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ROLL NUMBER

DESCRIPTION

1251

2005 HOUSE JUDICIARY

HB 1251

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1251

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/17/05

Tape Number	Side A	Side B	Meter #
2	XX		18.3-48
2		xx	16.6-21.3

Committee Clerk Signature *APenrose*

Minutes: 14 members present.

Chairman DeKrey: We will open the hearing on HB 1251.

Representative Klemin: I am a sponsor on this bill, support it (see written testimony).

Representative Bernstein: What is an example of frivolous case. I know the meaning of frivolous, but how is a frivolous defense being defined.

Representative Klemin: It would be defined the same way, as a frivolous claim, it was trivial, silly, had no sound basis in fact or law, and was not warranted under existing law, etc. Those are all definitions of non-frivolous claims or defenses. Example of frivolous defense, it might be one that we had in a collection situation, where a person simply was raising a non-issue where he actually owed the money.

Representative Koppelman: I can understand the plaintiff's scenario. When you are talking about a frivolous defense, a plaintiff brings a lawsuit, had a choice. The defendant had no

choice, they are dragged into it. Maybe they don't have a good defense. Should they just not mount one then, for fear of attorney fees awards issue.

Representative Klemin: I think there is a big difference between not having a good defense and asserting a frivolous defense. It may be a subjective matter of which one looks at was this a good defense or not. If it had some basis in law or fact, even though it may not be the prevailing argument on the cite, doesn't make it frivolous. I think that anybody who has a reasonable defense at all, has nothing to worry about here. We are talking about frivolous cases.

Representative Koppelman: It looks like you're deleting language in the current statute that basically asserts the reasonable person standard. Is that your intent and what effect will that have.

Representative Klemin: I don't believe I am repealing the reasonable person standard. I think this goes far beyond the reasonable person standard. A complete absence of actual facts or law that a reasonable person could not have thought, the court would render judgment in their favor. I think history has shown us, that this standard is too high. We're used to dealing with a reasonable person, and we do it all the time. But in this case, the standard is too high. If the case had no sound basis in law or fact, I think that is a lesser standard, but it's more realistic.

Representative Onstad: If you looked at the definition of frivolous, unworthy of serious attention. Allow attorney fees in the frivolous defense as well as frivolous claims. If it's a frivolous claim, how does it get the attention of the courts anyway.

Representative Klemin: It gets to the attention of the court in the first place, is a lawsuit gets started. A summons says I am suing you and there is a complaint. The complaint says why I am suing you. The court doesn't have any discretion not to accept the filing of those lawsuits. It's

only after the suit is filed that it comes to the attention of the court and that's because the other side brings it to the attention of the court, or there is some motion in the course of the litigation that brings it to the attention of the court. The courts, the judges don't sit around looking through cases that have been filed to pick out those they don't think have any merit. Rather those are filed with the clerk of court and assigned to a judge, the judge isn't going to do anything on that until something happens to bring it before the judge. So the same thing would apply to the defense. It is only fair that it works both ways. If you've got a meritorious claim, but somebody is asserting a frivolous defense, which is unnecessarily burdening the court with additional time to resolve that frivolous defense, meaning it had no sound basis in law or fact, I think the same rules should apply.

Representative Charging: Do you think that if this is in place, then it won't go that far. The judge has the final decision. The judge can award them one way or the other.

Representative Klemin: Yes, that's true. The judge makes the final decision. But the judge must look at the language of the statute, keep it to that extremely high standard in order to make that decision. He has to find that the deleted language, that I've got here. That's what the court must find before he can award attorney fees for a frivolous claim or defense.

Representative Meyer: On line 16, is this just supposed to be a comma underlined and not a period. Is that how it is supposed to read.

Representative Klemin: There is a little line over the top of that period.

Chairman DeKrey: Thank you. Further testimony in support of HB 1251.

Bill Butcher, National Federation of Independent Business: Both nationally and in the state, NFIB has traditionally has taken the position of favoring reasonable legal reform. We feel

strongly and our members have voted to support this position many times over the years. We feel strongly that a reasonable basis for a law is preferred. What we support is the change that a frivolous lawsuit is the continuing definition is that it has no sound basis in fact or in law. That's so much better than upon complete absence of actual facts or law. I think that second definition is pretty unattainable.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition to HB 1251.

Joel Gilbertson, State Bar Association: We are neutral. The State Bar Association, on a number of bills during the course of the session will take a position offering some technical assistance whether they are in favor of the bill or not. We want to offer additional information for you to consider when you deciding whether to vote Do Pass or Do Not Pass. In terms of frivolous cases, if the claim doesn't have a snowball's chance then they ought to award attorney fees if you are claiming them. Under Rule 11 is a fairly, strict rule of Civil Procedure, because it gives a lot of leeway to the court in awarding attorney fees. Rule 11 says that essentially anytime an attorney signs a pleading or any paper, they are saying to the court, they are representing that they are certifying that it's not being presented for improper purpose, secondly that anything they raise in their claim, etc. Then it says that these allegations you are representing to the court that the allegations or factual contentions have evidentiary support. If the court finds that the attorney has violated those rules, then there are two different ways to do it. First the attorney for the other side, would then make a motion before the court for attorney fees under Rule 11 or sanctions under Rule 11 or in fact until Rule 11, the court has the power, on its own initiative, say I am going to assess attorney fees for what I consider bad faith on the part of the attorney. The other

thing I wanted to mention, it's maybe something you need to worry about. You will see with this change in 1251, you will be allowing the plaintiff's side to say that the defense raised, was essentially frivolous. It says it will be done in line 17, if the prevailing party has in a responsive pleading alleged a frivolous nature or unsound basis for the claim or defense. There would be no way for the plaintiff's lawyer to raise the issue that the defense is frivolous, because there is nothing filed after the Answer is filed by the defendant. That's a problem with that language.

Representative Koppelman: I asked about the reasonable person standard, which is common in the law. It sounds to me like the main objection is the phrase that says there is such a complete absence of actual facts, etc. that is such a high hurdle to overcome, rather than the reasonable person standard. What effect would removing the reasonable person standard language from this statute have in regard to awarding attorney fees.

Joel Gilbertson: In my opinion, it's problematic. I don't think it will have a lot of effect either way. Typically the judges see through machinations of either side.

Chairman DeKrey: Usually in a defense, you can delay things by bringing motions. Can that be considered frivolous, if you were doing your job.

Joel Gilbertson: If the sole reason for doing something is to delay it, I don't think that's a good reason. You aren't representing your client if you are doing that.

Chairman DeKrey: Thank you. Further testimony in opposition to HB 1251. We will close the hearing.

(Reopened in the same session)

Chairman DeKrey: We will take up HB 1251. This is Rep. Klemin's bill on frivolous defense.

Representative Koppelman: I move for a Do Pass on 1251.

Representative Kingsbury: Seconded.

Representative Meyer: Didn't Mr. Gilbertson say that it had to be fixed, that there wasn't any pleading after the answer to respond that it is a frivolous defense.

Representative Klemin: There are ways to respond to that, 1) technically we are in civil procedures, you file a complaint, answer, reply to a counterclaim; 2) put in a procedure to make a reply; and 3) take that requirement out, that you don't have to do it in the formality of a reply, just have to allege it somehow. I just don't think that we need to do anything to change that.

Representative Koppelman: If you were going to do the last remedy you talked about, how would we accomplish that in the bill.

Representative Klemin: I guess you would have to take out the words, 'if the' at the end of line 16 and all of line 17 and first part of line 18 to the period. The problem is that you have to bring this to the attention of the court somehow.

Representative Koppelman: Then it would read, if the attorney or party advancing the claim or defense alleging the frivolous nature. Just eliminate the change alleged to alleging and continue with the language.

Representative Klemin: That is another option.

Representative Delmore: I would like to see what the amendments were written up.

Representative Koppelman: I withdraw my motion.

Chairman DeKrey: Rep. Klemin will work on these amendments and we will take it up later.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1251

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/18/05

Tape Number	Side A	Side B	Meter #
1		xx	9-15

Committee Clerk Signature



Minutes: 12 members present, 2 members absent (Rep. Charging, Kingsbury).

Chairman DeKrey: Let's take a look at HB 1251.

Representative Klemin: I am passing around amendments. I move the amendments.

Representative Maragos: Seconded.

Chairman DeKrey: Further discussion. Motion carried. We now have the bill before us as amended.

Representative Maragos: I move a Do Pass as amended.

Representative Delmore: Seconded.

Chairman DeKrey: The clerk will take the vote.

12 YES 0 NO 2 ABSENT DO PASS AS AMENDED CARRIER: Rep. Koppelman

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1251

Page 1, line 17, after the word "in" insert "an answer, reply to an answer, or other"

Renumber accordingly

VR
1/18/05

HOUSE , AMENDMENTS TO HOUSE BILL NO. 1251 JUD 1-18-05

Page 1, line 17, after "in" insert "an answer, reply to an answer, or other"

Renumber accordingly

Date: 7/18/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1251

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Do Pass as Amended

Motion Made By

Rep. Maragos

Seconded By

Rep. Delmore

Representatives
Chairman DeKrey
Representative Maragos
Representative Bernstein
Representative Boehning
Representative Charging
Representative Galvin
Representative Kingsbury
Representative Klemin
Representative Koppelman
Representative Kretschmar

Yes	No
✓	
✓	
✓	
✓	
A	
✓	
A	
—	
—	
—	

Representatives	Yes	No
Representative Delmore	✓	
Representative Meyer	—	
Representative Onstad	—	
Representative Zaiser	—	

Total (Yes)

12

No

0

Absent

2

Floor Assignment

Rep. Koppelman

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

REPORT OF STANDING COMMITTEE

HB 1251: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1251 was placed on the Sixth order on the calendar.

Page 1, line 17, after "in" insert "an answer, reply to an answer, or other"

Renumber accordingly

2005 SENATE JUDICIARY

HB 1251

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1251

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 14, 2005

Tape Number	Side A	Side B	Meter #
1	X		859 - 3140

Committee Clerk Signature *Maria Solberg*

Minutes: Relating to attorney's fees in frivolous cases.

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:

Rep. Lawrence R. Klemin, Dist. #47, Gave Testimony - Att. #1.

Senator Syverson asked why would any competent lawyer accept a case that was so in question?

Rep. Klemin discussed the difference between the acceptance of a claim and making a frivolous law suit. There may be the good faith argument at the onset.

Discussion of how the current law reads. There has been two occasions that the court awarded me fees but they were extremely frivolous and the claimant was unrepresented and I could not collect any ways. **Sen. Trenbeath** questioned how many of his 27 years of practice did he think the claims were frivolous? I have made the claim numerous times through the responsive

pleading process. The clerk did not grant attorney fees, the either ignored it or claimed the standard, siting it was not completely absent of the standard.

Sen. Trenbeath stated seeing two things in the bill an expansion of frivolous defense the other is adding a standard other then frivolous, citing of no sound basses in fact or law. With respect to the first the American way of the legal system upon attack the ability to through up anything I can to make it go away, as long as legal? Does this not modify that? Rep. Klemin did not think it did. Read the webster definition, it states "no sound law". **Sen. Trenbeath** wanted the Black's law dictionary definition. According to this dictionary frivolous and of no sound law means the same so we can eliminate the "of no sound law" part of the bill. Discussion of this between the two. Problem with the difference being "you may frivolously come after my money" but "I can not frivolously defend my money".

Sen. Traynor asked if it were not common to ask for the fees? Discussed this. (meter 1826)

Mr. Glenn Elliott, private citizen (meter 2040) Why would an attorney accept a questionable case. Discussed his own case. Mr. Elliott asked many questions why without answers.

Testimony in Opposition of the Bill

Roland Riemers, Self, Grand Forks, ND (meter 2270 It is not extremely rear to get awarded Attorney fees. In the last year and half I was awarded fees. I was Pro Se. I have paid out over \$10,000 in attorney fees in this time. I would promote to eliminate sub section 2. Rule 11 already covers this, why do we need a separate state law. Discussed rule 11. Once the court has made there decision to award there is nothing you can do.

Mitchell Sanderstrom, Self from Dist. #44 Gave Testimony (meter 2560) Usually I am for a bill that stops frivolous cases am not for this one. It is to wide open. If you can not afford an

Page 3

Senate Judiciary Committee

Bill/Resolution Number HB 1251

Hearing Date March 14, 2005

attorney you have to go Pro Se. This is very hard to do in our system. I reflect the same opinion as the speaker before me. Spoke of the "solid" proof. Family law has a large amount of frivolous law suits. Some come right from the start; eminent danger... This has to stop. We need judicial and attorney reform. We need a justice system not a legal system. Talked about his personal case.

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

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1251

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 14, 2005

Tape Number

2

Side A

X

Side B

Meter #

4958 - 5890

Committee Clerk Signature

Maria L. Salby

Minutes: Relating to conditions of probation; penalty.

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

Senators were present. The hearing opened with the following committee work:

The committee discussed the different products used to "beat" the test. discussion of "intent to willfully defraud". The condition of every probation is to be lawful.

Sen. Trenbeath made the motion to do pass bill and **Senator Triplett** seconded the motion. All members exept for Senator Syverson were in favor and the motion passes.

Carrier: **Sen. Trenbeath**

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

Date: 3/14/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1251

Senate Judiciary

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Do Not Pass*

Motion Made By Senator *Trenbeath* Seconded By Senator *Triplett*

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson		✓	Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) *56* No

1 No

Absent

0

Floor Assignment *Sen Trenbeath*

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

REPORT OF STANDING COMMITTEE (410)
March 14, 2005 4:51 p.m.

Module No: SR-46-4934
Carrier: Trenbeath
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1251, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends DO NOT PASS (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1251 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HB 1251

HOUSE BILL NO. 1251
TESTIMONY OF REP. LAWRENCE R. KLEMIN
HOUSE JUDICIARY COMMITTEE
JANUARY 17, 2005

Mr. Chairman and Members of the House Judiciary Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am appearing before you today to testify in favor of House Bill 1251.

House Bill 1251 relates to attorney fees. Under current law, North Dakota follows the American Rule, which provides that litigants in civil actions pay their own attorney fees, win, lose or draw, unless there is a previous agreement between the parties relating to attorney fees, or unless a statute allows the award of attorney fees in a particular type of case. Subsection 1 of Section 28-26-01 follows the American Rule and dates back to the early days of our State. In 1977, Section 28-26-01 was amended to allow the award of attorney fees for *frivolous claims*.

Under subsection 2, a court can award attorney fees for frivolous claims, but only if the standard set forth in this subsection is reached. *It is an extremely high standard.* A claim is not frivolous unless the court specifically finds that "there is such a complete absence of actual facts or law that a reasonable person could not have thought that a court would render judgment in their favor." In other words, it is so completely and absolutely devoid of any merit that no one in his right mind could have thought that he could win the case.

This is such a high standard that since 1977, when the law was amended to allow attorney fees for frivolous claims, attorney fees have rarely been awarded. I think the standard is too high and should be more realistic. I also think it should apply to frivolous *defenses*, as well as frivolous claims for relief. Neither the courts nor litigants should be burdened with frivolous claims or defenses.

House Bill 1251 amends subsection 2 of Section 28-26-01 to allow the award of attorney fees for frivolous defenses as well as frivolous claims. It also repeals the extremely high standard that is now required, in favor of a more reasonable standard. Under this bill, a court would be able to award attorney fees to the prevailing party for a frivolous claim or defense under the ordinary meaning of "frivolous," such as one would find in a dictionary, that is, it is trivial, inappropriately silly, or had no sound basis in fact or law. I have attached two examples of the definition of "frivolous" as found in online dictionaries. As you can see, the extremely high standard for "frivolous" as set out in the North Dakota law is not present in the dictionary definition.

The change to this section on line 16 is intended to clarify that the award of attorney fees can be made *against the attorney* advancing a frivolous claim or defense, as well as against a party. This is consistent with the existing language already in this section on line 19. While it is implicit in this section that an attorney advancing a frivolous claim or defense could be held accountable, the new language on line 16 makes this clear.

Mr. Chairman and Members of the Committee, I urge your support for House Bill 1251.

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Thesaurus

One entry found for **frivolous**.Main Entry: **friv·o·lous** ■Pronunciation: 'fri-v^əl-&s, -v&-l&sFunction: *adjective*Etymology: Middle English, from Latin *frivolus*

1 a : of little weight or importance **b** : having no sound basis
(as in fact or law) <a *frivolous* lawsuit>

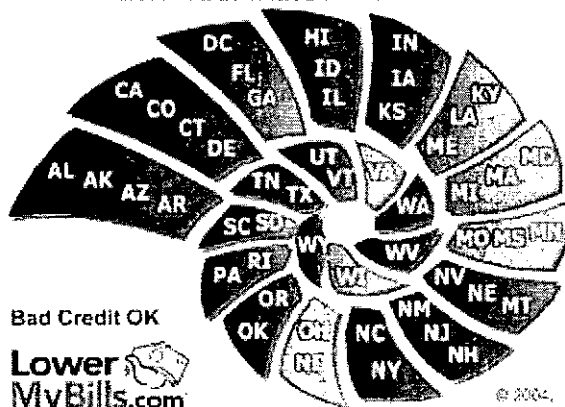
2 a : lacking in seriousness **b** : marked by unbecoming levity

- **friv·o·lous·ly** *adverb*- **friv·o·lous·ness** *noun*For More Information on "frivolous" go to Britannica.com

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Pronunciation Symbols

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- Dictionary
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friv·o·lous **Pronunciation Key** (frīv'ə-ləs)
adj.

1. Unworthy of serious attention; trivial: *a frivolous novel.*
2. Inappropriately silly: *a frivolous purchase.*

[Middle English, probably from Latin *frīvolus*, of little value, probably from *friāre*, to crumble.]

friv' o·lous·ly *adv.*

friv' o·lous·ness *n.*

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Source: *The American Heritage® Dictionary of the English Language, Fourth Edition*

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Main Entry: **friv·o·lous**

Pronunciation: 'fri-v&-l&s

Function: *adjective*

: lacking in any arguable basis or merit in either law or fact

NOTE: In an attempt to discourage frivolous lawsuits, Rule

11 of the Federal Rules of Civil Procedure requires the signature of an attorney or party on any pleading, motion, or other paper to certify that to the signer's knowledge it is grounded in fact and warranted by law or otherwise brought in good faith and not for an improper purpose. A court is authorized to impose sanctions for violation of the rule.

Source: Merriam-Webster Dictionary of Law, © 1996
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frivolous

adj : not serious in content or attitude or behavior; "a frivolous novel"; "a frivolous remark"; "a frivolous young woman" [ant: serious]

Source: WordNet ® 2.0, © 2003 Princeton University

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North Dakota Rules of Civil Procedure
Rule 7. Pleadings allowed - Form of motions.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under N.D.R.Civ.P. 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a **reply to an answer** or a third-party answer.

Att #1

HOUSE BILL NO. 1251
TESTIMONY OF REP. LAWRENCE R. KLEMIN
SENATE JUDICIARY COMMITTEE
MARCH 14, 2005

Mr. Chairman and Members of the Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am appearing before you today to testify in favor of House Bill 1251.

House Bill 1251 relates to attorney fees. Under current law, North Dakota follows the American Rule, which provides that litigants in civil actions pay their own attorney fees, win, lose or draw, unless there is a previous agreement between the parties relating to attorney fees, or unless a statute allows the award of attorney fees in a particular type of case. Subsection 1 of Section 28-26-01 follows the American Rule and dates back to the early days of our State. In 1977, Section 28-26-01 was amended to allow the award of attorney fees for *frivolous claims*.

Under subsection 2, a court can award attorney fees for frivolous claims, but only if the standard set forth in this subsection is reached. ***It is an extremely high standard.*** A claim is not frivolous unless the court specifically finds that "there is such a complete absence of actual facts or law that a reasonable person could not have thought that a court would render judgment in their favor." In other words, it is so completely and absolutely devoid of any merit that no one in his right mind could have thought that he could win the case.

This is such a high standard that since 1977, when the law was amended to allow attorney fees for frivolous claims, attorney fees have rarely been awarded. I think the standard is too high and should be more realistic. I also think it should apply to frivolous ***defenses***, as well as frivolous claims for relief. Neither the courts nor litigants should be burdened with frivolous claims or defenses.

House Bill 1251 amends subsection 2 of Section 28-26-01 to allow the award of attorney fees for frivolous defenses as well as frivolous claims. It also repeals the extremely high standard that is now required, in favor of a more reasonable standard. Under this bill, a court would be able to award attorney fees to the prevailing party for a frivolous claim or defense under the ordinary meaning of "frivolous," such as one would find in a dictionary, that is, it is trivial, inappropriately silly, or had no sound basis in fact or law. I have attached two examples of the definition of "frivolous" as found in online dictionaries. As you can see, the extremely high standard for "frivolous" as set out in the North Dakota law is not present in the dictionary definition.

The change to this section on line 16 is intended to clarify that the award of attorney fees can be made ***against the attorney*** advancing a frivolous claim or defense, as well as against a party. This is consistent with the existing language already in this section on line 19. While it is implicit in this section that an attorney advancing a frivolous claim or defense could be held accountable, the new language on line 16 makes this clear.

Mr. Chairman and Members of the Committee, I urge your support for House Bill 1251.