Approved: 3-30-07
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 6, 2007 in Room 313-S of the Capitol.

All members were present except:
Ben Hodge- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Duston Slinkard, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:
Representative Jason Watkins
Tom Whitaker, Kansas Motor Carriers Association
Dave Parker, Great West Casualty Company
Ken Keller, Western Extralite Company
Bill Miller, Building Erections Services
Dan Haake, Haake Foundations
Larry Magill, Kansas Association of Insurance Agents
Marvin Kleeb, Allied Staffing
Dan Murray, Midway Wholesale
Corey Peterson, Associated General Contractors of Kansas
Brent Moore, OXY Corporation
Keith Strama, Exxon Mobil
Steve Ware, Individual
Pat Barnes, Kansas Automobile Dealers Association
Ed Cross, KIOGA
David Dayvault, Abercrombie Energy
Jeff Kennedy, Martin & Pringle Attorney at Law
Wyatt Hoch, Coalition to Preserve Freedom to Contract
Callie Hartle, Kansas Trial Lawyers Association

The hearings on **HB 2007, 2228, & 2262 - indemnification clauses and additional insured requirements**, were opened.

Representative Jason Watkins spoke specifically in support of **HB 2007**. He explained that Kansas currently allows for one party to a contract to be indemnified by another party and be listed as an additional insured for their own acts of negligence. These types of indemnification clauses are increasing in popularity and have a devastating impact on small businesses. (Attachment 1)

Tom Whitaker, Kansas Motor Carriers Association, appeared in support of **HB 2262**. He stated that the proposed bill would prohibit indemnification clauses in motor carrier transportation contracts which require one party to indemnify and hold harmless a second party's negligence or wrongful acts. Indemnification clauses are most harmful to small carriers who want to deliver the freight, because they have to sign the contracts in order to take care and deliver the freight. The bill would not shield a motor carrier from their own liability or negligence. (Attachment 2)

Dave Parker, Great West Casualty Company, commented that the issue being discussed today is not unique to Kansas. It is impossible for insurance companies for motor carriers to underwrite and rate the risk of unknown shippers with unknown operations, unknown safety programs, unknown risks, and unknown employment procedure. (Attachment 3)

Ken Keller, Western Extralite Company, spoke in support of **HB 2228**. He commented that it effectively transfers risks to the sub-contractor and his insurance company making them responsible for claims for problems that were out of their control and for which they are not responsible for. (Attachment 4)

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 6, 2007 in Room 313-S of the Capitol.

Bill Miller, Building Erections Services, appeared in support of **HB 2228**. He stated that every person and company should be responsible for their own actions. He was concerned that there are cases where an unwitting subcontractor signs a contract agreeing to additional insure someone only to find out too late that his insurance company denies coverage required by the terms of the contract and that the subcontractor has self insured the loss. (Attachment 5)

Dan Haake, Haake Foundations, is a small contractor who employs ten individuals. His company has been required by an insurance company to carry more insurance than what the company is worth. Reality is that he is insuring individuals for deeds not necessarily connected to the company and out of his control. (Attachment 6)

Larry Magill, Kansas Association of Insurance Agents, appeared in support of all the bills up for hearing. The Association writes insurance for about 70% of all commercial insurance in Kansas. He believes that it would be good public policy to be negligent for only your actions; it encourages safety. (Attachment 7)

Marvin Kleeb, Allied Staffing, appeared in support of **HB 2007** because the requirement to receive a job is to sign an indemnification clause. These types of clauses have grown greatly in the past few years. (Attachment 8)

Dan Murray, Midway Wholesale, appeared in support of **HB 2007 & 2228.** He commented that the trend to require indemnification clauses in order to do business is very disturbing because it is placing liability onto those who actually can't afford to cover anyone involved in the project. (Attachment 9)

Corey Peterson, Associated General Contractors of Kansas, appeared in support of **HB 2007** and in opposition of **HB 2228**. They oppose **HB 2228** because it would include contracts and not single out the construction industry. If it is fair for one industry, then it should be fair to all. (Attachment 10)

Brent Moore, OXY Corporation, appeared as an opponent of the bill. He believed that it was too broadly drafted and applies to all contracts. He suggested that the committee look at Texas' anti-idemnity statute that they adopted which was directed towards the oil and gas industry. (Attachment 11)

Keith Strama, Exxon Mobil, appeared in opposition to the bill. The purpose of these contracts is to eliminate costly future disagreements by allocating in advance the responsibility for certain actions which might arise. (Attachment 12)

Steve Ware, Individual, teaches contract law at the University of Kansas and stated that indemnification provisions are simply ways to form legal binding contracts that allocate risk. Adoption of the proposed bill would cause prices of goods and services to rise because businesses will need to cover their increase in insurance costs. (Attachment 13)

Pat Barnes, Kansas Automobile Dealers Association, appeared as an opponent of the bill. Reminded the committee that the Freedom of Contract has been the emphasis of common law for thousands of years and the proposed bill would be a stark departure from that norm. (Attachment 14)

Ed Cross, KIOGA, commented that each party should be responsible for their own actions. His industry came up with a compromise and developed a model "Master Service Agreement" contract. (Attachment 15). Several other industries have requested a copy of the agreement and are in the process of making changes to apply to their specific needs.

David Dayvault, Abercrombie Energy, sees indemnification provisions as being a good way to establish responsibility by contract rather than through litigation. (Attachment 16)

Jeff Kennedy, Martin & Pringle Attorney at Law, commented that the Model Master Service Agreement is an effort to ensure that the indemnification provisions used by the oil & gas industry do not overreach and are fair to both parties signing the agreement. (Attachment 17)

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 6, 2007 in Room 313-S of the Capitol.

Wyatt Hoch, Coalition to Preserve Freedom to Contract, suggested that the legislature should not take sides in a non-consumer business transaction. The allocation of risk in a business transaction is not a fairness issue, but a commercial issue. (Attachment 18)

Callie Hartle, Kansas Trial Lawyers Association, suggested an amendment to delete word "indemnitee" because the definition used is superfluous and could lead to confusion. (Attachment 19)

The committee meeting adjourned at 5:45 p.m. The next meeting was scheduled for February 7, 2007.

STATE OF KANSAS

JASON P. WATKINS
REPRESENTATIVE, 105TH DISTRICT
6525 NORTHWIND
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
HEALTH AND HUMAN SERVICES
JUDICIARY
UTILITIES

February 6, 2007

To: Members of the House Judiciary Committee
From: Jason Watkins, State Representative
Re: HB 2007

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to appear and offer testimony in support of HB 2007. This bill is intended to place a prohibition on certain indemnification agreements in certain contracts.

I am aware that the Committee will be hearing two other bills related to this topic. While I will not offer testimony on these additional bills, I am generally supportive. However, I would ask the Committee to consider as a matter of public policy the appropriateness of providing protections to only a select few industries and not all businesses.

Currently in Kansas, it is allowable for one for party to a contract to be indemnified by another party and listed as an additional insured for their own acts of negligence. This is somewhat complicated so perhaps a few examples of this would help identify the problem I am attempting to fix.

Example 1.

American Protection is a small security alarm dealer in Topeka, Kansas. They only install security systems; they do not monitor them as they don't own a monitoring facility. They enter into a dealer agreement with ADT Security Services. ADT will buy security contracts from American Protection and therefore will be responsible for the monitoring of any alarm systems sold and installed by American Protection.

American Protection sells a security alarm system to Mr. and Mrs. Smith. The installation is done correctly and test signals are sent from the Smith's system and ADT verifies that the system is on-line and the Smiths are indeed protected. The 36 month monitoring agreement (contract) which is on ADT paper is then sold by American Protection to ADT for $1,000.00.

Fast forward two and half years: At 2:30 am on February 6, 2007 an ADT operator, while on break, goes out to his car and consumes drugs and alcohol. He then returns to his monitoring console in the central monitoring station in Denver, Colorado and passes out. At 3:30 A.M., the

Smiths' home, with them in it, is broken into by two violent criminals. The alarm goes off, sends an intrusion signal to ADT, but the police are not dispatched because the signal was sent to the console of the monitoring operator who has passed out. Mr. and Mrs. Smith are assaulted and severely injured by the intruders and their valuables are stolen.

An investigation is completed which finds that the system was installed correctly, was armed at the time of the attack, and that signals were received by ADT. ADT admits that signals were received and their employee was passed out at his console and unable to respond. Furthermore, ADT acknowledges that they were aware of their employee's drug and alcohol abuse problems, but simply failed to act.

The Smith's attorney promptly sues and the Smiths are awarded $1 million in damages.

ADT then tells American Protection to pay the Smiths $1 million.

Despite the Smiths being ADT's customer, despite the system being verified as correctly installed, despite American Protection not having even been in the Smith's home for over two years, and finally, despite ADT admitting fault; American Protection must pay.

Why? American Protection signed a dealer agreement with ADT that contained an indemnification clause that forced American Protection to indemnify ADT for ADT's own acts of negligence.

Example 2.

A large manufacturing plant hires Masters Contractors to renovate the executive office wing of its plant. It's a complete remodel project except that the owners of the plant tell the Masters not to bid any electrical work as the plant employs their own electricians. Masters Contractors signs the contract and work is to begin April 1.

On March 25, in anticipation of the project start date, the plant manager tells their electricians to begin the electrical work. After removing some light fixtures the electricians are called to another part of the plant. They leave wires exposed and believing they are supplying power to another part of the plant, flip a breaker back on.

A short time later, a consumer visiting the plant takes a wrong turn down a hall and ends up in the construction area. Sadly, the consumer walks into the exposed wire and is killed.

The owners of the manufacturing plant admit fault and express their deep regrets. They even terminate the electricians. To make a long story short, a wrongful death is filed and the widow is awarded $2 million.

Again, the contractor is forced to pay the judgment. Despite not having even started the project, the contractor, because of an indemnification clause must pay for the manufacturing plant's own

negligence.

These types of indemnification clauses are increasing in popularity. So much so that many insurance companies are including their own prohibitions in the policies they are writing for those they insure.

In the two examples I have given, what happens if these businesses are sole proprietors? Neither has the ability to satisfy a large judgment against them. They are service industry businesses, so they really aren't worth very much. Therefore, bankruptcy is the end result. What is left for the victim? Does this sound like good public policy?

Beyond the devastating impact that certain indemnification clauses have on business, especially small business, policy makers must also consider the question of shifting liability. Is it good public policy for a party to have the ability to shift their responsibility for negligence to another party? Tort laws are in place not just to make a victim whole, but also to hold people accountable and provide an incentive to do the right thing. What is the incentive for a costly investment in workplace safety or security if a party has no concerns over liability?

The opponents to HB 2007 argue that it interferes with the right to contract and that government has no place in this argument. I would disagree and point out that when it protects the interests of the public, government has a responsibility to place certain restrictions on business practices. We have done so in insurance, banking, medical, and even auto purchase contracts. I doubt many would argue we were wrong and should reverse course.

Thank you for the opportunity to testify before the committee. I would appreciate your careful consideration of HB 2007.

70th 1936-2006 ANNIVERSARY KMCA

Kansas Motor Carriers Association

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Allied Industries Chairman

Tom Whitaker
Executive Director

LEGISLATIVE TESTIMONY

Presented by the Kansas Motor Carriers Association
Before the House Judiciary Committee
Representative Mike O'Neal, Chairman
Tuesday, February 6, 2007

MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. I appear here this afternoon representing our 1,250 member-firms in support of House Bill No. 2262. The bill 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. Joining me today is David R. Parker, Senior Legal Counsel, Great West Casualty Company and Great West Risk Management, Inc. A copy of Mr. Parker's bio is included with our testimony.

This legislation is the result of action by the Special Interim Committee on Judiciary. The bill was approved by the Senate on a vote of 40 to 0. Along with our testimony, our folders include two separate transportation contracts to illustrate the use of indemnification clauses; a power point presentation entitled "Abusive Indemnification and Hold Harmless Agreements;" and, a copy of the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA).

HB 2262 is pro small business legislation. Of the 8,981 motor carriers in Kansas registered with the Federal Motor Carriers Safety Administration, 86% operate six or fewer trucks; 95% operate 19 or fewer trucks; and, only .5% operates more than 100 trucks. 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. Large trucking companies have the legal staff to review these contracts and the clout to negotiate these contracts.

The purpose of HB 2262 is to promote safety in the carriage of goods by motor carriers by eliminating clauses that shield shippers and others who perform their obligations negligently or wrongfully. The bill does not shield a motor carrier from their own liability or negligence.

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

PO Box 1673 • Topeka, KS 66601-1673 • 2900 SW Topeka Blvd. • To
(785) 267-1641 • Fax: (785) 266-6551 • www.kmca.o

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

What the proposed legislation does:

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

What the legislation does not do:

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

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

Mr. Chairman, those opposing this legislation under the guise of "freedom to contract" are large corporations, who by denying adoption of HB 2262, refuse to take responsibility for their own negligence, and shift their risk exposure to small motor carriers.

The Kansas Motor Carriers Association respectfully requests that the House Judiciary Committee report House Bill No. 2262 favorable for passage. We thank you for the opportunity to appear before you today. I will be pleased to stand for questions.

LEGISLATIVE TESTIMONY

Presented by Great West Casualty Company
On the Behalf of the Kansas Motor Carriers Association
Before the House Judiciary Committee
Representative Mike O'Neal, Chairman
Tuesday, February 6, 2007

MR. CHAIRMAN AND MEMBERS OF THE
HOUSE JUDICIARY COMMITTEE:

I am David R. Parker, Senior Legal Counsel, Great West Casualty Company. I appear here this afternoon on the behalf of the Kansas Motor Carrier Association in support of House Bill No. 2262. The bill 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. I have reviewed the written testimony submitted by Tom Whitaker on the behalf of the Kansas Motor Carriers Association, agree with it, and support his representations.

Great West Casualty Company is a Nebraska-based insurance company which only insures motor carriers throughout the United States. The vast majority of our insureds are small trucking companies, hundreds of which are domiciled in Kansas. We also represent thousands more who operate into, out of, and through the State of Kansas.

The issue being dealt with here today is not unique to Kansas, to its motor carriers, or to its shippers. I work with motor carriers and their federal and state industry associations throughout the country. This issue is of increasing major concern to all motor carriers, but is particularly a critical problem for smaller motor carriers. Such smaller carriers lack the resources to resist the demands of larger shippers which seek to transfer liability for their negligent and intentional acts to motor carriers. There is not a week that goes by that I do not receive inquiries from motor carriers that are struggling with this problem and seeking assistance to deal with it. At the same time, these small motor carriers, given their modest capacity and marketing contacts, often have limited choices for freight and cannot afford to walk away from the freight of shippers who make these inequitable indemnification demands.

For these reasons, motor carriers in other states are seeking this same "level playing field" protection through comparable legislation. And for these same compelling reasons, states like Indiana, Nebraska, North Carolina, Oklahoma, Texas, South Carolina, and West Virginia, have already stepped forward to grant the protection sought here today. Those other states have recognized that such a complete one-way transfer of risk at the expense of the motor carrier is not good public policy.

From the viewpoint of insurance companies for motor carriers, it is impossible to underwrite and rate the risk of unknown shippers with unknown operations, unknown safety programs, unknown risks, and unknown employment procedures. But that is precisely what those shippers are requiring of those insurance companies which are having to quote and set premiums for motor carriers.

Great West Casualty Company respectfully requests that the House Judiciary Committee report House Bill No. 2262 favorable for passage. I thank you for the opportunity to appear before you today. I will be pleased to respond to your questions.

House Judiciary
Date 2-6-07
Attachment # 3

WESTERN EXTRALITE® COMPANY

DISTRIBUTORS OF QUALITY ELECTRICAL AND VOICE/DATA PRODUCTS

February 6, 2007

Mr. Chairman, I want to thank you and your committee for the opportunity to speak to you in support of HB 2228. 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. Three years ago the Kansas Legislators passed a bill that eliminated hold harmless and indemnification agreements from construction contracts. Without question, this was good and necessary legislation that prohibited owners and general contractors from unfairly transferring risk from those in control of the contract to the sub-contractors and sometimes the supplier.

This was an enormous step forward, however, it failed to solve the problem entirely. What it didn't cover will be eliminated by HB 2228, that being the current practice of requiring the sub-contractor to name the owner, general contractor, etc. as additional insured on his insurance policies. This effectively transfers the risk to the sub-contractor and his insurance company making them responsible for claims for problems out of their control and for which they are not responsible.

This is indeed unfair and needs to be eliminated just as hold harmless and indemnification was three years ago. I urge your support of HB 2228.

Thank you

Ken Keller, Controller

Western Extralite Company

(816) 421-8404

House Judiciary
Date 2-6-07
Attachment # 4

BUILDING ERECTION SERVICES COMPAN.

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

Feb. 3, 2007

Chairperson O'Neal; Vice-Chairperson Kinzer and committee members:

My name is Bill Miller. I am here representing the American Subcontractors Association and myself as a subcontractor. The American Subcontractors Assoc. represents subcontractors in Eastern Kansas and Western Missouri that do work and supply materials throughout Kansas. I am here to testify in favor of HB 2228.

The primary issue is the contractual requirement to list multiple individuals and entities as additional insureds on the auto and general liability policies of all parties in the contract chain due to the flow down provisions that are in virtually every contract. This forces the lowest party in the chain to be liable for all of the claims against the parties above, regardless of who is responsible.

This additional insured requirement circumvents the anti-indemnity law that was passed in Kansas in 2004. The net result is higher premiums for the lower tier contractors and clean loss runs for those that should be liable for losses that they or their agents cause. There is no incentive to maintain a safe jobsite if someone else is paying all of the claims that result from unsafe conditions. The subcontractor is not the controlling contractor and in the case of expansion or renovation of existing facilities, the general contractor has no control over the plant operations.

The typical additional insured language requires defense should a claim be made or a suit be filed against the upper tier contractor. This cost reduces the available coverage by the amount of the cost of litigation and even if the defense is successful, it counts as a loss and the deductible applies

.

A major pitfall for many who do not understand the language that is peculiar to the insurance industry is that they unwittingly sign contracts that have insurance limits or extended coverage's that are either not available or cost prohibitive. In some instances, the policy renewal date is in the midst of a project term and coverage that was in effect in one policy period is no longer available in the next. The worst case is when an unwitting subcontractor signs a contract agreeing to additional insure some one only to find out too late that his insurance company denies coverage required by the terms of the contract and the subcontractor has self insured the loss.

We believe that every one should be responsible for their own actions and the acts of their agents and employees. The only legitimate additional insured requirements should be for vicarious liability and for the actual employers of employees that fall under statutory employee or borrowed servant doctrine where the employees are under the direction and control of someone other than the employer.

MEMBER pci PRECAST/PRESTRESSED CONCRETE INSTITUTE

SUBCONTRACTORS THE HEARTBEAT OF CONSTRUCTION AMERICAN SUBCONTRACTORS ASSOCIATION

AISC AMERICAN INSTITUTE OF STEEL CONSTRUCTION INC. FOUNDED 1921
Certified Steel Erector

METAL BUILDINGS INSTITUTE CERTIFIED CONTRACTOR

House Judiciary
Date 2-6-07
Attachment # 5

If we can enact legislation that makes everyone responsible for their own claims and the claims caused by those for whom they are responsible, we could reduce liability insurance costs and likely have safer construction sites which would in turn reduce the cost of work comp insurance as well.

The latest development is the requirement by the insurance companies that upper tiers force lower tiers to additional insure them for losses that they themselves cause. This is a condition of the cost of their premiums. We believe that the Legislature should establish the rules that govern the terms and conditions of the insurers that do business in this state. This latest requirement also increases the limits that each subcontractor must purchase to satisfy the upper tiers requirements that are also dictated by the insurance companies. It is no surprise that the insurance companies are enjoying record profits in excess of 50% last year.

There is no fiscal downside for the State of Kansas that will result from the passage of this Bill.

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

DAN HAAKE

Haake FOUNDATIONS, INC.

February 6, 2006

Re: House Bill No. 2228
Testimony From Dan M. Haake,
President Of Haake Foundations

Chairman Mike O'Neal, Vice Chairman Lance Kinzer and Committee Members,

I am here today to voice my support of this Bill and would like to offer you a few of my thoughts. I am not an expert on insurance contracts and endorsements, however I do have thirty years of experience trying to understand these endorsements and how they apply to my business. Then take that information, mesh it together with contracts for work (such as AIA Form A401-1997) from General Contractors, trying to understand their provisions of "Additional Insured Status" for Owners, Architects and General Contractors which extends my limits to include them.

Each year I sit down with my insurance agent and discuss the risk associated with my work, mix in the value of what I am not willing to risk and come up with limits of coverage that I need to purchase. My agent then brings up the additional insureds I add to my policy and now I have a limit amount that is not what I need or what I want but what I think I can afford. Reality is that I am insuring others for deeds not necessarily connected to me and generally out of my control.

Four years ago I had a fatal accident on one of my jobs, workers compensation insurance protected myself, the General Contractor and the Owner but when a wrongful death law suit was brought against the excavation contractor, the Owner and General Contractor were looking to me for protection under the additional insured provisions of my general liability policy. The outcome of that situation was worked out, however I realized that the risk of adding others to my policy where I do not have the ability to manage it properly is a receipt for disaster.

Finally the practice of transferring risk on a project to others is bad for business and should be against public policy.

Sincerely,

Dan M. Haake

10029 E. 63RD TERRACE

RAYTOWN, MISSOURI 64133

816•737•2954

House Judiciary
Date 2-6-07
Attachment # 6

Kansas Association of Insurance Agents

Testimony on House Bills 2007, 2228 and 2262
Before the House Judiciary Committee
By Larry Magill
February 6, 2007

Thank you mister Chairman and members of the Committee for the opportunity to appear today in support of House Bills 2007, 2228 and 2262. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 543 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.

We support the basic provision in all three bills that makes it against public policy to transfer one party's negligence to another party. In addition, all three bills expand on the protection given to contractors several years ago and prohibit requirements to name another party as an additional insured to pick up coverage for their own negligence.

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 to 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. And with the passage of HB 2154, Kansas joined approximately 37 states that have enacted similar legislation for contractors.

Bills Encourage Safety and Loss Prevention

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 causing 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.

Economic Leverage Shouldn't Be the Determining Factor

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 are often self-insured. Any liability for their negligence they can force on smaller businesses is a direct, dollar-for-dollar savings to their self-insured program.

House Judiciary
Date 2-6-07
Attachment # 7

But even if they are not self insured, it protects their loss experience (and potential premium credits) with their own insurer, saves them potential deductible costs and protects their liability insurance limits.

Additional Insured Prohibition

All three bills prohibit contract provisions requiring a party to name the other party as an additional insured for the other party's own negligence. Without this companion prohibition, companies simply do an "end run" around the anti-indemnification language and accomplish the same transfer of their negligence through the additional insured avenue.

One problem with naming entities as additional insured is that the insurance company has not had an opportunity to inspect and loss control the risk, has not been given underwriting information including information about exposures and prior losses and does not have a good picture of the risk they are being asked to assume. In the absence of a prohibition on naming additional insureds, it would make sense for the legislature to mandate that before a company could demand to be named as an additional insured, they be required to provide all this background information and submit to loss control engineering.

Other Means Exist

None of these bills would prohibit a requirement that a contractor provide either an "Owners & Contractors Protective Policy" or a "Railroad Protective Policy". Both are designed to provide separate coverage for the owner or the railroad on construction projects. This allows the insurance company to underwrite the risk and it protects the "downstream" parties own policy limits and loss experience.

Amendment Needed to HB 2007

While I am sure this is not the intent of Representative Watkins, the language in HB 2007, (3)(b) beginning on page 1, line 35 could be read to prohibit liability insurance policies. If our concern is correct, there should be an exception added for insurance contracts to the bill.

We encourage the Committee to pass 2007 out favorably with the above amendment, or in the alternative pass both 2228 and 2262 out favorably. We would be happy to answer questions or provide additional information.

SMALL BUSINESS SUPPORT FOR HB 2007

My name is Marvin Kleeb. I am a Partner of Allied Staffing, a Kansas Limited Liability Corporation, which is based in Lenexa. Our forty year-old company is a small business providing direct hire, contract and temporary staffing services to our business clientele in Johnson, Wyandotte and Douglas Counties.

I am here today to support HB 2007 as a representative for my firm and as our regional industry association's V.P. of Governmental Affairs (Mid-America Association of Personnel and Staffing Services). In addition, I am speaking on behalf of the broader small business community as a member of the Kansas State Council of the NFIB (National Federation of Independent Business).

Over the past several years, the use of Indemnification clauses within contracts has become quite commonplace between large corporations and their vendors and suppliers, frequently small businesses. In many instances, if not most, the inclusion of such Indemnification provisions has exposed the business community, particularly small business, to significant legal and financial risk.

The problem lies in the fact that many Indemnification provisions have moved beyond requiring a business, as a supplier or vendor, simply to be responsible for claims or losses resulting from their own actual fault, negligence, gross negligence or recklessness. Rather, the Indemnification often holds a business liable for almost any contrived damage or cost that the customer, usually large corporations, could remotely pass onto their supplier or vendor, often a small business.

Indemnification language frequently is so broad and encompassing that a small business supplier and vendor can be held responsible for liabilities totally out of their control. For example, in our business where we provide employees for staff augmentation or direct hire, the Indemnification provisions in many contracts expose us to responsibility for a wide range of claims or losses; including, the illegal conduct of our client's organization, management or employees. For example, our small business could be held financially responsible to defend our client from legal action arising from harassment or discrimination by their employees and management.

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In addition, Indemnification language can hold small businesses in our industry responsible for claims or losses resulting from:

1. The Client's failure to supervise, control or safeguard premises, processes, valuables or systems.
2. The Client allowing use of their company-owned vehicles, even though such use was not permitted or authorized by the service provider.
3. Claims by any person based on allegations that the Client's business activities damaged the environment.
4. Claims by any person relating to a Client's product or service.
5. Failure by a Client to provide a safe worksite or to provide information and safety equipment with respect to hazardous substances or conditions.

Furthermore, what is troublesome, the Client or Customer should not only be responsible for such issues; but they would customarily have their own insurance to cover such situations. In addition, vendors and service providers are increasingly being asked to name their Customers and Clients as an Additional Insured; at an added cost, of course, to the supplier. All of these customers and client companies have appropriate insurance; they are merely attempting to provide an additional layer of insurance coverage at the cost of their small business suppliers and vendors.

Despite being a well-established business, the fact is that there are three concerns that could us most easily put us out of business: out-of-control workers compensation costs, our inability to collect a large customer receivable and/or some Client invoking their legal muscle to have our company, a small business, pay for their errors, negligence or conduct due to contractual Indemnification language which imposes undue, unjust risk on our company.

On behalf of small business in Kansas, we urge the Committee to pass onto the full legislature HB 2007. This excellent legislation will greatly help rein in the very real legal and financial risk that unreasonable Indemnification language poses for small business.

Contact Information:
Marvin Kleeb marvink@alliedstaffing.com
Partner - Allied Staffing (913) 707-4535

CONTRACTUAL INDEMNIFICATION EXAMPLE

Agency shall indemnify COMPANY and hold it harmless from and against any and all costs (including the cost of reasonable attorney's fees), actions, liabilities, payments, taxes, interest, penalties, fees, and expenses in connection with any claims, actions, suits, damages, or liabilities arising out of or in connection with, in whole or in part, the act or omission of Agency, its agents, subcontractors, or employees, or any temporary worker assigned by Agency, or arising from or out of any breach of this Agreement by Agency, whether in contract or tort, or at common law, or for violation of any statute, regulation or ordinance, including but not limited to administrative or other claims or suits brought under applicable employment laws (including, but not limited to Title VII, ADEA, ADA, FLSA, and ERISA) or workers' compensation laws, including but not limited to any claims, actions, suits, damages or liabilities asserted by any temporary worker against COMPANY for any reason.

EXAMPLE: ADDITONAL INSURED REQUIREMENT

AGENCY shall maintain in force:

(i) Commercial General Liability Insurance with a combined single limit of not less than $1,000,000 per occurrence and $2,000,000 aggregate;

(ii) Workers' Compensation Insurance to the extent required by applicable laws;

(iii) Comprehensive Automobile Liability Insurance, (owned, hired and non-owned) with a combined single limit of not less than $1,000,000;

(iv) Umbrella Liability Insurance of not less than $5,000,000 per occurrence;

(v) Professional Liability Insurance with a $5,000,000 limit of liability; and

(vi) Employee Dishonesty Insurance, including a Third Party Fidelity endorsement and an endorsement naming COMPANY and it's affiliates and subsidiaries as a loss payee, with a $1,000,000 limit of coverage (on a discovery basis).

All policies shall be on a primary basis and without any right of contribution from any insurance carried by COMPANY. The insurance coverage specified in (i), (iii) and (iv) above shall name COMPANY and *it's affiliates and subsidiaries and its employees and agents as additional insureds*.

Dan Murray

Testimony on Senate Bill 2007
House Judiciary Committee
February 6, 2007

Mr. Chairman and Members of the Committee:

My name is Ken Daniel. I am Chairman and C.E.O. of Midway Wholesale. Today I am speaking for myself and my business partners.

I would like to speak in support of House Bill 2007.

Midway Wholesale is both a supplier and a subcontractor to the construction industry. In fact, more than 99% of our volume is with contractors and subcontractors. We are a long-time supplier member of the Associated General Contractors.

It pains me greatly to advocate for measures which impinge on private contracts, but we have reached the point where the unfairness to those of us at the "bottom of the food chain" has reached an unbearable level. I see no way for the situation to correct itself. In fact, it continues to get worse and worse.

In 1970, when I started Midway Wholesale, the documents we had to accept from purchasers of our products and services were simple, straightforward, and fair. Over the years, more and more conditions and "boilerplate" have been added to those documents until today they are so biased in favor of those above us on the food chain that we are left only with a choice between high risks or no sale. We call this the "tyranny of the boilerplate".

There is also the "tyranny of the checkbook", where the weaker party is always "wrong" until they agree to the stronger one's conditions.

The "tyranny of the boilerplate" can also be accomplished with "additional insured" clauses and requirements that circumvent what would otherwise be acceptable contract language.

Virtually all of our customers are highly honorable and treat us fairly even though the documents don't require it. Unfortunately, there are always a few bad actors up the food chain who use the "tyranny of the boilerplate" and the "tyranny of the checkbook" to keep our money.

We are not a party to the contracts between building owners and contractors. However, our money is used to leverage and finance those contracts. Some of these contracts are <u>completely</u> financed with subcontractor and supplier money.

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A recent trend that is highly disturbing is the dumping of liability onto those lower on the food chain. This is being driven by big insurance companies and a handful of large insurance agencies that specialize in contractor insurance, along with some large building owners. In a nutshell, this makes those of us who are low on the food chain pay for insurance to cover the bad acts of those higher on the food chain. This bill stops that abuse.

I encourage you to act favorably on House Bill 2007.

AGC of KANSAS

Building a Better Kansas Since 1934

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

TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE HOUSE COMMITTEE ON JUDICIARY
HB 2007 and HB 2228

February 6, 2007

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

Mister Chairman and members of the committee, my name is Corey D Peterson. I am the Executive Vice President of the Associated General Contractors of Kansas, Inc. 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).

AGC of Kansas opposes House Bill 2228 as written, but would support the bill should it include all contracts and not single out the construction industry. If this bill is deemed to be fair for the construction industry, it should be fair for all industries and vice versa. If the content of HB 2228 is deemed not fair for all, AGC is concerned why such a law would then be imposed specifically on one industry. **AGC supports HB 2007 for this reason.**

AGC of Kansas members are directly impacted by these bills on two levels. Subcontractor members are being asked to name general contractors as an "additional insured." While general contractors may ask subcontractors to name them as an additional insured, they are at the same time being asked to name owners as additional insured.

AGC fully supports the concept of one being responsible for their own actions and agrees it is not fair to require one to put their future insurability at risk because of the actions of another over which they have no control.

However, the issue of additional insured coverage (or lack thereof) has provided some uncertainty within the construction industry and apparently the insurance industry as well. Additional insured clauses have been discussed on the national level for several years. These discussions between general and subcontractor organizations and the insurance industry have yet to provide clear recommendations on how best to proceed.

AGC of Kansas has held numerous meetings with its members, other industry groups and insurance companies on this subject as well. As a result of these meetings, it is AGC of Kansas' understanding that adequate insurance should be available for all industry members, even if additional insured provisions were made to be against public policy. Some uncertainty remains, however, as to how the insurance industry will react to this and whether general contractors would continue to have complete coverage for their risk exposure in the future.

A remaining concern is that litigation expenses are likely to rise, as each insurance carrier (for the owner, general contractor and potentially several subcontractors) will likely be made party to any lawsuit that arises due to a claim at a construction jobsite and each insurance company would be required to defend these claims.

AGC of Kansas respectfully requests that HB 2228 be amended to cover all contracts and not single out the construction industry and that the amended bill be recommended for passage. Thank you

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Testimony re: HB 2007
Committee
Presented by Brent Moore
on behalf of
OXY USA Inc.
February 6, 2007

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 one of the largest producers of oil and gas in the State of Kansas, and is a wholly owned subsidiary of Occidental Petroleum Corporation.

OXY Opposes HB 2007 for the following reasons:

1. OXY is of the opinion that there needs to be significant abuses documented before this committee in order to justify statutorily limiting the right to freedom of contract for all of the people doing business in Kansas. Indemnity clauses within contracts serve legitimate goals in allocating risk between the parties that another party may not be willing or be able to accept.

2. The proposed legislation applies to all contracts. This broad of application may have many unintended consequences. Routine indemnities that apply in all businesses, such as indemnities that companies provide to their board of directors for serving on their board may prove to be void against public policy. Many insurance policies are in their purest sense a broad forms of indemnity agreements under which the insurance company agrees to indemnify the insured for its negligence. Therefore, in my opinion, a majority of insurance policies in the State of Kansas might have void provisions under this bill.

3. I am sure that there are countless other standard business contracts that contain risk allocation provisions that would be affected by the broad brush of this bill. However, I am most familiar with oil and gas contracts. There are many contracts that are negotiated among either the oil and gas companies themselves or the oil and gas companies and large contractors, such as drillers, that have been used for 40-50 years that allocate risk just in order to encourage one of the parties to perform the service involved.

For example, the standard form Joint Operating Agreement is a printed form produced by the American Association of Petroleum Landmen. This is the contract that virtually every operator in this State (as well as most all other states) use when jointly developing an oil and gas prospect. It contains a provision where non-operating oil companies authorize the operator, on their behalf, to engage in the high-risk activity of drilling and operating wells. Part of the incentive for the operator to take on those high-risk activities is that the operator under that standard agreement is only liable for its gross negligence or willful misconduct. The operator's

simple negligence is assumed by all of the drilling parties as part of the operator's compensation for taking on the risk of drilling and operating the well.

In addition, drilling companies have standard clauses contained in their contracts (for example the International Association of Drilling Contractors daywork form) that provide that the oil and gas companies that hire them to drill will indemnify them against claims for damage to the reservoir below the ground, regardless as to cause. To now make a driller responsible for that risk exposure may be (i) uninsurable, or (ii) drive the cost of drilling that well so high as to make it uneconomic due to the high cost of insuring that risk, or (iii) drive the drilling company out of business if the driller should not have sufficient insurance and ultimately be found civilly liable to have lost a prolific reservoir as a result of its negligence. The same holds true with respect to a well blowouts. If it is the driller's negligence that causes the blowout, usually there is a cap on the expenses the driller is required to absorb.

4. With respect to every day contractor agreements, 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 and its contractors. 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 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.**

5. These risk allocation provisions are prevalent industry wide and OXY 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.

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

> "The interests of both contracting parties are furthered by establishing a firm risk allocation scheme which allocates responsibility for specific risks and enables each party to measure the risk exposures it will absorb or insure. This only can be accomplished by a straightforward and unconditional risk allocation structure. *Provisions which provide that one party will assume a specific risk of loss or liability unless the other party is negligent or otherwise culpable do not accomplish this objective.* To the contrary, they create a situation where a determination of culpability is a prerequisite to identifying which party must absorb the risk. The undesirability of this situation becomes evident when it is recognized that such conditional risk allocation provisions often effectively require both parties to place insurance covering the same risks since a determination of negligence or culpability (and resulting contractual liability) only can be made after the loss occurs. Accordingly, 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)."

7. OXY believes that further study may prevent some unintended consequences that arise from the bill. Ideally, the scope of the bill needs to be narrowed and limited to those specific abusive situations which are documented to be prevalent. To the extent that it may be directed at the oil and gas industry, your attention is called to the anti-indemnity statute adopted by the state of Texas. That statute permits mutual indemnities backed by insurance and makes exceptions for many contracts that, without risk shifting, would not otherwise occur, such as joint operating agreements, control and cleanup of pollution, NORM (naturally occurring radioactive material) issues, reservoir damage liability and blowout situations. A copy of the Texas statute is attached to this testimony.

In conclusion, OXY believes that the current proposed legislation will cause serious unintended consequences with respect to many contracts within many businesses throughout the State. It may prohibit insurance companies from insuring negligence-based risks (including the typical automobile policy). It may deter our brightest and best business persons from serving as a director with a Kansas company. With respect to the oil and gas industry, the bill would affect the validity of many provisions within the contracts that are unique and standard to the industry today. I suggest that this committee proceed with caution when limiting the parties' right to contract and do business in Kansas. If this committee proceeds to apply this proposed law to the oil and gas industry, I ask that you consider making exemptions or exclusions of its application similar to that under the Texas statute.

Respectfully submitted,

Brenton B. Moore

Attachment

TEXAS 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.

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Legislative Testimony Opposing HB 2007, HB 2228 and HB 2262
Presented on behalf of ExxonMobil
Before the House Judiciary Committee
Representative Michael R. O'Neal, Chairman
February 6, 2007

Thank you for the opportunity to appear before your Committee on this important issue related to indemnity provisions in contracts. My name is Keith Strama with the law firm of Beatty Bangle Strama, P.C., and I am here on behalf of ExxonMobil.

We are compelled to testify against this Bill because we believe this legislation will have a dramatic impact on the right of businesses to contract freely with one another. We believe limiting the freedom to contract in such a dramatic fashion will disrupt what is currently a fair and balanced business environment in Kansas.

The proposed legislation would negate years of Kansas contract and insurance law which allow owners to transfer risks associated with contractor projects to the contractors responsible for those projects. Kansas law has recognized that indemnification provisions often serve a valuable purpose but strictly construe them in favor of indemnitors so that coverage is limited to losses arising out of the work to be performed under the contracts.

Indemnification agreements between owners and contractors and between contractors and subcontractors are widely used in Kansas to ensure that projects are economical, profitable and safe. Owners hire contractors for a variety of purposes, including identifying problems and assessing risks. An indemnity provision allows an owner to contract for a third party who will assume all risks associated with a contractor's work under the contract and act accordingly. This transfer of risk promotes safety because it removes all doubt as to who is responsible for the safety of a work area. Express indemnification provisions put the indemnitors on notice

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that they are responsible for the safety of the workplace as they find it, which is ultimately the best way to promote safety on construction projects. Moreover, indemnitors customarily already have insurance coverage for their obligations under these agreements.

This is what freedom to contract is all about. It is about risk transference and identifying obligations. Without such freedom, much of the incentive to contract work to local contractors is removed.

The primary purpose of indemnification agreements and additional insured is to eliminate costly future disagreements by allocating responsibility in advance for certain problems that may arise. Eliminating the ability to fully contract for indemnity agreements would expediently increase litigation costs and the number of parties involved in a lawsuit.

Proponents of this legislation will no doubt tell you that eliminating these provisions is an easy way to protect small contractors who are at a disadvantage to large owners. This is an unfair way to characterize legislation which is impeding the freedom to contract. It is impossible for any Legislature to outlaw all contractual provisions which could ultimately work against a party disadvantaged in contract negotiations. Legislatures have traditionally been reluctant to interfere with the freedom to contract, even though it is clear that some contracts result in unfairness. While there will always be an abundance of anecdotal stories in which various sorts of contract provisions reach an allegedly unfair result, good economic policy requires that an open and free market rectify the potential problems. In practice, indemnification agreements actually result in less unfairness because they clearly lay out the responsibilities of all parties and are, in fact, an important part of a fair business environment.

It may be easier to understand indemnification agreements in a situation where they are not often used. If a homeowner discovers that his staircase is rotten and hires a contractor to fix the staircase, the homeowner will want to do so without fear of liability for injuries that may occur to a worker while working on the staircase. If the contractor has worker's compensation insurance and a worker falls through one of the rotten stair boards and injures his leg, it is very possible that a litigious plaintiff's lawyer will sue the owner of the home for failure to upkeep the staircase. This, we all know, is a ridiculous lawsuit; but we also know that ridiculous lawsuits happen every day.

In the manufacturing world, the decision to hire a contractor is a complex process. Owners of large plants want to be able to hire sophisticated contractors to take over a certain work site without fear that they will become entangled in a lawsuit. The owners of these properties need to be able to assign a job to a contractor and know that the contractor will be responsible for all safety issues involved in the project. This is good public policy because it actually promotes safety at a workplace because the contractor will not cut corners knowing that they are protected exclusively by worker's compensation.

Kansas has long benefited from a fair business environment. While many contractors may feel that they will benefit from limiting the ability to contract for indemnity, in the long run those same contractors will be hurt as the business community reacts to legislative interference in its ability to contract. The business community takes this particular ability to contract very seriously, as evidenced by the fact that there are so many people here today concerned about this legislation. Opposing this legislation is not about the big asserting its will over the small. Many times these contracts are entered into between large sophisticated parties, and the freedom to enter into these contractual provisions ensures safety of the workplace and a fair business environment for the Kansas economy to continue to grow.

I can not urge the committee strongly enough to reject the proposal which would eliminate the contractual freedom to allow contractors to place owners as additionally insured parties on their insurance policies. It is important to remember that the insurance secured by a contractor for a project is insurance which is being paid for by the owner through the contract. If the Owner is essentially paying for the insurance, then they should have the right to be named as a beneficiary to that insurance.

When Owners make the decision to hire a contractor, questions about liability are big parts of their decision making process. Prohibiting a contractor from placing an owner as an additionally insured party on an insurance policy creates considerable barriers to the contracting process. Where the contractor will be required to obtain the insurance, regardless of the new law, many owners will now be forced to reassess their insurance every time it makes a decision to hire a contractor. This process causes significant delay and can add to the total cost, creating a disincentive for businesses to hire local contractors and negatively impacting the local economy where a facility is located.

Thank you for your time.

Legislative Testimony
Presented on behalf of a member of the Coalition to Preserve Freedom of Contract
Before the House Judiciary Committee
Rep. Michael R. O'Neal, Chairman
February 6, 2007

MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

My name is Stephen Ware. I am a professor of law at the University of Kansas. I have been a lawyer since 1991 and a law professor since 1993. Contract law is one of my specialties and I regularly teach contract law at KU.

I am here today, not on behalf of KU, but on behalf of a member of the Coalition to Preserve the Freedom of Contract. I have long been deeply impressed by the importance of contractual freedom, and I formed my own views on the topics discussed at this hearing prior to being contacted by the Coalition, so I appreciate the opportunity to express those views in this forum.

Like insurance generally, indemnification and additional-insured provisions are simply ways to form legally-binding contracts that allocate risk. In particular, these provisions are often used in contracts between businesses to allocate the risk of loss due to liability to a third party, such as an employee on the job.

All other things being equal, any business can be expected to prefer a contract that allocates risks to somebody else rather than one that allocates risks to that business. But all other things are not equal. Businesses can and do adjust the prices they charge to reflect the risks they carry. Competition among businesses can be expected to force such adjustments.

I know that the prices of the goods I buy reflect the liability risks borne by those who produce and transport those goods. As a consumer, I do not care whether particular risks are borne by motor carriers or manufacturers or any other type of business. How they allocate risks and prices among themselves is for them to decide. But, as a student of economics, I am confident that they will make those allocation choices most efficiently if left to themselves. In other words, I am confident that leaving those allocation choices to the free market will result in lower prices for consumers like me.

I am confident that enacting any of the three bills under consideration (House Bills 2007, 2228, 2262,) will have the ultimate effect of raising prices. Therefore, I see all three bills as naked special-interest legislation. I see them as attempts by particular industries to use the political process to enrich themselves at the expense of the general public.

In sum, I believe the Legislature ought not to regulate the agreements by which businesses allocate risks among themselves. I believe that preserving freedom of contract in this area will do a better job of allocating risk to the party who ought to bear that risk and do a better job of fostering the efficiency and low prices that are truly in the public interest.

Thank you very much for your time and attention.

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13-2

TESTIMONY OF THE
KANSAS AUTOMOBILE DEALERS ASSOCIATION
BEFORE THE
HOUSE COMMITTEE ON JUDICIARY

TUESDAY, FEBRUARY 6, 2007

HB 2007, INDEMNIFICATION

Good afternoon, Mr. Chairman and members of the committee, I am Pat Barnes, general counsel for the Kansas Automobile Dealers Association. We appear before you today in opposition of House Bill 2007 dealing with indemnification agreements.

This Act would make indemnification agreements as set forth in the bill before you void as against public policy. We believe this is too stark of a departure from the norm in terms of the ability of individuals and businesses to contract with one another and sets an extremely bad precedent. Freedom of contract has been the emphasis of the common law for thousands of years. It is a concept that carries forward into the very nature of our jurisprudence. This is not to say there have not been exceptions, but those exceptions have been initiated in circumstances where no person would find the bargain to be one that was fairly entered where the other party virtually dictated all of the terms with no choice but to accept them. There are limited circumstances where that is always the case.

Indemnification agreements serve to give certainty to risky ventures where comfort on the part of one or both parties with the transaction is needed. There are many instances where something should be done, but would not be done if the party being asked to enter the contract was not protected from the consequences that could occur with it, whether real or imagined. There are many instances where one party very badly needs the other party's participation in a perfectly legal endeavor, and one which would benefit the public in some fashion as a whole, yet cannot get the assent necessary to enter the contract without providing protection to the other party.

This works the other way, too. Many times we would not enter contracts that we would like to enter without the assurance that we are not going to be financially ruined by them. An example of this will actually promote business enterprises where a small company or a sole proprietor would like to do the job, could do the job, and would be good at it, but cannot assume the risk of financial ruin, or turning a profitable deal into one which is not profitable, if someone else's performance draws them into a lawsuit or a situation causing a loss. Sometimes, it is simply providence that draws a party performing a contract into a situation where they cannot afford to be in it without the backing of someone else which must be contractually assured.

Indemnification contracts are very common across a wide variety of arrangements. For example, KADA uses accountants in situations where their expertise is quite unique, and would be otherwise unavailable if we could not assure them that they would not be

held responsible for something else that may go wrong in a particular situation. We also encounter this with dealership sales where the departing owner wants to retire or otherwise be free of the business once he is gone and that becomes part of the consideration paid for it. It occurs vice versa, too, when an acquiring party wants to use something that the departing owner has set up, but does not want to be responsible for the prior owner's obligations because they were simply those of the prior owner and may be unascertainable or unpredictable. There are instances where someone else's willingness to take a needed task, such as retrieving an automobile or some other routine task, will not occur where the charges cannot justify the potential risk absent indemnity.

This would not be a good measure for business transactions in general and we, therefore, ask that you decline to make this a part of our law. I would be happy to answer any questions you may have of me and I thank you for the opportunity to make our thoughts known to you.

PRB:kl

Voice of the Kansas Independent Petroleum Industry

Kansas Independent Oil & Gas Association
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Testimony to House Judiciary Committee
House Bill 2007 – House Bill 2228 – House Bill 2262
Acts relating to contracts; indemnification clauses and additional insured requirements

Edward P. Cross, Executive Vice President
Kansas Independent Oil & Gas Association

February 6, 2007

Good afternoon Chairman O'Neal and members of the committee. I am Edward Cross, Executive Vice President of the Kansas Independent Oil & Gas Association (KIOGA). KIOGA is a 1,400 member trade association representing the interests of the independent oil and gas industry in Kansas. I am here today to express our opposition and concerns surrounding House Bills 2007, 2228, and 2262.

I will give a brief summary of how KIOGA arrived at our current position on the referenced bills. Insurance companies often require oil and gas operators to utilize Master Service Agreements (MSA) whenever they contract for services from third party contractors. The problem stems from the fact that some companies add other provisions to the MSA that cause significant concerns, expense, and legal requirements that conflict with other contractual obligations of the contractor or operator. To address these concerns, KIOGA requested legislation in 2005 to address the indemnification issues. As a result, SB 97 was introduced during the 2005 legislative session. In addition to the oil and gas industry, the construction and trucking industry also had legislation introduced in 2005. The Senate Judiciary Committee, seeing that several industries were asking for legislation to address indemnification issues, put the concern into an interim study to better understand the issue and find legislation that works for all industries concerned. KIOGA participated in the interim committee hearings. As a result of the interim hearings, SB 338 was introduced in the 2006 legislative session. However, after further review, KIOGA realized that voiding indemnification provisions held many unintended negative consequences. The gentlemen that follow me with testimony will detail some of these unintended consequences. As a result of our findings, KIOGA asked that the oil and gas industry be removed from SB 338 last year.

House Judiciary
Date 2-6-07
Attachment # 15

Knowing that the indemnification issue was still a concern for many small oil and gas industry service companies and operators, KIOGA sought to find a workable solution. KIOGA organized a task force in early 2006 to gain a better understanding of the issue and work to find a workable solution. The task force was made up of representatives from small servicing companies, oil and gas producers, drilling contractors, insurance companies and law firms. The task force developed a model MSA for use in Kansas as a framework for ongoing business relationships. The KIOGA-MSA is not THE answer to the indemnification issue, but it is a step in the right direction and provides a model by which all oil and gas companies can work from. Over time, we hope to see the KIOGA-MSA model agreement become an industry standard.

KIOGA wants to see each party of a contract be responsible for their own liability and not assign liability risk to another party. Party liability risk is not always easy to identify. Indemnification provisions define liability risk through contract rather than litigation. For these reasons and more, KIOGA opposes HB 2007, 2228, and 2262 and urge you not to pass the bills.

MASTER SERVICE AGREEMENT

THIS MASTER SERVICE AGREEMENT ("Agreement") is made and entered into this _____ day of _____, 20__ ("Effective Date") between _____ ("Contractor") and _____ ("Operator"). Contractor and Operator are also referred to as "party" and collectively as the "parties". Subject to and in consideration of the mutual promises,conditions, and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **APPROVED VENDOR.** Upon execution of this Agreement and compliance with its terms, Operator agrees that Contractor shall be added to Operator's list of approved vendors.

2. **WORK ORDERS.** If at any time during the term of this Agreement, Operator either verbally or through one or more written work orders, delivery tickets, or other instruments, requests Contractor to supply or perform services, and Contractor agrees to perform those services, each suchrequest regardless of form shall be deemed a "Work Order" governed by and subject to the terms and conditions of this Agreement. Agreements or stipulations in any Work Order that are contrary to any term of this Agreement shall be void, unless Contractor and Operator have expressly agreed in writing that such agreement or stipulation shall supersede the terms of this Agreement.

3. **LABOR, EQUIPMENT, MATERIALS, SUPPLIES AND SERVICES**

   a. Upon receipt of a mutually agreeable Work Order, Contractor shall begin furnishing the services according to the specifications and requirements of this Agreement and the Work Order.

   b. All services rendered by Contractor hereunder shall be performed in accordance with industry standards as applicable to the region or area where the work is to be performed. All materials and equipment furnished by Contractor in the performance of services hereunder shall be free from material defects. Any of the materials, equipment, or services found to be materially defective shall be at Contractor's sole discretion, either removed, replaced or corrected by Contractor without additional cost to Operator. Contractor shall not be liable for claims arising from or relating to latent or unknown defects.

   c. Contractor shall maintain its equipment in operating condition at all times and shall use commercially reasonable means to control and prevent fires and blowouts, protect the hole, and prevent damage to Operator's equipment.

4. **INVOICING; PAYMENT.** Upon receipt of an invoice from Contractor, Operator shall pay Contractor for those services, equipment, and materials furnished by Contractor at the rates specified in Contractor's Rate Schedule, attached and incorporated as Exhibit A, and the applicable Work Order. Operator shall have 30 days from the date of the invoice to pay the amount due thereon, or to notify Contractor in writing of a *bona fide* dispute as to one or more of the invoice items. If Contractor has not received payment of the invoiced amount within 30 days from the date of the invoice, Contractor shall be entitled to claim and pursue all available legal and equitable remedies against Operator to recover the invoiced amounts (except amounts in dispute),and shall be entitled to recover from Operator all invoiced amounts not in dispute, plus Contractor's collection and litigation costs (including attorney fees), plus interest on all amounts owed at the highest rateallowed by law.

5. **INDEPENDENT CONTRACTOR.** Contractor shall be deemed an independent contractor with respect to any and all work performed under this Agreement and any Work Order. It is the express understanding and intention of the parties that no relationship of master and servant or principal and agent shall exist between Operator and the employees, agents, or representatives of Contractor or between the Contractor and the employees, agents, or representatives of Operator, by virtue of this Agreement.

6. **INGRESS AND EGRESS**. Operator shall secure for Contractor rights of ingress and egress to the tract of land on which the work to be performed is located. Operator shall advise Contractor of any limitations or restrictions to ingress and egress, and Contractor, its employees, agents, or subcontractors shall abide by such limitations and restrictions. Should Contractor be denied access to the location for any reason not within the reasonable control of Contractor, Operator shall compensate Contractor for time lost by such denial, in accordance with Exhibit A, Contractor's Rate Schedule.

7. **COMPLIANCE WITH LAWS**. Operator and Contractor each agree to comply with all laws, rules, and regulations applicable to this Agreement or the performance of work hereunder. If either party is required to pay any fine or penalty resulting from the other party's violation of such laws, rules or regulations, the party who committed the direct violation shall immediately reimburse the other for any such payment.

8. **FORCE MAJEURE**. Except for the duty to make payments hereunder when due, and the indemnification provisions under this Agreement, neither Operator nor Contractor shall be responsible to the other for any delay, damage, or failure caused by or occasioned by a Force Majeure Event. As used in this Agreement, "Force Majeure Event" shall mean: Any act of God, act of nature or the elements, terrorism, insurrection, revolution or civil strife,

piracy, civil war or hostile action, labor strikes, acts of public enemies, federal or state laws, rules and regulations of any governmental authorities having jurisdiction over the premises, inability to procure material, equipment, or necessary labor in the open market, acute and unusual labor, material, or equipment shortages, or any other causes (except financial) beyond the control of either party. Delays due to any of the above causes shall not be deemed to be a breach of or failure to perform under this Agreement. Neither Operator nor Contractor shall be required against its will to adjust any labor or other similar dispute except in accordance with applicable law.

9. **INTELLECTUAL PROPERTY**. Contractor retains all intellectual property rights in any property invented or composed in the course of or incident to the performance of Contractor's work required under this Agreement. Operator acquires no right or interest in any such intellectual property, by virtue of this Agreement or the work performed under this Agreement.

10. **INSURANCE**.

a. At all times during the term of this Agreement, Contractor shall, at it's own expense, maintain with an insurance company or companies authorized to do business in the state where the work is to be performed, or through a self-insurance program, insurance coverage of the kind and in the minimum amounts listed in Exhibit B, which Exhibit is attached and incorporated into this Agreement. Contractor's initial compliance with this requirement is evidenced by the Certificate of Insurance issued by Contractor's insurers to Operator, which is attached and incorporated herein as Exhibit C. The amount of insurance required in this Section may be satisfied by the purchase of separate Primary and Umbrella (or Excess) Liability policies which, when combined together, provide the total limits of insurance specified.

b. Upon advance written notice, Contractorshall provide additional amounts or kinds of insurance as may reasonably be deemed necessary by Operator from time to time in response to the ongoing nature of operations and changes in exposure to loss, but only to the extent the insurance is commercially available, and provided Operator pays the cost of said coverage.

c. The above-required insurance shall be maintained by Contractor during the term of this Contract, and shall not be canceled, altered, or amended by Contractor without thirty (30) days advance written notice to Operator. Contractor agrees to have its insurance carrier furnish Operator a certificate or certificates evidencing insurance coverage in accordance with the requirements of this Agreement.

11. **TAXES AND CLAIMS**.

a. Contractor agrees to pay all taxes, licenses, and fees levied or assessedon Contractor incident to the performance of this Agreement by any governmental agency and unemployment compensation insurance, old age benefits, social security, or any other taxes upon the wages of Contractor, its agents, employees, and representatives.

b. Operator agrees to pay all taxes, licenses, and fees levied or assessed on Operator incident to the performance of this Agreement by any governmental agency and unemployment compensation insurance, old age benefits, social security, or any other taxes upon the wages of Operator, its agents, employees, and representatives.

c. Contractor agrees to pay all claims for labor, materials, services and supplies incurred by Contractor and agrees to allow no lien or charge to be fixed upon the rig, the lease, thewell, the land upon which the well was located, or other property of Operator or the party for whom Operator is performing services. Contractor agrees to indemnify, protect, defend, and hold Operator harmless from and against all such claims, charges and liens. If Contractor shall fail or refuse to pay any claims or indebtedness incurred by Contractor in connection with the services provided hereunder, it is agreed that Operator shall have the right to pay any such claims or indebtedness out of money due or to become due to Contractor hereunder. Notwithstanding the foregoing, Operator agrees that it will not pay any such claim or indebtedness as long as same is being actively contested by Contractor and Contractor has taken all actions necessary (including the posting of a bond when appropriate) to protect the property interest of Operator and any other party affected by such claim or indebtedness.

d. Before payments are made by Operator to Contractor, Operator may require Contractor to furnish proof that there are no unsatisfied claims for labor, materials, equipment and supplies, or for injuries to persons or property not covered by insurance.

12. **INDEMNITY**

a. **Contractor agrees to protect, defend, indemnify and hold harmless Operator, its officers, directors, employees or their invitees, and any working interest owner or non operator for whom Operator is obligated to perform services, from and against all claims, demands, and causes of action of every**

kind and character without limit arising out of Contractor's or its subcontractors' performance or non performance of this Agreement, except for such as may be caused by the negligence of Operator, its agents or employees. Contractor's indemnity under this Section shall be without regard to and without any right to contribution from any insurance maintained by Operator. If it is judicially determined that the monetary limits of the insurance required hereunder or of the indemnities voluntarily assumed in this Paragraph (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 indemnitees, 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.

b. **Operator agrees to protect, defend, indemnify and hold harmless Contractor, its officers, directors, employees or their invitees, and any working interest owner or non operator for whom Contractor is obligated to perform services, from and against all claims, demands, and causes of action of every kind and character without limit arising out of Operator's or its subcontractors' performance or non performance of this Master Service Agreement, except for such as may be caused by the negligence of Contractor, its agents or employees. Operator's indemnity under this Section shall be without regard to and without any right to contribution from any insurance maintained by Contractor pursuant to Section 10 above. If it is judicially determined that the monetary limits of insurance required hereunder or of the indemnities voluntarily assumed under this Section (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 indemnitees, 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.**

c. **Operator and Contractor each waive any right to special, indirect and consequential damages against the other party hereto.**

13. **RECORD RETENTION.** Contractor agrees to maintain its books and records reasonably relating to the work performed and invoices issued pursuant to this Agreement for a period of two (2) years following the date the work was performed, and during that time, to make such booksand records available to Operator and its auditors upon their request, during Contractor's regular office hours, provided Operator has provided Contractor with reasonable notice of its request to review said books and records.

14. **TERMINATION OF WORK.** Operator may, upon ten (10) days advance written notice, in its sole discretion, terminate work covered by any work order issued hereunder. In such event, Contractor shall be paid at the applicable rates stipulated in Contractor's Rate Schedule or Bid or as the parties otherwise agree, for services rendered up to the date of such termination.

15. **TERM; CANCELLATION.** This Agreement shall remain in effect until cancelled by either party hereto bygiving the other party ten (10) days written notice. If work then being performed pursuant to this Agreement or any Work Order extends past such ten (10) day period, then the cancellation shall not be effective until that work is completed.

16. **NOTICE.** Unless otherwise specified in this Agreement or any Work Order, any notice required under this Agreement shall be in writing, addressed as follows:

If to Contractor:	If to Operator:
_____	_____
_____	_____
_____	_____
_____	_____
Fax: _____	Fax: _____

17. **CONFIDENTIALITY.** The parties shall hold the terms of this Agreement and any work order issued hereunder confidential, and shall only disclose the same as required by law. Information obtained by Contractor in the conduct of work under this Agreement, including, but not limited to, depth, formations penetrated, the resultsof coring, testing and surveying, shall be considered confidential and shall not be divulged by Contractor or its employees, agents or subcontractors, to any person, firm, or corporation other than Operator's designated representatives.

18. **NO WAIVER.** No waiver by either party of any of the terms, provisions or conditions of this Agreement shall be effective unless the waiver is in writing and signed by an authorized representative of both parties.

19. **ASSIGNMENT.** Neither party shall assign this Agreement, either in whole or in part, without the express prior written consent of the other party hereto. Any such attempted assignment shallbe void.

20. **SEVERABILITY**. In the event any provision of this Agreement is inconsistent with or contrary to any applicable law, rule, or regulation, the provision shall be deemed to be modified to the extent required to comply with the law, rule, or regulation, and this Agreement, as so modified, shall continue in full force and effect.

21. **JURISDICTION; VENUE; WAIVER OF JURY TRIAL.** This Agreement shall be governed, construed, and interpreted in accordance with the laws of the state of Kansas without regard to any choice of law provisions. Any claim or lawsuit arising from or relating to this Agreement shall be filed and maintained in a court of competent jurisdiction in _____ County, Kansas. To the extent allowed by law, the parties each waive their right to a jury trial for any matter arising from or relating to this Agreement.

22. **EXHIBITS.** The following Exhibits are attached hereto and made a part of this Agreement for all purposes:

Exhibit A - Contractor's Rate Schedule
Exhibit B - Insurance Requirements
Exhibit C - Contractor's Certificate(s) of Insurance.

23. **OTHER CONTRACTS.** Unless the parties have expressly agreed otherwise, this Agreement shall not apply to, and shall not alter, modify or supersede any other written Agreement between the parties, whether such other Agreement was entered into before or after the Effective Date.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written. Both parties agree that a single original of this Agreement will be executed.

OPERATOR:	**CONTRACTOR:**
_____	_____
By: _____	By: _____
Printed name: _____	Printed name: _____
Title: _____	Title: _____

EXHIBIT A

To that Master Services Agreement dated _____, between _____ ("Contractor") and _____ ("Operator").

CONTRACTOR'S RATE SCHEDULE ATTACHED.

Contractor's Rate Schedule may be amended from time to time by Contractor, and shall be effective upon Contractor's delivery of the amended Rate Schedule to Operator. The amended Rate Schedule shall not apply to Work Orders that Operator and Contractor agreed to prior to delivery of the amended Rate Schedule.

EXHIBIT B

To that Master Services Agreement dated _____, between _____ ("Contractor") and _____ ("Operator").

CONTRACTOR'S INSURANCE REQUIREMENTS

- Workers Compensation and Employer's Liability Insurance with limits not less than the statutory requirements of applicable state and federal law.
- Comprehensive General Liability Insurance, including contractual liability, with minimum limits of liability for injury, death, or property damage of $100,000 combined single limit per occurrence.
- Automobile Liability Insurance covering owned, hired, and non-owned vehicles used by Contractor, with minimum limits of liability for injury, death, or property damage of $100,000 combined single limit per occurrence.

EXHIBIT C

To that Master Services Agreement dated _____, between _____ ("Contractor") and _____ ("Operator").

CONTRACTOR'S CERTIFICATE OF INSURANCE ATTACHED.

WORK ORDER

Pursuant to that Master Services Agreement dated _____, between _____ ("Contractor") and _____ ("Operator").

Project Start Date _____

Projected Completion Date _____

Location of Work to be Performed: Well or lease name _____

Section _____, Twp. _____, Range _____ Spot Location/Description _____

_____

Description of work to be performed (Please print clearly or type): _____

_____

_____

_____

_____

(If more space is needed, use back of form.)

Project contact information:

Contractor: _____ (___)____-_____
Contact Name Phone Number

Operator: _____ (___)____-_____
Contact Name Phone Number

THIS WORK ORDER IS AGREED TO AND ACCEPTED this _____ day of _____, 20__, by:

_____ _____
"Operator" "Contractor"

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

Please sign and return to Contractor by fax to: (___)____-_____

15-10

Description of work to be performed (cont.)

Testimony of David M. Dayvault
before the House Judiciary Committee
regarding HB 2007, HB 2262 & HB 2228
February 6, 2007

I am David M. Dayvault. I am testifying on behalf of the Kansas Independent Oil & Gas Association (KIOGA) and on behalf of my employer, The Abercrombie Companies. I serve as Chief Financial Officer of Abercrombie Companies which is involved in various phases of the oil & gas business. We operate over 200 oil and gas wells, run a contract drilling company with five active rotary rigs, operate a dirtwork construction company and we are also a motor carrier. The provisions of House bills 2007, 2262 and 2228 would impact our companies negatively in several respects. I would like to comment on those situations.

Indemnification provisions are used in our industry in many instances to define responsibility in cases where liability may be difficult to determine. When a well is drilled the operator of that well typically enters into a contract with a drilling contractor to provide drilling services under a standard form contract developed by the International Association of Drilling Contractors (IADC). The IADC contract establishes responsibility for property damages based on whether or not the well is on a footage or on a daywork basis at the time of the incident. If a well is on footage the well is being drilled at the time and the incident is likely to be the result of an equipment failure which is the contractors problem. If it is on daywork the incident is likely to be the result of downhole conditions which is the operators problem. In fact, the real cause of the incident may never be known as the problem has occurred under the earth's surface. The parties grant the indemnification provisions as an accommodation to avoid litigation time and expense in determining who the negligent party might be and the degree of negligence involved.

Similarly, indemnification provisions are common between operators when a property is transferred from one party to another, as with a sale. These indemnification provisions often relate to environmental damages that might not be discovered at the time of the sale and the timing of the contamination may not be able to be determined. In those instances the buyer assumes the liability and indemnifies the seller against any environmental claims. The buyer has the opportunity to conduct such environmental surveys as would be necessary to satisfy him prior to purchase. Absent the indemnification provisions certain transactions would not occur and others would have their pricing affected.

Often indemnification provisions are used to protect the contracting parties from the claims of each other's employees. In recent years we have seen an increase in what is known as an "action over claim". In certain instances an injured employee of a contractor might seek damages for workers compensation from his employer, the contractor, and damages from liability from the operator alleging unsafe work conditions. In most of these instances the accident would be at a remote location and it is unlikely to find an impartial witness who could testify as to the true conditions at the time. Because of this uncertainty many operators and contractors enter into agreements which indemnify one another for the claims of the respective employees. A reduction in uncertainty lowers the costs of doing business for both parties without reducing any rights of the injured employee.

In recent years most of the insurance carriers offering coverage to our industry have encouraged or insisted operators enter into master service agreements (MSA's) with certain contractors to establish the relationships between the parties. These MSA's typically contain indemnification provisions and may call for one party to name another as additional insured. Should the State enact legislation stating that indemnification provisions are contrary to public policy, this could negatively impact the availability and pricing of insurance.

Some have complained about MSA's saying that they are too one-sided. Others complain that they are complicated and un-uniform. To address these complaints KIOGA has formed a task force containing operators, contractors, insurance executives and attorneys to develop a model form MSA which would be acceptable to contractors and operators. An operator or contractor could adopt it or modify it to meet their particular needs and would not need to analyze every provision once familiar with the form. The task force is nearing the completion of their work and we believe that an industry solution serves us better than legislative action.

In summary, I see indemnification provisions as being a good thing as they establish responsibility by contract rather than through litigation. The relationships between parties have developed through negotiations by using contract language which has been developed over decades. Disturbing those traditional relationships would be detrimental to our industry and would not serve the interests of the State.

Testimony of Jeff Kennedy

Before the House Judiciary Committee regarding House Bill 2007,

House Bill 2262 and House Bill 2228

February 6, 2007

Mr. Chairman, Members of the Committee:

My name is Jeff Kennedy. I am the Managing Partner of Martin, Pringle, Oliver, Wallace & Bauer, a law firm of approximately 40 lawyers with offices in Wichita and Kansas City. We are a full service law firm, practicing in over twenty substantive areas of the law, and my own practice emphasizes oil and gas law and environmental law. I have served as the President of the Kansas Bar Association Oil, Gas and Mineral Law section, and currently serve as an officer of that group. I am also a member of the Kansas Independent Oil and Gas Association ('KIOGA").

Over the past year, a group of KIOGA members have attempted to come up with a model form Master Service Agreement for use by KIOGA members and others. A portion of the focus of this task force has been on indemnity provisions, and an effort to ensure that master service agreements contain indemnity provisions that do not overreach and are fair to the parties to those agreements. To the extent the proposed legislation has in any way attempted to address this issue, I would respectfully submit that allowing parties to negotiate their own contracts, containing provisions that they find fair and reasonable is preferable to a blanket prohibition against certain indemnity provisions.

Indemnity provisions are routinely used in the oil and gas industry. As an example, the drilling contract typically used is one developed by the International Association of Drilling

Contractors and contains very specific indemnity provisions that vary depending upon whether or not the well is on a footage or day work basis at the time of the occurrence. The reason for this is an attempt to allocate liability to the party who has control over the drilling activities at the time of the occurrence. In my experience, and based upon some research that I did approximately a year ago, there has been very little litigation over these provisions which have been widely accepted in the oil and gas producing states, including Kansas. The proposed legislation would undo indemnity provisions in drilling contracts that have developed over time and seem to be working well in practice.

Another example can be found in the model form operating agreement used in the oil and gas industry. Under that form agreement, the operator is only at risk for removal in situations where it has been grossly negligent or engaged in willful misconduct. Non-routine operational activities on oil and gas leases are plagued with uncertainty. It is essential that oil and gas operators have some protection against routine mistakes, which could be characterized as negligence, so that they are not continually at risk for losing operations of a particular lease, which in many cases they have originated as a prospect and exploited to result in oil and/or gas production.

Another example that I would urge you to carefully consider as part of your deliberation on this legislation is the situation of property transfers. I see this in both the sale of oil and gas leases and other real property transactions. The typical scenario in a sale transaction where there is not an obvious environmental problem that needs to be addressed, is for the buyer to conduct its own due diligence, following which it agrees to fully assume any and all environmental liabilities that affect the property following the closing of the transaction. It may well be that the prior owner's employees have negligently allowed some pollutant to escape into the property

which may not be discovered during the due diligence period. If the same type of business is conducted after the closing, the buyer's employees could make the same mistake. Under this legislation, an alleged act of negligence would open the seller to additional claims, preventing the certainty otherwise associated with the transaction. That litigation will be expensive and complicated because of the need for environmental consultants to render opinions about the likely cause of the contamination and in my view does nothing to promote property transactions.

Finally, I personally believe, and I think this opinion would be shared by many lawyers who practice in Kansas, that the freedom to contract is an extremely important concept. If I truly thought, based upon my experience, that there were real problems that this legislation would address, I would not be here today. In my view, the better approach is to allow parties to enter into contracts that address the specific circumstance of their situation or transaction, without the concern that this legislation may ultimately render a provision of their contract unenforceable. Indemnification provisions, when properly utilized and negotiated, are an important tool to allocate risk. Limiting the use of those provisions does not further any public policy that I am aware of at this time.

Thank you for allowing me to appear today.

BEFORE THE KANSAS HOUSE JUDICIARY COMMITTEE
Rep. Michael R. O'Neal, Chairman

TESTIMONY of WYATT HOCH
ON HOUSE BILLS 2228, 2262, and 2007
Presented on behalf of the Coalition to Preserve Freedom of Contract
February 6, 2007

MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

I am Wyatt Hoch, a partner with the law firm Foulston Seifkin LLP in Wichita, Kansas. My law practice includes more than twenty years of experience with the construction industry, including the drafting of construction contracts and trial of claims and disputes arising from the construction industry. I am here today to offer testimony on behalf of a coalition of companies that employ several thousand Kansans and that have deep concerns with House Bills 2228, 2262, and 2007.

These bills contain severe restrictions on two kinds of risk allocation terms, either or both of which are frequently included in business contracts. The first, an indemnity provision, allocates to the contractor the risk of third party claims (liability) caused by the contractor's operations. Financial responsibility for any negligence of the indemnified party is allocated ahead of time, via the indemnity provision, to the indemnifying party. The breadth of risk allocation varies according to the degree of risk that the parties decide each will bear.

The second risk allocation mechanism, an "additional insured" provision, allows the shipper or premises owner to be named as an additional insured party under the liability insurance policy maintained by the motor carrier or the contractor.

Indemnity and insurance provisions are common and accepted commercial contract terms, and are widely used in standard form mortgage documents, commercial real estate leases, and franchise agreements. Contracting parties in Kansas should continue to be allowed to allocate risks among themselves to fit the particular transaction. These bills would impair parties' ability to do so.

Indemnity is a widely-accepted risk allocation mechanism in all forms of business contracts.

House Bill 2262 would prohibit the allocation of risk by indemnity provisions in motor carrier transport contracts. House Bill 2007 would extend that prohibition to all contracts subject to Kansas law, and would prohibit the sale in Kansas of all forms of liability insurance policies.

The Kansas appellate courts have long recognized the validity of indemnity provisions as consistent with (as opposed to against) public policy. Although some states have restricted the enforceability of risk-allocating indemnity provisions, this restriction frequently has taken the form of describing in detail the specific language that a contract must include in order for the indemnity obligation to be enforceable. House Bills 2262 and 2007 permit indemnity only for the contractor's allocable fault – which is no risk allocation at all.

These long-standing contract provisions make perfect business sense because they:

- protect a facility owner from contractor-employee liability claims, which are indirectly encouraged by the workers' compensation exclusive remedy. There is a strong incentive for an injured employee facing a worker's comp bar to allege negligence (whether or not any existed) on the part of parties other than the employer. Contractual indemnification allocates the risk of an employee lawsuit by an employee to the employer, thus promoting worksite safety practices by the employer.
- protect the indemnified party from having to pay a disproportionate and unfair share of damages for something that, almost always, it didn't cause.
- avoid the cost of legal wrangling over the percentage of fault that rests with each party in the absence of an indemnity provision.
- recognize that the law sets strict liability as the standard in many settings. Freely contracting parties ought to be able to adopt the same allocation of liability if they so choose.

Additional-insured endorsements simply insure the parties' allocation of risk.

House Bills 2228, 2262, and 2007 would all prohibit a contracting party from purchasing an "additional insured" endorsement to its liability insurance policy. The insurance market developed "additional insured" coverage (extending coverage to someone other than the policyholder) in response to an identified need in the marketplace.

An additional insured endorsement operates in much the same way as an indemnity provision with three key differences. First, the cost of the additional insured provision is known and can be included in the cost of the contract. The contracting party can buy the coverage either on a blanket basis for an entire year's worth of contracts, or on an individual contract basis. The cost of that additional premium can be included in any proposal, bid or contract. Second, the ultimate cost of paying for the liability will fall on an insurer with sophisticated underwriting practices who has priced the coverage based upon its assessment of the risk. Third, additional insured coverage comes with a duty to defend which is broader than typical indemnity coverage. This is especially important

for small businesses and non-profits which may not be able to afford the costs of liability litigation.

Some of the arguments used against indemnity obligations simply do not and cannot apply to additional insured endorsements. Because the premium cost is known up front, there is no concern that identifying another as an additional insured is a bet-the-company decision. Because an insurance company accepts the exposure, the issue is not whether risk will be allocated but to whom. Businesses will obtain liability insurance for liability regardless of whether they have undertaken an obligation to indemnify another. Whether they obtain that insurance as first parties to a policy or as an additional insured on another's policy, the ultimate liability will be paid by a company in the business of managing risk. The question is just which insurance company pays, and the answer to that question does not make a difference for purposes of PUBLIC policy. *This point explains why practically NO states have outlawed additional insured provisions that cover the negligence of the additional insured.*

Finally, a prohibition against additional insured insurance would actually *raise* rather than eliminate a barrier to entry or continuing business for the small, undercapitalized contractor or motor carrier. The inability to allocate risk arising from the contractor/carrier's operations will be reflected in either (i) a reduction in the amount the owner is willing to pay for the service, because the owner must allocate a part of its transaction cost to the risk of problems arising from the contractor's operations; or (ii) the owner's unwillingness to hire a contractor or carrier with poor safety record, uncertain financial wherewithal, or both – opting instead for contracts with out-of-state (and therefore not subject to the Kansas prohibition) contractors and carriers who can and will include the additional insured requirement in their insurance portfolio.

Indemnity and additional insured contract terms *promote*, not violate, public policy.

Contracting parties in Kansas should continue to be allowed to allocate risks among themselves to fit a particular transaction. These bills would impair parties' ability to do so. Many other contractual provisions, like limits on liability or limits on consequential damages, have the same effect of allocating risk and liability by contract. Risk allocation is a legitimate and often necessary part of the package of services that a shipper or premises owner needs to obtain in order for a transaction to make sense from a business standpoint.

Freedom of contract dictates preserving flexibility for arrangements that real-world business circumstances have produced. This is not a business-to-consumer contract negotiation setting where "take-it-or-leave-it" contracts (contracts of adhesion) might sometimes leave the retail customer in a no-win situation. Rather, these terms arise in the context of *agreements* negotiated between sophisticated business entities that are fully

capable of protecting their interests. Businesses are always free to decline contracts that contain commercial terms (including risk allocation and insurance requirements) they do not want to accept or to negotiate alternative terms.

When one considers the kinds of contracts that *do* violate public policy, it is clear that these contract terms are nothing like gambling contracts, contracts in restraint of trade, or contracts to perform an illegal act. Even when compared to a covenant not to compete, there is no arguable similar harm to third parties that arises from enforcement of indemnity provisions or additional insured endorsements. Rather, these are standard contract provisions that businesses have for decades routinely included in all kinds of contracts.

Conclusion

In summary, government should not take sides in a non-consumer business transaction. The allocation of risk in a business transaction is not a fairness issue, but rather a commercial issue. At most, the legislature should pass a law only prohibiting indemnity provisions from covering the other party's *sole* negligence and/or require certain clear language in order for risk-allocating indemnity provisions to be upheld.

Less than a handful of states have adopted measures restricting additional insured endorsement provisions, and Kansas should not go down that path.

Thank you very much for your time and attention this afternoon.

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Representative Mike O'Neal, Chairman
Members of the House Judiciary Committee

From: Callie Denton Hartle
Kansas Trial Lawyers Association

Date: February 6, 2007

RE: HB 2007, HB 2228, HB 2262 Indemnification

I appear today on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who serve Kansans who are seeking justice. I appreciate the opportunity to provide testimony on HB 2007, HB 2228, HB 2262, relating to indemnification.

KTLA's position on the bills is neutral. We support the proposition that those that cause harm or injury through misconduct or negligence must be held accountable. HB 2007, HB 2228, and HB 2262 appear to embrace a corollary principle, i.e. that those that cause harm or injury must not be allowed to evade accountability to the detriment of others. If the committee finds that HB 2007, HB 2228, and HB 2262 would increase accountability of all parties for their own acts, we believe the passage of these bills is a positive step in the right direction.

KTLA suggests a technical amendment. In HB 2007, in section 1 (a) (3) at lines 33-34, the term "indemnitee" is defined. In our opinion, this definition is superfluous and could lead to confusion. We believe that the term "indemnitee" does not need additional definition beyond its common usage and suggest deletion of the definition of the term.

Thank you for the opportunity to provide you with our testimony.

Terry Humphrey, Executive Director

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House Judiciary
Date 2-6-07
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