Approved February 13, 1990
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

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

3:30 ~~a.m.~~/p.m. on January 31, 1990 in room 313-S of the Capitol.

All members were present except:

Representative Peterson, who was 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:

Gerald Palmer, Attorney, representing the Kansas Trial Lawyers Association
Wayne Maichel, Executive Vice-President, Kansas AFL-CIO,
Lewis A. Heaven, Jr., Attorney , Johnson County
Matt Lynch, Research Assistant, Judicial Council
Gerald L. Goodell, General Counsel, Kansas-Nebraska League of Savings Institutions
Jerel Wright, Governmental Affairs Director, Kansas Credit Union League
Mark Works, Attorney, representing Kansas Trial Lawyers Association

CONTINUATION OF HEARING ON HB 2689 Limitations of actions on latent diseases

Gerald Palmer, Attorney, representing the Kansas Trial Lawyers Association, reported on the history of K.S.A. 60-573(b), its amendment in 1987 and the decisions of the Kansas Supreme Court. He said HB 2689 strikes a fair balance between victims and wrongdoers and preserves basic policies underpinning limitation on personal injury actions. He encouraged the Committee to act favorably on HB 2689, see Attachment I.

The Chairman requested that Mr. Palmer meet with a subcommittee on HB 2689, when a subcommittee is appointed.

Mr. Palmer distributed a letter to the Committee in response to a question from a Committee member on January 30, 1990, see Attachment II.

A letter from Wayne Maichel, Executive Director, AFL-CIO, supporting HB 2689 was distributed to the Committee, see Attachment III.

There being no other conferees, the hearing on HB 2689 was closed.

Hearing on HB 2642 Changes to the redemption statute

Lewis A. Heaven, Jr. Attorney, testified his main area of practice is in real estate matters, both residential and commercial. As a member of the Executive Committee of the Real Estate, Probate and Trust Section of the Kansas Bar Association, he was requested to recommend changes to K.S.A. 60-2414. HB 2642 addresses changes to the redemption statute K.S.A. 60-2414. In real estate mortgage foreclosures a period of time is afforded the owner after the sheriff's sale to remain in possession of the property. The period is know as the redemption period. HB 2642 provides that interest during the redemption period shall be equal to the judgment rate of interest under existing law; allows the courts to completely extinguish redemption rights if it is proven that there has been an abandonment of the property, occupation in bad faith or the commission of waste; broadens the landowners ability to waive redemption rights; allows the first creditor redeeming the property, after the first three months will have completed redemption absolutely; affords greater latitude for the recovery of expenses advanced to prevent waste of the property; tests all indebtedness cumulatively against the market value of the property to determine the amount of equity, and, for the purposes of clarity, the determination of whether or not more than 1/3 of the indebtedness has been paid should be measured against the senior-most lien foreclosed; and makes several clerical changes in the law, see Attachment IV.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~xxx~~/p.m. on January 31, 1990

The Chairman asked Matt Lynch for a report on last year's equiteer bill. He said the Judicial Council has reviewed the bill and has recommended some minor revisions. He will make a report to the Committee when the Senate Judiciary Committee takes up the bill again.

Gerald L. Goodell, General Counsel, Kansas-Nebraska League of Savings Institutions, presented testimony in support of HB 2642, see Attachment V. He also submitted several suggested amendments, see Attachment VI.

Jerel Wright, Governmental Affairs Director, Kansas Credit Union League, testified in support of HB 2642. He said HB 2642 balances the debtors right of possession with the creditor's right to realize on collateral by allowing a court to determine the length of the redemption period if the property has been abandoned or is not occupied in good faith, see Attachment VII.

There being no other conferees, the hearing on HB 2642 was closed.

Representative Solbach moved and Representative Lawrence seconded to refer HB 2642 to the Judicial Council for study. The motion passed.

Hearing on HB 2688 Attorney fees taxed as costs in certain actions involving negligence

Mark Works, Attorney, representing the Kansas Trial Lawyers Association, testified HB 2688 provides for recovery of reasonable attorney fees to the prevailing party in automobile negligence cases, so long as he or she actually recovers damages and those damages exceed any tender made by the adverse party before the commencement of the action. The bill increases the damage limit for recovery of attorney fees from $3,000 to $10,000. He urged the Committee report HB 2688 favorably, see Attachment VIII.

Representative Sebelius moved to report HB 2688 favorably for passage. Representative Fuller seconded the motion. The motion passed.

The minutes of January 24 and January 25 were approved.

The Chairman announced the Supreme Court is planning on meeting next Tuesday on the Child Support Guidelines, at which time they will accept public comment. He said the Judiciary subcommittee will meet next week.

The Chairman informed the Committee that 1989 HB 2353, Oil and Gas Owners' Lien Act, sponsored by Representative Shore and Representative Holmes is being sent back to the subcommittee. He has requested the subcommittee hold a hearing and report back to the Committee. Members are Representative Walker, Chairman; Representative Snowbarger and Representative Shriver. The Chairman added Representative Moomaw to the subcommittee.

The Committee meeting was adjourned at 4:45 p.m. The next meeting will be Thursday, February 1, 1990, at 3:30 p.m. in room 313-S.

GUEST LIST

COMMITTEE: SPECIAL COMMITTEE ON JUDICIARY DATE: Jan 31, 1990

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
R G Frey	Topeka	KTLA
Joel Wright	Topeka	KCUL

KANSAS TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

TESTIMONY
of the
KANSAS TRIAL LAWYERS ASSOCIATION
before
HOUSE JUDICIARY COMMITTEE

January 30, 1990

HB 2689 - LIMITATION OF ACTIONS

My name is Jerry Palmer and I am an attorney in private practice in Topeka. I am representing the Kansas Trial Lawyers Association.

INTEREST OF THE KANSAS TRIAL LAWYERS ASSOCIATION:

The Kansas Trial Lawyers Association has nearly 1000 members in all parts of the state and its members represent injured persons who claim that others are responsible for their damages. Of great concern to injured persons is whether they can present their claims in court to seek compensation for their damages against those who have wrongfully injured them. Limitations of actions (statutes of limitation) arbitrarily restrict access to the courts based solely on a consideration of time. The underlying public policy for such limitations is that persons should not sit on their rights and present stale claims and that after a certain point in time, even just claims should expire.

HISTORY OF K.S.A. 60-513(b), ITS AMENDMENT IN 1987 AND DECISIONS OF THE KANSAS SUPREME COURT:

1. K.S.A. 60-513 permits two years within which to file actions, including those for personal injury.

In 1963 this statute of limitation limited the discovery period in tort actions to 10 years. The Supreme Court of Kansas in the case of Ruthraff, Administrator v. Kensinger, 214 Kan. 185, 519 P.2d 661 in 1974 interpreted the language to mean that the period of limitation did not begin to run until the date on which substantial injuries resulted and the 10-year provision referred only to injuries which were not reasonably ascertainable until some time after the initial act. In the case of traumatic torts, such as when a machine amputates a person's limb, the two-year statute of limitation did not start to run until the time of the amputation, even if it was 15 or 20 years after the manufacture of the product.

1/31/90
H. Jud Com
Attachment I

2. The Products Liability Act and "useful safe life".

The Kansas Legislature from 1978 until 1981 debated the application of the statute of limitations as it applied to products and adopted K.S.A. 60-3303 dealing with the "useful safe life" of a product and a presumption that after ten years a product had exceeded its useful safe life, but that the presumption could be overcome by clear and convincing evidence. There are also evidentiary criteria by which useful safe life issues could be resolved. That statute was in no way to impinge upon the operation of K.S.A. 60-513(b), which at that point was being interpreted under the Ruthraff decision.

3. The Tomlinson case.

Two significant things occurred within the last two years. First in 1987, language overcoming the effect of the Ruthraff decision was adopted pursuant to HB 2386 (1987). More significantly in the context of an asbestos-related claim the Supreme Court of Kansas considered the case of Tomlinson v. Celotex Corp., 224 Kan. 474, 770 P.2d 825 delivering its opinion on March 3, 1989. The Court ruled that the 10-year limitation applies to claims based on latent diseases and that such statute was constitutional, thus barring any recovery from an exposure to a disease where the exposure had taken place more than 10 years before.

The Court concluded that the 10-year limitation period commenced at the latest upon the last exposure of the plaintiff to the asbestos. The Court recognized that many asbestos-related injuries will not manifest themselves until more than 10 years after the last exposure to the produce. They were also cognizant of the harsh effect this application had in the instant case, but felt constrained to find that the statute barred the claim.

The result of the interpretation in Tomlinson is that Kansas arguably stands alone in barring latent disease cases. Other states do not have a similar period of repose or, if they do, exempt latent disease. Other courts have read latent disease out of the ambit of their statute of limitations, such as in North Carolina.

4. The 1987 amendment.

The 1987 amendment was proposed and hardly debated (HB 2386, 1987) when it was brought on by some representatives of the building industry. The only thing appearing in the legislative history is a letter from Mr. Crockett, an attorney in Wichita, declaring the unfairness of contractors being responsible for buildings for more than 10 years. He cited as an example a case he personally handled (no recovery by the plaintiff) and a hypothecated case of liability for a building that was on the

1/31/90
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att I 2

National Historic Register. The claim was made that the Ruthraff decision was terribly unfair. However, these were the only examples of "horrible imaginables" that were presented, even though there had been 14 years of experience with the Ruthraff decision. If contractors or improvers of real estate are to be specially treated, then perhaps something along the concept of the useful safe life of their product could be engrafted from the Products Liability Act.

WHY THE LEGISLATURE SHOULD ADOPT THIS BILL:

1. Asbestos as an example of why we need this legislation.

The problem of asbestos victims and the wrongdoing of the industry make an excellent example of the basic unfairness of an arbitrary 10-year limit. There are people who are going to die of cancer from a product that was manufactured and distributed after the manufacturer well knew (but the public did not know) of its potential for harm. Motivated by profit, the industry went on releasing and selling this product, knowing that people would be injured and die from exposure to the product, but nevertheless did not warn these people. However, the nature of a disease-process related to the inhaling of the fibers is such that the disease does not show up within a 10-year period in the ordinary case. The period of latency is much longer and only because the people have not discovered their fatal disease is the wrongdoer released from the consequences of his act.

Asbestos fibers, though, are just one example of environmental hazards which are arbitrarily eliminated by an inflexible application of a 10-year statute of limitations. The use of toxic materials and their relationship to disease emerges with more scientific information each year. It is only then that the questions are asked as to what knowledge the industry might have had and whether or not they were negligent in releasing their products and the degree of willfulness or recklessness that might have been involved in the distribution of the product. Thus, the Kansas law bars a claim before victims could even be aware they had a claim.

HB 2689 tries to comprehend not just asbestos (to protect its constitutionality from being special legislation or being an arbitrary classification), but extends to the class of latent diseases and to make use of science and epidemiology. This preserves the basic purpose of a statute of limitations to discourage people from sitting on their rights when they knew or should have known they should be in court. The bill tries to strike a balance, so that just claims can be filed when they are ripe (and not before) and likewise that after a person has a fair opportunity to file the suit, the statute would then expire.

1/30/90
H. Jud Com
Att I
3

A more extreme measure would simply be to delete the whole reference to the 10-year statute. However, we believe the legislature still wants to deal with the problem of stale claims and thus the bill takes into account the complexity of the scientific issues and fairness to prospective defendant.

The requirements are as follows:

(a) Requires a scientific determination of the fact of the injury -- in the case of asbestos, that would be the determination that a person had a disease such as mesothelioma;

(b) "Identify the fact ... of relationship" -- in the case of asbestos, the hallmark is the finding that asbestos fibers are in fact in the lung. In some cases this requires electronmicroscopy after the tissue has been removed from the person's body. Since there are other causes of lung cancer, you would not want people filing lung cancer suits based on a diagnosis of the disease alone without being able to relate it to the defendant's product.

(c) Relation to adverse party's conduct -- some products and their relationship to disease simply have not been established by science. It is not fair having injured people suing defendants at a time before the scientific evidence is accumulated that establishes a relationship between a product and a disease. It is also unfair to plaintiffs who are ignorant of the relationship. Because of the arbitrary statute of limitations, though, a suit must be filed or be lost by time if the legislature does not accommodate the process of scientific inquiry.

2. The Products Liability Act should not be dead-letter-law.

The Products Liability Act balanced the equities between injured persons and manufacturers of products in such a way that a presumptive safe life was established with specified types of information described to overcome the presumption. With the 1987 Amendment this language lost all of its meaning and victims of product-related injures (including latent diseases) lost their rights that have been preserved in the Products Liability Act. That Act now has no force or effect on "repose."

CONCLUSION:

The combination of the 1987 Amendment which gutted the Products Liability Act's concepts of "useful safe life" and the Supreme Court's harsh interpretation of our statute of limitations as to latent diseases, commands the attention of the legislature to revise the period within which to discover wrongful conduct and seek a remedy for injuries caused by that conduct. The awful tale of asbestos and the disadvantages experienced by Kansans demands an immediate remedy for those Kansans who have been exposed to

1/30/90
H. Jud Com
Att I 4

asbestos and who will die from its consequences without a lawful remedy solely because they are residents of Kansas and exposed in Kansas.

The legislature in 1963, when it considered this Act, could not have foreseen what the science of 1990 would tell us about latent diseases. The 10-year period which may have appeared reasonable then, clearly is unreasonable now. Our courts have their hands tied in trying to give relief to victims because of the strict construction of K.S.A. 60-513(b). The wording of the legislature works inequities never intended by the legislature. The 1987 Amendment does further harm to those asbestos victims and other victims of latent diseases, as well as gutting the Products Liability Act. This legislation did not stand exposed to all the policy arguments which are advanced today and the decision needs to be reconsidered in the light of this new information.

The work that went into the Products Liability Act should not be overcome by what appeared to be an uncontroversial bill a few years ago. It's time for the legislature to re-visit the issue. HB 2689 strikes a fair balance between victims and wrongdoers and preserves basic policies underpinning limitations on personal injury actions.

On behalf of the Kansas Trial Lawyers Association, I respectfully encourage you to act favorably on this bill.

1/31/90
H Jud Com
Att I 5

MANVILLE PERSONAL INJURY SETTLEMENT TRUST

Office of the General Counsel

January 30, 1990

VIA TELECOPIER

Jerry R. Palmer, Esq.
Palmer & Marquardt
Suite 102
112 W. 6th Street
Topeka, KS 66603

Dear Jerry:

Pursuant to our telephone conversation today, please be informed that as far as I have been able to determine, the state of Kansas is the only state where the ten-year statute of limitation prevents claimants from pursuing claims against this Trust where their claim is or was filed more than ten years after their last exposure to asbestos.

Specifically, we are aware of the March 3, 1989 decision of the Kansas Supreme Court (Tomlinson v. Celotex) in which the Supreme Court held that the plaintiff's cause of action was barred by the Kansas statute and that application of the statute to Tomlinson was not unconstitutional. The court held that, "[A]lthough it may be true that many asbestos-related injuries will not manifest themselves until more than ten years after last exposure to asbestos products produced, manufactured or sold by a defendant, this in itself does not establish the unconstitutionality of the ten-year limitation contained in [the statute]." Interestingly, the Indiana Supreme Court reached the opposite result in a similar case. [Covalt v. Carey Canada, Inc., decided Sept. 8, 1989.

This Trust has common law fiduciary trust duties to its beneficiaries and is virtually required to assert statutory and common law defenses where available. Thus, Kansas claimants are very unlikely to recover compensation from the Trust because of the 15- to 40-year latency period for disease manifestation following exposure to asbestos.

1/30/90
H. Jud Com.
Att I
6

1825 Eye Street, N.W.
Suite 300
Washington, D.C.
20006-1202
Phone: (202) 872-9044
Fax: (202) 872-1403

Ironically, this Trust, as described in the Manville Plan of Reorganization, is a "settlement vehicle" which has been given funds to pay to its beneficiaries. Because of the Kansas statute of limitations, I doubt there will be very many or even any beneficiaries from your state despite the scores of thousands of beneficiaries from other states who will be paid by this Trust.

If you have any questions concerning this matter, please let me know.

Sincerely yours,

David T. Austern
General Counsel

1/30/90
H. Jud Com
Att I

7

PALMER & MARQUARDT

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JERRY R. PALMER*
CHRISTEL E. MARQUARDT
KIRK LOWRY

*CERTIFIED CIVIL TRIAL ADVOCATE
BY THE
NATIONAL BOARD OF TRIAL ADVOCACY

January 31, 1990

Arthur W. Douville
House Judiciary Committee
Capitol Building
Topeka, KS 66612

Re: HB-2689

Dear Representative Douville:

On January 30 during testimony on this Bill you expressed a concern involving the following hypothetical facts. "A person is involved in an auto accident with a slight back injury, does not sue but 15 to 20 years later discovers a herniated disc and then files a lawsuit for the injury."

The question that concerns you is whether the modifications of the statute would expose defendant automobile drivers and their insureds to risk years later than the event. We first have to recognize that currently if the argument was made on these facts that theoretically that person could make the claim for a full eight years past the statute of limitations.

Although I have been practicing almost 25 years, I have never seen a case on an auto accident brought at a time substantially beyond the original two years. The only case I am aware of (and that was an unsuccessful one) is the one reported Roe v. Diefendorf, 236 Kan. 218, 689 P.2d 855. I believe it represents exactly the hypothetical situation you described.

Roe was involved in a vehicular collision on November 14, 1979. He was in pain and laid off work for several days. In February of 1981 Roe was re-injured and alleged that he was not aware of the full extent of the injuries arising from the first automobile accident and claimed he did not detect a "significant injury" to his back until February of 1981. He filed his lawsuit June 28, 1982, two and a half years after the collision.

The district court ruled that the statute of limitations had not run because Roe did not realize he had incurred a "substantial injury."

1/31/90
H. Jud Com.
Attachment II

FAX (913) 233-3703

The Supreme Court in holding that the statute of limitations had run, in citing Brueck v. Krings, 230 Kan. 466 observed, "It was the knowledge of injury, not the extent of the injury, which was important to the statute of limitations question." The Supreme Court derived a rule from all the cases the court had decided,

> The statute of limitations starts to run in a tort action at the time a negligent act causes injury if both the act and the resulting injury are reasonably ascertainable by the injured person. . . .We hold the use of the term `substantial injury' and the statute does not require an injured party to have knowledge of the full extent of the injury to trigger the statute of limitations. Rather, it means the victim must have sufficient ascertainable injury to justify an action for recovery of the damages, regardless of extent. An unsubstantial injury as contrasted to a substantial injury is only a difference in degree, ie. the amount of damages. That is not a legal distinction. Both are injuries from which the victim is entitled to recover damages if the injury is the fault of another. A separate classification for the two, for the purposes of limiting actions thereon, is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, because such classification has no legitimate legislative purpose. . . . Therefore, we construe the phrase `substantial injury' in K.S.A. 60-513(b) to mean `actionable injury.' (Pages 222, 223)

I believe that this takes care of the concern you raise and thus it is already engrafted in the law since the words "substantial injury" are not being changed and they have been interpreted by the court, I do not believe the danger that you believe will be created by the amendment will in fact be created.

I hope this makes you more comfortable with the proposed legislation and I would urge you to support it.

Yours truly,

JERRY R. PALMER

1/31/90
H. Jud Com
Att II 2

JRP/sd

Kansas AFL-CIO

110 W. 6th St. Topeka, KS 66603 (913)357-0396

UNION YES

January 31, 1990

Rep. Michael R. O'Neal, Chairman
House Judiciary Committee
State Capitol, Rm. 426-S
Topeka, KS 66612

Chairman O'Neal:

The Kansas AFL-CIO would like to go on record with the House Judiciary Committee as strongly supporting H.B. 2689.

Due to conflicts, we are not able to testify in your committee, but would be happy to provide you or your committee with any information you so desire in regards to our support of H.B. 2689.

Sincerely,

Wayne Maichel

Wayne Maichel
Executive Vice President

WM:da
opeiu #320, afl-cio

KANSAS SOLIDARITY

1/31/90
H. Jud Com.

Attachment III

TESTIMONY BEFORE HOUSE JUDICIARY COMMITTEE
H.B. 2642
January 31, 1990

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Lewis A. Heaven, Jr., however most people know me as "Pete". I have been a practicing Kansas attorney since 1977, and my area of concentration is real estate matters, both residential and commercial. I am a partner in the law firm of Holbrook, Ellis & Heaven, P.A., which has offices in Johnson County and Wyandotte County, Kansas. I would like to thank each of you for the opportunity to present my testimony concerning House Bill 2642, and your willingness to consider the modifications to K.S.A. 60-2414 proposed. I would also like to thank Representative Gene Amos for his assistance and sponsorship of the Bill.

I am certain that each of you are aware of the unfortunate, however necessary procedure of real estate mortgage foreclosure. The procedure enables a lender holding a mortgage upon real property to obtain a judgment against its borrower and an order of the Court to sell the real property to satisfy, in whole or in part, the indebtedness due and owing. Depending upon the factual situation presented, the procedure can become quite complicated, however suffice it to say that the purpose and objective of the procedure is to permit the county sheriff to sell real property at a public auction. In most mortgage foreclosure situations, a period of time is afforded the owner after sheriff's sale to remain in possession of the property; this period is known as the "redemption period".

The redemption law of Kansas had its genesis in 1893, and it was designed to benefit owners of agricultural land. Due to the seasonal income of many agricultural landowners, it was the thought of the Legislature that a period of time should be afforded after a sheriff's sale to allow the agricultural landowner to rotate crops and utilize the proceeds to "redeem" the land. The law provided a practical way to avoid the spectre of displaced farm families, loss of family lands and the chilling effect farm foreclosures could have on agricultural commerce. The original law afforded the owner up to twelve (12) months after the sheriff's sale to remain in possession of the property and generate proceeds sufficient to reimburse the successful sale bidder.

The law was later amended to provide the courts with a mechanism to shorten the redemption period to six (6) months in situations involving waste, abandonment or when the borrower had an insignificant amount of "equity" in the property.

1/31/90
H. Jud Com

Redemption rights have become one of the most revered rights accompanying land ownership in Kansas, and House Bill 2642 is not

Attachment IV

intended to materially affect redemption rights in situations originally intended by the Legislature.

As a practicing attorney, I have participated in many foreclosure proceedings, both as counsel for lenders and counsel for borrowers. In addition, as a member of the Executive Committee of the Real Estate, Probate and Trust Section of the Kansas Bar Association, I have shared the experiences of many other practitioners who engage in foreclosure practice. I was requested by the Section to recommend changes to K.S.A. 60-2414, and shared those changes at the Plaza Lights Seminar sponsored by the Kansas Bar Association in December of 1988. During my presentation, I requested that practitioners interested in the law review my proposed modifications and provide comments.

For the next several months, the response was overwhelming, and I had the opportunity to discuss K.S.A. 60-2414 in detail with many attorneys, title insurance companies and lenders. House Bill 2642 incorporates most of the suggestions I received. The version of House Bill 2642 before you represents over two (2) years of study and "fine tuning".

The redemption laws certainly have a place in Kansas, however abuses thereof have resulted, primarily in the urban areas. It is important to remember that unless waived under narrow exceptions to K.S.A. 60-2414, all property owners are afforded a minimum redemption period of six (6) months. During that redemption period, the borrower is entitled to possession of the property, and is under no obligation to make payments to lenders or other creditors who were parties to the foreclosure proceedings. The intent of the redemption laws is to give the borrower the unrestricted ability to generate funds for the purpose of redemption. The most common abuse of the redemption laws occurs in connection with assignment or transfer of redemption rights to others.

Commonly, a landowner whose property is being foreclosed requires funds to move his or her personal property to another location prior to the expiration of the redemption period. In recent years, we have seen companies formed, the primary purpose of which is to purchase redemption rights and take possession of foreclosed properties during redemption periods. The transfer is normally completed through a formal assignment of the redemption rights or a Quit Claim Deed, thus allowing the transferee to take possession of the property and rent it to third parties without obligation to the original mortgage lender. Under the present K.S.A. 60-2414, the transferee of the redemption rights and the tenant to whom the transferee rents the premises have no liability to the purchaser at sheriff's sale for damages or waste committed to the property during the redemption period; the statute provides that damages may be recovered, however is silent as to those parties responsible for damages. To circumvent the possibility of personal liability for damages, many transferees accept the assignment of redemption rights as a "trustee".

1/31/90
H. Jud Com.
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While I am not suggesting that all redemption right transferees commit unscrupulous practices or are dishonest, the fact remains that in many transfer situations, various parties are adversely affected. First, the landowner is paid only a fraction of the value of the redemption rights due to his or her need for immediate cash, when the landowner could just as easily rent the property to a third party and collect the rent in full. Second, lenders are adversely affected due to the waste and damage committed by tenants who are seeking short-term shelter and who have no method of reaching their landlord in the event of problems with the premises. Third, the tenants are often unaware of the fact that their tenancy will only be several months, and are displaced at the end of the redemption period without prior notice. And fourth, as stated above, there is a question under the current statute as to the parties responsible for damage to the property during the redemption period, thus leaving the successful bidder at sheriff's sale at risk to sustain damage to the property without the ability to recover same. My suggested changes to K.S.A. 60-2414 are not intended to prohibit the transfer of redemption rights; the changes do, however, afford the Court discretion to modify redemption rights and award damages in cases of abuse. To obtain relief, the successful bidder at sheriff's sale will have to go before the Court and prove his or her allegations of damage, waste or abandonment and, by virtue of the rules of civil procedure, all parties will be given an opportunity to be heard. Under the present statute, however, there is no mechanism to effectively protect the successful bidder at sheriff's sale in cases where the original intent of the redemption laws is being circumvented.

With the foregoing background of the redemption law and its need for modification, I will briefly address the specific changes recommended to K.S.A. 60-2414. As this is the first attempt I have made to suggest amendments to an existing law, I appreciate your forebearance.

One of the most confusing aspects of K.S.A. 60-2414 is the rate of interest to which the successful bidder at sheriff's sale is entitled during the redemption period. As you are aware, the successful bidder must pay, in cash, his or her bid at sale and then wait until the expiration of the redemption period to obtain title to the property. If redemption is made during the redemption period, confusion has resulted as to whether the purchaser at the sale is entitled to the interest rate he or she has actually paid (or lost) on the funds used to bid, or whether some other interest rate should be used. The Kansas Supreme Court some years ago interpreted K.S.A. 60-2414 to mean that the interest rate during redemption should be that of the note of the senior-most mortgage foreclosed. This interpretation, while probably the best under the existing law, results in successful bidders potentially losing money if redemption is made. My suggestion is to clarify the statute to provide that interest during the redemption period shall be equal to the judgment rate of interest under existing law. The suggested change is by no

1/31/90
H. Jud. Com.
Att IV
3

means a perfect one, and there could remain a differential between the interest rate paid by the successful bidder for the money used to bid and the judgment rate; the judgment rate, however, "floats", and appears to me a better barometer than the interest rate of a note that could be many years old.

As stated above, the amended K.S.A. 60-2414 will allow the Courts to completely extinguish redemption rights if it is proven that there has been an abandonment of the property, occupation in bad faith or the commission of waste. I believe that this change is reflective of the fact that if the landowner does not use the redemption period for the purpose intended, he or she should be deemed to have waived the right. In addition, the changes reflect that the transfer of redemption rights may be evidence of bad faith occupation of the premises, however will not be dispositive. This, of course, will in no manner affect the renting of the property by the owner during the redemption period to third parties who actually occupy the property.

I am suggesting that the ability of a landowner to waive redemption rights be broadened. Currently the law reflects a number of amendments broadening the waiver rights to corporations, general partnerships, limited partnerships and in situations where the property is not agricultural land or designed for occupation by more than two (2) families. I would suggest that the owners capable of waiving redemption rights be expanded to include joint ventures, syndicates and groups of more than two (2) individuals in ownership of the property. The suggested changes will in no manner affect the prohibition against waiver of the redemption period on single family dwellings or agricultural land, in keeping with the original intent of the redemption laws.

The single-most confusing portion of K.S.A. 60-2414 is the creditor-to-creditor redemption provisions. While legend has it that creditors have, in fact, redeemed property from one another, I have yet to see such an event in my practice. The current law provides a procedure by which senior and junior creditors may redeem from one another in certain situations, and prohibits creditor redemption during the first three (3) months of the redemption period, when redemption is exclusively the property of the landowner. While the changes I propose will retain the exclusivity of the landowner redemption right during the first three (3) months, the first creditor redeeming the property after that period will have completed redemption absolutely. The revised law will retain, in addition, the right of the landowner to redeem from the creditor at any time prior to the expiration of the redemption period.

There has been a reluctance on the part of lenders and successful bidders at sheriff's sale to advance expenses to preserve the property during the redemption period. This is, in part, due to the fact that K.S.A. 60-2414(d) provides only that taxes, insurance premiums and sums due on a prior lien or

1/31/90
H. Jud Com
Att IV 4

encumbrance can be advanced and recovered as part of the redemption amount. I am suggesting that greater latitude be afforded for the recovery of expenses advanced to prevent waste of the property. Similarly, former K.S.A. 60-2414(p) (now (l)) makes clear that if a receiver is appointed during the period of redemption, the fees and expenses of the receiver shall be paid from income collected by the receiver. Currently, the law merely provides that the receiver is entitled to pay from income repairs, taxes and insurance premiums.

As described above, there is a question as to the party or parties liable for waste committed during the redemption period. I am suggesting that former K.S.A. 60-2414(n) (now (j)) be modified to clarify that the landowner, the transferee of redemption rights and the occupant of the property may be liable for damage or injury to the property during the redemption period. This modification should not concern scrupulous transferees, and should create a greater awareness of the need to monitor and screen prospective tenants.

Second only to the creditor-to-creditor redemption provisions, K.S.A. 60-2414(q) (now (m)) has created much confusion. The section provides that the Court may reduce the one-year redemption period to six (6) months if the mortgage default occurs before 1/3 of the original indebtedness secured by the mortgage has been paid. Even if less than 1/3 of the original indebtedness is paid, if the outstanding indebtedness is less than 1/3 of the market value of the property, the redemption period will remain at one year. The intent behind the section is to allow the Court an equitable power to reduce the redemption period in situations where the landowner has an insignificant amount of equity in the property. Confusion has resulted, however, with regard to what "indebtedness" is to be used to determine whether 1/3 of the same has been paid, or what "indebtedness" should be measured against the market value of the property. In many situations, several mortgages will be foreclosed in a single proceeding, together with other liens and encumbrances. Since the intent behind the section is to measure the amount of equity the landowner has in the property, it appears only logical that <u>all</u> indebtedness be cumulatively tested against the market value of the property to determine the amount of equity. And, for the purposes of clarity, the determination of whether or not more than 1/3 of the indebtedness has been paid should be measured against the senior-most lien foreclosed. This will resolve the situation where more than 1/3 of the first mortgage indebtedness has been paid, yet less than 1/3 of the second mortgage indebtedness has been paid. My experience indicates that courts generally have applied the status of the senior-most mortgage foreclosed in determining whether 1/3 of the same has been paid, and I believe that the changes I am proposing are reflective of current practice.

The remaining changes proposed are basically clerical in nature. For example, the landowner is referred to in the current

1/31/90
H. Jud Com.
Att IV
5

law as the "defendant owner", "mortgagor" and "owner", and I have attempted to consistently refer to the landowner as the defendant owner. Similarly, the term "successors and assigns" has replaced numerous, varying descriptions of persons receiving title from the defendant owner. Other changes have been suggested to create internal consistency in the description of the parties affected. Subsections (e), (f), (g) and (m) have been eliminated as redundant or the provisions thereof have been incorporated elsewhere within the statute.

During my many conversations concerning the amendment of K.S.A. 60-2414, I have been repeatedly reminded that amendments to this statute have traditionally been made only in response to Court decisions and that due to the revered nature of redemption rights in Kansas, any substantial amendment to the law will not be favorably received. I sincerely believe, however, that the changes I have proposed will not result in a deviation from the original intent of the law and will afford property owners in Kansas the same basic rights they now possess. What I have attempted to do, however, is strike a rather delicate balance between the rights of landowners and creditors, and at the same time eliminate many of the abuses now occuring under the law. And although I may be accused of concentrating on companies specializing in the transfer of redemption rights, I cannot stress strongly enough that I recognize that those companies serve a purpose and are generally operated in an honest and ethical manner; it is my hope that they will recognize that the intent behind the proposed changes will eliminate those in their profession who do not engage in responsible practices.

I thank you again for your consideration of House Bill 2642 and the opportunity to appear before you today. I will stand ready to further discuss the matter at your convenience, and I would encourage any of you to contact me if you have questions or comments.

1/31/90
H. Jud Com.
Att IV
6

Kansas-Nebraska League of Savings Institutions

James R. Turner, President

Suite 512
700 Kansas Avenue
Topeka, Kansas 66603
(913) 232-8215

January 31, 1990

TO: HOUSE COMMITTEE ON JUDICIARY
FROM: GERALD GOODELL, GENERAL COUNSEL, KNLSI
RE: H.B. 2642 - REDEMPTION LAW CHANGES

The Kansas-Nebraska League of Savings Institutions appreciates the opportunity to appear before the House Committee on Judiciary in support of H.B. 2642. The measure makes important revisions to the present Kansas redemption law while continuing the protections afforded legitimate homeowners. It also addresses the continuing problem of equiteers.

The bill amends K.S.A. 60-2414 relating to the real estate mortgage redemption laws to make several important changes:

1. Where the property after sale is abandoned or not occupied in good faith, the court may shorten or extinguish the owner's right of redemption.

2. Any joint venture or syndicate and any group of more than two individuals as owners may agree to wholly waive redemption in the mortgage agreement.

3. There are creditor redemption rights if the owner has no redemption rights.

4. The complicated provisions allowing senior creditors to redeem from junior creditors are eliminated.

5. Only one creditor may redeem. Once a creditor redeems, all other creditors are barred.

6. The owners right of redemption may be sold and transferred only if the transferee or the holder of the certificate of purchase occupies the property.

7. The purchaser at the sheriff's sale may recover damages from the former owner for damages to the property if there is no redemption.

We believe these changes to be a positive improvement in the present redemption law and would encourage the committee's earliest consideration of reporting the bill favorably for passage.

1/31/90
H. Jud. Com.

Gerald L. Goodell, Counsel
KNLSI

GLD:bw

Attachment V

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OF COUNSEL
ROBERT A. McCLURE

SUGGESTED AMENDMENTS
to House Bill 2642

The Kansas-Nebraska League of Savings Institutions suggests the following amendments to House Bill 2642:

1. Amend page 1, line 22 to add the words "before or" so the line would read as follows:

"If the court finds that before or ~~the lands and tenements have~~ after sale the property has been abandoned, ---."

2. Amend page 1, line 34 to add the word "grantees" so the line would read as follows:

"--- as against the mortgagor and ~~all persons receiving title from the mortgagor~~ grantees, successors and assigns."

3. Amend page 1, line 38 to add the word "grantees" so the line would read as follows:

"--- as against the mortgagor and ~~all persons receiving title from the mortgagor~~ grantees, successors and assigns, ---."

4. Amend page 2, line 30 to add the words "an adjudicated" so the line would read as follows:

"Any creditor whose claim is or becomes ~~a~~ an adjudicated lien ---."

Respectfully submitted,

Gerald L. Goodell
Attorney for Kansas-Nebraska
League of Savings Institutions

GLG:jac

1/31/90
H. Jud. Com.

Attachment VI

TESTIMONY ON H.B. 2642

AN ACT relating to redemption rights

Presented to the

HOUSE COMMITTEE ON JUDICIARY

January 31, 1990

by the

KANSAS CREDIT UNION LEAGUE

Mr. Chairman, members of the committee:

I am Jerel Wright, Governmental Affairs Director for the Kansas Credit Union League (KCUL). Our association represents 98% of the 147 state-chartered and 42 federally-chartered credit unions located in Kansas. KCUL member credit unions serve the personal financial needs of over 500,000 individual credit union members and have over $1.5 billion in combined assets. Kansas credit unions range in asset size from $29,000 to $114 million and range in membership size from 58 to 43,000 members.

CREDIT UNIONS SUPPORT THE PASSAGE OF HB 2642

Over the years, some credit unions have moved from offering only the traditional services of basic share deposits accounts and consumer loans to a variety of share accounts and a full range of loan accounts including mortgage loans.

1/31/90
H. Jud. Comm.

Attachment VII

Along with this new market of mortgages, credit unions are experiencing new problems when there is a default on a mortgage. Credit unions are used to collecting consumer loans but credit unions have found collecting and realizing on a mortgage loan to be long, drawn out legal proceeding which leaves them to wait for months for the redemption period to terminate in order to actually get their collateral.

This proceeding is especially frustrating since the debtor can remain on the property without paying and is frustrating because the debtor can sell their rights of redemption to a third party who may then rent out the property and collect rent while the credit union continues to wait for the redemption period to terminate.

HB 2642 balances the debtor's right of possession with the creditor's right to realize on collateral by allowing a court to determine the length of the redemption period if the property has been abandoned or is not occupied in good faith. We feel this legislation will help to eliminate the unnecessarily long waiting period when the debtor has abandoned the property or when a third party is benefiting from the debtors redemption rights at the expense of the credit union.

For these reasons, we support HB 2642

Thank you Mr. Chairman, for considering our comments. I will stand for questions at your direction.

1/31/90
H. Jud Com.
Att VII 2

KANSAS
TRIAL LAWYERS ASSOCIATION

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TESTIMONY
of the
KANSAS TRIAL LAWYERS ASSOCIATION
before
HOUSE JUDICIARY COMMITTEE

January 30, 1990

HB 2688 - FEES IN AUTO DAMAGE CASES

Mr. Chairman and members of the Judiciary Committee, my name is Mark Works. I am an attorney in private practice here in Topeka. I am today speaking on behalf of the Kansas Trial Lawyers Association, of which I am a member.

HB 2688 provides for recovery of reasonable attorney fees to the prevailing party in auto negligence cases, so long as he or she actually recovers damages and those damages exceed any tender made by the adverse party before the commencement of the action.

K.S.A. 60-2006 was last amended eight years ago. Inflationary trends have pushed car values up and up, making the $3,000 damage limit for recovery of attorney fees too low to be economically feasible for many attorneys to handle a contested case. Attorney fees also encourage settlement of smaller cases and benefit a large group of the population by returning transportation to them in a prompt manner. The statute in its present form works well and in order to keep up with inflationary trends in the auto market, the damage limit should be increased to $10,000.

HB 2688 should be of equal interest to automobile insurors. They have the same rights to make use of this statute and may also benefit by the likelihood of recovery from the party at fault through subrogation.

We believe this bill will help many Kansans receive their proper insurance claims and encourage you to act favorably on it. I appreciate the opportunity to come before this Committee and would be pleased to respond to any questions you may have.

1/31/90
H. Jud. Com.

Attachment VIII