

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2305

2005 SENATE JUDICIARY

SB 2305

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2305

Senate Judiciary Committee

Conference Committee

Hearing Date February 2, 2005

Tape Number	Side A	Side B	Meter #
1		X	1198 - 3736
Committee Clerk Signature			

Minutes: Relating to immunity for altered liquefied petroleum gas equipment or appliances.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Sen Dever, Dis #32 Introduced the bill. (meter 1198) In the real world I am in the heating business and am aware of some of the concerns of liability in society as it is today. This bill was brought forth to me by the propane gas dealers on liability situations where the equipment has been modified or used in a manor that it is not suppose to. Today the one who pays is the one with the most money.

Sen Duane Mutch, Dist #19 - Also introduced the bill (meter 1472). This proposal has been discussed by propane dealers, distributors, and wholesalers. We have a concern with the liability aspect as a supplier on where the liability ends after the alteration of a device. We are only the

suppliers of the fuel. We are not even the manufacture of the equipment being altered. We would only like to know where the liability starts and stops.

Senator Triplett asked if he was aware of this being an issue? Yes personally I do, sited a law suit of a couple of residence that burnt down do to altered equipment (meter 165). **Senator Triplett** continued to ask why the attorneys did not ask the judge to “dismiss them out of the law suit”. **Sen Much** stated that he was at the mercy of his insurance attorneys and they did not. We now suffer the increased premium payments.

Sen. Trenbeath stated that he did not think this bill will do what he hopes it will do. If we are talking about “causation”, that the lost was caused by someone other than the distributor etc... that is something to be determined either by law-the judge, or a matter of fact-by the jury. That will still keep you in the lawsuit. **Sen Much** responded that we have to start somewhere.

Ken Kraft, State Dir. of ND Propane Gas Assoc. Member of the National Board and am a certified instructor (meter 1960) Gave testimony - Att. #1

Senator Syverson asked why the industry could not “prohibit under law” the alteration of the product to reduce liability. **Mr. Kraft** thought that was a good idea.

Robin Johnson - Gen manager of SE Propane, LLC (meter 2650) Gave Testimony - Att. #2

Sen. Trenbeath stated that if this legislation passed do you think you would still not be suit? No probably not.

Ilona A. Jefcoat-Sacco, Public Service Commission - State of ND (meter 2890) Gave Testimony - Att. #3

Testimony in Opposition of the Bill:

none

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The committee discussed the language dealing with equipment and penalties for alteration of equipment.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2305

Senate Judiciary Committee

Conference Committee

Hearing Date February 7 , 2005

Tape Number	Side A	Side B	Meter #
1		X	221 - 1585
Committee Clerk Signature			

Minutes: Relating to immunity for altered liquefied petroleum gas equipment or appliances.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following:

Sen. Traynor stated "will this bill help the petroleum industry do what it thinks it will do?"

Public Service Commission handed out a letter - Att. #1a and an amendment - Att. #1b.

Senator Triplett stated that (meter 208) with accordance to the testimony given this bill will not.

It will only add to the confusion of what is in existence today. Sen. Traynor asked if they could

craft an amendment that would be helpful to the industry? Sen. Trenbeath responded that while

he would like to but it would be very time taking. Senator Triplett stated that this will not keep

people out of court. Sen. Trenbeath replied that the examples given did not keep them from

going to court due to the fact that the insurance companies settled out of court.

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Senate Judiciary Committee

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Senator Syverson stated "what if" we placed a stiffer penalty on the "tampering or modification" of a product? **Sen. Trenbeath** responded that you could do that. Usually this is your property and not the gas companies.

Sen. Trenbeath stated that this is between the insurance defense attorneys and the company itself. We did not here any testimony of anyone unlawfully brought to court only that of an insurance attorney settling before court. This is there problem not ours. (meter 900)

Discussion of the liability of an altered product and the work "causation" and "dismissing out".

Senator Triplett moved to do pass amendment 1b and seconded by **Sen. Trenbeath**. All were in favor and motion passes.

Senator Triplett made the motion to Do Not Pass as Amended and **Sen. Trenbeath**. All were in favor except **Senator Syverson** and motion passes.

Carrier: **Senator Triplett**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

REPORT OF STANDING COMMITTEE

SB 2305: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO NOT PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2305 was placed on the Sixth order on the calendar.

Page 1, line 6, after the boldfaced period insert:

"1."

Page 1, line 10, replace "1." with "a."

Page 1, line 14, replace "2." with "b."

Page 1, after line 16, insert:

"2. This section does not limit the jurisdiction of the public service commission under title 49 or 64."

Renumber accordingly

2005 HOUSE JUDICIARY

SB 2305

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2305

House Judiciary Committee

Conference Committee

Hearing Date 3/1/05

Tape Number	Side A	Side B	Meter #
1	xx		0-26.8
2	xx		7-15
Committee Clerk Signature <i>Nawn Penrose</i>			

Minutes: 14 members present.

Chairman DeKrey: We will open the hearing on SB 2305.

Sen. Duane Mutch: A sponsor of the bill, support, explained the bill. It relates to the immunity for liquified petroleum gas equipment and appliances. This is patterned after a Kansas law that has been successful, or least they've been happy with it, the LP gas dealers in Kansas. What it purports to do is develop an immunity in case of a fire or accident that might happen by a propane user, where the propane user has altered or modified to the equipment that is unbeknown to the dealer that supplies him the fuel. What's been happening is, in the case is simply this, we have to carry a lot of liability insurance, and when there's an action, naturally we get thrown into every case no matter if we delivered fuel a year and a half earlier, we get thrown into these, joined in the lawsuit if there's a fire, or whatever. So they'd like to have this bill cast, this isn't going to stop a person from being sued, but it will at least, we feel, in the pretrial hearing before the judge, before there is a trial, at least the judge will know that there's a law on the books that

we'd be immune, if we've not altered or repaired the furnace or whatever appliance, etc. That's all we're asking for, some consideration. I've often thought, too, that we're in the fuel business, too. We don't have to carry that kind of liability insurance in the fuel business, and I've never heard of any fuel dealer ever being enjoined in any type of action. But that's where we're going to go in this business, and it's hard to find carriers, because of these frivolous lawsuits that make it rather expensive, not only to pay for the insurance, but to find an insurance carrier in the first place. Probably the best thing if you had any questions, I know it's hard to address an issue with none of you having had any experiences and know of everybody having experience with this sort of problem.

Chairman DeKrey: We've got the industry rep. today, so we'll question him.

Sen. Dick Dever: I'm a sponsor of this bill, support. This bill provides immunity from liability if somebody uses propane in a way that they shouldn't. If they modify the equipment or anything like that. You probably noticed that this bill came out of the Senate Judiciary Committee with a Do Not Pass recommendation, and it was passed on the Floor. The argument in favor of the Do Not Pass on the floor was that the courts can sort this kind of thing out. Well, propane dealers set up the tank, hook up the regulators, the high pressure regulator on the tank, a low pressure regulator on the building, they run a line, and generally, equipment in the building is installed by a contractor. It might be wired by a different contractor, and then it might be modified sometime later. I guess my argument on the Floor of the Senate was that the courts don't always sort those things out and quite often it's not a matter of who's at fault, but who's got the deepest pocket. I think the propane dealers, in bringing this legislation, are asking that that consideration be changed in order that they can afford to buy the insurance that they need to

cover. If I can just relate, this doesn't have to do with propane, it was natural gas, as many of you know, I'm in heat, that is to say that I am a factory rep and I sell heating systems. In 1980, a building was built in Bismarck, a warehouse. The heating system that I saw was installed by the local utility. Sometime later, the customer, the owner of the building, built a mezzanine, and they started storing things on top of the mezzanine, and they stored it right up next to the heating system. The building burned down and that night on the 6:00 p.m. news, they asked one of the warehouse guys what caused the fire, and he said we stacked those paper cups right next to the heating system. Well a couple of weeks later, they really liked the heating system, since it does happen to be the best option for that kind of a facility. They ordered a new building, a new heating system, everybody was happy until about a month before the statute of limitation ran out, the insurance company for that building brought a lawsuit against the local utility, and against our manufacturer. They went back and forth and they ended up settling out of court, \$25,000 from the local utility, \$25,000 from the manufacturer, and everybody was happy. It had nothing at all to do with the value of the business, it had nothing to do with who was at fault. It was just a way to exchange some dollars, I guess a matter of business. The value of the building, at that time, was about \$400,000. Those kinds of things in our litigious society are just wrong. I think this legislation kind of helps to address some of that and put the blame where it belongs.

Representative Klemin: Just procedurally, I'm wondering how this would work with, let's say you need to repair the furnace and you called up the furnace repairman, and he comes over and fixes the furnace. Is that furnace repairman going to have call the party that delivered the LP gas and put it in the tank and tell him that he's going over to repair this furnace now, is that okay. Is that what he's going to have to do. Because the way I read this, you have to do it, with the

knowledge and consent of the LP gas seller, supplier, handler, transporter. So in every case now, if the furnace repair man going to have to tell the gas dealer, I'm going over to fix this furnace, or how is that going to work.

Sen. Dick Dever: I think to the contrary, what this is saying is that the propane dealer should not be responsible if he weren't aware that it was happening.

Representative Klemin: Well I understand that, but there is a qualifier there, on lines 12 and 13. You're immune if the repair was done without the knowledge and consent. So if it were done with the knowledge and consent, then you're not immune, the way I read this. So that's why I had the question about what a procedure could be expected to be; if the repair man is going to have to make the fuel dealer aware and get his consent before he goes to repair that furnace. A lot of times, I know in my case, if a furnace igniter goes out in the middle of the night, and you call up the guy at 6:00 am and say it's cold in the house. Is he going to have to track down the LP gas dealer.

Sen. Dick Dever: You're going to call the heating contractor. You're not going to call the propane guy, or in your case the utility.

Representative Klemin: Right.

Sen. Dick Dever: So why should the utility or the propane guy be responsible if a problem develops.

Representative Klemin: My question really relates to the qualifier here...without the knowledge and consent. Because if you have the knowledge and consent, then there's no immunity, the way I read this.

Sen. Dick Dever: If you'd like to amend that out I would have no objection to that. If it would better clarify that.

Chairman DeKrey: Thank you. Further testimony in support of SB 2305.

Ken Kraft, State Director, ND Propane Gas Association: Support (see written testimony).

Representative Klemm: First of all, the question I was asking Sen. Dever, about the procedure and how this would work, as I read subsection 1 here, that there's no immunity if the dealer has knowledge and consent that there's going to be work done. Am I reading that correctly or is that the way it would work.

Ken Kraft: If a consumer, of course, would light his pilot light, without our knowledge or consent, and that's when it happens, or they're going to call a local service guy, that's going to happen. We don't have a problem with that, the problem being if they make a mistake, we still somehow in a court of law, end of liable for the whole thing. That doesn't work.

Representative Klemm: My example for Sen. Dever was that if my furnace goes out in the wee hours of the morning and I wake up and it's cold, I'm not going to call the LP gas dealer, to come over and do anything, because I've got plenty of propane in my tank. I'm going to call the furnace repair guy to come over and do that. He's going to come over and repair my furnace, but is he then going to have to first call up the LP gas dealer and say I'm going over to repair XX's furnace, is that okay. Do I have your consent. Because here it says that immunity applies if it were done without the knowledge and consent of the gas dealer. So if it's done with the knowledge and consent of the gas dealer, there, the converse, would be that there would be no immunity, if that's the case. So in order to preserve any kinds of rights that there may be against

the gas dealer, and I don't know if there are any, but isn't he going to have to call up the gas dealer and tell him I'm going to make the repair to that furnace and get his consent.

Ken Kraft: In the real world, I don't believe that's the intent and it won't happen. We know it won't happen.

Representative Klemin: So I guess the point is, that this is kind of shifting a burden over here to the repairman. Maybe that's where it should be...

Ken Kraft: The repairman is certified and knows the code, under 54 and 58, he would have his own insurance, it would be his responsibility, if I'm following your question.

Representative Klemin: I have another question, in the first example you gave where the home owner removed the gas furnace. The way this is written, it relates to the alteration, modification or repair to the gas equipment or gas appliance. Simply removing that dryer, doesn't look to me like that would have been either an alteration, modification or repair of the equipment or the appliance. Therefore, there would be no immunity under that particular situation.

Ken Kraft: Under Pamphlet 54, any changes to the gas piping system would be an alteration; so if the consumer removes his appliance, regardless of what it is and doesn't cap the line, he's altered that piping system, we as marketers shouldn't be responsible for his inaction or action.

Representative Klemin: What's Pamphlet 54, you mentioned that when you testified.

Ken Kraft: Pamphlet 54 is a national fire protection association, national fuel gas code, propane people work with it, natural gas, of course, works with it extensively, and it is the standard set by the Century Code in the state of ND. We must follow it, as well as 49 other states.

Representative Klemin: So whether something is an alteration, modification or repair, would be determined by referring to this particular pamphlet.

Ken Kraft: Yes, it is.

Representative Klemin: In a situation, I'm somewhat familiar with some of these cases, because I've been involved in some of them. For example, a homeowner north of Bismarck, came out to his new house that was under construction and was ready to move into in three weeks, and it had been destroyed by fire in the middle of the night. The suspicion was that it was either the gas line that went into the house from the LP tank, or something was wrong with the furnace, which was brand new. In any event, the whole house was destroyed. In that particular case, they didn't know if there was something wrong with the system, the piping system with the regulators, or with the furnace or whatever. The difficulty was that everything burned up, so it was hard to tell, all the evidence went up in smoke. Under that kind of a scenario, which I think is kind of common, where you have a hard time determining exactly what the cause was, because the evidence has been destroyed, would this section apply.

Ken Kraft: I'm not sure it does. Historically, the marketer would be held responsible because they couldn't determine who did it. Did someone else alter, you don't know that because we have the hazardous material on site, we're responsible. If it was put in for 58, and 58 in the leak test and the flow test and the leak check were all done, that system should be intact and documented. It would be hard to hold the propane marketer responsible for his system that was documented safe. I don't have the answer to what a court of law would decide, I'm not sure.

Representative Onstad: Typically, with a lot of other utilities, their responsibility ends at the meter. Now, I think we have a tendency to get supply with that contractor that's putting in the

heating system and working with that supplier, and maybe clean up. If you're the supplier of that propane, you're going to put the propane in there and you're going to do your inspection of the propane, and up to the regulator that's located outside of the house. What's inside the house, that's not your responsibility.

Ken Kraft: I would 100% agree with that.

Representative Onstad: Your responsibilities, your inspection, you could see what's altered, you don't have control of what's inside the house, so it seems that your responsibility should end up at that point unless you did go in and do some work at that point. Is that how it is.

Ken Kraft: I would agree with that 100%; but we know it is a fact, that in rural ND, the local company in Bowbells ends up putting in the tank, running the line, putting the line in the house, does it all. There is a lot of that. Historically, maybe that's a rule of thumb. You're correct in your assumption, if you're normally a natural gas company, your responsibility ends at the meter. The courts have said, ours doesn't. If anything goes wrong, and we've never been in the basement, we don't know what's in there, but when it goes wrong, because you have the hazardous material on-site, someone's got to pay. We're trying to limit that. We're trying to have a backstop, that after the consumer. I come from a farm background. I believe my brothers, who still farm, could fix anything with a roll of duct tape and pliers. That's what we do on the farm. When they do that, we lose control. We've done everything for the code, but yet we ended up, our insurance company, has to insure us against that catastrophic event. We have no control, we want a backstop.

Representative Onstad: I understand that, coming from a rural area too, they end up installing that furnace, but it seems to me if you're trained in that field, and you install that furnace, yes

you're going to take that responsibility. But if I haven't been in that point, I can see where this is good to the point, let's end the responsibility up to where you have control over it. If you put that furnace in there, you're going to be somewhat responsible for that. If it's altered after that fact, then that's where the question comes in, but sometimes we don't know if that got altered or whatever, but in a lot of areas, you've got the supplier that goes up to the house, and then you've got another contractor involved in there, and I think that's what Representative Klemin is asking about, we may be getting the two confused a little bit, or if we want it that way. I guess that's the question. You can't put the contractor and supplier together here, when you have separate issues.

Ken Kraft: There's probably rules in ND, it would be a perfect world if we just went to the second stage low pressure regulator and that was our deal. But a lot of it, our guys put the line in the house, hook the water heater up, and of course we're responsible and that's fine. Because I'm of the opinion that our guys will do it right and according to code. But next week when the consumer goes to the local discount store and buys a non-approved heater, which they can do today and goes home and puts it in with a garden hose, there we stand.

Representative Koppelman: In your testimony, you gave a couple of examples of apparently incidents that occurred in ND, and then I heard in your answers to Representative Onstad, talked about what court cases have held. It appears that the examples you've given us, were cases that were settled out of court. Have there actually been cases that went to court, where there's been an adverse decision against the marketers.

Ken Kraft: Yes.

Representative Koppelman: In ND or elsewhere.

Ken Kraft: Three in the last ten years, million dollar deals, multi-million and of course, we just had one in SD, a huge one.

Chairman DeKrey: Thank you. Further testimony in support of SB 2305.

Robin Johnson, General Manager, Southeast Propane, LLC, Gwinner, ND; President, ND

Propane Gas Association: Support (see written testimony).

Representative Kretschmar: Have you been advised by your insurer, or other insurers, that if a bill like this was law, that the insurance rates would decrease.

Robin Johnson: Specifically, I haven't been. It would be something that, I think, the insurance company would take a hard look at, because hopefully our liability would decrease. We're hoping it will decrease our premiums.

Representative Klemin: Could you give us a little more detail on how your insurance premiums have increased over the last eight years.

Robin Johnson: In 2000, our LLC was formed; our premiums at that time were \$26,000. In three years' time, it went to \$168,000.

Representative Klemin: Have you had any claims.

Robin Johnson: We have not had any claims; but there have been claims that the insurance company have paid, that have increased the premiums across the board. I think that's the general case with propane companies.

Chairman DeKrey: Can you say that again, you went from what \$\$.

Robin Johnson: We went from \$26,000 to \$168,000.

Representative Maragos: How many carriers are there in ND, and how many carriers are there nationally.

Robin Johnson: I can't specifically answer that. The number of carriers in ND has decreased in the last five years. We started out with National Farmers Union, and they got out of ND completely in propane. I heard that some are coming back into ND, but... Nationally, I don't know.

Representative Zaiser: Do you have an attorney that you work with, has he advised you that this sort of immunity protection would substantially protect you from litigation, because it's been my experience that these immunity pieces are disregarded by the courts.

Robin Johnson: I guess I can't answer that one.

Representative Zaiser: You haven't talked to an attorney about this.

Robin Johnson: I haven't, no. I don't know if anyone else had or not.

Chairman DeKrey: Thank you. Further testimony in support of SB 2305. Testimony in opposition. We will close the hearing.

(Reopened later in the same session)

Chairman DeKrey: What are the committee's wishes in regard to SB 2305. I hesitate to talk about SB 2305 because Representative Klemin had some good questions during testimony and he's not here and I think he probably wants to do something about that. What did you want to do with SB 2199 (to Representative Klemin). Do you have a fix.

Representative Klemin: I guess procedurally it kind of bothers me that, somebody is going to have to call up the LP gas dealer, and say can I go and fix this guy's furnace, is that okay? Procedurally, I think it seems a little impractical and it shifts the burden to the furnace repair guy who now, if it does turn out that there is a problem, because he didn't get the consent from the

LP gas dealer, that shifts the burden to the furnace repair guy, for failure to get that consent. I think that, it certainly could be alleged.

Chairman DeKrey: Do you want to work on an amendment or do you just not like the bill.

Representative Klemm: I think I have a problem with giving immunity to anybody for something that maybe they shouldn't do.

Chairman DeKrey: I realize that they want to be treated like a gas company, where it ends at the house, but the problem is with these guys is that a lot of times they install it from the tank all the way to the end unit. So they do have some liability.

Representative Klemm: Well the one case I had that I mentioned to this man that was here, was this house burned down north of town, and there it wasn't certain whether it was the low pressure regulator valve on the outside of the house that was the problem, or the furnace, because it was a brand new furnace in a brand new house. I don't know if this would protect the gas company or not, but really, the thing is if the gas company, or the transporter, or whoever delivers that fuel, didn't do anything, they're not going to be liable anyway. You still have to prove negligence on the part of that person. The kinds of examples that they gave in their testimony from the propane gas association, those were settlements that were made, probably as business decisions, by the parties in the insurance company. They decided to settle it rather than going through the cost of litigation, whatever. They didn't give us any cases where they brought it to trial, so I think they did respond to Representative Koppelman, saying yes there had been cases. But I do know that the Supreme Court has been very clear about what happens with fire cases, you have to prove liability on the part of whoever you claimed is responsible. You can't say, by a process of elimination, well we ruled out all these other causes, so it must have been

this. That's not good enough. You have to prove liability and the problem with fire cases, is that oftentimes the evidence is destroyed by fire and you can't prove anything, in which case they're not going to be liable anyway, because you can't prove it.

Representative Koppelman: I'm torn on this, on the one hand, I really understand what the industry is trying to do and support the intent of the bill and their concerns. The reason I asked the question about the cases that were cited, and the fact that the testimony indicated that they were settlements and not judgments at trial, is because I think we're in the legal environment today, where that happens more often than not, and because of the litigious nature of our society, and I agree that most of the time it's national, not what's happening here in ND, but nevertheless these insurance companies look at the national trends. They look at cases where there was a million dollar verdict someplace, I wasn't sure if that were in ND or someplace else. If that's the case, I'm sure the insurance company takes a look at it and says, well, we don't think you're guilty and we don't think you're liable, and we think we can probably prove in court that you're not; it might cost us more to do that than it would just to settle. So let's make it go away. I think what the industry is saying is that if they can get something like this in statute, those cases probably wouldn't even be settled, they would just go away because it will be clear that there's no liability. I think that's their intent. I don't know if I like the wording of the bill, I look at item #2 here, it says that the company would be immune if, under item #2, the use of liquified petroleum gas equipment or ain a manner or for a purpose other than that for which the equipment or appliance was intended. That makes sense, excepts it just says the use, it doesn't say by whom. In your example, Representative Klemin, maybe it was the company itself that used it wrong, setting the equipment up, turning it on.

Representative Klemin: This section caused me a problem too, in that the gas company, the company selling the gas, or transporting the gas, or supplying it or handling it, is going to be immune if a piece of equipment that they didn't have anything to do with, or an appliance, is used inappropriately, and so now they're immune. If somebody used somebody else's equipment inappropriately. I think that it's carried out to an extent here that I don't think, they're not going to be liable anyway and why do we need to give them immunity, because of someone else's negligence.

Representative Koppelman: But it would probably take a court case to prove that they're not liable and I think that's the point.

Representative Onstad: Representative Klemin's got a point, that what's inside that house, it seems to be the argument, I do know the propane person, when he comes to fill that propane tank, that the tank is empty, he is supposed to be required to test that tank before he puts any propane back in that tank. But he's the one responsible from the outside of that tank up to that house or up to the regulator. I think the problem with the whole thing is trying, I know in rural areas, they do the whole gamut. But you're right, you don't know what's inside that house, you don't know what's been altered inside that home. That person has to keep pretty accurate records. That went today and inspected this and this and this, and everything looked okay with me and then he goes the next time, and I think they're trying to add too many things in this, too broad a coverage.

Chairman DeKrey: If you've got some amendments you want to bring forth.

Representative Maragos: If we remove the first section and left the subsection 2, would that still leave somewhat of an egregious situation with regard to the immunity, that way if the Senate

doesn't concur, we can always go to conference and then really hash out these points; especially with those that really have some concern with the bill, rather than not passing the bill at all.

Representative Koppelman: I don't mind section 1, except for the point that Representative Klemin raised, the language about knowledge and consent. It's kind of troublesome. I think that perhaps we could fix that and still leave the intent of that section in there.

Representative Delmore: Let's think about it for a day.

Chairman DeKrey: We will adjourn for now and take it up later.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2305

House Judiciary Committee

Conference Committee

Hearing Date 3/7/05

Tape Number	Side A	Side B	Meter #
1		xx	44.4-end
2	xx		0-9.1
Committee Clerk Signature <i>Daun Penrose</i>			

Minutes: 14 members present.

Chairman DeKrey: What are the committee's wishes in regard to SB 2305.

Representative Klemin: (handed out 32-03.2-02 Modified comparative fault)

Representative Kretschmar: Their concern is that their insurance premiums are going to skyrocket.

Representative Klemin: The only reason I am handing this out, this is the current statute on modified comparative fault, and the reason that this is relevant, is because as I understand it, these propane dealers don't want to be a deep pocket, in case a heating repair person comes in and does something, and the problem with fires is that there is trouble figuring out what happened. So if I were representing heating repair people, under subsection 1, I would say all the time, don't ever go anyplace to fix a furnace unless you first get consent from the gas dealer, whether it's 2:00 am or whatever it is, get their consent. Because if you don't get their consent, they're going to be immune under this statute, and somebody is going to be mad at you for not

getting their consent. Then you would become their deep pocket if that's a problem, if the gas dealer was actually at fault. So what they'll do then, to protect themselves, they're going to have to get the gas dealer's consent, which under the modified comparative fault statute, could be argued that it's a ratification. Right now, under comparative fault, we have several liability. You said joint and several liability, now we only have several liability, which means you're only liable for your percentage of fault out of 100%, there are some circumstances in which you can become jointly liable for the whole thing. One of those is if you ratify or adopt the act of the other party. So if you consent to what they're doing, if I was the attorney and trying to hold the deep pocket jointly liable for 100%, I would say, you consented, that's ratification and I'm sure that there would be arguments against that, but under this statute, they have just destroyed, right now they may be liable for a small percentage, if we pass this, it's possible that they might be liable for 100%.

Representative Koppelman: So if you were the attorney for the propane dealer, conversely, I suspect given your argument, you would counsel them to never give consent.

Representative Klemin: That's right.

Representative Koppelman: Nobody's propane would ever get fixed.

Representative Klemin: That's the problem. I would say don't ever consent, because once you consent, you might dig yourself a deeper hole.

Representative Koppelman: Just to follow that through for a minute, I followed your argument up until the point where you said that the propane dealer, if they did consent, and you are representing the repair person, wouldn't be liable.

Representative Klemin: Well I think they said they are immune from liability for any of these kinds of things, if it is done without their knowledge and consent on line 12.

Representative Koppelman: Or, not and. It says or the repair was done.

Representative Klemin: If the alteration, modification, or repair, if those three things were done without the knowledge and consent. I think this is not only going to cause a problem for anybody who wants to get their furnace fixed, it's also going to cause a problem for the propane dealers that they weren't anticipating.

Representative Delmore: I don't think there's a way to fix this bill. I agree with Representative Klemin, I don't think it does anything for them that they were hoping it would. I would move a Do Not Pass.

Representative Zaiser: Seconded.

Representative Koppelman: I don't know, I was just wondering if there was a way to fix it. If you're concern, Representative Klemin, is the issue of consent, if in section 1, if we were to delete everything on lines 12 and 13 and just say by the party. In other words, if they're not doing the repair, and it's not anything of their fault, they're not liable and you get rid of that whole consent thing, if that's what concerns you.

Representative Klemin: The problem is with fires, is that it's really hard to tell sometimes where the fire started; with the regulator outside the house, the high pressure regulator on the propane tank is probably not going to blow up. It may still be there after the house fire. But the low pressure regulator on a house, is probably going to melt off, and you can't tell if that was the problem or not.

Representative Koppelman: But if that's true, if this were a court case, wouldn't you have to establish, if the bill was amended as I've suggested, wouldn't you have to establish that the damage was caused by that alteration, modification. In other words, the propane dealer would still be on the hook until a determination like that were made by the court.

Representative Delmore: I would think that they should have a responsibility for something they did. And this bill isn't fixing that problem at all.

Representative Koppelman: I think it would be if we changed it in that way, because it would be saying that they're not at fault if the problem was caused by an alteration made by somebody else or if they used the appliance incorrectly.

Representative Delmore: That already has to be proven in court now. I'm saying what they're really going after here is something that they would already have to go to court, until that's proven there, they still could have a % of the liability.

Representative Koppelman: But I think that under current law, if I'm understanding this correctly, the court could say, okay, one of these scenarios existed and therefore the guy that repaired the thing incorrectly, or the homeowner that might have jury-rigged an appliance incorrectly and unsafely, they're 75% involved, but the propane dealer is 25% at fault because they supplied propane, and it wouldn't have blown up if there wouldn't have been gas there. I mean you could make that kind of determination. I mean what they're saying is that, get us off the hook, it's not our fault.

Representative Klemin: I just don't see a ND jury saying you're 25% at fault just because you supplied the fuel, I just don't see that happening. But go back to what you're suggesting here, if you left in line 10 and half of line 11, I think that sometimes it's the person who is selling the gas

that does some of this and if we just left it at that, you'd make them immune from something they did in altering, modifying or repairing.

Representative Koppelman: My suggestion was to delete lines 12 and 13 and replace them with "by another party", so that it would read, if the loss was caused by the alteration, modification or repair of LP gas equipment or LP gas appliance, if the alteration, modification or repair was done by another party. That way they're on the hook if they did it, they're off the hook if somebody else did it and it was the cause.

Representative Meyer: So after line 11, it was "if the repair was done by another party."

Representative Koppelman: Line 11, was done, so I just added by another party, or third party, or whatever the proper terminology would be on line 12 and delete lines 12 and 13 of what we see there.

Representative Delmore: How would that change it from what is already present in law, you'd have to go into a court at this stage in the game and prove that anyway. What I'm saying is that I just don't think that this bill does anything, even with your amendment.

Representative Koppelman: If you're correct, and you may be, I think the point, the reason that the proponents said they brought this forward, was because they think it might help with their liability insurance, whether it would or not I don't know. But it might help them from going up, it may or may not lower them, but I think what happens with these insurance companies, I just heard Representative Klemin and Representative Kretschmar exchanging stories about how their professional liability is going up, even though they never had claims. A lot of these insurance companies look at a regional or national basis, and they say, gee there are lawsuits like this, so you make the case that says a ND jury would never do this, and it may be

absolutely true, but if the insurance company looks at 30 states and says this is what's happening, so we're going to raise this on the blanket direction and they see a statute like this in ND, and our LP gas dealers can come to them and say, we're different in ND, we've got some liability protection, even if what you're saying is true, that it really wouldn't matter in a ND court. I guess I don't see the harm in it either.

Representative Zaiser: I don't think we've ever used that as justification for a bill; I mean now being that it didn't really do anything, but maybe provide some sort of fluff language to maybe affect insurance, which is actually unrelated to the legislation.

Representative Koppelman: I disagree, I think we do it all the time. I think that if an industry in our state is suffering because of some problem, and there is something we can do in our law to help them, I mean even if it's perception instead of reality, I think there are lots of laws that are passed that do that now.

Representative Klemin: I guess that other than the problem I thought they were creating for themselves here, which I don't think they realized, I guess I don't think that this really does anything different from what is under current law anyway; because right now we have the federal liability, the plaintiff is going to have to prove that this party was at fault and the jury is going to have to determine what % of fault they were at fault. Secondly, this subsection 2, which is really a product liability issue really is the state of the law on product liability now, so this really adds nothing to it.

Representative Koppelman: I just think that we would be doing a better service if we were to amend it as I suggested. I realized the motion is already on the floor to Do Not Pass it, but we're going to send this down to the House floor, if the proponents work it out on the floor, you

don't know how it is going to go, and I guess if it passes, I would like to at least see it in that shape because of all the concerns that Representative Klemin raises and if it does pass, then at least the Senate gets to look at that and we might end up with a better bill in the conference committee.

Representative Klemin: They gave an example of somebody who took a gas dryer off the gas line, without capping it. I don't think we got the whole story there, because I can't imagine somebody running a gas line directly into an appliance, without putting in a valve to shut off the gas, which is a safety requirement anyway, or #2 putting a warning there, do not disconnect this without turning it off at the main valve someplace. You'll see under modified comparative fault, one of the issues there, is failure to warn. Now they settled that case, they must have felt that it was reasonable to settle it, rather than go to court. I just can't imagine that a gas line going into a gas dryer, a clothes dryer directly like that without having some way to shut it off.

Representative Koppelman: Was it a professional that did that, or a homeowner.

Representative Klemin: He didn't say, he said it wasn't capped off.

Chairman DeKrey: Those of you on natural gas, probably don't quite understand, for those of us on propane, like we built a new house three years ago, and other than a licensed electrician and plumber, for one day, everybody else just came in and did their thing. Especially with propane, they came in and put the tank in, they put the line in, they put the line into the furnace, so they've already gotten into my house to work, so my house burns down, how are they ever going to know what happened, if somebody asks me what happened, I'm going to say I don't know.

Chairman DeKrey: We'll call the roll on a Do Not Pass motion.

Page 8
House Judiciary Committee
Bill/Resolution Number SB 2305
Hearing Date 3/7/05

11 YES 3 NO 0 O ABSENT

DO NOT PASS

CARRIER: Rep. Klemin

Date: 3/7/05
 Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2305

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Delmore

Seconded By Rep. Zaiser

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning		✓	Representative Zaiser	✓	
Representative Charging		✓			
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman		✓			
Representative Kretschmar	✓				

Total (Yes) 11 No 3

Absent 0

Floor Assignment Rep. Klemin

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

REPORT OF STANDING COMMITTEE (410)
March 7, 2005 2:44 p.m.

Module No: HR-41-4302
Carrier: Klemin
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2305: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS
(11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). SB 2305 was placed on the
Fourteenth order on the calendar.

2005 TESTIMONY

SB 2305

AH #1

Testimony SB 2305
Senate Judiciary Committee
February 2, 2005

Same
given to
House

Mr. Chairman and members of the Senate Judiciary Committee, My name is Ken Kraft and I am here to present testimony supporting SB 2305. I am the State Director of the North Dakota Propane Gas Association (NDPGA) and also am the association's certified educational trainer. I have over 30 years of experience of direct involvement in the propane industry as well as facilitating training. NDPGA represents 125 of the 135 bulk propane dealers in the state.

NDPGA takes the responsibility of safety and training very seriously. In fact, education is one of the main focuses of the association. NDPGA has trained approximately 1500 propane employees the past 5 years in an effort to have the most highly trained industry employees to handle the product. Our training program is second to none in the nation. Frankly, we view training as a responsibility of the association on behalf of the industry.

Propane is a versatile, environmentally friendly fuel. It is used safely by residential, industrial/commercial and agricultural customers throughout the state. Although it is safe, it can become hazardous if handled improperly. When a propane marketer is responsible for an incident, it should be held responsible for its negligence. However, if there is an incident involving propane from actions, inactions, mistakes or misuse by consumers – we do not believe the marketer should be held liable.

In essence, a propane marketer can do everything right – he/she can have the best trained employees and excellent insurance coverage. However, he/she can be subject to litigation and substantially increased insurance premiums if the propane equipment it altered or misused by an unauthorized individual.

Here are a couple examples. In the late 1990's a house near Hazen exploded after a homeowner removed a clothes dryer but left the propane piping exposed. The propane

marketer had no idea this alteration occurred but a lawsuit left a much higher settlement than the value of the home (\$46,000).

Another example occurred in northeast North Dakota a couple years ago. A homeowner altered a propane tank and equipment which led to an explosion. Thankfully no one was hurt but the homeowner sued the company insuring the marketer and a settlement was reached. The result? The marketer's insurance premiums more than quadrupled from approximately \$10,000 per year to \$54,000.

How does the consumer benefit from the enactment of SB 2305? When insurance premiums are drastically increased they are included in the marketers cost of doing business and ultimately those costs are passed on to the consumer in the form of higher propane prices.

In conclusion, Mr. Chairman and members of the committee, we support SB 2305 because it provides responsibility where it belongs. If a marketer makes a mistake, he/she still will be held responsible – and rightly so. But if an unauthorized individual alters the equipment and there is an incidence – the finger cannot be pointed at the marketer. And we believe that, too, is good public policy.

I appreciate the opportunity to testify and ask for your favorable consideration for SB 2305 and will attempt to address any questions.

Testimony Supporting SB 2305
Senate Judiciary Committee
February 2, 2005

Same given to House

Att #2

Mr. Chairman and members of the Senate Judiciary committee, my name is Robin Johnson, I am the General Manager at Southeast Propane, LLC in Gwinner, ND and President of the ND Propane Gas Association. I have been in the LP business for nearly 8 years. During this time I have seen insurance premiums increase dramatically due to the number and extent of injury of LP incidents. Insurance regulations have become very stringent for policy renewal, which is great for the safety of our customers, employees and companies. However, under current law, our companies have no protection no matter how safe they are. With the large civil settlements stemming from propane incidents, it only takes one incident caused by a customer to destroy a company. With this proposed bill we will be protecting our ND companies and holding the consumer responsible for their actions rather than holding our companies liable for alterations or repairs they did not complete. Thank you for your time and consideration of SB 2305. Have a good day.

#3

S. B. 2305

Presented by: Illona A. Jeffcoat-Sacco
Executive Secretary
Director, Public Utilities Division
Public Service Commission

Before: **Senate Judiciary Committee**
Honorable John T. Traynor, Chairman

Date: **2 February 2005**

TESTIMONY

Mr. Chairman and committee members, my name is Illona Jeffcoat-Sacco. I am the Executive Secretary of the Public Service Commission and Director of the Public Utilities Division. The Commission asked me to appear today to testify on SB 2305. The Commission is neutral on the bill but is concerned about how it may impact or conflict with responsibilities administered by the Commission's Testing and Safety Division.

The Testing and Safety Division has three main areas of responsibility. The weights and measures inspection program is responsible for ensuring that North Dakota buyers and sellers do business in a fair marketplace. The metrology program provides for laboratory certification of all working standards used by division staff and registered service companies to test commercial measuring devices. The gas pipeline safety inspection program is a federal/state program under the U.S. Department of Transportation, Office of Pipeline Safety which enforces minimum gas pipeline safety

standards for all intrastate gas distribution and transmission systems. Each of these programs includes functions that involve or could affect liquefied petroleum gas equipment or appliances.

We cannot determine from the language of the bill if the bill was intended to affect these Commission responsibilities. As currently written, however, we can envision situations in which the bill could conflict with weights and measures or pipeline safety enforcement.

For example, if the Commission tests a retailer's LPG measuring device and finds it out of tolerance, that device cannot be used for commercial purposes until it is recertified. Should the retailer continue to use that device in commerce and a complaint is made to the Commission, the Commission could, after investigation, find the retailer in violation of laws and rules within the Commission's jurisdiction. Under this bill, it appears the Commission would be unable to impose a fine on that retailer for using an inaccurate LPG measuring device in commerce, even if many consumers were harmed by that use. We assume such an outcome was not intended, but that is not clearly specified in the language of the bill.

Similarly, an operator of a liquefied petroleum distribution system might be using improperly repaired equipment in the operation of the system that is in violation of a state or federal requirement. Such an operator might be the subject of a Commission proceeding to enforce relevant gas safety requirements. This bill appears to limit the Commission's enforcement options, and again, eliminate the possibility of a fine, even though we assume that the bill was not intended to conflict with existing state and federal law.

The Commission hopes that the Committee will consider amending the bill to make the purpose and intent more clear, and to limit the bill's applicability. We would be happy to prepare an amendment to exclude from the bill areas that are under the Commission's jurisdiction, and we are available to work with the sponsors and the Committee to develop other language to better implement the intent of the sponsors.

This completes my testimony. I will be happy to answer any questions you may have.



Public Service Commission
State of North Dakota

2/6
Att 1a

COMMISSIONERS

Tony Clark, President
Susan E. Wefald
Kevin Cramer

Executive Secretary
Ilona A. Jeffcoat-Sacco

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7 February 2005

Honorable John T. Traynor, Chairman
Senate Judiciary Committee
600 E. Boulevard Ave.
Bismarck, ND 58505

Re: Proposed Amendment to S.B. 2305

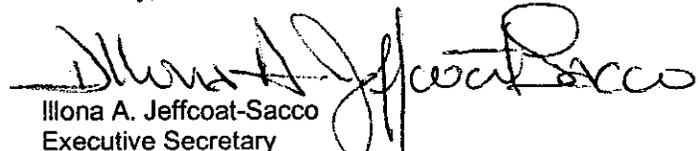
Dear Chairman Traynor:

Thank you for the opportunity to work on a proposed amendment to SB 2305.

Unfortunately, even though I discussed this problem with others involved in the industry, I was not able to come up with any language that would address the concerns of the sponsors and those who testified in support of the bill. The main reason for this result is the concern first mentioned by Senator Trenbeath that the interpretation of any proposed language would still likely result in litigation, even if the end result of that litigation would be limited liability for the LPG retailers.

Consequently, I have drafted a proposed amendment to address the concerns of the Public Service Commission and have provided copies of this letter and amendment to the sponsors. I apologize for not being able to write a more comprehensive amendment. If I can be of any further assistance, please call or e-mail.

Sincerely,


Ilona A. Jeffcoat-Sacco
Executive Secretary
Director, Public Utilities Division

Enclosure

cc: Senator John O. Syverson, Vice Chairman
Senator Nicholas P. Hacker
Senator Thomas L. Trenbeath
Senator Carolyn Nelson
Senator Constance Triplett
Senator Duane Mutch
Senator Richard D. Dever
Senator Ben C. Tollefson
Representative Keith Kempenich
Representative Earl R. Rennerfeldt

Att 1b

Prepared by Public Service Commission
7 February 2005

PROPOSED AMENDMENT TO SENATE BILL NO. 2305

Page 1, after line 16, insert

- "3. This section does not limit the jurisdiction of the public service commission under titles 49 or 64 of the North Dakota Century Code."

Renumber accordingly

32-03.2-02. Modified comparative fault.

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. ***When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint,*** and each party is liable only for the amount of damages attributable to the percentage of fault of that party, ***except that any persons who*** act in concert in committing a tortious act or aid or encourage the act, or ***ratifies*** or adopts the act for their benefit, ***are jointly liable for all damages attributable to their combined percentage of fault.*** Under this section, ***fault includes negligence,*** malpractice, absolute liability, dram shop liability, ***failure to warn,*** reckless or willful conduct, assumption of risk, ***misuse of product,*** failure to avoid injury, and ***product liability,*** including product liability involving negligence or strict liability or breach of warranty for product defect.