensation insurance policy
- The motor carrier's worker's compensation insurer demands subrogation reimbursement from the shipper
- Indemnification agreement includes waiver of subrogation
- The shipper sends the reimbursement claim back to the motor carrier

9

Betting the Company

- The dominant bargaining position of large shippers forces many carriers to accept indemnification agreements
- Liability insurance may not cover damages not caused by the carrier
- Some carriers appreciate the risk of signing an indemnification agreement but do so anyway to get or keep business

10

Destructive Outcomes

- Loss of business for carriers refusing to sign
- Increased risk for carriers that do sign
- Increased insurance costs for the whole industry
- Increased litigation cost
- Decreased insurance availability
- Financial instability
- Pressure to raise rates
- Unfair competition

11

Bad Public Policy

- Removes an incentive for accident prevention
- Places burden on trucker for events beyond its control
- Fails to require taking responsibility for one's own actions

12

The Benefits of Banning Unfair Indemnification

- Promote safety
- Level the playing field between carriers and shippers
- Allow all carriers to compete fairly without "risking the farm"
- Eliminate the cost of insuring someone else's negligence
- Reduce litigation costs
- Eliminate a point of contention between carriers and customers
- Reduce pressure to raise rates
- Reduce pressure to impose insurance surcharges

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ACCESS AGREEMENT
Agreement Number: [redacted]

This **ACCESS AGREEMENT** ("Agreement") is made this [redacted] by and between: (i.) [redacted] ("Entering Party"), having a place of business at [redacted] and (ii.) [redacted] (collectively referred to as "Company"), having a place of business at [redacted]

Company owns/leases and/or operates various lots, properties, and facilities located in various states (such lots, properties, and facilities shall be referred to hereinafter as the "Facilities"). Entering Party desires permission to enter Company's Facilities for the purpose of loading or unloading of goods, materials and/or products (the "Purpose").

Company hereby agrees to grant permission to Entering Party to enter the Facilities for the Purpose stated above, **but only at times and in manners agreeable to Company**, and pursuant to the terms of this Agreement. (If Company, as defined above includes more than one entity such permission shall be from the entity that owns, leases and/or operates the applicable property). Such permission is revocable by Company upon notice to Entering Party. Entering Party acknowledges the valuable consideration extended by Company in granting such permission, and Entering Party does in return agree as follows:

1. INDEMNITY. TO THE FULLEST EXTENT PERMITTED BY LAW, ENTERING PARTY AGREES TO RELEASE, DEFEND, INDEMNIFY, AND HOLD COMPANY AND ITS AFFILIATED ENTITIES AND THE OFFICERS AND EMPLOYEES OF EACH OF THEM (COLLECTIVELY REFERRED TO HEREINAFTER AS "INDEMNITEES") HARMLESS FROM AND AGAINST ANY LIABILITY, LOSS, DAMAGE, CAUSE OF ACTION, PENALTY, FINE, COST (INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES), CLAIM, OR STRICT LIABILITY CLAIM ARISING OUT OF OR IN ANY WAY INCIDENT TO THE ACTIVITIES PERFORMED BY ENTERING PARTY OR ITS CONTRACTORS OR SUBCONTRACTORS HEREUNDER, ON ACCOUNT OF PERSONAL INJURIES, DEATH, DAMAGE TO PROPERTY, OR DAMAGE TO THE ENVIRONMENT, REGARDLESS OF WHETHER SUCH HARM IS TO ENTERING PARTY, INDEMNITEES, THE EMPLOYEES OR OFFICERS OF EITHER, OR ANY OTHER PERSON OR ENTITY, AND REGARDLESS OF HOW SUCH INJURY/DEATH/DAMAGE IS CAUSED (BY INDEMNITEES' NEGLIGENCE, THE NEGLIGENCE OF THIRD PARTIES, OR OTHERWISE), BUT EXCLUDING INJURY/DEATH/DAMAGE TO THE EXTENT CAUSED BY THE SOLE (100%) NEGLIGENCE OF INDEMNITEES. ENTERING PARTY'S DUTIES UNDER THIS PARAGRAPH SHALL SURVIVE THE TERMINATION, REVOCATION, OR EXPIRATION OF THIS AGREEMENT. ENTERING PARTY SHALL MAINTAIN, AT ITS COST, INSURANCE COVERING THIS INDEMNITY PROVISION.

2. **SAFETY**. Entering Party shall at all times strictly follow all requests and instructions given by Company regarding safety and health matters in or at the Facilities. Notwithstanding the preceding sentence, Entering Party shall at all times be responsible for the safety and health of its (and its contractors' or subcontractors') employees and agents present at the Facilities or elsewhere in connection with this agreement. Entering Party also warrants that when transporting any product that is classified as Hazardous Materials, under applicable law, Entering Party assumes full responsibility that its (and subcontractors) employees have been screened to safely handle material while en route and that the transported material will arrive at stated destination in a safe manner. Entering Party shall have developed and implemented U.S. Department of Transportation Security Plans in compliance with 49 C.F.R. 172.800 and that Entering Party will furnish a true and correct copy thereof to Company, upon Company's request.

3. **CONDUCT OF ACTIVITIES.** Entering Party agrees that it and its contractors and subcontractors will conduct their activities hereunder: (i.) in accordance with the terms, provisions, rules, regulations and instructions contained in the Facilities' "Operating Instructions" available upon request from Company and incorporated by this reference, and any other supplements or amendments thereto that Company may issue from time to time including any instructions attached hereto as Exhibit B; (ii.) in accordance with all applicable governmental laws, rules, and regulations and good standard industry practices; and (iii.) in a manner that does not interfere with the operations of others (Company or third parties) at the Facilities.

4. **TERM.** This Agreement shall be effective as of the date first written above, and shall continue in effect thereafter until terminated by either party upon notice to the other party.

5. **ASSIGNMENT; SUBCONTRACTORS; AMENDMENTS.** This Agreement may not be assigned in whole or in part by Entering Party without the prior written consent of Company, nor shall activities be performed under this Agreement by a contractor or subcontractor of Entering Party without the prior written consent of Company. No amendment to this Agreement shall be valid unless made in writing and signed by authorized representatives of both parties.

6. **CONFIDENTIALITY.** All information that Entering Party acquires from Company hereunder, directly or indirectly, and all information that arises out of the activities performed hereunder concerning such activities and/or proprietary processes involved in such activities including without limitation, information concerning Company's current and future business plans, information relating to Company's operations, and other Company-furnished information and know-how relating to such activities shall be deemed Company's Proprietary Information. Company's Proprietary Information shall be held in strictest confidence by Entering Party (except to the extent any disclosures are reasonably necessary in the course of performing the activities hereunder or related services) and shall be used solely for purposes of performing such activities. The obligations under this Paragraph shall survive completion of such activities and termination of this Agreement.

7. **INSURANCE.** Entering Party shall, at all times during the term of this Agreement, maintain the following insurance (Entering Party shall provide to Company a certificate of insurance [either in the form attached hereto as Exhibit A or other form acceptable to Company] evidencing such insurance prior to commencing activities hereunder, and periodically as needed thereafter to show continuing coverage; such insurance coverages shall be independent of the indemnity provisions of this Agreement and are not designed solely to guarantee payment of Entering Party's indemnity obligations):

(a.) Commercial General Liability Insurance (with coverage no more restrictive than that provided for by standard ISO Form CG 00 01 01 96 with standard exclusions "a" through "n" or ISO Form CG 00 01 07 98 with standard exclusions "a" through "o", or ISO Form CG 00 01 10 01 with standard exclusions "a" through "o") with a minimum limit of **$3,000,000** per occurrence for bodily injury and property damages, and with Products and Completed Operations and Contractual Liability coverages, and shall name Company as an additional insured on such policy using Endorsement CG 20 26 11 85 or CG-2026R(2-02), with such insurance being primary to and not in excess of any other insurance available to Company;

(b.) Worker's Compensation and Employers' Liability Insurance, as prescribed by applicable law. Such insurance shall contain a waiver of the right of subrogation against Company and an assignment of statutory lien, if applicable; and

(c.) Automobile Liability Insurance, covering all owned, non owned, hired and leased vehicles with a minimum combined single limit for Bodily Injury and Property Damage of **$3,000,000** per accident, with Contractual Liability coverage.

The limits specified in (a), (b), and (c), above, may be satisfied with a combination of primary and Umbrella/Excess Insurance.

So agreed, executed on the dates indicated below, but effective as of the date first above written:

"COMPANY" (as defined above)

[redacted]

By: _____
Printed Name: _____
Title: _____
Date: _____

"ENTERING PARTY" (as defined above)

[redacted]

By: _____
Printed Name: _____
Title: _____
Date: _____

EXHIBIT A
TO
ACCESS AGREEMENT
AGREEMENT NUMBER: [redacted]

CERTIFICATE OF INSURANCE

This certificate is not an insurance policy. It is evidence of the types of coverages and forms of endorsements existing in regard to the insurance policies specified and neither amends the requirements of the contract to which this certificate pertains, nor amends, extends or alters the coverage afforded by the specified insurance policies or the terms, exclusions and conditions of such policies.

Name & Address of Certificate Holder: [redacted] ("Company") Attention: [redacted] This is to certify that the Insurance Companies as shown below have issued policies of insurance as indicated to [redacted] ("Entering Party"), [redacted] and are aware that said policies will apply to work/activities performed pursuant to Agreement Number [redacted] between Company and Entering Party, dated [redacted]

A. WORKERS' COMPENSATION/EMPLOYERS LIABILITY

Insurance Company _____
Policy Period _____
Policy Number _____

Workers Compensation: Statutory Limits: Yes ____
State Fund: Yes ____
Qualified Self-Insurer: Yes ____

Employers' Liability Limits: _____ Each Accident
_____ Disease-Policy Limit
_____ Disease-Each Employee

Yes	No	
___	___	Waiver of Subrogation as required

B. COMMERCIAL GENERAL LIABILITY

Limits of Liability
_____ General Aggregate
_____ Personal & Adv. Injury
_____ Each Occurrence

Insurance Company _____
Policy Period _____
Policy Number _____

Yes	No		Yes	No	
___	___	Is the coverage at least as broad as that provided by standard ISO Form CG 00 01 11 96 with standard exclusions "a" through "n" or ISO Form CG 00 01 07 98 or ISO Form CG 00 01 10 01 with standard exclusions "a" through "o"?	___	___	Railroad Contractual Liability Endorsement (CG 24 17 10 93)
			___	___	Additional insured Endorsement CG 20 26 11 85 or CG-2026R(2-02)
___	___	Contractual Liability assumed in an Insured Contract			

C. AUTOMOBILE LIABILITY INSURANCE

Limits of Liability
_____ Combined Single Limit
_____ Bodily Injury Per Person
_____ Bodily Injury Per Accident
_____ Property Damage

Insurance Company _____
Policy Period _____
Policy Number _____

Yes	No		Yes	No	
___	___	Owned Vehicles	___	___	Pollution Liability (Endorsement MCS-90)
___	___	Non Owned Vehicles	___	___	Contractual Liability coverage
___	___	Hired / Leased Vehicles			

D. UMBRELLA/EXCESS LIABILITY INSURANCE

Limits of Liability _____ Each Occurrence
_____ Aggregate

Insurance Company _____
Policy Period _____
Policy Number _____

Yes	No	
___	___	Excess of Section A - Worker's Compensation / Employers Liability Insurance
___	___	Excess of Section B - Commercial General Liability Insurance
___	___	Excess of Section C - Automobile Liability Insurance
___	___	Additional Insured as required
___	___	Follows Form as to coverages and endorsements on primary policies

E. CARGO INSURANCE

Insured Value _____

Type of Cargo Covered _____

Insurance Company _____
Policy Period _____
Policy Number _____

REMARKS:

It is further certified that:

(1) Each of the above policies contains a provision that the policy shall not be canceled or materially changed without 30 days' prior written notice to the holder of this certificate.

(2) The policies listed under B and D shall be primary to and not in excess of or contributory with any other insurance available to Company.

Upon written request by the holder of this certificate, the Insurer or his agent will furnish a copy of any policy cited above, certified to be a true and complete copy of the original.

AUTHORIZED REPRESENTATIVE

By _____

_____
(Printed Name)

Date _____ **20**_____

PRODUCER

_____
Name

_____
Address

_____
City **State** **Zip**

_____ _____
Telephone **Fax**

* Applicable if work performed by Entering Party includes construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing.

Developed By:

Effective: June 2, 2005

The Intermodal Interchange Executive Committee

UNIFORM INTERMODAL INTERCHANGE AND FACILITIES ACCESS AGREEMENT (U I I A)

Administered By:

The Intermodal Association of North America
11785 Beltsville Drive, Suite 1100
Calverton, Maryland 20705-4048
Phone: Toll-Free (877)438-UIIA (438-8442) or (301)474-8700
Fax:(301)982-3414 or (301)982-5478 Email: www.uiia.org

FORM 2

UNIFORM INTERMODAL INTERCHANGE AND FACILITIES ACCESS AGREEMENT

(A Program of the Intermodal Association of North America)

Participating Party Agreement

The Party named below agrees that by executing the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) it will be bound by the provisions of the UIIA, and subsequent amendments and/or revisions of that Agreement, and any addendum thereto, that does not conflict with the terms of this Agreement, which govern the interchange and use of Equipment in intermodal interchange service. The Provider named below agrees that in its interchange activities with Motor Carrier participants who are signatories to the Agreement, this Agreement will be the only Agreement it will use, unless superceded in whole by a separate bilateral written agreement.

This Agreement shall be effective unless cancelled in writing, by consent of the Parties, or by any Party upon thirty (30) days prior Notice to the other Party or to the President of IANA.

COMPANY NAME:_____

AUTHORIZED BY: (Print or Type)_____

SIGNATURE:_____ **TITLE:**_____ **DATE:**_____

BUSINESS ADDRESS:_____
(Mailing Address) No. Street City

_____
State Zip Code Phone No. Fax E-Mail

Indicate Nature of Business: _____ Motor Carrier _____ Provider

Indicate Standard Carrier Alpha Code (SCAC):_____

If Applicable to a Motor Carrier:

Federal Registration (MC Number)_____ State Authorization (DOT) No._____

STCC Code:_____ Tax Identification No. _____

Dated:_____ By: _____
President & CEO
Intermodal Association of North America

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FORM 2

UNIFORM INTERMODAL INTERCHANGE AND FACILITIES ACCESS AGREEMENT

(A Program of the Intermodal Association of North America)

Participating Party Agreement

The Party named below agrees that by executing the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) it will be bound by the provisions of the UIIA, and subsequent amendments and/or revisions of that Agreement, and any addendum thereto, that does not conflict with the terms of this Agreement, which govern the interchange and use of Equipment in intermodal interchange service. The Provider named below agrees that in its interchange activities with Motor Carrier participants who are signatories to the Agreement, this Agreement will be the only Agreement it will use, unless superceded in whole by a separate bilateral written agreement.

This Agreement shall be effective unless cancelled in writing, by consent of the Parties, or by any Party upon thirty (30) days prior Notice to the other Party or to the President of IANA.

COMPANY NAME:_____

AUTHORIZED BY: (Print or Type)_____

SIGNATURE:_____ **TITLE:**_____ **DATE:**_____

BUSINESS ADDRESS:_____
(Mailing Address) No. Street City

_____
State Zip Code Phone No. Fax E-Mail

Indicate Nature of Business: _____ Motor Carrier _____ Provider

Indicate Standard Carrier Alpha Code (SCAC):_____

If Applicable to a Motor Carrier:
Federal Registration (Motor Carrier) No._____ State Authorization (DOT) No._____

STCC Code:_____ Tax Identification No. _____

The provisions of this agreement shall become effective on the date accepted by the Association of the above named carrier and published in the list of subscribers or supplements thereto.

By: _____
President & CEO
Intermodal Association of North America

KEEP THIS COPY FOR YOUR FILES

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UNIFORM INTERMODAL INTERCHANGE AND FACILITIES ACCESS AGREEMENT

A. Purpose

The Parties to this Agreement hereby establish their respective understandings as to their rights and liabilities in one Party's access to the Premises of the other for the purpose of interchanging intermodal transportation Equipment and further establish the terms and conditions under which such intermodal Equipment will be used.

B. Definition of Terms

1. Actual Cash Value: Replacement cost less depreciation as referred to on Equipment Owners' or Providers' Books.
2. Addendum/Addenda: Providers' schedule of terms and conditions of Equipment use.
3. Agreement: This Agreement or amendments thereto and Addendum/Addenda.
4. Equipment: Equipment commonly used in the road transport of intermodal freight including trailers, chassis, containers and associated devices.
5. Equipment Owner: The holder of beneficial title to the Equipment, regardless of the form of the title.
6. Equipment Interchange Receipt (EIR): A document setting forth the physical condition of the Equipment at the time of Interchange and executed by the Parties to this Agreement, or their agents.
7. Facility Operator: Party whose Premises are accessed for the purpose of effecting an interchange.
8. Indemnitees: Provider, Equipment Owner and/or Facility Operator, as their interest may appear.
9. Interchange: The transfer of physical possession of Equipment under the Agreement.
10. Interchange Period: The period, commencing upon Interchange to Motor Carrier and concluding upon Interchange to Provider.
11. Motor Carrier: The Party being granted access to the Provider's facilities and/or having physical possession of the Equipment for the purpose of road transport or its designated agent or contractor.
12. Notice: A communication between Parties of this Agreement required by the terms of the Agreement.
13. Premises: The property operated by Equipment Provider or Facility Operator for the purpose of Interchange.
14. Provider: The Party authorizing delivery and/or receipt of physical possession of Equipment with a Motor Carrier.
15. Parties: The Provider, Motor Carrier and/or Facility Operator who are signatories of this Agreement.
16. Wear and Tear: Damage or deterioration of Equipment incident to its usual and customary intended use.
17. Contamination: Damage resulting from release of a hazardous material or other substance in Equipment which prevents subsequent use of the Equipment without removal of the material or substance. **[Revised 10/22/04]**

C. Premises Access

1. Provider and/or Facility Operator grants to Motor Carrier the right to enter upon its terminal facility for the sole purpose of completing an Interchange of Equipment.

2. Nothing in this Agreement shall preclude Provider or Facility Operator from refusing access to a Motor Carrier for good cause shown. Provider or Facility Operator shall exercise this right in good faith, providing to Motor Carrier a written statement of the reason for its action by registered mail or confirmed facsimile transmission within five (5) business days of the event causing such refusal.

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D. Equipment Interchange

1. Notification of Equipment Availability

   a. If Provider/Facility Operator undertakes to notify Motor Carrier of Equipment availability, it represents that the Equipment will be available for Interchange when the Motor Carrier arrives.

   b. Where it is notified, as provided herein, Motor Carrier must Interchange Equipment promptly upon notification. Motor Carrier will be responsible to Provider for the charges, as may be described in Provider's Addendum hereto, in the event Motor Carrier fails to remove Equipment during the free time provided in the Addendum.

2. Equipment Interchange Receipts

   a. At the time of Interchange, the Parties or their agents shall execute an Equipment Interchange Receipt and/or exchange an electronic receipt equivalent, which shall describe the Equipment and any defects observable thereon at the time of Interchange. Each Party shall be entitled to make notations upon such EIR concerning the condition of the Equipment at the time of Interchange. The receipt shall be considered executed upon signature by both Parties or complete identification of both parties.

   b. Each Party shall be entitled to receive a copy and/or an electronic receipt equivalent of the Equipment Interchange Receipt.

3. Equipment Condition

   a. Warranty: **WHILE PARTIES MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE FITNESS OF THE EQUIPMENT, THEY RECOGNIZE AND AFFIRM THEIR RESPONSIBILITIES UNDER THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS.**

      1) Motor Carriers will conduct a pre-trip inspection prior to departing with interchanged Equipment that will include those items set forth in Exhibit A to this Agreement. **[Revised 1/17/05]**

   b. Equipment controlled by Provider shall have a valid FHWA inspection sticker. Provider will reinspect and recertify the Equipment, at Motor Carrier's request, if the existing inspection will expire during the Addendum free time period of the Motor Carrier's use.

   c. Motor Carrier will reinspect and recertify the Equipment if the existing inspection will expire prior to the Motor Carrier's return of the Equipment to the Provider.

   d. Motor Carrier will return the Equipment to the Provider in the same condition, reasonable Wear and Tear excepted.

      1) In any disputes arising in connection with classification of Wear and Tear, the Association of American Railroads TOFC/COFC Interchange Rules, Sections B, G, and F, shall be the controlling document.

E. Equipment Use

1. Absent contrary Agreement between the Parties, Motor Carrier shall use the Equipment only for the purposes for which it was interchanged and shall promptly return it to the location at which it was received.

2. Lost, Stolen, or Destroyed Equipment

   a. In the event the Equipment is lost, stolen from, badly damaged or destroyed by Motor Carrier, the method of settlement shall be the Actual Cash Value or the depreciated replacement value, as agreed between the Parties.

b. In the event Motor Carrier is compelled to compensate Provider for loss or damage to Equipment due to the acts of third parties, Provider will assign to Motor Carrier its rights against such third party upon receiving payment in full from Motor Carrier.

c. When Equipment is lost, stolen, badly damaged or destroyed, the Motor Carrier and Provider will follow the notification and invoicing processes as set forth in the Provider's addendum. If the Provider's addendum does not contain notification and/or invoicing processes for lost, stolen, badly damaged or destroyed equipment, the following will apply:

Motor Carrier shall promptly notify Provider when Equipment is lost, stolen, badly damaged or destroyed. Provider shall within thirty (30) days after receipt of such notification, secure and furnish to the Motor Carrier a written statement of the depreciated replacement value or Actual Cash Value of the equipment, as agreed between the parties [or as set forth in Provider's addendum]. Motor Carrier shall pay Provider the amount specified in the written statement within (30) days of the date of such written statement. **[Revised 9/13/04]**

3. Damage to Equipment

a. Motor Carrier shall pay to Provider the reasonable and customary costs to repair damages done to Equipment during Motor Carrier's possession.

b. Where the reasonable and customary cost to repair exceeds the casualty loss value as determined in Section E.2.a hereof, the Motor Carrier shall be obligated only for the lesser sum.

4. Tires

a. Repair of damage to tires during Motor Carrier's possession is the sole responsibility of Motor Carrier.

b. Repair of tires unrelated to damage occurring during Motor Carrier's possession is the sole responsibility of the Provider.

5. Disposal of Dunnage

a. Motor Carrier shall return Equipment with all dunnage, bracing, contaminants and debris removed and the floor swept.

6. Free Days and Use Charges

a. Interchange of Equipment is on a compensation basis. Provider may permit some period of uncompensated use and thereafter impose use charges, as set forth in its Addendum.

b. Motor Carrier shall be responsible for use and/or storage charges set forth in the Addenda.

c. Provider shall invoice Motor Carrier for use and/or storage charges within sixty (60) days from the date on which Equipment was returned to Provider by Motor Carrier.

d. In absence of a dispute resolution process contained in the Provider's addendum, the following dispute resolution process will apply:

Motor Carrier shall advise Provider in writing of any disputed items on Provider's invoices within 30 days of the receipt of such invoice(s), pursuant to paragraph E.6.g of the Agreement. Provider will undertake to reconcile such disputed items within 30 days of receipt of Motor Carrier's notice and will either provide verification for charges as invoiced or will issue a credit to Motor Carrier's account for any amount not

properly invoiced. Such disputes do not constitute valid grounds for withholding or delaying payments of undisputed charges as required by the Terms of this Agreement. In the event that charges have been verified by Provider and are again rejected and disputed by Motor Carrier for whatever reasons, Provider and Motor Carrier reserve their rights and remedies under the law regarding the payment of such charges. **[Revised 5-17-04]**

e. Provider shall provide the Motor Carrier documentation as is reasonably necessary to support its invoice.

f. Motor Carrier shall respond in writing to Provider's invoices within thirty (30) days, documenting with appropriate evidence its disagreement with any of Provider's invoices it believes to be incorrect.

g. Motor Carrier will participate in good faith in Provider's established method of dispute resolution, as set forth in its Addendum.

7. International Trade
Where Equipment is an instrument of international traffic only, Provider shall advise Motor Carrier thereof on the Equipment Interchange Receipt and, thereafter, Motor Carrier agrees to restrict the use of Equipment to the permitted uses contained in 19 CFR 10.41 a (f).

F. Liability, Indemnity, and Insurance

1. Fines, citations: Motor Carrier shall pay all fines arising out of its acts or omissions in the operation of Equipment during the Interchange Period.

   a. Motor Carrier will provide a corrected copy of Equipment-related citations to Provider upon completion of Interchange.

2. Independent contractor status: No Party or its agents is the employee or agent of any other Party.

3. If the Equipment is interchanged by Motor Carrier or is otherwise authorized by Motor Carrier to be in the possession of other parties, the Motor Carrier shall be responsible for the performance of all terms of this Agreement in the same manner as if the Equipment were in the possession of the Motor Carrier, unless the written consent of Provider has been obtained.

4. Indemnity:

   a. Subject to the exceptions set forth in Subsection (b) below, Motor Carrier agrees to defend, hold harmless and fully indemnify the Indemnitees (without regard to whether the Indemnitees' liability is vicarious, implied in law, or as a result of the fault or negligence of the Indemnitees), against any and all claims, suits, loss, damage or liability, for bodily injury, death and/or property damage, including reasonable attorney fees and costs incurred in the defense against a claim or suit, or incurred because of the wrongful failure to defend against a claim or suit, or in enforcing subsection F.4 (collectively, the "Damages"), caused by or resulting from the Motor Carrier's: use or maintenance of the Equipment during an Interchange Period; and/or presence on the Facility Operator's premises. **[Revised 1/17/05]**

   b. Exceptions: The foregoing indemnity provision shall not apply to the extent Damages: (i) occur during the presence of the Motor Carrier on the Facility Operator's premises and are caused by or result from the negligent or intentional acts or omissions of the Indemnitees, their agents, employees, vendors or third party invitees (excluding Indemnitor); or (ii) are caused by or result from defects to the Equipment with respect to items other than those set forth in Exhibit A, unless such defects were caused by or resulted from the negligent or intentional acts or omissions of the Motor Carrier, its agents, employees, vendors, or subcontractors during the Interchange Period. **[Revised 1/17/05]**

5. Notice of Filed Claims:

   a. Motor Carrier shall promptly notify Provider, Equipment Owner and/or Facility Operator of any claim arising against Motor Carrier under Section F.4, and shall also advise Provider, Equipment Owner and/or Facility Operator at that time of the legal defense undertaken regarding that claim. Failure of the Motor Carrier to timely provide such legal defense, and the undertaking of that legal defense by Provider, Equipment Owner and/or Facility Operator to protect such Party's respective interests, shall result in the Motor Carrier's bearing such reasonable attorney fees and costs incurred by the Provider, Equipment Owner and/or Facility Operator in providing such legal defense.

   b. Provider, Equipment Owner and/or Facility Operator shall promptly notify Motor Carrier of any claim arising under Section F.4. which Provider, Equipment Owner and/or Facility Operator receives. Provider, Equipment Owner and/or Facility Operator shall not undertake any legal defense of or incur any legal expenses pertaining to the claim submitted to the Motor Carrier, unless Motor Carrier fails to timely do so as provided in Section 5.a.

6. Insurance: To the extent permitted by law, Motor Carrier shall provide the following insurance coverages in fulfillment of its legal liability and obligations contained in this Agreement:

   a. A commercial automobile insurance policy with a combined single limit of $1,000,000 or greater, insuring all Equipment involved in Interchange including vehicles of its agents or contractors; said insurance policy shall be primary to any and all other applicable insurance and shall name the Equipment Provider as additional insured. The extent of Equipment Providers' additional insured status is limited to the provisions of Section F.4 hereof. **[Revised 1/17/05]**

   b. A commercial general liability policy with a combined single limit of $1,000,000 per occurrence or greater;

   c. Motor Carrier shall have in effect, and attached to its commercial automobile liability policy, a Truckers Uniform Intermodal Interchange Endorsement (UIIE-1), which includes the coverages specified in Section F.4. Motor Carrier shall use endorsement form UIIE-1 (or other corresponding forms which do not differ from UIIE-1) in the most current form available to the insurance carrier. Evidence of the endorsement of the policy and the coverage required by this provision shall be provided to IANA by the insurance company.

   d. IANA shall receive a minimum of thirty (30) days advance Notice of any cancellation of such coverages.

7. The Provider agrees that it will obtain all information concerning Motor Carrier Certificates of Insurance from the Intermodal Association of North America, and that additional evidence of insurance will not be requested from Motor Carrier Participants.

G. General Terms

1. Entire Agreement: This Agreement, including its Addendum, but only to extent that its terms do not conflict with this Agreement, contain the entire Agreement of the Parties hereto. This Agreement supersedes all prior agreements and understandings, oral or written, if any, between the Parties except as contained herein. No modification or amendment of any of the terms, conditions or provisions herein may be made otherwise than by written Agreement signed by the Parties.

   This Agreement shall apply unless it is superseded in whole by a separate bilateral written contract.

2. Headings: The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

3. Waiver: The terms or conditions of this Agreement may be waived at any time by the Party entitled to the benefit thereof, but no such waiver shall be effective unless the same is in writing and no such waiver shall affect or impair the right of the waiving Party to require observance, performance or satisfaction either of that term or

condition as it applies on a subsequent occasion or of any other term or condition hereof. The waiver by any Party of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach of the same or any other provision of this Agreement by either Party.

4. Material Breach: If it is determined that, at the time of Interchange, the Motor Carrier was not insured in accordance with Section F.6. of this Agreement, the Motor Carrier shall have been in material breach of this Agreement and the Agreement shall, subject to the survivability provisions hereof, terminate immediately pursuant to Section G.16.

   With the exception of Section G.4., no breach of this Agreement, either by an individual Motor Carrier or by an individual Provider/Facility Operator, shall affect the rights and obligations of that Motor Carrier or Provider/Facility Operator with all other Parties hereto.

5. Assignment: No Party shall assign this Agreement or any part hereof without the written consent of the other Parties provided that no such consent shall be required in the event of Provider's assignment to a successor-in-interest as a result of a merger or sale of substantially all of Provider's assets.

   Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assign.

6. No Third Party Beneficiaries: Except as expressly provided herein, nothing in this Agreement shall entitle any person other than the Parties or their respective successors and permitted assigns to any claim, cause of action, remedy or right of any kind.

7. Governing Law: The laws of the state of Maryland, the location at the principal place of business of the Intermodal Association of North America shall govern the validity, construction, enforcement and interpretation of this Agreement without regard to conflicts of law principles.

8. Venue: Any action which may be brought to enforce or interpret this Agreement shall be brought in a trial court of competent jurisdiction as follows:

   a. As to questions of interpretation or enforcement of the Agreement, at the location of the principal place of business of the Intermodal Association of North America;
   b. As to questions of indemnification under the Agreement at the situs of the transaction giving rise to the requested indemnification;
   c. As to monetary obligations between the Parties by reason of Equipment usage charges at the situs of the transaction giving rise to the requested damages;
   d. As to monetary damages between the Parties arising out of physical damage to or loss of Equipment, at the situs at which the Equipment was last interchanged prior to such loss or damage.

9. Severability: If any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or enforceability shall not change or invalidate any other provisions hereof.

10. Survival: Cancellation of this Agreement notwithstanding, Motor Carrier shall remain obligated to return Equipment provided hereunder and otherwise perform its obligations outstanding at the time of cancellation.

11. Compliance of Law: The Parties shall obey all federal, state and local laws, rules and regulations including those pertaining to the transportation of hazardous materials.

12. Force Majeure: In the event the Motor Carrier is unable to Interchange Equipment to Provider within the free time as specified in Provider's Addendum, or Provider's applicable Tariff, as a result of Acts of God, war, insurrections, strikes, fire, flood or any like causes beyond the Motor Carrier's control, the Motor Carrier shall be exempted from the per diem charges to the extent of, and for the duration of, the condition that prevented the redelivery of the Equipment. **[Revised 9/13/04]**

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13. Attorney's Fees: Should any action be brought by either Party to enforce or for the breach of any other terms, covenants or conditions of this Agreement, either Party shall be entitled, if it shall prevail, to recover reasonable attorneys' fees together with the cost of the suit therein incurred.

14. Notices:

    a. The Provider agrees to provide ten (10) days written Notice to the Motor Carrier of any changes to the terms or conditions of its Agreement Addendum. The effective date of any change shall be no less than thirty (30) days from the date of notification to Motor Carrier. **[Revised 6/02/05]**

    b. Notices required under this Agreement from Motor Carrier to Provider, or from Provider to Motor Carrier, shall be in writing and sent by confirmed facsimile or by first class mail, postage paid, and properly addressed. Alternatively, such written Notice can be personally served, sent by registered or certified mail, postage prepaid, or by a national overnight courier or delivery service, properly addressed to the individual shown in the UIIA subscriber record. Either Party, at any time, may change its address by written Notice to the other party sent as provided in this Paragraph. The earlier of (1) the date of receipt or (2) three days after the date such written Notice is given in accordance with this Paragraph shall constitute the initial date of Notice in computing the elapsed time as specified in any Notice requirement in this Agreement.

    c. In the event it becomes necessary for the Provider to suspend a Motor Carrier's interchange privileges for non-payment of outstanding invoices, Provider shall notify Motor Carrier, via confirmed facsimile, e-mail or letter, no less than 3 business days prior to suspension, that unless the outstanding issue is resolved, suspension of interchange privileges may occur. The final notification shall include contact information necessary for the Motor Carrier to resolve the outstanding issue. **[Revised 4/26/05]**

15. Multiple Counterparts: The Agreement may be executed in a number of identical counterparts, each of which for all purposes is to be deemed an original, and all of which constitute, collectively, one Agreement; but in making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

16. Term: This Agreement shall be effective for a period of one year from its execution and shall continue in effect thereafter for consecutive one year terms unless cancelled in writing, by consent of the Parties, or by any Party upon thirty (30) days prior Notice to the other Party or to the President of IANA.

    A Party whose participation in the Agreement has been cancelled for nonpayment of the IANA Administrative Service Fee may not assert any rights under this Agreement for any Interchange undertaken during the period of the cancellation.

    The absence of insurance as required in Section F.6. hereof shall effect immediate cancellation of the Motor Carrier's rights under this Agreement until such time said requirements are again satisfied.

    Notwithstanding any other provisions of this Agreement, the obligations and rights of the Parties under Section F.1, 4, 5, and 6 shall survive any cancellation of this Agreement.

H. Execution Clause

This Agreement shall be binding upon all Parties, and of full force and effect, at the time of its signing by a duly authorized official of a Party and its acceptance by IANA. An authorized official's signing constitutes the executing Party's representation that the executor possesses such authorization.

Appendix I

ADMINISTRATIVE PROCEDURES

I. Administration and Implementation

A. The Intermodal Interchange Executive Committee (hereinafter called the "Committee"), a Standing Committee of the Intermodal Association of North America, is responsible for the administration and interpretation of the Agreement, and for the processing of changes and/or modifications to the Agreement. **[Revised 4/06/05]**

B. The Chairperson of the Committee shall be the President of the Intermodal Association of North America, who shall serve without voting privilege. The President is responsible for the Administration and Management of IANA and the Agreement, as provided in IANA's bylaws.

C. The Committee shall consist of a minimum of two representatives from each mode representing Motor, Ocean and Rail Carriers participating in the Agreement. Each representative shall name his or her alternate from their respective mode who shall participate in Committee meetings and serve as the voting member in the absence of the principal representative. Representatives and their alternates must be from companies that are current signatories to the Agreement. Attendance at meetings is limited to voting members and their alternates. If Committee members wish to have an industry representative invited to attend a meeting in an advisory capacity, the majority of the Committee must approve of this invitation prior to it being delivered. **[Revised 4/06/05]**

D. To conduct business under the IANA Agreement, a quorum shall consist of the Chairperson and at least two Committee representatives from each involved industry mode or segment.

E. Items to be included on the Agenda for any regularly scheduled meeting of the Committee must be provided, in writing, to the Chairperson, at least forty-five (45) days in advance of the meeting date. Agenda items received less than 45 days prior to a regularly scheduled Committee meeting, will be placed on the Agenda under Other Business, and will be discussed, time permitting. **[Revised 4/06/05]**

F. The duties of the Chairperson, shall consist of the following:

1. The Chairperson shall be responsible for the day-to-day management of the Interchange program, including marketing and promoting the Agreement among the various segments of the industry; retaining the originals of the signed Uniform Intermodal Interchange and Facilities Access Agreements or amendments thereof; and exchanging information with Committee members concerning new signatories.

2. The Chairperson shall maintain a current list of the Parties to the Agreement and shall periodically identify newly terminated participants.

3. The Chairperson shall disseminate pertinent information on participating Motor Carriers to Providers, in a method mutually agreed to by Providers and the IANA. Entry by new participants to the Agreement shall become effective on the date the Agreement is accepted by the Chairperson as being in compliance.

4. Committee members will be provided with the meeting Agenda and appropriate backup materials, at least thirty (30) days in advance of any regularly scheduled meeting. **[Revised 4/06/05]**

G. In the absence of a definitive process within these Administrative Procedures, all meetings shall be conducted in accordance with Roberts Rules of Order. **[Revised 4/06/05]**

II. Review Procedures for New or Revised Providers Addenda

A. The appropriate modal Committee members will review the Addenda for new Providers and revisions to Addenda for existing Providers. These Committee members will determine whether the Addenda language is consistent with the existing provisions of the Agreement. Economic and commercial terms of the Addenda are not reviewed. **[Revised 4/06/05]**

B. A new or existing Provider shall submit Addendum language to the Chairperson of the Committee a minimum of ninety (90) days prior to the effective date of the Addendum. Within ten (10) working days after receipt of new or revised Addendum language, the Chairperson shall forward, through facsimile transmission or mail, and/or by e-mail, a copy of the proposed Addendum language and an evaluation by IANA staff of the conformance of such language with the Agreement to Committee members representing the affected mode(s). Economic or commercial terms will be deleted from the Addendum before forwarding to the Committee members. **[Revised 4/06/05]**

C. Modal Committee members shall review the Addendum language and submit any comments, in writing, to the Chairperson of the Committee within fifteen (15) working days of their confirmation of receiving the new Addendum language, and **[Revised 4/06/05]**

1. If no adverse comments are received from the modal Committee members, the Addendum will become effective on the proposed effective date. **[Revised 4/06/05]**

2. If a modal Committee member questions Addendum language as being in conflict with the Agreement, a meeting of, or conference call with, Committee members representing the affected mode(s), the Provider submitting the Addendum language, and such IANA staff as the Chairperson shall select, shall be held to discuss the specific provisions in question. That meeting or conference call shall be held within fifteen (15) working days after the expiration of time for submission of Addendum language comments. **[Revised 4/06/05]**

   a) If a majority of the modal Committee members participating in the meeting or conference call determine that the Addendum language conflicts with the Agreement, the Provider will be requested to modify or delete the specified Addendum language. If such revisions responsive to the Committee's determination are made the Addendum will become effective on the proposed effective date. In the event the Provider refuses to modify the Addendum language, participation in the Agreement will be declined. Regarding modifications to existing Addendum language, Provider will be requested to modify or delete the involved Addendum language and will be provided a ten (10) day comment period to respond to the Committee's determination. Refusal by a Provider to adopt the language modifications will result in the termination of participation in the Agreement.

   If a "simple" majority of the modal Committee members participating in the meeting or conference call do not agree on acceptance or denial of the addendum language, the Addendum language in question, will be denied. **[Revised 4/06/05]**

   b) If a majority of the Committee members participating in the meeting or conference call do not agree that the Addendum language conflicts with the Agreement, the Addendum will become effective on the proposed date.

3. Once Addendum language is approved by the modal Committee members, no additional requests from Committee members for modifications to the approved language in the Addendum will be entertained for a period of six months from the effective date of the Addendum. **[Revised 4/06/05]**

III. Requests for Interpretation of Agreement Provisions

A. Requests for interpretations of the Agreement shall be handled initially by informal ruling of the Chairperson in consultation with Committee members representing the industry segments involved. The IANA's General Counsel will serve as legal advisor for such consultations.

The Party seeking an interpretation shall submit its request in writing to the Chairperson of the Committee, who within seven (7) working days of receipt, shall send a copy to any other party involved in [the particular instance prompting] or known to support the request. Such party shall submit to the Chairperson within seven (7) working days a statement of its position on the matter. The Chairperson shall disseminate both the original request for interpretation and any statements provided by other parties to Committee members representing the involved industry Parties within five (5) working days of receipt. The modal Committee members shall provide the Chairperson with their comments regarding the request for interpretation within ten (10) working days from receipt of information provided by Chairperson. **[Revised 4/06/05]**

B. The Chairperson shall promptly advise the Party(ies) by facsimile or mail, of the modal Committee members' action on the requested interpretation within five (5) working days. Should the interpretation rendered by the modal Committee members following consideration and determination not be agreed with by the Party(ies) participating in the requested changes or modification, or commenting on the proposed language, such Party(ies), upon a demonstration of new information or previous information not considered or other provisions in the Agreement supporting the proposed language or changes, may request an interpretation by the full Committee. The Committee shall within fifteen (15) working days of request either (1) confirm the determination of the Chairperson and the modal representatives who made the initial interpretation, (2) render a revised interpretation, or (3) decline further comment because good cause has not been shown for reconsidering the initial interpretation. **[Revised 4/06/05]**

C. In cases of interpretations which affect Parties other than those involved in a particular request, or whose outcome involves a substantive change in the terms of the Agreement, the Chairperson shall prepare and serve Notice thereof on all Parties via first class U.S. mail.

IV. Requests for Modifications to the Agreement.

A. The full Committee shall be responsible for considering requests for changes to the Agreement. Such requests shall be submitted in writing to the Chairperson and may be filed by any Party that is a participant in the Agreement. Upon receipt of the written request, the Chairperson shall transmit the request to the full Committee within ten (10) working days. **[Revision 4/06/05]**

B. The Committee shall consider the request for modification at the next scheduled meeting of the Committee at which a quorum is present and promptly advise petitioner of its decision. If a proposed change to the Agreement is not approved by a three-fourths (3/4's) majority vote of the full Committee, the suggested change will fail. **[Revised 4/06/05]**

V. Notice of Proposed Modifications to the Agreement and Comment Process

A. If the Committee votes to modify the Agreement, the Chairperson shall provide Notice in writing and by posting on IANA website within ten (10) working days of the Committee vote, of the exact language and a proposed effective date of the proposed change to all Participants in the Agreement. UIIA Participants shall have thirty (30) days from the date of this notification to provide comments on the proposed change. Comments must be submitted in writing to the Chairperson, who shall transmit the comments to the full Committee for consideration within ten (10) working days after the close of the thirty (30) day comment period. The Committee shall consider comments and advise of its decision to either rescind or move forward with the proposed modification within fifteen (15) working days from receipt of comments provided by Chairperson. A three-fourths (3/4's) majority vote of the full Committee will be required to rescind the prior decision to modify.

Notice of the Committee's final decision will be provided to all Parties within five (5) working days from the close of the period to receive comments from the Committee and the proposed effective date of any changes shall not be less than fifteen (15) days from this date of notification. **[Revised 4/06/05]**

B. If no comments are received, or all comments concur with the Committee's decision to modify the Agreement, the Chairperson shall immediately notify all Parties of the change, and its effective date, which shall be not less than thirty (30) days from the date of the close of the thirty (30) day comment period. **[Revised 4/06/05]**

VI. Prerequisites for Participation

A. Parties seeking to participate in this Agreement must first provide to IANA, its officially-registered Standard Carrier Alpha Code (SCAC) as issued by the National Motor Freight Traffic Association, the cost of which shall be borne by the prospective Agreement participant. Failure of the participant to maintain its officially-registered SCAC shall constitute grounds for immediate cancellation of its participation in the Agreement and related Addendum/Addenda.

B. Parties to this Agreement shall maintain facsimile communications capabilities on a 24 hour per day, 7 days per week, basis. Failure to provide such communication capabilities can result in the cancellation of this Agreement and related Addendum/Addenda.

C. Upon demand, Motor Carrier shall furnish to the Intermodal Association of North America (IANA), the insurance policies required under this Agreement and/or any participating Equipment Provider's Addendum. Failure of the Motor Carrier to furnish said policy(ies) on demand shall constitute a breach of this Agreement, and shall be cause for immediate cancellation of the Motor Carrier's Agreement.

D. Companies "Doing Business As" another entity will be listed in the UIIA database and in other appropriate documents, by the company name as placarded and/or stenciled on the interchange Equipment. Certificates of insurance must clearly identify said company as having all insurance coverages as required under the Agreement and/or any participating Equipment Providers' Addenda.

VII. Party's Right to Terminate Participation

A. Any party desiring to terminate participation in this Agreement, as subsequently revised or supplemented, shall so notify the Chairperson, in writing, by Certified mail, prior to the effective date of the modification. The absence of such notification will constitute acknowledgement of the Party's intent to continue to participate in the revised or supplemented Agreement.

Reorganized and Revised
By Intermodal Interchange Executive Committee: June 19, 2000
Revised: June 2, 2005

Exhibit A to UIIA
As referenced in Sections D.3.a.1 and F.4.b.

The following list sets forth those items, which the Motor Carrier has responsibility for visually or audibly checking prior to use of the Equipment:

1. Chassis Twist Locks and Safety Latches – (Check that twist locks and safety latches are engaged and properly secured.)

2. Slider Pins – (Check that slider pins are engaged for all sliding chassis.)

3. Bolsters (Check that bolsters are not bent and the container can be secured properly.)

4. Landing Legs (Check that Landing legs are in 90 degree position and they move up and down properly.)

5. Sand Shoes (Check that sand shoes or dolly wheels are attached to landing legs and secure.)

6. Crank Handles (Check that handle is attached, secure and operable to move landing legs up and down.)

7. Mud Flaps – (Check that mud flaps are whole and properly secured.)

8. Tires (Check that the following conditions are **not** present.)

    a. Tire is flat, underinflated or has noticeable (e.g., can be heard or felt) leak.
    b. Any tire with excessive wear (2/32nds or less thread depth), visually observable bump, or knot apparently related to tread or sidewall separation.
    c. Tire is mounted or inflated so that it comes in contact with any part of the vehicle. (This includes any tire contacting its mate in a dual set.)
    d. Seventy-five percent or more of the tread width is loose or missing in excess of 12 inches (30cm) in circumference.

9. Rims (Check that rims are not cracked and/or bent.)

10. Rear Underride Guard ("ICC Bumper") (Check that Guard is in place and not bent under the frame.)

11. Electrical Wiring/Lights – (Check that lights are in working order.)

12. Reflectors/Conspicuity Treatments (Check for reflector lenses and presence of conspicuity tape or bar on the 3 visual sides of the chassis.)

13. Brake Lines, Including Air Hoses and Glad Hands – (Check for audible air leaks and proper pressurization only.)

14. Current License Plate (Check to see that it is affixed to equipment.)

15. Proper Display of Hazardous Cargo Placards, In Accordance with Shipping Papers

16. Display of Current Non-expired Federal Placards or Stickers (Check to see that it is affixed to equipment.)

The foregoing list does not include latent defects unless caused by or resulting from the negligent or intentional acts or omissions of the Motor Carrier, its agents, employees, vendors or subcontractors during the Interchange Period. The foregoing list is without limitation of any federal or state legal requirements applicable to Motor Carrier with respect to use or operation of Equipment. **[Revised 1/17/05]**

TRUCK LOADING AGREEMENT
([redacted])

THIS TRUCK LOADING AGREEMENT (hereinafter referred to as "AGREEMENT") is entered into on the _____ day of _____, 2005, by and between [redacted] L.P., a [redacted] limited partnership, (hereinafter referred to as [redacted] ([redacted] its general and limited partners, subsidiaries, and affiliated companies, and their respective officers, agents and employees are hereinafter referred to as the "[redacted]") and _____, whose address is _____, (hereinafter referred to as "CARRIER"), ([redacted] and CARRIER are collectively referred to a "PARTIES").

WITNESSETH:

WHEREAS, [redacted] maintains and operates petroleum products terminals at various locations (each hereinafter referred to as "TERMINAL") from which petroleum products are loaded into transport trucks owned and/or operated by others;

WHEREAS, CARRIER is desirous of having access to each TERMINAL for the purpose of loading petroleum products into CARRIER'S transport trucks on behalf of customers or exchange partners of [redacted] (or on behalf of itself if CARRIER is a customer of [redacted] loading petroleum products into its own transport trucks) and driving such loaded trucks away from the TERMINAL;

WHEREAS, [redacted] is agreeable to granting access and loading privileges to CARRIER on the terms and conditions set forth in this AGREEMENT;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the PARTIES agree as follows;

1. Access to TERMINALS

CARRIER is hereby granted access to [redacted] TERMINALS in accordance with the terms and conditions outlined in this AGREEMENT.

(a) CARRIER is hereby granted access to each TERMINAL designated by [redacted] if CARRIER has been issued an access card as provided in Section 2 of this AGREEMENT for the sole purpose of loading petroleum products into transport trucks furnished by CARRIER and driving such loaded trucks away from the TERMINALS.

(b) For CARRIER to have access to [redacted] TERMINALS, CARRIER must comply with the following requirements prior to a CARRIER receiving access to the TERMINALS:

(i) CARRIER must have been issued an access card for each driver in accordance with the requirements of this AGREEMENT;

(ii) Each driver for CARRIER must have completed all driver training as outlined in the [redacted] Driver Loading Instruction Manual and have acknowledged in writing the completion of this training as well as the review and agreement to comply with all requirements of the Driver Loading Instruction Manual;

(iii) Certificates of Insurance as required in Section 4 of this AGREEMENT must be on file with [redacted]

(iv) A photocopy of the Driver's License for each driver for CARRIER must be on file with [redacted]

(v) The annual tank vapor tightness certification required by 40 C.F.R. Section 63, Subpart R must be on file with [redacted]

(vi) If CARRIER has been issued a federal or state Common Carrier license, a copy of CARRIER's common carrier license must be on file with [redacted]

(c) CARRIER must agree that by sending any truck and trailer into [redacted] TERMINALS CARRIER is affirmatively warranting that such truck and trailer is in compliance with all federal, state and local laws, rules, regulations and ordinances, are compatible with the product dispensing system at each TERMINAL and are appropriate for the service in which CARRIER is utilizing the truck and trailer.

(d) CARRIER agrees that [redacted] may in its sole discretion, by giving notice to CARRIER, delete any TERMINAL or TERMINALS from those to which CARRIER is granted access pursuant to this Section.

2. Access Cards

[redacted] may in its sole discretion furnish to CARRIER, if CARRIER is approved by [redacted] access cards for CARRIER to gain access to each TERMINAL and to each TERMINAL'S petroleum products dispensing system so that CARRIER can load [redacted] petroleum products into CARRIER'S transport trucks. Access cards so issued to CARRIER shall remain the property of [redacted] CARRIER shall return to [redacted] any or all access cards furnished it upon request of [redacted] or upon termination of this AGREEMENT immediately, but in no case more than three (3) business days from receipt by CARRIER of such request or termination. CARRIER shall not duplicate, nor shall it permit the duplication of, any such access cards furnished to it. CARRIER shall immediately notify the applicable Terminal Manager by telephone of the loss, theft, fraudulent or unauthorized use or duplication of an access card furnished CARRIER hereunder, and CARRIER shall confirm such notification in writing to [redacted] within three business days. CARRIER shall pay to [redacted] the posted price for all petroleum products loaded from each TERMINAL arising from any loss, theft, fraudulent or unauthorized use or duplication of an access card issued CARRIER until such time as CARRIER notifies the appropriate Terminal Manager at the [redacted] Regional Office by telephone of the loss, fraudulent or unauthorized use or duplication of an access card furnished CARRIER hereunder and confirms such notification in writing. CARRIER must first try to reach the appropriate Terminal Manager(s) by telephone as specified below:

LOCATION	[redacted] CONTACT
[redacted]	[redacted] (Office) [redacted]

3. Privileges

The term "privileges" as used in this AGREEMENT shall mean the right extended hereunder to CARRIER of access to each TERMINAL to load petroleum products.

4. Insurance

(a) Without in any way limiting, or limited by, CARRIER'S indemnity obligation under Section 5 of this AGREEMENT, CARRIER shall maintain at CARRIER'S own expense during the term of this AGREEMENT the insurance specified below with respect to CARRIER'S operations in connection with this AGREEMENT:

(1) Workers' Compensation as prescribed by applicable law and Employer's Liability Insurance of not less than $1,000,000;

(2) Commercial General Liability (Bodily Injury and Property Damage) Insurance of not less than $2,000,000 combined single limit per occurrence, including Contractual Liability Insurance to cover liability assumed under this AGREEMENT.

(3) Automobile Liability (Bodily Injury and Property Damage) Insurance, including Broadened Auto Pollution Endorsement CA 99 48, of not less than $2,000,000 combined single limit per occurrence, on all owned, non-owned and hired vehicles; and

(4) Any other insurance or surety bonding that may be required under the laws, ordinances and regulations of any governmental authority, including the Federal Motor carrier Act of 1980 and all rules and regulations of the Department of Transportation.

(b) The insurance specified in Section 4(a) of this AGREEMENT shall require the insurer to provide [redacted] with thirty (30) days' prior written notice of any cancellation or change in the insurance and shall be **ENDORSED** to contain a waiver of subrogation against the [redacted] In addition, the insurance specified in subsections (2), (3) and (4) of Section 4(a) shall be **ENDORSED** to name the [redacted] as additional insureds.

(c) CARRIER shall furnish [redacted] with certificates of insurance in the form of Exhibit 1 to this AGREEMENT of the insurance required to be maintained by CARRIER under this Section 4. CARRIER shall furnish such certificates to [redacted] prior to any of CARRIER'S trucks being allowed to enter any [redacted] TERMINAL.

CARRIER shall provide new insurance certificates (reflecting the above coverages) prior to the policy expiration date of any coverage. Upon request, CARRIER shall furnish [redacted] with a copy of each insurance policy. If CARRIER has been issued a federal or state "Common Carrier License," its name appearing on this AGREEMENT, the certificates of insurance and receipts for access cards shall be the same as CARRIER'S name appearing on such license. If CARRIER is a "private Carrier," its name shall appear the same on this AGREEMENT, the certificates of insurance and receipts for access cards.

5. Indemnity

(a) CARRIER shall defend, indemnify and hold harmless the [redacted] from and against any and all fines, loss, costs, damage, injury and liability for injury to or death of any person (including an employee of CARRIER or the [redacted]) or for loss or damage to property (including loss of use thereof, or for environmental contamination or pollution), including claims and attorneys' fees and court costs relating thereto whether arising directly or indirectly or alleged to have arisen out of, or in any way connected with:

(1) The exercise by any person of the access and privileges granted CARRIER hereunder or from any operation or activity of CARRIER, its agents, employees or any other person in connection therewith;

(2) The loss, theft, fraudulent or unauthorized use or duplication of a key and/or card for any TERMINAL issued CARRIER; and

(3) The failure of CARRIER, its agents and employees or any other person in connection therewith to comply with any requirement of this AGREEMENT.

(b) **THIS INDEMNITY SHALL APPLY WHETHER OR NOT THE [redacted] WERE OR ARE CLAIMED TO BE PASSIVELY, CONCURRENTLY OR ACTIVELY NEGLIGENT, AND REGARDLESS OF WHETHER LIABILITY WITHOUT FAULT IS IMPOSED OR SOUGHT TO BE IMPOSED ON THE [redacted] HOWEVER, IT SHALL NOT APPLY TO THE EXTENT IT IS VOID OR OTHERWISE UNENFORCEABLE UNDER APPLICABLE LAW IN EFFECT ON OR VALIDLY RETROACTIVE TO THE DATE OF THIS AGREEMENT AND SHALL NOT APPLY WHERE SUCH LOSS, DAMAGE, INJURY, LIABILITY OR CLAIM HAS BEEN FINALLY DETERMINED THROUGH ARBITRATION OR ANY OTHER LEGAL PROCEEDING AVAILABLE UNDER THIS AGREEMENT TO BE THE RESULT OF THE SOLE NEGLIGENCE OR WILLFUL MISCONDUCT OF THE [redacted]**

(c) CARRIER shall assume full responsibility for any and all injuries occurring to its agents, employees or employees of any subcontractors arising from or in connection with their employment. CARRIER specifically agrees to fully defend, indemnify and hold

harmless the [redacted] regarding any claims, losses, damages, expenses or fees (including without limitation, all fines, penalties, court costs and reasonable attorney's fees) arising from, or in connection with its agents', employees' or subcontractors' activities, including, but not limited to, all claims for bodily injury, personal injury, disease or death brought by CARRIER, CARRIER'S agents and employees or employees of any subcontractors against the [redacted] **REGARDLESS OF WHETHER SUCH INJURY OR DEATH IS OR IS ALLEGED TO BE CAUSED BY THE SOLE, PARTIAL OR CONCURRENT NEGLIGENCE OF THE [redacted] THIS INDEMNITY PROVISION CONTROLS** OVER ANY CONFLICTING PROVISION IN THIS AGREEMENT OR ANY RECEIPT OR PURCHASE ORDER BETWEEN THE PARTIES, INCLUDING HANDWRITTEN CHANGES TO ANY PURCHASE ORDER. **AS BETWEEN ITSELF AND THE [redacted] ON ALL INDEMNIFICATION CLAIMS UNDER THIS AGREEMENT, CARRIER EXPRESSLY AGREES TO WAIVE ANY IMMUNITY OR EXCLUSIVITY OF ANY LABOR, WORKER'S COMPENSATION OR OTHER SIMILAR STATUTE.**

(d) In the event CARRIER is obligated to provide the [redacted] a defense under this AGREEMENT, CARRIER shall provide or cause to be provided competent counsel for said defense reasonably acceptable to the [redacted] within ten calendar days of the [redacted] notice to CARRIER of CARRIER'S indemnity obligations under this AGREEMENT. In the event CARRIER fails to provide such counsel within this time period, then the [redacted] may appoint its own outside counsel and CARRIER agrees to reimburse the [redacted] for all costs and fees incurred in such defense.

(e) The obligations of the PARTIES under this Section 5 shall survive the expiration or termination of this AGREEMENT.

6. Laws, Rules, Regulations and Instructions

(a) CARRIER agrees at all times to comply, and to ensure and be responsible for the compliance of its drivers, with all federal, state and local laws, ordinances, rules and regulations applicable to the privileges granted hereunder and agrees to obtain all permits, licenses and other authorizations required by any governmental authority under such laws, ordinances, rules and regulations. By way of example, but not of limitation, the transport trucks (including the cargo tanks into which the petroleum products are loaded) used by CARRIER in exercising such privileges shall meet all applicable Department of Transportation labeling, placarding, marking and tank specifications and regulations and shall be authorized by the Department of Transportation to transport the petroleum products loaded into such trucks.

(b) CARRIER further agrees to abide fully and strictly with the driver loading instructions promulgated by [redacted] with respect to the use of each TERMINAL including but not limited to the Driver's Loading Instruction Manual which has previously been

furnished to CARRIER and which CARRIER acknowledges receipt thereof. Such instructions and regulations may be amended or modified by [redacted] at any time and such instructions and regulations as amended or modified shall be binding on CARRIER upon receipt of a copy thereof.

(c) CARRIER shall ensure all HAZMAT (49 CFR 172.700) and HAZWOPER (29 CFR 1910.120) training is completed as required.

(d) CARRIER shall permit only personnel properly instructed in the characteristics and safe handling of the petroleum products to be transported and the safe operation of the applicable TERMINAL facilities and all applicable federal, state and local laws or ordinances applicable thereto, to exercise the privileges granted CARRIER hereunder. All such personnel shall be fully knowledgeable about and abide by all of [redacted] safety regulations and driver loading instructions. [redacted] may in its discretion temporarily or permanently prohibit any person from entering any TERMINAL and using any or all of the facilities at the TERMINALS.

(e) All personnel working in CARRIER'S operations and at its facilities shall be mentally and physically capable of performing their assigned duties in a competent and safe manner. The possession and/or use of illegal or unauthorized drugs, intoxicating beverages, firearms or other weapons is prohibited on all [redacted] property. To insure the safety of persons and to prevent the loss of [redacted] property, [redacted] may conduct security inspections or searches at random. [redacted] shall have the right to search the person, personal effects or vehicle of any person on [redacted] property to enforce compliance with this policy. Persons found to be in violation of this policy will be immediately removed and barred from entering any [redacted] TERMINAL. Illegal or unauthorized drugs, intoxicating beverages, firearms or other weapons discovered on [redacted] property may be confiscated and turned over to law enforcement officers at [redacted] discretion. The instructions and regulations pertaining to [redacted] inspection policy may be amended or modified by [redacted] at any time, and such instructions and regulations as amended or modified shall become binding on the CARRIER upon receipt of a copy thereof.

(f) CARRIER shall fully cooperate with [redacted] in the investigation of any accident, spill, or other incident at a TERMINAL involving CARRIER'S vehicles and/or employees in any way. With respect to any accident, spill, or other incident in which one of CARRIER'S vehicles is involved, such vehicle shall not be moved except in case of emergency or at the direction of a [redacted] employee.

7. Term of AGREEMENT

This AGREEMENT supercedes and terminates any prior Truck Loading Agreement between [redacted] and CARRIER covering each TERMINAL. The privileges herein granted to CARRIER are temporary in nature and may be terminated by either [redacted] or CARRIER in its sole and absolute discretion at anytime by serving written notice of termination of this AGREEMENT upon the other PARTY sent by registered or certified mail (return receipt

requested). Such termination to be effective upon the receipt of such notice during normal business hours. Should CARRIER terminate this AGREEMENT, CARRIER shall return all keys and/or cards furnished to it hereunder with its notice of termination, and should [redacted] terminate this AGREEMENT, CARRIER shall immediately, but in no case more than three (3) days, after receipt of the notice of termination return all keys and/or cards furnished to it hereunder. CARRIER shall be responsible, but in no case more than three (3) days from receipt by CARRIER of the notice of termination, for all liability hereunder accrued prior to the termination becoming effective.

8. Nonassignment

CARRIER shall not assign this AGREEMENT in whole or in part without [redacted] prior written consent which consent may be withheld in [redacted] sole discretion, and any such assignment without such prior consent shall be void.

9. Nonwaiver

No course of dealing between the PARTIES hereto nor any failure by either PARTY at any time, or from time to time, to enforce any term or condition of this AGREEMENT shall constitute a waiver of such term or condition, nor shall such course of dealing or failure affect such term or condition in any way or the right of the PARTIES at any time to avail themselves of such remedies as they may have for any breach of such term or condition.

10. Independent Contractor

It is expressly agreed that CARRIER is acting hereunder solely as an independent contractor and that all persons exercising the privileges shall be deemed agents, servants or employees of CARRIER and that none of such persons shall be deemed agents, servants or employees of [redacted]

11. Entire Agreement, Amendments

This AGREEMENT and the attached exhibits set forth the entire agreement and understanding of the PARTIES with respect to the privileges, supercedes and merges all prior discussions and writings between them and is not subject to modification or interpretation by either PARTY other than by an amendment hereto duly executed by both PARTIES.

12. Governing Law

This AGREEMENT shall be governed by the laws of the State of [redacted] without regard to conflict of law rules contained therein. Any interpretation of the Arbitration provision shall also be governed by the Federal Arbitration Act. To the extent any dispute related to or arising from this AGREEMENT or the relationship between the PARTIES is not governed by the arbitration provision set forth in section 13, the PARTIES agree the venue for any such dispute shall be [redacted] County, [redacted]

13. Dispute Resolution; Arbitration

THE PARTIES AGREE THAT TO THE EXTENT ANY DISPUTE DOES NOT EXCEED $500,000, ANY SUCH DISPUTE RELATING TO OR ARISING OUT OF THIS AGREEMENT SHALL BE DECIDED BY BINDING NEUTRAL ARBITRATION AS PROVIDED BY [redacted] LAW. THE PARTIES ARE GIVING UP ANY RIGHTS EACH MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR BY JURY TRIAL. THE PARTIES ARE GIVING UP THEIR JUDICIAL RIGHT TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THIS PROVISION. IF EITHER PARTY REFUSES TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, IT MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE LAWS OF THE STATE OF [redacted] OR IN ACCORDANCE WITH FEDERAL LAW. THE AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

(a) Such arbitration shall be conducted in accordance with the JAMS Streamlined Arbitration Rules and Procedures (the "Rules").

(b) The arbitration shall be conducted by a single neutral arbitrator in accordance with the Streamlined Rules. The PARTIES shall attempt to select and agree upon a single arbitrator. If the PARTIES can not reach agreement upon a suitable arbitrator, one shall be appointed by JAMS in accordance with the Streamlined Rules.

(c) Unless the PARTIES agree otherwise, the place of arbitration shall be [redacted] The arbitrators shall not be empowered to award any form of exemplary, incidental, consequential or punitive damages except as contemplated by this AGREEMENT. As part of any arbitral award pursuant to this paragraph, the arbitrators shall render a reasoned written decision and award. The PARTIES consent to judgment on such award being entered in any court having jurisdiction. Under no circumstances shall the arbitrator have the right to award any amount in excess of $500,000 including any interest, costs or any other amount.

(d) The dispute resolution proceedings contemplated by this provision shall be as confidential and private as permitted by Applicable Law or the rules of any applicable securities exchange. To that end, the PARTIES shall not disclose the existence, content, or results of any proceedings conducted in accordance with this provision, and materials prepared or submitted in connection with such proceedings shall not be admissible in any other proceeding, provided, however, that this confidentiality provision shall not prevent a petition to vacate or enforce an arbitral award, and shall not bar disclosures required by Applicable Law or the rules of any applicable securities exchange. The PARTIES agree that any decision or award resulting from proceedings in accordance with this dispute resolution provision shall have no preclusive effect in any other matter involving third parties.

(e) Should any PARTY be required to institute a court proceeding to enforce any arbitration award, the prevailing Party (as determined by the arbitral panel or court) shall be entitled to recover their reasonable attorneys' fees to be fixed by the arbitral panel or court.

(f) Unless otherwise determined at law or in arbitration, each PARTY is required to continue to perform its obligations under this AGREEMENT pending final resolution of any Dispute.

(g) Any judicial proceedings permitted to be brought with respect to this AGREEMENT shall be brought in any state or federal court of competent jurisdiction in [redacted] and the

PARTIES generally and unconditionally accept the exclusive jurisdiction and venue of such courts. The PARTIES waive, to the fullest extent permitted by applicable law, any objection which they may now or hereafter have to the bringing of any such action or proceeding in such jurisdiction and venue.

(h) The obligations of the PARTIES under this Section 13 shall survive the expiration or termination of this AGREEMENT.

14. Execution

The person executing this AGREEMENT has full authority from CARRIER, or [redacted], as the case may be, to do so.

15. Mutual Drafting

The PARTIES acknowledge that each of them had input into the drafting of this AGREEMENT and that no term or portion of the AGREEMENT should be interpreted against either PARTY.

IN WITNESS WHEREOF, the PARTIES hereto have executed this AGREEMENT the day and year first above written.

[redacted]
A [redacted] limited partnership

By: [redacted]
Its General Partner

By:_____
Name:_____

CARRIER_____

By:_____
Name:_____

BUILDING ERECTION SERVICES COMPANY

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

January 24, 2006

To: The Senate Judiciary Committee
Re: SB-338

Chairman Vratil, Vice Chairperson Bruce, and Committee Members:

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.

Kansas has a long standing history of promoting personal responsibility and holding individuals accountable for their negligence. Kansas applies a comparative negligence standard where each is liable in direct proportion to the percentage of fault. The purpose of SB-338 is to apply a comparative negligence standard in construction so that legal liability is allocated to the appropriate party in proportion to that party's fault and prevent one construction contract party from side-stepping the pro-rata doctrine of negligence by requiring another party to name them as additional insured on its general liability policy.

Unfortunately, by contractually requiring a party to a contract to additionally insure one or more other parties to the contract, the intent of the anti-indemnity law is 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 little incentive to maintain a safe operation or improve quality if someone else is forced to assume all of the liability and pay all claims. Accountability is what this Legislation is all about and it is certainly time to get it right in Kansas.

SB-338 will over time improve safety and quality in construction and reduce insurance cost for good safe contractors who focused on quality work. SB-338 will force the bad actors and unsafe contractors to re-think their safety and quality practices when their premium is based upon their actual loss history rather than showing a clear claims record because other parties have paid the price and the resulting increased insurance and deductible charges.

There is no functional difference between a broad form indemnity clause in a construction contract and an additional insured requirement. Each is typically covered by insurance paid for by the indemnitor (subcontractor). Whether the risk is undertaken as a direct indemnitor or indirectly through additional insured status, the potential cost to the indemnitor is the same. Higher, future premiums and in severe cases, uninsurability and business failure. Therefore, to have limited direct indemnity provisions in construction contracts to the extent of fault on the part of the indemnitor [as

Senate Judiciary
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Attachment 4

you did in 2004] and fail to close the loophole of indirect indemnity by way of additional insured status eviscerates the intended effect of the statue which is to prevent risk transfers in the first place. This Bill will not delete or reduce coverage provided in contractors', subcontractors' and suppliers' general liability policies. Any testimony to the contrary is simply untrue. Completed operations coverage (which covers liability for bodily injury and property damage arising from completed work including the resultant damage caused by defective work) is not affected in any way.
The safety of our workers and the quality of our buildings and infrastructure is important to all Kansans. Responsibility and accountability for each construction stakeholder is a key component to a bright future for all of us.
On behalf of myself and the of contractors, thousands 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.

act of God—An accident or event resulting from natural causes, without human intervention or agency, and one that could not have been prevented by reasonable foresight or care, e.g., floods, lightning, earthquake, or storms. This is a peril terminology found in ocean and inland marine policies.

actual cash value (ACV)—In property and auto physical damage insurance, one of several possible methods of establishing the value of insured property to calculate the premium and determine the amount the insurer will pay in the event of loss. Although the term is seldom defined in the policy, the generally accepted insurance industry definition of actual cash value is the cost to repair or replace the damaged property with materials of like kind and quality, less depreciation of the damaged property. Courts have differed as to whether depreciation includes economic obsolescence as well as actual physical depreciation. See also REPLACEMENT COST COVERAGE. *[CAI VIII.E; CPI V.J; PRMI 5.G, 10.G]*

actuary—An individual, often holding a professional designation, e.g., Fellow of the Casualty Actuarial Society (FCAS), who computes statistics relating to insurance, typically estimating loss reserves and developing premium rates. *[RF I.B]*

acute exposure—A single exposure to a toxic substance that results in severe biological harm or death. Acute exposures are usually characterized as lasting no longer than a day, as compared to continuous or repeated exposure over a longer period of time.

acute toxicity—The ability of a substance to cause poisonous effects resulting in severe biological harm or death soon after a single exposure or dose. Also, any severe poisonous effect resulting from a single short-term exposure to a toxic substance. See also CHRONIC TOXICITY.

ACV—See ACTUAL CASH VALUE.

ADA—See AMERICANS WITH DISABILITIES ACT.

AD&D—See ACCIDENTAL DEATH AND DISMEMBERMENT.

additional expense coverage—See EXTRA EXPENSE COVERAGE.

additional insured—A person or organization not automatically included as an insured under an insurance policy, but for whom insured status is arranged, usually by endorsement. A named insured's impetus for providing additional insured status to others may be a desire to protect the other party because of a close relationship with that party (e.g., employees or members of an insured club) or to comply with a contractual agreement requiring the named insured to do so (e.g., customers or owners of property leased by the named insured). See also ADDITIONAL NAMED INSURED; NAMED INSURED. *[CLI VI.H; CPI IV.G; CRT XI.B; IWC VI.C; PRMI 6.G, 13.G]*

additional living expense (ALE) coverage—A type of insurance included within homeowners policies. ALE coverage reimburses the insured for the cost of maintaining a comparable standard of living following a covered loss that exceeds the insured's normal expenses prior to the loss. For example, additional living expense insurance would cover an insured's motel bill while fire damage to the home is being repaired, the home is replaced, or until the insured moves to a permanent residence. ALE coverage is subject to a 20 percent sublimit on the coverage amount that applies to the dwelling under forms HO-2 and HO-3, to a 10 percent sublimit applying to the dwelling under forms HO-1 and HO-8, to 40 percent of the personal property limit applying under form HO-6, and to 20 percent of the personal property limit under form HO-4. *[PRMI 10.D]*

additional medical—Provides medical benefits to an insured worker over and above those provided by the statutory compensation laws of a particular state. Most state regulations provide for unlimited medical coverage for injured workers; however, in the few states where a limit remains in place, the workers compensation administrator may grant a variance to override the limit. *[PRMI 5.G, 10.G]*

additional named insured—**(1)** A person or organization, other than the first named insured, identified as an insured in the policy declarations or an addendum to the policy declarations. **(2)** A person or organization added to a policy after the policy is written with the status of named insured. This entity would have the same rights and responsibilities as an entity named as an insured in the policy declarations (other than those rights and responsibilities reserved

NEXT PAGE

to the first named insured). In this sense, the term can be contrasted with additional insured, a person or organization added to a policy as an insured but not as a named insured. The term has not acquired a uniformly agreed upon meaning within the insurance industry, and use of the term in the two different senses defined above often produces confusion in requests for additional insured status between contracting parties. See also ADDITIONAL INSURED; NAMED INSURED. *[CRT XI.C]*

add-on control device—An air pollution control device, such as carbon absorber or incinerator, that reduces the level of pollutants in an exhaust gas. The control device usually does not affect the process being controlled and thus is "add-on" technology, as opposed to a scheme to control pollution effected by altering the basic process itself.

"add-on" no-fault laws—Statutes applicable in some states that allow the addition of personal injury protection coverages to auto insurance policies without limiting an injured party's right to sue in tort. In some of these "add-on" states, purchase of these personal injury, or "no-fault," coverages is mandatory. In others, purchase is at the insured's option although insurers are required to offer them. See also PERSONAL INJURY PROTECTION. *[CAI IV.I]*

adjustable feature—A cost modification provision found in some reinsurance agreements. Parties agree to adjust final premium rate or final ceding commissions retrospectively, in accordance with the loss experience, by formulas set forth in the agreement.

adjusted earnings—Estimated earnings of an insurer based on the growth in premiums written plus net earnings from operations.

adjusted net worth—An estimated value for a book of business and unrealized capital gains (less potential income tax on the gains), plus the capital surplus and voluntary reserves of an insurer. Other adjustments are frequently made as well.

adjuster—One who settles insurance claims. This typically involves investigation of the loss and a determination of the extent of coverage. In the context of first-party (e.g., property) insurance, the adjuster negotiates a settlement with the insured. In liability insurance, the adjuster coordinates the insured's defense and participates in settlement negotiations. Adjusters may be employees of the insurer (staff adjusters) or of independent adjusting bureaus (independent adjusters) that represent insurers and self-insureds on a contract basis. Public adjusters are consultants who specialize in assisting insureds in presenting claims to insurance companies in a manner that will maximize their recovery. *[CPI IV.Z]*

administrative law—The body of law created by federal or state administrative agencies, with the consent of the respective legislatures. This law normally takes the form of rules and regulations, such as those promulgated by state insurance departments.

administrative order—A legal document issued by an administrative agency such as the Environmental Protection Agency (EPA) directing an individual, business, or other entity to take corrective action or refrain from an activity. It describes the violations and actions to be taken, and can be enforced in court. Such orders may be issued, for example, as a result of an administrative complaint whereby the respondent is ordered to pay a penalty for violations of a statute.

administrative order on consent—A legal agreement signed by an administrative agency such as the Environmental Protection Agency (EPA) and an individual, business, or other entity through which the violator agrees to pay for correction of violations, take the required corrective or cleanup actions, or refrain from an activity. It describes the actions to be taken, may be subject to a comment period, applies to civil actions, and can be enforced in court.

administrative services only (ASO)—A group health self-insurance program for large employers wherein the employer assumes responsibility for all the risk, purchasing only administrative services from the insurer. Such administrative services include such activities as the preparation of an administration manual, communication with employees, determination and payment of benefits, preparation of government reports, preparation of summary plan descriptions, and accounting. Most employers would also purchase stop loss insurance to protect against catastrophic losses.

administrator
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admiralty law
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property dam
See also MARI

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ADR—See AL

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laims administrator—A generic term used to refer ither to an insurance company claims department or o a third-party claims administrator.

claims audit—A systematic and detailed review of claims files and related records to evaluate the adjuster's performance.

claims-made—A term describing an insurance policy that covers claims first made (reported or filed) during the year the policy is in force for any incidents that occur that year or during any previous period during which the insured was covered under a "claims-made" contract. This form of coverage is in contrast to the occurrence policy, which covers an incident occurring while the policy is in force regardless of when the claim arising out of that incident is filed—1 or more years later. *[CLI II.C; PLI VIII.C]*

claims-made and reported policy—A type of claims made policy in which a claim must be both made against the insured and reported to the insurer during the policy period for coverage to apply. Claims-made and reported policies are unfavorable from the insured's standpoint because it is sometimes difficult to report a claim to an insurer during a policy period if the claim is made late in that policy period. However, more liberal versions of claims-made and reported policies provide post-policy "windows" which allow insureds to report claims to the insurer within 30 to 60 days following policy expiration. *[PLI VIII.C]*

claims-made and reported provision—A claims-made coverage trigger requiring that a claim be both made against the insured and reported to the insurer during the policy period for coverage to apply. Such provisions, which are found most frequently in professional and D&O liability policies, often cause problems if a claim is made against an insured late in a policy period and the insured is unable to report the claim to the insurer prior to expiration of the policy. *[CLI XIII.E; PLI VIII.C]*

claims-made multiplier—A factor applied to rates used for a claims-made CGL policy, depending on how long an insured has been in a claims-made program. The insured receives a larger credit its first year in a claims-made program, and the credit is reduced in each subsequent year (unless the retroactive date is advanced). The credit virtually disappears in the fifth claims-made year. *[CLI VIII.C]*

claims-made reinsurance—Provides for reinsurance of claims-made policies on a claims-made basis.

claims reserve—An amount of money set aside to meet future payments associated with claims incurred but not yet settled at the time of a given date.

clash cover—A form of reinsurance that covers the cedant's exposure to multiple retentions that may occur when two or more of its insureds suffer a loss from the same occurrence. This reinsurance covers the additional retentions.

class—Group of insureds who have similar exposures and experience and are grouped together for rating purposes.

class action—A type of lawsuit which is brought by a single, affected individual, on behalf of a large group of similarly affected individuals. Class actions were created by the judicial system because frequently, the number of plaintiffs involved in a lawsuit are so numerous that it would be onerous to name and adjudicate the claims of all plaintiffs on an individual basis. *[PLI X.J]*

class I area—Under the Clean Air Act, a class I area is one in which visibility is protected more stringently than under the national ambient air quality standards (NAAQS); includes national parks, wilderness areas, monuments, and other areas of special national and cultural significance.

classification—The system of establishing classes for rating purposes.

classified insurance—Insurance for substandard risks in life and health insurance.

class rating—An Insurance Office Services, Inc. (ISO), method of determining property insurance premium for properties occupied by businesses that fall into certain "classes," provided that they meet certain eligibility criteria. Properties that do not qualify for class rating (generally, large or specially

protected properties or
or unusual occupancie
using rates that are spe
erties, as determined
property. *[CPI IV.F]*

clause—A section of
dorsement attached to
subject in the contract.
the "coinsurance claus

Clean Air Act (CAA)
emission of harmful
quires corporations to
versely affect human h
ity standards. The CA
and criminal penalties
zen suits. See also CRI

cleanup fund—Life
specifically to fund th
with the insured's death

Clean Water Act (CV
quires monitoring of
The CWA contains prov
penalties, fines, and i
parties.

closed-loop recycling
wastewater for nonpota
process.

CLU—See CHARTERED

coded excess—A form
under which different p
successive bands of pri
excess is considered m
posure than averaging n

codefendant—More th
in the same litigation
charged in the same con

COGSA—See the CARR

coding—The process
numeric information int
statistical or internal rec

4-5

combination policy—See PACKAGE POLICY.

combined ratio—The sum of two ratios, one calculated by dividing incurred losses plus loss adjustment expense (LAE) by earned premiums (the calendar year loss ratio), and the other calculated by dividing all other expenses by written premiums. When applied to a company's overall results, the combined ratio is also referred to as the composite, or statutory ratio. Used in both insurance and reinsurance, a combined ratio below 100 percent is indicative of an underwriting profit.

comment period—Time provided for the public to review and comment on a proposed EPA action or rulemaking after publication in the Federal Register.

commercial appropriation—The unauthorized use of the name or likeness of a person (either a private individual or a celebrity) for commercial purposes. Commercial appropriation could, for example, involve publishing a picture of a celebrity taken with the owner of a restaurant indicating that the celebrity endorses the establishment. Coverage for such claims is afforded under media liability insurance policies. *[PLI XVIII.C]*

commercial auto insurance coverage forms—The entire portfolio of coverage forms that furnish auto coverage for any type of commercial entity. It includes the business auto, business auto physical damage, garage, motor carrier, and truckers coverage forms. *[CAI III.C]*

commercial crime program—A portfolio of coverage forms, rating rules, and procedures for insuring the crime exposures of business entities, promulgated by Insurance Services Office, Inc. (ISO), the Surety Association of America (SAA), and the American Association of Insurance Services (AAIS). *[CPI XII.D]*

commercial general liability (CGL) policy—A standard insurance policy issued to business organizations to protect them against liability claims for bodily injury and property damage arising out of premises, operations, products, and completed operations; and advertising and personal injury liability. The CGL policy was introduced in 1986 and replaced the "comprehensive" general liability policy. *[CLI V.B]*

commercial insurer or reinsurer—Any insurer whose principal business is selling insurance to anyone who requests a quotation, not just shareholders of the insurer. The shareholders, not necessarily the insureds, benefit from the insurer's profits.

Commercial Lines Manual (CLM)—See INSURANCE SERVICES OFFICE, INC.

commercial output policy (COP)—A broad all risk policy that provides a combination of commercial property and commercial inland marine coverages many businesses need. The COP is the successor to the manufacturers output policy (MOP), which was originally developed in the mid-1950s to insure in a single policy stock during the manufacturing process as well as in transit. The American Association of Insurance Services (AAIS) offers standard COP forms and rules for use by its member insurers. In addition, many insurers have developed their own COP forms and rules. COP premiums are typically developed using a distinctive rating system (referred to as a "deficiency point rating system") that allows many insurers to be more competitive using a COP than they could be using a standard commercial property policy. *[CPI VII.O]*

commercial property conditions form (ISO)—Attached to every Insurance Services Office, Inc. (ISO), commercial property policy, this form (CP 00 90) establishes the policy provisions with respect to the following issues: concealment, misrepresentation, and fraud; control of property; insurance under two or more coverages; legal action against the insurer; liberalization; no benefit to bailee; other insurance; policy period and coverage territory; transfer of recovery rights against others (subrogation). *[CPI V.D]*

commercial property coverage forms (ISO)—Insurance Services Office, Inc. (ISO), commercial property forms that define, limit, and explain what property or property interest is covered. An ISO commercial property policy consists of: one or more coverage forms; one or more causes of loss forms; the commercial property conditions form; and the common policy conditions form. The most widely used ISO commercial property coverage forms are the building and personal property coverage form (CP 00 10) and the business income and extra expense coverage form (CP 00 30). See also CAUSES

4-6

handles the goods of the gener-
CPI IX.E]

\ situation in which the insured
'a life insurance policy appear to
ithout evidence of who died first.

ritten law derived from court
. on custom and precedent. It is
y law.

es—Defenses to suits for liabil-
ommon law. Such defenses in-
iited to, assumption of risk, lack
last clear chance, and no negli-
the defendant. *[IWC III.C]*

ty—Responsibility imposed on
on custom, as opposed to liabil-
e.

ditions—The part of the insur-
lly relating to cancellation,
, audits, inspections, premiums,
ie policy. The commercial lines
lio promulgated by Insurance
c. (ISO), takes a modular ap-
g policies. A commercial lines
f a declarations page, the com-
ns, one or more coverage forms,
hat modify the coverage forms.
conditions form (IL 00 17) is
ercial property, general liability,
specify the conditions applicable
II.B; CLI V.M; CPI V.C]

rty—A law (which applies in
tates) stipulating that at the time
l and wife are each entitled to
earnings and property acquired

—Rating based on the experi-
ty in which the insureds reside,
e, sex, occupation, or health.

ually refers to the cancellation or
nsurance contract in which there
to be allocated. *[RF V.D]*

commutation provision—A provision in a finite risk insurance contract mandating the return of a portion of the premium paid if loss experience is more favorable than projected. The inclusion of a commutation provision in a finite risk insurance contract converts the arrangement into a quasi-self-insurance fund. *[RF V.D]*

commutation rights—The right of a beneficiary to receive a lump sum payment rather than continuing under an installment option selected for settlement of a life insurance policy.

comparative negligence—The rule used in negligence cases in some states that provides for computing both the plaintiff's and the defendant's negligence, with the plaintiff's damages being reduced by a percentage representing the degree of his or her contributing fault. If the plaintiff's negligence is found to be greater than the defendant's, the plaintiff will receive nothing. See also CONTRIBUTORY NEGLIGENCE.

compensable—An injury or illness that meets the statutory standard and qualifies an employee to receive workers compensation benefits.

compensating balance plan—An insurance cash flow plan whereby the insurer, in an account specifically set up for the plan, collects premiums and deposits them in the insured's bank. Although the account is in the insurer's name, the insured's bank recognizes the funds as the insured's compensating balance, freeing the insured's funds. *[RF III.J]*

compensatory damages—A sum of money to which a plaintiff is entitled that, so far as is possible, makes amends for the actual loss sustained. See also PUNITIVE DAMAGES.

competitive bidding—A situation in which an insured requests premium quotations on its insurance program from a number of agents/brokers. In some instances, insureds provide agents/brokers with detailed specifications upon which to base their quotations. Under other circumstances, the agents/brokers present proposals for coverage reflecting their own ideas for structuring the insured's program. *[CRM II.B]*

competitive state funds—State-owned and operated facilities that compete with commercial insurers in writing workers compensation insurance specific solely to that state. The states with these funds are Arizona, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, and Utah. *[IWC V.O]*

complaint—The original or initial pleading by which an action is commenced under the Codes and Rules of Civil Procedure. The pleading sets forth a claim for relief which includes (a) a short and plain statement of the grounds upon which court had jurisdiction, (b) a short and plain statement of the claim stating the pleader is entitled to relief, and (c) a demand for judgment for the relief sought.

completed operations—Under a general liability policy, work of the insured that has been completed as called for in a contract; or work completed at a single job site under a contract involving multiple job sites; or work that has been put to its intended use. *[CLI V.L]*

composite rating—A method of rating insurance premiums on a singular rate developed to apply to all coverages according to a selected exposure basis. It facilitates a policy's audit process. *[RF III.A]*

comprehensive auto coverage—Coverage under an automobile physical damage policy insuring against loss or damage resulting from any cause, except those specifically precluded. It covers losses such as fire, theft, windstorm, flood, and vandalism, but not loss by collision or upset. *[CAI VIII.E; PRMI 5.G]*

comprehensive auto liability (CAL)—See BUSINESS AUTO POLICY.

comprehensive boiler and machinery coverage—Boiler and machinery coverage that applies to all insurable objects. There are two types: standard comprehensive coverage applies to all objects except production machinery; extended comprehensive coverage applies to all objects including production machinery. Contrasts with blanket group boiler and machinery coverage, which applies to all objects within specified categories of objects, and with coverage applying only to individually described objects. *[CPI XI.B]*

4-7

O

object—A boiler and machinery insurance term for equipment or machinery. Boiler and machinery coverage applies to loss or damage resulting from an accident (such as a breakdown or explosion) to a covered object. *[CPI XI.G]*

objective findings—Observations made during medical evaluations that are not under the patient's control, such as X-ray results, nerve conduction studies, and MRIs.

obligatory treaty—A reinsurance treaty between an insurer and a reinsurer (usually involving pro rata reinsurance), in which the insurer agrees to automatically cede all business that falls within the terms of the treaty. The reinsurer, in turn, is obligated to accept such business. "Automatic treaty" is another term for obligatory treaty. *[RF V.B]*

obligee—A person or organization to whom another party (the "obligor") owes an obligation. In a bonding situation, this is the party that requires and receives the protection of the bond. For example, under a performance bond, the obligee is the project owner for whom the bonded contractor is required to perform the specified work.

obligor—A person or organization that is bound by an obligation to another. In a bonding situation, this party, commonly called the "principal," purchases a bond to protect the party to whom it owes an obligation. For example, under a performance bond, the obligor is the contractor that is required to perform the specified work for the project owner.

occupational accident insurance—A type of coverage purchased by firms that have chosen to opt-out of the Texas workers compensation system. The policies allow an employer to provide benefits similar to those afforded under workers compensation laws. *[RF IV.J]*

occupational classification—In workers compensation, the assembling of like occupations together for classification and premium rating purposes. The rationale for the grouping is that certain occupations share common exposures and hazards.

occupational disease—Any abnormal condition or disorder, other than one resulting from an occupational injury, that is caused by, or alleged to be caused by, exposure to environmental factors associated with employment, including acute and chronic illnesses or diseases that may be caused by inhalation, absorption, ingestion, or direct contact. State workers compensation laws vary as to whether coverage is afforded for occupational disease. *[IWC XIV.R]*

occupational injury—An injury arising in the course and scope of employment that is caused by factors associated with the work undertaken. *[IWC III.C]*

occupational manual—A manual listing occupational classifications for different types of work.

occurrence—In a commercial general liability coverage form, an accident, including continuous or repeated exposure to substantially the same general harmful conditions. General liability policies insure liability for bodily injury or property damage that is caused by an occurrence. This is also a common homeowners provision. See also ACCIDENT. *[CLI V.L; PRMI 10.C]*

occurrence policy—A policy covering claims that arise out of damage or injury that took place during the policy period, regardless of when claims are made. Most commercial general liability insurance is written on an occurrence form. Contrast with claims-made insurance.

occurrence year—The time period defined by a body of losses composed of all claims occurring during a particular year.

ocean marine coverage—Insurance covering the transportation of goods and/or merchandise by vessels crossing both foreign and domestic waters including any inland or aviation transit associated with the shipment. This type of marine insurance also encompasses coverage for damage to the vessels involved in shipments and any legal liability arising in the course of shipment.

OCP—See OWNERS A
TIVE LIABILITY.

OCSLA—See OUTER C
ACT.

OEE—See OPERATORS

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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 this committee sponsored 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 remains is 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. SB 338 will eliminate this practice.

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
816-421-8404

Senate Judiciary
1-25-06
Attachment 5

THE KANSAS CONTRACTORS ASSOCIATION, INC.

316 SW 33RD ST • PO BOX 5061
TOPEKA KS 66605-0061
TEL (785) 266-4152
FAX (785) 266-6191
kca@ink.org
www.accesskansas.org/kca

Testimony

By the Kansas Contractors Association

before the Senate Judiciary Committee regarding SB 338

January 25, 2006

Mr. Chairman and members of the Senate Judiciary Committee, I am Bob Totten, Public Affairs Director for the Kansas Contractors Association. Our organization **represents over 400 companies** who are involved in the construction of highways and water treatment facilities in Kansas and the Midwest.

Our members are greatly concerned with this legislation as we were the main supporters in asking the legislature to pass the indemnification measure several years ago. Our concern today is centered in the First Section and the first paragraph.

We are concerned that the language talks about an "oil or gas lease" in line 20 and then later on in line 22 it says "except no deed, lease, easement" . What we have been unable to determine is whether in one sentence we are adding the word lease and then in next sentence we are taking out the requirement of " lease". I am confused and I assume others are too. We need to clean up that paragraph so that it makes sense.

Senate Judiciary
1-25-06
Attachment 6

My main concern is in line 26 and 27 on page 1, …the new language which says "such contract shall include a right of entry provision." Our contractors are concerned with the word "shall" in that sentence as that appears to be a requirement and not a maybe. We are suggesting the word "shall" be replaced with "may" or the sentence be specific by saying "such oil or gas contracts shall include a right of entry provision."

Our contractors don't want to be subjected to a requirement that a right of entry provision must be provided to anyone who wants to get on the property for a construction project and and we fear this language may allow such entry.

We have little comment on page 2 on line 11 through 14…which has to do with the concern on additional insured but we will support what the insurance industry deems necessary in this area.

If you have any questions, I will be glad to answer them at your convenience.

Proposed amendment
Kansas Contractors Assn.
1-25-06

Session of 2006

SENATE BILL No. 338

By Special Committee on Judiciary

1-6

AN ACT concerning contracts; relating to indemnification provisions and additional insured parties; amending K.S.A. 2005 Supp. 16-121 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2005 Supp. 16-121 is hereby amended to read as follows: 16-121. (a) When used in this section:

(1) "Construction contract" means an agreement for the design, construction, alteration, renovation, repair or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition ~~or~~, excavation, *oil or gas lease or other contract pertaining to oil and gas exploration, development, operations and production activities on or in connection with an oil and gas lease,* except that no deed, lease, easement, license or other instrument granting an interest in or the right to possess property shall be deemed to be a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair or maintain improvements on such real property. *Such contract shall include a right of entry provision.*

(2) "Damages" means personal injury damages, property damages or economic loss.

(3) "Indemnification provision" means a covenant, promise, agreement, *clause* or understanding in connection with, *contained in or collateral to,* a ~~construction~~ contract that requires the promisor to hold harmless, indemnify or defend the promisee or others against liability for *loss or* damages.

(4) "Motor carrier" has the meaning ascribed thereto in K.S.A. 66-1,108, and amendments thereto.

(5) "Motor carrier transportation contract" means an agreement covering:

(A) The transportation of property by a motor carrier;

(B) the entrance on property by the motor carrier for the purpose of loading, unloading or transporting property; or

(C) a service incidental to activity described in paragraph (A) or (B) including, but not limited to, storage of property.

(6) "Contract" means a construction contract and motor carrier transportation contract.

(7) "Indemnitee" shall include an agent, employee or independent contractor who is directly responsible to the indemnitee.

(b) An indemnification provision in a ~~construction~~ contract ~~or other agreement, including, but not limited to, a right of entry, entered into in connection with a construction contract,~~ which requires the indemnitor to indemnify the indemnitee for the indemnitee's negligence *or intentional acts or omissions* is against public policy and is void and unenforceable.

(c) A provision in a contract which requires 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 is against public policy and is void and unenforceable.

(d) Nothing contained in this section shall affect a provision, clause, covenant, promise or agreement where the motor carrier indemnifies or holds harmless the contract's promisee against liability for damages to the extent that the damages were caused by and resulting from negligence of the motor carrier, its agents, employees or independent contractors who are directly responsible to the motor carrier.

(e) Notwithstanding the other provisions contained in this section, a motor carrier transportation contract shall not include the uniform intermodal interchange and facilities access agreement administered by the intermodal association of North America, as that agreement may be amended by the intermodal interchange executive committee.

~~(c)~~ *(f)* This act shall not be construed to affect or impair the contractual obligation of a contractor or owner to provide railroad protective insurance or general liability insurance.

~~(d)~~ *(g)* This section applies only to indemnification provisions entered into after the act takes effect.

Sec. 2. K.S.A. 2005 Supp. 16-121 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

DAN HAAKE

Haake FOUNDATIONS, INC.

January 25, 2006

Testimony of Dan M. Haake to Special Committee on Judiciary

Re: Senate Bill Number 338

I am here today in support of Senate Bill 338 and offer you evidence that I hope will convince you of the need to pass SB 338. I am a small concrete contractor in Kansas City employing 20 craftsmen and producing 1.4 million in annual sales.

August 1992, our company suffered a fatality accident that could have been prevented. The accident consisted of a cave in of vertical excavated dirt that failed due to improper sloping by the Excavation Contractor and crushed our employee against our poured foundation.

On this job the Owner hired a General Contractor, General Contractor hired Architect, Engineer, Excavation Contractor, Foundation Contractor and so on, each Subcontractor name the General Contractor as Additional Insured. As a result of the accident the family received $350,000.00 in death benefits from Workers Compensation, $500,000.00 from a civil action against the excavator and Soil Engineer. I was cited by OSHA for $5,000.00 and there were no other citation handed out.

I share this experience with you to illustrate how the system shields from financial responsibility the one with the most authority and power to make sure work is performed in a safe manner. The General Contractor puts together a team of Contractors to work together to produce a building and within their contract, shift their risk and a portion of their responsibility to others. I believe that if SB 338 was enacted, General Contractors would pay more attention to the job with regard to safety because they will not be able to shift their responsibility to others.

Sincerely,

Dan M. Haake
President

10029 E. 63RD TERRACE

RAYTOWN, MISSOURI 64133

816•737•2954

Senate Judiciary
1-25-06
Attachment 7

Southwest Kansas Royalty Owners Association
209 East Sixth Street
Hugoton, Kansas 67951

Testimony before the Senate Judiciary Committee
Senate Bill No. 338
January 25, 2006

Chairman Vratil and Members of the Senate Judiciary Committee:

I appear on behalf of the Southwest Kansas Royalty Owners Association (SWKROA). That Association's mission is the protection of the rights of royalty owners in the Hugoton Gas Field in southwest Kansas.

We appear as a neutral party on the bill and are seeking clarification to language contained on page 1, lines 26 and 27. The language states that "Such contract shall include a right of entry provision."

We assume that in regard to oil and gas leases, no right of entry provisions contained in a "construction contract" shall exceed the permitted entries authorized for the lessee under the original terms of the oil and gas lease or any amendment thereto.

If that is not the case, we would like to work on drafting language to protect the original entry provisions of the oil and gas lease document.

On behalf of the Southwest Kansas Royalty Owners Association, I appreciate your time and consideration.

Respectfully submitted,

Douglas E. Smith
Southwest Kansas Royalty Owners Association

Senate Judiciary
1-25-06
Attachment 8

OXY USA Inc.
P.O. Box 27570, Houston, TX 77227
Telephone (713) 215-7386 Fax (713) 350-4804

BRENTON B. MOORE
Managing Counsel

Testimony re: SB 338
Senate Judiciary Committee
Presented by Brent Moore
on behalf of
OXY USA Inc.
January 25, 2006

Presented by
Ron Heim

Mr. Chairman, Members of the Committee:

My name is Brent Moore, and I am Managing Counsel for OXY USA Inc. OXY USA Inc. ("OXY") is a wholly owned subsidiary of Occidental Petroleum Corporation.

OXY Opposes SB 338 for the following reasons:

1. The inclusion in the definition of "construction contract" of the language "oil and gas lease or other contract pertaining to oil and gas exploration, development, operations and production activities on or in connection with an oil and gas lease" encompasses virtually all oil and gas industry contracts in the field including, but not limited to drilling contracts, master service agreements, material contracts, etc.

2. A very common practice in the industry is to have what is known as "knock-for-knock" risk allocation provisions backed by insurance incorporated into its various service and drilling contracts. Generally, the knock-for-knock arrangement provides that each contracting party will be liable for the injuries to and claims from its own employees and contractors, regardless as to the negligence of the other party (see the IADC provisions below). It is similar to the no-fault insurance provided for with respect to vehicles.

The following is a definition taken from "A Glossary of Insurance Terms" at the Trafalgar International Ltd. (Insurance Brokers and Consultants) website:

Knock for Knock Agreement
An agreement between two insurance companies whereby each insurer pays the vehicle's repair costs of its own policy-holder regardless of who was responsible for an accident. While an insurer may be able to pursue a recovery from the party responsible for an accident of from his insurer, this is a costly administrative procedure. The Knock for Knock Agreement simplifies recovery claims among insurers and the cost is seen to balance out over a long period of time.

Senate Judiciary
1-25-06
Attachment 9

Below is an excerpt from one of the International Association of Drilling Contractors (IADC) daywork form drilling contracts. It is offered as a typical form of contract that is used by the industry every day, and the type of risk allocation provision that SB 338 would prohibit:

4.8 Contractor's Indemnification of Operator: Contractor shall release Operator of any liability for, and shall protect, defend and indemnify Operator, its officers, directors, employees and joint owners from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof of the negligence of any party or parties, arising in connection herewith in favor of Contractor's employees or Contractor's subcontractors or their employees or Contractor's invitees, on account of bodily injury, death or damage to property. Contractor's indemnity under this Paragraph shall be without regard to and without any right to contribution from any insurance maintained by Operator pursuant to Paragraph 13. If it is judicially determined that the monetary limits of insurance required hereunder or of the indemnities voluntarily assumed under Subparagraph 14.8 (which Contractor and Operator hereby agree will be supported either by available liability insurance, under which the insurer has no right of subrogation against the indemnities, or voluntarily self-insured, in part or whole) exceed the maximum limits permitted under applicable law, it is agreed that said insurance requirements or indemnities shall automatically be amended to conform to the maximum monetary limits permitted under such law.

14.9 Operator's Indemnification of Contractor: Operator shall release Contractor of any liability for, and shall protect, defend and indemnify Contractor, its officers, directors, employees and joint owners from and against all claims, demands, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof of the negligence of any party, or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees, or Operator's invitees other that those parties identified in Subparagraph 14.8 on account of bodily injury, death or damage to property. Operator's indemnity under this Paragraph shall be without regard to and without any right to contribution from any insurance maintained by Contractor pursuant to Paragraph 13. If it is judicially determined that the monetary limits of insurance required hereunder or of the indemnities voluntarily assumed under Subparagraph 14.9 (which Contractor and Operator hereby agree will be supported either by available liability insurance, under which the insurer has no right of subrogation against the indemnities, or voluntarily self-insured, in part of whole) exceed the maximum limits permitted under applicable law. It is agreed that said insurance

requirements or indemnities shall automatically be amended to conform to the maximum monetary limits permitted under such law.

3. These risk allocation provisions are prevalent industry wide and the oil and gas industry has found that "knock-for-knock" eliminates the inevitable finger-pointing and maneuvering that takes place to establish the existence and degree of liability as well as the costly litigation that results from trying to determine which party was at fault and the extent of that fault.

4. Section 7 (b) of SB 338 declares that these types of risk allocation provisions would be void and against public policy and Section 7 (c) would prevent insurance from covering such types of provisions.

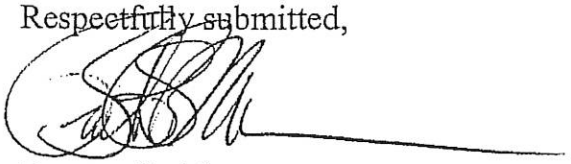
5. 1999 Quote from Cary A. Moomjian, V.P. and General Counsel for Santa Fe International speaking about offshore drilling contracts in an article entitled "Contractual Insurance and Risk Allocation in the Offshore Drilling Industry":

"Risks generally are allocated to the contracting parties without regard to cause. While it may initially seem inappropriate to protect a party guilty of negligence or misconduct, a fundamental purpose of risk allocation is to create a clear line of demarcation so each party will be able to evaluate its risk exposure and obtain appropriate insurance (or elect to self-insure)."

6. As you can see from the attachment to my testimony, Texas permits such indemnification if it is supported by insurance. In addition, Texas took the time to determine how the oil field contracts would be affected by the statute. I understand that this proposed Kansas bill may have been studied this summer, but OXY believes that limited further study may prevent some unintended consequences that arise from the bill with respect to the oil and gas industry. The Texas statute excludes from coverage the **joint operating agreement**. As you may know, virtually every operating agreement in the state of Kansas has a provision that limits the liability of the operator to events caused by the operator's gross negligence. The proposed Kansas law would arguably declare that provision void. In addition, Texas excluded contracts involving, among other things, the **control of blowouts, pollution cleanup and NORM (naturally occurring radioactive material) issues**. Well operators might not be able to get a contractor to attempt to control a well without the exclusion of damage caused by the contractor's negligence. Furthermore, there are concerns that drilling of wells will be curtailed, because drilling contractors will not agree to accept liability for downhole damage caused by the driller's negligence.

In conclusion, OXY believes that the current legislation will have unintended consequences with respect to many of the contracts that are unique and standard to the industry today. OXY believes that the oil and gas industry and service contractors in the state of Texas have arrived at a statute that has been workable since the late 1980's and we ask this Committee and the proponents of S.B. 338 to consider amendments to S.B. 338 that would be consistent with the Texas statute.

Respectfully submitted,



Brenton B. Moore

Attachment

CIVIL PRACTICE & REMEDIES CODE

CHAPTER 127. INDEMNITY PROVISIONS IN CERTAIN MINERAL AGREEMENTS

Sec. 127.001. DEFINITIONS. In this chapter:

(1) 'Agreement pertaining to a well for oil, gas, or water or to a mine for a mineral':

(A) means:

(i) a written or oral agreement or understanding concerning the rendering of well or mine services; or

(ii) an agreement to perform a part of those services or an act collateral to those services, including furnishing or renting equipment, incidental transportation, or other goods and services furnished in connection with the services; but

(B) does not include a joint operating agreement.

(2) 'Joint operating agreement' means an agreement between or among holders of working interests or operating rights for the joint exploration, development, operation, or production of minerals.

(3) 'Mutual indemnity obligation' means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which the parties agree to indemnify each other and each other's contractors and their employees against loss, liability, or damages arising in connection with bodily injury, death, and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from the performance of the agreement.

(4) 'Well or mine service':

(A) includes:

(i) drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing, or transporting oil, brine water, fresh water, produced water, condensate, petroleum products, or other liquid commodities, or otherwise rendering services in connection with a well drilled to produce or dispose of oil, gas, other minerals or water; and

(ii) designing, excavating, constructing, improving, or otherwise rendering services in connection with a mine shaft, drift, or other structure intended for use in exploring for or producing a mineral; but

(B) does not include:

(i) purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fixed associated facilities; or

(ii) construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities.

(5) 'Wild well' means a well from which the escape of oil or gas is not intended and cannot be controlled by equipment used in normal drilling practice.

(6) 'Unilateral indemnity obligation' means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee with respect to claims for personal injury or death to the indemnitor's employees or agents or to the employees or agents of the indemnitor's contractors but in which the indemnitee does not make a reciprocal indemnity to the indemnitor.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 1102, Sec. 1, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., ch. 36, Sec. 1, eff. April 19, 1991.

Sec. 127.002. FINDINGS; CERTAIN AGREEMENTS AGAINST PUBLIC POLICY. (a) The legislature finds that an inequity is fostered on certain contractors by the indemnity provisions in certain agreements pertaining to wells for oil, gas, or water or to mines for other minerals.

(b) Certain agreements that provide for indemnification of a negligent indemnitee are against the public policy of this state.

(c) The legislature finds that joint operating agreement provisions for the sharing of costs or losses arising from joint activities, including costs or losses attributable to the negligent acts or omissions of any party conducting the joint activity:

(1) are commonly understood, accepted, and desired by the parties to joint operating

agreements;

(2) encourage mineral development;

(3) are not against the public policy of this state; and

(4) are enforceable unless those costs or losses are expressly excluded by written agreement.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1991, 72nd Leg., ch. 36, Sec. 2, eff. April 19, 1991.

Sec. 127.003. AGREEMENT VOID AND UNENFORCEABLE. (a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:

(1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and

(2) arises from:

(A) personal injury or death;

(B) property injury; or

(C) any other loss, damage, or expense that arises from personal injury, death, or property injury.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 127.004. EXCLUSIONS. This chapter does not apply to loss or liability for damages or an expense arising from:

(1) personal injury, death, or property injury that results from radioactivity;

(2) property injury that results from pollution, including cleanup and control of the pollutant;

(3) property injury that results from reservoir or underground damage, including loss of oil, gas, other mineral substance, or water or the well bore itself;

(4) personal injury, death, or property injury that results from the performance of services to control a wild well to protect the safety of the general public or to prevent depletion of vital natural resources; or

(5) cost of control of a wild well, underground or above the surface.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 1102, Sec. 2, eff. Sept. 1, 1989.

Sec. 127.005. INSURANCE COVERAGE. (a) This chapter does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).

(b) With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee.

(c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed $500,000.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 1102, Sec. 3, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., ch. 36, Sec. 3, eff. April 19, 1991; Acts 1995, 74th Leg., ch. 679, Sec. 1, eff. Aug. 28, 1995; Acts 1999, 76th Leg., ch. 1006, Sec. 1, eff. Aug. 30, 1999.

Sec. 127.006. INSURANCE CONTRACT; WORKERS' COMPENSATION. This chapter does not affect:

(1) the validity of an insurance contract; or

(2) a benefit conferred by the workers' compensation statutes of this state.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 127.007. OWNER OF SURFACE ESTATE. This chapter does not deprive an owner of the surface estate of the right to secure indemnity from a lessee, an operator, a contractor, or other person conducting operations for the exploration or production of minerals of the owner's land.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

AGC of KANSAS

Building a Better Kansas Since 1934

200 SW 33rd St. Topeka, KS 66611 785-266-4015

WRITTEN TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE SENATE JUDICIARY COMMITTEE
SB 338

January 25, 2006

By Corey D Peterson, Associated General Contractors of Kansas, Inc.

Mister Chairman and members of the committee, my name is Corey D Peterson, Exec. Vice President of the Associated General Contractors of Kansas. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

The **AGC of Kansas opposes Senate Bill 338 as written and respectfully requests that you do not recommend it for passage without amendment.**

AGC of Kansas supports the concept of each party being responsible for their own actions and in fact was a major sponsor of HB 2154 (passed in 2004) which this bill (SB 338) is amending. However, it has been stated by the representatives of the insurance industry that the language on page 2, lines 11-14, regarding additional insured provisions could create serious gaps in insurance coverage for general contractors.

Again, AGC of Kansas does not oppose the concept of prohibiting one party from forcing a second party to insure the first party for their own negligence, intentional acts or omissions. However, because of the products being offered by the insurance industry, there are times that the only method a general contractor can obtain full coverage is through being named by the subcontractor as an additional insured. This is not necessarily a construction issue, but an insurance issue.

This is a very confusing and controversial subject that has been debated nationally of over five years. Because of the uncertainties in the insurance industry, the national construction organizations and insurance industry representatives have not yet reached a conclusion on how to best address this issue.

In light of the unintended consequences created by this well intended bill, AGC of Kansas respectfully requests that the committee consider an amendment that would add the words "*,except construction contracts,*" following the existing words "(c) A provision in a contract" on Page 2, line 11 of the bill.

The AGC of Kansas **respectfully asks that you amend SB 338 as stated above and vote favorably for passage as amended.** Thank you for your consideration.

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Testimony on Senate Bill 338
Before the Senate Judiciary Committee
By Larry Magill
Kansas Association of Insurance Agents
January 25, 2006

Thank you mister Chairman and members of the Committee for the opportunity to appear today in opposition to Senate Bill 338 without amendments. We support the basic provision in the bill that expands the protection given to contractors several years ago and prohibits indemnification clauses requiring oil and gas operators or truckers to assume another's negligence. However, we are opposed to the blanket prohibition on naming additional insureds. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 550 member agencies and branches throughout the state and our members write approximately 70% of the commercial insurance in Kansas including workers compensation. Our members are free to represent many different insurance companies.

Our association supported House Bill 2154 in the 2003 session that ultimately passed in 2004 outlawing indemnification clauses in construction contracts where one party attempted force the other to assume their negligence. Essentially, our association believes it is good public policy to require each party be responsible for their own negligence. For that same reason we support the continued use of reciprocal indemnification clauses, where each party protects the other from the results of their own negligence.

If the purpose of tort law is to encourage safe behavior and avoid injury by holding people liable for the injuries they cause, then it makes sense that that encouragement needs to be directed at the party taking the action or failing to act that causes the injury. To force someone else to assume that burden provides no incentive for the party "in control" to either stop doing the harmful activity or to eliminate the dangerous condition.

Almost universally we are talking about situations where the party being required to assume another's negligence is at an economic disadvantage, in the negotiations, to the one making the request. Generally it is very large corporations who have the legal and risk management staff to attempt to shift liability for their actions to any other party and away from themselves. This has obvious cost saving advantages to the largest companies who demand these clauses.

And with the passage of HB 2154, Kansas joined approximately 43 states that have enacted similar legislation for contractors.

Additional Insured Prohibition
The interim committee added the language on page 2, lines 11-14, prohibiting contract provisions requiring a party to name the other party as an additional insured for the other party's own negligence. We had testified to the interim and encouraged them not

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to make this change due to the problem that general contractors are experiencing finding completed operations coverage.

For many general contractors in today's insurance environment, the only way they can obtain any completed operations coverage is by being named as an additional insured on their subcontractors' policies. This is because the Insurance Services Office, the body that develops the closest thing to standardized forms, has developed an endorsement that excludes completed operations coverage for work performed by subcontractors. For most generals who sub out most of the job, that's the majority of their completed operations coverage for the project.

We propose that you add back a definition of construction contract on page (1) and then separately define oil and gas and trucking contracts that the bill applies to as well. Then on page 2, you can make the prohibition on the naming of additional insureds **not** apply to construction contracts.

Part of our reasoning is that in the case of indemnification clauses where the upstream party is requiring the downstream party to assume the upstream party's negligence, the downstream party may have no liability insurance coverage that applies to the liability being assumed under the contract. In other words, they are being forced to assume an uninsured, and probably uninsurable exposure.

But in the case of adding the upstream party as an additional insured, there is insurance coverage for the exposure by definition.

It is possible that the interim committee language was intended to leave the completed operations coverage in place with its language limiting the prohibition to the other party's negligence. However, many times on completed operations claims, the claimant brings the general in by alleging that the general failed to properly supervise the work or inspect it. That claim would not be covered under the general's policy but would be covered by naming the general as an additional insured on the subcontractor's policy.

We encourage the Committee to amend SB 338 by excepting construction contracts from the additional insured prohibition on page 2(c) and pass it out favorably. We would be happy to answer questions or provide additional information.

Session of 2006

SENATE BILL No. 338

By Special Committee on Judiciary

1-6

AN ACT concerning contracts; relating to indemnification provisions and additional insured parties; amending K.S.A. 2005 Supp. 16-121 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2005 Supp. 16-121 is hereby amended to read as follows: 16-121. (a) When used in this section:

(1) "Construction contract" means an agreement for the design, construction, alteration, renovation, repair or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition ~~or~~, excavation, ~~*oil or gas lease or other contract pertaining to oil and gas exploration, development, operations and production activities on or in connection with an oil and gas lease*~~, except that no deed, lease, easement, license or other instrument granting an interest in or the right to possess property shall be deemed to be a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair or maintain improvements on such real property. *Such contract shall include a right of entry provision.*

(2) "Oil and gas ~~lease~~ contract" means an oil or gas lease or other contract pertaining to oil and gas exploration, development, operations and production activity on or in connection with an oil and gas lease

~~(2)~~ (3) "Damages" means personal injury damages, property damages or economic loss.

~~(3)~~ (4) "Indemnification provision" means a covenant, promise, agreement, *clause* or understanding in connection with, *contained in or collateral to,* a ~~construction~~ contract that requires the promisor to hold harmless, indemnify or defend the promisee or others against liability for *loss or* damages.

~~(4)~~ (5) *"Motor carrier" has the meaning ascribed thereto in K.S.A. 66-1,108, and amendments thereto.*

~~(5)~~ (6) *"Motor carrier transportation contract" means an agreement covering:*

(A) The transportation of property by a motor carrier;

(B) the entrance on property by the motor carrier for the purpose of loading, unloading or transporting property; or

(C) a service incidental to activity described in paragraph (A) or (B) including, but not limited to, storage of property.

proposed amendment
Kansas Assn. of
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, oil and gas contract

(7)(8) *"Contract" means a construction contract and motor carrier transportation contract.*

(8)~~(7)~~ *"Indemnitee" shall include an agent, employee or independent contractor who is directly responsible to the indemnitee.*

(b) An indemnification provision in a ~~construction~~ contract ~~or other agreement, including, but not limited to, a right of entry, entered into in connection with a construction contract,~~ which requires the indemnitor to indemnify the indemnitee for the indemnitee's negligence *or intentional acts or omissions* is against public policy and is void and unenforceable.

Except for construction contracts,

(c) ~~A~~ provision in a contract which requires 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 is against public policy and is void and unenforceable.

(d) Nothing contained in this section shall affect a provision, clause, covenant, promise or agreement where the motor carrier indemnifies or holds harmless the contract's promisee against liability for damages to the extent that the damages were caused by and resulting from negligence of the motor carrier, its agents, employees or independent contractors who are directly responsible to the motor carrier.

(e) Notwithstanding the other provisions contained in this section, a motor carrier transportation contract shall not include the uniform intermodal interchange and facilities access agreement administered by the intermodal association of North America, as that agreement may be amended by the intermodal interchange executive committee.

~~(e)~~ *(f)* This act shall not be construed to affect or impair the contractual obligation of a contractor or owner to provide railroad protective insurance or general liability insurance.

~~(d)~~ *(g)* This section applies only to indemnification provisions entered into after the act takes effect.

Sec. 2. K.S.A. 2005 Supp. 16-121 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

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Oliver Insurance Agency Inc.
6201 College Blvd Suite 230
Overland Park KS 66211

January 23, 2006

Via e-mail

Oliver Insurance Agency, Inc. is an associate member of ASA and supports their stand on prohibiting the additional insured requirements in construction contracts. The ASA has been successful in supporting legislation that limits indemnity agreements, but that is a hollow victory, if requirements to added higher tiers as additional insures are still permitted. When additional insured status is granted to the higher tier, then the anti-indemnity statute is defeated, because additional insured status is not dependent on the extent of the additional insured's negligence.

The reason that the additional insured endorsement defeats the anti-indemnity statue is that the additional insured endorsement gives the additional insured direct access to the subcontractor's policy and the separation of insureds condition of the general liability policy treats each insured separately. For example the employer's liability exclusion does not apply to the additional insured, so that if an injured worker of the subcontractor sues the general contractor for the general contractor's own negligence, the general contractor gets defense and coverage from the subcontractor's policy. This allows the general contractor to avoid the effect of the anti-indemnity statute, while the subcontractor forfeits the protection of the workers' compensation policy he purchased. The subcontractor pays twice for the same claim, once in his workers compensation policy and again through his general liability policy.

General contractors and owners often require additional insured status for products and completed operations. This requirement is often a continuing requirement until the statute of repose runs, which in Kansas is at least ten years. What most subcontractors don't fully grasp is the cost of the bargain, so they fail to properly price their bids and also end up agreeing to do the impossible. The cost of an additional insured endorsement (at this moment in time) is inexpensive. Since from an insurance company's point of view, this is a claim they would be involved in anyway and the total limits at risk don't change, so there is no need to charge much. But from the subcontractor's viewpoint, they have just added the general contractor's name to the only source of funds they will have at their moment of greatest need. The real cost for the subcontractor is the cost of purchasing replacement limits solely for the benefit of the subcontractor. A contract that requires a lower tier contractor to purchase insurance for the benefit of the higher tier usually requires that the higher tier be included as an additional insured until the statute of repose runs, which is at least ten years in Kansas. Since, there is no way that the subcontractor can know the cost of such a future obligation, or even if it will be possible to purchase the insurance in the future, such a contract is unfair and deceptive. What is happening is that subcontractors are in effect issuing insurance policies to general contractors in unauthorized insurance companies – namely themselves – and that is bad public policy. Frankly I do not think that the interests of general contractors or owners are served by relying on such a house of cards.

The ASA believes that subcontractors should take responsibility for their own actions. Certainly they do not have any objections to requiring that insurance be inforce for subcontractors, to provide the financial backup for the risk subcontractors take. What they do not want is the imposition terms that place an unfair burden of liability for things over which they have no control or responsibility. I urge you to support SB 338.

Keith C. Oliver C.P.C.U. A.R.M.

President
Oliver Insurance Agency Inc.

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Attachment 12

STATEMENT OF THE KANSAS BUILDING INDUSTRY ASSOCIATION

TO THE SENATE JUDICIARY COMMITTEE

SENATOR JOHN VRATIL, CHAIR

REGARDING S.B. 338

January 25, 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.

We do have a question concerning the amendment on lines 26 and 27 of page one of the bill, "Such contract shall include a right of entry provision." We would not think that this should be construed to mean that all construction contracts should include a right of entry provision, so are not clear on the intent of this language.

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

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Mr. Chairman and Members of the Committee:

My name is Janet Stubbs. I am the Administrator of the Kansas Building Industry Workers Compensation Fund, a Kansas group funded pool for the construction industry. We are proponents of SB 338.

Although this bill is written for general liability coverage, we view this as a benefit for the safety of the workers on the jobsites. KBIWCF places great importance on workplace safety for our insured companies and their employees. The Williams-Steiger Occupational Safety and Health Act of 1970 contains a General Duty Clause under which an employer may be sited for unsafe work conditions which may not be otherwise specified under the regulations. However, it does state that employers are responsible for a safe and hazard free workplace.

It should be important to all employers to protect their most valuable asset—an efficient and productive workforce. If the General Contractor does not require all subcontractors to maintain a work site that is hazard free, another contractor's employee may be injured. The ultimate responsibility for every jobsite lies with the General Contractor. However, if they are able to have indemnification from this liability, they have no reason to require the subcontractors to operate safely.

Therefore, we support SB 338 and urge passage.

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TESTIMONY OF WILLIAM A. LARSON, GENERAL COUNSEL FOR THE ASSOCIATED GENERAL CONTRACTORS OF KANSAS ON SENATE BILL 338

In the 2003-2004 legislative session, the Kansas Legislature enacted K.S.A. 16-121. K.S.A. 16-121 prohibits certain types of indemnification agreements in construction contracts. The types of indemnity agreements that are barred by K.S.A. 16-121 are where one party to a construction contract agrees to indemnify another party for that parties own negligence or fault. I assisted in drafting the language that was ultimately enacted in this statute.

One of the primary considerations in prohibiting the type of indemnity agreement described above was that these types of agreements unfairly required one party to pay for the negligence of another party. Another equally important consideration, however, was the then current and future anticipated difficulty in finding insurance to cover the risk of having to pay for another's negligence.

My perception is that K.S.A. 16-121 has been well received. In fact, it has been so well received that other segments of the business community in Kansas want to apply the provisions of K.S.A. 16-121 to their own industries. Certainly, that would seem to make sense. There is, however, a provision in Senate Bill 338 that is of considerable concern to the construction industry and particularly general contractors in that industry.

Section 3(c) of Senate Bill 338 states:

> "A provision in a contract which requires 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 is against public policy and is void and unenforceable."

The enactment of this portion of Senate Bill 338 could create a considerable gap in coverage for general contractors. In order to explain why that is, it is necessary to discuss the history of liability coverage in the construction industry.

The problem stems from the basic fact that liability insurance was never intended to provide coverage for a contractor's own work. For example, if a contractor built a brick wall and there was a defect in that brick wall, liability coverage would not cover repair to the wall. Up until this year, however, most general contractors, particularly commercial general contractors, were able to obtain insurance which provided coverage for work done by a subcontractor. For example, if the general contractor was sued for a defect in a brick wall constructed by a subcontractor, the general contractor's liability insurance would often provide coverage for that.

Recently, however, the insurance companies have begun to change their forms to eliminate coverage for work done by subcontractors. It is already true in the residential construction segment of the industry that most residential general contractors cannot

obtain coverage for the subcontractor's work. A number of companies are also starting to eliminate that coverage for commercial general contractors although it is still available from certain insurance carriers. In order to continue to fully protect general contractors from liability for subcontractor's work, most insurance agents strongly advise that general contractors require that they be named as additional insureds on the subcontractor's policies. In this situation, the "your work" exclusion contained in most liability policies does not apply to the general contractors because the work as defined in the subcontractor's general liability policy is the work of the subcontractor and not the general.

It is true that the prohibition against additional insured clauses in Senate Bill 338 applies only to those which insure the additional insured for the additional insured's own acts of negligence, but the reality of this prohibition is somewhat different. In virtually every construction defect case in which it is alleged that the defects were the result of the subcontractor's work, the general will also be sued for improper supervision and inspection. This is an exposure which arises directly from the subcontractors work and for which the general should have coverage. In some situations now, and many situations in the future, it is anticipated that the only way to obtain that coverage would be to name the general contractor as additional insureds on the sub's policy.

This is admittedly a very complicated issue. One of the problems with this issue is no one knows for sure what changes are going to be made within the next few years in general liability policies for owners, contractors and subcontractors. While the Associated General Contractors agrees, in principal, with the idea that each party should be responsible for its own negligence or fault, the practical affect of the additional insured prohibition in Senate Bill 338 could be very significant for general contractors.

It should also be pointed out that the additional insured issue is substantially different from the indemnity issue which prompted the enactment of K.S.A. 16-121. As noted, one of the principal reasons for enacting K.S.A. 16-121 was the risk that a party would have an uninsured exposure for someone else's negligence which could neither be planned for nor included in a bid. The additional insured issue concerns, by definition, insured losses. The cost of the additional insured endorsement that may be incurred by any party in the construction industry would be known up front and can be included in bids that are submitted.

While it may be possible to do something about the additional insured's situation in the future, the Associated General Contractors of Kansas is very concerned that any attempt to bar additional insured clauses currently is very dangerous given the unknowns in exactly what is going to happen with insurance coverage for contractors. I have recommended that the Association oppose the enactment of that portion of Senate Bill 338 that prohibits certain types of additional insured clauses in contracts.

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