

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

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

10:00 a.m. ~~xxx~~ on January 15, 1987 in room 514-S of the Capitol.

All members were present except: Senators Frey, Hoferer, Burke, Langworthy, Steineger and Yost.

Committee staff present:

Mike Heim, Legislative Research Department  
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Dick Croker, United Telecommunications, Inc.  
John Wine, Office of Secretary of State  
David Litwin, Kansas Chamber of Commerce and Industry  
Ron Smith, Kansas Bar Association  
Herb Iams, Kansas Bankers Association  
Gary McCallister, Kansas Trial Lawyers  
Robert Runnels, Kansas Catholic Conference  
Richard Funk, Kansas Association of School Boards  
T. C. Anderson, Kansas Society of Certified Public Accountants

Senate Bill 26 - An act amending the Kansas general corporation code; amending K.S.A. 17-6002 and 17-6305 and repealing the existing sections.

A staff member presented a brief overview of the bill. The legislation was recommended by the 1986 Interim Committee on Tort Reform and Liability Insurance.

Jeff Russell, United Telecom, was recognized. He introduced Dick Croker, who is Vice President and Associate General Counsel of United Telecommunications, Inc.

Dick Croker stated they support the bill because it conforms the Kansas Corporation Code to the Delaware Corporation Law, as the legislature has wisely done in major respects over the years and as recently as last year. It permits Kansas corporations to obtain and retain the best possible independent directors without such directors putting their personal assets totally at risk, and it places the entire decision very properly in the hands of the stockholders. He stated this bill is merely one more step to encourage Kansas corporations to stay in Kansas and attract more corporations to incorporate and move to Kansas. A copy of his testimony is attached (See Attachment I). Mr. Croker requested an amendment to Section 4 of the bill to delete statute book and insert Kansas Register. During discussion Mr. Croker explained his sense of urgency with the passage of the bill because the provision will be voted on at their board meeting February 7.

John Wine, Office of Secretary of State, testified they do not have a great deal of knowledge of tort reform, but they are knowledgeable about corporate codes, and they believe this change in this bill is an improvement. It will bring the code up to Delaware's corporate code. They do support Telecom's lead in that regard. This encourages economic development and growth. The office does support the proposed amendment to publish in the Kansas Register.

David Litwin, Kansas Chamber of Commerce and Industry and Kansas Coalition for Tort Reform, appeared in support of the bill. He stated the bill has built into it a very attractive symmetry, in that it permits only the potential class of plaintiffs, namely

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on January 15, 1987

Senate Bill 26 continued

shareholders, to limit their own right to sue their own directors. The rights of any third parties are not affected. We have received reports that many business corporations are having difficulty attracting and retaining qualified outside directors to their boards due to the greatly increased fear of lawsuits. We support the bill because we think it is inherently fair, and it should help stabilize and improve the climate for the writing of directors' and officers' insurance, with the result that it will be easier to attract to corporate boards the outside directors whose participation is so essential for our corporate system to work well.

Ron Smith, Kansas Bar Association, testified KBA supports the bill, and it is important to remember that it has an affect only on those cases brought by shareholders against directors; it does not affect liability of directors to third parties. A copy of his testimony is attached (See Attachment II).

During committee discussion, Herb Iams, Kansas Bankers Association, stated in talking to persons across the state the bill will be very helpful in stabilizing the cost and improve the availability of insurance in Kansas. The chairman commented he didn't think you could expect a real change of availability or price of your insurance. The thrust of the bill is to provide more security to directors and officers.

Senate Bill 27 - An act concerning civil procedure; limiting civil liability of directors and officers of certain nonprofit organizations.

Gary McCallister, Kansas Trial Lawyers, testified the trial lawyers have reviewed this bill, and they are in support of the concept; however, they don't support the granting of immunity. He explained the amendments they requested this summer in the imterim meeting. A copy of the proposals is attached (See Attachment III). He stated it does not grant immunity that insurnace is required or to the extent that the directors or officer carry the coverage. He explained they wish to build in an incentive to buy the insurance, not mandate insurance, and to redefine charitable organization.

John Wine, Office of Secretary of State, stated the office has no objection to the bill.

David Litwin, Kansas Chamber of Commerce and Industry, testified they support the bill. He said it is not a business problem it is a societal problem. He recommended expanding the organizations included in the bill.

Ron Smith, Kansas Bar Association, testified KBA generally supports this legislation as an appropriate response to the ability of non-profit corporations to provide D&O insurance. A copy of his statement is attached (See Attachment IV).

Robert Runnels, Kansas Catholic Conference, testified because of the proliferation of lawsuits we are finding it more difficult to obtain good people to serve without remuneration on various boards. Insurance rates for all types of liability insurance have soared far beyond what we believe experience has justified. They support the passage of this bill. Copy of statement attached (See Attachment V).

Richard Funk, Kansas Association of School Boards, stated they are in favor of the bill.

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Senate Bill 27 continued

T. C. Anderson, Kansas Society of Certified Public Accountants, urged consideration of Mr. Litwin's testimony. He requested his organization be covered in the bill.

The hearings on Senate Bills 26 and 27 were concluded.

Senate Bill 26 - An act amending the Kansas general corporation code; amending K.S.A. 17-6002 and 17-6305 and repealing the existing sections.

Senator Steineger moved to amend the bill by deleting statute book in line 313 and inserting Kansas Register. Senator Langworthy seconded the motion, and the motion carried.

Senator Langworthy moved to report the bill favorably as amended. Senator Burke seconded the motion, and the motion carried.

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 1-15-86

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
VERNA ROBERTS	Topeka	QTUW
Richard Funk	Topeka	KASB
Jeff Russell	TOPEKA	UNITED TEL.
DICK CROKER	WESTWOOD	UNITED TELECOM
C.J. Schwartz	Topeka	United Telecom
D. WAYNE ZIMMERMAN	TOPEKA	KCA
John Wine	Topeka	Sec. of St.
Jim Edwards	"	KCCI
T.O. Anderson	"	KSCPA
Mike German	"	Ks Railroad Association
Larry Hinton	"	<del>KBA</del> SRS-ADAS
Ron Smith	"	KBA
David [Signature]	"	KCCI

Attach. VI  
Senate Judiciary  
1-15-87

KANSAS LEGISLATURE  
1/15/87  
SENATE JUDICIARY COMMITTEE

Mr. Chairman, Members of the Committee:

I appreciate this opportunity to speak in favor of Senate Bill 26.

My name is Dick Croker and I am Vice President and Associate General Counsel of United Telecommunications, Inc.

United, a Kansas corporation, supports Senate Bill 26 because:

- (1) It conforms the Kansas Corporation Code to the Delaware Corporation Law as the legislature has wisely done in major respects over the years and as recently as last year.
- (2) It permits Kansas corporations to obtain and retain the best possible independent directors without such directors putting their personal assets totally at risk and it places the entire decision very properly in the hands of the stockholders.
- (3) This Bill is merely one more step to encourage Kansas corporations to stay in Kansas and attract more

*Attach. I*  
*Senate Judiciary*  
*1-15-87*

corporations to incorporate and move to Kansas. United is aware of and supports your efforts to improve economic development in our State.

- (4) United respectfully requests the earliest consideration of the Bill to permit preparation and filing of our proxy material with the S.E.C. on February 3, in connection with our annual stockholders' meeting to be held in early April.

A delay in passage of the Bill whereby United would have to conduct a second or special stockholders' meeting would cost the corporation approximately \$175,000 to \$200,000.

Therefore, Mr. Chairman and Committee Members, we respectfully request an amendment to Section 4 of this Bill to delete the words "Statute Book" and insert the words "Kansas Register".

Again, thank you for this opportunity. We wish you the very best in your very important responsibilities. If you have any questions, I would be happy to try to answer them.

Richard J. Croker

*Attach. I*



1-15-87

January 15, 1987  
SB 26

**KANSAS BAR  
ASSOCIATION**

Mr. Chairman. Members of the Senate Judiciary Committee. I am  
Ron Smith, Legislative Counsel for the Kansas Bar Association.

1200 Harrison  
P.O. Box 1037  
Topeka, Kansas 66601  
(913) 234-5696

KBA generally supports this legislation which allows changes to the corporation code to allow stockholders to agree to indemnify officers and directors for costs of litigation in certain types of lawsuits. Our position paper is attached.

The legislation was recommended by the 1986 Interim Committee on Tort Reform and Insurance. KBA supported the bill then, and does so now. It is important to remember that it affects only those cases brought by shareholders against Directors -- it does not affect liability of directors to third parties.

In December, I sent a draft of what was to become SB 26 to twenty or so members of KBA with corporate law practices. All were generally supportive of the legislation. There were some recommendations for you to consider:

1. Arguably, SB 26 changes the common law of Kansas in addition to changing the corporation code. There was sentiment that in addition to what is recommended in the bill, you may want to consider language doing exactly what is on page 5, but set it forth in a new section. Then the new subsection (8) on page 5 would simply refer back to the new section to give it permissive powers.
2. The Page 5 amendments speak only to Directors liability. Officers of a corporation also have similar fiduciary duties to their corporation for duty of loyalty and refraining from deriving an improper personal benefit. The

*Attach II*  
*Senate Judiciary*  
*1-15-87*

Delaware code does not go that far. However, the type of insurance affected by this act is called "Directors and Officers" insurance, and it would appear that any actuarial impact of the bill as drafted would not affect the "officers" portion.

3. Lines 166-169 prohibit retroactive application of the limitations of liability and indemnification. We think the majority shareholders of small non-public corporations may be able to agree to indemnify directors against monetary damages even when the minority shareholders have brought an action based on prior conduct. The prohibition on retroactive application of limitations on liability is probably appropriate for publicly held corporations where SEC provisions govern.
4. There is concern that the last sentence beginning at line 169 is unclear. The intent is to include nonprofit corporations within the provisions of Subsection (8). They suggest simply providing that Subsection (8) applies to any corporation chartered pursuant to KSA 17-6002, whether for-profit or non-profit in nature.

Respectfully submitted,

Ronald D. Smith

KBA Legislative Counsel



WILBERT AND TOWNER, P.A.  
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PAUL L. WILBERT  
JOHN B. TOWNER  
GARRY W. LASSMAN  
NELSON E. TOBUREN  
ROBERT J. FLEMING  
A. J. WACHTER  
ROBERT S. TOMASSI

December 29, 1986

J. GORDON GREGORY  
BILL WACHTER

Mr. Ronald D. Smith  
Legislative Counsel  
Kansas Bar Association  
1200 Harrison,  
P.O. Box 1037  
Topeka, KS 66601

Dear Mr. Smith:

This is in response to your letter of December 20, 1986 to my partner, Mr. Paul L. Wilbert, regarding proposed Tort Reform legislation.

A very good corporate client is currently wrestling with the issue of director liability. This client has for many years had outstanding outside directors on its board, and the corporation has unquestionably been the better for it. The corporation had a policy of D & O liability insurance in effect until very recently. The coverage was for \$10,000,000.00, at an annual premium cost of \$4,400.00. The policy expired a few months ago, and the best replacement which could be found was coverage of \$1,000,000.00, with a \$100,000.00 retention and a 95% coinsurance provision, at an annual premium of \$67,500.00. The corporation decided that the offered coverage was insufficient, and too expensive, so the directors are now without coverage. Naturally, the outside directors are quite nervous. Some or all of them may decline to continue as such.

I believe the proposal to amend the Kansas general corporation code so as to limit or eliminate the liability of directors to the corporation and its stockholders, is a step in the right direction. Even if this isn't the perfect solution, it is a good temporary solution, which could be "cleaned-up" later if time and experience shows that to be necessary.

The only qualms I have about the proposal is that it appears in 17-6002 under the heading (b) which is a listing of what the articles of incorporation may contain. Since the proposal is at least arguably a change in the common law, it seems to me that in addition to the amendment to 17-6002, there should also be a complete new statute which flatly says that directors will not be liable to the corporation or, its stockholders, (except for certain stated acts), if the incorporators have included the required provision in the articles, or if a majority of the stockholders have voted to so

Page two  
Mr. Ronald D. Smith  
December 29, 1986

amend the articles. My underlying thought is that simply sticking the amendment in under a list of what the articles may contain, might not be strong enough to make it so. Wouldn't it be better to have a specific enabling statute, to team up with the proposed amendment to 17-6002?

I believe the Kansas amendment is being proposed in basically the same form as the recent Delaware amendment which was enacted in 1986 but even knowing that fact, I'm still a bit uncomfortable about the proposed amendment procedure.

Respectfully yours,



JOHN B. TOWNER

JBT/kjw

## **CORPORATIONS**

**Issue:** Partnership rights to sue and be sued.

**KBA Position:** KBA supports allowing partnerships the right to sue and be sued.

**Rationale:** The Uniform Partnership Act contains no provision allowing a partnership to bring suit, or be sued, in its own name. The common law provides no such authority, either, since a partnership was not recognized at common law. KSA 60-304(e) provides jurisdictional authority for affirmative grants to sue, but partnerships were not included. The Uniform Partnership Act, itself, does not create liability or authority for a partnership to sue or be sued. Making this change in our law is appropriate to bring our partnership code into conformity with federal law.

**Issue:** Articles of Incorporation changes for Liability Purposes

**KBA Position:** KBA Supports changes to the corporation code to reflect recent Delaware Code changes to allow stockholders, through bylaw changes, to indemnify officers and directors for litigation costs in certain types of lawsuits.

**Rationale:** Under Delaware law, stockholders can voluntarily agree to indemnify officers or directors against costs of litigation for certain types of corporate lawsuits. The change was made to attract directors and officers to larger corporations. Such persons were declining to serve because of open ended personal liability. This proposed amendment would keep Kansas corporation law similar to the model Delaware Code, from which our law springs.

KTLA PROPOSED REDRAFT OF S.B. NO. 27

By Special Committee on Tort Reform and Liability Insurance

Re Proposal No. 29

AN ACT concerning civil procedure; limiting civil liability of directors and officers of certain non profit organizations.

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

Section 1. (a) Directors or officers of a charitable organization are not liable in a civil action for damages arising from their acts or omissions as individual directors or officers or as a board as a whole unless such conduct constitutes willful or wanton misconduct or intentionally tortious conduct, but only to the extent the directors and officers are not required to be insured by law or are not otherwise insured against such acts or omissions.

(b) Nothing in this section shall be construed to affect the liability of a charitable organization for damages caused by the negligent or wrongful acts or omissions of its directors or officers, and a director's or officer's negligence or wrongful act or omission, when acting as a director or officer, shall be imputed to the charitable organization for the purpose of apportioning liability for damages to a third party pursuant to K.S.A. 60-258a and amendments thereto.

(c) As used in this section, "charitable organization" means those charitable or educational organizations exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code of 1954 and which maintains liability insurance in minimum limits of \$100,000/\$300,000.

Attch. III  
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1-15-87

(d) The provisions of this act shall apply only to causes of action accruing on or after July 1, 1987.

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

(SZ1752)



1-15-87

January 15, 1987  
SB 27

**KANSAS BAR  
ASSOCIATION**

1200 Harrison  
P.O. Box 1037  
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(913) 234-5696

Mr. Chairman. Members of the Senate Judiciary Committee. I am  
Ron Smith, KBA Legislative Counsel.

KBA generally supports this legislation as an appropriate response to the ability of nonprofit corporations to provide D&O Insurance.

It should be noted that subsection (b) of SB 27 is an exception to the comparative negligence statute in Kansas, KSA 60-258a, says that every joint tortfeasor is liable to the claimant in a percentage to be determined by the trier of fact based on the evidence. From a practical point, while you are relieving the individual officer or director of liability for ordinary negligence if not otherwise required to be insured by law, that portion of the total negligence to the claimant imputed to the officer or director is to be picked up by the "charitable organization."

This may cause a court challenge, but we do not believe this contingency should deter you from enacting the bill. If the appropriate circumstances arise, the charitable organization might allege that the legislature has given partial immunity to some individuals solely because of their relationship with the codefendant charitable organization that is not burdened upon for-profit corporations, or other nonprofit corporations. In other words, this exception to the general statute may cause the charitable organization to pay a greater verdict than it would otherwise be required under KSA 60-258a.

*Attach. IV*  
*Senate Judiciary*  
*1-15-87*

Example: Assume a Director of a nonprofit day care center hires an employee who has worked around children before, and has been inattentive in the past. The director by checking references could have determined such propensity. A child is incorrectly supervised and is severely injured at the day care center. The child has \$100,000 of damages. The jury determines that the director was 50% negligent for hiring the employee, the corporation itself was 25% vicariously liable, and the employee was 25% negligent because of the carelessness.

1. If the day care center was a for-profit corporation, under KSA 60-258a the director (or D/O insurance) pays half the verdict, and the corporation pays only 25%. The employee is responsible for 25%, and probably insolvent. Child collects \$25,000 from the corporation and may or may not collect from the director or the employee.

2. If the corporation is a not-for-profit filed under Section 501(c)(3), then the corporation pays all the liability of the director and the corporation: \$75,000.

Whether this difference in treatment will be constitutional is, of course, difficult to predict. Certainly the important thing is to encourage persons to help guide and work for nonprofit corporations, and this change in the law may be needed for that purpose.

Respectfully submitted,

Ronald D. Smith

Legislative Counsel

TESTIMONY  
SENATE JUDICIARY COMMITTEE

Chairman, Senator Robert Frey  
January 15, 1987 - 10:00 a.m.

Mr. Chairman and Committee Members:

My name is Bob Runnels, Executive Director of the Kansas Catholic Conference speaking under the authority of the Roman Catholic Bishops of Kansas.

In Church there is an ever growing concern regarding liability of volunteers and liability insurance cost.

Because of the proliferation of lawsuits we are finding it more difficult to obtain good people to serve without remuneration on various Boards (e.g. school boards; parish council boards, etc.)

Additionally insurance rates for all types of liability insurance have soared far beyond what we believe experience has justified.

We ask that this committee which has a great deal of expertise in tort matters give attention to our concerns.

We support and ask that you favorably report Senate Bill 27 for passage.

*Attach. V*  
*Senate Judiciary*  
*1-15-87*