

Approved 3/20/85  
Date

MINUTES OF THE House COMMITTEE ON Judiciary

The meeting was called to order by Representative Joe Knopp at  
Chairperson

3:30 ~~am~~/p.m. on March 6, 1985 in room 526-S of the Capitol.

All members were present except:

Representatives Duncan and Fuller were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department  
Mike Heim, Legislative Research Department  
Mary Ann Torrence, Revisor of Statutes Office  
Becca Conrad, Secretary

Conferees appearing before the committee:

Steve Joseph, Chairman of Legislative Committee of  
Wichita Bar Association  
Jim Clark, Kansas County & District Attorneys Association  
Steve Tatum, Johnson County Prosecutor  
Sid Gilman, Assistant Federal Public Defender from Wichita  
Dan Morgan, Associated General Contractors of Kansas, Inc.  
Bob West, Kansas Chapter of National Electrical Contractors Association  
Janet Stubbs, Executive Director of the Home Builders Association of Kansas  
Karen McClain, Director of Governmental Affairs for the Kansas Association  
of Realtors

HB 2455 - Concerning civil procedure; relating to service of process by mail.

Ron Smith, Kansas Bar Association, introduced Steve Joseph, Chairman of Legislative Committee of Wichita Bar Association. Mr. Joseph said this bill, with the exception of one line, is a duplication of the Federal Rule of Civil Procedure which provides the identical service of process by mail. This is an additional method of obtaining service in civil cases. It allows the plaintiff filing a lawsuit to merely mail a copy of the summons and petition to the defendant by first class mail with a form. If the defendant refuses to sign this form, then you will come to service by one of the more traditional methods that are presented in this bill -- send to sheriff, hire a private process service, or do it some other way. He said in that instance you are then entitled to go the judge and tell him that a process service had to be hired and then the judge has the authority to make the defendant who refused to accept service by mail come up with the cost of service.

HB 2445 - Relating to criminal procedure; providing for discovery depositions in criminal cases.

Mr. Joseph said that in this bill if a defendant is charged by a complaint of felony and waives his or her right to a preliminary examination, then that defendant can take discovery depositions. The rest of the bill is a copy of the Rules of Civil Procedure followed in Kansas for depositions in civil cases. The only exception is the location which it states is in the courthouse. He handed out Attachment Nos. 1, 2 and 3 which show Florida's, Vermont's and Texas' Rules of Criminal Procedures. Mr. Joseph said having the depositions in a courthouse served the function of keeping the prosecutors at home and also puts the deposition in an environment, if not neutral, is least favorable to prosecution and would keep witnesses from being very uncomfortable in defense attorney's offices. As far as a cost problem with Indigent Defense, Mr. Joseph said he served a year as Chairman of the Indigent Defense Board and he did not see a cost problem because it could be tape recorded instead of using court reporters.

Jim Clark, Kansas County & District Attorneys Association, told of language changes they would like in HB 2445 as shown in Attachment No. 4. Mr. Clark also pointed out to the committee that he was concerned about keeping an informant confidential under this bill.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,  
room 526-S, Statehouse, at 3:30 ~~xxx~~/p.m. on March 6, 1985

Steve Tatum, Johnson County Prosecutor, said that his only concern was about what is called 60-1507 motion in effective assistance of counsel. He said he was concerned that if this law was passed it would be necessary and important that they impose nearly all of the witnesses that are listed on a complaint as far as fulfilling their obligation to that defendant.

HB 2454 - Concerning criminal procedure; relating to preliminary examinations.

Jim Clark also spoke on HB 2454. He presented language changes as shown in Attachment No. 5.

Concerning the statements about having to take depositions of the people listed, Steve Joseph said it would just not happen. He said concerning the tape recording of depositions, under the civil procedure code as it stands today, they are now tape recorded.

HB 2442 - Concerning criminal procedure; relating to pleas of guilty or nolo contendere.

Sid Gilman, Assistant Federal Public Defender from Wichita, said there are a vast number of non-citizens who are coming to the criminal justice, and they are very concerned that those defendants and their counsel are not aware that the criminal case can result in very severe implications in the legality of their immigration status. She said these circumstances can result in an alien being deportable, defusable or prevented from getting natural immunity in the United States. These are people who have met in every other way the legal requirement of getting some kind of status in this country. Ms. Gilman said there are very few attorneys in Kansas who have any comprehension of immigration laws. She said one thing that is done to protect aliens from the severe consequences is that the Federal District Court in Wichita has approved a Petition to Plead Guilty form, which makes the defendants aware that if they plead guilty, certain offenses are going to wind up to be deportable or excludable.

Ms. Gilman said that HB 2442 is not what the legislative committee proposed to everyone. She said that the bill speaks of "felonies" which are only one portion of the vast array of convictions that result in a person being deported. There are also very, very minor incidents, such as shoplifting, that can be considered an offense of moral turpitude and which can result in deportation. Ms. Gilman said another problem is that it is implied that the defendants would be asked at the plea if they are a citizen or not, which is a constitutional problem because it is requiring a person to provide discriminating information.

HB 2494 - Concerning real property; relating to certain liens.

Dan Morgan, Associated General Contractors of Kansas, Inc., spoke in opposition of this bill as shown in Attachment No. 6.

Bob West, Kansas Chapter of National Electrical Contractors Association, spoke in opposition to HB 2494 as shown in Attachment No. 7.

The Chairman said that this has been a very heated issue in the past because of significant interest on both sides, and thought it may be best to move this to Federal and State Affairs with the idea that they would send it back to us which would allow the Judiciary Committee to consider it after the deadline. Then a subcommittee could be appointed to work some of the problems out.

Janet Stubbs, Executive Director of the Home Builders Association of Kansas, presented her written testimony as a proponent because of the decision that HB 2494 need further work and may be sent to another committee. See Attachment No. 8 which also states her opposition to HB 2296.

Karen McClain, Director of Governmental Affairs for the Kansas Association of Realtors, presented Attachment No. 9 with language changes in HB 2494.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,  
room 526-S, Statehouse, at 3:30 ~~xxx~~/p.m. on March 6, 1985

HB 2522 - Concerning civil procedure; providing certain exemption from process.

It was suggested that because of all the changes needed, this be made a substitute bill. Representative Snowbarger made a motion to make this a substitute bill with the following proposal: for bankruptcy purposes you cannot claim the federal exemptions except for those things that are listed under Section 6 as it appears in this bill and specifically allows the Kansas debtor to claim these things in federal court. Representative Solbach seconded the motion and it carried.

Representative Snowbarger made a motion to pass Substitute HB 2522 favorably and it was seconded by Representative Cloud. The motion carried by a vote of 11 to 5.

HB 2105 - Concerning crimes and punishments; relating to the crime of sexual exploitation of a child.

Representative Cloud presented Attachment No. 10 which shows amendments to be made on this bill.

Representative Cloud made a motion to include these amendments and it was seconded by Representative Wagnon. The motion did not carry by a vote of seven to seven and the Chairman voted no.

There was a technical amendment which Mary Torrence from the Revisor's office pointed out. Representative O'Neal made a motion to pass this amendment and it was seconded by Representative Wunsch. It carried.

A motion to report the bill favorably as amended was made by Representative Cloud and it was seconded by Representative Buehler. The motion carried.

HB 2455 - Concerning civil procedure; relating to service of process by mail.

Representative Shriver made a motion to recommend this bill favorably. It was seconded by Representative Whiteman and carried.

HB 2445 - Relating to criminal procedure; providing for discovery depositions in criminal cases.

HB 2454 - Concerning criminal procedure; relating to preliminary examinations.

The amendments to these bills are shown in Attachment Nos. 4 and 5.

Representative Solbach made a motion to combine these two bills into a substitute bill and adopt the amendments. It was seconded by Representative Shriver and the motion carried.

Representative O'Neal made a motion to strike in lines 21 - 22 the words "and" through the word "examination". Also he wanted to change in line 24 the period to a semicolon and add "provided however that the defendant shall not have the right to depose any witness who has testified at a preliminary hearing on the case". Representative Wunsch seconded the motion.

Representative Bideau offered a substitute amendment to strike out "who may have information relevant to the offense charged" in lines 23 and 24. In place of this he wanted to add "listed as a witness on the complaint". It was seconded by Representative Whiteman. Representative Bideau withdrew the substitute amendment. Representative O'Neal said he did not oppose Representative Bideau's substitute motion so it was not withdrawn.

A vote was taken on Representative O'Neal's motion to take out the requirements that they have to waive their statutory right before they take a deposition and it carried.

A vote was taken on Representative Bideau's motion to limit the right to take depositions of those endorsed on the complaint and it carried.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,  
room 526-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on March 6, 1985.

Representative Bideau made a motion and it was seconded by Representative Vancrum to include the District and County Attorneys Association's amendments. The motion carried.

Representative Walker made a motion on the combined bill as amended by Representative Bideau, and seconded by Representative O'Neal to pass the bill. It was voted on and carried.

The minutes of February 25 and 26 were approved by a motion of Representative Buehler which was seconded by Representative Wunsch and voted upon.

The meeting was adjourned at 5:35 p.m.

Florida Rules of Criminal Procedure  
Rule 3.220 Discovery

**(d) Discovery Depositions.** At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. The deposition shall be taken in a building where the trial may be held, such other place agreed upon by the parties or where the trial court may designate by special or general order. The party taking the deposition shall give written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place of taking. Except as provided herein, the procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or its clerk shall, upon application, issue subpoenas for the persons whose depositions are to be taken. A resident of the State may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

# Vermont Rules of Criminal Procedure

## Rule 15

### Depositions

**When Taken**—A defendant or the state at any time after the filing of an indictment or information may take the deposition of a witness provided that no deposition may be taken more than 30 days after arraignment, or after the date set for the omnibus hearing if that date is later, except by leave of court granted for cause shown.

Texas Code of Criminal Procedure

**Article 39.02**

**Depositions for Defendant.** Depositions of witnesses may be taken by the defendant. When the defendant desires to take the deposition of a witness, he shall, by himself or counsel, file with the clerk of the court in which the case is pending an affidavit stating the facts necessary to constitute a good reason for taking the same, and an application to take the same. Provided that upon the filing of such application, and after notice to the attorney for the state, the courts shall hear the application and determine if good reason exists for taking the deposition. Such determination shall be based on the facts made known at the hearing and the court, in its judgment, shall grant or deny the application on such facts.

Attachment #3  
House Judiciary Committee  
March 6, 1985

HOUSE BILL No. 2445

By Committee on Judiciary

2-18

0017 AN ACT relating to criminal procedure: providing for discovery  
0018 depositions in criminal cases.

0019 *Be it enacted by the Legislature of the State of Kansas:*

0020 Section 1. (a) Any defendant who is charged by complaint  
0021 with a felony and who waives the defendant's statutory right to a  
0022 preliminary examination may take the deposition or oral exami-  
0023 nation of any person who may have information relevant to the  
0024 offense charged. Except as provided in this section, the Kansas  
0025 code of civil procedure shall govern the taking of discovery  
0026 depositions in criminal cases.

0027 (b) The deposition shall be taken in the courthouse where  
0028 the action is pending, such other place on which the parties  
0029 agree or where the court may designate by order on the applica-  
0030 tion of a party. The defendant taking the deposition shall give to  
0031 every other party reasonable written notice of the time and place  
0032 for taking the deposition. The notice shall state the name and  
0033 address of each person to be examined. For cause shown, the  
0034 court may extend or shorten the time for taking the deposition.  
0035 The attendance of witnesses may be compelled by the use of  
0036 subpoenas as provided in K.S.A. 60-245 and amendments  
0037 thereto. If a subpoena duces tecum is to be served on the person  
0038 to be examined, a designation of the materials to be produced as  
0039 set forth in the subpoena shall be attached to or included in the  
0040 notice.

0041 (c) The parties may stipulate in writing or the court, on  
0042 motion, may order that the testimony at a deposition be recorded  
0043 by other than stenographic means, in which event the stipulation  
0044 or order shall designate the person before whom the deposition  
0045 shall be taken and the manner of recording, preserving and filing

*Handwritten notes:*  
... deposition...  
... preliminary...  
... examine...  
... deposition...  
... 22-3211(3) ...  
... deposition...  
... person...  
... statement...  
... evidence.

0046 the deposition and may include other provisions to assure that  
0047 the recorded testimony will be accurate and trustworthy. If a  
0048 method other than stenographic means is used, a party may  
0049 nevertheless arrange to have a stenographic transcription made  
0050 at the party's expense. A deposition recorded by nonsteno-  
0051 graphic means shall be accompanied by the following, which shall  
0052 be set forth in writing: Any objection under subsection (c) of  
0053 K.S.A. 60-230 and amendments thereto; any changes made by  
0054 the witness; the signature identifying the deposition as that of  
0055 the witness or the statement of the officer that is required if the  
0056 witness does not sign, as provided in subsection (e) of K.S.A.  
0057 60-230 and amendments thereto; and the certification of the  
0058 officer required by subsection (f) of K.S.A. 60-230 and amend-  
0059 ments thereto.

0060 (d) A discovery deposition may be used by any party for the  
0061 purpose of contradicting or impeaching the testimony of the  
0062 deponent as a witness at the trial or at any hearing. A deposition  
0063 to perpetuate testimony shall be taken in accordance with the  
0064 provisions of K.S.A. 22-3211 and amendments thereto.

0065 Sec. 2. This act shall take effect and be in force from and  
0066 after its publication in the statute book.



HOUSE BILL No. 2454

By Committee on Judiciary

2-19

0017 AN ACT concerning criminal procedure; relating to preliminary  
0018 examinations; amending K.S.A. 22-2902 and repealing the  
0019 existing section.

0020 *Be it enacted by the Legislature of the State of Kansas:*

0021 Section 1. K.S.A. 22-2902 is hereby amended to read as fol-  
0022 lows: 22-2902. (1) Every person arrested on a warrant charging a  
0023 felony or served with a summons charging a felony shall have a  
0024 right to a preliminary examination before a magistrate, unless  
0025 such warrant has been issued as a result of an indictment by a  
0026 grand jury.

0027 (2) The preliminary examination shall be held before a mag-  
0028 istrate of a county in which venue for the prosecution lies within  
0029 ~~ten (10)~~ 10 days after the arrest or personal appearance of the  
0030 defendant. Continuances may be granted only for good cause  
0031 shown.

0032 (3) The defendant shall not enter a plea at the preliminary  
0033 examination. The defendant shall be personally present and the  
0034 ~~witnesses~~ evidence shall be examined in ~~said~~ the defendant's  
0035 presence. *Hearsay evidence may be admitted as long as there is*  
0036 *a substantial basis for crediting such evidence and may be relied*  
0037 *upon and form the basis for a probable cause finding.* The  
0038 defendant's voluntary absence after the preliminary examination  
0039 has been begun in ~~said~~ the defendant's presence shall not  
0040 prevent the continuation of the examination. The defendant shall  
0041 have the right to crossexamine witnesses against the defendant  
0042 and introduce evidence in ~~his or her~~ the defendant's own behalf.  
0043 If from the evidence it appears that a felony has been committed  
0044 and there is probable cause to believe that a felony has been  
0045 committed by the defendant the magistrate shall order the de-

*Defendant shall have  
the same right of  
discovery and inspection  
under K.S.A. 22-3213, as  
if the witness had directly  
testified at the preliminary  
hearing.*

0046 fendant bound over to the district judge or associate district  
0047 judge having jurisdiction to try the case; otherwise, the magis-  
0048 trate shall discharge the defendant.

0049 (4) If the defendant waives preliminary examination the  
0050 magistrate shall order the defendant bound over to the district  
0051 judge or associate district judge having jurisdiction to try the  
0052 case.

0053 (5) Any judge of the district court may conduct a preliminary  
0054 examination, and a district judge or associate district judge may  
0055 preside at the trial of any defendant even though such judge  
0056 presided at the preliminary examination of such defendant.

0057 (6) The complaint or information, as filed by the prosecuting  
0058 attorney pursuant to K.S.A. 22-2905, ~~or as amended,~~ and amend-  
0059 *ments thereto* shall serve as the formal charging document at  
0060 trial. When a defendant and prosecuting attorney reach agree-  
0061 ment on a plea of guilty or *nolo contendere*, they shall notify the  
0062 district court of their agreement and arrange for a time to plead,  
0063 pursuant to K.S.A. 22-3210 and *amendments thereto*.

0064 (7) The district judge or associate district judge, when con-  
0065 ducting the preliminary examination, shall have the discretion to  
0066 conduct arraignment at the conclusion of the preliminary exami-  
0067 nation.

0068 Sec. 2. K.S.A. 22-2902 is hereby repealed.

0069 Sec. 3. This act shall take effect and be in force from and  
0070 after its publication in the statute book.

TESTIMONY RE HB 2494 BEFORE THE HOUSE JUDICIARY COMMITTEE  
BY DAN MORGAN, ASSOCIATED GENERAL CONTRACTORS OF KANSAS, INC.  
MARCH 6, 1985

THANK YOU, MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. I AM DAN MORGAN AND I AM APPEARING TODAY IN OPPOSITION TO HB 2494 ON BEHALF OF THE ASSOCIATED GENERAL CONTRACTORS OF KANSAS. AGC OF KANSAS REPRESENTS OVER 200 GENERAL CONTRACTOR AND ASSOCIATE SUBCONTRACTOR AND SUPPLIER MEMBERS THROUGHOUT THE STATE WHO ARE ENGAGED DIRECTLY IN OR ARE SUPPORTING THE COMMERCIAL AND INDUSTRIAL BUILDING CONSTRUCTION INDUSTRY IN THE STATE.

AS I SAID, WE ARE OPPOSED TO HB 2494 AND FOR A NUMBER OF REASONS. IF HB 2494 IS PASSED, ANY MATERIAL SUPPLIER, SUBCONTRACTOR OR OTHER PERSON FURNISHING LABOR OR MATERIALS AT A JOBSITE SUBJECT TO A LIEN COULD ONLY OBTAIN A VALID LIEN IF HIS OR HER LIEN STATEMENT IS FILED EITHER (1) BEFORE TITLE TO THE PROPERTY IS PASSED, OR (2) BEFORE 90 DAYS (3 MONTHS) PASS FROM THE DATE SUPPLIES OR LABOR WAS LAST FURNISHED OR PERFORMED -- WHICHEVER OCCURS EARLIER. IN OTHER WORDS, IF TITLE TO THE PROPERTY IS PASSED, A SUBCONTRACTOR'S OR SUPPLIER'S LIEN RIGHTS WOULD BE EXTINGUISHED IF THE LIEN IS NOT PROPERLY FILED BEFORE THE TITLE PASSED. SINCE IT WILL BE IMPOSSIBLE, WITHOUT SOME KIND OF NOTICE, FOR SUBCONTRACTORS AND SUPPLIERS TO KNOW WHEN TITLE TO PROPERTY IS GOING TO PASS THEY ARE GOING TO BE FORCED TO MAKE A DIFFICULT CHOICE -- EITHER FILE THE LIEN UPFRONT AND, IN EFFECT, TELL THE PRIME CONTRACTOR OR OWNER THAT THEIR WILLINGNESS OR ABILITY TO PAY IS SUSPECT EVEN BEFORE THE PROJECT STARTS, OR, CHOOSE NOT TO FILE AND RISK LOSING PART OR ALL OF WHAT IS DUE THEM WHEN TITLE IS PASSED UNEXPECTEDLY BEFORE A PROPER LIEN

STATEMENT IS FILED. IF, TO BE SAFE, LIEN STATEMENTS ARE FILED BY EACH SUBCONTRACTOR AND SUPPLIER ON EACH INDIVIDUAL PROJECT THEY ARE INVOLVED IN THEN THE DISTRICT COURT CLERKS ARE SIMPLY GOING TO BE INUNDATED WITH LIEN STATEMENT FILINGS. THAT SEEMS TO PUT A REAL BURDEN BOTH ON THE CLERKS OF THE DISTRICT COURTS AND ON THE SUBCONTRACTORS AND SUPPLIERS.

WE FEEL VERY STRONGLY THAT CONSIDERATION OF THE TYPES OF CHANGES PROPOSED IN THIS BILL SHOULD BE LIMITED TO RESIDENTIAL CONSTRUCTION. COMMERCIAL AND INDUSTRIAL CONSTRUCTION, ESPECIALLY PRIVATE COMMERCIAL AND INDUSTRIAL CONSTRUCTION, SHOULD BE EXEMPT. IT IS OUR UNDERSTANDING THAT THE BILL IS DESIGNED TO ADDRESS A HOMEOWNERS' PROBLEM AND ANY SOLUTION SHOULD BE LIMITED TO RESIDENTIAL CONSTRUCTION. SUBCONTRACTOR'S LIENS ARE USED AS LEVERAGE FOR PAYMENT BY SUBCONTRACTORS AND SUPPLIERS, THEY ENCOURAGE THE EXTENSION OF CREDIT AND THEY SHOULD BE PRESERVED.

IN THE FINAL ANALYSIS THERE IS A BALANCING OF INTERESTS INVOLVED HERE. WE HAVE TO CONSIDER BOTH WHAT IS BEST FOR THE HOMEOWNER AND WHAT IS BEST FOR THE SUBCONTRACTOR AND SUPPLIER. WE CERTAINLY DO NOT BELIEVE THAT SUBCONTRACTORS AND SUPPLIERS SHOULD BE PUT IN THE POSITION OF SUFFERING LOSSES OR BEING DRIVEN OUT OF BUSINESS BECAUSE THEY HAVE CHOSEN TO EXTEND CREDIT WITHOUT FILING A LIEN STATEMENT UPFRONT BEFORE A JOB, OR THEIR PORTION OF A JOB, IS EVEN BEGUN. WE ARE ALSO SYMPATHETIC TO THE HOMEOWNER WHO IS FORCED TO PAY TWICE BECAUSE A DEVELOPER-BUILDER GOES BROKE OR AN UNSCRUPULOUS CONTRACTOR DEVISES SOME SCHEME TO TAKE PAYMENT FOR SERVICES RENDERED BY SUBCONTRACTORS AND SUPPLIERS AND FAILS TO PASS IT ON. WE DO NOT BELIEVE THIS BILL IS THE

ANSWER TO THE HOMEOWNERS' PROBLEM ON NEW RESIDENTIAL CONSTRUCTION.  
PERHAPS THERE IS A WORKABLE SOLUTION TO ADDRESS THIS PROBLEM BUT  
FRANKLY WE SEE THIS PROPOSAL CAUSING MORE PROBLEMS THAN IT IS  
INTENDED TO SOLVE. AGAIN, WE STRONGLY RECOMMEND THAT ANY FURTHER  
CONSIDERATION OF THIS BILL BE LIMITED TO RESIDENTIAL CONSTRUCTION  
ONLY. THANK YOU VERY MUCH FOR THIS OPPORTUNITY TO BE HEARD.  
I'LL TRY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

TESTIMONY  
BEFORE THE  
HOUSE JUDICIARY COMMITTEE

MARCH 6, 1985

ROBERT A. WEST

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

Mr. Chairman and Members of the Committee:

My name is Robert West and I represent the Kansas Chapter of the National Electrical Contractors Association. I am appearing here today in opposition to H.B. 2494 concerning subcontractors' liens.

The basic reason that we oppose H.B. 2494 is that we do not believe that this bill accomplishes the purpose it supposedly sets out to do. It is our understanding that the bill's purpose is to protect a homeowner from paying twice. We question whether or not that purpose is actually being realized, and our reasons are as follows:

First of all, the bill does not contain itself to residential construction. It also applies to commercial construction. The provisions of the bill state liens must be filed before title passes. Even though title does not usually pass on commercial construction, we are still going to have to file the lien the minute we step foot on a job to insure we are protected. We usually work directly for a general contractor who works for an owner and that owner's architect. The general contractor generally carries a performance bond and a payment bond. Our electrical contractor also

Attachment #7  
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carries a performance and payment bond. The only time a lien is filed is when we are having trouble getting paid. This filing of the lien usually solves that problem. In fact, a call to the owner or architect informing them of the possibility of a lien will generally suffice. If the prime contractor is unable to pay us, seldom if ever, does a lien have to be collected upon, since that prime contractor's bonding company steps in to not only pay the subcontractors but to finish the job on behalf of the owner. In other words the commercial construction market is a market made up of sophisticated owners, attorneys, architects, bankers and contractors who 99% of the time know the rules of the game and play accordingly.

According to H.B. 2494 if we file this lien at the beginning of a commercial job, which we will have to do not knowing if title might possibly pass, we are going to succeed in alienating the owner, alienating the architect and alienating the general contractor. We will have successfully questioned their integrity before the job even begins. Thus, the one and only leverage we have in getting prompt payment, the subcontractors' lien, will have been negated. That is our biggest concern with the bill, that it applies to commercial construction.

Part of the same scenario I just laid out for commercial construction can also apply to residential construction. That being that if a lien has to be filed at the beginning of a job which we will have to do, not knowing when title passes, this lien will quite possibly not be filed at all. This certainly means a homeowner will not pay that subcontractor twice, but now the subcontractor is now going to suffer because he cannot get paid.

To summarize our position, liens are a subcontractor's only leverage to receive payment. And again, this does not mean that by threatening to file or by actually filing that lien, that someone is going to pay twice. It only means that it gives us the leverage to get paid in the first place. If liens are neutralized, which we feel they will be by H.B. 2494, many subcontractors are going to go broke. And the reason they will go broke is that a small firm simply does not have the financial resources to cover him not getting paid. Especially on commercial jobs where 10's of 1000's of dollars that is due the sub be held up by an owner or a prime contractor. The use of a lien many, many times solves the problem of the subcontractor receiving his money. Without it costly litigation and lack of cash flow will quite simply put the small contractor out of business.

Finally, if there is an actual problem with liens, it seems to be in the residential market. We certainly do not want to see a homeowner pay twice for his work, but like wise we do not want to cut off our financial life line.

This is a very complicated issue to say the least. And if there is a serious problem with homeowners being hurt, thru the use of the mechanic's lien, we would be willing to discuss other options available other than H.B. 2494 to address the issue. If these homeowners however, are being taken in by fraudulent contractors, then neutralizing the subcontractor's lien is only going to neutralize the subcontractor, it will not do a thing to stop the homeowner from being victimized.

TESTIMONY BEFORE  
HOUSE JUDICIARY COMMITTEE  
MARCH 6, 1985  
BY  
JANET STUBBS  
HOME BUILDERS ASSOCIATION OF KANSAS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

MY NAME IS JANET STUBBS, EXECUTIVE DIRECTOR OF THE HOME BUILDERS ASSOCIATION OF KANSAS.

I AM APPEARING TODAY ON HB 2494 AND HB 2296, BOTH OF WHICH AMEND K.S.A. 60-1103.

THE PROVISIONS OF HB 2494 WERE AGREED TO BY HBAK BECAUSE WE RECOGNIZE THE PROBLEM BEING ADDRESSED AND ARE ATTEMPTING TO RESOLVE THIS, JUST AS WE HAVE OTHER INSTANCES THE LAST 7 SESSIONS. WE DO NOT BELIEVE ANYONE SHOULD PAY TWICE, BUT EVERYONE SHOULD BE PAID FOR THEIR INVOLVEMENT ON A JOB. THEREFORE, WE BELIEVE THE COMPROMISE REACHED IN HB 2494 PROTECTS THE PURCHASER AND PERMITS THE SUBCONTRACTOR TO PROTECT HIS INVESTMENT.

THIS ISSUE HAS BEEN THE TOPIC OF DISCUSSION EACH YEAR DURING MY TENURE WITH HBAK AND WAS, I BELIEVE, RESOLVED IN A VERY SATISFACTORY MANNER IN 1982 WITH REGARD TO REMODELING ON OWNER OCCUPIED RESIDENTS. AT THAT TIME, WE WERE ADVISED, AND STATISTICS INDICATED, THIS WAS THE PROBLEM AREA.

DURING THE DISCUSSIONS WITH INDUSTRY RELATED GROUPS IN 1981 AND 1982, REPRESENTATIVES OF SUBCONTRACTORS REQUESTED THE ABILITY TO PROTECT THEIR OWN LIEN RIGHTS AND NOT BE DEPENDENT UPON A PRIME CONTRACTOR WHO, IF HE PLANNED NOT TO PAY HIS BILLS, WOULD NOT GIVE NOTICE OF THE SUBS INVOLVED TO THE HOMEOWNER.

IN ADDITION, THE PRIME CONTRACTOR IS NOT AWARE OF ALL THE SUBS INVOLVED ON A PROJECT AND COULD UNINTENTIONALLY FAIL TO NOTIFY THE HOMEOWNER OF ALL THOSE INVOLVED.

THE TOPEKA PROJECT WHICH MR. EISENBARTH TALKED ABOUT WAS A SITUATION INVOLVING MUCH MORE THAN VIOLATION OF MECHANICS LIEN STATUTES AND IS CERTAINLY PROOF THAT YOU CANNOT LEGISLATE HONESTY.

Attachment #8  
House Judiciary Committee  
March 6, 1985



HB 2494 WOULD PERMIT THE SUBCONTRACTOR TO FILE A MECHANICS LIEN ON JOBS WHERE THE PRIME CONTRACTOR WAS NOT WELL KNOWN TO HIM OR VIEWED AS FINANCIALLY IRRESPONSIBLE. THIS IS THE SAME CONCEPT WHICH WAS FOLLOWED TO MEET THE SUBCONTRACTOR'S REQUEST IN THE AMENDMENTS MADE IN 1982.

I MIGHT ADD THAT MOST SUBS REPORT THEY DO NOT CURRENTLY PROTECT THEIR LIEN RIGHTS BY GIVING NOTICE TO THE OWNER. THAT IS THE BUSINESS DECISION OF THAT SUBCONTRACTOR.

IF THE AMENDMENTS MADE TO K.S.A. 60-1103 UNDER HB 2494 ARE NOT COMPATIBLE TO COMMERCIAL CONSTRUCTION PRACTICES, THEN HBAK WOULD SUPPORT THAT EXEMPTION.

THE SPONSOR ADVISES THAT HB 2296 IS AN ATTEMPT TO PROTECT THE PERSON WHO IS ACTING AS HIS OWN CONTRACTOR ON HIS INTENDED RESIDENCE. HOWEVER, WE ARE NOT CONVINCED THIS WOULD BE THE RESULT.

NEW SECTION 2 PROVISIONS ON "TRUST FUNDS" IS UNCLEAR. AS I UNDERSTAND THE EXPLANATION GIVEN, IT IS NOT REQUIRING SEPARATE BANK ACCOUNTS ON EACH PROJECT, BUT IS AN ATTEMPT TO INSURE USE OF PAYMENTS RECEIVED ON EACH ACCOUNT FOR PAYMENT OF THE SUBS ON THAT PARTICULAR JOB. HOW WOULD THAT BE ACHIEVED?

ALL BUSINESS OPERATES ON A CASH FLOW BASIS. HOW WOULD YOU PAY FOR LABOR AND RENTAL OF SPACE, ETC?

A PREVIOUS CONFEREE STATED THE INTENT OF HB 2296 WAS TO GET AT THE "UNDER CAPITALIZED" AND "UNSCRUPULOUS" CONTRACTORS. BEING "UNDER CAPITALIZED" DOES NOT MEAN THE SAME AS "UNSCRUPULOUS". BEING "SMALL" DOES NOT MEAN "INCOMPETENT". HOWEVER, THIS TRUST FUND CONCEPT, AS WE UNDERSTAND IT, WOULD FORCE BORROWING OF MONEY AND PAYING OF INTEREST, THUS INCREASING THE COST OF DOING BUSINESS.

WE ARE CONSTANTLY PLACING MORE ONEROUS BURDENS ON BUSINESS THUS ADDING TO THE COST OF DOING BUSINESS. ELIMINATING THE CASH FLOW OF BUSINESS WOULD HAVE A SIGNIFICANT RESTRICTIVE EFFECT ON THE CONSTRUCTION INDUSTRY.

CARRYING THE APPROACH USED IN THIS BILL TO OTHER AREAS OF BUSINESS, YOU WOULD HAVE THE AIRCRAFT INDUSTRY PAY FOR THE LABOR AND MATERIALS USED TO CONSTRUCT THE AIRPLANES ONLY AFTER THOSE EXACT AIRCRAFT HAVE BEEN SOLD. IF SUCH RECORD KEEPING WAS POSSIBLE, WOULD THE AIRCRAFT WORKER WANT TO WAIT 2 OR 3 YEARS TO RECEIVE PAYMENT FOR HIS LABOR?

DO YOU EXPECT THE FEED AND GRAIN DEALER TO WAIT FOR PAYMENT OF HIS PRODUCT UNTIL THE CATTLE FATTENED WITH IT HAVE BEEN SOLD? OR WOULD YOU AGREE THAT IT WOULD BE THE ACCEPTED BUSINESS PRACTICE TO PAY WITH FUNDS DERIVED FROM PREVIOUS OR OTHER BUSINESS VENTURES?

IN CONCLUSION, WE WOULD URGE THE COMMITTEE TO CAREFULLY WEIGH THE ADVERSE EFFECT OF PASSAGE OF HB 2296 AND ACT ACCORDINGLY. HBAK OPPOSES PASSAGE OF THIS BILL.

IF THE COMMITTEE AGREES THAT AN AMENDMENT IS NEEDED TO K.S.A. 60-1103, WE WOULD URGE PASSAGE OF HB 2494. IN OUR VIEW, IT IS THE MOST EQUITABLE SOLUTION TO THE PROBLEM, IF THE AMENDMENT REGARDING COMMERCIAL CONSTRUCTION IS ADOPTED.

## AMENDMENT TO HOUSE BILL NO. 2494

K.S.A. 60-1103(a)(3)

The subcontractor must have filed a statutory Notice of a Right to File a Lien, hereinafter called a Lien Notice. Such Lien Notice shall contain the following information:

1. The name of the owner of the property and the name of the lien claimant.

2. The legal description of the property. In the case of condominium projects, the statement must contain the correct legal description of each unit of the project as set out and shown in the Declaration of Condominium.

All Lien Notices must be filed on any newly constructed house or building or condominium unit prior to the date on which title of the property subject to the Lien Notice passes to a bona fide purchaser for value. For the purposes of this act, transfer of title shall be evidenced by the date and time of the recording of the deed of conveyance in the office of Register of Deeds or by court order in court proceedings, filed with the District Court in which the real estate is located. The failure to file a Lien Notice prior to the transfer of title prohibits the lien claimant from filing a mechanics lien.

3. The notice of a right to file a lien must be filed of record in the office of Register of Deeds in the county in which said real estate is located.

New Section (c)

The Lien Notice described in subparagraph (a)(3) shall be removed from the property upon presentation of a Release of the Lien Notice. The Release of Lien Notice shall be a notarized statement containing the following information:

1. The date of execution
2. The name of the contractor and subcontractor
3. The amount of consideration received by the subcontractor in satisfaction of any and all lien rights against the property.
4. The legal description of the property
5. The signature of the subcontractor.

## SUBSTITUTE for HOUSE BILL NO. 2105

By Committee on Judiciary

AN ACT concerning crimes and punishments; relating to the crime of sexual exploitation of a child; amending K.S.A. 21-3516 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 21-3516 is hereby amended to read as follows: 21-3516. (1) Sexual exploitation of a child is:

(a) Employing, using, persuading, inducing, enticing or coercing a child to engage in sexually explicit conduct for the purpose of promoting any film, photograph, negative, slide, book, magazine or other printed or visual medium, or any play or other live performance; or

(b) possessing any film, photograph, negative, slide, book, magazine or other printed or visual medium in which a real child is shown engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, the child or another; or

(c) being a parent, guardian or other person having custody or control of a child and knowingly permitting such child to engage in, or assist another to engage in, sexually explicit conduct for the--purpose--of--promoting--any--film,--photograph,--negative,--slide,--book,--magazine--or--other--printed--or--visual--medium any purpose described in subsection (1)(a) or (b).

(2) As used in this section:

(a) "Child" means any person who is less than sixteen--(16) 16 years of age;

(b) "Sexually explicit conduct" means actual or simulated: sexual intercourse; or sodomy, including genital-genital, oral-genital, anal-genital; or oral-anal contact, whether between persons of the same or opposite sex; bestiality; masturbation;

sado-masochistic abuse for the purpose of sexual stimulation; or lewd exhibition of the genitals or pubic area of any person.

(c) "Promoting" means producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising:

(1) For pecuniary profit; or

(2) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender, the child or another.

(3) Sexual exploitation of a child is a class E felony.

(4) This section shall be part of and supplemental to the Kansas criminal code.

Sec. 2. K.S.A. 21-3516 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.