

2009 HOUSE JUDICIARY

HB 1404

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1404

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/28/09

Recorder Job Number: 7970, 7979

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1404.

Rep. Jim Kasper: Sponsor, support (was not present but had given information on HB 1393 for all three bills: HB 1393, 1404 and 1387).

Mike Eisert, Fargo, Landlord: Support, this bill came about as a result of the other bill that we just heard, HB 1393. If you go to small claims court, you are assigned a referee, and they hear the case. There are a couple of referees in Fargo; one is very knowledgeable and understands construction and the other one is not qualified. The problem is if you are going to have a referee, it would be nice to have a referee that understood what you're talking about. This bill gives the opportunity to change referee and also appeal, on both sides, the plaintiff or defendant.

Rep. Koppelman: I'm sympathetic to your plight. This committee has discussed the issue of small claims court before and the fact that decisions are final. ND has a patchwork of small claims processes and in some judicial districts, some small claims cases are primarily handled by judges and others by referee. That may or may not be part of the problem. I introduced a bill similar to this a few years ago, and the opposition to it, which I suspect we will hear here today again, because they don't want the extra work load of those small cases being appealed

to them and having to try them de novo, which means try them all over again, because no record is kept of the small claims court cases. We've talked about some other options in this session such as maybe having a different referee revisit the case, but keeping it in small claims court rather than appealing to district court. Would you object to that.

Mike Eisert: That would be fine.

- **Rep. Koppelman:** Do you think that asking for a different referee on the front side of the action will solve the problem because some people won't know there is a problem until it's too late to change. This might work for a person who has had claims handled before that referee before, such as you. You would know which one to request. Do you think that would help or not.

Mike Eisert: I think it would help me.

Rep. Delmore: How long have you had rental units and for how many years.

Mike Eisert: I have 39 units in all and have been renting units for the past 10 years.

Rep. Delmore: How often have you had damage to your units; is this the only time you have had damage and been to court.

Mike Eisert: Five times over the course of the 10 years I have had to go to court.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Judge Bruce Haskell, South Central Judicial District: Opposed. I am not here officially representing any group, but I have been in contact with judges around the state, and they are all in opposition to this bill. Initially, I would state that I have listened to the testimony of the landlord and it is difficult without knowing both sides of the case to make a judgment as to whether that referee was right or wrong. I suspect if we spent more time talking about specific cases, we would find a lot of people on both sides that don't like the decision in the small claims case. I think whenever you propose legislation that deals with one specific set of facts,

you may have some unintended consequences. That's what I am here to talk about. The whole idea of small claims court is set up to resolve issues at the lowest level. Typically small claims have legal issues that are quite simple. Typically the legal issues are not going to lend themselves to appeal. Jurisdiction in small claims court, as you know, is limited to cases in which we're talking about recovery of money or the cancellation of an agreement. The gentleman earlier did not have any legal issues, he just didn't like the amount of the judgment. If this happens, almost every case will be appealed. The majority of appeals to the Supreme Court are not based on whether the judge or jury was right or wrong, but where there was a legal issue, procedural issue, an issue that caused a problem and one side or the other didn't get a fair trial. Sometimes there are times, even when the dollar amount may be small, that the case should be heard in district court, because of its complexity and can't be heard in a relatively small amount of time in small claims court hearing. If the defendant removes it to district court, costs and attorney fees can be assessed. The sole purpose of that was to avoid removal to district court by the defendant to use it as a harassment tool against the plaintiff; because the plaintiff would have to get a lawyer and it would cost them more money, and maybe they would just give up on it all together. Obviously you can move your case to district court and it may cost more money, but you would have someone more qualified to hear the case. When we talk about change of judge or referee, again you have the situation where someone didn't like the decision of the referee. I would assume that if a case were removed, and they heard the same facts in the same way, they would likely come up with the same decision. I could be wrong about that, it is possible that there may have been a different decision. But when you look at some of the administrative and time issues involved here, I think this bill would create a tremendous amount of problems. As Rep. Koppelman testified, right now we're trying to get an additional judge because of the case load in Cass County. In

Cass County, in 2008 there were over 1200 small claim court cases filed. In Ward County there were over 400, Burleigh and Morton together there were 548 cases.

Rep. Koppelman: I have had numerous people come to me where I live that have had a problem with the referee in that district. Part of the system seems to be broken where we live. I don't know how to fix this. You talked about needing a district court judge for Cass County. I would submit that maybe one of the reasons for the increased case load, is because there have been a lot of people who live there who are people because of the nature of the business, may have to go to small claims court more often, who have had experiences like these, who have said that they will never go to small claims court again, no matter how much money is involved. So if I ever have to sue someone for under \$5,000 I am going straight to district court. They don't trust small claims court. What is the solution to this problem. Could there be a second hearing or appeal within the small claims court level versus going straight to district court.

Judge Bruce Haskell: You need more than dissatisfaction to appeal a case. I suspect if you talk to the litigant on the other side, he would probably think it was a good result. I don't have a specific answer. Some districts don't have referees, and if they do, they may only have one. In smaller courts, the district judge hears the small claims cases. In some districts that simply would not work. If there is a referee not doing their job, people should be notified at the Supreme Court to look into this matter.

Rep. Delmore: Have you had a referee referred to you because of a problem.

Judge Bruce Haskell: No, I have not. Maybe we're fortunate that our referees are competent and educated.

Rep. Delmore: Obviously then if I move it up to your court on the district level, somebody is going to win and somebody is going to lose. Is there a process that they have with judges

other than going up to the next court. Is there something where you can say that you felt you were treated unfairly.

Judge Bruce Haskell: The right to appeal. Obviously if you think you were really treated unfairly, you can go to the Judicial Conduct Commission and complain to them about how you were treated. That raises a good issue. I think one thing that needs to be done in small claims court and if there is a problem with it, the judges and referees should look at it, is to make that the parties have a full and fair hearing so that they feel that they have been heard and also make sure that the referee clearly explains their rationale. At least if you don't like the decision, the rationale might make sense to you about why and how the decision was made. Sometimes in most districts, small claims cases are put in 30 minute slots and sometimes it is hard to get your case across in 15 minutes. However, if the parties think they will need more time, they should bring that to the attention of the scheduling people and schedule it outside of those slots. One of the problems of asking for a different judge or referee is, if there is only one judge in some of the small courts, you would have to wait another month for a different judge to come. That stretches the case out and no one benefits. Now a case that was supposed to take less than 60 days is now taking at least 2 months or longer and still hasn't been resolved. Then if the case is heard, and one side doesn't like the outcome, now they can appeal. Now we're an additional month out or more. Then the other side appeals. Then it talks about who is paying for the case if it is appealed. How will that work. It doesn't say. Another thing is if all these cases would be appealed, where will they get scheduled in. We are already short of judges in Cass County, so where will they go. These are small claim cases that should be fairly easy to dispose of. I can see the situation where the defendant knows full well that he/she owes money, but they will try to drag the case out with change of judge/referee and appeals as long as possible. There are unfortunate cases that do happen.

Again, if we're trying to pass legislation to deal with one bad situation, it typically doesn't work real well. The other thing might be that the plaintiff will go to court to see what the defendant says what his defense might be, and have a dry run at it, even though his evidence may not be that strong. Then if he loses, he goes ahead and has another hearing and gets everything in there on time. This would be a huge burden on the judicial resources. I don't know if this would even solve the issues brought forward by that gentleman. There are a lot of times where I award damages and the person never collects. There are a lot of criminal cases where I say if you make restitution you don't go to jail, and they don't make restitution, so they end up going to jail.

Rep. Kretschmar: In this district, are the referees law trained.

Judge Bruce Haskell: Yes, all referees are law trained, in other words, they are law school graduates. There aren't any referees that are not law trained. That's not necessarily to say that they will know construction law or landlord/tenant law. To a certain extent, and I realize that small claims cases are supposed to be informal, but the plaintiff has a duty to bring in information in that is going to provide a basis for making the decision. In other words, they must at least do a minimal amount of work to educate that person. If they don't understand, then you have to take the time to explain it again. I realize that's hard to do sometimes, but I think referees and judges do as well as they can to try and understand issues and make a right decision.

Chairman DeKrey: Thank you. Further testimony in opposition. We will close the hearing.

----(Opened later in the afternoon)---

Chairman DeKrey: We will take a look at HB 1404. What are the committee's wishes.

Rep. Klemin: I move a Do Not Pass.

Rep. Wolf: Second.

Rep. Koppelman: Rep. Griffin and I talked about an amendment on another bill. I would like an opportunity to look at this bill and present an amendment to consider. I don't agree with where the bill goes, but I think the problem is real, and I think there might be another approach to this to address some of the issues.

Rep. Klemin: I will withdraw my do not pass motion.

Rep. Wolf: Withdraw my second.

Rep. Delmore: Unless you want to create another whole section for the court, I'm not sure that we can fix it. I think the judge made a good point, whether it's in district court or in small claims court and I lose, I don't always like the outcome. The referee should have explained better if that was done to begin with. Maybe that wasn't done. I don't think we can fix the problem.

Rep. Koppelman: I think that if there was a referee who kept getting their decisions appealed, it would send up a red flag to someone that there is a problem and it could be looked at.

Chairman DeKrey: We will take this up later.

2009 HOUSE STANDING COMMITTEE MINUTES

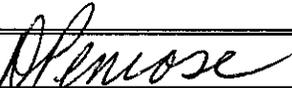
Bill/Resolution No. HB 1404

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/4/09

Recorder Job Number: 8686

Committee Clerk Signature 

Minutes:

Chairman DeKrey: We will take a look at HB 1404.

Rep. Koppelman: This is Rep. Kasper's bill. I introduced a bill a few sessions ago about raising the small claims limit. I think we have some real issues in small claims court in some places in the state; particularly with referees. Rep. Griffin and I talked earlier in the session about whether there was a way to deal with this short of allowing appeal to district court. One of the things we talked about was appealing within small claims court. I move the amendment 90042.0101.

Rep. Boehning: Second.

Chairman DeKrey: Further discussion.

Rep. Koppelman: In the amendment it would allow for appeals from small claims court if the decision is by a referee. That's a little different twist than we talked about before. I have heard many complaints about the referees. I haven't heard complaints where the parties were heard before a district judge. You could ask for removal if your case is heard by a referee and would have to be heard by a judge. I believe that even in areas of the state where referees are used for small claims, some cases are still heard by district judges in that small claim court. So it wouldn't be an extra duty for the judges, because they are already doing this. It would mean

that if you had a bad decision from a referee you could go to a judge. It wouldn't let you do anything if a judge heard your case.

Rep. Zaiser: Do you know for a fact that some judges handle small claims court.

Rep. Koppelman: Yes. In rural counties, district judges hear small claims.

Rep. Delmore: I can't believe if we amend this bill that it will not put an added burden on the district courts. I think the Judge had a very good point, when he said you're never going to make both parties happy in small claims cases. Sometimes both parties walk out not very happy at all. This would really be adding another whole layer to the court system to hear these appeals in cases.

Chairman DeKrey: I'm afraid that this will set up a situation where the people will say, we'll go to small claims court, we'll find out what the other side has and if we don't like the ruling, then we'll take it to district court. So it would be a way to run the case twice.

Rep. Koppelman: I don't see the language here, but one other possibility that we talked about in addition to this, was allowing a small claims court litigant to ask for a different referee. I think we talked about that, perhaps it is in the bill. Yes, it is already. So if we amended according to .0101, it would allow someone coming into small claims court, maybe there is a referee that they know is bad news and they've had a bad experience before, and would allow them to ask for someone else when a case is being scheduled. Then, if the case is heard by a referee, not by a judge, they could appeal that decision to the judge. This doesn't remove it to district court. It stays in small claims court, but the judge would hear it there. It is not establishing a new lawyer. Yes you would have to hear the case twice, but small claims court cases take 15-20 minutes; not like a big trial. I don't think it would be an unusual burden, I think the most sensible way that I've seen to try to get at the problem that exists without creating another level or a huge beaurocracy or all the other concerns heard here today; and

one other thing I wanted to say was that I emailed back and forth with Judge Haskell about this, and I think he understands the concern. I didn't get a chance to go over the final amendment because it came before the committee today. He was certainly amenable to something that would work, and I would be happy to go over this with him.

Rep. Klemin: First of all, being able to remove it to district court. In Section 2, the existing language that is over struck, if you proceed in small claims court it is irrevocable and you can't remove it to district court later. You're stuck. The chairman thought that you could see what the other side had for evidence, and then remove it to district court. I'm saying you can't do that because once you have gone through small claims court you cannot go to district court. My second comment is that you are doing something similar because you are giving the parties two bites of the apple in small claims court. If you don't like the first decision, you get another decision in the small claims court all over again.

Rep. Koppelman: Only if your case is heard by a referee and not a judge. I think that the number of small claims courts that have referees are very few. I think they are only in the four major city areas. You can't appeal a judge's decision; only the referee's decision.

Rep. Klemin: But you are still getting two bites of the apple. If you don't like the decision of the referee, you can have the judge decide the case in small claims court de novo, which means that you do it all over again. I think I'm going to resist that part of the amendment. I agree with the rest of it. I think having the ability to request a change of judge or referee on page 1 takes care of most of the issues.

Rep. Koppelman: The reason for the de novo review is that there isn't a record kept of the proceeding in small claims court and a normal review in district court, as was testified by the Judge in the hearing, in an appeal to a higher court, they are not going to hear the case over again, they have the record of the case and they will look at the fine points of your appeal;

that's a lot less cumbersome and of course, most of those cases are more complex than a small claims court case would be. As for the two bites of the apple; we do that now. In district court cases you can say that now, you have two bites of the apple when you have the appeal process. You're concern about the request for a different judge or referee and that solves it, my point on that is that I think it would solve it for the seasoned small claims court litigants. The problem is the innocent person that comes in and doesn't know that they should request a different referee. They wouldn't be able to exercise that option.

Rep. Klemin: I would like to divide the amendment into two parts. One part would be deleting section 2 out of the bill; the second amendment would be the rest of the amendment. I like the amendment taking section 2 out of the bill, when you remove lines 1-16, but I don't like the rest of it. The first amendment would be what is on the original amendment from page 1 through page 2, remove lines 1-16. The second amendment would be removing Page 2.

Rep. Wolf: Second.

Chairman DeKrey: Voice vote on amendment A, which is top part of the .0101 amendment down through Page 2, remove lines 1-16.

Rep. Klemin: On amendment A, the language that is being deleted in section 2 of this bill right now, on lines 14-16, if the defendant elects to remove the action from small claims court to district court, the district court shall award attorney fees to a prevailing plaintiff. Under this bill, that would no longer be the law in ND that was put in 2005 to correct what was perceived to be a serious abuse of the whole process by persons who would remove the case to district court in order to get the plaintiff to drop the case. I was the sponsor of that particular amendment to this law which received a unanimous Do Pass in the House Judiciary committee, in the Senate Judiciary committee, passed unanimously in the House and Senate

and was enacted into law. If we adopt this bill as is, we'll be taking out this provision which I think would be inappropriate. My amendment puts that back in.

Chairman DeKrey: Roll call on Amendment A.

13 YES 0 No 0 Absent Motion passes on Amendment A.

Chairman DeKrey: Further discussion on amendment B.

Rep. Koppelman: The last line of amendment B requires the person requesting the appeal that they have to pay all the filing fees for the party that does not request an appeal. I realize that probably isn't a big deal but it does at least dissuade a little bit of the potential abuse.

Rep. Klemin: I can't imagine what the filing fee would be, there is no fee provided by law for it now for an appeal by the small claims court to the small claims court.

Rep. Koppelman: I would assume it would be the same fee for filing the original claim.

Rep. Klemin: No, I think you have to provide in the statute for a filing fee before there is one. There is no filing fee for an appeal in small claim court to another small claims court case.

Chairman DeKrey: All those in favor of Amendment B, voice vote. Motion fails for Amendment B. We now have the bill before us as amended. What are the committee's wishes?

Rep. Griffin: I move a Do Not Pass as amended.

Rep. Wolf: Second.

Chairman DeKrey: I am going to vote for the Do Not Pass because I live in a rural area, where we get a district judge once a month, and if this would pass it would drag out those cases and slow down the process. We strictly have district judges. Roll call vote.

9 YES 4 NO 0 ABSENT DO NOT PASS AS AMENDED CARRIER: Rep. Kretschmar

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1404

Page 1, line 2, replace "sections" with "section"

Amendment A

Page 1, line 3, remove "and 27-08.1-04"

Passed

Page 1, line 12, remove the overstrike over "~~and whether the defendant~~"

Page 1, line 13, remove the overstrike over "~~elects to remove the action to district court~~"

Page 1, line 14, remove the overstrike over "~~an election to remove to district~~"

Page 1, line 15, remove the overstrike over "~~court, or~~"

Page 2, remove lines 1 through 16

Page 2, replace lines 19 through 23 with:

"Appeal from small claims court decision of judicial referee. If a small claims court proceeding is heard by a referee of the small claims court, either the plaintiff or the defendant may appeal the decision of the referee to the small claims court. The appeal to the small claims court must be heard by a district court judge. The district court judge shall try the matter de novo. The request for an appeal must be made within twenty days of the decision of the referee. The party that requests an appeal shall pay all filing fees for the party that does not request an appeal."

Renumber accordingly

Amendment B Failed

VK
2/4/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1404

Page 1, line 2, replace "sections" with "section"

Page 1, line 3, remove "and 27-08.1-04"

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Page 1, line 15, remove the overstrike over "~~court, or~~"

Page 2, remove lines 1 through 16

Renumber accordingly

Date: 2/4/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1404

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Klemin Seconded By Rep. Wolf

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser	✓	
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 0

Floor Carrier: _____

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

Amendment A passes

Date: 2/4/09
 Roll Call Vote #: 2

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 1404

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Griffin Seconded By Rep. Wolf

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. DeImore	✓	
Rep. Klemin		✓	Rep. Griffin	✓	
Rep. Boehning		✓	Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser	✓	
Rep. Kingsbury		✓			
Rep. Koppelman		✓			
Rep. Kretschmar	✓				

Total (Yes) 9 No 4

Absent 0

Floor Carrier: Rep. Kretschmar

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

REPORT OF STANDING COMMITTEE

HB 1404: 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 1404 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "sections" with "section"

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Renumber accordingly