

# MICROFILM DIVIDER

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DESCRIPTION

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Demetrius H. Hall  
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10/3/03  
Date

2003 HOUSE JUDICIARY

HB 1324

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Deanna Hallworth  
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10/3/03  
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1324

House Judiciary Committee

Conference Committee

Hearing Date 2-10-03

| Tape Number                                | Side A | Side B | Meter # |
|--|--------|--------|---------|
| 2  | x      |        | 5.8-end |
| 2  |        | x      | 0-10    |
| Committee Clerk Signature <i>D Penrose</i> |        |        |         |

**Minutes:** 13 members present:

**Chairman DeKrey:** We will open the hearing on HB 1324.

**Paul Sanderson, attorney, representing the ND Domestic Insurance Companies:** Support (see attached testimony and amendments).

**Rep. Eckre:** Is North Dakota, are we hanging out there, are we the only state that would want a system like this, are there others?

**Mr. Sanderson:** There may be others, it's more in the way the ND courts have interpreted our statute and between the statute and the insurance policies they look at.

**Rep. Eckre:** So if you're not sure, it could be set up differently in different states.

**Mr. Sanderson:** I didn't do an exhaustive search of all 50 states. I looked at SD and MN have addressed it.

**Rep. Delmore:** Would not this bill set it up so that unless it was bad faith, there would be no attorney fees awarded.

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House Judiciary Committee  
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**Mr. Sanderson:** That is what we are suggesting. We argue that it is the fundamental rule behind litigation in the state. When you have litigation concerning an issue, it is not bad faith for an insurance company to press their rights, if they believe they have a valid claim, it shouldn't be bad faith, that they try to establish their rights and move for a declaratory judgment action. We don't believe it is bad faith for an insurance company to press their rights.

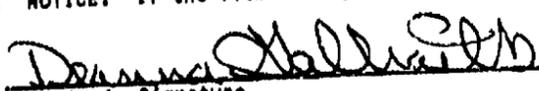
**Rep. Delmore:** I think this is creating a new playing field, and I'm not so sure if the only way there can be awarded to me, is by proving bad faith in court is necessarily the fairest way to go for the citizens of our state either.

**Mr. Sanderson:** If I can get back to 32-23-06, that the legislative assembly amended in 1983, was to encourage that we go to declaratory judgment action and now the insurance companies don't even want to bring declaratory judgment. They are just going to sit back and wait until we take it to trial, because they know there is a chance they're going to get stuck with attorney's fees, the way the courts have interpreted it, is the opposite of what we believe the legislative intent behind this declaratory judgment meant.

**Rep. Klemm:** One question is that the declaratory judgment actions, it makes it sound here like all we're talking about is insurance companies interpreting insurance policies, but actually the declaratory judgment actions statute is much broader than just insurance policies as it relates to most any kind of interpretation of any kind of action.

**Mr. Sanderson:** We are here representing the insurance companies regarding the problems we have. Declaratory judgments are used in a wide array of cases.

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**Rep. Klemin:** In essence, what you are proposing here is even though you have this issue with insurance companies and insurance policies, what you are doing here is providing for allocating costs and attorney fees for all kinds of declaratory judgment actions, not just insurance actions.

**Mr. Sanderson:** We believe it is our position that that is the fundamental rule and the ND Supreme Court said numerous times, the fundamental rule is that each side bears their own attorneys costs.

**Rep. Klemin:** Is the same rule going to apply in the insurance declaratory judgment actions if the insured gets sued.

**Mr. Sanderson:** The problem is in that case, should the insurance company bring declaratory judgment to establish whether there is coverage or not, and the other party doesn't show, and the insurance company wins, they still pay their own attorneys fees and they never get awarded their attorneys fees as it is. It is a one way loser pay.

**Rep. Klemin:** If an insurance company brings a declaratory judgment action, you have to do that by suing the insured; and if the insured doesn't show up, will he have to pay the attorneys fees and court costs.

**Mr. Sanderson:** No. This bill is intended to take away any award of attorneys fees by the court.

**Rep. Klemin:** The Sigman case, the policy was interpreting language that the insured had a duty to assist the insurance policy with respect to the claim and said there was some language in the policy requiring the insured to have this duty. Why don't you just amend your insurance policy?

**Mr. Sanderson:** If they would have just looked at the insurance policy in that case, and the reason those provisions are in, is to deal with subrogation claims. If they just relied on that, we

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could have amended the policy, but the problem is that they started relying on 32-23-08, that's where they are relying on that, on supplemental relief. We're not trying to amend that only because we believe it is easier to amend 32-23-10.

**Rep. Klemm:** You are dealing with another section of the statute. You don't want to amend that one too.

**Mr. Sanderson:** It's all a part of the declaratory judgment act. It will be more specific, using the rules of statutory interpretation. We feel that 32-23-10 is clearer.

**Chairman DeKrey:** Thank you. Any further testimony in support.

**Rob Hovland, Chairman, ND Domestic Insurers' Association:** Support (see attached testimony).

**Rep. Eckre:** You say that ND is the least attractive state to write insurance in, and we are a land of extremes; because of floods, drought, etc. From the 1880-1940, there were lots of floods, blizzards, lot of drought in those times. From the 1950-1980's, ND was very stable, and there weren't a lot of claims, the insurance companies did fairly well in North Dakota. Now in the 1990's again, we are different weather patterns, floods, drought, I know it goes back and forth, but things were attractive in ND too.

**Mr. Hovland:** We had profitable years, but the profitable years were nothing compared to the loss years. When you look at what the homeowner's policy premium was during the 50's through the 80's, there wasn't much money made compared to the losses of the 90's. It is no way comparable. They do go in cycles. The companies look at what the future holds, the sparse population and the economy; there is still an outward bound migration, things are still getting worse and there isn't that much money to be made in the state to begin with.

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**Rep. Eckre:** I have no problem with the attorneys fees part, but I just wanted to state that we had 35 years of extremely stable weather, and we were fortunate, and things may not be that way.

**Rep. Bernstein:** Did I understand you to say that insurance companies do not give flood insurance.

**Mr. Hovland:** Yes.

**Rep. Bernstein:** Where do you get flood insurance.

**Mr. Hovland:** It is a federal program, no insurance company will insure against floods.

**Rep. Delmore:** We get a number of bills brought in because of one case, and maybe I'm minimalizing, but it seems to me that's where this bill is coming from. Did the companies really leave because of the attorneys fees they had to pay or because of other losses.

**Mr. Hovland:** First of all, if there is bad faith, the insurance company does pay the attorneys fees. I know we can't control the weather, but this bill will make it more appealing to insurance companies to come to the state.

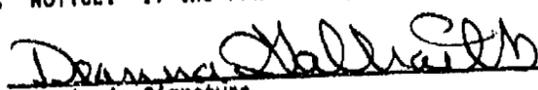
**Rep. Delmore:** As a consumer, I can't control the weather either; how hard is it to prove bad faith in court when you take on a large insurance company.

**Mr. Hovland:** An individual can sue the insurance company, and all they have to say is "do you think that the company acted unreasonably". I can tell you that companies are scared to death of punitive damages. It is a tough call to go in even when you are 90% sure you are going to win, simply because that hammer is held over our head.

**Rep. Delmore:** Are you arguing against the need for this bill.

**Mr. Hovland:** No, I'm not.

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**Rep. Klemm:** The statute you are amending relates to costs, and we have had a number of discussions in this committee in several sessions on costs and disbursements. Costs are something different than attorney fees. Costs are set out at length in statute as what party can them and when and what kinds of costs are recoverable and so forth. Now what you've done in this statute, and you are concerned with attorney fees. But what you've done here is taking the old rules relating to costs and put them in here too. And that would reverse all of the laws and all of the statutes we have now. Because you are saying that each party shall bear its own costs and that is not talking about the attorneys fees at all, just talking about costs. You're changing all of these other statutes we have on the award of costs to a bear your own cost system when it comes to declaratory judgment actions.

**Mr. Hovland:** The intent is not to change all the laws relating to costs as you have mentioned. The reason this was done, the court said that attorneys fees were part of these costs statute. If there is a different way to amend the bill, we would be amenable to that.

**Rep. Klemm:** The Supreme Court was not talking about section 10, they were talking about section 8, and you are not amending section 8, you are amending section 10. Does the Supreme Court ever talk about section 10.

**Mr. Hovland:** We looked at doing a whole separate statute, and the merit of the separate statute was that you could just deal with that particular ruling. We felt that putting into a specific statute rather than a general one, we would be identifying the legislative intent to not include attorneys fees as part of these awards. That's why it was done this way, it is their interpretation. The only time this becomes an issue, is in insurance companies declaratory judgment actions.

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**Rep. Klemm:** The bill, however, is much broader than that because it covers all kinds of declaratory judgment actions including wills, and anything else, and it seems to reverse the rule on attorneys fees in frivolous cases, because we already have a statute saying that the court can award attorneys fees to the prevailing party in a frivolous case. Now if that case was a declaratory judgment action, the court could not do that in this bill. Is that correct?

**Mr. Hovland:** I disagree with your interpretation. First of all, this is specific to declaratory action cases where each side bears their own costs, this is the rule right now. And I don't think that would effect cases. Because Rule 11 is a specific statute as opposed to the general one here where we are saying that generally in a declaratory action attorneys fees are not awarded.

**Rep. Klemm:** My interpretation of this is that we are talking about anytime there is a declaratory judgment action, no matter what the subject matter is, that each party shall bear its own costs and attorney fees.

**Mr. Hovland:** Would you be more comfortable if the exceptions were carved into this bill. Would you be more comfortable if it applied only to insurance disputes, specifically mentioned in there.

**Rep. Klemm:** I don't know what I would be comfortable with, but really it sounds like you are here only on insurance coverage declaratory judgment actions and only with respect to the award of attorney fees.

**Mr. Hovland:** Correct.

**Rep. Klemm:** What you've done in this bill, is to apply it to all kinds of declaratory judgment actions and also to include the issue on costs.

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**Mr. Hovland:** I think costs could be removed, but I don't think we need to make any change to the declaratory part, because the only time attorneys fees are awarded is in insurance company disputes.

**Rep. Klemin:** But this section in the original law only deals with costs, so if we take costs out of this, we're going to have to put it back someplace else.

**Mr. Hovland:** Which would be in the section 32-23-08.

**Rep. Klemin:** Which deals with supplemental relief.

**Mr. Hovland:** Right.

**Rep. Klemin:** Which is why I previously asked you how come you weren't amending section 08, which is where your concern is.

**Mr. Hovland:** We could have done that, or maybe the answer was to have a separate statute, but I really think the exception has been carved out, this deals with it. Removing the costs part of that, would not be a big deal and we wouldn't have a problem with that, just take the word, costs or even put that into section 32-23-08. If there is a better way to do that, that would be okay.

**Chairman DeKrey:** Thank you. Anyone else wishing to testify in support of 1324. Any testimony in opposition to HB 1324.

**Paula Grosinger, Director of the ND Trial Lawyers Association:** Opposed. I take exception to the term of rogue juries. It is extremely hard to prove. Also it is very hard to prove "bad faith".

**Rod Pagel, lawyer from the ND Trial Lawyers Association:** Opposed. Declaratory judgment actions are one of a needs by which citizens of this state can press their rights against their insurance carriers when they have insurance coverage; especially insurance coverage on smaller

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Hearing Date 2-10-03

items. By changing this law, you are eliminating the rights of the citizens of this state to bring those claims and to press their rights. I don't know of any citizen of this state, is going to pay an attorney \$6,000 to recover \$5,000 on a property damage loss. That insurance company should have been paying that under their insurance contract. There is no reason for insurance companies to deny coverage in some of these cases. There is no case law in North Dakota indicating that ND has adopted a "one way loser pay system". There is no law, no court case that I'm aware of, that indicated that ND has adopted a "one way loser pay system". That is the insurance companies interpretation. He talked about the losses the insurance companies have. I certainly don't disagree or dispute that, but we are all aware that the vast majority of those losses were from a weather pattern, and not because they are paying attorneys fees and denying coverage in declaratory judgment actions. Additionally, Mr. Hovland indicated that this may be a mild form of tort reform. I think this is tort reform. They are trying to change the rights available to the citizens of the state. You have a lot of small claims, it is impractical to have to pay attorney fees in small claims cases. On the subject of "bad faith", you have to show that the insurance company has a history of bad faith. Let's not take away alternatives for the citizen, they can get another carrier if the premiums are too high. The insurance company needs to make contracts less vague.

**Chairman DeKrey:** I know sometimes attorney take cases on a contingency fee basis, will this change the dynamic if this bill passes.

**Mr. Pagel:** I don't handle contract cases on a contingency basis, I take them on an hourly basis.

**Rep. Boehning:** Would the grandpa have had to pay the attorneys fees.

**Mr. Pagel:** Yes. He would have had to pay my attorneys fees.

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**Chairman DeKrey:** Thank you. Any further testimony in opposition? We will close the hearing.

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1324

House Judiciary Committee

Conference Committee

Hearing Date 2-11-03

| Tape Number                                | Side A | Side B | Meter #   |
|--|--------|--------|-----------|
| 3  | xx     |        | 16.9-28.4 |
|  |        |        |           |
|  |        |        |           |
| Committee Clerk Signature <i>D Penrose</i> |        |        |           |

**Minutes:** 13 members present.

**Chairman DeKrey:** What are the committee's wishes in regard to HB 1324.

**Rep. Maragos:** I move the amendment 38287.0101.

**Rep. Kingsbury:** Seconded.

Voice vote: Carried.

**Rep. Klemin:** I move a Do Pass as Amended.

**Rep. Maragos:** Seconded.

**6 YES 7 NO 0 ABSENT DO PASS AS AMENDED FAILED**

**Rep. Kretschmar:** I move a Do Not Pass as amended.

**Rep. Onstad:** Seconded.

**9 YES 4 NO 0 ABSENT DO NOT PASS AS AMENDED CARRIED**

**CARRIER: Rep. Kretschmar**

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10/3/03  
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38287.0101  
Title.0200

Prepared by the Legislative Council staff for  
Representative Klemin  
February 11, 2003

VK  
2/12/03

HOUSE AMENDMENTS TO HOUSE BILL NO. 1324 JUD 2-12-03

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-23 of the North Dakota Century Code, relating to allocation among parties of costs in declaratory judgments with respect to insurance policies.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 32-23 of the North Dakota Century Code is created and enacted as follows:

**Determination of coverage under insurance policy.** In a declaratory judgment action to determine coverage under an insurance policy, each party, including insureds and insurers, shall bear that party's own attorney's fees unless the court determines that contract language in the insurance policy provides coverage for attorney's fees, the insurer has acted unreasonably or unfairly in disputing coverage or a claim, or the insurer acted in bad faith."

Renumber accordingly

Page No. 1

38287.0101

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Date: 2/11/03  
 Roll Call Vote #: 1

**2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 1324**

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass As Amended

Motion Made By Rep. Klemm Seconded By Rep. Maragos

| Representatives       | Yes | No | Representatives | Yes | No |
|-----------------------|-----|----|-----------------|-----|----|
| Chairman DeKrey       | ✓   |    | Rep. Delmore    |     | ✓  |
| Vice Chairman Maragos | ✓   |    | Rep. Eckre      |     | ✓  |
| Rep. Bernstein        |     | ✓  | Rep. Onstad     |     | ✓  |
| Rep. Boehning         | ✓   |    |                 |     |    |
| Rep. Galvin           | ✓   |    |                 |     |    |
| Rep. Grande           |     | ✓  |                 |     |    |
| Rep. Kingsbury        | ✓   |    |                 |     |    |
| Rep. Klemm            | ✓   |    |                 |     |    |
| Rep. Kretschmar       |     | ✓  |                 |     |    |
| Rep. Wrangham         |     | ✓  |                 |     |    |
|                       |     |    |                 |     |    |
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Total (Yes) 6 No 7

Absent 0

Floor Assignment \_\_\_\_\_

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

*Failed*

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*Dorinda Hallworth* Operator's Signature 10/3/03 Date

Date: 3/11/03  
Roll Call Vote #: 2

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1324

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number 38287.0101 .0200

Action Taken Do Not Pass as Amended.

Motion Made By Rep. Kretschmar Seconded By Rep. Onstad

| Representatives       | Yes | No | Representatives | Yes | No |
|-----------------------|-----|----|-----------------|-----|----|
| Chairman DeKrey       |     | ✓  | Rep. Delmore    | ✓   |    |
| Vice Chairman Maragos | ✓   |    | Rep. Eckre      | ✓   |    |
| Rep. Bernstein        | ✓   |    | Rep. Onstad     | ✓   |    |
| Rep. Boehning         |     | ✓  |                 |     |    |
| Rep. Galvin           |     | ✓  |                 |     |    |
| Rep. Grande           | ✓   |    |                 |     |    |
| Rep. Kingsbury        | ✓   |    |                 |     |    |
| Rep. Klemin           |     | ✓  |                 |     |    |
| Rep. Kretschmar       | ✓   |    |                 |     |    |
| Rep. Wrangham         | ✓   |    |                 |     |    |
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Total (Yes) 9 No 4

Absent 0

Floor Assignment Rep. Kretschmar

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

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Deanna Hallworth 10/3/03  
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REPORT OF STANDING COMMITTEE (410)  
February 12, 2003 4:36 p.m.

Module No: HR-27-2500  
Carrier: Kretschmar  
Insert LC: 38287.0101 Title: .0200

**REPORT OF STANDING COMMITTEE**

**HB 1324: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (9 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1324 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-23 of the North Dakota Century Code, relating to allocation among parties of costs in declaratory judgments with respect to insurance policies.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 32-23 of the North Dakota Century Code is created and enacted as follows:

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Renumber accordingly

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10/3/03  
Date

2003 TESTIMONY

HB 1324

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10/3/03  
Date

## TESTIMONY HB 1324

My name is Paul Sanderson. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies and other property and casualty insurers, including State Farm and American Family Insurance in support of this bill.

House Bill 1324 amends North Dakota Century Code section 32-23-10 to ensure that each party bears its own costs and attorneys' fees in a declaratory judgment action.

In North Dakota, the fundamental rule is that each party to a lawsuit bears their own attorneys' fees. While this is a fundamental principle of our judicial system, North Dakota courts have carved out an exception in declaratory judgment actions, in particular declaratory judgment actions involving insurance disputes.

In State Farm v. Sigman, 508 N.W.2d 323 (N.D. 1993), State Farm brought a declaratory judgment action against its insured to determine whether the insured's homeowner's policy covered injuries from a fight. State Farm settled the case with the third party for injuries from the fight, but faced a claim from the insured for attorneys' fees for the declaratory judgment action. Id. A majority of the Court determined State Farm was required to pay the insured's attorneys' fees in the declaratory judgment action under N.D.C.C. § 32-23-08. Of particular importance in the State Farm v. Sigman opinion was Chief Justice Vande Waile's dissenting opinion. The Chief Justice recognized the Legislature's intent in amending N.D.C.C. § 32-23-06 in 1983 to require insurance coverage declaratory judgments was to encourage insurers and insureds to settle their coverage disputes with declaratory judgment actions instead of long,

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Paul Sanderson  
Operator's Signature

10/3/03  
Date

expensive legal actions. He recognized the Supreme Court's opinion would have an opposite result.

The Supreme Court's decision in Sigman has resulted in North Dakota adopting a fundamentally unfair "One-Way Loser Pay" system. Under the current system as applied by our courts, if either party seeks a declaratory judgment action to determine coverage, and the court finds coverage exists, the insured will recover attorneys' fees. However, if the court finds coverage doesn't exist, there is no award of attorneys' fees to the insurer, even if the action was brought by the insured.

The problem recently came to a head recently in the case of Western National Insurance Co. v. UND, 643 N.W.2d 4 (N.D. 2002). After finding a way to construe an unambiguous insurance policy against Western National, the Court relied on the rationale of Sigman to award \$118,000 in attorneys' fees to UND. In its opinion the Court noted the Legislature has not amended the declaratory judgment statutes since the Sigman decision, so therefore they concluded the Legislative intent supports the current declaratory judgment system. Id. The Insurance Companies are before you today, in response to the Supreme Court's invitation, to amend the declaratory judgment statute to prevent the continued misapplication of attorneys' fees in declaratory judgment actions.

Our declaratory judgment chapter, N.D.C.C. Ch. 32-23, was adopted by the Legislative Assembly from the Uniform Declaratory Judgment Act. A look at our neighboring states who also adopted the Uniform Act shows how our courts have misapplied attorneys' fees in declaratory judgments. In South Dakota, before a trial court can award attorneys' fees in a declaratory judgment action, it must find the insurance company refused coverage and the refusal was in bad faith. See North Star

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Mut. Ins. Co. v. Kneen, 484 N.W.2d 908 (S.D. 1992); Tri-State Insurance Co. of Minnesota v. Bollinger, 476 N.W.2d 697, 702 (S.D.1991). The insurance companies do not contend this bill in any way limits a party's rights to recover attorneys' fees if there was a showing of bad faith. In instances of bad faith by the insurer, the insured would still be entitled to attorney's fees.

In Minnesota, the courts have determined there can be no award of attorneys' fees in first-party declaratory judgment actions between an insurer and an insured to determine coverage. See Garrick v. Northland Ins. Co., 469 N.W.2d 709 (Minn. 1991); see also Wood Goods Galore v. Reinsurance Ass'n, 478 N.W.2d 205 (Minn. App. 1991); Empire Fire and Marine Ins. V. Carlson, 476 N.W.2d 666 (Minn. App. 1991). The Minnesota courts' opinions that there should be no award of attorneys' fees in first-party declaratory judgment actions is based on the same statutes we have here in North Dakota.

I encourage you to take a minute to contemplate how fundamentally unfair North Dakota's "One-way Loser Pay" system is currently being applied. There are no attorneys' fees being awarded if the insurer prevails in declaratory judgment action against the insured. The North Dakota Supreme Court has said it is not bad faith for an insurer to deny coverage if a reasonable basis exists for the denial. See Fetch v. Qualm, 623 N.W.2d 357 (N.D. 2001). This bill will help return North Dakota to a legal system where each party to a lawsuit will bear their own attorneys' fees, and remove the exception that applies just to insurance companies.

I urge a Do Pass on HB 1324.

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*Sanderson*

PROPOSED AMENDMENTS TO HB 1324

Page 1, line 8, remove "and shall equally share in the fees and expenses of"

Page 1, line 9, remove "the hearing"

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*Dorinda Hallworth*  
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TESTIMONY FOR HOUSE BILL 1324

My name is Rob Hovland. I am currently serving as Chairman of the North Dakota Domestic Insurers' Association, which is comprised of 10 insurance companies that have a home office in North Dakota. Five of the domestic companies write property and casualty insurance, including my employer, Center Mutual Insurance Company. We support House Bill 1324.

The North Dakota property and casualty industry has sustained enormous losses over the past ten years. For example, from 1991-1995, the industry had a 151% loss ratio in homeowners' insurance – meaning for every dollar in premium collected, \$1.51 in losses and expenses were incurred. From 1995-2000, the loss ratio was approximately 175%. In 2001, the loss ratio was 340%. In the last 10 years, while the results are not as dramatic as homeowners insurance, auto insurance has also lost money. As a result, several companies have quit writing insurance in our state, some companies have discontinued writing certain lines of insurance, and probably all companies have significantly tightened their underwriting guidelines. A "hard market" has resulted – not from the perspective of insurance companies, but from the consumers' standpoint. Rates have increased dramatically, and in some areas, availability has become an issue.

To put this in perspective, so many insurance companies have left our state or quit writing insurance, that at the urging of the Insurance Commissioner's office, the House recently passed a Bill that requires companies to notify the Insurance Commissioner before they leave or quit. In Senate Bill 2251, the Commissioner's office is asking the Legislature to give them the power to force companies to

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Rob Hovland  
Operator's Signature

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involuntarily write insurance if the property and casualty market deteriorates further, and insurance is no longer reasonably available. These Bills show that serious problems in the North Dakota market exist.

Unfortunately, North Dakota is one of the least attractive states in which to write insurance. A sparse population spread out over a large land mass, an economy that has struggled for years, and several years of losing money have all created a negative atmosphere in which to write insurance.

The North Dakota Domestic Insurers have put extensive effort into identifying problem areas, and put together a package of legislation intended to make our state a more attractive place to write insurance, and have also attempted to find alternatives to premium increases. House Bill 1324 is one of the Bills we are proposing.

In 1993, the North Dakota Supreme Court took a leap in adopting a one-way loser pay system for declaratory actions. They based their decision on two theories – that the common language in insurance contracts provides coverage, and N.D.C.C. 32-23-08 also supports it. There is nothing in the legislative history supporting the Court's interpretation of 32-23-08, but last year, the Court wrote,

“The Legislature has not amended N.D.C.C. 32-23-08 since this Court's 1993 decision in Sigman, and the Legislature's acquiescence and failure to amend the statute is evidence the Sigman interpretation of that statute is in accordance with legislative intent.”

The Supreme Court's interpretation of the statute is contrary to what most other states follow, it is very expensive to North Dakota's consumers, and oftentimes causes absurd results.

A good example of the problem is in the recently decided case of Western

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National Mutual Insurance Company vs. UND. In 1997, a major flood occurred in Grand Forks, and all of Grand Forks east of I29 was ordered evacuated, including the UND campus. As a result of the flood, the lift stations serving UND were shut down, and as a natural consequence of shutting them down, water entered UND buildings through the sewer system and caused significant damage. UND had purchased sewer backup coverage for some buildings, but chose not to purchase it for the buildings that were the subject of the lawsuit. The Western National Mutual policy provided coverage for "covered losses" but had an exclusion that excluded coverage for,

"loss or damage caused directly or indirectly by ... flood, surface water, ... regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

The case was submitted to a Grand Forks jury, which awarded a huge verdict, and the case was appealed to the North Dakota Supreme Court. Two North Dakota Federal Courts had already ruled that exclusions like Western National's were enforceable, and denied Grand Forks residents coverage for damages that occurred as a result of the flood. Several other states' Supreme Courts had ruled on this issue, and all of them had determined that exclusions like Western National's were enforceable. (It could be argued that Washington's Supreme Court has implied a different result). It should also be noted that the exclusion in Western National's policy had never been determined to be unenforceable prior to the UND case. However, in spite of all of this precedent, the North Dakota

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Supreme Court upheld the verdict, and ruled that exclusions like Western National's were unenforceable. Western National was required to pay over \$100,000 for UND's attorneys' fees.

It is important to know what will not be changed by passing House Bill 1324. House Bill 1324 only addresses N.D.C.C. 32-23-08, and will not affect any contract language that provides coverage for attorneys' fees. More importantly, this Bill does not affect situations where insurance companies act unreasonably or unfairly. Insurance companies will continue to be liable for costs, attorneys' fees, and possibly even punitive damages if a judge or jury determines the company acted unreasonably or unfairly in disputing coverage or a claim. House Bill 1324 only affects cases where an insurance company acts reasonably.

There is good logic behind why most states do not follow the North Dakota Supreme Court's ruling. It has a significant negative impact on consumers because it unnecessarily increases insurance premiums – not just because of money paid in attorneys' fees, but more so due to companies paying bogus or marginal claims rather than taking a chance that a rogue jury or unusual verdict will result, and consequently, the company will have to pay enormous attorneys' fees. This is particularly problematic in situations like no-fault auto insurance claims.

We urge a Do Pass on House Bill 1324.

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"Rob"  
<centermutual@stellar  
net.com>

To: "Lawrence Klemm" <lklemln@state.nd.us>  
cc:  
Subject: Fw: HB 1324

02/11/2003 10:33 AM

----- Original Message -----

**From:** Rob  
**To:** Lawrence Klemm  
**Sent:** Tuesday, February 11, 2003 10:27 AM  
**Subject:** Fw: HB 1324

----- Original Message -----

**From:** Rob  
**To:** Lawrence Klemm  
**Sent:** Tuesday, February 11, 2003 9:29 AM  
**Subject:** HB 1324

Dear Representative Klemm:

I testified yesterday in support of HB 1324. I am not writing to you for support for the bill, but as the only lawyer on the committee, I would really appreciate you setting the record straight for the committee.

This is the first year that our association has been active in the legislative process. Without question, the biggest surprise to us is that lack of respect some people have for the process, in the sense that they are willing to mislead legislators to accomplish goals. Unfortunately, legislators are oftentimes left not knowing the truth, and those who testify untruthfully are not held accountable.

On more than one occasion, the representatives of the trial lawyers association testified that in order to prove bad faith, a plaintiff must prove a "pattern" of unreasonable conduct. This is a somewhat absurd assertion, because it would mean that an insurance company could act in the most unreasonable, and obnoxious manner, but if it was an isolated incident or they only occasional do it, it would not be bad faith. Insurance companies get sued every day for bad faith solely for their conduct on an individual claim, and oftentimes there isn't even an allegation of a "pattern of conduct." No one is more familiar with that fact than the trial lawyers who sue insurance companies. Paul Sanderson should be getting you a copy of a North Dakota Supreme Court case which spells this out clearly.

This issue is particularly important to me, because Representative Delmore asked me how difficult it is to prove "bad faith", and I told her that it is not really difficult because of juror animosity toward insurance companies, and the fact that a company is named in the lawsuit. It really bothers me that she may be left with the impression that I misled her.

I don't know how important this issue is to the bill, but the idea of removing attorneys' fees from insurance declaratory actions was never intended to affect situations where a company acts unreasonably.

Regardless of how you or the committee votes on the bill, I would sincerely appreciate if you could clarify this point.

Please contact me if you have any questions. Thanks for your consideration.

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Sincerely,

Rob Hovland  
Center Mutual Insurance Company

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