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2003 HOUSE JUDICIARY

HB 1324

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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 #
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2		x	0-10
Committee Clerk Signature <i>W 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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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. Klemin: 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.

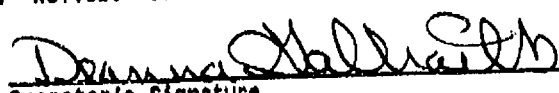
Rep. Delmore: As a consumer, I can't control the weather either; how hard is it to prove bad faith in court when you take on a large insurance company.

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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