

SESSION OF 2008

**CONFERENCE COMMITTEE REPORT BRIEF
HOUSE SUBSTITUTE FOR SENATE BILL NO. 379**

As Agreed to April 4, 2008

Brief*

House Sub. for SB 379 would amend the law on an indemnification provision in construction contracts, motor carrier transportation contracts, dealer agreements, or franchise agreements. The bill would:

- Define promisee, motor carrier transportation contract, mutual indemnity obligation, unilateral indemnity obligation, dealership agreement, and franchise agreement;
- Provide the definitions of mutual indemnity obligation and unilateral indemnity obligation would not specifically pertain to oil, gas, or water wells but would relate to a contract. With regard to a unilateral indemnity obligation, the indemnity obligation would be at the promisee's expense and would be a separate liability insurance policy;
- Clarify the definition of construction contract;
- Expand the contracts to include motor carrier transportation contracts, as well as dealer agreements or franchise agreements;
- Prohibit a provision in a construction contract, motor carrier transportation contract, or other agreement that

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requires the first party to secure against damages or losses caused by the second party's intentional acts or omissions. Such provision is against public policy and would be void and unenforceable; and

- Prohibit a provision in a covered contract that would require a party to provide liability coverage to another party, as an additional insured, for the other party's negligence, intentional acts, or omissions. Such provision is against public policy and would be void and unenforceable.

The bill would expand the situations that would not be affected to include:

- Agreements to indemnify contractors with respect to strict liability under environmental laws;
- Indemnification agreements that are an integral part of an offer to compromise or settle certain disputed claims;
- Validity of any insurance contract, construction bond, or other agreement lawfully issued by an insurer or bonding company;
- Separately negotiated provisions whereby the parties mutually agree to a reasonable allocation of risk, if each such provision is based on generally accepted industry loss experience and supported by adequate consideration; and
- An agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the promisor, subject to the limitation of insurance coverage or self-insurance coverage for mutual indemnity obligation and subject to the limitation of insurance coverage in unilateral indemnity obligation.

The bill expressly states that the laws of Kansas will govern every contract to be performed in the state. Any litigation, arbitration or other dispute resolution arising from such contracts would be conducted in the state and any contract provision, covenant or clause that conflicts with these provisions would be void and unenforceable.

The provisions of the bill would be effective on and after January 1, 2009.

Conference Committee Action

The Conference Committee concurred with the amendments made by the House to the bill with the addition of the language regarding unilateral indemnity obligations to clarify that bill would not affect unilateral indemnity obligations when the indemnity is limited to the extent of the insurance coverage.

Background

The proponents of the bill in the Senate Committee, as introduced, included Bill Miller, American Subcontractors Association; SueAnn Schultz, Kansas Association of Insurance Agents; Dan Morgan, Builder's Association; and Dan Haake, Haake Foundations, Inc. Written testimony in support of the bill was received from Ken Keller, Western Extralite Company; Ken Daniel, KsSmallbiz.com; Gus Meyers, Rau Construction; Corey Peterson, Associated General Contractors of Kansas; and Chris Wilson, Kansas Building Industry Association, Inc.

The opponents of the bill in the Senate Committee, as introduced, included Wyatt Hoch, Coalition to Preserve Freedom of Contract; Shannon Ratliff, Coalition to Preserve Freedom of Contract; and Stephen Ware, Coalition to Preserve Freedom of Contract.

The Senate Committee amended the bill to exempt construction contracts between the owner of the property and the general contractor from the provisions of the bill. The

Senate Committee further amended the bill to strike the exemption to a construction contract regarding additional insureds between the owner of the property and the general contractor. The Committee also made technical amendments to statutory references and dates in the bill. The Senate Committee of the Whole passed the bill on a vote of 34 yeas and 4 nays.

The House Committee amended the bill by inserting the provisions that would expand the scope of the bill. The provisions are contained in House Sub. for SB 379.

The House Committee of the Whole modified the definitions of mutual indemnity obligation and unilateral indemnity obligation and mandated the unilateral indemnity obligation be at the promisee's expense and be a separate liability insurance policy. The House Committee of the Whole passed the substitute bill on a vote of 122 yeas and 1 nay.

The Senate nonconcurred with the amendments made by the House and requested a Conference Committee. The House acceded to the request to conference. The Conference Committee agreed to concur with the amendments made by the House with the addition of a provision on unilateral indemnity obligation that is similar to the provision on mutual indemnity obligation that was already in the bill. The purpose of the additional language is to close a potential loophole in the bill.

The fiscal note from the Division of Budget, on the original bill, states that passage of the bill would likely result in additional cases brought before the district courts, increasing court administrative costs. However, the Office of Judicial Administration is unable to estimate the number of additional cases and the subsequent fiscal effect.

dealer and franchise agreements