Approved February 6, 1990
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Michael R. O'Neal at
Chairperson

3:30 ~~XXX~~/p.m. on January 30, 19 90 in room 519-S of the Capitol.

All members were present except:

RepresentativePeterson and Moomaw, who were excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Representative Robert Vancrum
Edwin VanPetten, Deputy Attorney General
Paul Morrison, Johnson County District Attorney
Jim Clark, Kansas County and District Attorneys Association, appeared for C. William Ossmann, Shawnee County District Attorney
Larry Thomas, Kansas Peace Officers Association
Mark Furney, Attorney, Overland Park
Charlett Harding
T. Bradley Manson, Attorney, Overland Park
John M. Klamnn, Attorney, Overland Park
Galen Davis , Special Assistant for Drug Abuse Program, Office of the Governor

HEARING ON HB 2671 Probable cause shown before installation and use of pen register

Representative Robert Vancrum informed the Committee Judge G. Joseph Pierron, District Judge, Johnson County, first suggested this legislation in December of 1988. The bill would amend K.S.A. 22-2527 regarding the installation and use of a pen register or a trap and trace device. Currently an investigative or law enforcement officer certifies to the court that the information likely to be obtained by the installation and use of a pen register is relevant to an on-going criminal investigation. No facts have to be stated in support of this assertion other than to identify who or what is being trapped and what kind of crime is suspected. Judge Pierron proposed an amendment beginning at line 20 "...enforcement officer has certified to the court facts sufficient to show that the information likely to be obtained by such installation and use is relevant to an on-going criminal investigation." The amendment would replace language in lines 20, 21, 22 and 23. Copies of a letter from Judge Pierron were distributed to the Committee, see Attachment I.

Edwin VanPetten, Deputy Attorney General, testified in opposition to H.B. 2671. The proposed bill would make it more difficult for investigative law enforcement agencies to utilize an effective weapon to battle drug dealers and other organized crime operations. He explained pen registers record the numbers of outgoing local telephone calls. A trap and trace device records the telephone number from which a call is placed to the target telephone, see Attachment II.

In answer to Committee questions, Mr. Van Petten said the proposed amendment would not change dramatically the position of the Attorney General's office. He said there was no need for HB 2671 or the proposed amendment.

Paul Morrison, Johnson County District Attorney, testified in opposition to HB 2671, see Attachment III. He said the current law is sufficient and regulates the use a pen registers and conforms with federal requirements. In regard to the proposed amendment, Mr. Morrison said he had no problem with the proposed new wording except Kansas would no longer conform to the federal requirements. Kansas uses federal case law to determine what is legal or what is illegal in regard to pen register orders. If Kansas imposes stricter requirements in regard to pen registers than the federal government requires, then Kansas will no longer be able to use federal case law.

Jim Clark, Kansas County and District Attorneys Association, presented the testimony of C. William Ossmann, Shawnee County Assistant District Attorney, in opposition to HB 2671, see Attachment IV.

Mr. Clark stated he was not opposed to the amendment by Judge Pierron.

Larry Thomas, Kansas Peace Officers Association, testified on behalf of the 3,000 members of the K.P.O.A. and he strongly urged that HB 2671 not be passed. For his testimony, see Attachment V.

In response to a Committee question, Mr. Thomas said he does not want HB 2671 or the amendment proposed by Judge Pierron.

There being no other conferees, the hearing was closed on HB 2671.

HEARING ON HB 2689 Limitations of actions on latent diseases

Mark Furney, Attorney, introduced his client, Charlett Harding.

Charlett Harding said her husband was 56 years old when he died of mesothelioma. Her husband ran a successful painting contracting business and in the course of his work was exposed to plaster and other painting products which contained asbestos. She said due to the Kansas Supreme Court ruling in March of 1989 she will be unable to file a cl m in Kansas for the wrongful death of her husband.

Mark Furney testified that Mr. Harding's exposure to asbestos was from late 1950 through 1952. He explained the latent period between the state of exposure and the discovery of the manifestation of asbestosis is likely to be a minimum of 15 years and more often considerably longer. Because of a ruling in Tomlinson v. Celotex a person is barred from bringing their cause of action before the person has even contracted a disease from the exposure to asbestos.

Mr. Furney stated K.S.A. Supp. 60-513(b) should be amended so that victims of latent disease are not barred from bringing their claim prior to its manifestation. He also proposed a revival statute should be passed so that the legislative intent is clear that those individuals whose claim was barred, or might have been barred, by the operation of K.S.A. 1989 Supp. 60-513(b), as interpreted by the Kansas Supreme Court in Tomlinson v. Celotex, have a period of one year within which to pursue their claim, see Attachment VI.

T. Bradley Manson and John M. Klamnn, Attorneys, testified in support of HB 2689. They stated their law firm, Payne and Jones of Overland Park, is co-counsel for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, and Forgers and Helpers for their National Asbestos Program. Their firm also represents a number of asbestos victims and/or their widows and families.

Mr. Manson and Mr. Klamnn supported a revival statute. They said a revival statute is necessary to protect those citizens whose causes of action have accrued more than 10 years since the wrongful conduct of another but before the passage of legislation such as HB 2689, see Attachment VII.

BILL REQUESTS

Galen Davis, Special Assistant for Drug Abuse Program, Office of the Governor, requested the Committee introduce a bill concerning violations of the uniform controlled substances act including minors and a bill concerning mandatory revocation of drivers licenses and a mandatory fine if violating the uniform controlled substances act.

Representative Solbach moved to introduce the two bills requested by the Governor's office. The motion was seconded and passed.

The Committee meeting was adjourned at 5:20 p.m. The next meeting will be Wednesday, January 31, 1990 at 3:30 p.m. in room 313-S.

DISTRICT COURT OF KANSAS
TENTH JUDICIAL DISTRICT
JOHNSON COUNTY COURTHOUSE
OLATHE, KANSAS
66061

CHAMBERS OF:
G. JOSEPH PIERRON
DISTRICT JUDGE
COURT NO. 3

OFFICERS:

MARILYN ZELLER
ADMINISTRATIVE ASSISTANT

DEBORA RANDOLPH, C.S.R.
OFFICIAL COURT REPORTER

(913) 782-5000 EXT. 472

January 26, 1990

Representative Michael R. O'Neal
State Capitol Building, Room 426-S
Topeka, Kansas 66612

In re: House Bill 2671 - Pen Registers

Dear Representative O'Neal:

Representative Vancrum has indicated that a hearing has been scheduled for Tuesday, January 30, 1990 at 3:30 P.M. The press of court business prevents me from making comments on this bill in person, so I am submitting these written remarks for your consideration.

I think it would come as a surprise to most citizens of the State of Kansas if they were informed that the only requirement for getting a pen register on their phones is that an investigative or law enforcement officer certify to the court that the information likely to be obtained by such installation and use is relevant to an on-going criminal investigation. No facts have to be stated in support of this assertion other than to identify who (or what) is being trapped and what kind of crime is suspected.

As a prosecutor for ten years prior to taking the bench, I understand the importance of such investigative tools. I also believe that they are probably not misused very often. However, the opportunity for abuse is obvious. "Trust me" is generally not regarded as sufficient grounds for taking legal action.

Although I believe the law needs tightening, the amendment suggested in H.B 2671 might be going a little too far. By requiring that the officer certify "facts sufficient to show probable cause that a crime has been or is being committed", we are approaching or achieving the standard necessary for a wiretap. Also, as written, the amendment is somewhat of a non sequitur. Just because an officer can show probable cause that a crime has been or is being committed is

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Attachment I

not necessarily the basis for the authorization of a pen register. There would need to be additional language requiring that the pen register produce information whose use would be relevant or material to an on-going criminal investigation.

I would suggest the following modification. Beginning at line 20 amend so it reads:

> ". . . enforcement officer has certified to the court facts sufficient to show that the information likely to be obtained by such installation and use is relevant to an on-going criminal investigation."

This would replace all of the present language in lines 20, 21, 22 and 23.

With this amendment the officer would simply have to tell the judge why he believes that the pen register will in fact produce information that could be used in a criminal investigation. The judge would then rule on whether there were sufficient facts to justify the trap.

Thank you for this opportunity to comment on this bill. If I can be of any assistance, please let me know.

Sincerely,

G. Joseph Pierron

GJP:mz

cc: Representative Robert J. Vancrum
State Capitol, Room 112-S
Topeka, Kansas 66612

Senator Wint Winter, Jr.
State Capitol, Room 120-S
Topeka, Kansas 66044

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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
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TESTIMONY
DEPUTY ATTORNEY GENERAL EDWIN VAN PETTEN
BEFORE THE HOUSE JUDICIARY COMMITTEE
HOUSE BILL 2671
THURSDAY, JANUARY 30, 1990

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Robert T. Stephan, I am here today to speak in opposition to House Bill 2671. The proposed bill would make it more difficult for investigative law enforcement agencies to utilize one of the most effective weapons we have to battle drug dealers and other organized crime operations.

Pen registers simply allow for the recording of the numbers of outgoing local telephone calls, also called on a dial number recorder. A trap and trace device merely records the telephone number from which a call is placed to the target telephone. In other words, the exact same kind of records that are available on phone bills if the call had been long distance. We are not dealing with privileged information or the actual contents of the conversations in this act. What we are dealing with is basically a business record which individuals freely provide to their local telephone company.

Traditionally, no order by a court was required to obtain pen register devices by law enforcement. The Supreme Court of the United States ruled in Smith v. Maryland, 442 U.S. 735 (1979), that a person

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Attachment II

had no legitimate and reasonable expectation of privacy in the phone numbers dialed from a telephone. In 1986, the federal government passed a major revision in what we refer to as Title III, and in that revision it set out the procedures which now have been adopted in Kansas law for obtaining the use of a pen register. Briefly, the statute K.S.A. 22-2525, et seq. requires an attorney for the government or law enforcement officer to certify to the court that the information to be obtained by pen register is relevant to an ongoing criminal investigation. In other words, this is an investigative tool for the executive branch to control.

The federal government considered and specifically decided that an independent judicial review was not appropriate in this investigative stage of a case: "The provision does not envision an independent judicial review of whether the application meets the relevant standard, rather the court needs only to review the completeness of the certification submitted." Senate Report #99-541 at 47 reprinted in U.S. Code, Congressional and Administrative News 3555,3601.

It is vital to remember the kinds of crimes that are involved here. It is very easy to establish probable cause that a crime has been committed with a murder or robbery, as you have victims, witnesses, evidence of the crime. However, with organized criminal activity such as drug dealing, or bookmaking, there is no one reporting it to the police. Neither the buyer or seller would report it to the police. It is only by a long, sometimes slow investigative process that enough pieces are

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collected whereby probable cause can be established to obtain a search or arrest warrant.

One of the most vital pieces to such a puzzle is the associations and contacts established by pen register devices. A citizen may report they heard a suspect was dealing dope and getting it from California. Based on that information an investiation may be opened. However, that cannot be called reasonable suspicion, let alone probable cause. But, once we establish telephone calls by means of a pen register to a number, which turns out to be that of a convicted methamphetamine manufacturer from California, we then would consider surveillance, undercover or other investigative resources.

Another concern is the counterproductive effects of requiring the same probable cause showing for pen registers as is needed for wiretaps. Agencies would be tempted to engage in the highly intrusive interception of communication rather than the simpler, cheaper and less intrusive pen register if you have the same burden involved.

If the ability to obtain pen registers is ever abused, and I have heard at this time no such allegations, there are remedies both in the criminal courts and under civil actions to right such a wrong. However, it would be extremely ill-advised to essentially negate such an effective weapon against organized crime merely on the speculation that it might someday be abused.

Thank you for your time and consideration.

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STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

PAUL J. MORRISON
DISTRICT ATTORNEY

JOHNSON COUNTY COURTHOUSE
P.O. BOX 728, 6TH FLOOR TOWER
OLATHE, KANSAS 66061
913-782-5000, EXT. 5333

January 30, 1990

TO: MEMBERS OF THE HOUSE JUDICIARY COMMITTEE

RE: HOUSE BILL 2671

Good Afternoon:

I am here today to express my opposition to House Bill 2671. I come from a county where we have a long history of the use of court authorized wiretapping for the investigation of major narcotics dealers. Obviously, we are all interested in doing what we can to aid the cause of law enforcement when it comes to fighting drug abuse. As such, one of the most effective tools that law enforcement has in this battle is the use of court authorized eavesdropping.

This bill, however, deals with the use of pen registers. The pen register device is nothing more than a machine that is attached to a telephone line that records the telephone numbers being dialed out from the target telephone. It involves absolutely no use of the interception of conversations. Because the use of the pen register device allows law enforcement to know who suspected drug dealers are in contact with, it has become a very important tool that we use in helping to determine whether suspect individuals are significant narcotics dealers. This is done by analyizing the pen register tapes to determined who these people might be in contact with. Oftentimes, it lets us know early on whether a case is worth pursuing any further. For example, an individual's pen register analysis might tell us that that person is in contact with several known large scale narcotics dealers in Florida. As such, coupled with other information, we might eventually pursue a wiretap order. Conversely, oftentimes a person will be a suspect in a narcotics investigation and the pen register analysis will reveal little or no activity. In cases such as that, the pen register allows us to either stop the investigation or pursue it from another angle. In other words, an argument can be made that use of pen register devices actually eliminates some wiretapping which would

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Attachment III

of the Electronic Communications Privacy Act of 1986 by the federal government. This Act was the first federal regulation of pen registers and gave states two years to comply their statutes with the federal standards. Kansas was one of the first states to adopt these standards and the state of Kansas is in full compliance with the federal law. Obviously, it is important that pen registers be regulated by the courts and that judges oversee them. However, to ask the State to make a probable cause showing before every pen register device can be ordered would be counter productive to our ability to target and prosecute large scale narcotics dealers. It is as simple as that.

Thank you.

PAUL J. MORRISON
DISTRICT ATTORNEY

TESTIMONY ON HOUSE BILL 2671

OF C. WILLIAM OSSMANN, ASSISTANT DISTRICT ATTORNEY

A pen register is "a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but shall not include any device used by provider or customer or an electronic communications service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of an electronic communications service for cost accounting or other like purposes in the ordinary course of it's business"; K.S.A. 22-2529(2).

A pen register then allows law enforcement officers to determine what telephone numbers have been dialed from a particular telephone line. It does not allow them to monitor conversations being transmitted over the telephone line.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits the interception of "a wire or oral communication" except in accordance with the strict procedures set out therein. Similar pro-

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tections were provided in K.S.A. 22-2514 et. seq., most recently amended by the Kansas Legislature in 1988.

Courts have consistently held that the procedures for the interception of "a wire or oral communication" are not applicable to pen registers. In United States v. New York Telephone Company, 434 U.S. 159, 98 S.Ct. 364, 50 L.Ed.2d. 376 (1977), the Supreme Court reached the same conclusion. In that case the Court held:

> Pen registers do not "intercept" because they do not acquire the "contents" of communications, as that term is defined by 18 U.S. C.A. Subsection 2511(8). Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed - a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identifies, nor whether the call was even completed are disclosed by pen registers. Furthermore, pen registers do not accomplish the "aural acquisition" of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or the pressing of buttons on push button telephones) and present the information in a form to be interpreted by sight rather than by hearing.
>
> The legislative history confirms that there was no congressional intent to subject pen registers to the requirements of Title III. The Senate Report explained that the definition of "intercept" was designed to exclude pen registers:
>
> Paragraph 4 (of Subsection 2510) defines "intercept" to include the aural acquisition of the contents of any wire or oral communi-

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> cation by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. . . . The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register", for example, would be permissible. * * * The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication." * * *
>
> It is clear that Congress did not view pen registers as posing a threat to privacy of the same dimension as the interception of oral communications and did not intend to impose Title III restrictions upon their use.

In Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d. 220 (1979), the Supreme Court ruled that a pen register order does not involve a search and seizure under the Fourth Amendment. Justice Blackmun, writing for the majority, rejected the petitioner's claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone:

> First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching requirement that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law." * * * Telephone users, in sum, typically know that they must

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> convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically guaged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret. * * *
>
> Second, even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not "one that society is prepared to recognize as 'reasonable.'" This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. * * * In Miller, for example, the Court held that a bank depositor has no "legitimate 'expectation of privacy'" in financial information "voluntarily conveyed to . . . banks and exposed to their employees in the ordinary course of business." * * *
>
> This analysis dicates that petitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy.

The Court discussed the petitioners contention that he had a legitimate expectation of privacy as to the particular incriminating call because it was a lo-

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cal one, which "telephone companies, in view of their present billing practices, usually do not record":

> This argument does not withstand scrutiny. The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police. * * * We are not inclined to make a crazy quilt of the Forth Amendment, especially in circumstances were (as here) the pattern of protection would be dictated by billing practices of a private corporation.

As of July 1, 1988, a pen register order was required in Kansas. Such an order requires a certification that "the information likely to be obtained is relevant to ongoing criminal investigation being conducted by the (law enforcement) agency". K.S.A. 22-2525 et. seq. A similar statement is required for the use of a "trap and trace" device.

Toll call records for long-distance calls have frequently been subpoenaed pursuant to the inquisition powers provided by K.S.A. 22-3101 et. seq. One example can be found in the Court of Appeals case Southwestern

Bell Telephone Company v. Miller, 2 Kan.App.2d. 558, 583 P.2d. 1042. (1978)

An inquisition can be instituted when a designated prosecuting official "is informed or has knowledge of any alleged violation of the laws of Kansas", and requires no "probable cause" finding that a crime has been or is being committed.

Kansas wire tap applications (K.S.A. 22-2514 et. seq.) require "probable cause", which in practice is frequently established through information obtained from toll call records, trap and trace orders, and the use of pen registers.

Law enforcement officers and prosecutors have a duty to investigate criminal activity which comes to their attention. The inquisition statute and the provisions for pen register and trap and trace orders are tools entrusted to them by the legislature to assist in that function.

To adopt House Bill 2671 would place valuable "association" evidence beyond the reach of law enforcement officials until "probable cause" has been established. As the Court of Appeals noted in Southwestern Bell, infra, "We find it hard to believe the legislature intended the forces of law enforcement to go into battle against crime with half their guns spiked."

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To require "probable cause" in an application for a pen register or a "trap and trace" which neither records nor monitors the individuals conversation would unnecessarily frustrate law enforcements efforts to investigate criminal activities in the absence of some showing that abuses have occurred.

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KANSAS BUREAU OF INVESTIGATION
DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

JAMES G. MALSON
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
SPECIAL AGENT LARRY J. THOMAS
KANSAS BUREAU OF INVESTIGATION
HOUSE BILL 2671
BEFORE THE JUDICIARY COMMITTEE
THURSDAY, JANUARY 30, 1990
STATE CAPITOL, ROOM 514-S

Mr. Chairman and Members of the House Judiciary Committee:

My name is Larry Thomas. I've been a Special Agent with the Kansas Bureau of Investiagtion (KBI) since 1984, assigned to the Narcotics Division. I'm here today on behalf of the Kansas Peace Officer's Association as well as a representative for the KBI, to testify against House Bill 2671.

House Bill 2671 seeks to amend K.S.A. 22-2527 regarding the application authorizing the installation and use of a pen register or a trap and trace device.

The current language requires that the information likely to be obtained by such installation and use is relevant to ongoing criminal investigation. The change introduced in House Bill 2671 raises the burden by requiring a showing of facts sufficient to show probable cause that a crime has been or is being committed.

A pen register or dial number recorder, the technical name for the pen register, and trap/trace device are investigative tools used by law enforcement authorities primarily in drug and gambling investigations. As investigative tools the equipment is used to gather evidence in the same

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Attachment V

manner as other investigative tools, including neighborhood interviews, surveillance details, and even crime scene analysis to focus your investigation on the criminal perpetrators.

The pen register and trap/trace device are usually utilized in higher level, more complex narcotics investigations. The persons at the top of these organizations utilize several measures including countersurveillance equipment, phony business fronts and a pyramid of lower-level working associates to insulate themselves from detection and avoid prosecution. At a time when the war on drugs needs to strike at the top of these pyramids, as an investigator, we cannot afford to lose any of our investigative tools from our arsenal.

It is important to understand the pen register and trap/trace device pose no threat to anyone's rights from the invasion of privacy. The equipment does not allow interception of actual conversations as in an actual wire intercept. The equipment allows for identification of telephone locations from which telephone calls are originating or terminating. The information is a business record of the same nature as a long distance telephone bill.

If the change as proposed by House Bill 2671 is passed, allowing for judicial review and requiring a showing of probable cause prior to authorization for use of a pen register or trap/trace device, it brings the court systems into the investigative process. This could create problems especially in smaller jurisdictions when the availability of judges to review and authorize wire intercept orders is limited.

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As proposed in House Bill 2671, the showing of probable cause to secure an order for a pen register or trap/trace device raises the level to the same requirment needed for a wire intercept order. In the investigations I have been involved with that have utilized a pen register or trap/trace device, the information from the pen register and trap/trace equipment frequently is used to help meet the required probable cause showing needed for the application to conduct a court authorized wire intercept. If the higher level of probable cause is needed for a pen register and trap/trace device, wire intecept investigations posed at the higher level narcotics traffickers could be in jeopardy of extinction.

Another benefit of using the pen register and trap/trace device as an investigative tool is the avoidance of conducting a wire intercept when not needed. The information from the equipment can show if there is a lack of evidence to be gathered from the targeted telephones. In such a case when a target may not be using the telephone in question in the furtherance of a crime, the expense of a wire intercept can be avoided.

The average cost of conducting an electronic eavesdropping investigation is approximately $40,000. In the time I have been with the KBI, I have conducted ten wire intercept investigations. In addition to these cases I have utilized the pen register as an investigative tool in three other cases where the information showed a wire intercept would not be effective, thereby avoiding the high cost of the wire intercept investigation and avoiding the invasion of privacy of those using the telephones in question.

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Att V-3

In closing, I would reiterate the concern of losing the pen register and trap/trace device as investigative tools necessary to help accumulate information to show probable cause for wire intercept investigations. During 1989, I was personally involved with three investigations where pen registers were used. One case resulted in the seizure of twenty-two and one half pounds of cocaine, the largest in Kansas history. The second case resulted in the seizure of approximately ten pounds of cocaine, and the other resulted in the seizure of over one hundred and ten pounds of marijuana in addition to assets being seized in four states totalling over three million dollars.

On behalf of the 3,000 members of the KPOA I would strongly urge that House bill 2671 not be passed. Thank you for your consideration. I will be pleased to answer any questions.

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Mark A. Furney, Esquire
JONES & GRANGER
6811 West 63rd Street
Suite 310
Overland Park, Kansas 66202
(913) 677-1166

TO: Kansas Judiciary Committee

FROM: Mark A. Furney

DATE: January 30, 1990

RE: Comments in Support of Legislation to Amend K.S.A. 60-513(b), House Bill _____

I. INTRODUCTION.

I represent Charlett Harding. Charlett Harding is the widow of Jerry Harding, who on October 26, 1988 died of mesothelioma. Charlett Harding resides in Wichita, Kansas and has for more than twenty (20) years. Jerry Harding ran a successful painting contracting business and in the course of his work was exposed to plaster and other painting products which contained asbestos.

Malignant mesothelioma is a form of cancer for which the only known cause is exposure to asbestos. He was 56 years of age at the time he died. Charlett, age 52, had given up her career as a beautician, over fifteen years ago, to assist in the family business.

Because of the substantial loss of income that Charlett Harding suffers as a result of her husband's death, she is facing the sale of her house and has had to return to work at an age where most would be making plans for retirement.

If K.S.A. 60-513(b), as interpreted by the Kansas Supreme Court in the case of Tomlinson v. Celotex, is applied to the facts of Charlett Harding's cause of action for the wrongful death of her husband, then she will simply be unable to recover for the damages she has sustained. Had Charlett Harding and her husband lived in any one of forty-seven (47) other states, Charlett Harding would not be barred from seeking compensation for the death of her husband due to this asbestos related cancer.

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H. Jud Com.

Attachment VI

II. WHAT ARE ASBESTOS RELATED DISEASES, AND WHAT IS THE IMPORTANCE OF "LATENCY."

Asbestos related diseases fall into three primary categories:

1. Asbestosis is a form of pulmonary fibrosis, or scarring of the inner parts of the lung which effects the breathing mechanism. The American Thoracic Society in its official statement with regard to "The Diagnosis of Non-Malignant Diseases Related to Asbestos" states that:

> "With levels of exposure common in the past few decades, the latent period between the state of the exposure and the discovery of the manifestation of asbestosis is likely to be a minimum of fifteen (15) years and more often considerably longer." (Footnote 1)

An increased risk of lung cancer as a result of asbestos exposure has been established in numerous epidemiologic studies of diverse groups. Asbestos induced lung cancer usually has a latency period in excess of twenty (20) years. (Footnote 2)

The association between malignant mesothelioma and asbestos exposure has been conclusively established by many studies. Generally, a latency period of at least twenty-five (25) to thirty (30) years is required before mesotheliomas are observed. (Footnote 3)

Thus, it is clearly established that asbestos related diseases have a latency period longer than ten (10) years. Because of the ruling in Tomlinson v. Celotex, a person is barred from bringing their cause of action before the person has even contracted a disease from the exposure to asbestos.

This proponent of legislative change sincerely doubts that the Kansas Legislature, in enacting K.S.A. 60-513(b) truly intended to bar the victims of latent diseases from having their day in court prior, to the manifestation of illness.

III. WHAT DID THE ASBESTOS COMPANIES KNOW, AND WHEN DID THEY KNOW IT.

Through the many trials of asbestos related cases over the last ten years, this proponent believes it is safe to summarize the knowledge of the asbestos industry with regard to the harmful effects of asbestos.

That that the medical literature on the relationship between asbestos exposure and disease is extensive. A preliminary survey through the end of 1960 reveals over 400 citations of medical articles on the hazards of asbestos exposure, a great many of them in some of the most widely circulated and read journals in the world, including The Journal of the American Medical Association.

Upon examination of this list, the proponent believes that the following evidence would be established.

1. The knowledge that exposure to asbestos could cause a serious chronic pulmonary disease called asbestos is irrefutable and generally accepted by 1930.

2. The suspicion that asbestos could cause cancer of the lung was first voiced in the 1930's, was considered a probable relationship by 1942, and was generally accepted by 1949, with epidemiological studies in the mid-1950's leaving little room for doubt.

3. The index of suspicion relating asbestos exposure to the rare tumors called mesotheliomas was high by 1953 and by 1960 the full extent of the relationship was being revealed.

4. Exposure to asbestos in the course of work with asbestos containing products posed the same hazards as exposure in the factory setting; the simple fact that "asbestos was asbestos" was evident from the medical record and confirmed by numerous case reports and studies showing harm to those who worked with asbestos products.

The above is summarized and verified in the book of Dr. Barry Castleman, Asbestosis; Medical and Legal Aspects.

In addition, many internal memoranda produced by asbestos industry defendants, show that as early as the 1940's the companies were clearly aware of the dangerous propensities of asbestos.

IV. A REVIVAL STATUTE IS NEEDED.

This proponent submits that in addition to the amendment of K.S.A. 60-513(b) which is under consideration, the legislature should also adopt a specific revival statute.

This proponent believes that, should K.S.A. 60-513(b), change the ten (10) year rule with regard to latent disease cases, that those who had been diagnosed within the last several years, and whose claim would be barred pursuant to the old law, will face the argument that because the diagnosis was made when the current version of K.S.A. 60-513(b) was in effect, that a defendant has a substantive right to be free from liability for those claims.

This proponent submits a clear statement of legislative intent to revive claims is necessary. Further, this proponent believes there is substantial authority that the action of the legislature in doing so will meet with federal due process clause requirements. In the case of Chase Sec.Corp. v. Donaldson, 325 U.S. 304, the United States Supreme Court upheld the revival of a time barred action, stating that statutes of limitation "represent a public policy about the privilege to litigate... the history of pleas of limitation show them to be good only by legislative grace

and to be subject to a relatively large degree of legislative control." (id., at 314)

A recent revival statute, similar to the one being offered here was upheld by the highest court of New York. In Hymowitz v. Lilly & Co., 73 NY2d 487 (1989), the New York high court held that a revival statute, giving victims of previously barred latent diseases one year within which to file suit, was constitutional. In that case, the New York court states:

> Laws of 1986... is not unconstitutional as a denial of due process under the state and federal constitutions... insofar as it revived, for the period of one year, actions for damages caused by the latent effects of... (DES). The legislature may constitutionally revive personal causes of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intentions of the legislature were not effected. The latent nature of DES injuries is well known and it is clear that in the past the court maintained exposure rule for toxic substances prevented the bringing of timely actions for recovery. Thus, exceptional circumstances are presented, an injustice has been rectified, and the high standard for determining whether the legislature's revival of a personal cause of action satisfies due process has been met." Hymowitz, at page 488.

Thus, proponent submits a specific revival statute should be passed by the legislature to make it clear that it is the legislature's intent to allow those victims of latent disease, and whose claim would be barred pursuant to the ruling in Tomlinson v. Celotex, be allowed to bring suit.

CONCLUSION

K.S.A. 60-513(b) should be amended so that victims of latent disease are not barred from bringing their claim prior to its manifestation. In addition, a revival statute should be passed so that the legislative intent is clear that those individuals whose claim was barred, or might have been barred, by the operation of K.S.A. 60-513(b), as interpreted by the Kansas Supreme Court in Tomlinson v. Celotex, have a period of one year within which to pursue their claim.

Thank you for your consideration of this matter.

AMENDMENT TO K.S.A. 60-513(b)

AN ACT RELATING TO THE REVIVAL OF CERTAIN TIME BARRED LATENT DISEASE CLAIMS:

(a) Any injured party who was diagnosed with a latent disease more than two years prior to the effective date of this act and whose claim was time barred pursuant to K.S.A. 60-513 (1986 Supp) (1987 Supp) (1988 Supp) (1989 Supp), shall have one year from the effective date of this act to bring suit for said latent disease, so long as the injured party was a resident of Kansas at the time of the diagnosis or the injured party's claim otherwise accrued pursuant to Kansas law.

(b) The provision of subsection (a) of this act, and the revival period created therein, shall not be deemed or construed to bar any injured party's claim which would otherwise be valid pursuant to K.S.A. 60-513(b) as amended by the legislature in 1990.

FOOTNOTES

Footnote 1: "The diagnosis of non-malignant diseases related to asbestos." Am.Rev.Respir.Dis. 1986:134:363, at page 365.

Footnote 2: Federal Register/Vol. 51, No. 119/Friday, June 20, 1986/Rules and Regulations, page 22615.

Footnote 3: Federal Register/Vol. 51, No. 119/Friday, June 20, 1986/Rules and Regulations, page 22616.

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January 31, 1990

Mr. Chairman and the
Membership of the Committee on Judiciary
House of Representatives
Kansas Legislature
Topeka, Kansas

Re: House Bill 2689

Ladies and Gentlemen:

With the permission of the Committee, we would like to present the following written testimony in support of House Bill 2689.

By way of background, our offices are co-counsel for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers for their National Asbestos Program. We represent the International in 31 states, including the state of Kansas. We are authorized by this International and by the AFL-CIO to present this testimony in support of House Bill 2689.

By way of additional background, our firm also represents a number of asbestos victims and/or their widows and families from the state of Kansas who are suffering substantial personal hardship arising out of their asbestos-related disease. In addition, we represent a large number of property owners throughout the United States who are now suffering severe financial consequences associated with the contamination of their buildings with asbestos fibers which have been released from asbestos-containing construction products. Included in this latter group are the Shawnee Mission, Kansas and Kansas City, Kansas school districts. Mr. John Klamann of our offices has been involved with asbestos-related issues on a local and national scale since 1979.

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We would like to present to the Committee our very grave concerns, and the concerns of a great number of constituents from the state of Kansas, over the current state of the law as it relates to K.S.A. 60-513b, as interpreted by the case of Tomlinson v. Celotex, et al. decided by the Kansas Supreme Court in March of 1989. In essence, the Tomlinson decision applied a 10-year statute of repose found within K.S.A. 60-513b to so-called "latent disease" cases, including those presented by the victims of asbestos exposure.

Background

Asbestos is a fibrous mineral extracted from open pit and underground mines located principally in Canada and South Africa. Its commercial use originated with the discovery of the Canadian chrysotile mines in the 1870s. By 1898, the Chief Inspector of Factories in Great Britain had made note of the scarring effect of asbestos fibers inhaled into the lungs of asbestos textile workers. By 1928, those scarring effects became known as "asbestosis" and with the discovery in 1930 of the widespread occurrence of asbestosis in British asbestos factories, the use of asbestos became subject to strict regulation in Great Britain in 1933.

In the United States, the first epidemiologic study of the health effects of asbestos was conducted through the sponsorship of the Metropolitan Life Insurance Company and the asbestos industry from 1929 to 1931. The results of that study were published by Dr. Anthony Lanza in 1935. His report showed a significant incidence of asbestos disease in asbestos plants located in this country. Dr. Lanza pointed out that the scarring disease asbestosis had a latency period of 15 to 25 years; that is, the study showed that on average the disease did not manifest itself until 15 to 25 years following the initial exposure to asbestos.

In the same year, 1935, Drs. Lynch and Smith published their article associating asbestosis with lung cancer. In 1938, Germany recognized lung cancer as a compensable disease among asbestos workers. In 1947, the Chief Inspector of Factories for Great Britain reported a large-scale study which established the propensity of asbestos to cause lung cancer. By 1949, the Journal of the American Medical Association acknowledged this association of asbestos exposure and lung cancer in the United States.

In 1960, Drs. Wagner, Sleggs and Marchand established the relationship between asbestos exposure and an extremely rare form of cancer known as mesothelioma. At the world conference

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on the Biological Effects of Asbestos exposure held in New York City in 1963, inhalation of asbestos fibers and its association with asbestosis, pleural scarring, lung cancer, mesothelioma and gastrointestinal cancer became well established throughout the medical and scientific communities.

Asbestos fibers found wide usage in the construction industry during the period of the latter 1940s through the early 1970s when federal, state and local governments intervened to control or ban its use. Its widest use within the state of Kansas would have been in the construction trades where asbestos-containing materials were used in insulation, plaster, acoustical, and fireproofing applications. Each of those usages within this state continued until such time as the products were banned from the marketplace variously in the 1970s.

In 1969, New York City announced the commencement of hearings to determine whether the spray application of asbestos-containing products should be banned for environmental and health reasons. By 1970-71, the use of spray-applied asbestos products was banned in New York City, Philadelphia, Chicago and San Francisco. In 1972, OSHA required that all asbestos-containing materials introduced into the marketplace were to contain a warning relative to the health effects of inhalation of asbestos fibers. In 1973, the EPA banned the spray application of asbestos-containing products throughout the United States. In 1975, the EPA banned the use of asbestos-containing insulating products. In 1979, the EPA banned the use of asbestos-containing drywall compounds. In 1988, the EPA announced its intention to ban all remaining usages of asbestos-containing products within the next decade.

Medical Consequences of the Use of Asbestos in the United States and in the State of Kansas

As stated above, since the time of the first study of the health effects of asbestos in this country, it has been acknowledged that asbestos-related diseases are "latent" in nature. That is, a substantial period of time will in most, if not all, cases pass between the date of first exposure to asbestos and the date of the manifestation of disease. For asbestosis, that average latency period was recognized in 1935 to be from 15 to 25 years. The average latency period recognized today for asbestos exposures occurring in the 1960s and 1970s is believed to be 25 to 35 years. The average latency period for lung cancer induced by asbestos exposures during the same era is believed to be in the range of 25 to 35 years. The average latency period for mesothelioma is 35 years

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and can extend outward to more than 50 years. As a result of the exposures which occurred well into the 1970s, scientists and epidemiologists have observed nationwide 2000 mesotheliomas and 6000 lung cancers per year. Dr. David Lilienfeld, one of the foremost epidemiologists in the United States, has projected asbestos-related malignant mesothelioma mortality in the United States for the period 1985 to 2009 at 21,500 deaths. Similarly, he has projected 76,700 deaths in the United States during the same period from asbestos-related lung cancer, and an additional 33,000 deaths from gastrointestinal cancer due to asbestos.

Fortunately, the state of Kansas will not experience the dramatic numbers of asbestos-related disease over the next two decades that can be expected in shipyard states where asbestos-containing products were used extensively in the construction of naval vessels. Nor can we expect to see the amount of disease which will occur in the major metropolitan areas located in the United States where substantial amounts of asbestos-containing construction materials were used in the many high-rise and commercial structures built during the construction booms of the late 1950s through the early 1970s.

Nevertheless, asbestos products were used in Kansas, as in all other states, at least until the mid-1970s, and we will most certainly see among our citizenry a proportional amount of asbestos disease and death for the projected periods. For example, the statistics for mesothelioma gathered at the University of Kansas located in Kansas City, Kansas, showed seven mesotheliomas during the year 1988. If the average latency period for mesothelioma of 35 years is applied to these seven cases, then we are seeing disease which comes from exposures dating back to approximately 1953. Coincidentally, the revitalization of the Sunflower Ordinance Plant in DeSoto, Kansas during the Korean War, constituted a major source of asbestos exposure among insulators, pipe fitters, plumbers and boilermakers who are now manifesting asbestos disease. In view of the fact that asbestos-containing construction products were used for two more decades following 1953, we can expect to see at least two more decades of disease in our state.

K.S.A. 60-513b and Tomlinson

The Tomlinson decision extends the application of the 10-year period of repose set forth in K.S.A. 60-513b to latent disease cases. Indeed, the plaintiff in Tomlinson was a victim of asbestos-related disease. In Tomlinson, the court held that the 10-year period is triggered by the plaintiff's last exposure to asbestos-containing products. While those

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concerned with public health can be grateful for the intervention of federal, state and local authorities in controlling or eliminating asbestos exposures in the mid-1970s, the fact that occupational exposures for many Kansans ceased in the early to mid-1970s triggered the running of the 10-year limitations period. Thus, by the operation of K.S.A. 60-513b as it is currently structured and interpreted by the Supreme Court, most, if not all, Kansans who developed asbestos-related disease after the early to mid-1980s will be completely dispossessed of their access to the courts, a phenomenon unique to the state of Kansas among all of the United States.

That there will be a number of Kansans who will suffer the clearly unintended effect and bar of K.S.A. 60-513b with respect to their asbestos disease is beyond doubt. If we acknowledge that Kansas, like the rest of the United States, experienced a baby boom in the late 1940s and early 1950s, those new citizens would have been reaching the age where they were eligible to enter the trades during the middle to late 1960s. If we assume that the baby boomers in Kansas had their initial occupational exposure to asbestos in 1968, and if we assume that their last exposure would have occurred in 1972 (the year that a large number of construction products were reformulated to eliminate asbestos), then the minimum latency period for this entire generation of workers suggested by Dr. Lanza in 1935 would not exist until after the 10-year period of repose had expired. In other words, the effect of K.S.A. 60-513b, while clearly not intended by the legislature, is to deny access to the courts to an entire generation of exposed working men and women, some proportion of whom will suffer the disabling or fatal consequences of asbestos disease.

The Chairman remarked in the proceedings of the Judiciary Committee on January 30, 1990 that he believed it was not the intention of the legislature to dispossess the victims of latent disease of their access to the courts. Indeed, at the time K.S.A. 60-513b was first enacted with its 10-year period of repose, there was very little understanding of the broad significance and potential for latent disease except among the asbestos industry itself and a small body of researchers in the medical and scientific community. Even at the time K.S.A. 60-513b was amended in 1987, the labor, scientific and legal communities did a poor job of highlighting the importance of latent disease to the Kansas legislature because at that time, the courts in this state had not extended the 10-year limitations period to latent disease cases. However, with the Tomlinson decision, the overbreadth of the limitations statute has been brought sharply into focus, and on behalf of all laboring people within the state of Kansas we now urge our

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legislature to right an inadvertent wrong. House Bill 2689 will do just that.

Proposed Revisions to Subsection (b) of K.S.A. 60-513

One of the unique problems confronted by the victims of latent disease relates to the identity of the specific person whose wrongful conduct has given rise to the injury. In view of the fact that an extended period of time may pass between the time of initial exposure and the determination of the fact of injury (by medical diagnosis in the case of bodily injury and by scientific testing in the case of property damage), the identification of the tortfeasor can be quite difficult and require specialized investigation and/or scientific study.

For example, in the case of asbestos disease, a scientific determination (medical diagnosis) is necessary to identify the fact of injury, whether it be the specific disease entity of asbestosis or the diagnosis of asbestos-related malignancy. Furthermore, implicit in the diagnosis of asbestosis and mesothelioma, two forms of disease which are unique to asbestos exposure, is the scientific determination that the injury relates to another person's wrongful conduct. However, in the case of lung cancer, since there are other causes of the disease, the asbestos victim cannot know that his injury is related to another person's wrongful conduct but for a scientific determination. Scientific determination by medical diagnosis of the fact of the lung cancer may not be sufficient in and of itself to alert the victim to the fact that he or she has a cause of action against one or more specific persons or entities because of asbestos exposure.

By way of further example, in the context of a property owner's claim against asbestos companies for contamination of buildings, a scientific determination is required to identify the fact of injury--i.e., that the building environment is indeed contaminated with the submicroscopic asbestos fibers. Furthermore, given the passage of time between the date of sale of the asbestos-containing products and the recent widespread concern for the potential for contamination, the building owner in many cases can only identify the tortfeasor through scientific testing. Indeed, in the majority of claims by a building owner against the asbestos companies (whether they sound in fraudulent concealment of the hazards, failure to warn or disclose the hazards, breach of warranty, or other statutory or common law theories) resort to the sophisticated scientific techniques of materials characterization is frequently the only way to determine the identity of the person whose wrongful

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conduct has given rise to the claim. Thus, unless the legislature wishes to encourage the filing of claims in a scatter-gun approach, provision must be made, as is done in House Bill 2689, such that the statute of limitations does not begin to run until in those appropriate cases a scientific determination of the relationship of the injury to another person's wrongful conduct has been made.

The Need for a Revival Statute

In view of the manifest injustice which existing K.S.A. 60-513b works in its application to latent diseases, we believe that there was never any legislative intent that the existing statute apply in the latent disease context. We are confident in our belief that the Kansas legislature has never, and will never, lose sight of fundamental fairness and that the Kansas legislature has not, and will not, intend by any of its enactments the fundamentally unfair result of denying access to the courts by the innocent victims of latent disease resulting from the misconduct of others. We think that these beliefs and this confidence in our legislature is universal throughout the state of Kansas.

Therefore, since it could not have been the legislature's intent that current K.S.A. 60-513b apply to latent diseases at any time since its enactment, it is important that the current reading given to that statute not be allowed to work an injustice never intended. Consequently, in light of the Tomlinson decision, and in view of summary judgment motions which have been filed by the asbestos industry in asbestos litigation since Tomlinson (and in some cases granted contrary to the interests of Kansas residents suffering from asbestos disease), a revival statute is necessary.

Thus, while we vigorously support each of the current provisions of proposed House Bill 2689, we also support an amendment to the bill which would add a provision which makes it clear that no victim of latent disease or other latent personal injury whose claim is cognizable in the state or federal courts located in Kansas be denied access to the courts because their cause of action accrued more than 10 years after their last exposure to the product giving rise to the injury. A revival statute is necessary to protect those citizens whose causes of action have accrued more than 10 years since the wrongful conduct of another but before the passage of legislation such as House Bill 2689.

On behalf of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and

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Helpers, the AFL-CIO and the citizenry of the state of Kansas, we thank you for your consideration of our testimony.

Respectfully submitted,

T. Bradley Manson

John M. Klamann

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The University of Kansas Medical Center

School of Medicine
Department of Internal Medicine
Division of General and Geriatric Medicine

Frederick F. Holmes, M.D., F.A.C.P.
Edward Hashinger Distinguished Professor

January 17, 1990

Mr. John M. Klamann
Payne and Jones
P.O. Box 25625
Overland Park, KS 66225-5625

Dear Mr. Klamann:

In regard to your question to about mesothelioma incidence in the state of Kansas I can report to you that pleural and peritoneal mesotheliomas numbered nine in 1982, five in 1983, three in 1984, six in 1985, three in 1986, three in 1987 and seven in 1988. This would give an average of slightly more than five cases per year for Kansas. With a population of 2.4 million this would give a crude incidence of 0.2 per 100,000 population per year for the state of Kansas. This might be a little bit less than the United States generally but there probably was never the industrial exposure in Kansas that many of the northeastern and western states had.

Trusting these data are of use to you, may I remain,

Yours sincerely,

Frederick Holmes

FFH/id

c: Suey Su, Cancer Data Service

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