

Approved January 30, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on January 24, 1986 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Steineger and Winter.

Committee staff present:

Mary Sue Hack, Office of Revisor of Statutes
Mike Heim, Legislative Research Department

Conferees appearing before the committee:

Karen McClain, Kansas Association of Realtors
Jim Turner, League of Kansas Savings Institutions
Bob West, Kansas Lumber Dealers
Vernon Jarboe, Mid-American Lumbermen's Association
Kathy Marney, Mechanical Contractors Association of Kansas
Roy Worthington, Kansas Land Title Association
Jane Elliott, National Electrical Contractors Association
David Moses, Sedgwick County Assistant District Attorney

Staff presented background information on Proposal 34.

Senate Bill 413 - Mechanics' liens; intent to perform; Re Proposal No. 34.

Karen McClain, Kansas Association of Realtors, testified in support of the bill (See Attachment I). She stated the bill is the product of work which began almost a year and one-half ago. The problem it addresses has to do with the purchase of new homes. It does not address the remodeling issue; it affects single family and residential property. She explained three proposed amendments to the bill (See Attachment II).

Jim Turner, League of Kansas Savings Institutions, testified in support of the bill. He said they have wanted it for years. This bill is considered a compromise, but they are glad to have it. They are supportive of the proposed amendments by Karen McClain, but if there are other amendments, he would like to appear again on the bill.

Bob West, Kansas Lumber Dealers, appeared in support of the bill. He passed out copies of a proposed amendment (See Attachment III).

Vernon Jarboe, Mid-American Lumbermen's Association, testified in support of the bill. He stated this bill will create an administrative burden for people in the business, but it will help the consumer. The lumbermen need the protection to make sure their bills are paid. Mr. Jarboe stated he had no objection to the amendments proposed by Karen McClain. He urged the support of the amendment proposed in lines 142 and 143 of the bill which appear in Attachment III. He said if the bill is amended more, he would like an opportunity to appear again.

Kathy Marney, Mechanical Contractors Association of Kansas, testified in support of the bill. A copy of her testimony is attached (See Attachment IV).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,
room 514-S, Statehouse, at 10:00 a.m.~~p.m.~~ on January 24, 1986.

Senate Bill 413 continued

Roy Worthington, Kansas Land Title Association, testified in support of the bill. He stated their industry is concerned about purchasers of title being able to get free and clear title. He said the problem comes where there is new construction. This bill will allow purchaser to be advised of outstanding claims at the closing. He stated he had no objection to the proposed changes that have been presented this morning.

Jane Elliott, National Electrical Contractors Association, appeared in opposition to the bill. A copy of her testimony is attached (See Attachment V). She said after visiting with several members, they feel that due to the time and paperwork involved, the cost would have to be passed on to the consumers. They feel this added cost might be approximately fifty dollars. She stated they are in favor of the concept, but they have this concern.

David Moses, Sedgwick County Assistant District Attorney, testified he is not an opponent to the bill. He is concerned this bill does not address the new home owner. He said there is no protection for the person who owns real estate and decides to build a house on it. A copy of his testimony is attached (See Attachment VI).

Following committee discussion concerning Mr. Moses proposed New Sec. 2 amendment, a new bill will be drafted and circulated to interested persons for their consideration. Senator Feleciano will then report back to the committee the response received concerning the bill draft.

The meeting adjourned.

A copy of the guest list is attached (See Attachment VII).



Executive Offices:
3644 S. W. Burlingame Road
Topeka, Kansas 66611
Telephone 913/267-3610

TO: SENATE JUDICIARY COMMITTEE
FROM: KAREN MCCLAIN, DIRECTOR, GOVERNMENTAL AFFAIRS
DATE: JANUARY 24, 1986
SUBJECT: MECHANICS LIENS

The Kansas Association of REALTORS® comes today to ask you to support SB 413. SB 413 is the product of work which began almost a year and one half ago. The problem which it addresses has to do with the purchase of new homes. It does not address the issue of remodeling. It effects single family, residential property.

The problem arises in this way. A family saves for a new home and finds one in a development project and signs a sales contract. When a title search is done, no liens show up because the 90 days for some of the subcontractors to file has not yet run. A mortgage is arranged, the sale of the house is closed and the family now owns a home.

In a few days, maybe a few weeks or months, mechanics liens are filed by subs because the developer whom the house was purchased from has now either gone bankrupt or has skipped town--or both--and left unpaid bills behind. Lien creditors begin hounding the family for payment on the work they completed, they threaten lien foreclosure suits and eventually some file them.

The family has various options--most of which include hiring an attorney--one, pay the liens in full--oftentime these are in amounts as high as 20% and 30% of the value of their home; two, settle with the sub for $\frac{1}{2}$ of the amount of the liens, or three, lose their home to foreclosure sale, becuse they don't have enough money to cover the amount of the liens. Remember, these are the unpaid


S. Judiciary
1/24/86

bills of the builder or developer. The family has already paid for this completed house once, and yet can end up paying for as much as 20% or more all over again, just to be able to keep this house, part of the American dream.

When various people in both this industry and legislators heard that the Mechanics Lien issue was being studied again, they rolled their eyes and said "again"? Some of you may be thinking this. In working this problem over and over in my mind, I came to the conclusion that the recurring problem should come as no surprise. Lien laws, as they are used in the building industry, are an artificial introduction into the usual flow of business. In any other business, if someone fails to pay for something which they agreed to pay for, the remedy at law is a breach of contract suit for damages. A third party to the contract cannot be held liable.

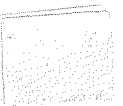
I use the example of a car. If Lee Iaccoca fails to pay the bolt manufacturer which Chrysler contracted with, and the cars which have these bolts are subsequently sold, the bolt manufacturer cannot trace one of those cars, put a lien on it, and make the new car purchaser pay for all of those bolts in their car. The bolt manufacturer has a breach of contract suit against Chrysler, not the purchaser of the new car. This is not what happens in the new home construction business. By some twist in the law years ago, it was decided that the purchaser of a home may be held liable if the builder of the home didn't meet his contractual responsibilities with his subcontractors--even if the purchaser of the new home has already paid the full value of the house.

What to do??? While different remedies have been suggested in the past, the problem has yet to be solved. The REALTORS® suggested a bill which was introduced last year which would have required that the liens be filed prior to closing. The bill never made it out of the House Judiciary Committee, and it was recommended for study by an interim committee. SB 413 is the product of that interim study done by the Special Committee on the Judiciary this summer.



SB 413 provides that, in order for a subcontractor to have the right to file a lien after passage of title to a bona fide purchaser, he must have filed a "Notice of Intent to Perform" in the Clerk of the District Court in the county where the property is located, prior to passage of title. The "Notice" would state the subcontractor's name, the subcontractor's address, the name of the owner of the property, and the description of the real property. Then, when it comes time to close the sale of the property, the abstract or title company who does a title search will pick up these Notices which are of record, and will not permit the sale to close until the subs who have filed the Notices have been contacted and have either given lien waivers or will have filed their bills so that the money they are owed can be escrowed. That way, if anyone takes title to the property with any outstanding Notices, they are fully responsible. Now, it is unfair to hold them responsible because they have no idea who may be lurking in the shadows, waiting to file a lien.

This system protects the subcontractor's right to file a lien, while providing the protection for the innocent homebuyer which is currently missing.



PROPOSED AMENDMENTS TO SB 413

1. LINE 25 Add the phrase "contractor owner" after the word "contractor" and before "subcontractor". Construction Materials, Inc. v. Becker
8 Kan.App.2d 394.

2. Include a statutory form for the Notice of intent to perform, similar to the warning statement used for remodeling:

"Notice of Intent to Perform": "I (Name of person giving notice) of (mailing address of person giving notice) do hereby give public notice that I am a supplier or subcontractor or other person furnishing materials or labor on property owned by (name of property owner) and having the legal description as follows: (legal description)."

3. LINE 142 by adding the phrase "the recording of the deed effecting" after the words "prior to" and before the words "passage of title."

S. Judiciary
1/24/86

0119 _____ at (residence address) under an agreement with
 0120 (name of contractor). Kansas law will allow this supplier or
 0121 subcontractor to file a lien against your property for materials or
 0122 labor not paid for by your contractor unless you have a waiver of
 0123 lien signed by this supplier or subcontractor. If you receive a
 0124 notice of filing of a lien statement by this supplier or subcon-
 0125 tractor, you may withhold from your contractor the amount
 0126 claimed until the dispute is settled."

0127 (d) The warning statement provided for by this section shall
 0128 not be required if the claimant's total claim does not exceed
 0129 \$250.

0130 New Sec. 3. (a) As used in this section, "new residential
 0131 property" means a new structure which is constructed for use as
 0132 a residence and which is not used or intended for use as a
 0133 residence for more than two families or for commercial purposes.
 0134 "New residential property" does not include any improvement
 0135 of a preexisting structure or construction of any addition, garage
 0136 or outbuilding appurtenant to a preexisting structure.

0137 (b) A lien for the furnishing of labor, equipment, materials or
 0138 supplies for the construction of new residential property may be
 0139 claimed pursuant to K.S.A. 60-1103 and amendments thereto
 0140 after the passage of title to such new residential property to a
 0141 good faith purchaser for value only if the claimant has filed a
 -0142 [notice of intent to perform prior to passage of title to such new
 -0143 residential property] Such notice shall be filed in the office of the
 0144 clerk of the district court of the county where the property is
 0145 located and shall contain:

- 0146 (1) The name of the owner of the property;
- 0147 (2) the name and address of the claimant; and
- 0148 (3) a description of the real property.

0149 Sec. 4. K.S.A. 1985 Supp. 28-170 is hereby amended to read
 0150 as follows: 28-170. (a) The docket fee prescribed by K.S.A.
 0151 60-2001 and amendments thereto shall be the only costs assessed
 0152 for services of the clerk of the district court and the sheriff in any
 0153 case filed under chapter 60 of the Kansas Statutes Annotated. For
 0154 services in other matters in which no other fee is prescribed by
 0155 statute, the following fees shall be charged and collected by the

1-24-86

H

LINE 142-143

notice of intent to perform prior to
 the recording of the deed effecting passage
 of title to such new residential property.

S. Judiciary
 1/24/86
 Atch. III

TESTIMONY

BEFORE

SENATE JUDICIARY COMMITTEE

S. B. 413

BY

KATHY J. MARNEY

MECHANICAL CONTRACTORS ASSOCIATION OF KANSAS

Mr. Chairman and Members of Committee:

My name is Kathy Marney, I am the Executive Director of the Mechanical Contractors Association of Kansas. I appear before you today to testify in support of S. B. 413, mechanic liens.

We feel this bill will help elevate problems that the subcontractors and homeowners have had in the past with unscrupulous contractors, therefore, MCAK has no problems with the current bill.

Thank you Mr. Chairman and Members of the Committee, for allowing me to testify before you today.

S. Judiciary
1/24/86
IV

TESTIMONY
BEFORE THE
SPECIAL COMMITTEE ON JUDICIARY
JANUARY 23, 1986

BY
S. JANE ELLIOTT
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

Mr. Chairman and Members of the Committee:

My name is Jane Elliott, and I represent the Kansas Chapter of the National Electrical Contractors Association.

We do not want the homeowner to pay twice for construction of a new home. If S.B.413 is passed as it is now written, it could increase cost of construction. I would like to explain briefly the process of additional cost. It is a real possibility to have ten or more sub-contractors and suppliers involved in constructing new homes.

In 1985 there were 3,945 single family building permits issued in Kansas. The way this bill is written, it would be in the best interest of sub-contractors and suppliers to file notice of intent on the day the job begins.

After visiting with several of our members, they feel that due to the time and paperwork involved, they would have to pass this cost on to consumers. They feel this added cost might be approximately \$50.00. That is not to say that this amount would be the exact fee, as different sub-contractors and suppliers may charge a different amount.

Using this \$50.00 added cost as an example and multiplied times the number of building permits, 3,945, multiplied times the possibility of a minimum of ten sub-contractors and suppliers, could possibly be \$1,972,500.00 additional costs to consumers.

S. Judiciary
1/24/86

SEDGWICK COUNTY DISTRICT ATTORNEY

18th Judicial District

Sedgwick County Courthouse
Annex — First Floor
535 North Main
Wichita, Kansas 67203

CLARK V. OWENS
District Attorney

Henry H. Blase
Chief Deputy

Consumer Fraud and
Economic Crime Division
(316) 268-7921

TESTIMONY

TO: SENATE JUDICIARY COMMITTEE

FROM: DAVID H. MOSES, DIRECTOR, CONSUMER FRAUD & ECONOMIC
CRIME DIVISION OF THE SEDGWICK COUNTY DISTRICT
ATTORNEY'S OFFICE

RE: SENATE BILL 413 - AN ACT AMENDING THE MECHANICS
LIEN LAW

GIVEN: JANUARY 24, 1986 - STATE CAPITOL, TOPEKA, KANSAS

I would like to thank the chairman and this committee for allowing me the opportunity to comment on the proposed changes to the mechanics lien law as it exists today. Although we all recognize the existence of a potential remodeling problem within the mechanics lien law, my comments today are limited solely to the new home dilemma and the proposed amendment to the mechanics lien law to deal with that problem.

As Director of the Sedgwick County District Attorney's Consumer Fraud and Economic Crime Division, I oversee an office of twelve employees who handle over twelve thousand consumer inquiries in a given year. Although many of these inquiries are from the Sedgwick County area, some of them are initiated by residents outside of this area and from all parts of the state. Our sources of information are not limited to consumer inquiries. The economic climate and its effect on consumer transactions as well as information from the business community provide additional valuable sources of information.

I acknowledge that this hearing is on Senate bill 413, which deals exclusively with the new home problem. For this reason, I will not comment on the remodeling issue. If this committee, at a later date, has the opportunity to address the remodeling issue, I hope to be able to provide additional information to you at that time. As the law exists today, all "new homes" are left out. The proposed Senate bill 413 appears to fill the "new home" void. The "new home" problem exists for a number of reasons. In part, the problem is due to the fact suppliers and subcontractors are allowed under K.S.A. 60-1103 to file lien notices up to three months after the date supplies,

S. Judiciary
1/24/86

VI

material or equipment are last furnished or labor performed by the supplier or subcontractor. This extended time period creates an overlapping effect when a new home is purchased and commonly allows the obtaining of a lien to take place after the closing on the new home. A classic example of this overlap problem is that of CSI of Kansas (Don Wood Homes, Inc.). CSI of Kansas built several new homes in and around the Sedgwick County area. At the time of closing, a number of suppliers and subcontractors remained unpaid. It was only after closing, when consumers/homeowners realized that suppliers and subcontractors of CSI of Kansas had obtained liens on their "new homes". In some of these instances, the consumers/homeowners have received relief from their title insurance companies. This relief is due to the specific policies written by particular title insurance companies. As a general rule, however, these consumers/homeowners could very easily have been left with liens on their homes and no protection from CSI of Kansas, title insurance or state law. The ultimate effect of this void in the law is that the consumers/homeowners conceivably would have to pay twenty to thirty percent or more to suppliers or subcontractors over and above the original full contract price for their "new home". The proposed amendment found in Senate bill 413 deals directly with this problem. By requiring suppliers and subcontractors to file a notice of intent to perform prior to passage of title to "new home" buyers, all potential liens against the consumers/new home buyer's property should be discovered prior to closing. By discovering these potential liens prior to closing, the parties involved in the closing can then insure protection of the consumer/new homeowner as well as the suppliers and subcontractors filing such notice.

The "new home" void, discussed above, includes another type of new home owner not dealt with Senate bill 413, in its current form. During the interim committee hearings on the mechanics lien law, Representative Wunsch expressed a concern for people who built new homes on real estate owned by them. More and more financial advisors are suggesting to people that they buy land and have a home built on that land for their own use. This, however, is not a recent phenomenon. For years, people have recognized the economic benefit to having your own home built on land they already own. Neither the current mechanics lien law or Senate bill 413 as proposed offers protection to these people. There are people throughout the State of Kansas, both in rural and urban areas, who are more and more opting for this type of new home purchase. Our office has received inquiries from people regarding their status when the contractor hired by them fails to pay suppliers and subcontractors performing work or providing material and supplies for their new home. It is apparent from the discussions at the interim committee hearings, as well as reviewing the recent Attorney General's opinion that the legislature intended to protect consumers/homeowners from the dilemma of having to pay twice for work done on their home or work done in building their new home. One example of this problem is that of Mrs. Linda Stinnett. The Stinnetts, like

many Kansans, owned real estate upon which they desired to build a new home. Due to the anticipated economic benefits, the Stinnetts contracted with a company to dig and provide cement and labor for the basement of their new home. The Stinnetts paid one half of the contract price to the contractor with the understanding that he would purchase the necessary supplies. Upon completion of the basement job, the contractor was paid the remaining contract price. They learned after payment to the contractor that he failed to pay his supplier. The Stinnetts were aware of the mechanics lien law and felt that it protected them. It was only after a communication with the supplier and their attorney that they learned that they were not afforded protection under the current mechanics lien law. Although the Stinnetts have contacted both the supplier and their attorney and advised them that they paid the full contract price to the contractor, a lien continues to remain on their home. The supplier did not provide written notice to the Stinnetts within the three month period of time designated in the existing law. A close reading of the existing law, however, uncovers the fact that there is no protection for individuals such as the Stinnetts.

The Stinnetts, and others in Kansas like them, can, in the future, receive the same protection afforded homeowners under the existing mechanics lien law. This protection can be provided them by inserting the following language into Section 2 of Senate bill 413:

New Sec. 2. (a) As used in this section, "residential property" means (1) a preexisting structure in which the owner resides at the time the claimant first furnishes labor, equipment, material or supplies and which is not used or intended for use as a residence for more than two families or for commercial purposes; (2) any construction upon real property which is: (A) Owned or acquired by an individual at the time the claimant first furnishes labor, equipment, material or supplies; (B) intended to become and does become the principal personal residence of that individual upon completion; and (C) not used or intended for use as a residence for more than two families or for commercial purposes.

This language will, at least, allow Kansans building their own new homes to receive some of the intended protection offered by the existing mechanics lien law.

In conclusion, as long as the existing mechanics lien law remains in effect, more protection needs to be offered those most adversely affected, the consumers/homeowners. Senate bill 413 as proposed with the above change to Section 2

provides all new home owners some of that protection.

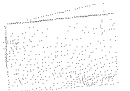
Respectfully submitted,



DAVID H. MOSES
Assistant District Attorney
Director, Consumer Fraud &
Economic Crime Division

ADDENDUM

Enclosed for the committee's information are two letters I have received from members of the private bar in Wichita. Both individuals are highly respected, practicing attorneys in Federal Bankruptcy Court. You will note that the recurring mechanics lien problem exists at their level, as well. Both Mr. Wallace and Mr. Zimmerman schedules did not allow them to appear personally before you today.



ROYCE E. WALLACE

ATTORNEY AT LAW

(316) 267-1791

January 23, 1986

328 NORTH MAIN, SUITE 200
WICHITA, KANSAS 67202

RECEIVED
DISTRICT ATTORNEY
18TH JUDICIAL DISTRICT

JAN 23 1986

David Moses, Esquire
Assistant County Attorney
Sedgwick County Courthouse
525 North Main
Wichita, KS 67203

By _____

Dear Mr. Moses:

As attorney of record for Don Wood Homes, Inc., d/b/a CSI of Kansas, in bankruptcy proceedings, and as an attorney practicing in commercial law since early 1962, I have been involved in numerous mechanic lien problems as attorney representing lenders, suppliers, contractors and owners. This experience has led me to certain conclusions, which I briefly summarize, concerning the present lien laws of Kansas.

It is my firm conviction that the granting of an interest in property should be knowingly given and accepted by the contracting parties. Lien laws generally do not provide for a knowing, or consensual granting of a 'lien' interest, but infer or impose such consent by virtue of the goods and services supplied at the specific request of the owner of the property.

In working with lien right problems, it has been my experience that lien rights created by statute of agister or artisan character, work as intended and are understood and accepted by those involved. In those instances the lien is a first and prior lien, superior to all others prior in time, upon the basis of required care, repair, preservation or enhancement of the value of the property involved. These liens are limited to the primary contract parties. Neither characteristic is attendant to the real estate lien. This absence has created many inequities, or horror stories, in real estate matters.

In my opinion, the existing lien laws led directly to the failure of Don Woods Homes, Inc., and effectively prevented attempts to reorganize the company and pay the accumulated debt. It is certain that creditor losses will be substantial. Absence of lien rights created by statute would have contributed to prevention of the circumstance in the first place, and certainly would have allowed pre-bankruptcy reorganization of the company.

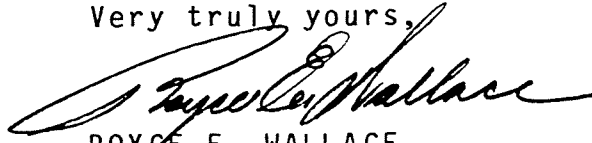
David Moses, Esq.
Re: Lien Law Legislation

January 23, 1986

- Page 2 -

Simply stated, it is my firm opinion that legislation should be enacted terminating any statutory lien rights, or, limiting such lien rights to the primary contract parties and making lien rights superior to all other prior interests of record, just as is the case in agister and artisan liens, and for the same reasons.

Very truly yours,



ROYCE E. WALLACE

REW:lw

McDowell, Rice & Smith, Chartered

JOSEPH H. McDOWELL
CLAUDE L. RICE
R. PETE SMITH
ROBERT G. HERNDON
JOHN K. PEARSON*
BYRON C. LOUDON
DONALD E. BUCHER
STEPHEN D. MCGIFFERT
CHRIS W. HENRY

MARK S. GUNNISON
JAMES S. WILLIS
CHARLES F. SPEER
WILLIAM H. ZIMMERMAN, JR.*
ALICE LESLIE RAWLINGS*
W. FREDRICK ZIMMERMAN
CONRAD MILLER, JR.
BARBARA J. COEN*
MICHAEL P. CARPENTER

*(LOCATED IN WICHITA OFFICE)

ATTORNEYS AT LAW
221 NORTH MAIN STREET
POST OFFICE BOX 3446
WICHITA, KANSAS 67201
316-263-8400

KANSAS CITY OFFICE
600 SECURITY NATIONAL BANK BLDG.
SEVENTH & MINNESOTA
KANSAS CITY, KANSAS 66101
913-621-5400 913-371-7750

OF COUNSEL
KANSAS CITY OFFICE
J. F. STEINEGER, JR.
913-321-9900
CARL V. RICE
913-371-7750

July 22, 1985

Mr. David H. Moses
Assistant District Attorney
Sedgwick County Courthouse
535 North Main
Wichita, Kansas 67203

Dear Dave:

As we have discussed in the past, I believe that there is still a significant problem with consumers being subjected to double payment, or at least significant to additional costs when they deal with certain contractors here in the Sedgwick County area. On several occasions, in the course of my practice as counsel to debtors, creditors and bankruptcy trustees, I have noticed occasions where contractors, for whatever reason, receive contract payments from consumers and apply them to their own use, leaving sub-contractors and material men unpaid. The sub-contractors and material men then do the obvious and file their liens under Kansas lien law.

The consumer, even though ostensibly protected by K.S.A. 60-1103, is forced to defend the lien claim, which generally involves hiring counsel to clean up the mess.

I am personally aware of occasions where contractors provided their customers with lien waivers which were patently false and then planned to go into bankruptcy, notwithstanding the fact that they had probably committed a felony and justified a non dischargability complaint. As always, the bottom line is that the consumer is stuck with a sub-contractor or material men wanting their money, and a lien on their home. They are faced with the threat of a foreclosure action, even though they might

Mr. David H. Moses
July 22, 1985
Page Two

have a good defense, of payment to the contractor. As we well know, that defense is expensive and often involves proceedings both in State District Court and Bankruptcy Court.

After all this, I wish I had a simple answer to this complex problem. Obviously, I don't, but I wish you luck in trying to get this straightened out.

Very truly yours,



William H. Zimmerman, Jr.

WHZ:llh

